

March 9, 2004

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 on Nonferrous Metals and Ores for Trade Policy Matters on the U.S.-Australia Free Trade Agreement, reflecting consensus opinion on the proposed Agreement.

Sincerely,

Joseph L. Mayer

Chair
Industry Sector Advisory
Committee on Nonferrous
Metals and Ores for Trade
Policy Matters

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

Report of the
Industry Sector Advisory Committee on
Nonferrous Metals and Ores for Trade Policy Matters

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Industry Sector Advisory Committee on Nonferrous Metals and Ores for Trade Policy Matters

Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Australia 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 Nonferrous Metals and Ores for Trade Policy Matters (ISAC 11) hereby submits the following report.

II. Executive Summary of Committee Report

The U.S.-Australia FTA has not been an overall priority issue for ISAC 11. The country is not a particularly large consumer of U.S. exports of nonferrous metals and metal products, though it is, of course, an important shipping center for Asian trade.

Apart from eliminating remaining duties on imports of nonferrous metals, the FTA addresses some other topics of importance to ISAC 11 companies and industries, notably: competition policy, environment, labor, customs/rules of origin, dispute settlement, and safeguards.

This Committee Report will identify the negotiating objectives and priorities for ISAC 11, including instances where the agreement's provisions differed from ISAC 11 negotiating objectives and priorities. In most cases the agreed-to provisions did not pose a substantive concern for Committee members, given the relative size of the Australian economy. However, Committee members have been cognizant of concurrent negotiations for a Free Trade Area of the Americas, as well as the WTO Doha Development Round, the Central American Free Trade

Agreement, and other, bilateral, trade negotiations. As such, this Report will also identify areas where the Committee had concerns with precedents being established in the U.S.-Australia FTA.

This report is based on the draft of the FTA made available to Committee members for review in preparation of this report. It is the understanding of the Committee that this is not a final text; the report is still subject to a “legal scrubbing” and other possible revision. The Committee wishes to note this reservation, and will submit comments to the USTR on any changes to the text which affect the opinions of this report, or which are of general concern to the Committee. For future FTAs, the USTR would enhance the ability of the Committees to report their opinions of the agreements if the Committees are basing these reports on a final text.

III. Brief Description of the Mandate of Industry Sector Advisory Committee on Nonferrous Metals and Ores for Trade Policy Matters

The Committee advises the Secretary and the USTR concerning the trade matters referred to in Sections 101, 102, and 124 of the Trade Act of 1974, as amended; with respect to the operation of any trade agreement once entered into; and with respect to other matters arising in connection with the development, implementation, and administration of the trade policy of the United States including those matters referred to in Reorganization Plan Number 3 of 1979 and Executive Order 12188, and the priorities for actions thereunder.

In particular, the Committee provides detailed policy and technical advice, information, and recommendations to the Secretary of Commerce and the USTR regarding trade barriers and implementation of trade agreements negotiated under Sections 101 or 102 of the Trade Act of 1974, as amended, and Sections 1102 and 1103 of the 1988 Trade Act, which affect the products of its sector; and performs such other advisory functions relevant to U.S. trade policy as may be requested by the Secretary and the USTR or their designees.

IV. Negotiating Objectives and Priorities of Industry Sector Advisory Committee on Nonferrous Metals and Ores for Trade Policy Matters

- Reduction and elimination of remaining barriers to trade in a manner which does not unduly disrupt markets.
- No requirement for the U.S. to reduce and eliminate tariffs prior to or independently of Australia.
- Rules of origin procedures consistent with the NAFTA agreement.
- Investment protocol which enhances opportunities for U.S. companies to invest in the Australian metals and mining sector.
- Preservation of existing U.S. and WTO trade laws and remedies (safeguards, anti-dumping/countervailing duties).
- An environmental (and labor) side-agreement, as opposed to a chapter in the text of the FTA, which encourages private-sector cooperation toward furthering the advancement of environmentally sustainable economic development.

- A cooperative dispute settlement procedure, aimed at encouraging compliance with the provisions of the FTA.

V. Advisory Committee Opinion on Agreement

Market Access

ISAC 11 is satisfied with the agreement's approaching tariff reduction and elimination in a reciprocal manner, so that U.S. tariffs will not be reduced or eliminated prior to or independent of the respective Australian tariff reduction and elimination. However, despite an overall positive outcome, the initial U.S. negotiating position on tariff reduction and elimination (modalities) going into the negotiation was a subject of concern. U.S. negotiators continue to identify tariffs below five percent as "nuisance tariffs" despite continued advice from ISAC 11 that tariffs as low as one percent can have a significant impact on prices in commodity and commodity-like industries, such as nonferrous metals. This initial negotiating stance has carried over into FTAA and WTO modalities.

Customs/Rules of Origin

The Australia FTA market access agreement's rules of origin procedure is consistent with the NAFTA rules and is satisfactory.

Competition Policy

Unlike the Singapore FTA, the U.S.-Australia FTA contains no requirement for Australia to reduce the direct ownership/participation of the state in the economy.

Dispute Settlement

The proposed dispute settlement provision promotes a consultative and cooperative approach to dispute settlement and permits the initiating party to pursue remedy through the FTA's dispute settlement procedure or through the existing WTO process. As the procedure relates to environmental disputes, ISAC members are concerned that the FTA does not adequately provide the details necessary for both Parties to understand the framework in which monetary penalties are applied. Furthermore the authorization in the agreement for dispute panels to consider views of interested third persons in the Parties territories is problematic. This appears to the Committee to be vague and could abuse the intent of the panel, which is to encourage cooperation in advancing environmentally sustainable economic development between the parties.

The Committee endorses the innovative provisions of the agreement including enforcement mechanisms based on monetary penalties determined by dispute panels to resolve commercial and labor and environmental obligations of the agreement.

The Committee again notes that the text available to the Committee for review was not final; the report is still subject to a “legal scrubbing” and other possible revision. The Committee wishes to note this reservation, and will submit comments to the USTR on any changes to the text which affect the opinion of this provision, or which are of concern to the Committee.

Environment

In the Committee’s view the Agreement commits parties to effectively enforce their own domestic environmental laws, and this obligation is enforceable through the Agreement’s dispute settlement procedures.

ISAC 11 members would have strongly preferred an environmental side agreement rather than incorporating environmental provisions directly into the core text of the FTA. The Committee does not view an FTA as the appropriate mechanism to address short-comings in environmental protection. Furthermore, conclusions that the failure to enforce existing environmental rules impacts trade is an inherently subjective determination, and subjecting such a conclusion to the FTA’s dispute settlement procedure invites third parties to abuse the mechanism in ways which could, in fact, negatively affect trade.

In addition to building upon existing cooperation between U.S. and Australian agencies on environment and sustainable development, the environmental review of the proposed agreement, conducted under the Executive Order requiring such reviews, correctly concluded that there was no significant adverse environmental impact to be expected from an Australia FTA. This environmental review paid particular attention to the mining and minerals sectors in both countries.

The Committee is concerned about suggestions in the Agreement that appear to approve use of measures to achieve environmental goals in the context of multilateral environment agreements (MEAs). While theoretically laudable, this language contains no counterbalance to assure that these trade measures are the least disruptive necessary to meeting those goals. There are also likely to be situations where either the U.S. or Australia is not a party to the MEA in question. Use of trade measures by the Party to achieve the goals of the MEA under those circumstances would not be acceptable to the non-Party.

Labor

The Committee believes the Agreement fully meets the labor objectives set out by Congress in the TPA, although including labor obligations as part of the core text of the trade agreement contrasts with the Committee’s preference for a side Agreement.

The Committee supports both parties commitment to their obligations as members of the International Labor Organization (ILO), and efforts to ensure that their domestic laws provide for labor standards consistent with internationally recognized labor principles. The Agreement also makes clear that it is inappropriate to weaken or reduce domestic labor protections to encourage trade or investment between the Parties.

The Committee also approves the requirement that Australia and the United States effectively enforce their own domestic labor laws, and that this obligation is enforceable through the Agreement's dispute settlement procedures.

Procedural guarantees in the Agreement will ensure that workers and employers will continue to have fair, equitable and transparent access to labor tribunals/courts.

The Parties have appropriately established a process for further cooperation on labor matters, including possible joint cooperative activities to advance common objectives and work on labor law and practice in the context of the ILO Declaration on Fundamental Principles and Rights at Work.

Investment

The Committee supports the protection of all forms of investment under the Agreement, including property.

U.S. investors will have the right to establish, acquire and operate investments in Australia on an equal footing with local investors, and with investors of other countries.

The Committee views as a positive development that all U.S. investment in new businesses is exempted from screening under Australia's Foreign Investment Promotion Board (FIRB). Thresholds for acquisitions by U.S. investors in most sectors are raised significantly, from A\$50 million to \$800 million. A work program will be initiated to limit the kinds of investment transactions, such as passive investment, that would be subject to review.

Despite the unique circumstances of this Agreement – including, for example, the long-standing economic ties between the United States and Australia, their shared legal traditions, and the confidence of their investors in operating in each others' markets the Committee would prefer that the two countries agree to adopt procedures in this FTA that would allow investors to arbitrate disputes with the governments. The Committee understands that this issue will be revisited if circumstances change.

General Provisions

The Committee believes that the allocation of the resources of the USTR and the Department of Commerce and the ISAC/ITAC trade advisory process should be reviewed. The multiplication of bilateral trade negotiation, in many cases with countries of very limited general trade potential for most economic sectors, has the potential of diverting attention from multilateral negotiations of overriding importance to U.S. trade and prosperity. While the efforts and performance of government agencies in pursuit of bilateral agreements have been commendable, a reassessment of negotiating priorities and reevaluation of the overall benefits of current efforts could lead to expanded progress in global trade liberalization.

In conclusion, the Committee is of the opinion that the Agreement provides for equity and reciprocity within the nonferrous metals and ores sector.

VI. Membership of Committee

Chairman

Mr. Joseph L. Mayer, Esq.
President and General Counsel
Copper & Brass Fabricators Council, Inc.

Mr. Joseph Baker
Chairman
Manitoba Corporation

Mr. John Bullock, Esq.
Consultant
Representing the International Precious Metals Institute

Mr. Jerome Cline
Senior Vice President, Special Projects
Zinc Corporation of America

Ms. Linda Findlay
Vice President, Government Relations
The Phelps Dodge Corporation

Mr. Michael Goodman
President
Metallurgical Products Company

Mr. Ivan L. Jeffery
President
Crescent Brass Manufacturing Corporation

Mr. Peter K. Johnson
Director, Public Relations and Government Affairs
Metal Powder Industries Federation

Mr. Robin King
Vice President, Public Affairs
The Aluminum Association

Mr. James L. Mallory
Executive Director
Nonferrous Founders Society

Ms. Moya Pheleps
Vice President, International Trade
National Mining Association

Mr. Russell C. Wisor
Vice President, Government Affairs
Aluminum Company of America

Mr. J. Thomas Wolfe
Vice President for Environment Policy
representing Battery Council International