

ISAC - 3

Industry Sector Advisory Committee for Chemicals and Allied Products

The Honorable Robert B. Zoellick
United States Trade Representative
600 17th 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 report of the Industry Sector Advisory Committee for Chemicals and Allied Products on the Free Trade Agreement between the United States and Australia, reflecting consensus on the proposed Agreement.

Very truly yours,

Geoffrey Gamble
Chair
ISAC-3

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

Report of the
Industry Sector Advisory Committee for Chemicals and Allied Products
(ISAC-3)
March 12, 2004

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

Advisory Committee Report to the President, the Congress and the United States Trade Representative on AUSTRALIA

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.-Australia FTA 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 areas.
- U.S. Government negotiators were well prepared and briefed us regularly. Our advice was treated very seriously, and almost all of our concerns were resolved in an adequate and satisfactory way.
- We urge early Congressional approval of this Free Trade Agreement.

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 product 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.

IV. Negotiating Objectives and Priorities of ISAC-3

ISAC-3 emphasized the following points prior to, and during the negotiations.

- **Importance**

Australia is a major trading partner of the United States. We continue to urge the Administration to devote its energies to negotiating FTA/s with such important trading partners. We want to reemphasize the twin priorities of implementation and enforcement of this and other free trade agreements.

- **Chemical Tariff Harmonization Agreement**

ISAC-3 has long supported the Chemical Tariff Harmonization Agreement (CTHA) initiated in the Uruguay Trade Round. Accordingly, we particularly favor increased trade relationships with current CTHA signatory countries as well as other nations that have chemical producing industries.

Over 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 pharmaceuticals sector supports immediate tariff elimination in accordance with the multilateral understanding on elimination of pharmaceutical tariffs. The negotiation by the Administration of FTA/s with key chemical producing countries, including Australia, 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 support continuing efforts to achieve the elimination of chemical tariffs through selective bi-lateral and regional FTA/s, including the Central America Free Trade Agreement (CAFTA) the Free Trade Area of the Americas (FTAA), and as part of countries' accessions to the WTO, as desirable alternatives, so long as they do not undercut efforts to achieve the ultimate goal of a level trading field and broad multilateral tariff elimination.

- **Staging of Market Access Provisions**

ISAC-3 favors realistic and balanced staging timetables in all FTA/s, as well as the broader FTAA, for the elimination of tariffs and non-tariff barriers. ISAC-3 also favors immediate tariff elimination for the pharmaceutical sector in all FTA/s and in the FTAA, in accordance with the multilateral consensus contained in the Understanding on Elimination of Pharmaceutical Tariffs. The Australian agreement is a notable example of prompt tariff elimination and should serve as a model for tariff negotiations in other future FTA/s.

- **Rules of Origin**

The rules of origin for chemicals under free trade agreements are a vitally important aspect for the chemicals sector.

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.

ISAC-3 strongly supports harmonizing Rules of Origin in as many trade agreements as possible.

- **Investment**

The industry members of ISAC-3 believe that the inclusion of a chapter in the U.S.-Australia FTA providing for strong investment protection rules for U.S. companies is a priority.

Among the elements that we advocate that should be covered in an investment chapter are: 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.

Mr. Waskow urged that the mandate in the Trade Act of 2002, requiring that foreign investors should receive no greater substantive rights than U.S. citizens are accorded under U.S. law, should be complied with. He further advocated that environmental and other public interest protections be fully protected in the text of the Agreement and that foreign investors should not be permitted to bypass the domestic judicial systems of the Parties to the Agreement.

- **Labor and Environment Provisions**

ISAC-3 has advocated 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, all of the industry sector members of ISAC-3 believe that 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 multilateral 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 free trade agreements is, in the judgement of the industry sector ISAC-3 members, inadvisable.

The industry members of ISAC-3 also indicated that it is fundamentally misguided to include labor and environmental provisions in future trade agreements in such a way as to lead to the imposition of trade sanctions. If we were to pursue this formula, those members felt that the U.S. would ultimately be choosing a market-closing, not a market-opening strategy. Important trading partners would turn away from this strategy, and U.S. efforts to create more open markets would fail. The industry members urged that the chemical and pharmaceutical industries, and their respective trade

associations, get more actively involved in numerous discussions with interested parties about the relationship that should exist between trade and the environment. They believed that dialogues of this nature are the best means of providing 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 numeration and titles in the Agreement text:

Chapter 1: Establishment of a Free Trade Area and Definitions

No comment.

Chapter 2: National Treatment and Market Access for Goods

On tariffs, the Agreement allows reciprocal duty free access to almost the entire chemical section immediately. This is an extraordinary accomplishment. The Government did an excellent job in negotiating the tariff phase-outs for our section of the Agreement. We truly appreciate that they were prepared to recognize the one sensitive item between our two economies and make suitable provisions for an orderly phase-out of the tariff on this line item.

Chapter 5: Rules of Origin

The Rules of Origin that have been negotiated are appropriate and fit the needs of our industrial sector. We do note, however, that our request for the European rules on fungible goods and materials regarding time and declaration were not included in this Agreement.

Chapter 6: Customs Administration

We applaud the requirement [Article 6.1.1] of publication of laws, regulations, guidelines, procedures, and administrative rulings governing customs matters on the Internet. The concept of written advance rulings [Article 6.3] is also highly desirable.

Chapter 7: Sanitary and Phytosanitary Measures

The Parties' affirmation of existing rights and obligations with respect to each other under the SPS Agreement [Article 7.3.1], and the establishment of a Committee on Sanitary and Phytosanitary Matters to enhance the implementation of the SPS Agreement should serve to ensure trade equity and minimize trade distortions as a result of SPS issues.

Chapter 8: Technical Barriers to Trade

The misuse of Technical Barriers is an enduring threat to free and fair trade. We are pleased to see in this Agreement the commitment to reciprocity and transparency. We are also pleased to see the establishment of Chapter Coordinators to facilitate communication and the exchange of information on technical standards and regulations.

Chapter 9: Safeguards

No comment

Chapter 11: Investment

ISAC-3 notes with approval that this Chapter mandates “National Treatment” [11.3] and “Most Favored Nations Treatment” [11.4] 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.

Although the provisions in the Chapter provide foreign investors with substantive rights that are greater than those available to US citizens under US law, and thereby pose potential risks for environmental and public interest protections, the omission of an investor-state dispute mechanism, in the judgement of Mr. Waskow, is an extremely important and welcome improvement that precludes foreign investors from bypassing US and Australian courts. It is also important to note, however, that Article 11.16.1 of the Investment Chapter appears to provide an ad hoc process for the executive branch to implement an investor-state mechanism without Congressional approval, although this appears to be limited in application to losses arising from civil strife or armed conflict.

Chapter 14: Competition-Related Matters

We are pleased to see in the text a recognition that state enterprises should not operate in a manner that creates obstacles to trade and investment [Article 14.4.1]. We also applaud the statement that where normal commercial considerations, such as supply and demand, prompt the charging of different prices in the same or in different markets, this is not to be considered anticompetitive [Article 14.5].

Chapter 15: 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 various procurement standards based on important environmental concerns, including protection of endangered species.

Chapter 17: Intellectual Property

ISAC-3 views negotiations of the FTA/s 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 FTA/s. Rather, each individual FTA should be viewed as setting a new baseline for future FTA/s.

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.-Australia FTA. By not providing clarity regarding the availability of these environmental and other public interest exceptions, the Agreement may fail 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.

Regarding pharmaceuticals in particular, ISAC-3 is pleased that the Agreement recognizes the need to promote timely and affordable access to innovative pharmaceuticals through processes characterized by transparency, expeditiousness, and accountability. We are pleased to see that Australia will be making improvements in its Pharmaceuticals Benefits Scheme (PBS) procedures, particularly the establishment of an

independent process to review determinations of product listings. This also enhances transparency and accountability. The establishment of a Medicines Working Group is a forward-thinking means of ongoing dialogue between the two nations on emerging healthcare issues.

With respect to data exclusivity, the Agreement serves to clarify the obligations contained in TRIPS Article 39.3 and to provide additional protections to pharmaceutical products subject to patents. It accomplishes this without imposing any additional obligations above those contained in TRIPS Article 39.3. We note with approval that if a government, or government entity, discloses confidential information previously provided by someone seeking market approval for a pharmaceutical or agrochemical product, it is to be protected from unfair commercial use. We are particularly pleased to see that the Agreement unambiguously prevents Australia from arbitrarily terminating the data protection period at the time of the expiration of the underlying patent.

We are additionally gratified to see that the Agreement provides for patent term restoration when the market approval process results in an unreasonable consumption of the patent term. The Agreement's prohibition of generic drug approvals during the term of the patent for the related pharmaceutical, and the obligation of mandatory disclosure of the identity of generic applicant who is seeking to enter the market during the patent term, are both excellent measures to ensure intellectual property protection. We do have concern, however, on Australia's current practice of permitting exports of a patented pharmaceutical by a third party during the period of the patent term extension for purposes of meeting the marketing approval requirements of another territory.

Chapter 18: Labor

No comment.

Chapter 19: Environment

Industry members of ISAC-3 are pleased to see the statement that flexible, voluntary, and market-based mechanisms can contribute to the achievement and maintenance of high levels of environmental protection [Article 19.4].

Mr. Waskow notes that the Agreement recognizes the commercial and competitive implications of a country's failure to enforce effectively environmental laws. He also notes, however, that there is not parity between enforcement of environmental and commercial provisions of the Agreement.

Chapter 20 Transparency

No comment.

Chapter 21: Institutional Arrangements and Dispute Settlement

No comment.

Chapter 22: General Provisions and Exceptions

No comment.

Chapter 23: Final Provisions

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

Ms. Lori M. Anderson, CAE
Strategic Planning & Industry Relations Officer
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Mr. Henry P. Stobenau
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Mr. Max Turnipseed
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The Dow Chemical Company

Mr. Ford B. West
Vice President, Government Relations
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Mr. Michael Kelly
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Ms. Aracelia Vila
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David Waskow, Esquire
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W. Martin Strauss, Ph. D.
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Ms. Barbara Norton
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