

# ISAC - 3

## Industry Sector Advisory Committee for Chemicals and Allied Products

The Honorable Robert B. Zoellick  
United States Trade Representative  
600 17<sup>th</sup> Street, N.W.  
Washington, D.C. 20508

Dear Ambassador Zoellick:

Pursuant to Section 2104 (e) of the Trade Act of 2002 and Section 135 (e) of the Trade Act of 1974, as amended, I am pleased to transmit the revised report of the Industry Sector Advisory Committee for Chemicals and Allied Products on the Free Trade Agreement between the United States and Chile, reflecting consensus on the proposed Agreement.

Very truly yours,

Geoffrey Gamble  
Chair  
ISAC-3

The U.S.-Chile Free Trade Agreement (FTA)

Report of the  
Industry Sector Advisory Committee for Chemicals and Allied Products  
(ISAC-3)  
Revised March 17, 2003

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Industry Sector Advisory Committee for Chemicals and Allied Products (ISAC-3)

**Revised Advisory Committee Report to the President, the Congress and the United States Trade Representative on CHILE**

**I. Purpose of the Committee Report**

Section 2104 (e) of the Trade Act of 2002 requires that advisory committees provide the President, the U.S. Trade Representative, and Congress with reports required under Section 135 (e)(1) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002.

The report of the appropriate sectoral or functional committee must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, the Industry Sector Advisory Committee on Chemicals and Allied Products hereby submits the following report.

**II. Executive Summary of Committee Report**

We believe that the negotiating objectives and priorities of ISAC-3 with regard to the U.S.-Chile FTA, incorporated by reference in Section IV hereinbelow, have substantially been met. Industry sector representatives on ISAC-3 are of the opinion that the agreement overall promotes the economic interests of the United States and provides for equity and reciprocity within the chemicals, pharmaceuticals, and allied products sectoral area. One of the environmental representatives on ISAC-3, Mr. Waskow, concurs in part and provides additional views as indicated in the text. Another of our environmental representatives, Mr. Mannix, concurs in the Report with the exception of Mr. Waskow's comments found in the text pertaining to investment and the environment.

### **III. Brief Description of the Mandate of ISAC-3**

ISAC – 3, the Industry Sector Advisory Committee for Chemicals and Allied Products, in addition to counting representatives of the environmental community amongst its members, represents the following sectors and subsectors:

Adhesives and Sealants	Rubber and Rubber Articles
Specialty Chemicals	Soaps and Detergents
Industrial Chemicals	Plastics and Compounded Products
Organic Chemicals	Composite Materials
Inorganic Chemicals	Biocides
Crop Protection Chemicals	Forest and Paper Product Chemicals
Pharmaceuticals	Rare Earth Metals
Biotechnology	Radioactive Chemicals
Dyes and Pigments	Enzymes, Vitamins, and Hormones
Paints and Coatings	Cosmetics, Toiletries, and Fragrances
Petrochemicals	Photographic Chemicals and Film
Fertilizers	Catalysts
Printing Inks	Animal Health Products
Electronic Chemicals	

The product sector coverage (as listed above) for ISAC – 3 includes the products and substances classified in the U.S. Harmonized Tariff Schedule (HTS) Chapters 28 – 40, as well as other specific chemicals found in HTS Chapters 13, 14, 15, 22, 23, 25, 27 and 55.

For the record, despite monthly requests from its membership, the Government called no meetings of ISAC-3 from June 2000 until April 2001, a period of 11 months, and from March 2002 until February 2003, a period of more than 10 months. Thus, in the past two and a half years, or 30 months, virtually the entire time that the US-Singapore and US-Chile FTAs were being negotiated, ISAC-3 was unable to function for 21 of those 30 months.

The lack of opportunity to engage in an interactive dialogue with the Government negotiators as the agreements took shape has left the chemicals, the pharmaceuticals, and allied industries in a very disadvantageous position in discharging their statutory duties under ISAC-3 of rendering a collective opinion as to whether the agreements promote the economic interests of the United States, achieve the 2002 Trade Act objectives, and provide for equity and reciprocity within our collective sectoral area.

Nevertheless, with the help of the Department of Commerce and the Office of the United States Trade Representative, ISAC-3 has done its best to discharge its statutory obligations.

#### IV. Negotiating Objectives and Priorities of ISAC-3

Had ISAC-3 the opportunity to meet and interact with the U.S. negotiating team on the Chile FTA, during the course of the past year, it would have made the following points prior to, and during the negotiations.

- **Importance**

The symbolic importance of the FTA with Chile far outweighs the country's economic size. This agreement will mark the first FTA negotiated in Latin America since the North American Free Trade Agreement (NAFTA) in 1993.

- **Chemical Tariff Harmonization Agreement**

ISAC-3 has long supported the Chemical Tariff Harmonization Agreement (CTHA). We have sought to add trading partners in Latin America to this agreement, but progress in doing so has been limited. Thus the U.S. agreement with Chile offers the opportunity to achieve new trade liberalization with a key trading partner in Latin America that is consistent with the even more ambitious liberalization in the chemical sector.

In the long term, the U.S. chemical sector generally favors, with appropriate staging, a multilateral agreement on the elimination of chemical tariffs by the world's chemical producing nations. The negotiation by the Administration of FTAs with certain key chemical producing countries, including Chile, can provide the catalyst to bring the tariff elimination objective into focus in the current round of multilateral negotiations under the auspices of the World Trade Organization. Until the Doha Development Agenda is successfully concluded, we believe that continuing efforts to achieve the elimination of chemical tariffs through selective FTAs, including in the Free Trade Area of the Americas, and as part of countries' accessions to the WTO, could be desirable alternatives, so long as they do not undercut efforts to achieve the ultimate goal of broad multilateral tariff elimination.

- **Staging of Market Access Provisions**

ISAC-3 favors a realistic staging timetable in all FTAs, including that with Chile, as well as the broader FTAA, for the elimination of tariffs and non-tariff barriers. Since Chile has already committed to an overall tariff for all goods of 6% by 2003, we believe that the Chile FTA should set the most ambitious objective in the hemisphere, and we favor the elimination of chemical tariffs for Harmonized Schedule chapters 28-40 within the first basket of tariff cuts to be negotiated.

- **Rules of Origin**

The rules of origin for chemicals under free trade agreements are a vitally important aspect for the chemicals sector. The chemicals sector worked closely with U.S. negotiators toward the conclusion of the North American Free Trade Agreement (NAFTA) to craft “tariff-shift” rules of origin for our sector guaranteeing that the vast majority of value-added in our sector accrued to the NAFTA parties. It is vitally important that the U.S. chemical industry work with U.S. negotiators as the Chile FTA is developed, and in the context of chemicals trade between the U.S. and Chile, in crafting the most appropriate rules of origin for our sector in the context of this agreement.

We have proposed that the FTA’s rules of origin for chemical products (HS Chapters 28-40) be based on the position taken by the United States in their submission to the World Customs Organization’s Committee on Rules of Origin. These rules are hierarchical in nature, starting first with the concept of “tariff shift” as the test for determining whether there has been a substantial transformation of a product that will confer origin. Where a good does not meet the tariff shift rule, the second test should be the chemical reaction rule. If, following these two tests, the product’s origin is still in doubt, a third set of tests based on additional rules for mixtures, purification, separation, and so forth.

ISAC-3 is not in favor of a “value content” rule of origin, which we find to be burdensome and inefficient.

- **Investment**

ISAC-3 believes that the inclusion of a chapter in the U.S.-Chile FTA providing for strong investment protection rules for U.S. companies is a priority. The U.S. and Chile do not have in place a bilateral investment treaty (BIT), and Chile currently retains the right to screen investments, although in practice the country has been open to investment in most sectors. Given the precedent-setting nature of this agreement in the region and for future FTAs, the coverage of investment in the FTA based on the principles that would ordinarily be contained in a BIT is of significant importance. U.S. investors will need to have these protections to maintain a high level of confidence in the predictability of treatment they can expect in the market.

Among the elements that should be covered in an investment chapter would be: defining investment in a comprehensive manner; guaranteeing the better of either MFN or national treatment; providing for and ensuring the free transfer of profits and capital; dealing with issues affecting the movement of key personnel; disciplining the use of performance requirements; prohibiting expropriation except in the case of a public purpose and only with the payment of prompt, adequate and effective compensation; guaranteeing that investment receives fair and equitable treatment, with full protection and security, consistent with international law principles; and ensuring that investors have

access to an effective mechanism in the agreement for the settlement of investor-state disputes.

- **Labor and Environment Provisions**

ISAC-3 believed that U.S. negotiators should consider with great care the pursuit of this objective. The importance of labor and environment, and other issues such as human rights, must not be denied by any industry sector. However, the complex and global issues of labor and environment are best dealt with in the international institutions that already exist to examine these issues—in the case of labor, the International Labor Organization, and, for the environment, the various environmental agreements (MEAs) and the WTO Committee on Trade and Environment, which seeks to determine how trade agreements and environmental agreements should interact. Approaching these issues in a piecemeal fashion through bilateral agreements is inadvisable.

We also believed that including labor and environmental provisions in future trade agreements in such a way that could lead to the imposition of trade sanctions is fundamentally misguided. If we pursue this formula, we will ultimately be choosing a market closing, not a market-opening strategy. Trading partners will turn away from this strategy, and our efforts to create more open markets will fail. Chile, for example, has suggested that it can support making commitments on labor and the environment but only if the formula for doing so does not lead ultimately to the imposition of trade sanctions that close markets. The chemical and pharmaceutical industries, and their respective trade associations, must get actively involved in numerous discussions with interested parties about the relationship that should exist between trade and the environment. We believed that dialogues of this nature provide the basis for exploring constructive approaches on a multilateral level.

## **V. Advisory Committee Opinion on Agreement**

The following specific comments are inserted in accordance with the alphabetization and titles in the Agreement text:

### **A. Competition Policy**

No comment.

### **B. Dispute Settlement**

No comment.

### **C. Institutional Issues**

No comment.

**D. E-Commerce**

No comment.

**E. Environmental**

Mr. Waskow notes that the Agreement recognizes the commercial and competitive implications of a country's failure to enforce effectively environmental laws. However, there are concerns about a lack of a citizen submission process similar to the one used in the NAFTA Agreement on Environment Cooperation. The citizen submission provides the opportunity for concerns about a government's failure to enforce effectively its environmental laws to be raised before a neutral body. The lack of such a process, and the simultaneous inclusion of an investor-state dispute mechanism in the investment chapter, creates a problematic imbalance in the Agreement.

Mr. Mannix notes that, with respect to the environment, the NAFTA procedures are not necessarily good models to emulate in future FTAs.

**F. Government Procurement**

The government procurement section appears to have strong provisions on national treatment, which should assure that our companies are treated fairly. It is noted that the United States has excepted from this chapter all programs that benefit small or minority business or programs administered by the Government that promote the development of distressed areas and businesses owned by minorities, disabled veterans, and women. It also appears that all U.S. military operations are exempt.

There are concerns on environmental grounds regarding the lack of an exception comparable to GATT Article XX (g), which provides deference to Government measures related to the conservation of exhaustible natural resources and has been used by the United States in WTO jurisprudence to defend its environmental laws. This is a problematic gap that leaves open to challenge procurement standards based on important environmental concerns, including protection of endangered species.

**G. Labor**

No comment.

**H. Customs Procedures/Rules of Origin**

The Rules of Origin are unacceptable as a template and will be problematic for the industry in many areas, especially pharmaceuticals, fertilizers and cosmetics.



They may also be too permissive in some parts of Chapter 32, organic colorants and inks. We have proposed that the FTA's rules of origin for chemical products (HS Chapters 28-40) for both preference and non-preference be based on the position taken by the United States in their submission to the World Customs Organization's Committee on non-preference Rules of Origin.

The crop protection chemicals industry sector is concerned about the dilution of Rules of Origin requirements in this Agreement as compared to those in NAFTA. While it may be too late to make changes in the Chile FTA, we urge the USTR to consult with this industry sector before negotiations on the CAFTA and FTAA Rules of Origin are finalized.

We are not advocating the value and volume rules approach in NAFTA, but volume (weight percentage) when it is adequate and otherwise needed where "tariff shift" methodology is not adequate.

ISAC-3 is not in favor of origin rules that require either 'value content' or 'volume content' tests. We find such rules to add to the administrative burden of the import process, while providing little or no value.

ISAC-3 notes that our request for the European rules on fungible goods and materials was not included in this FTA.

**I. Sanitary and Phytosanitary Issues**

No comment.

**J. Technical Barriers to Trade**

No comment.

**K. Telecommunications**

No comment.

**L. Temporary Entry**

No comment.

**M. Safeguards**

No comment.

**N. Market Access – Textiles**

No comment.

**O. Services**

No comment.

**P. Financial Services**

No comment.

**Q. Investment**

ISAC-3 notes with approval that this chapter mandates “Most Favored Nations Treatment” and “National Treatment” of investments. We also are pleased to see that there are no requirements for senior management or a majority of boards of directors be from one particular country or another. We are pleased that no performance incentives may be given. ISAC-3 is also pleased to see that there are no barriers to the free transfer of capital and profits in and out of either country.

Mr. Waskow has expressed a concern that the investment provisions, particularly concerning “minimum treatment” and expropriation, do not meet the Congressional mandate that foreign investors not receive greater substantive rights than those that are afforded to U.S. citizens under U.S. law. In his view, the Agreement does not include the critical principle that a governmental action, in order to constitute a “taking,” must affect a ‘parcel as a whole’ and must be analyzed in terms of the action’s permanent interference with a property in its entirety. The impact of these rules is a concern for public interest and environmental protection. Further, given that many businesses have operations primarily in the United States, the granting of greater rights to foreign investors may be of concern for those businesses.

Mr. Mannix disagrees with Mr. Waskow’s characterization of the investment provisions, particularly as to the issue of what is a “taking” under current U.S. case law. He believes that a “taking” can be temporary or partial. He believes, moreover, that concern for environmental quality would argue for a trade policy that respects private property rights and that encourages our trading partners to do so as well. Mr. Mannix believes that weak property rights, more than any other underlying cause, are responsible for the “tragedy of the commons” that manifests itself as environmental degradation around the world. Strong property rights are essential, not only for free trade, but also for sustainable environmental protection.

**R. Intellectual Property Rights**

ISAC-3 views negotiations of the FTAs with individual partners as a useful mechanism for clarifying minimal international obligations found in the World Trade Organization (WTO) Agreement on Trade Related Intellectual Property Rights (TRIPS) and for

building on those minimum standards. While the negotiation of an individual FTA provides the opportunity to deal with specific intellectual property concerns that the U.S. industry may have in the particular negotiating partner, the resultant level of intellectual property protection that it contains should not be viewed as setting any ceilings for the intellectual property chapters for future FTAs. Rather, each individual FTA should be viewed as setting a new baseline for future FTAs.

ISAC-3 notes that while the IP chapter of the Chile FTA included new benefits to industry, we remain concerned that Chilean regulatory authorities took advantage of the negotiation period to authorize introduction of infringing pharmaceutical products that remain on the market to this day. We welcome the improvements in the areas of trademarks, patents, and provisions relating to regulated products, and going forward, urge our Government negotiators to include strong and effective “stand-still” provisions to prevent our negotiating partners from taking advantage of the run-up to an FTA to flood the market with copied products.

We have insufficient knowledge at this point in time to comment on the provision of this chapter concerning measures related to certain regulated products particularly to confidentiality of test data and trade secrets of 5-years for pharmaceuticals and 10 years for agricultural chemical products.

There are concerns on environmental grounds that the Agreement is unclear as to whether the exceptions in Article 27.2 and 27.3 of the WTO TRIPS Agreement fully apply to the U.S.-Chile FTA. By not providing clarity regarding the availability of these environmental and other public interest exceptions, the Agreement fails to ensure the ability of governments to regulate and protect the environment, including sufficient flexibility concerning the patenting of animals and plants that is needed to address environmental concerns such as the protection of biodiversity.

## **S. Market Access-Industrial**

On tariffs, the Agreement allows Chile duty free access to the entire chemical section immediately. We did not get similar reciprocal access to Chile’s market though we are grateful for the fact that in specific instances, the negotiations were able to obtain concessions from Chile to benefit U.S. manufacturers.

Chile has agreed to eliminate many duties immediately but kept the four-year staging on approximately 100 items in Chapters 28 through 40, and eight-year staging on about 20 items in Chapters 33 through 40. There is no request for longer staging in the other chapters that affect the chemical industry. This appears to be an acceptable outcome for our industry.

However, there is some concern that several of the line items which Chile extended staging on chemical tariffs were efforts to protect manufacturers outside of Chile’s

economy. In several instances it is thought that the Chileans do not manufacturer materials for which they have achieved extended staging.

**T. Market Access - Agriculture**

No comment.

**VI. Membership of Committee**

Chairman  
Geoffrey Gamble, Esquire,  
Chief Counsel, International and Trade  
E.I. du Pont de Nemours & Company

Vice-Chairman  
Mr. V.M. (Jim) DeLisi,  
President  
Fanwood Chemical, Inc

2<sup>nd</sup> Vice Chairman  
Robert E. Branand, Esquire,  
Representative  
National Paint & Coatings Association

Ms. Lori M. Anderson, CAE  
Strategic Planning & Industry Relations Officer  
The Society of the Plastics Industry, Inc

Mr. Morris A. Chafetz  
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Hemisphere Polymer & Chemical Co

Ms. Katherine M. Dutilh  
Washington Representative  
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Mr. Donald E. Ellison  
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Mr. Phillip G. Ellsworth  
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Ms. Mildred W. Haynes  
Manager, Government Relations  
3M Company

Ms. Shannon S. Herzfeld  
Senior Vice President  
PhRMA

Ms. Nancy R. Levenson  
Director, Federal Government Relations  
S.C. Johnson & Son, Inc.

Mr. Brian Mannix  
Senior Research Fellow  
Mercatus Center, George Mason University

Ms. Rosemary L. O'Brien  
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CF Industries

Mr. K. James O'Connor  
Director, International Trade  
American Chemistry Council

Dr. George L. Rolofoson  
Vice President, Government Affairs  
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Mr. Arthur J. Simonetti  
Director, Trade Regulation and Legislation  
Honeywell International, Inc.

Mr. Max Turnipseed  
Representative  
The Dow Chemical Company

Mr. Ford B. West  
Vice President, Government Relations  
Fertilizer Institute

Ms. L. Ann Wilson  
Vice President, Government Affairs  
Rubber Manufacturers Association

Government:

Mr. Michael Kelly  
Designated Federal Officer  
Department of Commerce

Mr. John C. O'Connor  
Senior Customs Associate  
Eli Lilly & Company

Mr. Louis G. Santucci  
Director, Trade Regulation & Legislation  
Cosmetic, Toiletry & Fragrance Assoc.

Mr. Henry P. Stobenau  
Representative  
American Assoc. of Exporters & Importers

Ms. Aracelia Vila  
Vice President, Public Affairs  
Schering-Plough Pharmaceuticals

Mr. David Waskow  
Trade & Investment Policy Coordinator  
Friends of the Earth

Ms. Barbara Norton  
Liaison  
United States Trade Representative Office