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UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT IMPLEMENTATION ACT

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Mr. GRASSLEY, from the Committee on Finance, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 2610]

[Including cost estimate of the Congressional Budget Office]

The Committee on Finance, to which was referred the bill (S. 2610) to implement the United States-Australia Free Trade Agreement, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. REPORT AND OTHER COMMITTEE MATERIAL

A. REPORT OF THE COMMITTEE ON FINANCE

The Committee on Finance, to which was referred the bill (S. 2610) to implement the United States-Australia Free Trade Agreement, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

B. SUMMARY OF CONGRESSIONAL CONSIDERATION OF THE UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT

1. Background

In an address to a joint meeting of the United States Congress on June 12, 2002, Australian Prime Minister John Howard announced a proposal to negotiate a free trade agreement between Australia and the United States. On June 13, 2002, Prime Minister Howard met with President George W. Bush at the White House, where President Bush expressed willingness to negotiate such an agreement as soon as Congress granted him the authority. On August 6, 2002, President Bush signed the Trade Act of 2002 (Pub. L. 107–210), which grants the President the authority to enter into trade agreements and provides expedited procedures for consideration of legislation implementing trade agreements that meet certain objectives provided for under the Act. On November 13, 2002, President Bush authorized and directed Ambassador Robert B. Zoellick, U.S. Trade Representative, to notify the Congress of the President's intention to enter into negotiations for a free trade agreement with Australia. In letters dated November 13, 2002, to the Honorable Robert C. Byrd, President Pro Tempore, U.S. Senate, and to the Honorable J. Dennis Hastert, Speaker, U.S. House of Representatives, Ambassador Zoellick notified Congress of the President's intention to negotiate a trade agreement with Australia. On February 13, 2004, President Bush notified Congress of his intention to enter into the United States-Australia Free Trade Agreement. U.S. Trade Representative Robert B. Zoellick and Australian Minister of Trade Mark Vaile signed the Agreement in Washington, D.C. on May 18, 2004.

2. Trade Promotion Authority Procedures in General

The requirements for Congressional consideration of the United States-Australia Free Trade Agreement (the Agreement) under ex-

pedited procedures (known as Trade Promotion Authority (TPA) procedures) are set forth in sections 2103 through 2106 of the Bipartisan Trade Promotion Authority Act of 2002 (the Act) (19 U.S.C. §§ 3803–3806) and section 151 of the Trade Act of 1974 (19 U.S.C. § 2191).

Section 2103 of the Act authorizes the President, prior to June 1, 2005 (or prior to June 1, 2007, if trade authority procedures are extended under section 2103(c) of the Act), to enter into reciprocal trade agreements with foreign countries to reduce or eliminate tariff or nontariff barriers and other trade-distorting measures. The purpose of section 2103 procedures is to provide the means to achieve U.S. negotiating objectives set forth under section 2102 of the Act in international trade negotiations.

3. Notification Prior to Negotiations

Under section 2104(a)(1) of the Act, the President must provide written notice to the Congress at least 90 calendar days before initiating negotiations. In Presidential Memorandum of November 13, 2002, President Bush authorized and directed Ambassador Robert B. Zoellick, U.S. Trade Representative, to notify the Congress, consistent with section 2104(a)(1) of the Act, of the President's intention to enter into negotiations for a free trade agreement with Australia. Section 2104(a)(2) requires the President, before and after submission of the notice, to consult regarding the negotiations with the relevant Committees of Congress and the Congressional Oversight Group established under section 2107 of the Act. The Administration engaged in the requisite consultations, including appearances by Ambassador Zoellick at meetings of the Congressional Oversight Group on January 7, 2003, April 11, 2003, July 24, 2003, and May 6, 2004.

4. Notification of Intent To Enter Into an Agreement

Under section 2105(a)(1)(A) of the Act, the President is required, at least 90 days before entering into an agreement, to notify Congress of his intent to enter into the Agreement. On February 13, 2004, President George W. Bush notified Congress of his intention to enter into the United States-Australia Free Trade Agreement. The Agreement was signed on May 18, 2004.

Section 2105(a)(1)(B) of the Act also requires the President, within 60 days of signing an agreement, to submit to Congress a description of changes to existing laws that the President considers would be required to bring the United States into compliance with such agreement. On July 6, 2004, the President transmitted to Congress a description of changes to existing laws required to comply with the Agreement.

5. Development of the Implementing Legislation

Under TPA procedures, the Congress and the Administration work together to produce the legislation to implement a free trade agreement. Draft legislation is developed in close consultation between the Administration and the Committees with jurisdiction over the laws that must be enacted or amended to implement the Agreement. The Committees then hold informal meetings to consider the draft legislation and make recommendations to the Administration, if any. The Administration then finalizes imple-

menting legislation for formal submission to the Congress and referral to the Committees of jurisdiction. These procedures are meant to ensure that the final legislation reflects only those provisions that are necessary or appropriate to faithfully implement the agreement.

The Senate Committee on Finance met in open executive session on June 23, 2004, to informally consider draft implementing legislation for the Agreement. At that meeting, an amendment was offered by Senator Conrad to require approval by the Senate Committee on Finance and the House Ways and Means Committee before the U.S. Trade Representative could exercise waiver authority with respect to two beef safeguard mechanisms provided for in the Agreement and included in the draft implementing legislation. The amendment was approved by roll call vote, a quorum being present, 11 Ayes (6 by proxy), 10 Nays (6 by proxy). The Committee meeting recessed without final consideration of the draft implementing legislation, as amended. The Chairman reconvened the meeting on June 24, 2004. On approval of the draft implementing legislation, as amended, the Committee disapproved the amended draft by roll call vote, a quorum being present, 7 Ayes (1 by proxy), 14 Nays (none by proxy). As a result, the Committee did not provide an informal recommendation of implementing legislation to the Administration.

6. Formal Submission of the Agreement and Implementing Legislation

When the President formally submits a trade agreement to Congress under section 2105 of the Act, the President must include in the submission the final legal text of the agreement, together with implementing legislation, a statement of administrative action (describing regulatory and other changes that are necessary or appropriate to implement the agreement), a statement setting forth the reasons of the President regarding how and to what extent the agreement makes progress in achieving the applicable policies, purposes, priorities, and objectives set forth in the Act, and a statement setting forth the reasons of the President regarding how the agreement serves the interests of U.S. commerce.

The implementing legislation is introduced in both Houses of Congress on the day it is submitted by the President and is referred to Committees with jurisdiction over its provisions. President George W. Bush transmitted the final text of the United States-Australia Free Trade Agreement, along with implementing legislation, a Statement of Administrative Action, and other supporting information, as required under section 2105 of the Trade Act of 2002, to the Congress on July 6, 2004. The legislation was introduced that same day in both the House and the Senate.

To qualify for TPA procedures, the implementing bill itself must contain provisions formally approving the agreement and the statement of administrative action. Further, the implementing bill must contain only those provisions necessary or appropriate to implement the Agreement. The implementing bill reported here—which approves the United States-Australia Free Trade Agreement and the Statement of Administrative Action and contains provisions necessary or appropriate to implement the Agreement into U.S. law—was referred to the Senate Committee on Finance.

7. Committee and Floor Consideration

When the requirements of the Act are satisfied, implementing revenue bills, such as the United States-Australia Free Trade Agreement Implementation Act (Implementation Act), are subject to the legislative procedures of section 151 of the Trade Act of 1974. The following schedule for Congressional consideration applies under these procedures:

(i) House Committees have up to 45 days in session in which to report the bill; any Committee which does not do so in that period will be automatically discharged from further consideration.

(ii) A vote on final passage by the House must occur on or before the 15th day in session after the Committees report the bill or are discharged from further consideration.

(iii) Senate Committees must act within 15 days in session of receiving the implementing revenue bill from the House or within 45 days in session of Senate introduction of the implementing bill, whichever is later, or they will be discharged automatically.

(iv) The full Senate then must vote within 15 days in session and without amendment on the implementing bill.

Thus, the Congress has a maximum of 90 days in session to complete action on the bill, although the time period can be shortened.

Once the implementing bill has been formally submitted by the President and introduced, no amendments to the bill are in order in either House of Congress. Floor debate in each House is limited to no more than 20 hours, to be equally divided between those favoring the bill and those opposing the bill.

C. Trade Relations With Australia

1. United States-Australia Trade and Investment

The United States is the top foreign supplier of goods and services to Australia, and the largest foreign investor in Australia. According to the World Bank, Australia is the fourth largest economy in the Asia-Pacific region and the 14th largest in the world, with a gross national income (GNI) of $430.5 billion and a per capita GNI of $21,650 in 2003. In recent years, Australia has pursued a policy of market reform and liberalization, and it has ranked as one of the fastest growing developed economies.

Australia is the 21st largest trading partner of the United States with two-way merchandise trade of $18.9 billion in 2003. Australia is the 13th largest export market for the United States, accounting for $12.5 billion in merchandise exports in 2003. It is the 30th largest source of merchandise imports, valued at $6.5 billion in 2003. The United States has had a merchandise trade surplus with Australia in recent years: $3.9 billion in 2001; $5.9 billion in 2002; and $6 billion in 2003. Principal U.S. merchandise exports in 2003 included transport equipment (mainly aircraft and parts), road vehicles, specialized machinery, industrial machinery, equipment and parts, and miscellaneous manufactured articles. Principal U.S. merchandise imports from Australia in 2003 included meat and meat preparations, beverages, metal ores and scrap, road vehicles, and petroleum and related products.

Bilateral private services trade between the United States and Australia was $8.1 billion in 2002, and the United States has had a surplus in services trade with Australia in recent years. Aus-

tralia was the 13th largest market for private U.S. services exports, valued at $5.2 billion in 2002. The United States imported private services valued at $2.9 billion from Australia, yielding a $2.3 billion surplus in cross-border services trade for U.S. service providers. Principal U.S. cross-border services exports in 2002 included travel and transportation services; business, professional and technical services; and financial (non-insurance) services. Principal U.S. cross-border services imports in 2002 included travel and transportation services, and business, professional and technical services.

The United States is the leading foreign investor in Australia with total U.S. investments valued at $36.3 billion in 2002. In 2003, U.S. residents received $6.3 billion in income from U.S. investments in Australia, while Australian residents received $2.1 billion in income from investments in the United States. Australia is the third largest destination for U.S. investment in the Asia-Pacific region, and the 12th largest in the world. U.S. investment in Australia is broadly based, with principal sectors including manufacturing, mining, finance, and insurance. Australia is the 8th largest foreign direct investor in the United States with $24.5 billion in U.S. investments, concentrated in manufacturing, real estate, rental and leasing, and finance and insurance.

2. Tariffs and Trade Agreements

Australia's strong economic performance over the past decade has resulted from sound macroeconomic policies, far-reaching structural reforms and past unilateral trade liberalization. Australia's gradual reduction of tariffs, prior to the initiation of negotiations of a free trade agreement with the United States, has brought 86 percent of its tariffs to between zero and 5 percent, with more than 99 percent of its tariffs applied on an ad valorem basis and more than 96 percent of its tariff lines being bound in the World Trade Organization (WTO). Australia's average bound normal trade relation/most-favored-nation (NTR/MFN) tariff rate is 10.5 percent, and its average applied NTR/MFN tariff is 4.3 percent. The average applied NTR/MFN tariff for industrial products is 4.7 percent, with bound rates generally ranging between zero and 55 percent. The average applied NTR/MFN tariff for agricultural products is 1.2 percent, with bound rates generally ranging between zero and 29 percent.

Australia is a member of the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), and the Asia-Pacific Economic Cooperation (APEC) forum. Australia has been a leader in the so-called Cairns Group, which has pressed for agricultural trade reform in the WTO. Australia has reached free trade agreements with Singapore (effective July 2003) and with Thailand (signed October 2003).

U.S. EXPORTS TO AUSTRALIA, 1998–2003

[In millions of U.S. dollars]

Top 15 products, by HTS chapter		1998	1999	2000	2001	2002	2003
84	Machinery	2,883.9	2,952.3	2,879.1	2,657.6	2,431.2	2,498.9
88	Aircraft	860.9	1,192.2	1,075.8	895.8	2,980.2	2,161.6
87	Vehicles	1,054.4	873.2	1,060.8	939.6	1,083.2	1,245.3
85	Electrical machinery	901.6	969.1	1,236.2	846.7	907.2	944.9

U.S. EXPORTS TO AUSTRALIA, 1998–2003—Continued

[In millions of U.S. dollars]

	Top 15 products, by HTS chapter	1998	1999	2000	2001	2002	2003
90	Optical, medical equipment	751.4	777.8	779.4	795.2	783.0	845.6
98	Special classifications	631.0	611.8	597.2	533.3	552.4	633.4
30	Pharmaceutical products	220.1	221.1	279.1	274.3	361.8	432.1
39	Plastics	375.3	383.2	393.4	354.7	361.9	346.3
29	Organic chemicals	400.9	353.1	367.9	345.1	215.7	250.5
38	Miscellaneous chemicals	219.2	207.5	213.1	217.1	223.0	216.6
01	Live animals	10.4	15.1	7.8	7.0	6.7	202.6
48	Paper and paperboard	214.1	192.2	186.9	172.9	172.7	176.0
49	Printed matter	219.7	202.1	180.7	151.9	156.8	165.7
31	Fertilizers	276.9	220.4	170.9	179.6	150.2	164.5
33	Essential oils	110.2	116.1	117.5	158.3	125.1	161.2
	Subtotal for top 15 products	9,130.2	9,287.5	9,545.8	8,529.1	10,511.2	10,445.3
	Subtotal for all other U.S. exports	2,420.4	2,106.4	2,138.1	1,696.7	1,782.6	2,004.3
	Total U.S. exports to Australia	11,550.6	11,393.9	11,683.9	10,225.8	12,293.8	12,449.6

Note.—HTS is the Harmonized Tariff Schedule of the United States.
Source: U.S. International Trade Commission Dataweb.

U.S. IMPORTS FROM AUSTRALIA, 1998–2003

[In millions of U.S. dollars]

	Top 15 products, by HTS chapter	1998	1999	2000	2001	2002	2003
02	Meat	572.7	621.7	819.5	1,023.5	1,071.4	1,148.8
22	Beverages	151.6	204.7	282.2	346.7	459.2	626.7
98	Special classifications	408.5	437.3	427.3	475.3	462.6	591.6
87	Vehicles	264.6	326.4	422.0	434.2	507.0	368.1
27	Fuels	266.7	254.7	449.5	367.0	495.9	366.9
84	Machinery	304.6	333.7	331.7	307.2	295.8	327.9
28	Inorganic chemicals	607.0	544.5	600.9	388.7	348.2	322.6
90	Optical, medical equipment	160.3	231.3	311.7	337.9	306.9	276.8
26	Ores, slag and ash	144.4	142.5	244.2	230.1	244.0	214.0
61	Knit apparel	66.2	126.2	168.2	209.1	232.7	198.0
85	Electrical machinery	137.4	142.3	212.8	193.1	170.3	181.2
72	Iron and steel	264.8	198.6	224.0	162.2	167.8	174.3
30	Pharmaceutical products	35.0	63.8	58.2	161.7	135.7	143.5
88	Aircraft	152.2	137.5	104.9	131.6	111.3	111.2
75	Nickel	92.2	77.7	136.6	121.4	78.5	100.8
	Subtotal for top 15 products	3,628.2	3,842.9	4,792.8	4,889.9	5,087.4	5,152.6
	Subtotal for all other U.S. imports	1,649.5	1,351.1	1,420.3	1,443.2	1,311.0	1,315.5
	Total U.S. imports from Australia	5,277.7	5,194.1	6,213.1	6,333.1	6,398.4	6,468.1

Note.—HTS is the Harmonized Tariff Schedule of the United States.
Source: U.S. International Trade Commission Dataweb.

3. U.S. International Trade Commission Study

In May 2004, the U.S. International Trade Commission (ITC) released the results of its investigation (Investigation No. TA–2104–11) into the probable economic effects of a United States-Australia Free Trade Agreement. The ITC concluded that the economy-wide effects of the Agreement's tariff reductions alone are likely to result in an increase in overall U.S. welfare in the range of $434.8 million to $639.4 million. The ITC projected that U.S. exports to Australia would increase by about $1.5 billion, and U.S. imports from Australia would increase by about $1.2 billion.

At the sectoral level, the ITC report concluded that some sectors of the U.S. economy likely would experience increased import competition from Australia, while other sectors likely would experience

increased export opportunities with respect to Australia. When the Agreement is fully implemented and the tariff reductions are fully phased in, the ITC estimated the effects to be greater for U.S. exports of: coal; oil and gas; certain processed foods; textile, apparel and leather products; motor vehicles and parts; ferrous metals; and wood products. For U.S. imports, the likely effects would be greater for: meat products; certain processed foods; textiles and apparel; chemicals, rubber and plastic; and motor vehicles and parts.

D. Overview of the United States-Australia Free Trade Agreement

1. Overview of the Agreement

The United States-Australia Free Trade Agreement establishes a bilateral free trade area that eliminates tariffs on most bilateral merchandise trade. The Agreement liberalizes trade in services, and contains provisions that cover investment, intellectual property, environment, labor, government procurement, and competition policy. The Agreement also contains a mechanism for settling disputes that arise under the Agreement. Throughout the Agreement there are important provisions that promote bilateral consultation and cooperation, procedural and substantive due process, administrative and judicial review, transparency, and the rule of law.

Manufactured goods account for 93 percent of U.S. exports to Australia, and the import duties applicable under 99 percent of Australia's tariff categories for industrial and consumer goods will be eliminated on the first day that the Agreement enters into force. Australian import duties on the remaining manufactured goods will be phased out over the next 10 years. Australian import duties on all U.S. agricultural products that are currently exported to Australia, valued at nearly $700 million in 2003, will be eliminated as soon as the Agreement enters into force. The Agreement is expected to enter into force on January 1, 2005.

2. Chapter Summaries

Establishment of a Free Trade Area and Definitions. Chapter 1 provides that the Agreement establishes a free trade area in accordance with the provisions of the Agreement, and consistent with Article XXIV of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article V of the General Agreement on Trade in Services (GATS). In Article 1.1, the Parties affirm their rights and obligations under existing bilateral and multilateral agreements, including the Marrakesh Agreement Establishing the World Trade Organization (WTO). The chapter also includes a number of general definitions that apply throughout the Agreement, unless otherwise specified.

National Treatment and Market Access for Goods. Chapter 2 sets forth the core obligations under the Agreement with respect to two-way trade in goods. Article 2.2 provides that each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994. Article 2.3 provides that each Party shall progressively eliminate its customs duties on originating goods of the other Party in accordance with its schedule pro-

vided for in Annex 2–B (Tariff Elimination) of the Agreement. The term "originating good" is defined in Article 5.1 of the Agreement.

Article 2.5 provides that each Party shall grant duty-free temporary admission for certain types of goods, regardless of origin. Such types of goods include goods intended for display or demonstration, commercial samples and advertising films and recordings, and goods imported for sports purposes. Article 2.6 provides duty-free treatment for goods that are imported after having been exported temporarily to the other Party for repair or alteration, and for goods that are imported temporarily for repair or alteration. Article 2.12 provides that neither Party may adopt or maintain a merchandise processing fee on an originating good.

Annex 2–B to the Agreement contains the general staging categories for tariff elimination, and a specific, item-by-item schedule of tariff elimination for each Party. Under the general staging categories, originating goods will either: (1) remain duty-free, if they are currently duty-free; (2) become duty-free on the date that the Agreement enters into force; or (3) become duty-free after equal annual reductions over periods of 4 years, 8 years or 10 years. In addition, there are some special staging categories for certain products that are set forth in the general notes that accompany each Party's Schedule in Annex 2–B. For certain U.S. imports from Australia, the import duties will be reduced over 18 years. U.S. import duties on sugar are not reduced under the Agreement.

A number of product-specific preferential tariff-rate quotas (TRQs) for certain sensitive products are included in an annex to the general notes accompanying the Schedule of the United States in Annex 2–B. Products covered by preferential TRQs include beef, cotton, dairy, peanuts, tobacco and wine. Separately, in Annex 2–A of the Agreement, each Party exempts certain measures from the national treatment obligation of the Agreement and the prohibition on import or export restrictions. The United States exempts its controls on the export of U.S. logs and certain measures under the Merchant Marine Act of 1920 and the Passenger Vessel Act. Australia's exemptions include certain agricultural marketing arrangements and controls on the importation of used motor vehicles.

Annex 2–C to the Agreement sets forth certain agreed principles with respect to pharmaceuticals and public health care; these include: the important role played by innovative pharmaceuticals in delivering high quality health care; the importance of research and development in the pharmaceutical industry and of appropriate government support, including through intellectual property protection and other policies; the need to promote timely and affordable access to innovative pharmaceuticals through transparent, expeditious, and accountable procedures, without impeding a Party's ability to apply appropriate standards of quality, safety, and efficacy; and, the need to recognize the value of innovative pharmaceuticals through the operation of competitive markets or by adopting or maintaining procedures that appropriately value the objectively demonstrated therapeutic significance of a pharmaceutical.

Annex 2–C does not require any changes to how U.S. programs operate with respect to pharmaceuticals. Pharmaceutical formulary development and management by federal healthcare agencies are expressly recognized as aspects of government procurement that are covered by Chapter 15 of the Agreement (Government Procure-

ment) and not Annex 2–C. Chapter 15 contains obligations that the United States has already assumed as a signatory to the WTO Agreement on Government Procurement.

Annex 2–C establishes a Medicines Working Group to promote discussion and mutual understanding of issues relating to Annex 2–C, including the importance of pharmaceutical research and development to continued improvement of healthcare outcomes. The Parties also commit to advancing the existing dialogue between the Australian Therapeutic Goods Administration and the U.S. Food and Drug Administration to make innovative medical products more quickly available to their nationals. In addition, each Party commits to allowing pharmaceutical manufacturers to disseminate truthful and not misleading information to health professionals and consumers through a manufacturer's Internet site registered in the territory of the Party and other Internet sites registered in the territory of the Party and linked to the manufacturer's site.

Agriculture. Chapter 3 establishes a Committee on Agriculture in order to provide a forum for: promoting trade in agricultural goods between the Parties; addressing barriers to trade in agricultural goods; conducting consultations between the Parties on agricultural export competition issues; and, considering any matters arising under Chapter 3. In addition, Chapter 3 provides for three agricultural safeguard mechanisms.

Section A of Annex 3–A provides for a price-based safeguard for a specified list of horticulture goods, under which the United States shall assess a duty on imports of certain Australian horticulture goods if import prices for specific shipments fall below specified levels. The rate of additional duty under the safeguard increases as the difference increases between the unit import price of a shipment and the trigger price. The trigger price reflects historic unit import values for the relevant horticulture good. The assessment of additional duty under this provision terminates on the date on which duty-free treatment must be provided to that good under the Schedule of the United States to Annex 2–B of the Agreement. Specific horticulture goods listed in Section A of Annex 3–A of the Agreement include: dried onions and garlic; processed tomato products; canned asparagus; canned pears, apricots, peaches, and fruit mixtures; and orange and grape juices.

Section B of Annex 3–A provides for a transitional quantity-based beef safeguard, which is available during the phase-out of over-quota tariffs on certain beef products (i.e., years 9 through 18 of the Agreement). The safeguard applies when the volume of covered imports exceeds 110 percent of the preferential in-quota volume for the specific year. The added duty under this safeguard is equal to 75 percent of the difference between the normal trade relation/most-favored-nation (NTR/MFN) duty rate and the applied over-quota duty rate for that year. Any additional safeguard duty remains in effect until the end of the calendar year. The United States shall have the discretion not to apply an agricultural safeguard measure under Section B of Annex 3–A.

Section C of Annex 3–A provides for a permanent price-based beef safeguard, which is available after the over-quota tariff has been phased out (i.e., beginning in year 19 of the Agreement). When the price of beef in the United States falls below a calculated trigger price, imports of beef products from Australia in excess of

specified quota levels are subject to additional duties under this safeguard. The safeguard trigger is based on a 24-month rolling average index price. For each of the first three-quarters of the year, the safeguard is triggered when the average index price for any 2 months in a given quarter falls below 6.5 percent of the 24-month average index price. The safeguard is also triggered if the average index beef price falls 6.5 percent below the 24-month rolling average in the months of September, October, or November. If the safeguard is triggered during the first three-quarters of the year, the additional duty is applied in the following quarter. If the safeguard is triggered in September, October, or November, the additional duty is applied for the remainder of the year. The additional duty to be applied is equal to 65 percent of the applied NTR/MFN tariff rate. This price-based safeguard can only be imposed on imports of Australian beef that exceed the Agreement's quota amount (i.e., 70,000 metric tons in the 19th year, an amount that will grow annually at 0.6 percent) plus Australia's country-specific quota established under the World Trade Organization (currently set at 378,214 metric tons). The United States shall have the discretion not to apply an agricultural safeguard measure under Section C of Annex 3–A.

Article 3.6 provides that upon request after year 20 of the Agreement, the Parties shall consult on, and consider the possibility of, modifying market access commitments for the dairy goods listed in each Party's Schedule to Annex 2–B. Unless both Parties agree, however, no change will occur in U.S. commitments on dairy products. The dairy provisions in the Agreement are not expected to affect the operation of the Commodity Credit Corporation's dairy price support programs. Under the Agreement, the United States will create preferential TRQs for certain dairy products currently covered by TRQs that are maintained in accordance with WTO rules. The in-quota tariff rates for these preferential TRQs will be eliminated immediately. However, there will be no change in the normal trade relation/most-favored nation (NTR/MFN) rate of duty applied to over-quota imports for these products. Initial increases in imports from Australia under the preferential TRQs will amount to about 0.17 percent of the value of annual U.S. dairy production. Increased market access will be provided for such products through the expansion of quantities eligible for duty-free access under the preferential TRQs. These TRQs will expand by rates ranging from 3 percent to 6 percent annually, depending on product, with lower growth (i.e., 3 percent) for sensitive commodities directly related to the U.S. dairy price support program and higher growth (i.e., 4 to 6 percent) for other commodities, some of which are not produced in significant amounts in the United States. In most cases, tariffs on dairy items not covered by the preferential TRQs will be phased out over 18 years. Under the rules of origin provided for in the Agreement, dairy products from other countries that are transshipped through Australia to the United States will not benefit from the preferential TRQs. The Government of Australia will administer export certificates for dairy products; this will ensure that in-quota preferential TRQ levels are not exceeded and that any transshipped third-country dairy products do not benefit from the Agreement.

Textiles and Apparel. Chapter 4 lowers barriers to bilateral trade in textile and apparel goods, and establishes the rules that govern such trade under the Agreement. Some U.S. duties on textiles and apparel articles that qualify for preferential treatment under the Agreement will be phased out by 2010, but most duties on such products will be phased out by 2015.

The Agreement contains a specific safeguard mechanism for textiles and apparel, and specific rules of origin for textile and apparel goods. The rules of origin include a "fiber forward" rule of origin for yarns and knit fabrics, and a "yarn forward" rule of origin for woven fabrics and apparel. Under a "fiber forward" rule, the fiber must come from one of the Parties in order for the finished product to qualify for preferential treatment under the Agreement. Under a "yarn forward" rule, the fiber may be imported but the yarn must be produced in one of the Parties in order for the finished product to qualify for preferential treatment under the Agreement. For apparel, the rule of origin applies only to the component that determines the tariff classification of the apparel (i.e., the component that determines the "essential character" of the apparel). Visible lining fabrics are subject to a "yarn forward" rule.

The Agreement contains a "de minimis" rule, which provides that a good that does not meet the rule of origin may nonetheless qualify for preferential treatment under the Agreement as long as no more than 7 percent of the total weight of the component that determines the tariff classification is from a third country. The Agreement provides for consultations, and the possibility of modifying the rules of origin, to address the availability of fibers, yarns or fabrics, and whether any given input is produced in sufficient commercial quantities in a timely manner. The Agreement preserves the Berry Amendment for U.S. military procurement, which provides that textiles and apparel for the military must be made in the United States from U.S. inputs. No tariff preference levels (which allow some foreign inputs to be used) are provided for in the Agreement.

The Agreement contains a provision on customs cooperation. Article 4.3 provides that the Parties shall cooperate: (1) to enforce measures affecting trade in textile and apparel goods; (2) to ensure accuracy of claims of origin; (3) to enforce measures implementing international agreements affecting trade in textile and apparel goods; and (4) to prevent circumvention of such international agreements. Article 4.3 provides for facility inspections, examinations of records, and other forms of verification, to determine the accuracy of claims of origin for textile and apparel goods and to determine that exporters and producers are complying with applicable laws, regulations, and procedures regarding trade in textile and apparel goods.

Under Articles 4.3.2 and 4.3.3, the United States may request that Australia, the United States, or both, conduct a verification with respect to an Australian exporter or producer. The object of a verification under Article 4.3.2 is to determine that a claim of origin for a textile or apparel good is accurate. The object of a verification under Article 4.3.3 is to determine that an exporter or producer is complying with applicable customs laws, regulations, and procedures and that claims of origin for textile or apparel goods exported or produced by that person are accurate.

Under Article 4.3.7 of the Agreement, the United States may take appropriate action during a verification, including suspending the application of preferential treatment to textile or apparel goods that are subject to verification or that are exported or produced by a person subject to verification. Under Article 4.3.8, if within 12 months after requesting a verification, the United States is unable to make a determination, or the United States makes a negative determination, the United States may then deny preferential tariff treatment to the textile or apparel good that is subject to verification or is produced or exported by the person subject to verification.

Rules of Origin. Rules of origin are used to determine whether a good is an originating good for purposes of the Agreement. A good must be an originating good in order to qualify for preferential treatment under the Agreement. Chapter 5 provides the general rules of origin for goods under the Agreement. Chapter 5 rules of origin apply to textile and apparel goods, in addition to the rules of origin provided in Chapter 4, unless otherwise provided.

Under Article 5.1, there are several ways for a good to qualify as an "originating good" and thus be eligible for preferential treatment under the Agreement. First, under Article 5.1(a), a good is an originating good if it is "wholly obtained or produced entirely in the territory of one or both of the Parties." The concept of "wholly obtained or produced" is defined in Article 5.18.5, and includes, for example, minerals extracted in the territory of either Party, live animals born and raised in the territory of either Party, and vegetables harvested in the territory of either Party.

Second, under Article 5.1(b), a good is an originating good if it is "produced entirely in the territory of one or both of the Parties" and "each of the non-originating materials used in the production of the good undergoes an applicable change in tariff classification * * *, or the good otherwise satisfies any applicable regional value content {requirement}; or the good meets any other requirements specified" in the Agreement. Non-originating material is defined in Article 5.18.13 as material that does not qualify for preferential treatment under the Agreement because it has not satisfied the requirements of Chapter 5. The specific changes in tariff classification that are required in order for a good to qualify for preferential treatment under the Agreement are set forth in Annex 5–A of the Agreement.

Third, a good is an originating good if the good is "produced entirely in the territory of one or both Parties exclusively from originating materials." Originating materials are materials that satisfy a rule of origin and are used in the production of another good.

Fourth, under Article 5.1(d), a good can qualify as an originating good if the good otherwise satisfies any of the specific requirements in Chapter 4 or Chapter 5 of the Agreement.

Article 5.2 provides for a *de minimis* exception to the rules of origin, which applies to goods other than certain specified goods such as textile and apparel goods. Under the exception, a good that does not undergo a change in tariff classification pursuant to Annex 5–A of the Agreement is nonetheless an originating good if the value of all non-originating materials used in the production of the good does not exceed 10 percent of the adjusted value of the good. Article 5.3 addresses cumulation, while Article 5.4 provides several rules

for determining regional value content, including a specific rule for automotive products.

The Agreement provides that an importer may make a claim for preferential treatment based on the importer's knowledge or on information in the importer's possession. A Party may require a statement from the importer that includes relevant cost and manufacturing information, but the statement, which may be submitted electronically, need not be in a prescribed format. If preferential treatment under the Agreement is denied, a written determination must be issued that contains findings of fact and the legal basis for the denial. The Parties shall consult and cooperate to ensure the effective and uniform application of the rules of origin. The Parties shall also consult regularly to discuss necessary amendments to the rules of origin, taking into account developments in technology, production processes, and other related matters.

Customs Administration. Chapter 6 contains standard customs provisions that provide for transparency, due process, and the rule of law. These provisions concern: the prompt publication of laws, regulations, guidelines, procedures, and administrative rulings on the Internet and in print form; the designation of one or more official contacts for information requests; a notice and comment process prior to any regulatory changes; the opportunity to obtain advance written rulings regarding tariff classification, valuation, origin and whether a product qualifies for preferential treatment under the Agreement; and, an opportunity for administrative and judicial review of administrative decisions. The Agreement provides for mutual cooperation in implementing the Agreement and prior notice of any significant modification of administrative policy. The Agreement includes provisions calling for the release of goods within 48 hours of arrival (to the extent possible), risk assessment procedures to focus inspection activities on high-risk goods, and expedited procedures for express shipments (i.e., under normal circumstances, release of an express shipment no later than 6 hours after the required information has been submitted).

Sanitary and Phytosanitary Measures. Chapter 7 affirms the existing rights and obligations of the Parties under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The objectives of the chapter are: to protect human, animal, or plant life or health in the Parties' territories; to enhance the Parties' implementation of the SPS Agreement; to provide a forum for addressing bilateral sanitary and phytosanitary matters; and, to resolve trade issues, thereby expanding trade opportunities. The chapter applies to all SPS measures that may, directly or indirectly, affect trade between the Parties. Neither Party may have recourse to the dispute settlement provisions of the Agreement for a matter arising under Chapter 7.

Article 7.4 of the Agreement establishes a bilateral Committee on SPS Matters. The Committee's objectives are: to enhance each Party's implementation of the SPS Agreement; to protect human, animal or plant life or health; to enhance consultation and cooperation between the Parties on SPS matters; and, to facilitate trade between the Parties. In addition, Article 7.4.9 establishes a Standing Technical Working Group on Animal and Plant Health Measures. The Working Group's mission, as set out in Annex 7–A, is to facilitate "trade between the Parties to the greatest extent possible

while preserving each Party's right to protect animal or plant life or health in its territory and respecting each Party's regulatory systems and risk assessment and policy development processes."

Technical Barriers to Trade. Chapter 8 applies to all standards, technical regulations and conformity assessment procedures of the central level of government that may, directly or indirectly, affect trade in any product between the Parties. The Agreement provides for enhanced cooperation and consultation with respect to technical barriers to trade. In Article 8.2, the Parties affirm their existing rights and obligations under the WTO Agreement on Technical Barriers to Trade (TBT Agreement). Article 8.5 provides that each Party "shall give positive consideration to accepting as equivalent technical regulations of the other Party, even if these regulations differ from its own, provided it is satisfied that these regulations adequately fulfill the objectives of its regulations." If a Party does not accept a technical regulation of the other Party as equivalent to its own, it shall, on request, explain its reasons for not accepting the regulation. Neither Party may have recourse to the dispute settlement provisions of the Agreement for a matter arising under Article 8.5.

Article 8.6 provides that the Parties shall exchange information on a broad range of mechanisms that may be used to facilitate the acceptance in a Party's territory of the results of conformity assessment procedures conducted in the other Party's territory. Either Party may have recourse to the dispute settlement provisions of the Agreement for a matter arising under Article 8.6. With respect to transparency, Article 8.7 provides that "each Party shall allow persons of the other Party to participate in the development of standards, technical regulations, and conformity assessment procedures on terms no less favorable than those accorded to its own persons."

Safeguards. Chapter 9 provides for a transitional bilateral safeguard mechanism. If, as a result of the reduction or elimination of a customs duty according to the terms of the Agreement, an originating good of the other Party is being imported into the territory of a Party in such increased quantities, in absolute terms or relative to domestic production, and under such conditions that the imports of such originating good constitute a substantial cause of serious injury, or threat thereof, to a domestic industry producing a like or directly competitive good, that Party may: (1) suspend the further reduction of any rate of customs duty on the good provided for under the Agreement; (2) increase the rate of customs duty on the good, to a level not to exceed the lesser of the NTR/MFN rate of duty on the good in effect at the time the action is taken and the NTR/MFN rate of duty on the good in effect on the day before the Agreement enters into force; or (3) in the case of a customs duty applied to a good on a seasonal basis, increase the rate of customs duty on the good to a level not to exceed the lesser of the NTR/MFN rate of duty on the good in effect for the immediately preceding corresponding season and the NTR/MFN rate of duty on the good in effect on the day before the Agreement enters into force.

A Party may impose a bilateral safeguard measure only after conducting an investigation in accordance with Articles 3 and 4.2(a) and (c) of the WTO Agreement on Safeguards, which are incorporated by reference into the Agreement. A bilateral safeguard

measure can be imposed for an initial period no longer than 2 years, and for safeguards applied for more than 1 year the Party must progressively liberalize the safeguard measure at regular intervals. A bilateral safeguard measure may be extended for up to 2 additional years if the Party determines that the measure continues to be necessary to prevent or remedy serious injury and to facilitate adjustment and that there is evidence that the domestic industry is adjusting to import competition. A bilateral safeguard measure may not be imposed on the same good more than once.

Upon termination of a safeguard measure, the rate of duty on the good shall be no higher than the rate that would have been in effect 1 year after the safeguard measure was imposed, as set forth in the Party's Schedule to Annex 2–B to the Agreement. Beginning on January 1 of the year following the termination of the safeguard measure, the Party shall either apply the rate of duty set forth in the Party's Schedule to Annex 2–B to the Agreement as if the safeguard measure had never been applied, or the Party shall eliminate the duty applied in equal annual stages ending on the date set forth in the Party's Schedule to Annex 2–B to the Agreement for elimination of the duty on that good.

The Party imposing a bilateral safeguard measure shall provide mutually agreed-upon trade liberalizing compensation in the form of concessions having substantially equivalent trade effects, or equivalent value, compared to the additional duties resulting from the safeguard measure. If the Parties are unable to reach an agreement on compensation, the exporting Party may suspend the application of substantially equivalent concessions to the other Party. A Party may not impose a bilateral safeguard measure after the expiration of the 10-year transition period defined in Article 9.6.7, unless the other Party consents.

Each Party retains its rights and obligations under Article XIX of GATT 1994 and the WTO Agreement on Safeguards. The Agreement does not confer any additional rights or obligations on the Parties with respect to actions taken in accordance with the WTO Agreement on Safeguards, except that a Party imposing a global safeguard measure may exclude imports of an originating good from the other Party if such imports are not a substantial cause of serious injury or threat thereof.

Cross-Border Trade in Services. Chapter 10 applies to measures that affect cross-border trade in services by service suppliers of the other Party, including, inter alia, measures that affect the production, distribution, marketing, sale and delivery of a service, and the purchase or use of, or payment for, a service. The measures covered by the Agreement include measures adopted by central, regional, or local governments and authorities, and non-governmental authorities exercising governmental powers by delegation. Chapter 10 does not apply to several service sectors, including: financial services (which are covered in Chapter 13 of the Agreement) other than financial services relating to the supply of a service by a covered investment (as defined in Chapter 1 of the Agreement); government procurement (which is covered in Chapter 15 of the Agreement), air services other than aircraft repair and maintenance and specialty air services; subsidies or grants provided by a Party; and services supplied in the exercise of governmental authority. While telecommunications services are not excluded from the application of

Chapter 10, additional specific commitments relating to telecommunications services are contained in Chapter 12 of the Agreement.

Chapter 10 further provides that each Party shall accord national treatment and most-favored-nation treatment to all service suppliers of the other Party. Article 10.6 excludes specified nonconforming measures and any measure that a Party adopts or maintains with respect to specified sectors, sub-sectors, or activities, from certain of the obligations in Chapter 10. Existing nonconforming measures that are excluded from coverage are listed for each Party in their respective Schedule to Annex I of the Agreement. Non-conforming measures adopted or maintained with respect to specified sectors, sub-sectors or activities that are excluded from coverage are listed for each Party in their respective Schedule to Annex II of the Agreement. Any existing non-conforming measure maintained by a Party at a local level of government is similarly excluded from coverage under Article 10.6.

Except for measures, sectors, sub-sectors, and activities listed on a Party's Schedules to Annex I or Annex II of the Agreement, neither Party may impose limitations on: the number of service suppliers; the total value of service transactions or assets; the total number of service operations or the total quantity of services output; or the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ; nor may either Party restrict or require a specific type of legal entity or joint venture through which a service supplier may supply a service. Similarly, unless a measure is listed on a Party's Schedules to Annex I or Annex II of the Agreement, "neither Party may require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service."

The Agreement provides for services liberalization beyond Australia's current commitments under the WTO General Agreement on Trade in Services (GATS). The Agreement will provide increased market access for U.S. service providers in areas such as advertising, asset management, audio/visual, computer and related services, education and training, energy, express delivery, professional services, and tourism.

Investment. Chapter 11 applies to measures adopted or maintained by a Party relating to investors of the other Party and covered investments. Investment is defined to mean every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include, inter alia: an enterprise; shares, stock, and other forms of equity participation in an enterprise; bonds, debentures, other debt instruments, and loans; futures, options, and other derivatives; intellectual property rights; licenses, permits, and similar rights conferred pursuant to domestic law; and other tangible or intangible property and related property rights, such as leases, mortgages, liens, and pledges.

Each Party shall accord national treatment and most-favored-nation treatment to investors of the other Party and to covered in-

vestments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. Each party shall permit all transfers relating to a covered investment to be made freely and without delay into or out of its territory. Such transfers include, inter alia: contributions to capital, including the initial contribution; profits, dividends, capital gains, and proceeds from the sale or liquidation of some or all of the covered investment; interest, royalty payments, management fees, and technical assistance and other fees; payments made under a contract, including a loan agreement; and payments arising out of a dispute. Neither Party may impose or enforce any performance requirement in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor, including, inter alia: requiring an investment to export a given level or percentage of goods or services; requiring an investment to achieve a given level or percentage of domestic content; or requiring an investment to transfer a particular technology or other proprietary knowledge to a person in the Party's territory.

Article 11.13 excludes specified non-conforming measures and any measure that a Party adopts or maintains with respect to specified sectors, sub-sectors, or activities, from certain of the obligations in Chapter 11. Existing non-conforming measures that are excluded from coverage are listed for each Party in their respective Schedule to Annex I of the Agreement. Non-conforming measures adopted or maintained with respect to specified sectors, sub-sectors or activities that are excluded from coverage are listed for each Party in their respective Schedule to Annex II of the Agreement. Any existing non-conforming measure maintained by a Party at a local level of government is similarly excluded from coverage under Article 11.13.

Current Australian law limits foreign investments in certain sectors, and subjects other proposed foreign investments to review if the value of the total assets involved in the investment exceeds $A50 million. Under Annex I of the Agreement, Australia will retain its foreign investment screening regime, but will increase the threshold for review to $A800 million for U.S. investors in most existing Australian businesses. The Agreement exempts U.S. investment in new business ventures in Australia from screening altogether. The Agreement does not provide a mechanism whereby an investor of a Party may submit an investment claim involving the other Party to arbitration. The Agreement does provide that, if a Party considers that there has been a change of circumstances affecting the settlement of investment disputes, the Party may request consultations with a view toward establishing appropriate investor-state arbitration procedures.

Telecommunications. Chapter 12 of the Agreement applies to measures affecting trade in telecommunication services. In general, Chapter 12 does not apply to any measure relating to broadcast or cable distribution of radio or television programming. Article 12.25 defines the term "public telecommunications service" as any telecommunications service that a Party requires, explicitly or in effect, to be offered to the public generally. Such services may include, inter alia, telephone and data transmission typically involving customer-supplied information between two or more points without

any end-to-end change in the form or content of the customer's information. The United States does not classify an "information service" as a public telecommunications service; accordingly, "information services" are not considered public communications services for purposes of the Agreement.[1]

Article 12.2 stipulates that each Party shall ensure that enterprises of the other Party have access to and use of any public telecommunications service, including leased circuits, offered in its territory or across its borders, on reasonable and non-discriminatory terms and conditions. Each Party shall also ensure that enterprises of the other Party may use public telecommunications services for the movement of information in its territory or across its borders and for access to information contained in databases or otherwise stored in machine-readable form in the territory of either Party or any WTO Member. Appropriate measures shall be maintained by each Party to prevent suppliers that, alone or together, are a major supplier, from engaging in anti-competitive practices.

Section C of Chapter 12 details additional obligations relating to major suppliers of public telecommunication services. A major supplier is defined as being a supplier of a public telecommunications service that has the ability to materially affect the terms of participation in the relevant market (with respect to price and supply) as a result of control over essential facilities or use of its position in the market. Major suppliers must accord suppliers of public telecommunications services of the other Party treatment no less favorable than such major suppliers accord in like circumstances to their subsidiaries, their affiliates, or non-affiliated service suppliers, regarding the availability, provisioning, rates, or quality of like public telecommunications services, as well as the availability of technical interfaces necessary for interconnection. Additional provisions call for major suppliers to provide, on a reasonable and non-discriminatory basis: interconnection for the facilities and equipment of suppliers of public telecommunications services of the other Party; provisioning and pricing of leased circuit services for suppliers of the other Party; physical co-location of equipment necessary for interconnection for suppliers of the other Party; and access to rights-of-way for suppliers of the other Party. Significantly, neither Party may prevent suppliers of public telecommunications services from choosing the technologies that they wish to use to supply their services, including packet-based services and commercial mobile wireless services, subject to requirements necessary to satisfy legitimate public policy interests.

Financial Services. Chapter 13 applies to measures adopted or maintained by a Party relating to: financial institutions of the other Party; investors and investments of such investors in financial institutions within the Party's territory; and cross-border trade in financial services. Financial services are defined to include any service of a financial nature, including insurance and insurance-related services, banking and other financial services, as well as services incidental or auxiliary to a service of a financial nature. The

[1] The term "information service" is defined at 47 U.S.C. § 153(2) to mean the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, including electronic publishing, but not to include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

provisions of Chapter 10 (Cross-Border Trade in Services) and Chapter 11 (Investment) apply to financial services only to the extent that such provisions are incorporated into Chapter 13.

The Agreement provides that each Party shall accord national treatment to investors and financial institutions of the other Party, as well as to investments of investors of the other Party in financial institutions, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments. It also provides that each Party shall accord most-favored-nation treatment to investors of the other Party, financial institutions of the other Party, investments of investors in financial institutions, and cross-border financial service suppliers of the other Party.

Article 13.9 excludes specified non-conforming measures and any measure that a Party adopts or maintains with respect to specified sectors, sub-sectors, or activities, from certain of the obligations in Chapter 13. Existing non-conforming measures that are excluded from coverage are listed for each Party in Section A of their respective Schedule to Annex III of the Agreement. Non-conforming measures approved or maintained with respect to specified sectors, sub-sectors, or activities that are excluded from coverage are listed for each Party in Section B of their respective Schedule to Annex III of the Agreement. Any existing non-conforming measure maintained by a Party at a local level of government is similarly excluded from coverage under Article 13.9. To the extent any non-conforming measure listed on a Party's Schedules to Annex I or Annex II of the Agreement is also covered by Chapter 13, such measure is also excluded from coverage under Article 13.9.

Except for measures, sectors, sub-sectors, and activities listed in Section A or Section B of a Party's Schedule to Annex III of the Agreement, a Party shall not impose limitations on, inter alia: the number of financial institutions; the total value of financial service transactions or assets; the total number of financial service operations or the total quantity of financial services output; or, the total number of natural persons that may be employed in a particular financial service sector. Similarly, a Party shall not restrict or require specific types of legal entity or joint venture through which a financial institution may supply a service.

Each Party shall permit, under terms and conditions that accord national treatment, cross-border financial service suppliers of the other Party to supply the services specified in Annex 13–A of the Agreement. With respect to the cross-border supply of insurance and insurance-related services, Australia listed a number of sectors under Annex 13–A, including, inter alia: maritime shipping and commercial aviation; goods in international transit; and reinsurance. With respect to the cross-border supply of banking and other financial services (excluding insurance), Australia listed a number of sectors under Annex 13–A, including, inter alia: the provision and transfer of financial information and financial data processing.

Competition-Related Matters. Chapter 14 deals with anticompetitive business conduct and competition law. The Agreement provides that each Party shall adopt or maintain measures to proscribe anticompetitive business conduct, and shall maintain an authority or authorities to enforce its national competition laws. Each Party shall ensure that any designated privately-owned monopoly

and any designated government monopoly: acts in a manner that is not inconsistent with the Party's obligations under the Agreement; acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market; provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and does not use its monopoly position to engage in anticompetitive practices in a non-monopolized market in its territory. Similarly, the Agreement provides that state enterprises should not operate in a manner that creates obstacles to trade and investment. The Parties shall cooperate in the enforcement of competition laws and policy, including through mutual assistance, notification, consultation, and exchange of information. In addition, the Parties shall cooperate to promote policies related to matters covered by Chapter 14 that foster free trade and investment and competitive markets.

Government Procurement. Australia is not a party to the WTO Agreement on Government Procurement. Thus, by including strong provisions on government procurement, the Agreement significantly opens Australia's government procurement market to U.S. suppliers of goods and services. Chapter 15 applies to "covered procurement," which is defined as the procurement of goods and services by any contractual means, above a specified threshold in value, by a specified procuring entity, and not otherwise excluded. Each Party and its procuring entities shall accord national treatment to the goods and services of the other Party and to the suppliers of the other Party offering goods and services. A procuring entity may not discriminate against a locally established supplier based upon that supplier's degree of foreign ownership or based upon the fact that goods or services offered by that supplier are goods or services of the other Party. The Agreement prohibits the use of offsets in any stage of a covered procurement. Offsets are defined as any conditions or undertakings that require use of domestic content, domestic suppliers, the licensing of technology, technology transfer, investment, counter-trade, or similar actions to encourage local development or to improve a Party's balance-of-payments accounts.

The Agreement requires each Party to promptly publish all laws, regulations, procedures and policy guidelines, as well as judicial decisions and administrative rulings of general application, related to covered procurement. Each Party shall ensure that suppliers may challenge and appeal procurement decisions before an impartial body. Each Party shall also ensure that criminal or administrative penalties exist to sanction bribery.

Electronic Commerce. In Chapter 16 the Parties acknowledge the value of electronic commerce, the importance of avoiding barriers to its use and development, and the applicability of WTO rules to measures affecting electronic commerce. Neither Party may impose customs duties, fees, or other charges on, or in connection with, the importation or exportation of digital products. Digital products are defined as the digitally encoded form of computer programs, text, video, images, sound recordings, and other products, regardless of whether they are fixed on a carrier medium or transmitted electronically. Digital products must receive national treatment and most-favored-nation treatment under the Agreement, except with

respect to: a Party's non-conforming measures that are identified in accordance with Articles 10.6, 11.13, or 13.9; subsidies or grants that a Party provides to a service or service supplier; services supplied in the exercise of governmental authority; and, except to the extent that the national treatment and most-favored nation obligations in Chapter 16 are inconsistent with Chapter 17 of the Agreement.

Intellectual Property Rights. Chapter 17 governs the protection of intellectual property rights, including, inter alia, patents, copyrights, and trademarks. The Agreement builds on the common standards that are already codified in numerous international agreements, including the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Importantly, the provisions in the Agreement reflect the significant technological and commercial developments that have occurred since TRIPS was negotiated, particularly with respect to the new and rapidly-evolving digital environment in which music, videos, software and text can be readily copied and transmitted over the Internet.

Article 17.1 provides that each Party shall have ratified or acceded to a number of international agreements by the time the Agreement enters into force, including the World Intellectual Property Organization (WIPO) Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty (1996), which provide the essential legal framework for digital products, e-commerce, and the transmission of protected material over the Internet. The United States and Australia have each ratified or acceded to each of the agreements identified in Article 17.1.2. With respect to Article 17.1.4, the United States has acceded to the two WIPO treaties, while Australia has not. Article 17.1.5 provides that each Party shall make its best efforts to comply with the provisions of the Patent Law Treaty (2000) and the Hague Agreement Concerning the International Registration of Industrial Designs (1999), subject to the enactment of laws necessary to apply those provisions in its territory. Neither the United States nor Australia has yet completed its respective process for ratifying those two international agreements.

The Agreement provides that each Party shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right, and that judicial authorities shall have the authority to order, inter alia, the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement. The Agreement further provides that judicial authorities shall have the authority to order the seizure of suspected infringing goods and any related materials and implements.

Each Party shall provide that in civil judicial proceedings, at the right holder's request, goods that have been found to be pirated or counterfeit shall be destroyed, except in exceptional circumstances. In addition, judicial authorities shall have the authority to order that materials and implements that were used to manufacture the pirated or counterfeit goods be destroyed without compensation. Judicial authorities shall also have the authority to order the infringer to disclose information about other persons involved in any aspect of the infringement and regarding the means of production or distribution. Each Party shall further provide that its judicial

authorities have the authority to fine or imprison a party to a litigation who fails to abide by valid orders issued by such authorities, and to impose sanctions on parties to litigation, their counsel, experts, or other persons who violate a judicial order for the protection of confidential business information produced or exchanged in a judicial proceeding.

In addition to civil proceedings, the Agreement provides that each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. In such cases, each Party shall provide penalties that include imprisonment as well as monetary fines sufficient to provide a deterrent to future infringements, consistent with a policy of removing the monetary incentive to the infringer. Judicial authorities shall have the authority to order the seizure, forfeiture, and destruction of counterfeit goods and the materials and equipment used to produce counterfeit goods. Each Party shall provide that its authorities may self-initiate criminal legal action without the need for a formal complaint from a private party or right holder. Similarly, each Party shall provide that its customs authorities may self-initiate border measures against imported merchandise suspected of infringing an intellectual property right, without the need for a specific formal complaint.

Labor. In Chapter 18 of the Agreement, the Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) (ILO Declaration). Under the Agreement, each Party must strive to ensure that such labor principles and the internationally recognized labor principles and rights set forth in article 18.7 of the Agreement are recognized and protected by its domestic law. Article 18.7 defines "internationally recognized labor principles and rights" to mean: "the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labor; labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." The Agreement recognizes the right of each Party to establish its own domestic labor standards, and to adopt or modify its domestic labor laws.

Under the Agreement, "a Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties." The Agreement recognizes that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters. Also, each Party recognizes that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or derogate from, such laws in a manner that weakens or reduces adherence to internationally recognized labor principles and rights. Each Party shall ensure that interested persons have access to administrative, quasi-judicial, judicial, or labor tribunals for the enforcement of its

domestic labor laws, and that such proceedings be fair, equitable, and transparent.

Article 18.4 provides that the Joint Committee (established under Chapter 21 of the Agreement to supervise the overall implementation of the Agreement) shall consider matters related to the operation of the labor provisions of Chapter 18, and may establish a Subcommittee on Labor Affairs to meet and discuss the operation of Chapter 18. The Agreement also establishes a consultative mechanism whereby the Parties may cooperate on labor matters and explore ways to further advance labor standards on a bilateral, regional and multilateral basis. In addition, the Agreement provides for consultations on any matter arising under Chapter 18 of the Agreement. If bilateral consultations do not resolve the matter, then the Subcommittee on Labor Affairs shall be convened to endeavor to resolve the matter. If a Party considers that the other Party is not effectively enforcing its domestic labor laws, through a sustained or recurring course of action or inaction, in a manner that affects trade between the Parties, then that Party may initiate dispute settlement procedures under Chapter 21 of the Agreement.

If pursuant to the dispute settlement procedures of Chapter 21, a panel determines that a Party has not conformed with its obligations to effectively enforce its domestic labor laws, and the Parties are unable to agree on a resolution, or there is an agreed resolution but the complaining Party considers that the other Party has failed to observe the terms of that agreement, then the complaining Party may suspend the application to the other Party of benefits of equivalent effect. The Party complained against may choose to pay an annual monetary assessment in lieu of the suspension of benefits. If the Party complained against fails to pay the monetary assessment, the complaining Party may then suspend the application to the other Party of benefits of equivalent effect.

Environment. Chapter 19 of the Agreement provides that each Party shall ensure that its domestic laws provide for and encourage high levels of environmental protection, while recognizing the right of each Party to establish its own levels of environmental protection and to adopt or modify its domestic environmental laws and policies accordingly. Article 19.9 defines "environmental law" to mean any statute or regulation of a Party, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through: the prevention, abatement, or control of the release of pollutants or environmental contaminants; the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes; or, the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially-protected natural areas.

Under the Agreement, "a Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties." The Agreement recognizes that "each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters." Also, each Party recognizes that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive

or derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with the other Party. Each Party shall ensure that interested persons have access to judicial, quasi-judicial, or administrative proceedings for the enforcement of its domestic environmental laws, and that such proceedings are fair, equitable, and transparent.

Article 19.5 provides that the Joint Committee (established under Chapter 21 of the Agreement to supervise the overall implementation of the Agreement) shall consider matters related to the operation of the environmental provisions of Chapter 19, and may establish a Subcommittee on Environmental Affairs to meet and discuss the operation of the Chapter. In the Agreement, the Parties "recognize the importance of strengthening capacity to protect the environment and to promote sustainable development in concert with strengthening bilateral trade and investment relations." The Parties acknowledge the importance of ongoing joint bilateral, regional, and multilateral environmental activities, and agree to negotiate a United States-Australia Joint Statement on Environmental Cooperation to explore ways to support these ongoing activities.

In addition, the Agreement provides for consultations on any matter arising under Chapter 19 of the Agreement. If bilateral consultations do not resolve the matter, then a Subcommittee on Environmental Affairs shall be convened under Chapter 21 to endeavor to resolve the matter. If a Party considers that the other Party is not effectively enforcing its domestic labor laws, through a sustained or recurring course of action or inaction, in a manner that affects trade between the Parties, then that Party may initiate dispute settlement procedures under Chapter 21 of the Agreement.

If, pursuant to the dispute settlement procedures of Chapter 21, a panel determines that a Party has not conformed with its obligations to effectively enforce its domestic environmental laws, and the Parties are unable to agree on a resolution, or there is an agreed resolution but the complaining Party considers that the other Party has failed to observe the terms of that agreement, then the complaining Party may suspend the application to the other Party of benefits of equivalent effect. The Party complained against may choose to pay an annual monetary assessment in lieu of the suspension of benefits. If the Party complained against fails to pay the monetary assessment, the complaining Party may then suspend the application to the other Party of benefits of equivalent effect.

Transparency. Chapter 20 provides that each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application regarding any matter covered by the Agreement are promptly published or otherwise made available so as to enable interested persons and the other Party to become acquainted with them. To the extent possible, each Party shall publish in advance any such laws, regulations, procedures, and administrative rulings that it proposes to adopt, and provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures. To the maximum extent possible, each Party shall notify the other Party of any proposed or actual measure that might materially affect the operation of the Agreement, and on request of the other Party, a Party shall promptly provide

information and respond to questions pertaining to any actual or proposed measure that the other Party considers might affect the operation of the Agreement. Wherever possible, each Party shall ensure that persons of the other Party directly affected by a proceeding are provided reasonable notice when a proceeding is initiated, and afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action. Moreover, each Party shall maintain impartial and independent judicial, quasi-judicial, or administrative tribunals or procedures to promptly review and, where warranted, correct final administrative actions regarding matters covered by the Agreement.

Institutional Arrangements and Dispute Settlement. Chapter 21 establishes a Joint Committee to supervise the implementation of the Agreement, as well as a dispute settlement mechanism to address disputes between the Parties. The responsibilities of the Joint Committee include, inter alia: to review the general functioning of the Agreement; to facilitate the avoidance and settlement of disputes arising under the Agreement; to consider and adopt any amendment to the Agreement, subject to the completion of necessary domestic legal procedures by each Party; to issue interpretations of the Agreement, as appropriate; and to take such other action as the Parties may agree.

The dispute settlement provisions apply with respect to the avoidance or settlement of all disputes over the consistency of a measure with the Agreement or the fulfillment of a Party's obligation under the Agreement, unless otherwise provided in the Agreement. Article 21.5 provides that either Party may request consultations with respect to any matter under the Agreement. If consultations fail to resolve the matter within 60 days (or 20 days if the matter concerns perishable goods), then either Party may refer the matter to the Joint Committee for resolution. If the Joint Committee is unable to resolve the matter within 60 days (or 30 days if the matter concerns perishable goods), then the complaining Party may refer the matter to a dispute settlement panel. If a dispute settlement panel issues a report finding that a Party has not conformed with its obligations or has nullified or impaired a benefit to the other Party under the Agreement, the Parties shall try to agree on a resolution of the dispute. Whenever possible, the resolution shall be to eliminate the non-conformity or the nullification or impairment; however, if the parties are unable to agree on such elimination, resolution of the dispute may include mutually acceptable compensation, the suspension of benefits of equivalent effect, or an annual monetary assessment.

General Provisions and Exceptions. For the purposes of Chapters 2 through 8 (i.e., National Treatment and Market Access for Goods, Agriculture, Textiles and Apparel, Rules of Origin, Customs Administration, Sanitary and Phytosanitary Measures, and Technical Barriers to Trade), the Agreement incorporates by reference the general exceptions contained in Article XX of GATT 1994 and its interpretive notes. The Parties understand that the measures referred to in Article XX(b) include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.

For the purposes of Chapters 10, 12, and 16 (i.e., Cross-Border Trade in Services, Telecommunications, and Electronic Commerce), the Agreement incorporates by reference the general exceptions contained in GATS Article XIV, including its footnotes. The Parties understand that the measures referred to in Article XIV(b) include environmental measures necessary to protect human, animal, or plant life or health. The Agreement also includes reservations regarding: essential security interests; taxation; and disclosure of confidential information. The Parties also commit to cooperate in seeking to eliminate bribery and corruption and to promote transparency in international trade.

Final Provisions. The Agreement provides for the accession of third countries to the Agreement, an amendment process, and entry into force and termination of the Agreement. Article 23.4 provides that the Agreement will enter into force 60 days after the United States and Australia exchange written notifications certifying that they have completed their respective necessary internal requirements (or on such other date as the Parties may agree). The exchange of notifications is a necessary precondition for the Agreement's entry into force. The Agreement's entry into force is thus conditioned on a determination by the President that Australia has taken measures necessary to comply with those of its obligations that are to take effect at the time the Agreement enters into force. A Party may terminate the Agreement by written notification to the other Party. Such termination shall take effect 6 months after the date of the notification.

E. General Description of the Bill To Implement the United States-Australia Free Trade Agreement

Sec. 1. Short Title; Table of Contents

This section provides that the short title of the legislation implementing the United States-Australia Free Trade Agreement (the Agreement) is the "United States-Australia Free Trade Agreement Implementation Act." Section 1 also provides the table of contents for the implementing legislation.

Sec. 2. Purposes

This section provides that the purposes of the implementing legislation are: to approve and implement the Agreement; to strengthen and develop economic relations between the United States and Australia; to establish free trade between the United States and Australia through the reduction and elimination of barriers to trade in goods and services and to investment; and to lay the foundation for further cooperation to expand and enhance the benefits of the Agreement.

Sec. 3. Definitions

This section defines the terms "Agreement," "HTS," and "Textile or Apparel Good," for purposes of the implementing legislation.

TITLE I—APPROVAL OF, AND GENERAL PROVISIONS RELATING TO, THE AGREEMENT

Sec. 101. Approval and Entry Into Force of the Agreement

This section provides Congressional approval for the Agreement and its accompanying Statement of Administrative Action. Section 101 also authorizes the President to exchange notes with the Government of Australia to provide for entry into force of the Agreement on or after January 1, 2005. The exchange of notes is conditioned on a determination by the President that Australia has taken measures necessary to comply with those of its obligations that take effect at the time the Agreement enters into force.

Sec. 102. Relationship of the Agreement to United States and State Law

This section establishes the relationship between the Agreement and U.S. law. It clarifies that no provision of the Agreement will be given effect under domestic law if inconsistent with Federal law; this would include provisions of Federal law enacted or amended by the Act.

Section 102 also provides that no State law may be declared invalid on the ground that the law is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law invalid. This section precludes any private right of action or remedy against the Federal Government, or a State government, based on the provisions of the Agreement.

Sec. 103. Implementing Actions in Anticipation of Entry Into Force and Initial Regulations

This section authorizes the President to proclaim such actions, and other appropriate officers of the United States Government to issue such regulations, as may be necessary to ensure that provisions of the implementing legislation are appropriately implemented by the date the Agreement enters into force if such provisions are required to be implemented by that date. Section 103 also provides that, with respect to any action proclaimed by the President that is not subject to the consultation and layover provisions contained in section 104, such action may not take effect before the 15th day after the date on which the text of the proclamation is published in the Federal Register. The 15-day restriction is waived, however, to the extent it would prevent an action from taking effect on the date the Agreement enters into force. Section 103 also specifies that initial regulations necessary or appropriate to carry out the provisions of the implementing legislation shall, to the maximum extent feasible, be issued within 1 year after the date on which the Agreement enters into force.

Sec. 104. Consultation and Layover Provisions for, and Effective Date of, Proclaimed Actions

This section sets forth consultation and layover steps that must precede the President's implementation of any tariff modification, continuation, or additional duty, by proclamation. Under the consultation and layover provisions, the President must obtain the advice of the relevant private sector advisory committees and the U.S. International Trade Commission (ITC) on a proposed action. The

President must submit a report to the Senate Committee on Finance and the House Committee on Ways and Means setting forth the action proposed to be proclaimed, the reasons therefore, and the advice of the private sector advisors and the ITC. The Act sets aside a 60-day period following the date of transmittal of the report for the Committees to consult with the President on the proposed action.

Sec. 105. Administration of Dispute Settlement Proceedings

This section authorizes the President to establish or designate within the Department of Commerce an office responsible for providing administrative assistance to dispute settlement panels established under Chapter 21 of the Agreement. This section also authorizes the appropriation of funds to support this office.

Sec. 106. Effective Dates; Effect of Termination

This section provides the dates that certain provisions of the implementing legislation will go into effect. This section also provides that the provisions of the implementing legislation will no longer be in effect on the date on which the Agreement ceases to be in force.

TITLE II—CUSTOMS PROVISIONS

Sec. 201. Tariff Modifications

Section 201(a) authorizes the President to implement by proclamation the continuation, modification, or addition of tariffs, or the continuation of duty-free or excise treatment, as the President determines to be necessary or appropriate, to carry out Articles 2.3, 2.5, and 2.6, and Annex 2–B, of the Agreement.

Section 201(b) authorizes the President, subject to the consultation and layover provisions of section 104 of the bill, to proclaim any continuation, modification, or addition of tariffs, or the continuation of duty-free or excise treatment, as the President determines to be necessary or appropriate, to maintain the general level of reciprocal and mutually advantageous concessions with respect to Australia provided by the Agreement.

Sec. 202. Additional Duties on Certain Agricultural Goods

Section 202 implements three separate safeguard mechanisms for agricultural goods; specifically: (1) a price-based horticultural safeguard; (2) a quantity-based beef safeguard; and (3) a price-based beef safeguard. Section 202(a) contains general provisions applicable to each of the safeguards.

Section 202(b) implements the price-based horticulture safeguard, under which the United States shall assess a duty on imports of certain Australian horticulture goods if import prices for specific shipments fall below specified levels. The rate of additional duty under the safeguard increases as the difference increases between the unit import price of a shipment and the trigger price. The trigger price reflects historic unit import values for the relevant horticulture good. The assessment of additional duty under this provision terminates on the date on which duty-free treatment must be provided to that good under the Schedule of the United States to Annex 2–B of the Agreement. Products listed in Annex

3–A of the Agreement are covered by the horticulture safeguard provision, including: dried onions and garlic; processed tomato products; canned asparagus; canned pears, apricots, peaches, and fruit mixtures; and orange and grape juices.

Section 202(c) implements the transitional quantity-based beef safeguard, which is available during the phase-out of over-quota tariffs on certain beef products (i.e., years 9 through 18 of the Agreement). The safeguard applies when the volume of covered imports exceeds 110 percent of the preferential tariff-rate quota (TRQ) volume for the specific year. The added duty under this safeguard is equal to 75 percent of the difference between the normal trade relation/most-favored-nation (NTR/MFN) duty rate and the applied over-quota duty rate for that year. The safeguard duty remains in effect until the end of the calendar year. The U.S. Trade Representative (USTR) may waive application of the transitional quantity-based safeguard only if the USTR determines that extraordinary market conditions demonstrate that the waiver would be in the national interest of the United States. It is anticipated that such exceptional circumstances will rarely, if ever, materialize. The USTR is required to notify the Senate Finance and House Ways and Means Committees promptly after receipt of a request for a waiver from an agency, Member of Congress or interested person, and to consult with the appropriate private sector advisory committees and the Senate Finance and House Ways and Means Committees regarding the reasons supporting a determination to grant a waiver and the proposed scope and duration of any waiver prior to making a determination under this subsection.

Section 202(d) implements the permanent price-based beef safeguard, which is available after the over-quota tariff has been phased out (i.e., beginning in year 19 of the Agreement). When the price of beef in the United States falls below a calculated trigger price, imports of beef products from Australia in excess of specified quota levels are subject to additional duties under this safeguard. The safeguard trigger is based on a 24-month rolling average of the U.S. Wholesale Select Box Beef index price. For each of the first three quarters of the year, the safeguard is triggered when the average index price for any 2 months in a given quarter falls below 6.5 percent of the 24-month average index price. The safeguard is also triggered if the average index beef price falls 6.5 percent below the 24-month rolling average in the months of September, October, or November. If the safeguard is triggered during the first three-quarters of the year, the additional duty is applied in the following quarter. If the safeguard is triggered in September, October, or November, the additional duty is applied for the remainder of the year. The additional duty to be applied is equal to 65 percent of the applied NTR/MFN tariff rate. This price-based safeguard can only be imposed on imports of Australian beef that exceed the Agreement's quota amount (i.e., 70,000 metric tons in the 19th year, an amount that will grow annually at 0.6 percent) plus Australia's country-specific quota established under the World Trade Organization (currently set at 378,214 metric tons). The USTR may waive application of the permanent price-based safeguard only if the USTR determines that extraordinary market conditions demonstrate that the waiver would be in the national interest of the United States. It is anticipated that such exceptional circumstances

will rarely, if ever, materialize. The USTR is required to notify the Senate Finance and House Ways and Means Committees promptly after receipt of a request for a waiver from an agency, Member of Congress or interested person, and to consult with the appropriate private sector advisory committees and the Senate Finance and House Ways and Means Committees regarding the reasons supporting a determination to grant a waiver and the proposed scope and duration of any waiver prior to making a determination under this subsection.

Sec. 203. Rules of Origin

This section implements the general rules of origin set forth in Chapter 5 of the Agreement. Under these rules, there are several ways for a good imported from Australia to qualify as an originating good and therefore be eligible for preferential tariff treatment, according to the terms of the Agreement, when the good is imported into the United States.

First, a good is an originating good if it is wholly obtained or produced entirely in the territory of Australia, the United States, or both. Second, a good is an originating good if those materials used to produce the good that are not themselves originating goods are transformed in such a way as to cause their tariff classification to change or meet other requirements, as specified in Annex 4–A or Annex 5–A of the Agreement.

Third, a good is an originating good if it is produced entirely in the territory of Australia, the United States, or both, exclusively from materials that satisfy the first two rules of origin above. Finally, the remainder of section 203 sets forth specific rules for determining whether a good qualifies as an originating good under the Agreement. Section 203(c) provides that, with certain exceptions, a good is not disqualified as an originating good if it contains de minimis quantities of non-originating materials that do not undergo a tariff transformation. Section 203(e) implements provisions in Annex 5–A of the Agreement that require certain goods to have at least a specified percentage of regional value content to qualify as originating goods, including a special rule for certain automotive goods. Section 203(f) addresses the valuation of materials, while section 203(g) addresses the treatment of accessories, spare parts, or tools. Section 203(h) addresses claims for preferential treatment of fungible goods and materials, while section 203(i) addresses the treatment of packaging materials and containers for retail sale.

Additional provisions in section 203 address the treatment of: packing materials and containers for shipment; indirect materials; third country operations; and textile and apparel goods classifiable as goods put up in sets. Section 203(n) provides definitions of terms applicable to the rules of origin, while section 203(o) authorizes the President to modify certain of the Agreement's specific rules of origin by proclamation, subject to the consultation and layover provisions of section 104 of the implementing legislation.

Sec. 204. Customs User Fees

This section amends Section 13031(b) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c(b)) to provide for the immediate elimination of the merchandise processing fee for goods qualifying for preferential treatment under the terms of the

United States-Australia Free Trade Agreement. Processing of goods under the Agreement will be financed by money from the General Fund of the Treasury.

Sec. 205. Disclosure of Incorrect Information

This section provides that the United States may not impose a penalty on an importer who makes an invalid claim for preferential tariff treatment under the Agreement if, after discovering that the claim is invalid, the importer promptly and voluntarily corrects the claim and pays any duty owing, in accordance with regulations issued by the Secretary of the Treasury. Such regulations shall afford at least 1 year within which an importer may correct an invalid claim for preferential tariff treatment.

Sec. 206. Enforcement Relating to Trade in Textile and Apparel Goods

This section authorizes the President to apply anti-circumvention provisions concerning trade in textile and apparel goods. The Secretary of the Treasury may request that the Government of Australia conduct a verification to determine that an exporter or producer in Australia is complying with applicable customs laws, regulations, procedures, requirements, or practices affecting trade in textile or apparel goods, or to determine that a claim for preferential treatment of textile or apparel goods is consistent with the terms of the Agreement. Section 206 authorizes the President to order the suspension of liquidation of entries from exporters or producers in Australia that are subject to a verification, and the suspension of liquidation of any entry that is subject to verification. If the Secretary of the Treasury determines that information obtained within 12 months of a request for verification is insufficient to make a determination, section 206 authorizes the President to direct the Secretary to: publish the name and address of the person subject to verification; deny preferential tariff treatment under the Agreement to any textile or apparel good exported or produced by the person subject to verification; deny preferential tariff treatment under the Agreement to the entry subject to verification; deny entry into the United States of any textile or apparel good exported or produced by the person subject to verification; or deny entry into the United States of the entry subject to verification.

Sec. 207. Regulations

This section requires the Secretary of the Treasury to prescribe such regulations as may be necessary to carry out the provisions dealing with rules of origin, customs user fees, and the President's proclamation authority to amend certain of the Agreement's specific rules of origin.

TITLE III—RELIEF FROM IMPORTS

Sec. 301. Definitions

This section defines the terms "Australian article" and "Australian textile or apparel article" for purposes of the general bilateral safeguard provision contained in Chapter 9 of the Agreement and the textile and apparel bilateral safeguard provision contained in Chapter 4 of the Agreement. The term "Australian article" is de-

fined as an article that qualifies as an originating good under section 203(b) of the implementing legislation. The term "Australian textile or apparel article" is defined as an Australian article that is listed in the Annex to the Agreement on Textiles and Clothing referred to in section 101(d)(4) of the Uruguay Round Agreements Act (19 U.S.C. § 3511(d)(4)). Section 301 also defines the term "Commission" as the U.S. International Trade Commission.

Subtitle A. Relief From Imports Benefiting From the Agreement

Sec. 311. Commencing of Action for Relief

This section requires the filing of a petition with the Commission by an entity that is representative of an industry in order to commence a bilateral safeguard investigation. Section 311(a) permits a petitioning entity to request provisional relief as if the petition had been filed under section 202(a) of the Trade Act of 1974 (19 U.S.C. § 2252(a)). Any request for provisional relief shall include an allegation of "critical circumstances" in the petition.

Section 311(b) provides that, upon the filing of a petition, the Commission shall promptly initiate an investigation to determine whether, as a result of the reduction or elimination of a duty provided for under the Agreement, an Australian article is being imported into the United States in such increased quantities, and under such conditions, that imports of the Australian article constitute a substantial cause of serious injury, or threat of serious injury, to the domestic industry producing an article that is like, or directly competitive with, the imported article.

Section 311(c) applies to any bilateral safeguard initiated under the Agreement certain provisions, both substantive and procedural, contained in subsections (b), (c), (d), and (i) of section 202 of the Trade Act of 1974 (19 U.S.C. § 2252(b), (c), (d), and (i)) that apply to global safeguard investigations. These provisions include, *inter alia*, the requirement that the Commission publish notice of the commencement of an investigation; the requirement that the Commission hold a public hearing at which interested parties and consumers have the right to be present, to present evidence, and to respond to the presentations of other parties and consumers; the factors to be taken into account by the Commission in making its determinations; and authorization for the Commission to promulgate regulations to provide access to confidential business information under protective order to authorized representatives of interested parties in an investigation.

Section 311(d) precludes the initiation of an investigation with respect to any Australian article for which import relief has already been provided under this bilateral safeguard provision.

Sec. 312. Commission Action on Petition

This section establishes deadlines for Commission determinations following the initiation of a bilateral safeguard investigation. Section 312(b) applies certain statutory provisions that address an equally divided vote by the Commission in a global safeguard investigation under section 202 of the Trade Act of 1974 (19 U.S.C. § 2252) to Commission determinations under this section. If the Commission renders an affirmative injury determination, or a determination that the President may consider to be an affirmative

determination in the event of a divided vote by the Commission, section 312(c) requires that the Commission also find and recommend to the President the amount of import relief that is necessary to remedy or prevent the injury found by the Commission and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition. Section 312(d) specifies the information to be included by the Commission in a report to the President regarding its determination. Upon submitting the requisite report to the President, section 312(e) requires the Commission to promptly make public such report, except for confidential information contained in the report.

Sec. 313. Provision of Relief

This section directs the President, not later than 30 days after receiving the report from the Commission, to provide relief from imports of the article subject to an affirmative determination by the Commission, or a determination that the President considers to be an affirmative determination in the event of a divided vote by the Commission, to the extent that the President determines necessary to remedy or prevent the injury and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition. Under section 313(b), the President is not required to provide import relief if the President determines that the provision of the import relief will not provide greater economic and social benefits than costs.

Section 313(c) specifies the nature of the import relief that the President may impose, to include: the suspension of any further reduction in duty provided for under Annex 2–B of the Agreement; and an increase in the rate of duty imposed on such article to a level that does not exceed the lesser of (1) the normal trade relation/most-favored-nation (NTR/MFN) duty rate imposed on like articles at the time the import relief is provided, or (2) the NTR/MFN duty rate imposed on like articles on the day before the date on which the Agreement enters into force. In the case of a duty applied on a seasonal basis to an article, the President may increase the rate of duty imposed on such article to a level that does not exceed the lesser of (1) the NTR/MFN duty rate imposed on like articles for the immediately preceding corresponding season, or (2) the NTR/MFN duty rate imposed on like articles on the day before the date on which the Agreement enters into force. Section 313(c) also requires that, if the period for which import relief is provided exceeds 1 year, the President shall provide for the progressive liberalization of such relief at regular intervals during the period of its application.

Section 313(d) provides that the initial period for import relief in a bilateral safeguard action shall not exceed 2 years. The President is authorized to extend the effective period of such relief under section 313(d) if the President determines that import relief continues to be necessary to remedy or prevent serious injury and to facilitate adjustment to import competition, and that there is evidence that the domestic industry is making a positive adjustment to import competition. Before the President can extend the period of import relief, the President must first receive a report from the Commission under section 313(d)(2)(B) containing an affirmative determination, or a determination that the President may consider to be

an affirmative determination in the event of a divided vote by the Commission, that import relief continues to be necessary to remedy or prevent serious injury and that the domestic industry is making a positive adjustment to import competition. Section 313(d) also provides that the total period for import relief in a bilateral safeguard action, including any extension of such import relief, shall not exceed 4 years.

Section 313(e) provides that upon termination of import relief under the bilateral safeguard provision, the rate of duty to be applied in the calendar year of termination is the rate of duty that would have been in effect 1 year after the provision of import relief according to the Schedule of the United States to Annex 2–B of the Agreement. The rate of duty to be applied thereafter shall be, at the discretion of the President, either (1) the applicable NTR/MFN duty rate for that article set out in the Schedule of the United States to Annex 2–B of the Agreement, or (2) the rate of duty resulting from the elimination of the tariff in equal annual stages ending on the date set out in the Schedule of the United States to Annex 2–B of the Agreement for the elimination of the tariff.

Section 313(f) provides that no import relief may be provided under the bilateral safeguard mechanism on any article that previously has been subject to import relief under the bilateral safeguard, or is subject to relief under the textile and apparel safeguard under subtitle B of title III of the implementing legislation, or is subject to either the horticulture safeguard, the transitional quantity-based beef safeguard, or the permanent price-based beef safeguard under subsections (b), (c), and (d) of section 202 of the implementing legislation.

Sec. 314. Termination of Relief Authority

This section provides that the President's authority to impose import relief under the bilateral safeguard mechanism ends after the date that is 10 years after the date on which the Agreement enters into force, or if the period for tariff elimination for an article subject to import relief is greater than 10 years, after the date on which such period ends. Section 314(c) provides that the President may provide import relief under the bilateral safeguard mechanism after the foregoing termination dates if the President determines that the Government of Australia has consented to the imposition of such import relief.

Sec. 315. Compensation Authority

This section authorizes the President, under section 123 of the Trade Act of 1974 (19 U.S.C. § 2133), to grant Australia new concessions as compensation for the imposition of import relief in a bilateral safeguard investigation, in order to maintain the general level of reciprocal concessions.

Sec. 316. Confidential Business Information

This section applies the same procedures for the treatment and release of confidential business information by the Commission in a global safeguard investigation under Chapter 1 of Title II of the Trade Act of 1974 (19 U.S.C. § 2251 et seq.) to bilateral safeguard investigations under subtitle A of Title III of the implementing legislation.

Subtitle B. Textile and Apparel Safeguard Measures

Sec. 321. Commencement of Action for Relief

This section requires the filing of a request with the President by an interested party in order to commence action for relief under the textile and apparel safeguard provision. Upon the filing of a request, the President shall review the request to determine, from the information presented in the request, whether to commence consideration of the request. Section 321(b) provides that an interested party may seek provisional relief by including in its request an allegation that critical circumstances exist such that delay in the provision of relief would cause damage that would be difficult to repair. Section 321(c) provides that, if the President determines that the request provides the information necessary for the request to be considered, the President shall cause to be published in the Federal Register a notice of commencement of consideration of the request, and notice seeking public comments regarding the request. The notice shall include a summary of the request and the dates by which comments and rebuttals must be received.

The Committee notes that our regulatory process should be administered in an open and transparent manner that can serve as a model for our trading partners. For example, in addition to publishing a summary of a request for safeguard relief, the Committee notes that the President plans to make available the full text of the request on the website of the International Trade Administration of the U.S. Department of Commerce, subject to the protection of business confidential information. The Committee encourages this and similar efforts to enhance government transparency. In particular, the Committee encourages the President to issue regulations on procedures for: requesting a textile and apparel safeguard measure; making a determination under section 322(a) of the implementing legislation; providing safeguard relief under section 322(b) and (c) of the implementing legislation; and extending safeguard relief under section 323(b) of the implementing legislation.

Sec. 322. Determination and Provision of Relief

This section provides that following the President's commencement of consideration of a request, the President shall determine whether, as a result of the reduction or elimination of a duty under the Agreement, an Australian textile or apparel article is being imported into the United States in such increased quantities and under such conditions as to cause serious damage, or actual threat thereof, to a domestic industry producing an article that is like, or directly competitive with, the imported article.

Section 322(a) identifies certain economic factors that the President shall examine in making a determination, including changes in the domestic industry's output, productivity, capacity utilization, inventories, market share, exports, wages, employment, domestic prices, profits, and investment, none of which is necessarily decisive. Section 322(a) also provides that the President shall not consider changes in technology or consumer preference as factors supporting a determination of serious damage or actual threat thereof.

Section 322(b) authorizes the President, in the event of an affirmative determination of serious damage or actual threat thereof, to provide import relief to the extent that the President determines

necessary to remedy or prevent the serious damage and to facilitate adjustment by the domestic industry to import competition. Section 322(b) also specifies the nature of the import relief that the President may impose, to consist of an increase in the rate of duty imposed on the article to a level that does not exceed the lesser of (1) the NTR/MFN duty rate imposed on like articles at the time the import relief is provided, or (2) the NTR/MFN duty rate imposed on like articles on the day before the date on which the Agreement enters into force.

Section 322(c) identifies the basis and procedures by which the President may impose provisional import relief under the textile and apparel safeguard mechanism. Within 60 days of receiving a request for provisional import relief based upon an allegation of critical circumstances, the President shall determine, on the basis of available information, whether there is clear evidence that imports from Australia have increased as the result of the reduction or elimination of a customs duty under the Agreement, and whether such imports are causing serious damage, or actual threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, and whether delay in providing import relief under the textile and apparel safeguard mechanism would cause damage to the domestic industry that would be difficult to repair. If the President's determinations regarding provisional relief are affirmative, the President shall within 30 days determine the extent of provisional relief that is necessary to remedy or prevent the serious damage. Provisional relief shall not be provided for more than 200 days, and shall be comprised of an increase in the rate of duty imposed on the article to a level that does not exceed the lesser of (1) the NTR/MFN duty rate imposed on like articles at the time the import relief is provided, or (2) the NTR/MFN duty rate imposed on like articles on the day before the date on which the Agreement enters into force. The President shall also order the suspension of liquidation of all imports subject to the provisional relief. Any provisional relief shall terminate on the day on which the President makes a negative final determination regarding serious damage or actual threat thereof by reason of imports of such article, or the President imposes final import relief under the textile and apparel safeguard mechanism, or a decision by the President not to take any action under the textile and apparel safeguard becomes final, or the President determines that, because of changed circumstances, such relief is no longer warranted. Any suspension of liquidation also terminates on the day on which provisional relief is terminated. If there is a difference between the level of provisional import relief and the final import relief imposed by the President, entries subject to the provisional import relief shall be liquidated at whichever of such rates of duty is lower. If the President does not provide final import relief, imported articles that were subject to provisional relief shall be liquidated at the rate of duty that applied before the provisional relief was imposed.

Sec. 323. Period of Relief

This section provides that the initial period for import relief in a textile and apparel safeguard action, including any provisional relief, shall not exceed 2 years. The President is authorized to ex-

tend the effective period of such relief under section 323(b) if the President determines that import relief continues to be necessary to remedy or prevent serious damage and to facilitate adjustment by the domestic industry to import competition, and that there is evidence that the domestic industry is making a positive adjustment to import competition. Section 323(b) also provides that the total period for import relief in a textile and apparel safeguard action, including any extension of such import relief, may not exceed 4 years.

Sec. 324. Articles Exempt From Relief

This section precludes the President from providing import relief under the textile and apparel safeguard mechanism with respect to any article to which import relief has already been provided under subtitle B of Title III of the implementing legislation, or any article that is subject to import relief under either the bilateral safeguard mechanism under subtitle A of Title III of the implementing legislation or the global safeguard mechanism set forth in Chapter 1 of Title II of the Trade Act of 1974 (19 U.S.C. § 2251 et seq.).

Sec. 325. Rate After Termination of Import Relief

This section provides that the duty rate applicable to a textile or apparel article after termination of the import relief shall be the duty rate that would have been in effect, but for the provision of such import relief, on the date the relief terminates.

Sec. 326. Termination of Relief Authority

This section provides that the President's authority to provide import relief under the textile and apparel safeguard mechanism terminates after the date that is 10 years after the date on which duties on the article are eliminated pursuant to the Agreement.

Sec. 327. Compensation Authority

This section authorizes the President, under section 123 of the Trade Act of 1974 (19 U.S.C. § 2133), to grant Australia new concessions as compensation for the imposition of import relief in a textile and apparel safeguard proceeding, in order to maintain the general level of reciprocal concessions.

Sec. 328. Business Confidential Information

This section precludes the President from releasing information that the President considers to be confidential business information unless the party submitting the confidential business information had notice, at the time of submission, that such information would be released by the President, or such party subsequently consents to the release of the information. This section also provides that, to the extent business confidential information is provided, a non-confidential version of the information shall also be provided in which the business confidential information is summarized or, if necessary, deleted.

Subtitle C. Cases Under Title II of the Trade Act of 1974

Sec. 331. Findings and Action on Goods From Australia

This section authorizes the President, in granting global import relief under Chapter 1 of Title II of the Trade Act of 1974 (19 U.S.C. § 2251 et seq.), to exercise the discretion to exclude imports from Australia from such global import relief when certain conditions are present.

TITLE IV—PROCUREMENT

Sec. 401. Eligible Products

This section amends section 308(4)(A) of the Trade Agreements Act of 1979 (19 U.S.C. § 2518(4)(A)) to implement the government procurement provisions of the Agreement.

F. VOTE OF THE COMMITTEE IN REPORTING THE BILL

In compliance with section 133 of the Legislative Reorganization Act of 1946, the Committee states that on July 14, 2004, S. 2610 was ordered favorably reported, without amendment, by a recorded vote of 17 ayes and 4 nays, a quorum being present. Ayes: Grassley, Hatch, Nickles, Lott, Kyl, Thomas, Santorum, Frist, Smith, Bunning, Baucus (proxy), Breaux, Graham, Jeffords, Bingaman, Kerry (proxy), Lincoln. Nays: Snowe, Rockefeller, Daschle, Conrad (proxy).

II. BUDGETARY IMPACT OF THE BILL

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 30, 2004.

Hon. CHARLES E. GRASSLEY,
Chairman, Committee on Finance,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2610, a bill to implement the United States-Australia Free Trade Agreement.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Annabelle Bartsch.

Sincerely,

ELIZABETH M. ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

S. 2610—A bill to implement the United States-Australia Free Trade Agreement

Summary: S. 2610 would approve the free trade agreement (FTA) between the government of the United States and the government of Australia that was entered into on May 18, 2004. It would provide for tariff reductions and other changes in law related to implementation of the agreement.

The Congressional Budget Office estimates that enacting the bill would reduce revenues by $29 million in 2005, by $293 million over

the 2005–2009 period, and by $884 million over the 2005–2014 period, net of income and payroll tax offsets. The bill also would increase direct spending by less than $500,000 in 2005. Implementing the bill would cost less than $500,000 in each year, subject to appropriation of the necessary amounts.

CBO has determined that S. 2610 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 2610 over the 2005–2014 period is shown in the following table.

	By fiscal year, in millions of dollars—									
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
CHANGES IN REVENUES										
Estimated revenues	−29	−47	−58	−71	−89	−101	−109	−118	−127	−137
CHANGES IN DIRECT SPENDING [1]										
Estimated budget authority	*	0	0	0	0	0	0	0	0	0
Estimated outlays	*	0	0	0	0	0	0	0	0	0

[1] S. 2610 also would affect spending subject to appropriation, but the amounts of those changes would be less than $500,000 a year.

Note.—* = increase of less than $500,000.

Basis of estimate

Revenues

Under the United States-Australia agreement, all tariffs on U.S. imports from Australia would be phased out over time. Beginning on January 1, 2005, the tariffs would be phased out for individual products at varying rates according to one of several different timetables ranging from immediate elimination to gradual elimination over 18 years. According to the U.S. International Trade Commission, the United States collected $109 million in customs duties in 2003 on about $6.5 billion of imports from Australia. Those imports consist mostly of chilled and frozen meat, wine, certain motor vehicles and motor vehicle components, and various products made of metal. Based on these data, CBO estimates that phasing out tariff rates as outlined in the U.S.-Australia agreement would reduce revenues by $29 million in 2005, by $293 million over the 2005–2009 period, and by $884 million over the 2005–2014 period, net of income and payroll tax offsets.

This estimate includes the effects of increased imports from Australia that would result from the reduced prices of imported products in the United States, reflecting the lower tariff rates. It is likely that some of the increase in U.S. imports from Australia would displace imports from other countries. In the absence of specific data on the extent of this substitution effect, CBO assumes that an amount equal to one-half of the increase in U.S. imports from Australia would displace imports from other countries.

Direct spending

S. 2610 would exempt certain Australian imported goods from the merchandise processing fee collected by the Bureau of Customs and Border Protection (CBP). Under current law, those fees will expire after March 1, 2005. Based on information from the CBP, we

estimate that enacting the bill would decrease fee collections by less than $500,000 in fiscal year 2005.

Spending subject to appropriation

Section 104 of S. 2610 would authorize the appropriation of whatever sums are necessary to the Department of Commerce (DoC) for administrative support for Chapter 21 of the agreement. Based on information from DoC regarding its experience with similar requirements in recent free trade agreements, CBO estimates that implementing section 104 would cost about $100,000 per year, assuming appropriation of the necessary amounts.

Intergovernmental and private-sector impact: The bill contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Previous CBO estimate: On July 12, 2004, CBO transmitted a cost estimate for H.R. 4759, as ordered reported by the House Committee on Ways and Means on July 8, 2004. CBO also transmitted an estimate on July 30, 2004, for H.R. 4759, as cleared by the Congress on July 15, 2004. Those versions of H.R. 4759 were identical to S. 2610, as are CBO's cost estimates for the three pieces of legislation.

Estimate prepared by: Federal Revenues: Annabelle Bartsch; Federal Costs: Mark Grabowicz and Melissa Zimmerman; Impact on State, Local, and Tribal Governments: Melissa Merrell; and Impact on the Private Sector: Crystal Taylor.

Estimate approved by: Roberton C. Williams, Deputy Assistant Director for Tax Analysis; and Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

III. REGULATORY IMPACT OF THE BILL AND OTHER MATTERS

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill will not significantly regulate any individuals or businesses, will not affect the personal privacy of individuals, and will result in no significant additional paperwork.

The following information is provided in accordance with section 423 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. No. 104–04). The Committee has reviewed the provisions of S. 2610 as approved by the Committee on July 14, 2004. In accordance with the requirement of Pub. L. No. 104–04, the Committee has determined that the bill contains no intergovernmental mandates, as defined in the UMRA, and would not affect the budgets of State, local, or tribal governments.

IV. ADDITIONAL VIEWS

ADDITIONAL VIEWS OF CHAIRMAN GRASSLEY

The Committee's informal consideration of draft legislation to implement the United States-Australia Free Trade Agreement (the Agreement) culminated with a lopsided vote against approving an amended recommendation to the President for an implementing bill. Though the outcome of the Committee's informal consideration was unusual, the process followed by the Committee in reaching that outcome was fully consistent with the procedures set forth in the Bipartisan Trade Promotion Authority Act of 2002 (TPA) and prior practice. Moreover, that process completely satisfied the Committee's jurisdictional oversight responsibility with respect to the constitutional prerogative of the Congress over international trade. Yet the circumstances that led to the Committee's vote against approval merit additional comment. To start, I sincerely hope that such circumstances can be avoided entirely in the future. The Committee's informal consideration of implementing legislation for a trade agreement should result in a recommendation to the President, and I stand ready to work with my colleagues to ensure that outcome when it comes time to implement new agreements under TPA.

In this case, the Committee met in open executive session on June 23, 2004, to informally consider draft implementing legislation for the Agreement. In the days leading up to that meeting, some Members had expressed concerns over two provisions in the draft implementing bill that would allow the United States Trade Representative (USTR) to waive the application of two different safeguard mechanisms that would apply to imports of beef from Australia. Those safeguards can be waived only if the USTR determines that extraordinary market conditions demonstrate that the waiver would be in the national interest of the United States. I worked with the Ranking Member, Senator Baucus, and the Administration to develop an additional measure of Congressional oversight before the application of either safeguard could be waived. Specifically, the Administration added a provision to the draft Statement of Administrative Action (SAA) that accompanied the draft implementing legislation. The added provision specifies that the Administration will consult with the Senate Committee on Finance and the House Committee on Ways and Means no less than 5 business days before a beef safeguard may be waived. The inclusion of this additional provision clearly demonstrates that Congress was not a "rubber stamp" for the U.S.-Australia FTA.

That is how the process should work, with Members working together in a bipartisan fashion with the Administration to refine draft implementing legislation in a manner that advances the ob-

jectives identified under TPA while remaining consistent with the underlying trade agreement and with the U.S. Constitution. And it is that principle of consistency which is so critically important. TPA procedures do not require the President to accept any recommended changes made by the Committee in its informal consideration of draft legislation. Thus, if the Committee were to recommend a provision that is inconsistent with either the underlying trade agreement or with the U.S. Constitution, the President would necessarily have to reject the Committee's recommendation when formally submitting implementing legislation to the Congress. Opponents of a trade agreement could thus engage in political gamesmanship and subvert the process by recommending an inconsistent provision in order to embarrass the President and tarnish TPA procedures with allegations of a failure in the mechanism for Congressional oversight under TPA.

During the Committee meeting on June 23rd, Senator Conrad proposed an amendment described as follows:

> The amendment enhances the consultation requirement in the waiver provisions by adding a requirement in paragraphs 202(c)(4) and 203(d)(5) that the Finance and the Ways and Means Committees must both affirmatively approve a proposed waiver before the USTR can waive the application of a safeguard.

At that time, I provided to Committee Members an independent analysis of the Conrad amendment prepared by the Congressional Research Service (CRS), a copy of which is attached at the end of these additional views. CRS identified "a constitutional difficulty with the committee approval device, which flows from the decision in *INS* v. *Chadha,* 462 U.S. 919 (1983)." In the end, the Conrad amendment passed narrowly on a vote of 11 ayes, 10 nays. Not having a quorum present, I recessed the meeting before calling a final vote to approve the amended draft implementing legislation as the Committee's recommendation to the President.

I reconvened the meeting the next day, on June 24th, for a vote on final approval of the amended draft legislation. By a vote of 7 ayes, 14 nays, the Committee voted against approving the amended draft legislation as the Committee's recommendation to the President. That vote left the Committee without a recommendation to the President.

Some argue that the process was somehow shortchanged because the Committee did not, at that point, proceed to an informal conference with the House Committee on Ways and Means. That argument ignores one dispositive fact—i.e. a majority of the Committee never approved a recommendation to the President for implementing legislation. Absent a Committee-approved recommendation, there was simply nothing to conference with Ways and Means. Consider for a moment a scenario in which Committee Members are unanimous in their opposition to a particular free trade agreement negotiated under TPA procedures. During informal consideration of proposed implementing legislation for the agreement, the Committee unanimously votes against approval. No recommendation is made to the President, for no bill would be acceptable to the Committee. Yet TPA does not require a Committee recommenda-

tion, it merely affords an opportunity for one. The process moves forward, with formal submission of an implementing bill by the President to the Congress. Approval of the agreement then stands or falls on the vote on final passage in each House. This case is no different. A large majority of the Committee voted against final approval, and so no recommendation was made. I certainly agree that if the Finance Committee had approved a final recommendation that differed from the recommendation approved by the Ways and Means Committee, an informal conference would have been warranted to reconcile the differences between the two recommendations. But that is not the situation that confronted the Finance Committee in this case. Instead, the Committee's final decision not to approve the amended draft legislation was respected and the integrity of TPA procedures was maintained.

The Senate took up formal implementing legislation for the Agreement on July 15, 2004. I am submitting the Committee report on August 25, 2004, and so I have the benefit of hindsight in preparing these additional views. I find it noteworthy that when it came to a vote on final passage of the United States-Australia Free Trade Agreement Implementation Act on the floor of the Senate, the bill passed overwhelmingly on a vote of 80 ayes, 16 nays, 4 not voting. Any member who felt that consultations during consideration of the bill or that the TPA process itself was inadequate was certainly free to vote against the final implementing bill. Further, final passage included approval of the SAA containing the compromise provision I had negotiated with Senator Baucus and the Administration. Thus, any claim that the Committee did not exercise its constitutional responsibility is simply erroneous. The process followed by the Committee in its informal consideration of the draft implementing legislation was open, transparent, and entirely consistent with TPA procedures. And, as Chairman, I am satisfied that the Committee fully discharged its responsibility to ensure meaningful oversight of the development of implementing legislation for our free trade agreement with Australia and did so in a manner fully consistent with the U.S. Constitution.

CHUCK GRASSLEY.

CONGRESSIONAL RESEARCH SERVICE,
June 22, 2004.

MEMORANDUM

To: Senate Committee on Finance, Attention: Stephen Schaefer.
From: Johnny H. Killian, Senior Specialist, American Constitutional Law, American Law Division.
Subject: Validity of Provision Conditioning Executive Action on Congressional Committee Approval.

This memorandum is in response to your request to review a provision proposed to be added to the Australian FTA. The particular sections authorize quantity and price-based safeguards on beef whenever certain conditions apply. The sections provide for USTR waivers of application of the safeguards "if the Trade Representative determines that extraordinary market conditions demonstrate

that a waiver would be in the national interest of the United States" and USTR consults with private sector advisors and the Finance and Ways and Means Committees. The proposed amendment would add a requirement that the Senate Finance Committee and the House Ways and Means Committee both affirmatively approve a proposed waiver before USTR can waive the application of the safeguards.

There is a constitutional difficulty with the committee approval device, which flows from the decision in *INS* v. *Chadha*, 462 U.S. 919 (1983). In that case, the Court held unconstitutional a provision of the immigration laws that authorized either the Senate or the House of Representatives, by simple resolution, to disapprove the decision of the Attorney General to allow a particular deportable alien to remain in the country. The infirmity of the provision, according to the Court, was that "the exercise[s] of legislative power" by Congress or by one House had to comply with the Constitution's lawmaking prescription under Article I, § 1 and Article I, § 7, that is, passage by both Houses and presentment to the President for his approval or veto. In order to determine whether a congressional action is an exercise of legislative power, one must look to see if "it ha[s] the purpose and effect of altering the legal rights, duties and relations of persons, including [in this case] the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." Id., 952.

Although *Chadha* concerned a one-House simply resolution, the analysis of the Court made clear that two-House vetoes, with regard to presentment, and committee veto devices suffered from the same constitutional difficulty. (Needless to say, no constitutional significance attaches to whether the device is cast as a veto or a necessary approval). And, indeed, the Court shortly thereafter summarily affirmed two decisions by the District of Columbia Circuit, which had acted pre-*Chadha*, striking down two-House vetoes. *Process Gas Consumers Group* v. *Consumer Energy Council*, 463 U.S. 1215 (1983), summarily affg. 691 F.2d 575 (D.C.Cir., 1982) (*en banc*), and 673 F.2d 425 (D.C.Cir). 1982. Although the Supreme Court has not passed on a provision giving congressional committees veto power or necessary approval like that contained in the proposed amendment, the D.C. Circuit, contemporaneously with the two cited cases, invalidated a section of an appropriations law largely identical to the proposal. *AFGE* v. *Pierce,* 697 F.2d 303 (D.C.Cir., 1982) (panel composed of now-Justice Ginsburg and Judges Bork and Bazelon).

In *Pierce,* the court had before it a limitation on the use of funds in an HUD Appropriations Act to implement a RIF "without the prior approval of the Committees on Appropriations." According to the court, the provision could be interpreted in one or another of two ways. First, it could be read to empower either Appropriations Committee to prevent otherwise authorized expenditures of funds. Second, it could be read as prohibiting the agency from using appropriated funds for certain purposes but empowering both Committees, acting together, to lift the prohibition and to authorize the agency to make such use of the funds. Under either construction, the court stated, the provision was unconstitutional. If the first reading was correct, the section conferred a one-House veto on the

Committees; if the second reading prevailed, the directive was a grant of legislative power to the two Committees. Legislative power, either way, had to be exercised bicamerally and through presidential presentment.

Little doubt exists that *Chadha* confirms the D.C. Circuit's analysis of such committee provisions of law.

Now, it is true that Congress has not foresworn use of legislative veto devices in the aftermath of *Chadha*. By one authoritative but now dated count, "Congress [has] enacted more than two hundred new legislative vetoes." Fisher, The Legislative Veto: Invalidated, It Survives, 56 L. & Contemp. Prob. 273, 288 (1993). Most of these provisions of law are authorizations to committees, often the Appropriations Committees, to approve certain executive expenditures before they can take place. Id., 288, n. 83. Because of the comity the agencies must display to the Appropriations Committees, these provisions are rarely challenged, certainly not in court. However, Presidents in signing statements have typically complained about the measures and announced their intentions to ignore them. The format of these presidential statements usually follow one highlighted by Dr. Fisher of President George H.W. Bush. The President protested that the sections "constitute legislative vetoes similar to those declared unconstitutional by the Supreme Court in *INS* v. *Chadha*. Accordingly, I will treat them as having no legal force or effect in this or any other legislation in which they appear." 27 Weekly Comp. Pres. Docs. (Oct. 28, 1991).

In most instances, disputes between Congress and Executive over the use of such devices may fail to give rise to litigation, or, at least, litigation that enables court to reach the merits, because of the absence of Member standing, cf. *Raines* v. *Byrd*, 521 U.S. 811 (1997), and the lack of standing by private parties, and there will be political accommodation. But regardless of the justifiability of the question in any particular case, the amendment before us now certainly appears to meet the judicial definition of an impermissible exercise of legislative power and to be subject to invalidation in the event of a suit in which the merits are reached.

ADDITIONAL VIEWS OF SENATORS BAUCUS, ROCKEFELLER, DASCHLE, CONRAD, JEFFORDS, BINGAMAN AND LINCOLN

We are very disappointed with the process used to move the U.S.-Australia Free Trade Agreement Implementation Act through the Finance Committee and the Senate.

We support trade agreements that open markets and level the playing field for American workers, farmers, and businesses. Although we disagree on whether the U.S.-Australia Free Trade Agreement is such an agreement and merits Congressional approval, we strongly believe a good agreement is no excuse for bad process. And the ill-advised process permitted in this instance bodes poorly for the Congressional prospects of future trade agreements.

Congress should never be a rubber stamp for trade agreements proposed by the administration. Indeed, the United States Constitution gives Congress primary responsibility for trade. Article I, section 8, clause 3 says that: "The Congress shall have the power * * * to regulate Commerce with foreign Nations."

Because it is not practical for members of Congress to negotiate trade agreements, our predecessors saw the wisdom in delegating the power to conduct negotiations to the executive branch. But that does not mean that Congress has delegated its Constitutional responsibilities. To the contrary, under United states law no trade agreement is self-executing. It has no effect on domestic law until Congress passes implementing legislation.

A system where one branch of Government negotiates trade agreements and another must accept them and turn them into domestic law presented challenges. We meet those challenges through the fast-track process first adopted in the Trade Act of 1974 and most recently extended in the Trade Act of 2002.

Fast-track gives the Executive express authority to negotiate tariff and non-tariff agreements, so long as our trade representatives meet general negotiating objectives set out by Congress. It guarantees our trade partners that any agreement will receive an up-or-down vote by a date certain. That way, when they negotiate with the United States, they know that Congress cannot later amend the agreement or kill it with a filibuster. Most importantly, fast-track preserves Congress's Constitutional primacy on trade. No agreement gets implemented unless a majority of Congress approves.

Fast-track procedures require close collaboration between the Executive and Congress at every stage. The President must notify committees of jurisdiction and consult with them before a negotiation begins and regularly throughout the negotiations. Once talks are complete, the President must notify Congress 90 days before

signing the agreement, to permit Congress time to review the terms of the deal.

Once the agreement is signed, the President must submit it to Congress, along with a draft implementing bill, for approval. Congress has no more than 90 days during which the Congress is in session to act. Amendments are not in order.

But the time when close coordination between the Executive and Congress is most critical is the period between when the agreement is signed and when the President submits the agreement to Congress. This is the time when the administration and the trade committees sit down together to craft an implementing bill.

The law requires the Executive to consult with the committees of jurisdiction. But because the details of this consultative process are not spelled out by law, some call this the "informal process" or the "mock process."

No one should be fooled by these titles. This cooperative drafting ventue—while not spelled out in the law—is the centerpiece of the first track process. It is at this stage—before the implementing bill becomes unamendable—that the trade committees can and do shape the final legislation.

Congress and the President first used the procedures adopted in the Trade Act of 1974 to implement the GATT Tokyo Round agreements in 1979. The Government has since used these procedures to implement the WTO Uruguay Round Agreements, as well as free trade agreements with Israel, Canada, Mexico, Singapore, and Chile.

From the beginning, the Finance Committee has strived to make the informal process operate as much as possible like the normal legislative process. For that reason, the Finance Committee always holds a mock markup of the draft implementing bill. The Committee always gives its members an opportunity to review the draft legislation and has frequently modified the draft bill before proceeding to the mock markup. Like any markup, a mock markup is open to the public. Members are free to offer amendments to the draft bill that has been developed by the administration and Committee staff. The Committee holds a recorded vote on each amendment offered. It then votes on whether to approve the draft bill, as amended, in a recorded vote.

Amendments are common events at mock markups.

- When the Committee considered the U.S.-Israel Free Trade Agreement in 1984, Committee Members offered 13 amendments, and the Committee adopted 3.
- In 1988, when the Committee considered the Canada-United states Free Trade Agreement, Members offered 9 amendments, all of which were adopted.
- When the Finance Committee considered draft implementing legislation for the North American Free Trade Agreement in 1993, members offered at least 15 amendments, of which 14 were adopted. There were more than thirty differences between the Senate and House versions of the bill at the end of the mock markups.
- By contrast, no amendments were offered last year when the Committee considered the Singapore and Chile implementing bills. That was unusual.

In each of these cases, consideration of amendments was followed by a Committee vote to approve the draft bill, as amended.

In every case except Singapore and Chile, amendments added in the mock markup led to differences between the versions of the draft bill approved by the Finance Committee and the bill approved by the Ways and Means Committee. Consistent with normal legislative practice, the two Committees resolved these differences in an informal or "mock" conference, with each House appointing conferees to participate.

This time-tested process works. It allows Congress to exercise its Constitutional prerogatives, while still guaranteeing the President and our trading partners a timely vote on trade agreements. That is why we firmly believe that Congress should continue to insist on a meaningful and robust informal process that is as nearly identical as possible to the normal legislative process.

Measured by past experience, the process for considering the U.S.-Australia Free Trade Agreement falls short.

At the informal markup of this bill, Senator Conrad offered an amendment. The administration expressed opposition to the amendment. The amendment was nevertheless adopted in a roll call vote by a majority of Committee members.

The appropriate next step would have been to proceed to an informal conference with the House. A conference would have afforded the opportunity to address any concerns raised by the amendment. The conference could have approved the amendment over the Administration's objection—something that has happened before. It could have rewritten the amendment to make it acceptable to the Administration. Or it could have debated the matter and resolved, by majority vote, to reject the amendment.

We will never know how the conference process might have turned out, because, for the first time since fast-track was adopted in 1974, the informal process was not followed. The conference was simply bypassed in favor of permitting the administration to submit its original bill, ignoring the clearly expressed concerns of a majority of the Committee.

In the long run, we do ourselves a disservice by derailing the informal process when the Administration's legislation is altered in a way not to its liking. At most, we may have saved ourselves a few days or weeks getting this bill to a vote. But we are concerned that shortchanging the process sets a dangerous precedent that could lead to the administration ignoring Committee recommendations in the future and unravel the consultation and cooperation that are central to the Congress's grant on fast track authority to the administration.

In addition, more complex agreements may be ahead. CAFTA involves six countries and could raise controversial new issues. Any agreements that come out of the WTO Doha Round or the FTAA talks could require extensive new implementing legislation. There will surely be amendments offered during the informal process on each of these agreements, and some may win Committee approval. In sum, we would be foolish to assume the process of developing implementing bills will always be as easy in the future as our recent experiences with Singapore and Chile.

When we shortchange the process, we shortchange the Constitution. When we start cutting corners on process, we begin to abdicate Congress's constitutional role in making trade law. Short term expediency is no excuse for Congress to surrender its Constitutional role. The ends do not justify the means.

MAX BAUCUS.
JAY ROCKEFELLER.
JEFF BINGAMAN.
TOM DASCHLE.
KENT CONRAD.
BLANCHE L. LINCOLN.
JIM JEFFORDS.

V. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Pursuant to the requirements of paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT OF 1985

* * * * * * *

SEC. 13031. FEES FOR CERTAIN CUSTOMS SERVICES.

(a) * * *

* * * * * * *

(b) LIMITATIONS ON FEES.—(1)(A) Except as provided in subsection (a)(5)(B) of this section, no fee may be charged under subsection (a) of this section for customs services provided in connection with—

* * * * * * *

(14) No fee may be charged under subsection (a) (9) or (10) with respect to goods that qualify as originating goods under section 203 of the United States-Australia Free Trade Agreement Implementation Act. Any service for which an exemption from such fee is provided by reason of this paragraph may not be funded with money contained in the Customs User Fee Account.

* * * * * * *

TARIFF ACT OF 1930

* * * * * * *

SEC. 592. PENALTIES FOR FRAUD, GROSS NEGLIGENCE, AND NEGLIGENCE.

(a) * * *

* * * * * * *

(c) MAXIMUM PENALTIES.—

(1) * * *

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(8) PRIOR DISCLOSURE REGARDING CLAIMS UNDER THE UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT.—

(A) IN GENERAL.—An importer shall not be subject to penalties under subsection (a) for making an incorrect

claim that a good qualifies as an originating good under section 203 of the United States-Australia Free Trade Agreement Implementation Act if the importer, in accordance with regulations issued by the Secretary of the Treasury, voluntarily and promptly makes a corrected declaration and pays any duties owing.

(B) TIME PERIODS FOR MAKING CORRECTIONS.—In the regulations referred to in subparagraph (A), the Secretary of the Treasury is authorized to prescribe time periods for making a corrected declaration and paying duties owing under subparagraph (A), if such periods are not shorter than 1 year following the date on which the importer makes the incorrect claim.

[(8)**]** *(9)* SEIZURE.—If the Secretary has reasonable cause to believe that a person has violated the provisions of subsection (a) and that such person is insolvent or beyond the jurisdiction of the United States or that seizure is otherwise essential to protect the revenue of the United States or to prevent the introduction of prohibited or restricted merchandise into the customs territory of the United States, then such merchandise may be seized and, upon assessment of a monetary penalty, forfeited unless the monetary penalty is paid within the time specified by law. Within a reasonable time after any such seizure is made, the Secretary shall issue to the person concerned a written statement containing the reasons for the seizure. After seizure of merchandise under this subsection, the Secretary may, in the case of restricted merchandise, and shall, in the case of any other merchandise (other than prohibited merchandise), return such merchandise upon the deposit of security not to exceed the maximum monetary penalty which may be assessed under subsection (c).

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TRADE ACT OF 1974

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SEC. 202. INVESTIGATIONS, DETERMINATIONS, AND RECOMMENDATIONS BY COMMISSION.

(a) PETITIONS AND ADJUSTMENT PLANS.—

(1) * * *

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(8) The procedures concerning the release of confidential business information set forth in section 332(g) of the Tariff Act of 1930 shall apply with respect to information received by the Commission in the course of investigations conducted under this chapter, part 1 of title III of the North American Free Trade Agreement Implementation Act, title II of the United States-Jordan Free Trade Area Implementation Act, title III of the United States-Chile Free Trade Agreement Implementation Act, **[**and**]** title III of the United States-Singapore Free Trade Agreement Implementation Act, *and title III of the United States-Australia Free Trade Agreement Implemen-*

tation Act. The Commission may request that parties providing confidential business information furnish nonconfidential summaries thereof or, if such parties indicate that the information in the submission cannot be summarized, the reasons why a summary cannot be provided. If the Commission finds that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summarized form, the Commission may disregard the submission.

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TRADE AGREEMENTS ACT OF 1979

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SEC. 308. DEFINITIONS.

As used in this title—

(1) * * *

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(4) ELIGIBLE PRODUCTS.—

(A) IN GENERAL.—The term "eligible product" means, with respect to any foreign country or instrumentality that is—

(i) a party to the Agreement, a product or service of that country or instrumentality which is covered under the Agreement for procurement by the United States; **[**or**]**

(ii) a party to the North American Free Trade Agreement, a product or service of that country or instrumentality which is covered under the North American Free Trade Agreement for procurement by the United States**[**.**]***; or*

(iii) a party to a free trade agreement that entered into force with respect to the United States after December 31, 2003, and before January 2, 2005, a product or service of that country or instrumentality which is covered under the free trade agreement for procurement by the United States.

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