Mr. George Becker
Chair, Labor Advisory Committee on
Trade Negotiations and Trade Policy

Dear Mr. Becker:

We have carefully considered the recent report of the Labor Advisory Committee (LAC) on the proposed U.S. free trade agreements (FTAs) with Chile and Singapore.

The LAC report found virtually nothing of benefit for American workers and their families in either agreement. That conclusion is surprising, given that each of the 30 other trade advisory groups found that the proposed FTAs are in the national economic interest of the United States and substantially meet the negotiating objectives set out by Congress in the Bipartisan Trade Promotion Authority (TPA) Act of 2002. We agree with the findings of a majority of the President's Advisory Committee on Trade Policy and Negotiations, which found that these agreements will "substantially improve market access for American farm products, industrial and other non-agricultural goods, and services."

Moreover, the Chile and Singapore FTAs contain, as integral parts of the agreements, binding commitments by the Parties to effectively enforce their labor and environmental laws, thus fulfilling a significant principal negotiating objective Congress set out in TPA.

The uniformly negative perspective of the LAC report does not fairly reflect the impact these agreements will have on America's workers and families. Rather, the lack of balance and nuance in the report, together with its numerous factual errors and misrepresentations, strongly suggest an underlying bias against any market-opening trade agreements negotiated under the guidelines set out by Congress in TPA. Indeed, the LAC report appears designed less to challenge the conformity of the two agreements with TPA than to challenge the TPA objectives themselves.

The United States has thrived by opening markets around the world and by ensuring that our companies and workers have access to competitively-priced inputs from at home and abroad so they can compete successfully in the global marketplace. The proposed Singapore and Chile FTAs continue sixty years of U.S. leadership in trade around the world, with important innovations that bring worker rights and environmental obligations into the heart of our trade agreements. While no trade agreement will fully satisfy every constituency, we believe that these proposed agreements deserved a fair and balanced assessment.

The LAC report did not provide such an assessment. In the attached analysis, we highlight and respond to some of the more troubling aspects of the report.

Sincerely,

William B. Clatanoff
Assistant U.S. Trade Representative for Labor

Office of the United States Trade Representative
Response to Labor Advisory Committee Report on the
Proposed Chile and Singapore FTAs

U.S. Trade Balance

- The LAC report asserts, with no supporting evidence, that the proposed FTAs with Chile and Singapore will further increase the U.S. trade deficit. This assertion incorrectly assumes a simple cause-and-effect relationship between trade agreements and trade deficits. In fact, the U.S. current account trade deficit is a function of a number of factors, including the attractiveness of the U.S. economy to foreign investors, faster growth rates in the United States than in the rest of the world as a whole, and movements in currency exchange rates.

- Trade agreements contribute to our economic strength by encouraging our companies to innovate and compete and giving our manufacturers access to competitively-priced foreign inputs. Trade agreements also open markets around the world, allowing our workers and firms to export a vast array of products and services – such as advanced electronics, software, films, aircraft, farm products, environmental and medical equipment – for which the United States is the world leader. Contrary to the view expressed in the LAC report, the proposed FTAs with Chile and Singapore will only add to our economic strength.

U.S. Employment

- The LAC report suggests that the Singapore and Chile FTAs will drain jobs from the United States as, the report says, the NAFTA has done. In fact, during the period after the NAFTA went into effect in 1994, the United States enjoyed the greatest sustained growth in jobs in our nation's history. Over the past decade, increased U.S. exports -- made possible by bringing down foreign trade barriers under the NAFTA, the WTO, and other market-opening agreements -- played a major role in creating millions of jobs in the United States. On average, jobs supported by exports of U.S. goods pay 13-18 percent more than average wages in the United States. The proposed new FTAs will help create even more export opportunities for our firms, and hence more employment opportunities for our workers.

- U.S. trade agreements also help make the products American workers buy on a daily basis more affordable. The LAC report fails to mention this fact. The combined price-lowering effect of the NAFTA and most recent round of WTO tariff reductions effectively put an extra $1,300 to $2,000 in the pockets of American families. Such savings are of particular importance to America's lower-income workers.

Labor Provisions

- The LAC report also fails to mention that the proposed new FTAs positively respond to what organized labor claimed was its single most sought-after trade objective in recent years. Each FTA includes labor provisions along with traditional commercial provisions in the heart of the agreement itself -- backed up with remedies to encourage compliance.

- The report criticizes the two agreements because their dispute settlement procedures focus on ensuring that each government effectively enforces its own labor laws. The LAC report says FTAs should compel the United States and its trading partners to adopt specific types of labor laws. But the report neglects to mention that both Chile and Singapore (like the United States) already have strong labor rules that are consistent with the core principles of the International Labor Organization (ILO). Indeed, Chile amended its labor laws to ensure that its standards meet the benchmarks set out in the FTA, a signal accomplishment of the negotiations that the LAC report fails to even mention.

- A real-world problem with regard to labor rights – which both FTAs directly address – is that some countries do not enforce the laws they have on the books. To deal with that problem, both proposed FTAs make a government's systematic failure to effectively enforce its labor laws directly actionable under the trade agreement.

- The LAC report says the requirement for each government to effectively enforce its labor laws is of little value because a government could avoid its obligation simply by repealing or weakening those laws. This criticism assumes that governments can easily roll back domestic labor protections. But there is no basis for concluding that a government will choose to upset the established expectations of its domestic constituencies when faced with a choice between enforcing its own labor laws or facing possible penalties under an FTA. In fact, the Chilean experience is to the contrary. As it debated labor law reforms, Chile's Congress acknowledged that an FTA with the United States was likely to include provisions on the enforceability of its labor laws -- and then proceeded to strengthen the workers rights provisions in its laws.

- Moreover, if, as the LAC report suggests, governments might opt to roll back their labor protections rather than face a penalty for failing to enforce them, it can only be because a government takes such penalties seriously. But the LAC report goes on to claim that the penalties available in labor disputes are likely to be ineffectual.

- Finally, if the LAC's point is that a country would rather change its law than face the embarrassment of dispute settlement proceedings against it, then the LAC misunderstands the totality of the labor provisions in the Chile and Singapore FTAs. Those provisions create a forum in which disputes regarding *any* labor-related matter may be raised. A Party cannot avoid being called to account in this forum simply by changing its laws.

- The LAC report also ignores the provisions of the Chile and Singapore FTAs that create cooperative mechanisms to improve worker rights. The U.S. Department of Labor has already embarked upon a cooperative program with Chile to improve the administration of its labor laws and enhance labor justice.

Dispute Settlement

- The LAC report claims that the dispute settlement procedures available under the two proposed FTAs for enforcing the agreements' labor (and environmental) provisions are inconsistent with TPA Act objectives. That is clearly incorrect.

- First, exactly the same set of procedures apply under both agreements to all stages of dispute settlement – other than the post-panel penalty phase – regardless whether a dispute concerns commercial matters or a government's enforcement of its labor laws. The agreements thus satisfy the TPA objective of making available "equivalent" procedures for all matters covered by TPA Act principal negotiating objectives.

- Both agreements make monetary assessments and suspension of trade benefits available to secure compliance with panel decisions in all types of disputes, including those involving a government's enforcement of its labor laws. In commercial disputes, the defending government is subject to suspension of trade benefits, but may choose to pay a monetary assessment. In labor and environmental disputes, the defending party is subject to a monetary assessment and is subject to suspension of trade benefits if it does not pay. The agreements thus satisfy the TPA objective of "equivalent" remedies for all subject areas covered by TPA Act principal negotiating objectives.

- When monetary assessments are collected in labor (or environmental) disputes, the funds are to be used for appropriate labor (or environmental) initiatives designed to remedy the problems. This furthers the TPA Act objective of promoting compliance with the obligations in U.S. trade agreements. Moreover, the proposed agreements make trade effects just one element in setting assessment levels in labor cases and take into account the defending government's enforcement efforts and other factors pertinent in such cases. Thus the remedies available in labor disputes are specifically geared toward the "nature" and "subject matter" of these sorts of disputes – as called for under the TPA Act.

- By basing monetary assessments for non-compliance with labor obligations on both trade and other relevant factors, and by creating a procedure for panels to set proposed assessment levels, the agreements will help ensure that penalties are "appropriate to the . . . scope of the violation," a further TPA Act objective.

- Finally, because panels in labor disputes may take into account the pervasiveness and duration of the violation and the defending government's reasons for not curing the problem, among other factors, panels may set the assessment level at an amount appropriate to the circumstances. These procedures address the TPA Act objective of making enforcement penalties "effective."

- The LAC report argues that the proposed FTAs should authorize trade sanctions – rather than monetary penalties – as a first step to ensure that governments enforce their labor laws. But in his March 20, 2001 testimony before the Senate Finance Committee praising the dispute settlement provisions of the U.S.-Jordan FTA, AFL-CIO President Sweeney said that a monetary assessment – or even an ILO delegation or a training program for labor inspectors – would be an appropriate remedy for addressing violations of the labor disciplines in the Jordan agreement. Thus, it is surprising that the LAC report now says only trade sanctions are appropriate for enforcing the labor provisions of the proposed Chile and Singapore agreements.

- A compliance system that relies first on monetary penalties – a sanction that is borne by the government as a whole rather than by particular industries and their workers – is more appropriate than trade sanctions in the labor context. The two proposed FTAs authorize substantial monetary penalties – up to $15 million – year-in and year-out until the recalcitrant government takes its enforcement obligations seriously. The LAC report suggests that a $15 million assessment would have little deterrence effect because it "is less than three percent of the import charges we collected on Chilean products in 2002." This is simply wrong. U.S. duties on imports from Chile totaled $19.3 million in 2001 and $23.5 million in 2002. The risk of losing almost three-quarters of the FTA's tariff benefits should create a significant deterrent.

- The LAC report criticizes both proposed FTAs because they allow a dispute panel, in setting a monetary penalty, to consider factors other than the amount of trade the government's enforcement failures have affected. The LAC report suggests that this will result in lower penalties than if trade effects were the sole measuring stick. The opposite is true. If panels cannot not look beyond trade effects and consider such factors as the duration and gravity of the enforcement failure, the resulting monetary penalty may be very low. Some of the worst possible labor violations – such as a failure to prevent intimidation and harassment of labor union organizers – may have trade effects that are very limited or difficult to measure.

Temporary Entry

- The LAC report also criticizes the proposed Chile and Singapore FTAs for including provisions allowing U.S. professionals to work on a temporary basis in Chile and Singapore and allowing a small increase in the number of professionals of those countries that may seek to work in the United States on a temporary basis. The report suggests that since TPA Act negotiating objectives do not specifically address temporary entry, U.S. negotiators should not have included any provisions on this subject in the two FTAs.

- In fact, temporary entry of professionals falls squarely within TPA Act objectives regarding the opening of foreign country markets for U.S. services and investment. The TPA Act calls for the reduction or elimination of "barriers to international trade in services, including regulatory and other barriers that deny national treatment and market

access or unreasonably restrict the establishment or operations of service suppliers." The TPA Act also calls for the reduction or elimination of "unreasonable barriers to the establishment and operation of investments." Commitments regarding temporary entry directly advance these goals.

- Indeed, ensuring cross-border mobility of professionals and other business persons is critical for U.S. companies in developing new markets and business opportunities abroad. The temporary entry component of the two proposed FTAs thus complements and reinforces the market opening provisions of the two agreements.

- The LAC report faults the Administration for amending its initial temporary entry proposals after it consulted with the LAC and the Congress. In fact, that is precisely the purpose of such consultations – to ensure that all interested parties have input into the trade policy formation process.

- The LAC report suggests that the temporary entry provisions in the two agreements will adversely affect the U.S. labor market. That argument is baseless. First, the agreements provide for professionals and other business persons to enter the United States only on a temporary basis. The agreements do not deal with immigration flows, and thus do not change how Singaporean or Chilean nationals acquire U.S. citizenship, permanent residency, or permanent employment. Second, the number of additional Singaporean and Chile professionals that may seek to enter the United States under the proposed FTAs is very small, providing an annual cap of just 5,400 for Singapore and 1,400 for Chile.

- Moreover, several of the report's conclusions regarding the agreements' temporary entry provisions are simply erroneous. For example:

    - The report states that the agreements will allow U.S. companies to bring in foreign "temp workers" who are not employed by U.S. companies. This is not correct. Both the Singapore and Chile FTAs require that persons seeking temporary entry as professionals must have a labor attestation filed by their U.S. employer with the U.S. Labor Department, as is the case under current U.S. law. Thus, Chilean and Singaporean professionals will enter the United States under the agreements' temporary entry provisions only if they are employed by a U.S. firm.

    - The LAC report suggests that the labor attestations required under the two agreements will be less rigorous than the Labor Condition Application (LCA) called for under current U.S. law. This is also incorrect. While the FTAs will eliminate the requirement for a U.S. employer to file a petition with the INS after submitting a labor attestation, they will leave intact the fundamental requirement that a U.S. company seeking temporary entry for a Chilean or Singaporean professional must show that the position cannot not be filled from the U.S. labor pool. Moreover, letters appended to the FTAs plainly state that the labor attestation required under the FTAs will be modeled after the LCA that the

Department of Labor requires under the existing H-1B visa program, and that as is the case under the H-1B program, fees may be collected along with the labor attestations.

- The LAC report also claims that the proposed FTAs will allow a Chilean or Singaporean professional, rather than his or her U.S. employer, to submit a labor attestation. As stated above, this is incorrect. Under both FTAs, only U.S. employers can submit labor attestations regarding the temporary entry of professionals.

- The LAC report also argues that the definition of "professional" in the two agreements is unacceptably broad. However, it is drawn from a definition contained in the U.S. Immigration and Nationality Act itself (*see* 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) and 1184(i)(1)).

Investment

- The LAC report criticizes the investment provisions included in the two proposed FTAs, arguing that they repeat NAFTA's "flaws." But the Chile and Singapore agreements meet each of the investment objectives set out by Congress in the TPA Act and make significant innovations based on experience under NAFTA. The LAC report appears designed less to challenge the conformity of the two agreements with the TPA Act than to challenge TPA Act objectives themselves.

- For example, the report criticizes the agreements for providing investor-state arbitration procedures. Yet, the act calls for "meaningful procedures for resolving investment disputes" and speaks in terms of investor "claims" and "selection of arbitrators," making clear that the TPA Act specifically envisions investor-state arbitration. In fact, the conference report that accompanied the act explained, "The Conferees recognize that the procedures for resolving disputes between a foreign investor and a government may differ from the procedures for resolving disputes between a domestic investor and a government and may be available at different times during the dispute." (House Report No. 107-624 at p. 156).

- At the same time, the LAC report says the two agreements should have required investors to exhaust domestic remedies before initiating arbitrations and should have allowed the investor's home government to intervene in a dispute. Yet the LAC report fails to mention that these concepts are <u>not</u> included in the TPA Act.

- Similarly, the report criticizes the agreements for "constrain[ing] the ability of the Chilean and Singaporean governments to regulate the flow of speculative financial capital," ignoring the fact that one of the TPA Act's negotiating objectives is to "free[ ] the transfer of funds related to investments."

- In another instance, the LAC report argues that the agreements will provide foreign investors greater rights than U.S. investors. In particular, the report faults the proposed FTAs for not codifying the complex jurisprudence of the U.S. Supreme Court on the subject of "regulatory takings." However, this criticism fails to acknowledge the Supreme Court's own often repeated observation that issues of regulatory takings are highly fact-intensive. Thus, in its landmark decision in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), the Court explained that it

  > quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." Id. at 124.

- The Court affirmed this "'essentially ad hoc'" approach to regulatory takings analysis as recently as last year (See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002).) Nevertheless, the LAC report appears to advocate precisely the sort of "set formula" rejected by the Supreme Court.

- The two proposed FTAs incorporate the guiding principles on the question of compensation for regulatory action that can be drawn from U.S. cases. For example, the FTAs would provide that, in determining whether an indirect (*i.e*. a regulatory) expropriation has occurred, panels must examine the factors that the Supreme Court cited in *Penn Central*. Further drawing on *Penn Central*, the FTAs also instruct panels that determining whether an expropriation has occurred requires a case-by-case, fact-based inquiry.

- Furthermore, the LAC report mischaracterizes a provision included in the two proposed agreements that requires a government to provide "fair and equitable treatment" to investors from the other country. This sort of provision has been included for decades in hundreds of investment agreements around the world.

- The LAC report criticizes the two proposed FTAs on the ground that they do not precisely define "fair and equitable treatment." This critique fails to acknowledge that both agreements constrain the concept of fair and equitable treatment. First, the agreements make clear that the standard for judging whether a government has provided an investor fair and equitable treatment is whether the government has met the customary international law minimum standard of treatment for aliens. In other words, "fair and equitable treatment" is not simply what arbitrators may consider to be fair and just. Under the two proposed FTAs arbitrators must look to an established body of international law in deciding whether a government has met its obligation.

- Second, the proposed agreements include explicit understandings of what constitutes customary international law. These understandings further clarify the boundaries of fair and equitable treatment. The proposed agreements also make clear that an investor cannot base a claim that a government has breached its obligation to provide fair and equitable treatment on the ground that the government has failed to comply with one of its other obligations under the FTAs or its obligations under other international agreements.

- In addition, the LAC report mischaracterizes or entirely fails to mention the procedural innovations the FTAs introduce in investor-state arbitration procedures that will increase their transparency and efficiency and make investment rules more coherent, as called for under TPA. The report simply dismisses the FTAs' novel procedures for eliminating frivolous claims as "not very different from the expedited procedures for considering jurisdictional questions that already exist for NAFTA claims." This statement is erroneous for at least three reasons. First, it ignores the scope of the expedited gate-keeping procedure that the proposed Chile and Singapore FTAs include. That procedure provides for dismissal of claims not only for jurisdictional reasons, but also for failure to state a claim on which relief may be granted, as is the case in U.S. courts. Second, the two agreements generally require motions to dismiss for jurisdictional reasons and for failure to state a claim to be decided within 150 days, thus allowing for the early termination of frivolous cases, as mandated by TPA. Third, the two agreements expressly authorize panels to award attorneys' fees and costs after deciding whether a claimant has raised a frivolous claim, thus providing a deterrent to the filing of such claims.

- Moreover, the proposed agreements will ensure public access to arbitration hearings and documents, and provide for *amicus curiae* submissions. In addition, the proposed agreements commit the United States and its free-trade partners to explore the possibility of developing appellate procedures for reviewing arbitral decisions.

Intellectual Property Rights

- The LAC report claims that the rules included in the proposed Chile and Singapore FTAs regarding patent protection will prevent those governments from making life-saving drugs available to combat health crises. According to the report, the FTAs are thus incompatible with the 2001 WTO "Doha Declaration on the TRIPS Agreement and Public Health, " which addressed the relationship between intellectual property rights rules governing pharmaceuticals and public health concerns in developing nations.

- The objections in the LAC report are unfounded. First, the proposed FTAs will not constrain Singapore or Chile from addressing health crises. Each government will remain free to override drug patents to address any emergency situation, including a health crisis. Moreover, in situations that fall short of an emergency, the agreements will permit each government to authorize the manufacture and distribution of generic drugs on a noncommercial basis to address public health concerns. The agreements are thus fully consistent with the Doha declaration.

- Second, contrary to the LAC report, rules in the two proposed FTAs requiring governments to keep a competitor from unfairly using the data that another company has generated in testing a new drug or farm chemical will not impede Chile or Singapore from addressing public health crises. Those rules are based upon longstanding practice by the U.S. Food and Drug Administration and the Environmental Protection Agency with regard to test data that predate implementation of the TRIPS Agreement in 1995. No U.S. health agency and no foreign government has found that these rules impede its response to a health crisis. Moreover, just as is the case under the TRIPS Agreement, both proposed FTAs will allow a government to disclose proprietary data if necessary to protect the public health. Therefore, the proposed Chile and Singapore FTAs both protect the jobs of Americans in our pharmaceutical and agricultural chemical industries and also provide governments with the flexibility to react to any health crisis.

- Finally, the report criticizes provisions in the proposed FTAs stating that inventors who develop new plant or animal forms may seek patents for them. The rules that the LAC report criticizes, however, simply restate existing patent practices in the United States and many other countries, including Singapore. Contrary to the report's assertion, there is no evidence that patents for new animal and plant forms lead to environmental harm or threaten public health and safety. Moreover, the proposed agreements do not prevent either government from keeping harmful plant or animal forms off the market even if they are patented. The LAC report also ignores the fact that the patent protections provided by the FTAs provide an incentive for research and development that can lead to inventions – such as new crop varieties that do not require pesticides – that enhance environmental quality and public health.

Services

- The LAC report claims that the Chile and Singapore FTAs will make it more difficult for governments to regulate services, including public services. That is simply incorrect.

- First, like those in the NAFTA and the WTO, the trade-in-services rules in the proposed Chile and Singapore FTAs are consistent with traditional U.S. practices in the services sector. For example, they call on governments to make their services regulations as transparent as possible, to avoid discriminating on the basis of nationality, and to keep from erecting unnecessary impediments to entry.

- Second, both proposed agreements allow each government to exempt domestically sensitive laws or sectors. The LAC report fails to mention, for example, that the United States has exempted a long series of measures from many of the core provisions of the proposed agreements. For example, the United States exempted from most of the core provisions of the agreement <u>any</u> existing state law or regulation governing services or investment. The United States also exempted from most of the core provisions future measures pertaining to such U.S. social services as income security and insurance, social security, social welfare, public education, public training, health, and child care.

- The LAC report also suggests that the proposed FTAs will increase pressure for basic government services to be privatized and thus could raise the cost and reduce the quality of such services as health care and education. In fact, however, neither agreement calls for privatization and both FTAs expressly exempt services provided on a non-commercial basis and not in competition with other services suppliers.

- Finally, the LAC report notes that United Parcel Service has filed a claim against Canada under the investment provisions of the NAFTA on the ground that Canada has unfairly subsidized its postal service. The report suggests that a similar case could be brought under the two proposed FTAs. What the LAC report fails to mention is that in late 2002 the arbitral panel hearing the UPS case dismissed the company's anti-competitive subsidy claims against Canada Post on the ground that they are not prohibited under the NAFTA's investment rules. UPS has since tried to recast its claims. However, the mere fact that a company files a complaint under international investment rules does not mean that they prohibit the government action that the company is complaining about.

Financial Services

- The LAC report makes several unsubstantiated allegations regarding the financial services chapters of the Chile and Singapore FTAs.

- First, the report asserts, "Chile will have to change its regulations of the privatized portion of its pension system to allow 100% of workers' retirement savings in the system to be invested overseas." In fact, the FTA would not require Chile to change its requirements relating to where pension fund assets can be invested.

- Second, the LAC report asserts that "[c]ommittees of jurisdiction in the U.S. Congress and state and local regulators will have to read the financial services chapters carefully to discover what, if any, changes will be required to our own domestic financial regulations under the new trade agreements." The U.S. services market was already open long before the FTAs were negotiated. The Chile and Singapore FTAs will not require any changes to U.S. financial services regulations, as regulators at the federal and sub-federal level are well aware. During the course of the negotiations, U.S. negotiators consulted intensively with U.S. federal and state regulators to ensure that their regulatory sensitivities were understood and fully accommodated in the proposed FTAs.

- As a final example of its hyperbole, the LAC report states, "the agreements' rules open up a new avenue for financial firms to challenge existing or future regulations on their operations." The FTAs do provide dispute settlement provisions relating to financial services, which will help ensure that our FTA partners comply with their obligations with respect to U.S. firms. However, the financial services chapters in the proposed Chile and Singapore FTAs also include exceptions for prudential measures that are taken to protect investors, depositors, policy holders and others, and for measures that are taken to ensure the integrity and stability of the financial system. These safeguards, combined with the

fact that the proposed agreements will not require any changes to U.S. laws and regulations, ensure that the ability of the United States to regulate the financial services sector is not in any way undermined.