

# TRADE HOT TOPICS

# Commonwealth

Issue No.24

## United States-Chile Free Trade Agreement

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### 1. Introduction

The United States – Chile Free Trade Agreement (“the Agreement”) is a comprehensive trade agreement. It is the sixth Free Trade Agreement (“FTA”) negotiated by the United States and its first with a South American country.<sup>2</sup> On the other hand, Chile has negotiated FTAs with the other NAFTA countries and its trading partners in Latin America, Europe and South Korea.<sup>3</sup> The U.S. is Chile’s largest trading partner. In 2001, there was nearly US\$8.8 Billion in bilateral trade in goods and services. Although negotiations have been on-going since December 2000, the U.S.-Chile FTA and the U.S.-Singapore FTA (the negotiations of which were completed at approximately the same time) are the first FTAs to be completed after approval of Trade Promotion Authority (also called “fast-track”) by the U.S. Congress as part of the Trade Act of 2002. Among other provisions, the Trade Promotion Authority legislation requires trade agreements to meet certain negotiating objectives.

At the end of January 2003, the U.S. Congress was officially notified of the intention of the Bush Administration to sign the Agreement. The official signing may occur 90 days thereafter. After signing, the Agreement and any necessary implementing or conforming legislation and statements of administrative action will be submitted to the Congress for approval. Under the terms of Trade Promotion Authority, Congress may hold hearings and review the FTAs, but may only vote in favour of, or against, the FTA. It may not amend the texts of the agreements. It is hoped that Congressional action is completed in a time frame to permit the Agreement to come into force on 1 January 2004

The full text of the agreement was released to the public on 3 April 2003 via internet posting on the website of the U.S. Trade Representative (“USTR”) and an announcement and links at the Chilean Ministry of Foreign Affairs, Directorate General of International Economic Relations.<sup>4</sup>

Brief public summaries and fact sheets were made immediately available upon conclusion of the Agreement. Additional detailed summaries were made available to the public in early March. As part of

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<sup>2</sup> The others are the US-Canada FTA, NAFTA, US-Israel FTA, US-Jordan FTA and the US-Singapore FTA which was submitted to the U.S. Congress at the same time. The US-Canada FTA has been suspended while NAFTA is in effect. The U.S. also has a “Bilateral Trade Agreement” with Vietnam that covers many of the typical FTA subjects.

<sup>3</sup> Between 1990 and 1999, Chile negotiated FTAs based on the NAFTA structure with Canada and Mexico, and entered into “Acuerdo De Complementación Económica” agreements with most of its Latin American trading partners. In 2002, it negotiated agreements with the European Union and South Korea and, in 2003, with the EFTA countries.

<sup>4</sup> <http://www.ustr.gov/new/fta/Chile.htm> and [http://www.direcon.cl/frame/acuerdos\\_internacionales/f\\_bilaterales.html](http://www.direcon.cl/frame/acuerdos_internacionales/f_bilaterales.html)

the negotiation and review process, U.S. negotiators held more than 100 meetings with 700 advisors from business, farm groups, labour unions, environmental groups, consumer organisations, and state governments to discuss and seek their advice, on U.S. negotiating positions.<sup>5</sup>

In January 2003, the confidential draft texts of the two FTAs were submitted to private sector advisors for review, as mandated by U.S. legislation. The advisors are members of 31 industry advisory committees that are required by legislation to file reports with USTR after a 30 day review period. During the review period, the industry representatives were permitted to review, but not download, print or copy the text, from a secure website maintained by the USTR. This process reportedly made it difficult to review or discuss provisions with those who were experts in specific areas covered by the FTAs.

The 31 advisory committees, which are chartered by the U.S. Congress, include:

- a broad-based Advisory Committee for Trade Policy and Negotiations (ACTPN);
- three policy advisory committees: trade and environment, labour and agriculture;
- five technical advisory groups on specific agricultural groups (ATACs);<sup>6</sup>
- 17 industry sector advisory committees (ISACs);<sup>7</sup>
- four industry functional advisory committees (IFACs);<sup>8</sup> and,
- an intergovernmental policy advisory committee (IGPAC).

The committee members were asked to examine each FTA from the various interests represented within each chartered committee and the objectives set by the U.S. Congress. The advisory reports<sup>9</sup> were submitted at the end of February. With only one exception, all of the advisory committees that submitted reports supported the results of the negotiations, although there are several reports that include dissenting views. The one report that was universally negative regarding both the Chile and Singapore FTAs came from the Labour Advisory Committee. Another committee was unable to submit a detailed report because a lawsuit by environmental groups prevented a member from joining the committee and the committee could not meet until a replacement member was named, not allowing sufficient time for a proper review. The Textiles and Apparel ISAC report reflected the divergent views between the fibre, yarn and textile members who favoured the “yarn forward” rules but were concerned about high Tariff Preference Levels, and the apparel members who were unhappy with what were believed to be complicated origin rules.

After the negotiations with Chile were completed, U.S. and Chilean lawyers began reviewing the Agreement for legal clarity and consistency, both within the Agreement and between the English and Spanish texts, so it is possible that certain provisions will be revised prior to the official signing. The Agreement consists of 24 separate chapters. A major theme throughout the Agreement is transparency which is reflected in provisions that urge:

- the advance publication of proposed regulations;
- an opportunity for comment by interested parties or the public at large;
- publication of adopted rules, which to the extent practicable, address the comments received; and,
- delayed effective dates for final regulations.

Some chapters have additional transparency requirements which are discussed in more detail below. In addition, the Agreement recognizes the digital age in many ways that are also discussed below.

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<sup>5</sup> <http://www.ustr.gov/releases/2003/03/03-13.htm>

<sup>6</sup> The ATACs are: animal and animal products; fruits and vegetables, grains; feed and oilseeds; sweeteners; and tobacco, cotton and peanuts.

<sup>7</sup> The ISACs are: Aerospace, Capital Goods, Chemicals and Allied Products; Consumer Goods; Electronics and Instrumentation; Energy; Ferrous Ores and Metals; Footwear, Leather and Leather Products; Building Products; Lumber and Wood Products; Nonferrous Ores and Metals; Paper and Paper Products; Services; Small and Minority Business; Textiles and Apparel; Transportation, Construction and Agricultural Equipment; and Wholesaling and Retailing.

<sup>8</sup> The IFACs are: Customs Matters; Standards; Intellectual Property Rights; and Electronic Commerce.

<sup>9</sup> The full advisory committee reports are available at [http://www.ustr.gov/new/fta/Chile/advisor\\_reports.htm](http://www.ustr.gov/new/fta/Chile/advisor_reports.htm)

## 2. Comparison with the Other U.S. Trade Agreements

In comparing the U.S. Chile Free Trade Agreement to other trade agreements that the United States has negotiated, several points should be noted:

- The North American Free Trade Agreement (“NAFTA”) was completed during the Uruguay Round negotiations which resulted in the creation of the WTO and its multi-lateral agreements, and was deeply influenced by those negotiations;
- NAFTA was a tri-lateral agreement negotiated by three countries, each of which had a federal structure consisting of states or provinces with substantial rights under the respective constitutional structure. This was reflected in some of the reservations, exceptions and non-conforming provisions. Since that time, Chile has negotiated separate FTA’s with Mexico and Canada.
- Canada and the United States followed the common law while Mexican jurisprudence was founded on civil law principles. This required adjustments to various transparency and related provisions. Chile is also a civil law country.
- Canada and the United States were already developed economies, while Mexico was a developing country. Chile currently receives preferential treatment for some of its products under the U.S. Generalized System of Preferences regime.
- The U.S.-Jordan FTA was intended to put Jordan on a par with Israel and so is closely patterned after the earlier U.S.-Israel FTA, rather than NAFTA. The Chile FTA generally follows the NAFTA model.
- The U.S.-Vietnam Bilateral Trade Agreement (“BTA”) was intended to fully normalise trading relationships between two former foes and to assist Vietnam in meeting WTO membership requirements.

For the reasons mentioned above and others (e.g., adoption of WTO multilateral and plurilateral agreements, stage of economic development, trade agreement experiences), the U.S.-Chile FTA differs from earlier U.S. trade agreements in several respects. The Agreement is generally patterned after NAFTA, although there are some provisions that address unique problems, such as the Chilean price banding for agricultural products, GSP parity, and the elimination of Chile’s 50% surcharge on used goods. Although many products are entitled to benefits immediately upon entry into force, other products receive phased in benefits over a 12 year period. In addition, matters previously covered in side letters with other countries have been incorporated into the agreement (e.g., environment and labor provisions).

Agricultural interests and subsidies were a concern during the U.S.-Chile negotiations and provisions were drafted to address those concerns through the use of trigger prices and special safeguard provisions, not found in the U.S.-Singapore FTA. Chile’s price banding will be phased out. In addition, there are procedures for the mutual acceptance of agriculture and marketing standards and for mutual recognition of beef grading standards.

The Agricultural Policy Advisory Committee (APAC), one of the advisory committees, believes that the FTA will improve U.S. agricultural exports and open up Chilean markets, while providing a sensible timetable for elimination of agricultural tariffs. Sanitary barriers, which can be major hurdles to agricultural trade, are addressed in the Sanitary and Phytosanitary chapter.

The U.S.-Jordan FTA is based on the U.S.-Israel FTA and, except for textiles and apparel, uses the rather subjective “substantial transformation test” rules to establish origin for purposes of obtaining preference. The Chile Agreement follows the NAFTA precedent of using objective rules based on a shift in tariff classification, although the NAFTA rules for certain industries and commodities are far more complex. The Advisory Committee on Trade Policy and Negotiations (ACTPN) commented on the increased costs associated with different origin rules and suggested that a regional approach be taken in future FTAs.

The Chile Agreement departs from the NAFTA and Jordan FTA origin certification models. In both those agreements, the foreign producer or exporter is responsible for providing a required Certificate of

Origin in a prescribed format. The Chile Agreement allows the certification to be made by the importer, exporter or producer without mandating a prescribed format. Regional value content rules have also been simplified over those set forth in NAFTA, and the *de minimis* value for non-originating materials has been increased to 10%, from 7% in NAFTA and the Singapore FTA.

The textile and apparel provisions in the Chile Agreement reflect U.S. concerns over transshipment and establish procedures for bilateral emergency actions when there is a surge in imports because of duty elimination. In addition, there are provisions relating to treatment of “sets” and tariff preference levels for non-originating cotton and man-made fibers. The Customs Administration chapter includes specific obligations relating to transparency and trade facilitation, including expediting clearance of express couriers, and encourages the use of technology and automation.

The U.S.-Jordan FTA does not have a chapter on investment because the U.S. and Jordan had negotiated a separate bilateral treaty covering that topic in 1997, and a framework agreement on trade and investment two years later. The Vietnam BTA addresses investments in Chapter IV and in an exchange of letters between the parties. The Chile Agreement lists non-conforming measures at the national level in schedules, but local non-conforming measures are generally grandfathered. Chile is permitted to impose capital transfer restrictions for a limited time for certain types of speculative capital. In the area of services, both the Jordan FTA and Vietnam BTA identify specific sectors or requirements that are included under the agreements. The Chile Agreement takes a “negative list” approach. That is, the agreement covers all financial services and cross-border services unless they are covered by a reservation, exception, or listed in a non-conformity schedule.

The telecommunications provisions are significant in that they require access to public communications networks in an “unbundled” manner. This means that an enterprise is only required to pay for the services it requires. The Agreement’s e-commerce provisions ensure that customs duties will not be applied to electronically transmitted digital products.

The Chile Agreement includes substantial commitments in the area of intellectual property rights protection, although not as extensive as those in the U. S.-Singapore FTA. In addition to requiring the accession or ratification of a number of international agreements or recommendations, the Agreement requires the adoption of specific civil and criminal remedies and *ex officio* border enforcement of intellectual property rights. The Agreement also includes provisions on digital encryption devices and protection, encrypted satellite signals and internet domains.

The transparency provisions throughout the agreement are also very extensive. Posting via the internet is recognized as an acceptable means of publication of government guidelines and information.

U.S. Trade Promotion Authority (“fast track”) legislation sets forth negotiating goals and objectives for future trade agreements. The Singapore and Chile Agreements were the first two such agreements to be subject to review for consistency with the legislation. Although all the private sector advisory groups (except for the Labor Advisory Committee) have recommended approval of the agreements, their reports contain comments from individual members that dissent from the committee reports or suggest that future agreements address what they believed might be shortcomings in certain areas when applied to other countries. These comments frequently reflect the view that the Agreement’s text is acceptable for an FTA with Chile but that the provisions should not necessarily set a precedent or become a template for future agreements. Some of the areas in which concerns were expressed are:

- The scheduling of duty elimination for sensitive products, such as some agricultural goods, certain chemicals or those goods being eased out of subsidies or support programs;
- The definition of “expropriation”;
- Sanitary and phytosanitary problems are not all resolved;
- Inclusion of sugar in the market access negotiations;
- Restrictions on energy services in the exploration and processing of liquid or gas hydrocarbons found in ocean waters offshore;
- Transfer of capital restrictions;

- Restrictive rules of origin for textiles;
- *Unavailability of dispute settlement procedures in certain areas (e.g., portions of the labor and environment chapters);*
- Protection of workers' rights—the Agreement only requires compliance with local laws;
- Delayed implementation of some of the transparency provisions;
- Greater rights in the U.S. for foreign investors than U.S. investors have;
- Non-inclusion of simplified visa procedures for temporary business visitors;
- Reservations for certain services, such as health care;
- Failure to have one set of origin rules for all FTAs;
- Failure to provide funding or resources for capacity building; and,
- Failure to address patent delays due to ministries of health procedures.

It should be noted that the above concerns are not shared by all members of the particular advisory committee involved. Some members, often the majority, take the view that the Chile FTA should set the standard for all future FTAs entered into by the U.S.

Other countries negotiating FTAs with the U.S. should review the private sector advisory committee reports that have been posted on the USTR website.<sup>10</sup>

A chapter-by-chapter summary of the Agreement follows:

### **3. Chapter 1 - Establishment of a Free Trade Area**

This chapter establishes a Free Trade Area between Chile and the U.S. consistent with Article XXIV of GATT, 1994 and Article V of GATS and sets forth the objectives of the Agreement. In addition, the chapter reaffirms existing rights and obligations under existing agreements, including the WTO Agreement.

### **4. Chapter 2 – General Definitions**

This chapter defines certain terms of general application which are used throughout the Agreement. Many chapters contain further definitions of terms used within those chapters.

### **5. Chapter 3 - National Treatment and Market Access for Goods**

With certain exceptions, the Agreement requires that goods of one Party imported into the other Party's territory be given the same treatment as goods of that Party ("national treatment"). Customs duties will be eliminated progressively according to schedules annexed to the Agreement. The U.S. has also agreed to eliminate all duties on non-agricultural products originating in Chile that are designated in the future as eligible under the U.S. Generalized System of Preferences ("GSP"), except those which only apply to least developed beneficiary countries. Chile has agreed to cease the application of its 50% surcharge for used goods that originate in the U.S. The Parties will consult on accelerating the schedules.

The WTO Valuation Agreement will be applied to all transactions necessitating a customs valuation. In addition, the agreement provides that the value of imported carrier media, such as computer disks, will be based on the media. The chapter also requires each Party to permit duty-free entry for a variety of goods that will remain in the territory of a Party for a temporary period or which are of negligible value, regardless of their origin. The list includes professional equipment ("tools of the trade"), goods intended to be displayed or demonstrated at exhibitions or fairs, commercial samples, advertising materials, and goods for sports purposes.

Duty deferral and drawback programs will be reduced in stages beginning in year 8 of the Agreement and will be eliminated in year 12. Chile will progressively reduce its luxury tax on automobiles and increase the threshold to which it is applied, eventually eliminating it altogether.

<sup>10</sup> Id. The advisory reports on the U.S.-Chile FTA may be found at: [http://www.ustr.gov/new/fta/Chile/advisor\\_reports.htm](http://www.ustr.gov/new/fta/Chile/advisor_reports.htm) .

The Agreement also provides that goods reentered in a Party's territory after repairs or alterations in the other Party, which do not change the article into a different commercial item, are not subject to duty, regardless of origin. The Agreement generally prohibits a Party from imposing import restrictions on the goods of the other Party or export restrictions on goods destined to the other Party, although there are provisions to prevent circumvention of trading bans involving non-Parties. Originating goods from Chile will be exempt from the U.S. merchandise processing fee and export taxes are prohibited unless they are also imposed on domestic goods.

The Parties agree to recognize and protect certain distinctive beverage products. Chile will prohibit the sale of "Bourbon Whiskey" and "Tennessee Whiskey" unless it is lawfully manufactured in the United States. The U.S. is required to prohibit the sale of "Chilean Pisco," "Pajarete" and "Vino Asoleado" unless it is lawfully manufactured in Chile.

The Parties agree to work in the WTO towards the elimination of agricultural subsidies, and to not introduce or maintain such subsidies on agricultural goods destined to the other Party. The section also contains provisions for limited agricultural safeguard measures on certain goods if the good enters a Party's customs territory below a "trigger price" set forth in Annex 3.18. Safeguard measures may not be used on agricultural goods that have achieved duty-free status or increases a zero in-quota duty on a good subject to a tariff-rate quota. A procedure is establishing for mutual acceptance of agriculture and marketing standards and for the mutual recognition of beef grading standards.

Section G is devoted to textiles and apparel and reflects concerns over textile surges and illegal transshipment. Procedures are established for bilateral emergency actions when there is a surge in imports caused by the elimination of a duty which causes serious damage, or an actual threat, to a domestic industry producing a like or competitive good. These actions cannot exceed 3 years and cannot be taken beyond a period ending 8 years after the elimination of duties.

This section also contains any exceptions to the Chapter 4 rules of origin with respect to textiles and apparel, such as *de minimis* rules, treatment of sets and non-originating cotton and man-made fibre fabrics entitled to tariff preference levels ("TPL"). TPL certificates of eligibility may be required from importers. The Parties are required to provide full cooperation in: enforcing their laws, regulations and procedures affecting textiles and apparel; ensuring accuracy of claims of origin; and preventing circumvention. The section also establishes procedures for verifications of origin claims relating to textiles and apparel.

Furthermore, the Parties agree to review the textiles and apparel rules of origin to see if different rules of origin should be applied to particular goods to address the availability of fibres, yarns or fabrics. Section H establishes a Committee on Trade in Goods to promote trade between the Parties, including consideration of accelerating tariff elimination; and to address trade barriers including non-tariff measures.

## **6. Chapter 4—Rules of Origin**

There are several methods under the Agreement for a good to qualify as an "originating" good that receives preferential treatment. These are:

- a. the good is wholly obtained or entirely produced in the territory of one or both of the Parties;
- b. the good is produced entirely in the territory of one or both of the Parties and
  - i. each of the non-originating materials used in the production of the good undergoes an applicable change in tariff classification, or
  - ii. the good otherwise satisfies any applicable regional value content or other requirement, and the good satisfies all other applicable requirements of Chapter 4; or
- c. the good is produced entirely in the territory of one or both of the Parties exclusively from originating materials.

As with other FTA's, a good or material is not considered to be originating by virtue of having undergone simple combining or packaging operations or mere dilution with water or another substance that does not materially alter the characteristics of the good or material.

Annex 4.18 permits certain used goods that are disassembled into individual parts and then processed and reassembled (“remanufactured”), to qualify for preferential treatment.

When regional value content is required, it may be calculated using a “build-up” or “build-down” method. In calculating the value of materials, various additions and deductions are permitted. There are provisions for accessories, spare parts, and tools to be considered as materials. The origin of fungible goods may be determined by the use of various inventory methods. The rules allow the accumulation of originating goods or materials from one or more producers and from one or both Parties.

With the exception of certain designated products, the Agreement permits origin to be conferred on a good that does not undergo a change in tariff classification if the value of all non-originating materials does not exceed 10% of the adjusted value of the good (the “*de minimis*” rule).

An importer claiming preferential treatment must make a written declaration and may be required to submit a certificate of origin or other information demonstrating that a good qualifies as an originating good. A certificate of origin is valid for 4 years, need not be in a prescribed form, and may be submitted electronically. It may be issued by the importer, exporter or producer. As in NAFTA, an importer may submit a claim for preferential treatment up to one year after importation.

The importer must maintain records for up to five years and the claims are subject to verification. If the certificate of origin was issued by an exporter or producer, the issuing party must also maintain records for five years.

No certificate of origin or supporting documentation is required to claim preferential treatment for goods valued at \$2,500 or less (or a higher value established by the importing Party) unless the importation is considered to have been carried out to evade compliance with the Party’s laws governing claims of origin under the Agreement.

The Parties are required to establish common guidelines for the interpretation, application and administration of the origin rules.

## **7. Chapter 5—Customs Administration**

The Agreement has specific, concrete obligations on how customs procedures are to be conducted. These are intended to provide openness and transparency to the customs processing of goods. All Customs laws, regulations, and administrative procedures must be posted on the internet or other computer-based telecommunications network. The Agreement further requires each Party to designate one or more contact points for public inquiries and to publicise the contact information on the internet. Proposed regulations are to be published in advance with an opportunity for public comment

In the area of trade facilitation, each Party is to adopt procedures that provide for release of imported goods within a time not greater than required to ensure compliance, but to the extent possible, within 48 hours of arrival of the goods at the port of arrival. Customs authorities may require reasonable security guarantees prior to release. To expedite release, the Parties agree to use automation and to have their authorities use risk analysis and targeting, to focus customs enforcement activities on goods considered to be high risk while facilitating clearance of low risk goods.

In order to encourage cooperation between the Parties, the Agreement states that a Party will endeavour to provide the other Party with advance notice of any significant modification of its administrative policy or any other development related to its import laws or regulations that is “likely to substantially affect the operation of the agreement.” The Agreement further provides for mutual assistance in enforcement activities and technical cooperation on improving risk assessment techniques, and in simplifying and expediting customs procedures. Cooperation in specific cases involving confidential information may be dependent on written assurances of confidential treatment of the requested information for the purposes specified in the request.

The Agreement provides for expedited and simplified clearance for express shipments based upon pre-arrival information and electronic data processing. Release of express shipments is normally to occur within six hours of submission of the required documents, provided the shipment has arrived.

The Agreement requires each Party to maintain civil and administrative penalties and where appropriate, criminal penalties, for violations of its customs laws and regulations governing classification, valuation, origin, and preference eligibility.

The Agreement requires the customs authorities, upon the request of an importer or exporter, to provide written advance rulings on tariff classification, customs valuation, drawback, country of origin, and the qualification of a good for preferential treatment under the Agreement. The requirements for making such ruling requests are to be published. Once a request is received, the customs authorities are to act expeditiously and decide the matter within 150 days. A ruling will be valid for at least three years provided the facts and circumstances remain the same.

To ensure consistency, rulings are to be made publicly available subject to confidentiality requirements. Decisions of customs authorities will be subject to at least one level of independent administrative review plus judicial review.

## **8. Chapter 6—Sanitary and Phytosanitary Measures**

The Parties affirm their existing rights and obligations under the WTO SPS Agreement and agree to establish a Committee on Sanitary and Phytosanitary Matters within 30 days after the date the Agreement enters into force. The Committee's objectives are to enhance the implementation of the SPS Agreement, protect human, animal, and plant life and health and enhance cooperation and facilitate trade. Except for the establishment of the Committee, there are no new obligations in this chapter.

## **9. Chapter 7—Technical Barriers to Trade**

This chapter encourages the Parties to enhance cooperation in areas of technical regulations, standards, and conformity assessment procedures by promoting the use of international standards. Each Party is required to designate a Technical Regulations contact point to coordinate these efforts.

The Agreement requires a Party to explain why it will not accept the technical regulations or conformity assessments of the other Party as the equivalent of its own requirements where the law otherwise permits acceptance of foreign technical regulations or recognition of foreign standards.

To insure transparency, persons of the other Party are to be permitted to participate in the development of standards, technical regulations and conformity assessment procedures. Where the Parties follow Article 2.9 or 5.6 of the WTO TBT Agreement, persons are to be accorded at least 60 days to comment on such proposals. The comments are to be published electronically or otherwise made available at the same time as the final standards are adopted. These provisions must be implemented as soon as practicable, but not later than five years from the date of entry into force of the Agreement.

To enhance cooperation, the Parties agree to establish a Committee on Technical Barriers to Trade to monitor the implementation and administration of the chapter's provisions.

## **10. Chapter 8—Trade Remedies**

This chapter sets forth the procedures for establishing safeguards (other than tariff rate quotas or quantitative restrictions) during the transition period if reduced or eliminated duties lead to increased imports of originating goods in such numbers in absolute number or relative to domestic production as to cause substantial cause of serious injury, or threat thereof, to a domestic industry. When safeguards are imposed, duty reductions may be suspended or duties may be increased to MFN rates.

The procedures require notification to the other party upon initiation of a safeguard investigation and at other stages in the matter. The chapter incorporates Articles 3 and 4.2(c) of the WTO Agreement on Safeguards. Safeguards may be maintained for a maximum period of three years including any extension, but are required to be liberalized at regular intervals. If safeguards are imposed, the party applying them is required to provide mutually agreed upon trade liberalizing compensation.

Each party retains rights under Article XIX of GATT 1994 and the WTO Agreement on Safeguards with regard to global safeguards.

Each Party retains its rights and obligations under the WTO Agreement with regard to the application of antidumping and countervailing duties.

## **11. Chapter 9—Government Procurement**

In the area of government procurement, the parties recognize the importance of conducting government procurement in an open and transparent manner. The chapter's provisions generally apply to contractual procurements by the governmental entities listed in the annex. The Agreement requires national treatment and non-discrimination with respect to goods, services and suppliers of the other Party in covered procurements.

The Parties are required to publish measures of general applicability that pertain to covered procurements. In addition, for each covered procurement, a Party must publish an advance notice that describes the details of the procurement and any conditions and evaluation factors that apply. The technical requirements are to be published electronically or by other means. Technical specifications may not be drawn in a manner that would create an unnecessary obstacle to trade between the Parties. Tenders are to be written and the procedures for selection are to be open. Upon request, unsuccessful parties are entitled to be told the reasons for non-selection.

To ensure integrity in the procurement process, Parties are required to adopt measures that make it a criminal offence for procurement officials to solicit or accept gifts and for persons to offer, promise or give anything in order to obtain or retain business. The Agreement has provisions that protect confidential business interests against improper disclosure. The Agreement establishes a Committee on Procurement to assist in the implementation of the Agreement. The annexes set forth covered entities and exclusions and the monetary thresholds that apply. The applicable thresholds are subject to an indexing formula to account for inflation.

## **12. Chapter 10—Investment**

The Investment chapter is modeled on NAFTA, but also draws on bilateral investment treaties and customary international law. The Agreement provides a secure, predictable legal framework for investors. The term "investment" is broadly defined to include all forms of investment including: enterprises, securities, debt, intellectual property, concessions and contracts. There are six basic protections to investors:

- Each Party agrees to provide national treatment to investors of the other Party and treatment no less favorable than the most favorable treatment accorded to investors of any non-Party ("most favored nation treatment").
- If there is an expropriation of property, it must be for a public purpose, non-discriminatory, and must result in payment of prompt, adequate, and effective compensation equal to the fair market value.
- Neither Party may impose or enforce listed performance requirements, commitments or undertakings in connection with the establishment, acquisition, expansion, management, conduct, operation, or disposition of an investment.
- Senior management of an enterprise may not be required to be of any particular nationality. However, a Party may require a majority of the board to be resident in a Party's territory or of particular nationality, provided it does not materially impair the investor's ability to exercise control over its investment.
- Each Party agrees to permit transfers freely and without delay into and out of territory and into freely usable currency at the prevailing market rate. However, a Party may restrict transfers for
  - bankruptcy, insolvency or creditors;
  - issuing, trading or dealing in securities;

- criminal or penal offences;
- financial reporting and recordkeeping;
- ensuring compliance with orders or judgments in judicial or administrative proceedings.
- So-called “minimum standard of treatment” in conformity with customary international law.

The “negative list” approach is utilised for investments. That is, all forms of investment are protected unless specifically exempted.

A Party may deny benefits to an enterprise investor of the other party if the enterprise is controlled by persons of a non-Party with which the denying Party does not maintain diplomatic relations, or against which it maintains sanctions that would be violated or circumvented if benefits were accorded. A Party may also deny benefits if the enterprise has no substantial business activities in the territory of the Party and it is controlled by persons of a non-Party or the denying Party.

Certain “non-conforming measures” which apply at the national level are set forth in schedules. Local non-conforming measures are generally grandfathered without having to be identified. However non-conforming measures may not in the future be made more inconsistent with the Agreement, and if they are liberalized in the future the liberalization may not be reversed.

The U.S. has exempted legislation relating to nuclear power, broadcasting, mining, customs brokers and air transportation. Chile is permitted to impose capital transfer restrictions for 12 months for certain types of speculative capital. The Agreement permits the Parties to adopt measures to ensure that investments are consistent with environmental protection goals.

In the event of an investment dispute, resolution will initially be sought through consultation and negotiation. If that is unsuccessful, the Agreement establishes a dispute settlement mechanism based on various arbitration agreements. Arbitration requests may be filed by a claimant on its own behalf under the ICSID<sup>11</sup> Convention if the Parties are Parties to the ICSID Convention; under the ICSID Additional Facility Rules if one is Parties is a Party to the ICSID but the other is not; under UNCITRAL<sup>12</sup> arbitration rules, the Inter-American Convention<sup>13</sup> or any arbitration institution if both the claimant and respondent agree. The Agreement sets forth conditions and time limitations on seeking arbitration and procedures governing the selection of arbitrators, the conduct of the arbitration and the transparency in arbitration proceedings.

The Agreement is accompanied by various annexes which concern customary international law, special dispute settlement provisions under Chilean law, expropriation, and an appellate mechanism, all of which are an integral part of the Agreement.

### **13. Chapter 11—Cross Border Trade In Services**

The chapter on cross-border services provides substantial market access on the basis of national treatment and MFN; however, it does not apply to financial services, air services, government procurement, or to state supported subsidies or grants, with some exceptions. If a covered service has qualification requirements, the technical standards and licensing are to be objective and transparent. Unless permitted in the annex, neither Party may maintain or adopt quotas, monopolies, exclusive service suppliers, an economic needs test or employee limits for covered services. Furthermore, neither Party may require residency or representative offices for a cross-border service, unless set forth in the annex.

The chapter permits the denial of benefits where an enterprise is owned or controlled by a non-party that does not have a substantial business in the territory of the other party, or where the enterprise is owned or controlled by a non-party and the Party does not maintain diplomatic relations with the non-party or maintains sanctions against the non-party.

<sup>11</sup> International Centre for Settlement of Investment Disputes.

<sup>12</sup> United Nations Commission on International Trade Law.

<sup>13</sup> Inter-American Convention on International Commercial Arbitration.

The chapter contains transparency requirements in the development and application of regulations that are in addition to the requirements in the Chapter on Transparency. For example, to the extent possible, Parties are to address comments received in response to draft regulatory proposals and provide a reasonable time before the regulations take effect. The Agreement also encourages the development of mutually acceptable professional standards.

#### **14. Chapter 12—Financial Services**

This chapter opens up the financial services markets in the territories of both Parties. The chapter requires a Party to provide national treatment and market access for investments in the establishment, acquisition, expansion, management, conduct, operation, or disposition of financial institutions and investments in financial institutions in its territory. Cross border insurance commitments are as extensive as possible while recognizing regulatory sensitivities for particular means or supply.

Except for non-conforming measures set forth in the annexes, a Party may not require financial institutions of the other Party to engage individuals of any particular nationality as senior management or other essential personnel. Neither Party may require that more than a minority of the Board of Directors of a financial institution of the other Party be nationals or residents of that Party. Parties are permitted to take action for prudential reasons to protect investors, depositions, policy holders, and others to whom a fiduciary duty is owed.

The Parties agree to transparency in regulations and policies governing the activities of financial institutions and cross-border financial services, and agree to specific procedures regarding rulemaking, applications, administrative decisions, and inquiry mechanisms. Access to payment and clearing systems is to be provided, as is expedited offering of insurance services.

A “Financial Services Committee” is to be established which will supervise the implementation of this chapter, and participate in the dispute settlement mechanism established for financial services. Financial services disputes are to be heard before panelists who have experience or expertise in financial services law or practice. They are to be impartial and objective. When a dispute affects only the financial services sector, a Party may only suspend financial services benefits; and when a dispute affects only a sector other than the financial services sector, a Party may not suspend financial services benefits.

#### **15. Chapter 13—Telecommunications**

This chapter combines elements of NAFTA Chapter 13, GATS Telecommunications Annex and the WTO reference paper.

Each Party agrees to ensure that enterprises of the other Party have access to, and use of any public telecommunications network. This access is to be provided, “unbundled.” That is, an enterprise is only required to pay for the services it requires. The Parties are required to ensure that enterprises that are given such access protect the confidentiality of proprietary information relating to suppliers and end users of public telecommunications services. The Parties are to ensure that major suppliers provide co-location wherever possible for necessary interconnection or access. Measures must be adopted to prevent anti-competitive practices.

The Parties are to ensure that any regulatory body is separate and independent of any supplier of telecommunications services and that its decisions are impartial with respect to all interested parties. Parties are required to divest ownership interests in public telecommunications suppliers.

The Agreement sets forth transparency requirements for licensing and rulemaking, and procedures for resolving disputes that are then subject to judicial review.

Suppliers of telecommunications are to have the flexibility to choose the technologies they use, including mobile services, as long as their services are capable of interconnection so that end-users of different technologies may communicate with each other.

## **16. Chapter 14—Temporary Entry of Business Persons**

With limited exceptions, each Party agrees to grant the temporary entry of business persons listed in Annex 14.3, although visas or other documents may be required. Measures governing temporary entry are to be applied expeditiously using transparent criteria to avoid impairing or delaying trade in goods or services.

The general transparency requirements for the adoption of regulations and the establishment of points of contact which are contained in other chapters apply to this chapter as well. Parties are required to make timely decisions on applications for temporary entry and inform applicants of the status of the application. Prior to entry into force of the FTA, the Parties agree to provide each other information on procedures relating to processing applications so the other Party may become acquainted with those requirements.

The Parties agree within six months after entry to publish explanatory materials for business persons in a consolidated document. The Parties will also establish a “Committee on Temporary Entry” to meet, exchange information, develop facilitation measures, monitor implementation of the chapter, and provide data to the other Party upon request. In the case of temporary entry of business persons, dispute settlements under Chapter 20 are limited to matters involving a pattern or practice and the business person has exhausted all available administrative remedies or more than one year has passed without a final determination in an administrative proceeding, and the delay is not attributable to the business person.

Pursuant to Annex 13.3, each Party is to grant temporary entry to the business persons without work authorization if they are otherwise qualified. Temporary entry is to be granted to the following categories of business persons:

- Business visitors
- Traders and Investors;
- Intra-company transfers of persons who are managerial, executive, or who have specialised knowledge. A Party may require one year employment within the past three years in these categories; and,
- Professionals (and training for professionals) who possess the requisite credentials for their profession. The U.S. has agreed to allow 1,400 initial applications in this category.

## **17. Chapter 15—Electronic Commerce (“e-commerce”)**

The Parties recognise the importance of “e-commerce” and the importance of avoiding barriers to its use and development. The Agreement prohibits a Party from applying customs duties, fees or charges on the importation or exportation of digital products by electronic transmission. When a customs value is required for carrier media bearing digital products, it shall be determined based on the media without regard to the cost or value of digital products stored on the media.

This chapter is subject to any other relevant provisions that apply throughout the Agreement, such as transparency and dispute settlement. The Parties agree to provide non-discriminatory treatment. The Parties agree to share information and experiences on their laws, regulations and programs affecting e-commerce, including data privacy, consumer confidence, cyber security, electronic signatures, intellectual property rights and e-government programs. The Agreement states that Parties believe that the private sector should lead development; that the Parties should avoid imposing unnecessary regulations; that government action, when needed, should be transparent; that self regulation through codes of conduct should be encouraged; and cooperation among all countries will assist in the construction of a seamless environment for e-commerce.

## **18. Chapter 16—Competition Policy, Designated Monopolies, and State Enterprises**

Each Party agrees to adopt or maintain measures to proscribe anticompetitive business conduct. The Parties are required to maintain an authority that will be responsible for enforcing their national

competition laws on a non-discriminatory basis, subject to independent review. Although designated monopolies and government enterprises are permitted, they must use commercial considerations in the purchase and sale of goods or services and act in a manner consistent with the chapter's objectives, except for government procurement. The Parties agree to cooperate on competition law and policy development. In order to ensure transparency, Parties are required to make available, upon request of the other Party, public information concerning enforcement measures, information concerning government enterprises and designated monopolies, and exemptions from anticompetitive measures.

## **19. Chapter 17—Intellectual Property Rights**

The Agreement provides a high level of protection to intellectual property rights (“IPR”) and builds on existing TRIPS commitments, while enhancing enforcement.

Each party is required to ratify or accede to the following international agreements by the dates shown:

- Patent Cooperation Treaty (1984) by 1 January 2007
- Convention on Protection of new varieties of plants (1991) by 1 January 2009
- Trademark Law Treaty (1994) by 1 January 2009
- Brussels Convention on Satellites (1974) by 1 January 2009

Each Party is to undertake “reasonable efforts” to ratify or accede to the following agreements

- Patent Law Treaty (2000)
- Hague Agreement Concerning the International Deposit of Industrial Designs (1999)
- Protocol relating to Madrid Agreement on International Registration of Marks (1989)

To provide transparency, each party is required to ensure that all laws, regulations and procedures concerning protection or enforcement of intellectual property rights, and all final judicial decisions and administrative rulings of general application are published or made publicly available (via the Internet, for example) to enable rights holders and the other Party to become acquainted with them.

### ***Trademarks***

Trademark protection is very broad and also covers collective marks, certification marks, geographical indications and scent marks. Well-known marks are generally protected even if a mark is used for goods and services other than those registered for the mark.

The Agreement requires government involvement in resolving disputes between trademark owners and domain names on the Internet, an important provision to prevent “cyber-squatting” of trademarked domain names, according to USTR. Trademark registration is to be streamlined by allowing applicants to use electronic processing to the maximum degree practicable.

The Agreement requires the Parties to provide the legal means to identify and protect geographical indications of persons of the other Party, particularly wines and spirits. Applications or petitions for geographical indications must be published for purposes of allowing opposition.

### ***Copyrights***

The Agreement recognizes copyright problems in the digital era, and gives control over all reproduction, including permanent or temporary on-line uses of materials to the authors or other copyright owners. However, the right to authorize or prohibit the public broadcasting through analog communication and free over-the-air broadcasting is left to domestic law. The Agreement also protects against devices which allow the unauthorized decoding of encrypted program-carrying satellite signals.

Copyright owners will be protected for extended terms under the Agreement. Protection will be provided for a term not less than the life of author plus 70 years; if not based on the life of a person, 70 years from the end of the calendar year in which the work was first published; or if not published within 50 years from creation, not less than 70 years from the end of the calendar year of creation.

In order to ensure that all national government agencies use only legally authorized software, the Parties

agree to issue appropriate laws, orders, regulations or executive decrees to regulate the acquisition and management of software for government use.

The Parties agree to increase the protection of copyrighted works using advanced technologies to prevent infringement by establishing civil and criminal offenses. The increased protection will cover circumvention of technological measures that control access as well as manufacturing, importing, distribution, offering devices to the public or trafficking in the devices, products, components or services which are promoted, advertised or marketed to circumvent effective technology measures, or have only limited commercially significant purpose or use other than circumvention. The Agreement permits limited exceptions for certain scientific purposes, non-profit organisations and public libraries or archives. Expanded protection is also provided for encrypted program-carrying satellite signals.

### ***Patents***

Under the terms of the Agreement, patent protections are expanded and patents are to be available for all fields of technology. New legislation, protecting plants is to be developed with public participation within 4 years of the date of entry into force of the Agreement. At the request of an applicant, terms of patent protection are to be extended to compensate for unreasonable delays (over five years from filing or three years from examination) in processing patent applications.

In the case of certain regulated products (pharmaceuticals and agricultural chemicals), the Parties agree to keep confidential any information which is needed for ensuring the safety and efficiency of the product prior to marketing for five years (pharmaceuticals) or 10 years (agricultural chemicals).

The Agreement requires the Parties to establish civil and administrative remedies including seizure of devices and products, damages (on suggested retail price of legitimate good or service), recovery of court and attorney fees, and the destruction of devices involved in an IPR violation. In addition, the remedies may include compensation for injury and profits, and ordering the identification of third parties involved in the violation.

The Agreement expands border protection of IPR. For example, each Party is required to permit competent authorities to act *ex officio* without the need for a complaint. Where authorities determine that imported goods are counterfeit or piratical, they will be authorised to inform the rights holder of the names and addresses of the consigner, importer and consignee of the goods as well as the quantity detained. Goods that are counterfeit or piratical are to be destroyed. The Agreement provides that Parties will cooperate with each other in preventing violations.

Parties are required to establish criminal penalties and procedures for willful counterfeiting or piracy on a commercial scale which include imprisonment as well as a high monetary fine in addition to providing for the seizure, forfeiture and destruction of offending goods, related materials, implements, assets traceable to the violation and any related documents.

The Agreement provides legal incentives and protections to internet service providers who cooperate with copyright holders.

Certain provisions requiring legislation or additional financial resources have delayed effective dates.

## **20. Chapter 18—Labour**

Both Parties reaffirm their obligations as members of the International Labour Organisation and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work* and agree to strive ensure that internationally recognised labor rights are recognised and protected by domestic law. The Agreement makes it clear that it is inappropriate to weaken or reduce the enforcement of domestic labor laws in order to encourage trade or investment.

The Parties are required to ensure access to administrative, quasi-judicial, judicial or labor tribunals and to ensure that procedures are transparent, fair and equitable. The Parties are required to promote public awareness of their labor laws. The Agreement also establishes a formal Labour Affairs Council comprised of cabinet-level representatives or their designees, and a Labour Cooperation Mechanism.

## **21. Chapter 19—Environment**

Each Party agrees that its laws will provide high level of environmental protection that will not be waived to encourage trade or investment. A cabinet-level Environmental Affairs Council is established to discuss implementation and progress of this chapter. The Agreement permits interested parties to request investigations and seek remedies and injunctions. The Agreement requires transparency in procedural matters and requires appropriate sanctions for violations. In addition, each Party is required to establish a mechanism for public participation and for sharing best practices. The Agreement also recognises the importance of multilateral environmental agreements and paragraph 31(i) of the *Doha Ministerial Declaration* and agree to consult on the extent to which the outcome of the WTO talks will impact the Agreement. A separate Annex identifies specific areas of environmental cooperation and commits the Parties to pursue a bilateral Environmental Cooperation Agreement.

## **22. Chapter 20—Transparency**

This chapter is intended to ensure transparency in carrying out any of the Agreements provisions, although some chapters have additional requirements. The Parties agree to designate contact points to facilitate communications between the Parties on any matter in the Agreement. The Parties agree to promptly publish laws, regulations, procedures and administrative rulings of general application, or otherwise make them available. To the extent possible, the Parties will publish proposed regulations in advance with an opportunity for public comment and they agree to notify the other party of any measure being considered which may materially affect operation of the FTA or the other Party's interests.

Each Party will ensure that its administrative proceedings are administered in a consistent, impartial and reasonable manner; that parties who are directly affected are given reasonable notice and afforded a reasonable opportunity to present facts and circumstances. The Parties are required to establish or maintain review and appeal procedures that are impartial and independent and in which parties to the proceeding will have the right to support or defend positions. Decisions will be based on evidence and submissions of record or a record compiled by an administrative authority.

## **23. Chapter 21—Administration**

The Agreement establishes a Joint Free Trade Commission comprised of cabinet-level personnel or their designees to supervise implementation of the Agreement. The specific responsibilities of the Commission are rather broad and are set forth in this chapter.

## **24. Chapter 22—Dispute Settlement**

This chapter sets forth the general dispute settlement procedures for those chapters not having specific mechanisms. If the dispute is the subject of a WTO agreement or another FTA, the Parties may choose which forum will apply. If consultations fail to resolve a dispute within 60 days (15 days for perishable goods), the Parties may request a meeting of the Free Trade Commission established under chapter 21. If the Free Trade Commission fails to resolve the issue, either Party may request an arbitration panel. Under FTA procedures, arbitration panels consist of three panel members, one of whom is the chairman. Each member and the chairman are selected from a roster of 20 individuals, 6 of whom are non-Party nationals. The Agreement contains model rules of procedure which provide for:

- at least one hearing;
- initial and rebuttal submissions;
- written versions of oral statements and written responses;
- consideration of input from non-governmental entities; and,
- procedures to protect confidential information.

Initial reports are due within 120 days, followed by a final report to be issued within 30 days. A public report is to be released within 15 days.

If the Parties are unable to agree upon implementation of the final report within 45 days, the Parties are required to begin negotiations on compensation. If no compensation agreement is reached within 30 days, or there is a failure to observe the terms of the negotiated agreement, the aggrieved Party may give notice that it will suspend the application of benefits of equivalent effect. Compensation is to be paid as a monetary assessment or into a fund to pay for trade facilitation initiatives. The Parties may not establish a private right of action against the other Party under its domestic law.

## 25. Chapter 23—Exceptions

This chapter contains exceptions to the Agreement, including those needed for reasons of essential security or to fulfill its obligations relating to maintenance or restoration of international peace and security. The chapter also provides, with certain exceptions, that any tax convention to which the parties are signatories supersedes the FTA if there are conflicts.

Article XX of GATT 1994 and its interpretive notes are incorporated *mutatis mutandis* into the FTA for purposes of chapters 3-7. Article XIV of GATS and its footnotes are incorporated *mutatis mutandis* into the FTA for purposes of chapters 11, 13 and 15. It is understood that Article XX(b) of GATT and Article XIV(b) of GATS include environmental measures necessary to protect human, animal or plant life or health. Article XX (g) of GATT applies to measures relating to the conservation of living and non-living exhaustible natural resources.

The Parties will not be required to furnish information the disclosure of which would be contrary to their essential security interests, or which would impede law enforcement or would be contrary to the privacy protection of individual financial accounts.

Any measures imposed for balance of payments purposes must result in consultations and must follow GATT obligations.

## 26. Chapter 24—Final Provisions

This chapter provides that the annexes, appendices and footnotes are an integral part of the Agreement, which may be modified by mutual agreement of the parties after completion of applicable legal procedures. If a WTO provision that is incorporated by reference in the Agreement is amended, the Parties agree to consult on whether to amend the Agreement. Unless otherwise agreed by the Parties, the Agreement will enter into force 60 days after the exchange of written notification that domestic procedures have been completed. Termination requires 180 days notice. The English and Spanish texts are equally authentic.

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## *Commonwealth* **TRADE HOT TOPICS**

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