

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 USA and Morocco.

Very truly yours,

Geoffrey Gamble
Chair
ISAC-3

USA – Morocco Free Trade Agreement

Report of the
Industry Sector Advisory Committee for Chemicals and Allied Products
(ISAC-3)
April 6, 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 the Morocco – USA Free Trade Agreement.

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 regarding the Morocco FTA, with the exception of the subject of rules of origin, have substantially been met. Because of concern over the rules of origin language, industry sector representatives on ISAC-3, have struggled but have successfully reached a consensus that the Agreement promotes overall the economic interests of the United States as well as providing for equity and reciprocity within the chemicals, pharmaceuticals, and allied products sectoral areas.

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**

From the perspective of our industrial sectors, Morocco is not a significant trading partner with the United States. We continue to urge the Administration to devote its energies to negotiating FTA's with strategic trading partners. However, 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 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 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.

- **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 rules of origin in free trade agreements for chemical products (Harmonized Tariff Schedule Chapters 28-40) be based on the position taken by the United States in its 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 product, good, or substance 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. We find these rules of origin 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 any free trade agreement 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:

- The defining of investment in a comprehensive manner;
- The guarantee of the better of either MFN or national treatment;
- The provision for and the insurance of the free transfer of profits and capital;
- The adequate dealing with issues affecting the movement of key personnel;
- The disciplining of the use of performance requirements;
- The prohibition of expropriation except in the case of a public purpose and only with the payment of prompt, adequate and effective compensation;
- The guarantee that investment will receive fair and equitable treatment, with full protection and security, consistent with the principles of international law; and
- The insurance that investors have access to an effective mechanism in the agreement for the settlement of investor-state disputes within the provisions of the FTA that are consistent with the “Model BIT”, NAFTA, Chile, and Singapore.

Mr. Waskow has 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 advocates 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 any free trade 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 judgment 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 have 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 believe 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

ISAC-3 supports the approval of this Agreement. We would appreciate your special attention to our particular areas of concern, most notably rules of origin and investment, where this Agreement may serve as a template for future FTA/s.

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

Chapter 1: Initial Provisions and Definitions

No comment.

Chapter 2: Market Access for Goods

We would have preferred that Morocco had committed to offer the entire chemicals section for duty free treatment upon implementation, as did the United States. We understand that this was not realistically possible.

However, it is truly unfortunate that there are so many “F’s” (9 year staging) in our sector, especially since in many instances the base tariff rate is 50%. Because these base rates are so high, we will receive a competitive advantage over our international competitors by implementing this treaty in a relatively short period of time. We therefore are satisfied with the tariff staging that has been negotiated.

We applaud the commitment to National Treatment in Article 2.2, the general prohibition of restrictions on imports and exports, Article 2.8

Chapter 3: Agriculture

No comment

Chapter 4: Textiles & Apparel

No Comment

Chapter 5: Rules of Origin

We are very concerned about the rules of origin that have been negotiated in this Agreement. They are based on GSP rules of origin, and include a value content test and the notion of substantial transformation. We remain opposed to FTA/s that use these outdated concepts. We are concerned that our international competitors will set up export platforms in Morocco in order to take advantage of comprehensive duty free access to the US market.

We are also concerned that this is the second recent agreement concluded in this region with these rules, Jordan being the first. We hope that the USTR will work to secure more practical rules in the upcoming negotiations with Bahrain and SACU, as well as in other parts of the world.

We are aware that the United States intends to seek a Free Trade Area for the entire Middle East Region [MEFTA]. We support this concept but strongly urge that the language on Rules of Origin employed with Jordan and now Morocco not be used as a template for any future negotiations.

For future FTA/s, we view the requirement that the inventory management method of fungible materials be maintained for the entire fiscal year as being unnecessarily restrictive and burdensome.

Chapter 6: Customs Administration

We continue to be pleased with commitments by each country to publish its pertinent laws, regulations, and administrative procedures on the Internet, [Article 6.1], to release goods from customs formalities in a timely fashion. [Article 6.2], and to employ information technology automation, [Article 6.3].

We are especially pleased to note the commitment in Article 6.6 to maintain, as confidential, information the disclosure of which would prejudice the competitive position of the person providing it.

Chapter 7: Technical Barriers to Trade

We note with approval the presence of a commitment to transparency and reciprocity in the development of standards and technical regulations [Article 7.5].

Chapter 8 Safeguards:

No Comment

Chapter 9 Government Procurement

Regarding Article 9.1.3 General Principles *Rules of Origin*, we reiterate our previous statements on this subject, as noted above.

Chapter 10: Investment

We find that the investment elements we have advocated, which are listed above on Page 6 of this Report, have substantially been met within this Agreement. However, it should be noted that even though there are substantial protections written into the text of this Chapter covering national and MFN treatment, expropriation, fair and equitable treatment, the free transfer of capital, and other protections, they can amount to virtually meaningless rights without the ability of investors to enforce the provisions of the FTA through an investor-state dispute settlement mechanism.

There are a few areas that merit specific comment. In Article 10.6 *Expropriation and Compensation*, we are concerned that the Agreement calls for compensation that is equivalent to the fair market value of the expropriated investment “immediately before” the expropriation took place. In times of civil strife, values “immediately before” may not be truly indicative of the real valuation of the investment. We would prefer, as an alternative – not a replacement- the option of some sort of averaging over a period of time. Regarding Article 10.9 *Senior Management and Boards of Directors*, we object, as a matter of principle, to any requirement that a majority of boards of directors be of a particular nationality. However, we understand the realities of negotiations and also note the partially curative provision that such a requirement will not materially impair the ability of the investor to exercise control over its investment.

Chapter 11 Cross-Border Trade in Services

No Comment

Chapter 12 Financial Services

No Comment

Chapter 13 Telecommunications:

No Comment

Chapter 14 Electronic Commerce:

No Comment

Chapter 15 Intellectual Property Rights:

This Chapter is especially challenging to comprehend in that it includes a commitment by both Parties to ratify or accede to eight other IP, patent, and trademark treaties or agreements. In addition, there is an agreement that the U.S. and Morocco will use their “best efforts” to ratify or accede to two other agreements. Without having examined all of these ancillary commitments, we believe that this Chapter substantially achieves the intellectual property objectives we have advocated. We are pleased to see in Article 15.9 the provision of patentability of plants and animals by both Parties.

ISAC-3 members who represent the pharmaceuticals and agrochemical industry sectors note with approval some of the measures contained in Article 15.10. Specifically, usage of required testing data submitted by one company may not be used by another as the basis for approval without consent for five years in the case of pharmaceuticals and for ten years in the case of agrochemicals. There is also a provision for patent term extension when the term of a patented pharmaceutical is curtailed by the marketing approval process.

We note, under Provisional Measures in Article 15.11.17, the phrase:

“Parties shall act upon requests for relief *inaudita altera parte* shall be dealt with expeditiously...”

This might be more clearly and customarily written:

“Parties shall act upon requests for relief in *audi alteram partem* expeditiously...”

Chapter 16 Labor:

No comment

Chapter 17 Environment:

No Comment

Chapter 18 Transparency:

No Comment

Chapter 19 Administration of Agreement:

No Comment

Chapter 20 Dispute Settlement:

No Comment

Chapter 21 Exceptions:

No Comment

Chapter 22 Final Provisions:

No Comment

Annexes:

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

2nd 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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Mr. Donald E. Ellison
Representative of SACMA
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Matthew T. McGrath, Esquire
Barnes, Richardson & Colburn
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Ms. Mildred W. Haynes
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Ms. Shannon S. Herzfeld
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Ms. Nancy R. Levenson
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Mr. Brian Mannix
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Ms. Rosemary L. O'Brien
Vice President, Public Affairs
CF Industries

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

Dr. George L. Rolofson
CropLife America

Mr. Arthur J. Simonetti
Director, Trade Regulation and Legislation
Honeywell International, Inc.

Mr. Max Turnipseed
Representing
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

United States Government:

Mr. Man K. Cho
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
Representing
American Assoc. of Exporters & Importers

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

David Waskow, Esquire
Trade & Investment Policy Coordinator
Friends of the Earth

W. Martin Strauss, Ph. D.
Vice President,
Consumer Traits and Food Policy
Monsanto Company

Ms. Barbara Norton
Liaison
United States Trade Representative Office