THE UNITED STATES-CHILE FREE TRADE AGREEMENT IMPLEMENTATION ACT

STATEMENT OF ADMINISTRATIVE ACTION

This Statement of Administrative Action is submitted to the Congress in compliance with section 2105(a)(1)(C)(ii) of the Bipartisan Trade Promotion Authority Act of 2002 ("TPA Act") and accompanies the implementing bill for the United States-Chile Free Trade Agreement ("Agreement"). The bill approves and makes statutory changes necessary or appropriate to implement the Agreement, which the United States Trade Representative signed on June 6, 2003.

This Statement describes significant administrative actions proposed to implement U.S. obligations under the Agreement.

In addition, incorporated into this Statement are two other statements required under section 2105(a) of the TPA Act: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Agreement. The Agreement does not change the provisions of any agreement the United States has previously negotiated with Chile.

For ease of reference, this Statement generally follows the organization of the Agreement, with the exception of grouping the general provisions of the Agreement (Chapters 1, 2, and 20 through 24) at the beginning of the discussion.

For each chapter of the Agreement, the Statement describes the pertinent provisions of the implementing bill, explaining how the bill changes or affects existing law, and stating why those provisions are necessary or appropriate to implement the Agreement. The Statement then describes the administrative action proposed to implement the particular chapter of the Agreement, explaining how the proposed action changes existing administrative practice and stating why the changes are necessary or appropriate to implement the Agreement.

It should be noted that this Statement does not, for the most part, discuss those many instances in which U.S. law or administrative practice will remain unchanged under the Agreement. In many cases, U.S. laws and regulations are already in conformity with the obligations assumed under the Agreement.

Finally, references in this Statement to particular sections of U.S. statutes are based on those statutes in effect as of the date this Statement was submitted to the Congress.

Chapters:
One (Initial Provisions)
Two (General Definitions)
Twenty (Transparency)
Twenty-One (Administration of the Agreement)
Twenty-Two (Dispute Settlement)
Twenty-Three (Exceptions)
Twenty-Four (Final Provisions)

1. Implementing Bill

a. Congressional Approval

Section 101(a) of the implementing bill provides Congressional approval for the Agreement and this Statement, as required by sections 2103(b)(3) and 2105(a)(1) of the TPA Act.

b. Entry into Force

Article 24.4 of the Agreement requires the United States and Chile to exchange written notifications that their respective domestic requirements for the entry into force of the Agreement have been fulfilled. The exchange of notifications is a necessary condition for the Agreement's entry into force. Section 101(b) of the implementing bill authorizes the President to exchange notes with Chile to provide for entry into force of the Agreement on or after January 1, 2004. The exchange of notes is conditioned on a determination by the President that Chile has taken measures necessary to comply with those of its obligations that take effect at the time the Agreement enters into force. Some provisions of the Agreement, such as certain rules pertaining to intellectual property rights, become effective at prescribed times after the Agreement's entry into force.

c. Relationship to Federal Law

Section 102(a) of the bill establishes the relationship between the Agreement and U.S. law. The implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is intended to bring U.S. law fully into compliance with U.S. obligations under the Agreement. The bill accomplishes that objective with respect to federal legislation by amending existing federal statutes that would otherwise be inconsistent with the Agreement and, in certain instances, by creating entirely new provisions of law.

Section 102(a) clarifies that no provision of the Agreement will be given effect under domestic law if it is inconsistent with federal law, including provisions of federal law enacted or amended by the bill. Section 102(a) will not prevent implementation of federal statutes consistent with the Agreement, where permissible under the terms of such statutes. Rather, the section reflects the Congressional view that necessary changes in federal statutes should be specifically enacted rather than provided for in a blanket preemption of federal statutes by the Agreement.

The Administration has made every effort to include all laws in the implementing bill and to identify all administrative actions in this Statement that must be changed in order to conform with the new U.S. rights and obligations arising from the Agreement. Those include both regulations resulting from statutory changes in the bill itself and changes in laws, regulations, rules, and orders that can be implemented without change in the underlying U.S. statute.

Accordingly, at this time it is the expectation of the Administration that no changes in existing federal law, rules, regulations, or orders other than those specifically indicated in the implementing bill and this Statement will be required to implement the new international obligations that the United States will assume under the Agreement. This is without prejudice to the President's continuing responsibility and authority to carry out U.S. law and agreements. As experience under the Agreement is gained over time, other or different administrative actions may be taken in accordance with applicable law to implement the Agreement. If additional action is called for, the Administration would seek legislation from Congress or, if a change in regulation is required, follow normal agency procedures for amending regulations.

d. Relationship to State Law

The Agreement's rules generally cover state and local laws and regulations, as well as those at the federal level. There are a number of exceptions to, or limitations on, this general rule, however, particularly in the areas of government procurement, investment, and trade in services.

The Agreement does not automatically "preempt" or invalidate state laws that do not conform to the Agreement's rules -- even if a dispute settlement panel were to find a state measure inconsistent with the Agreement. The United States is free under the Agreement to determine how it will conform with the Agreement's rules at the federal and non-federal level. The Administration is committed to carrying out U.S. obligations under the Agreement, as they apply to the states, through the greatest possible degree of state-federal consultation and cooperation.

Section 102(b)(1) of the bill makes clear that only the United States is entitled to bring an action in court in the event that there is an unresolved conflict between a state law, or the application of a state law, and the Agreement. The authority conferred on the United States under this paragraph is intended to be used only as a "last resort," in the unlikely event that efforts to achieve consistency through consultations have not succeeded.

The reference in section 102(b)(2) of the bill to the business of insurance is required by virtue of section 2 of the McCarran-Ferguson Act (15 U.S.C. 1012). That section states that no federal statute shall be construed to supersede any state law regulating or taxing the business of insurance unless the federal statute "specifically relates to the business of insurance." Certain provisions of the Agreement (for example, Chapter 12, relating to financial services) do apply to state measures regulating the insurance business, although "grandfathering" provisions in Chapter 12 exempt existing inconsistent (*i.e.*, "non-conforming") measures.

Given the provision of the McCarran-Ferguson Act, the implementing act must make specific reference to the business of insurance in order for the Agreement's provisions covering the insurance business to be given effect with respect to state insurance law. Insurance is otherwise treated in the same manner under the Agreement and the implementing bill as other financial services under the Agreement.

e. Private Lawsuits

Section 102(c) of the implementing bill precludes any private right of action or remedy against a federal, state, or local government, or against a private party, based on the provisions of the Agreement. A private party thus could not sue (or defend a suit against) the United States, a state, or a private party on grounds of consistency (or inconsistency) with the Agreement. The provision also precludes a private right of action attempting to require, preclude, or modify federal or state action on grounds such as an allegation that the government is required to exercise discretionary authority or general "public interest" authority under other provisions of law in conformity with the Agreement.

With respect to the states, section 102(c) represents a determination by the Congress and the Administration that private lawsuits are not an appropriate means for ensuring state compliance with the Agreement. Suits of this nature may interfere with the Administration's conduct of trade and foreign relations and with suitable resolution of disagreements or disputes under the Agreement.

Section 102(c) does not preclude a private party from submitting a claim against the United States to arbitration under Chapter 10 (Investment) of the Agreement or seeking to enforce an award against the United States issued pursuant to such arbitration. The provision also would not preclude any agency of government from considering, or entertaining argument on, whether its action or proposed action is consistent with the Agreement, although any change in agency action would have to be consistent with domestic law.

f. Implementing Regulations

Section 104(a) of the bill provides the authority for new or amended regulations to be issued, and for the President to proclaim actions implementing the provisions of the Agreement, as of the date the Agreement enters into force. Section 104(b) of the bill requires that, whenever possible, all federal regulations required or authorized under the bill and those proposed in this Statement as necessary or appropriate to implement immediately applicable U.S. obligations under the Agreement are to be developed and promulgated within one year of the Agreement's entry into force. In practice, the Administration intends, wherever possible, to amend or issue the other regulations required to implement U.S. obligations under the Agreement at the time the Agreement enters into force. The process for issuing regulations pursuant to this authority will comply with the requirements of the Administrative Procedures Act, including requirements to provide notice and an opportunity for public comment on such regulations. If issuance of any regulation will occur more than one year after the date provided in section 104(b), the officer responsible for issuing such regulation will notify the relevant committees of both Houses of the delay, the reasons for such delay, and the expected date for issuance of the regulation. Such notice will be provided at least 30 days prior to the end of the one-year period.

g. Dispute Settlement

Section 105(a) of the bill 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 22 of the Agreement. This provision enables the United States to implement its obligations under Article 21.2(1) of the Agreement. This office will not be an "agency" within the meaning of 5 U.S.C. 552, consistent with treatment provided under the North American Free Trade Agreement and the U.S.-Canada Free Trade Agreement. Thus, for example, the office will not be subject to the Freedom of Information Act or the Government in the Sunshine Act. Since they are international bodies, panels established under Chapter 22 are not subject to those acts.

Section 105(b) of the bill authorizes the appropriation of funds to support the office established or designated pursuant to section 105(a).

h. Effective Dates

Section 107(b) of the bill provides that the first three sections of the bill as well as Title I of the bill go into effect when the bill is enacted into law.

Section 107(a) provides that the other provisions of the bill and the amendments to other statutes made by the bill take effect on the date on which the Agreement enters into force. Section 107(c) provides that the provisions of the bill and the amendments to other statutes made by the bill will cease to be effective on the date on which the Agreement ceases to be in force.

2. <u>Administrative Action</u>

The Agreement calls for the United States and Chile to develop various rosters of independent experts willing to serve as panelists to settle disputes arising under the Agreement. One roster will be available for most types of disputes, while specialized rosters will be established to address disputes regarding the Agreement's financial services, labor, and environmental provisions. USTR will consult with the Ways and Means and Finance Committees as it develops rosters of panelists.

Article 20.1(1) of the Agreement requires each government to designate a contact point to facilitate bilateral communications regarding the Agreement. The Office of the United States Trade Representative (USTR) will serve as the U.S. contact point for this purpose.

No administrative changes will be necessary to implement Chapter 1, 2, 21, 23, or 24.

Chapter Three (National Treatment and Market Access for Goods)

1. Implementing Bill

a. Proclamation Authority

Section 201(a) of the bill grants the President authority to implement by proclamation U.S. rights and obligations under Chapter 3 of the Agreement through the application or elimination of tariffs and tariff rate quotas. Section 201(a) authorizes the President to:

- modify or continue any duty,
- keep in place duty-free or excise treatment; or
- impose any duty

that the President determines to be necessary or appropriate to carry out or apply Articles 3.3, 3.7, 3.9, and 3.20(8)-(11), and Annex 3.3 of the Agreement.

The proclamation authority with respect to Article 3.3 authorizes the President to provide for the phase-out and elimination, according to the U.S. schedule in Annex 3.3, of tariffs on imports from Chile that meet the Agreement's rules of origin.

The proclamation authority with respect to Articles 3.7 and 3.9 authorizes the President to provide for the elimination of tariffs on particular categories of imports from Chile. Article 3.7 pertains to the temporary admission of certain goods, such as commercial samples, goods intended for display at an exhibition, and goods necessary for carrying out the business activity of a person who qualifies for temporary entry into the United States. Article 3.9 pertains to the importation of goods (1) that had been exported to Chile for repair or alteration in Chile, or (2) that have been imported from Chile for repair or alteration in the United States.

The proclamation authority with respect to Article 3.20(8)-(11) authorizes the President to provide preferential tariff treatment to certain textile and apparel goods that do not qualify as "originating goods" (*i.e.*, products that satisfy the Agreement's rules of origin). However, this treatment may be applied only up to annual quantitative limits set forth in that Article. While goods subject to this provision may receive preferential tariff treatment, they will remain subject to the U.S. merchandise processing fee when they are imported. (*See* item (b) in this section.)

Section 201(a)(2) of the implementing bill requires the President to withdraw beneficiary status under the Generalized System of Preferences program from Chile once the Agreement takes effect.

Section 201(b) of the bill authorizes the President, subject to the consultation and layover provisions of section 103(a) of the bill, to:

- modify or continue any duty;
- modify the staging of any duty elimination under the Agreement pursuant to an agreement with Chile under Article 3.3(4);
- keep in place duty-free or excise treatment; or
- impose any duty

by proclamation whenever the President determines it to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Chile provided by the Agreement.

Section 103(a) of the bill sets forth consultation and layover steps that must precede the President's implementation of any tariff modification by proclamation. This would include, for example, tariff modifications under section 201(b) of the bill. Under the consultation and layover provisions, the President must obtain the advice of the private sector (pursuant to section 135 of the Trade Act of 1974) and the U.S. International Trade Commission (ITC) on the proposed action. The President must submit a report to the House Committee on Ways and Means and the Senate Committee on Finance setting forth the action proposed, the reasons therefor, and the advice of the private sector and the ITC. The bill sets aside a 60-day period following the date of transmittal of the report for the Committees to consult with the President on the action. Following the expiration of the 60-day period, the President may proclaim the action.

The President may initiate the consultation and layover process under section 103(a) of the bill on enactment of the bill, but, under section 104(a), any modifying proclamation cannot take effect until the Agreement enters into force. In addition to tariff modifications, these provisions apply to other Presidential proclamation authority provided in the bill subject to consultation and layover, such as authority to implement a proposal to modify the Agreement's specific rules of origin pursuant to an agreement with Chile under Article 3.20(5).

Section 201(c) of the bill implements the agricultural safeguard provisions of Article 3.18 of the Agreement. Article 3.18 permits the United States to impose an "agricultural safeguard measure" – in the form of additional duties – on imports from Chile of an agricultural good listed in the U.S. section of Annex 3.18 of the Agreement. The United States may apply the additional duties to shipments of any such good whose price is below the threshold ("trigger price") for the good set out in the U.S. section.

Section 201(c)(1) of the bill establishes the basic authority for the safeguard.

Section 201(c)(2) of the bill explains how the additional duties are calculated. The rate of additional duty under the safeguard increases as the difference increases between the particular import price of a shipment and the trigger price.

Section 201(c)(3) of the bill implements Article 3.18(4)-(5) of the Agreement by establishing that no additional duty may be applied on an agricultural safeguard good if, at the time of entry, the good is subject to a measure under the bilateral safeguard mechanism established under Subtitle A of Title III of the bill or under the global safeguard procedures set out in Chapter 1 of Title II of the Trade Act of 1974 ("Section 201").

Section 201(c)(4) of the bill provides that the agricultural safeguard provisions cease to apply with respect to an agricultural safeguard good twelve years after the date of entry into force of the Agreement.

Section 201(c)(5) provides that if an agricultural safeguard good is subject to a tariff-rate quota with an in-quota tariff of zero, any additional agricultural safeguard duties may be applied only on over-quota imports of the good.

Section 201(c)(6) implements Article 3.18(7) of the Agreement by directing the Secretary of the Treasury to notify Chile and provide Chile with supporting data within 60 days of first assessing agricultural safeguard duties on a good.

Section 201(c)(7) requires the President to notify the House Ways and Means and Agriculture Committees and the Senate Finance and Agriculture Committees before agreeing with Chile to modify the "trigger prices" for agricultural goods in Annex 3.18.

Section 201(c)(8) defines certain terms used in section 201(c), including the term "agricultural safeguard good," which is a good that qualifies as an "originating good" under section 202 of the bill, that is included in the U.S. list in Annex 3.18 and for which preferential tariff treatment has been claimed.

Section 201(d) of the bill provides for the conversion of existing specific or compound rates of duty for various products to *ad valorem* rates for purposes of implementing the Agreement's tariff reductions. (A compound rate of duty for a good would be a rate of duty stated, for example, as the sum of X dollars per kilogram plus Y percent of the value of the good.)

b. Duty Drawback

Section 203 of the bill implements Article 3.8 of the Agreement, which will phase out duty drawback and duty deferral programs between the United States and Chile over three years, beginning eight years after the Agreement enters into force, to ensure that neither country can become an "export platform" for materials produced in other regions of the world.

Section 203 makes a number of amendments to current law to implement the Agreement's drawback provisions.

Section 203(a) of the bill defines the term "good subject to Chile FTA drawback" as any good imported into the United States other than a good specifically mentioned in that subsection. The categories track those listed in paragraph four of Article 3.8.

The term "Chile FTA drawback" in the bill refers to the formula used to calculate the amount of the refund, waiver, or remission that will be allowed for duties owed or paid during the three-year period that drawback is phased out. The formula, which is drawn from Article 3.8(5) of the Agreement, limits the amount of duty paid or owed that may be refunded, waived or reduced to no more than:

- 75 percent during 2012;
- 50 percent during 2013; and
- 25 percent during 2014.

The formula will be applied to drawback claims for duties paid on imported goods that are subsequently exported, as well as duties the payment of which has been deferred because of their introduction into a foreign trade zone or other duty deferral program. Beginning January 1, 2015, with limited exceptions, no drawback will be available for imports from and exports to Chile.

Section 203(b) of the bill amends the applicable provisions of the Tariff Act of 1930 and the Foreign Trade Zones Act to authorize application of Chile FTA drawback to goods subject to Chile FTA drawback that are covered in these provisions. Specifically, with respect to "manufacturing" drawback, section 203(b) amends section 311 of the Tariff Act of 1930 (19 U.S.C. 1311) relating to bonded manufacturing warehouses and section 312 (19 U.S.C. 1312) relating to bonded smelting and refining warehouses. With regard to "same condition substitution" drawback and "substitution" drawback, section 203(b) amends section 313 of the Tariff Act of 1930 (19 U.S.C. 1313) relating to drawback and refunds to apply Chile FTA drawback restrictions to goods subject to Chile FTA drawback. With regard to "same condition" drawback, section 203(b) amends section 562 of the Tariff Act of 1930 (19 U.S.C. 1562) relating to manipulation in bonded warehouse to apply Chile FTA drawback to goods subject to Chile FTA drawback. With regard to duty deferrals allowed under the Foreign Trade Zones Act, section 203(b) amends the Foreign Trade Zones Act to apply the Chile FTA drawback restrictions to goods exported from a foreign trade zone.

Section 203(c) of the bill clarifies that no amendment contained in section 203 authorizes the refund, waiver or reduction of countervailing or antidumping duties imposed on a good imported into the United States. This provision is consistent with Article 3.8(2)(a) of the Agreement, which provides that drawback shall not apply to such duties. Current U.S. law (19 U.S.C. 1677h) does not provide drawback on antidumping or countervailing duties.

Section 209 of the bill makes conforming amendments to section 508(b)(2)(B)(i)(I) of the Tariff Act of 1930 (19 U.S.C. 1508(b)(2)(B)(i)(I)) to reflect changes in paragraph numbering as a result of the above-referenced amendments.

c. Customs User Fee

Section 204 of the bill implements U.S. commitments under Article 3.12(4) of the Agreement, regarding customs user fees on originating goods, by amending section 13031(b) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c). The amendment provides for the immediate elimination of the merchandise processing fee for goods qualifying as originating goods under Chapter 4 of the Agreement. Processing of goods qualifying as originating goods under the Agreement will be financed by money from the General Fund of the Treasury. This is necessary to ensure that the United States complies with obligations under the General Agreement on Tariffs and Trade 1994 by limiting fees charged for the processing of non-originating imports to amounts commensurate with the processing services provided. That is, fees charged on such non-originating imports will not be used to finance the processing of originating imports.

d. Textile and Apparel Safeguard

Article 3.19 of the Agreement establishes a special procedure and makes remedies available to domestic textile and apparel industries that have sustained or are threatened by serious damage from imports of textile and apparel goods that enjoy preferential tariff rates under the Agreement. The Administration does not anticipate that the Agreement will result in injurious increases in textile and apparel imports from Chile. Nevertheless, the Agreement's textile and apparel safeguard procedure will ensure that relief is available if needed.

The safeguard mechanism applies when, as a result of the elimination of a customs duty under the Agreement, textile or apparel goods from Chile are being imported into the United States in such increased quantities, in absolute or relative terms, and under such conditions as to cause serious damage or actual threat thereof to a U.S. industry producing like or directly competitive goods. In these circumstances, Article 3.19 permits the United States to increase duties on the imported goods to a level that does not exceed the lesser of the prevailing U.S. normal trade relations/most-favored-nation ("NTR/MFN") duty rate for the good or the U.S. NTR/MFN duty rate in effect at the time the Agreement entered into force.

Subtitle B of Title III of the bill (sections 321 through 328) implements the Agreement's textile and apparel safeguard.

Section 321(a) establishes that an interested party may file with the President a request for a textile and apparel safeguard measure. The President is to review a request initially to determine whether to commence consideration of the request on its merits. If the President determines that the request contains information necessary to warrant consideration on the merits then, under section 321(b), the President must provide notice in the *Federal Register* stating that the request will be considered and seeking public comments on the request. The notice will contain the request itself and the dates by which comments and rebuttals must be received.

If the President considers a request under section 321, section 322(a) of the bill provides for the President to determine whether, as a result of the elimination of a duty provided for under the Agreement, a Chilean textile or apparel article is being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for that article, and under such conditions that imports of the article cause serious damage, or actual threat thereof, to a domestic industry producing an article that is like, or directly competitive with, the imported article. This determination corresponds to the determination required under Article 3.19 of the Agreement.

Section 322(a) of the bill includes criteria for determining serious damage or actual threat thereof, consistent with Article 3.19(2) of the Agreement.

Section 322(b) of the bill identifies the relief that the President may provide to a U.S. industry that the President determines is facing serious damage or actual threat thereof. Such relief may consist of an increase in tariffs to the lower of: (1) the NTR/MFN duty rate in place for the textile or apparel article at the time the relief is granted; or (2) the NTR/MFN duty rate for that article on the day before the Agreement enters into force.

Section 323 of the bill provides that the maximum period of relief under the textile and apparel safeguard shall be three years. If the initial period of import relief is less than three years, the President may extend the relief (to a maximum of three years) if the President determines that continuation is necessary to remedy or prevent serious damage and to facilitate adjustment, and that the domestic industry is, in fact, adjusting to import competition.

Section 324 of the bill provides that relief may not be granted to an article under the textile and apparel safeguard if relief previously has been granted to that article under this safeguard.

Section 325 of the bill provides that on termination of import relief, imports of the textile or apparel article that was subject to the safeguard action will return to duty-free status under the Agreement.

Section 326 of the bill provides that authority to provide relief under the textile and apparel safeguard with respect to any Chilean article will expire eight years after duties on the article are eliminated.

Under Article 3.19(6) of the Agreement, if the United States provides relief to a domestic industry under the textile and apparel safeguard, it must provide Chile "mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the [safeguard]." If the United States and Chile are unable to agree on trade liberalizing compensation, Chile may increase tariffs equivalently on U.S. goods.

Section 123 of the Trade Act of 1974 (19 U.S.C. 2133), as amended, authorizes the President to provide trade compensation for global safeguard measures taken pursuant to chapter 1 of title II of the Trade Act of 1974. Section 327 of the implementing bill extends that authority to measures taken pursuant to the Agreement's textile and apparel safeguard provisions.

Finally, section 328 of the bill provides that business confidential information submitted in the course of consideration of a request for a textile and apparel safeguard may not be released absent the consent of the party providing the information. It also provides that a party submitting business confidential information in a textile and apparel safeguard proceeding must submit a non-confidential version of the information or a summary of the information.

5. Enforcement of Textile and Apparel Rules of Origin.

In addition to lowering barriers to bilateral trade in textile and apparel Article 3.21 of the Agreement provides for verifications 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 3.21(2) and 3.21(3), the United States may make a request to the Government of Chile that a verification be conducted with respect to a Chilean exporter or producer. The object of a verification is to determine the exporter or producer's compliance with applicable customs laws, regulations, and procedures and whether claims of origin regarding textile or apparel goods exported or produced by that person are accurate. The United States may take appropriate action during a verification, including suspending the application of preferential tariff treatment to textile and apparel goods exported or produced by the person subject to the verification. The United States also may take appropriate action if, after 12 months, it is unable to make the requisite determination.

Section 208 of the bill implements Article 3.21 of the Agreement for the United States. Section 208(a) authorizes the President to direct the Secretary of the Treasury to take "appropriate action" while a verification requested by the Secretary is being conducted. Under section 208(b), such action may include, but is not limited to, suspension of liquidation of entries of textile and apparel goods exported or produced by the person that is the subject of the verification and publishing the identity of the person subject to the verification.

Under section 208(c), if the Secretary is unable to confirm within 12 months of a verification request that a claim of origin for a good is accurate or, more generally, that a Chilean exporter or producer is complying with applicable customs laws, regulations, and procedures regarding trade in textile and apparel goods, the President may determine what further "appropriate action" to take. Under section 208(d), this may include publishing the identity of the person subject to the verification, denying preferential tariff treatment under the Agreement to any textile or apparel goods exported or produced by the person subject to the verification, and denying entry of such goods into the United States. Such further appropriate action may last until such time as the Secretary receives information sufficient to make a determination under subsection (a) or until such earlier date as the President may direct.

2. Administrative Action

a. Temporary Admission of Goods and Goods Entered After Repair or Alteration

As discussed above, section 201(a) of the bill authorizes the President to proclaim duty-free treatment for certain goods to carry out Article 3.7 (temporary admission of certain goods) and Article 3.9 (repair or alteration of certain goods) of the Agreement. Implementing the proclamation will require regulations, which will be issued by the Secretary of the Treasury.

1. Distinctive Products

Article 3.15(2) of the Agreement commits the United States to recognize three Chilean products — *Pisco Chileno*, *Pajarete*, and *Vino Asoleado* --- as "distinctive products of Chile." The Alcohol and Tobacco Tax and Trade Bureau will implement this obligation administratively.

2. Textile and Apparel Safeguard

The function of receiving requests for textile and apparel safeguard measures under section 321 of the bill, making determinations of serious damage or actual threat thereof under section 322(a), and providing relief under section 322(b) will be performed by Committee for the Implementation of Textile Agreements ("CITA"), an interagency entity created by Executive Order 11651 that carries out certain textile trade policies for the United States. CITA will perform these functions pursuant to a delegation of the President's authority under the bill.

3. Enforcement of Textile and Apparel Rules of Origin

Under section 208 of the bill, United States customs officials will request Chile to initiate verifications and work with Chilean officials in conducting them. Following a U.S. request for a verification, CITA, by delegation of authority from the President, may direct U.S. officials to take appropriate action described in section 208(b) of the bill while the verification is being conducted. U.S. customs officials will determine whether the exporter or producer that is subject to the verification is complying with applicable customs rules, and whether statements regarding the origin of textile or apparel goods exported or produced by that firm are accurate. If U.S. customs officials determine that an exporter or producer is not complying with applicable customs rules or that it is making false statements regarding the origin of textile or apparel goods, they will report their findings to CITA. Similarly, if U.S. customs officials are unable to make the necessary determination (*e.g.*, due to lack of cooperation by the exporter or producer), they will report that fact to CITA. CITA may direct U.S. officials to take appropriate action described in section 208(d) in the case of an adverse determination or a report that customs officials are unable to make the necessary determination. If the appropriate action includes denial of preferential tariff treatment or denial of entry, CITA will issue an appropriate directive.

Section 208 of the bill provides the exclusive basis in U.S. law for CITA to direct appropriate action implementing Article 3.21 of the Agreement.

Chapter Four (Rules of Origin)

1. Implementing Bill

a. General

Section 202 of the implementing bill codifies the general rules of origin set forth in Chapter 4 of the Agreement. Under the general rules, there are three basic ways for a good of Chile to qualify as an "originating good," and therefore be eligible for preferential tariff treatment when it 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 Chile, the United States, or both." The term "goods wholly obtained or produced entirely in the territory of Chile, the United States, or both" is defined in section 202(n)(4) of the bill and includes, for example, minerals extracted in either country, products from animals born and raised in either country, and waste and scrap derived from production of goods that takes place in the territory of either or both countries.

The term "goods wholly obtained or produced entirely in the territory of Chile, the United States, Chile or both" includes "recovered goods." These are parts resulting from the disassembly of used goods, which are brought into good working condition, in order to be combined with other recovered goods and other materials to form "remanufactured goods." The term "remanufactured goods" is separately defined to mean goods listed in Annex 4.18 of the Agreement that (1) are comprised entirely or partially of recovered goods; (2) have the same life expectancy and meet the same performance standards as new goods; and (3) enjoy the same factory warranty as such new goods.

Second, the general rules of origin provide that 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 that they meet or satisfy a required change in tariff classification or meet other requirements, as specified in Annex 4.1 of the Agreement.

Third, the general rules of origin provide that a good is an "originating good" if the good is produced entirely in the territory of Chile, the United States, or both exclusively from originating materials.

Moreover, the general rules of origin provide that a good is not an "originating good" simply by virtue of combining, packaging, or mere dilution

The remainder of section 202 of the implementing bill sets forth specific rules related to determining whether a good meets the Agreement's requirements for qualifying as an originating good. For example, section 202(b) provides that a good is not disqualified as an originating good if it contains *de minimis* quantities of non-originating materials that do not undergo a required change in tariff classification. Section 202(d) implements provisions in Annex 4.1 of the Agreement that require certain goods to have at least a specified percentage of "regional value content" to qualify as "originating goods." Section 202(d) prescribes alternative methods for calculating regional value content. Other provisions in section 202 address valuation of materials and determination of the originating or non-originating status of fungible goods and materials.

b. Proclamation Authority

Section 202(o)(1) of the bill authorizes the President to proclaim the specific rules of origin in Annex 4.1 of the Agreement. In addition, section 202(o)(2) gives authority to the President to modify certain of the Agreement's specific origin rules by proclamation, subject to the consultation and layover provisions of section 103(a) of the bill. (*See* discussion under item 1.a of Chapter 3, above.)

Various provisions of the Agreement expressly contemplate modifications to the rules of origin. For example, Article 3.20(5) contemplates that the United States and Chile may agree to revise the Agreement's rules of origin for particular textile and apparel goods in light of the availability of fibers, yarns, or fabrics in their respective territories. Article 21.1(3)(b)(ii) of the Agreement authorizes the bilateral Free Trade Commission to approve proposed modifications to any of the Agreement's origin rules.

Section 202(o)(2) of the bill expressly limits the President's authority to modify specific rules of origin pertaining to textile and apparel goods (listed in Chapters 50 through 63 of the HTS). Those rules of origin may be modified by proclamation in only two circumstances: first, to implement an agreement with Chile pursuant to Article 3.20(5) of the Agreement to address commercial availability of particular fibers, yarns, or fabrics; and second, within one year of enactment of the implementing bill, to correct typographical, clerical, or other non-substantive technical errors.

c. Disclosure of Incorrect Information and Denial of Preferential Treatment

Under Article 4.16(4) of the Agreement, neither government may 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 voluntarily corrects the claim. Under Article 4.16(5) of the Agreement, a government that determines through verification that an importer has certified more than once, falsely or without substantiation, that a good qualifies as originating may suspend preferential tariff treatment under the Agreement for identical goods imported by that person. The suspension may continue until the importer proves that it has complied with the government's laws and regulations governing claims for preferential tariff treatment.

Section 205(a) of the bill implements Article 4.16(4) for the United States by amending section 592(c) of the Tariff Act of 1930 (19 U.S.C. 1592(c)). Section 205(b) of the bill implements Article 4.16(5) for the United States by amending section 514 of the Tariff Act of 1930 (19 U.S.C. 1514).

4. Claims for Preferential Tariff Treatment

Article 4.12(3) of the Agreement provides that an importer may claim preferential tariff treatment for an originating good within one year of importation, even if no such claim was made at the time of importation. In seeking a refund for excess duties paid, the importer must provide the customs authorities information substantiating that the good was in fact an originating good at the time of importation.

Section 206 of the bill implements U.S. obligations under Article 4.12(3) of the Agreement by amending section 520(d) of the Tariff Act of 1930 (19 U.S.C. 1520(d)) to allow an importer to claim preferential tariff treatment for originating goods within one year of their importation.

e. Recordkeeping Requirements for Exporters and Producers

Under Article 4.12(1)(b) of the Agreement, each government has committed to require an importer claiming preferential tariff treatment under the Agreement for a good to be prepared to submit to the customs authorities a certificate of origin for the good. (The Agreement allows certain exceptions, for example, for goods with a customs value less than or equal to $2,500.) A certificate of origin may be issued by an exporter, importer, or producer of the good. Where issued by an exporter or importer, the certificate must be supported either by the person's knowledge that the good is an originating good or by a separate certificate issued by the producer.

Article 4.14 of the Agreement sets forth certain obligations relating to importations, including record keeping requirements that each government must apply to its importers. U.S. obligations under Article 4.14 are satisfied by current law, including the record keeping provisions in section 508 of the Tariff Act of 1930 (19 U.S.C. 1508).

Article 4.15 sets forth certain obligations relating to exportations, including record keeping requirements that each government must apply to exporters and producers issuing certificates of origin for goods exported under the Agreement. Section 207 of the bill implements Article 4.15 for the United States by amending the customs record keeping statute (section 508 of the Tariff Act of 1930).

As added by section 207 of the bill, subsection (f) of section 508 of the Tariff Act of 1930 first defines the terms "Chile FTA Certificate of Origin" and "records and supporting documents." It then sets forth the requirement that a U.S. exporter or producer issuing a Chile FTA Certificate of Origin make, keep, and, if requested pursuant to rules and regulations promulgated by the Secretary of the Treasury, render for examination and inspection a copy of the certificate and the records and supporting documents. The exporter or producer must keep these documents for five years from the date of issuance of the certificate. New subsection (g) of section 508 of the Tariff Act of 1930 sets forth penalties for violations of this record keeping requirement.

Article 4.15(3) of the Agreement contains provisions regarding incorrect certificates of origin issued by exporters or producers. Where an exporter or producer becomes aware that a certificate of origin contains or is based on incorrect information, it must provide written notice of that fact immediately and voluntarily to every person to whom the exporter or producer issued the certificate. If it does so, neither Party may impose a penalty.

Section 205(a) of the bill implements U.S. obligations under Article 4.15(3) by amending section 592 of the Tariff Act of 1930 (19 U.S.C. 1592). New subsection (g) of section 592, as added by section 205(b), imposes penalties on exporters and producers that issue false Chile FTA Certificates of Origin through fraud, gross negligence, or negligence. These penalties shall not apply where an exporter or producer corrects an error as described above.

2. <u>Administrative Action</u>

The rules of origin in Chapter 4 of the Agreement are intended to direct the benefits of tariff elimination under the Agreement principally to firms producing or manufacturing goods in Chile and the United States. For this reason, the rules ensure that a product is eligible for benefits under the Agreement only is it is (1) wholly produced or obtained in one or both countries or (2) undergoes both substantial processing and substantial change in one or both countries.

Section 210 of the bill authorizes the Secretary of the Treasury to prescribe regulations necessary to carry out the rule of origin, duty drawback, and customs user fee provisions of the bill. The Treasury Department will use this authority in part to promulgate any regulations necessary to implement the Agreement's provisions governing claims for preferential treatment. Under Article 4.12 of the Agreement, an importer may claim preferential treatment for particular goods by making a written declaration, and may be asked to demonstrate that the goods satisfy the Agreement's rules of origin. Under Article 4.13 of the Agreement, the importer may satisfy such a request by providing a valid certificate of origin. Subject to certain exceptions, Article 4.16(1) requires that a claim for preferential treatment be granted unless customs officials have information that the claim is invalid or the importer fails to satisfy the Agreement's origin rules. Article 4.16(3) requires that a written determination, with factual and legal findings, be provided if a claim is denied.

Under Article 4.16, the verification methods provided under U.S. law may be used to verify claims that goods imported from Chile satisfy the Agreement's origin rules. Article 3.21 sets out special procedures for verifying claims that textile and apparel goods imported from Chile meet the Agreement's origin rules. U.S. officials will carry out verifications under Articles 4.16 and 3.21 of the Agreement pursuant to authorities under current law.

Chapter Five (Customs Administration)

1. Implementing Bill

No statutory changes will be required to implement Chapter 5.

2. Administrative Action

a. Inquiry Point

Article 5.1(2) of the Agreement requires each government to designate an inquiry point for inquiries from interested persons on customs matters. The U.S. Bureau of Customs and Border Protection will serve as the U.S. inquiry point for this purpose. Consistent with Article 5.1(2), the U.S. Bureau of Customs and Border Protection will post information on the Internet at "www.cbp.gov" on how interested persons can make customs-related inquiries.

b. Advance Rulings

Treasury regulations for advance rulings under Article 5.10 of the Agreement (on classification, valuation, drawback, qualification as an "originating good," and qualification for duty-free treatment for certain goods) will parallel in most respects existing regulations in Part 177 of the Customs Regulations for obtaining advance rulings. For example, a ruling may be relied on provided that the facts and circumstances represented in the ruling are complete and do not change. The regulations will make provision for modifications and revocations as well as for delaying the effective date of a modification where the firm in question has relied on an existing ruling. Advance rulings under the Agreement will be issued within 150 days of receipt of all information reasonably required to process the application for the ruling.

Chapter Six (Sanitary and Phytosanitary Measures)

No statutory or administrative changes will be required to implement Chapter 6.

Chapter Seven (Technical Barriers to Trade)

1. Implementing Bill

No statutory changes will be required to implement Chapter 7.

2. Administrative Action

Article 7.8 of the Agreement establishes a Committee on Technical Barriers to Trade (TBT). A USTR official responsible for TBT matters or trade relations with Chile will serve as the U.S. coordinator.

Chapter Eight (Trade Remedies)

1. Implementing Bill

Subtitle A of Title III of the bill implements in U.S. law the bilateral safeguard provisions set out in Chapter 8 of the Agreement. (As discussed under Chapter Three, above, Subtitle B of Title III of the bill implements the textile and apparel safeguard provisions of Chapter 3 of the Agreement.)

a. Bilateral Safeguard Measures

Sections 311 through 316 of the bill authorize the President, after an investigation and affirmative determination by the U.S. International Trade Commission ("ITC"), to suspend duty reductions or impose duties temporarily at NTR/MFN rates on "Chilean articles" when, as a result of the reduction or elimination of a duty under the Agreement, the article is being imported into the United States in such increased quantities and under such conditions as to be a substantial cause of serious injury or threat of serious injury to a domestic industry that produces a like or directly competitive product. The standards and procedures set out in these provisions closely parallel the procedures set forth in sections 201-204 of the Trade Act of 1974.

Section 301(2) defines the term "Chilean article" for purposes of the safeguard provisions to mean a good qualifying as an "originating good" under section 202(a) of the bill.

Section 301(3) defines the term "Chilean textile or apparel article" as a textile or apparel good of Chile that qualifies as an originating good under section 202(a) of the bill. The term "textile or apparel good" is defined in section 3(3) of the bill as a good listed in the Annex to the WTO Agreement on Textiles and Clothing.

Section 311 provides for the filing of petitions with the ITC and for the ITC to conduct bilateral safeguards investigations. Section 311(a) provides that a petition requesting a bilateral safeguard action may be filed with the ITC by an entity that is "representative of an industry." As under section 202(a)(1) of the Trade Act of 1974, the term "entity" is defined to include a trade association, firm, certified or recognized union, or a group of workers.

Section 311(b) sets out the standard to be used by the ITC in undertaking an investigation and making a determination in bilateral safeguard proceedings.

Section 311(c) makes applicable by reference several provisions of the Trade Act of 1974. These are the definition of "substantial cause" in section 202(b)(1)(B), the factors listed in section 202(c) applied in making determinations, the hearing requirement of section 202(b)(3), and the provisions of section 202(i) permitting confidential business information to be made available under protective order to authorized representatives of parties to a safeguard investigation.

Section 311(d) exempts from investigation under this section Chilean articles that have been the basis previously for according relief to an industry under the bill's bilateral safeguard provisions, or that are subject at the time the petition is filed to relief under the global safeguard statute in chapter 1 of title II of the Trade Act of 1974 ("Section 201").

Section 312(a) establishes deadlines for ITC determinations following an investigation under section 311(b). The ITC must make its injury determination within 120 days of the date on which it initiates an investigation.

Section 312(b) makes applicable the provisions of section 330(d) of the Tariff Act of 1930, which will apply when the ITC Commissioners are equally divided on the question of injury or remedy.

Under section 312(c), if the ITC makes an affirmative determination under section 312(a), it must find and recommend to the President the amount of import relief that is necessary to remedy or prevent the serious injury and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition. The relief that may be recommended by the ITC is limited to that authorized in section 313(c). Similar to procedures under the global safeguards provisions in current law, section 312(c) of the bill provides that only those members of the ITC who agreed to the affirmative determination under section 312(a) may vote on the recommendation of relief under section 312(c).

Under section 312(d), the ITC is required to transmit a report to the President not later than 30 days after making its injury determination. The ITC's report must include: the ITC's determination under section 312(a) and the reasons therefor; if the determination under section 312(a) is affirmative or may be considered to be affirmative by the President, any findings and recommendations for import relief and an explanation of the basis for each recommendation; and any dissenting or separate views of ITC Commissioners. Section 312(e) requires the ITC to publish its report promptly and to publish a summary of the report in the *Federal Register*.

Under section 313(a) of the bill, the President is directed, subject to section 313(b), to take action not later than 30 days after receiving a report from the ITC containing an affirmative determination or a determination that the President may consider to be an affirmative determination. The President must provide import relief to the extent that the President determines is necessary to remedy or prevent the injury found by the ITC 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 relief will not provide greater economic and social benefits than costs.

Section 313(c) sets forth the nature of the relief that the President may provide. In general, the President may take action in the form of:

- a suspension of further reductions in the rate of duty to be applied to the articles in question; or

- an increase in the rate of duty on the articles in question to a level that does not exceed the lesser of the existing NTR/MFN rate or the NTR/ MFN rate of duty imposed at the time the Agreement entered into force.

If the relief the President provides has a duration greater than one year, it must be subject to progressive liberalization at regular intervals over the course of its application.

Section 313(d) provides that the period for import relief under the bilateral safeguard shall not exceed three years. If the initial period of import relief is less than 3 years, the President may extend the relief (to a maximum of 3 years) if the President determines that continuation of relief is necessary to remedy or prevent serious injury and to facilitate adjustment to import competition, and that there is evidence that the industry is making a positive adjustment to import competition. That determination must follow an affirmative determination by the ITC to the same effect.

Section 313(e) specifies the duty rate to be applied to Chilean articles after termination of a bilateral safeguard action. Upon the termination of relief, the rate of duty for the remainder of the year is to be the rate that was scheduled to have been in effect one year after the initial provision of import relief. For the rest of the duty phase-out period, the President may set the duty:

- at the rate called for under the U.S. tariff phase-out schedule; or

- in a manner that eliminates the tariff in equal annual stages ending on the date set out in that schedule.

Section 313(f) exempts from import relief any article subject to import relief under the global safeguard provisions in U.S. law (chapter 1 of title II of the Trade Act of 1974).

Section 314 provides that the President's authority to take action under the bilateral safeguards provision expires at the end of the appropriate "transition period," which is ten years for most goods, and twelve years in the case of goods with a duty phase-out of twelve years. The

President may not take action under the bilateral safeguards provision after the expiration of the transition period.

Section 315 allows the President to provide trade compensation to Chile, as required under Chapter 8 of the Agreement, when the United States imposes relief through a bilateral safeguard action. Section 315 provides that for purposes of section 123 of the Trade Act of 1974, which allows the President to provide compensation for global safeguards, any relief provided under section 313 will be treated as an action taken under the global safeguard provisions of U.S. law (sections 201-204 of the Trade Act of 1974).

Section 316 amends section 202(a) of the Trade Act of 1974 to provide that the procedures in section 332(g) of the Tariff Act of 1930 with respect to the release of confidential business information are to apply to bilateral safeguard investigations.

The Administration has not provided classified information to the ITC in past safeguard proceedings and does not expect to provide such information in future proceedings. In the unlikely event that the Administration provides classified information to the ITC in such proceedings, that information would be protected from publication in accordance with Executive Order 12958.

2. Administrative Action

No administrative changes will be required to implement Chapter 8.

Chapter Nine (Government Procurement)

1. Implementing Bill

No statutory changes will be required to implement Chapter 9.

2. Administrative Action

Annex 9.1 of the Agreement establishes thresholds for procurements above which U.S. Government procuring entities must allow Chilean suppliers to bid in accordance with the rules set forth in Chapter 9 of the Agreement. USTR will notify the Federal Acquisition Regulation (FAR) Council of these thresholds. The FAR Council will then incorporate the thresholds into the FAR.

Chapter Ten (Investment)

1. Implementing Bill

Section 106 of the bill authorizes the United States to use binding arbitration to resolve claims covered by Article 10.15(1)(a)(i)(C) or Article 10.15(1)(b)(i)(C) of the Agreement. Articles 10.15(1)(a)(i)(C) and 10.15(1)(b)(i)(C) implicate disputes over government contracts, and section 106 of the bill clarifies that the United States consents to the arbitration of such disputes. No statutory authorization is required for the United States to engage in binding arbitration for other claims covered by Article 10.15. Provisions allowing arbitration of contract claims have regularly been included in U.S. bilateral investment treaties over recent decades.

Section 106 also states that all contracts executed by any agency of the United States on or after the date of entry into force of the Agreement shall contain a clause specifying the law that will apply to resolve any breach of contract claim in the event such a claim is submitted to binding arbitration.

2. Administrative Action

The Administration will examine the need for additional regulatory or other administrative measures that may be necessary to ensure that contracts to which the United States is a party include appropriate choice of law provisions.

Chapter Eleven (Cross-Border Trade in Services)

No statutory or administrative changes will be required to implement Chapter 11.

Chapter Twelve (Financial Services)

No statutory or administrative changes will be required to implement Chapter 12.

Chapter Thirteen (Telecommunications)

No statutory or administrative changes will be required to implement Chapter 13.

Chapter Fourteen (Temporary Entry of Business Persons)

1. Implementing Bill

Title IV of the bill implements U.S. commitments under Chapter 14 of the Agreement, which governs the temporary entry of business persons. In general, Chapter 14 is consistent with existing provisions of the Immigration and Nationality Act ("INA"). The four categories of persons eligible for admission under the Agreement's expedited procedures correspond to existing INA nonimmigrant and related classifications.

In order to provide for the admission of business visitors and intra-company transferees, no changes in U.S. statutes are required. Limited technical changes are needed to provide for the admission of traders and investors and professionals. Legislation is also required to implement Article 14.3(2) of the Agreement regarding labor disputes.

a. Traders and Investors

Under Section B of Annex 14.3 of the Agreement, citizens of Chile are eligible for temporary entry as traders and investors. This category provides for admission under requirements identical to those governing admission under INA section 101(a)(15)(E) (8 U.S.C. 1101(a)(15)(E)), which permits entry for persons to carry on substantial trade in goods or services or to develop and direct investment operations.

Section 101(a)(15)(E) currently conditions admission into the United States upon authorization pursuant to a treaty of commerce and navigation. Since the Agreement is not a treaty of commerce and navigation, and no such treaty exists between the United States and Chile, legislation is necessary to accord treaty trader and investor status to Chilean citizens qualifying for entry under Section B.

Section 401 of the bill does not amend section 101(a)(15)(E). Instead, it uses a mechanism similar to that provided in section 341(a) of the North American Free Trade Agreement Implementation Act, which in turn was based upon the Act of June 18, 1954 (68 Stat. 264, 8 U.S.C. 1184a). The Act of June 18, 1954 conferred treaty trader and investor status upon nationals of the Philippines on a basis of reciprocity secured by an agreement entered into by the President of the United States and the President of the Philippines.

b. Professionals

Section 402(a) of the bill amends section 101(a)(15)(H)(i) of the INA (8 U.S.C. 1101(a)(15)(H)(i)), which defines certain categories of persons entitled to enter the United States as nonimmigrant professionals. Section 402(a) of the bill inserts new subclause (b1) into INA section 101(a)(15)(H)(i). Subclause (b1) establishes a new category of aliens entitled to enter the United States temporarily as nonimmigrants. These aliens are citizens of countries with which the United

States has entered into free trade agreements listed in INA section 214(g)(8)(A), as amended by the bill, and who seek to come to the United States temporarily to engage in business activities at the professional level. To qualify as a professional for purposes of subclause (b1), a person must be engaged in a specialty occupation requiring (1) theoretical and practical application of a body of specialized knowledge, and (2) attainment of a bachelor's degree or higher degree in the specific specialty (or the equivalent of such a degree) as a minimum for entry into the occupation in the United States. It is intended that the definition of "specialty occupation" in the amendment to the INA made by section 402(a)(1) of the implementing bill will be interpreted in a manner similar to the interpretation of the definition of "specialty occupation" under section 214(i) of the INA.

Entry into the United States under section 101(a)(15)(H)(i)(b1) would be subject to annual numerical limits established by the Secretary of Homeland Security as provided for in the applicable agreement, and as set forth in INA section 214(g)(8)(B), as added by the bill. The Department of Labor will also issue regulations governing temporary entry of professionals under this new provision of law. These amendments to the INA implement Section D of Annex 14.3 of the Agreement.

Annual numerical limits under the H-1B program, set forth in INA section 214(g)(1)(A), will be reduced by the annual numerical limits set forth in new INA section 214(g)(8)(B). However, if at the end of a fiscal year the limits under section 214(g)(8)(B) have not been exhausted, the H-1B limit for that fiscal year may be adjusted by the amounts remaining under section 214(g)(8)(B). Visas may be issued under the H-1B program pursuant to such adjustment to persons who applied for H-1B visas in the year for which the adjustment was made. These visas may be issued only during the first 45 days of the next fiscal year.

A person's status under section 101(a)(15)(H)(i)(b1) will be valid for one year at a time, renewable in one-year increments (subject to conditions discussed below concerning the labor attestation made by the alien's employer). Continuation of such status will not count against the applicable numerical limit in INA section 214(g)(8)(B). However, after the fifth extension of an alien's status under section 101(a)(15)(H)(i)(b1), subsequent extensions will count against the H-1B numerical limit set forth in INA section 214(g)(1)(A).

Existing INA section 101(a)(15)(H) also provides for the entry of spouses and children accompanying or following to join business persons entering under new subclause (b1). The purpose of this provision is to grant express authorization for the admission of such persons, but not allow them to be employed in the United States unless they independently meet all applicable INA requirements.

Persons seeking temporary entry into the United States under section 101(a)(15)(H)(i)(b1) will be:

- considered to be seeking nonimmigrant status;

- subject to general requirements relating to admission of nonimmigrants, including those pertaining to the issuance of entry documents and the presumption set out in INA section 214(b) (8 U.S.C. 1184(b)); and

- accorded nonimmigrant status on admission.

This treatment also codifies current practice.

It should be noted that while there are many similarities between the way professionals would be treated under section 101(a)(15)(H)(i)(b1) of the INA, as added by the bill, and the way H-1B professionals are treated, a determination of admissibility under subclause (b1) will neither foreclose nor establish eligibility for entry as an H-1B professional. Further, section 101(a)(15)(H)(i)(b1) does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed.

Certain provisions of the H-1B program are due to expire at the end of fiscal year 2003. In future legislation, Congress may extend or modify those provisions. It is recognized that, should Congress extend or modify provisions of the H-1B program, it may make corresponding modifications to the amendments to the INA made by the implementing bill, to the extent consistent with the obligations of the United States under the Agreement. In particular, section 402(d) of the bill amends section 214(c) of the INA to establish that any fee charged for issuance of a visa pursuant to the H-1B program will also be charged for issuance of a visa pursuant to INA section 101(a)(15)(H)(i)(b1). Such fees will be used for worker training, scholarships, and other purposes for which H-1B fees are used, as described in INA section 286(s).

c. Numerical Limitations

Paragraph six of Section D of Annex 14.3 of the Agreement permits the United States to establish an annual numerical limit on temporary entries under the Agreement of Chilean professionals. Under new paragraph (8)(B) of INA section 214(g) added by section 402(a) of the bill, the Secretary of Homeland Security will issue regulations establishing an annual limit of up to 1,400 new temporary entry applications from Chilean professionals, as provided in Appendix 14.3(D)(6) of the Agreement.

As discussed above, the annual numerical limits applicable under the H-1B program will be adjusted in light of the numerical limits established under INA section 214(g)(8)(B).

d. Labor Attestations

Under section (D)(5) of Annex 14.3 of the Agreement, the United States may require that an attestation of compliance with labor and immigration laws be made a condition for the temporary entry of Chilean professionals. This provision allows U.S. labor and immigration officials to ensure that U.S. employers are not hiring Chilean professionals as a way to put pressure on U.S. employees to accept lower wages or less favorable terms and conditions of employment.

Section 402(b) of the bill implements the attestation requirement under the Agreement. Section 402(b) of the bill amends section 212 of the INA (8 U.S.C. 1182) by adding a new subsection (t) to the end of that section.

INA section 212(t)(1), as added by section 402(b) of the bill, requires a U.S. employer seeking a temporary entry visa for a Chilean professional to file an attestation with the Secretary of Labor. The attestation will consist of four core elements similar to those required for attestations under the H-1B visa program. *See* 8 U.S.C. 1182(n)(1)(A)-(C). Thus, an employer must attest that:

- It will pay the employee the higher of (a) the actual wage paid to all other individuals with similar experience and qualifications for the specific employment in question, or (b) the prevailing wage level for the occupational classification in the area of employment.

- It will provide working conditions for the employee that will not adversely affect the working conditions of workers similarly employed.

- There is no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

- The employer has provided notice of its attestation to its employees' bargaining representative in the occupational classification in the area for which the employee is sought or, absent such a representative, has otherwise notified its employees.

An attestation is required in connection with a professional's initial admission into the United States pursuant to INA section 101(a)(15)(H)(i)(b1). A professional's nonimmigrant status under section 101(a)(15)(H)(i)(b1) is valid for one year at a time, renewable in one year increments. Pursuant to INA section 214(g)(8)(C), as added by the bill, for a professional whose status under section 101(a)(15)(H)(i)(b1) is extended, a new attestation must filed every three years for the duration of the professional's continuation of nonimmigrant status under section 101(a)(15)(H)(i)(b1).

The remainder of new INA section 212(t) contains provisions for enforcing the labor attestation requirement. Like the contents of the attestation itself, the enforcement requirements are based on requirements under the H-1B visa program.

INA section 212(t)(2)(A) requires an employer to make copies of labor attestations (and such accompanying documents as are necessary) available for public examination at the employer's principal place of business or worksite.

INA section 212(t)(2)(B) requires the Secretary of Labor to compile a list of all labor attestations filed including, with respect to each attestation, the wage rate, number of alien professionals sought for employment, period of intended employment, and date of need. These lists will be available for public examination at the Department of Labor in Washington, D.C.

INA section 212(t)(2)(C) provides that the Secretary of Labor shall accept a labor attestation within seven days of filing and issue the certification necessary for an alien to enter the United States as a nonimmigrant under INA section 101(a)(15)(H)(i)(b1), unless the attestation is incomplete or obviously inaccurate.

INA section 212(t)(3)(A) requires the Secretary of Labor to establish a process for the receipt, investigation, and disposition of complaints respecting an employer's failure to meet a condition specified in a labor attestation or an employer's misrepresentation of material facts in such an attestation. Section 212(t)(3) also sets forth penalties that may be imposed for violation of the labor attestation requirements, including monetary fines and denial of applications for visas under INA section 101(a)(15)(H)(i)(b1) for specified periods.

INA section 212(t)(4) defines certain terms used in INA section 212(t).

e. Labor Disputes

Article 14.3(2) of the Agreement establishes an important safeguard for the domestic labor force in the United States and Chile, respectively. It permits either government to refuse to issue an immigration document authorizing employment where the temporary entry of a business person might affect adversely the settlement of a labor dispute or the employment of a person involved in such dispute. Article 14.3(2) thus allows the United States to deny temporary entry to a Chilean business person whose activities in the United States require employment authorization if admission might interfere with an ongoing labor dispute. If the United States invokes Article 14.3(2), it must inform the business person in writing of the reasons for its action and notify Chile.

Section 403 of the bill implements Article 14.3(2) of the Agreement by amending INA section 214(j) (8 U.S.C. 1184(j)), designating current subsection (j) as paragraph (1) and inserting a new paragraph (2).

New paragraph (2) of INA section 214(j) provides authority to refuse nonimmigrant classification under specified circumstances to a Chilean business person seeking to enter the United States under and pursuant to the Agreement. In particular, nonimmigrant classification may be refused if there is a labor dispute affecting the relevant occupational classification at the Chilean business person's place of employment or intended place of employment in the United States, unless that person establishes, pursuant to regulations issued by the Secretary of Homeland Security after consultations with the Secretary of Labor, that the business person's entry will not adversely affect the settlement of the labor dispute or the employment of any person involved in the labor dispute.

New paragraph (2) of INA section 214(j) also requires the provision of notice to the affected Chilean business persons and to Chile of a determination to deny nonimmigrant classification, as required under Article 14.3(3) of the Agreement.

As discussed above, an employer seeking to hire a Chilean professional under new section 101(a)(15)(H)(i)(b1) of the INA must submit an attestation in compliance with all of the conditions set forth in new section 212(t)(1) of the INA. If the employer is unable to make the necessary attestation, due to a strike or lockout in the professional's occupational classification, then the Chilean professional will not be admitted to enter the United States under section 101(a)(15)(H)(i)(b1), notwithstanding new INA section 214(j)(2).

INA section 214(j)(2) as inserted by the bill applies only to requests for temporary entry by traders and investors, intra-company transferees, and professionals---*i.e.*, the categories of nonimmigrants that require employment authorization under U.S. law (corresponding to Sections B, C, and D of Annex 14.3 of the Agreement). Employment in the U.S. labor market is not permitted for business visitors, as defined in INA section 101(a)(15)(B) (8 U.S.C. 1101(a)(15)(B)) (corresponding to Section A of Annex 14.3 of the Agreement); violations of status under that provision that involve labor disputes are fully redressable under existing law.

Section 214(j)(2) is similar to existing INA provisions that prohibit admission in certain circumstances where interference with a labor dispute may result. For example, under INA section 212(n)(1)(B) (8 U.S.C. 1182(n)(1)(B)), the U.S. employer sponsoring an alien for admission must certify that there is no strike or lockout in the occupational classification at the place of employment. Additionally, section 214(j)(2) will supplement INA section 237(a)(1)(C) (8 U.S.C. 1227(a)(1)(C)) and related INA provisions that now authorize deportation of an alien admitted under a particular nonimmigrant category if the alien ceases to perform the type of work permitted under that category or misrepresented the nature of the work at the time of admission. The Department of Labor will provide strike certifications to the Department of Homeland Security, as it has provided to the Immigration and Naturalization Service under existing provisions, pursuant to 8 C.F.R. 214.2(h)(17).

2. <u>Administrative Action</u>

Chile will be added to the list of countries, maintained by the Department of State, whose citizens are eligible for treaty trader and treaty investor status under INA section 101(a)(15)(E).

With respect to professionals provided for under Section D of Annex 14.3 of the Agreement, in all cases where a state license is required to engage in a particular activity in the United States, such professionals will be required to obtain the appropriate state license.

Pursuant to INA section 214(g)(8)(B) as added by section 402(a) of the bill, the Secretary of Homeland Security will issue regulations implementing the numerical limits set forth in Appendix 14.3(D)(6) of the Agreement. The Secretary of Labor will issue regulations implementing the labor attestation provisions in new subsection (t) of INA section 212. The administrative agencies responsible for administering the other amendments to the INA described above will promulgate regulations to implement those amendments.

Chapter Fifteen (Electronic Commerce)

No statutory or administrative changes will be required to implement Chapter 15.

Chapter Sixteen
(Competition Policy, Designated Monopolies, and State Enterprises)

No statutory or administrative changes will be required to implement Chapter 16.

Chapter Seventeen (Intellectual Property Rights)

No statutory or administrative changes will be required to implement Chapter 17.

Chapter Eighteen (Labor)

1. **Implementing Bill**

No statutory changes will be required to implement Chapter 18.

2. **Administrative Action**

Article 18.4(3) of the Agreement calls for each government to designate an office to serve as the contact point for implementing the Agreement's labor provisions. The Department of Labor's Bureau of International Labor Affairs will serve as the U.S. contact point for this purpose.

Chapter Nineteen (Environment)

No statutory or administrative changes will be required to implement Chapter 19.