

July 14, 2004

The Honorable Robert B. Zoellick
United States Trade Representative
Executive Office of the President
Washington, D.C. 20508

Dear Ambassador Zoellick:

Pursuant to Section 2104 (e) of the Trade Act of 2002 and Section 135 (e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Industry Trade Advisory Committee for Services and Finance Industries (ITAC 10) on the U.S.-Bahrain Free Trade Agreement reflecting consensus on the proposed Agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Vastine". The signature is fluid and cursive, with a large initial "R" and a long, sweeping tail.

Robert Vastine
Chairman, ISAC 13

**The U.S.-Bahrain
Free Trade Agreement**

**Report of the
Industry Trade Advisory Committee on Services
and Finance Industries (ITAC 10)**

July 14, 2004

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Industry Trade Advisory Committee on Services and Finance Industries (ITAC 10)

Report to the President, the Congress and the United States Trade Representative on the U.S.-Bahrain Free Trade Agreement (FTA).

I. Purpose of the Committee Report

Section 2104 (e) of the Trade Act of 2002 requires that advisory committees provide the President, the U.S. Trade Representative, and Congress with reports required under Section 135 (e)(1) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives set forth in the Trade Act of 2002. The report must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, the Industry Trade Advisory Committee on Services and Finance Industries (ITAC 10) hereby submits the following report.

II. Executive Summary of Committee Report

The free trade agreement with Bahrain upholds the principles of free trade in services embodied in the free trade agreements recently negotiated by the Administration and it is, in most respects, an excellent agreement. While it differs markedly from most FTAs in that it does not cover investment, we note, with strong approval, that the Administration chose, after consultation with the ITAC and others, to leave in place the U.S.-Bahrain Bilateral Investment Treaty which entered into force on May 31, 2002. That agreement is a high standard investment agreement which provides key market access commitments and investment protections such as national treatment, most-favored nation treatment, expropriation, fair and equitable treatment, full protection and security, transfer of capital, no performance requirements, and investment agreements. All are subject to dispute settlement.

Taken together with the U.S.-Bahrain BIT, the Bahrain FTA establishes a strong precedent for other trade agreements anticipated to be negotiated as part of the Administration's broader Middle East initiative, and as such has a significance greater than might be indicated by the size of the Bahrain economy and two way trade between the two Parties.

III. Brief Description of the Mandate of the ITAC 10

ITAC 10 performs such functions and duties and prepares reports, as required by Section 135 of the Trade Act of 1974, as amended, with respect to the services sector. To fulfill its mandate the ITAC meets at least monthly to review negotiations with U.S. trade officials and to advise as required by law.

ITAC 10 advises the Secretary of Commerce and the U.S. Trade Representative (USTR) concerning the trade matters referred to in Sections 101, 102, and 124 of the Trade Act of 1974, as amended; with respect to the operation of any trade agreement once entered into; and with respect to other matters arising in connection with the development, implementation, and administration of the services trade policy of the United States, including those matters referred to in Reorganization Plan Number 3 of 1979 and Executive Order 12188, and the priorities for actions there under.

In particular, ITAC 10 provides detailed policy and technical advice, information, and recommendations to the Secretary of Commerce and the USTR regarding trade barriers and implementation of trade agreements negotiated under Sections 101 or 102 of the Trade Act of 1974, as amended, and Sections 1102 and 1103 of the 1988 Trade Act, which affect the services sector, and performs such other advisory functions relevant to U.S. trade policy as may be requested by the Secretary and the USTR or their designees.

IV. Negotiating Objectives and Priorities of the ITAC 10

ITAC 10's overall goal is to liberalize trade in the wide range of services provided by U.S. businesses, thereby promoting the expansion and health of the U.S. economy and, by extension, the economies of its trading partners.

U.S. services industries provide about 87 million jobs, or 80% of total private sector employment. Most new jobs are services jobs. Between 1993 and 2003 services added 20.3 million new U.S. jobs.

According to the U.S. Bureau of Labor Statistics, 90% of all the 21.3 million new jobs to be created over the next 8 years will be services jobs.

ITAC 10's objective for this and other trade agreements is to achieve substantial additional market access for U.S. service industries. This means commitments to greater access to foreign markets for U.S. cross border trade, to investment abroad, and to the temporary movement of Americans who provide services.

With respect to the protection of U.S. investment abroad, ITAC 10's objective is to ensure high levels of protections for U.S. investors abroad, including protections related to national treatment and most-favored nation treatment, expropriation, fair and equitable

treatment, full protection and security, the free transfer of capital, no performance requirements, investment agreements and investor-state dispute settlement.

ITAC 10 also sees an opportunity to advance U.S. policy objectives to liberalize foreign markets by focusing U.S. agencies' and private entities' efforts to provide technical assistance and trade-related capacity-building abroad, especially in developing countries and transitional economies. ITAC 10 believes that intensive technical assistance is imperative in many parts of the world if mutual trade liberalization goals are to be attained.

Finally, ITAC 10 appreciates the decision of the U.S. Government to pursue a *negative list* (or "top-down") approach and hopes this template is used when negotiating future bilateral and regional trade agreements.

V. Advisory Committee Opinion on Agreement

Overall, the Committee believes that the U.S.-Bahrain Free Trade Agreement meets the Committee's objective of achieving new and expanded trade and investment opportunities.

A. Crosscutting Provisions. The Committee's opinions on investment, temporary entry, and transparency follow:

Investment

The Committee also welcomes the Agreement's reaffirmation of existing bilateral and other commitments (Article 1.2.1), which includes the U.S.-Bahrain Bilateral Investment Treaty (BIT). The Committee strongly supported the Administration's decision not to renegotiate investment issues in the context of the U.S.-Bahrain FTA given that that the U.S.-Bahrain BIT, that entered into force on May 31, 2001, already incorporates high standards. It includes the key market access and investment protections sought by U.S. investors abroad and already satisfies the investment-negotiating objective of the Trade Promotion Authority legislation that was enacted as part of the Trade Act of 2002. In particular, the BIT provides protections in the following areas, all subject to investor-state dispute settlement: national treatment, most-favored nation treatment, expropriation, fair and equitable treatment, full protection and security, the free transfer of capital, no performance requirements, and investment agreements. The only areas where Bahrain is permitted exceptions from national treatment and most-favored nation treatment relate to air transportation and ownership of land. As a result of the existing provisions of the U.S.-Bahrain BIT, the Committee supports the Administration's decision not to reopen investment negotiations with Bahrain, which could only have lowered, not raised, the standards for investment access and protection in Bahrain.

Movement of Personnel

The U.S.-Bahrain Free Trade Agreement does not include provisions for temporary entry

of key businesspersons. ITAC 10 is disappointed by the absence of such provisions in this and other FTAs.

Skilled personnel are essential to world trade and investment. They are the means by which U.S. service companies provide services to their customers. Without the ability to move their personnel with speed and agility, American services businesses simply cannot fulfill their obligations to clients around the world. Thus, for a trade agreement to be commercially viable it should contain meaningful personnel mobility provisions.

As ISAC 13 previously commented and the ITAC 10 reaffirms, U.S. service providers face complex, cumbersome and time-consuming requirements to obtain work permits and visas for their workers on short-term secondments and/or transfer to company facilities, projects or assignments in other countries. Increasingly, similar visa and other entry permit barriers face foreign employees and U.S. employers seeking temporary entry into this country for their employees and contract workers. These undermine the spirit and purpose of bilateral trade agreements.

The Committee well understands that temporary entry provisions are not being included in this Agreement and similar current Agreements because of Congressional concerns that the Agreements had not been explicitly authorized in advance. The responsible committees of Congress must develop guidelines for the negotiation of temporary entry provisions for future FTAs so that USTR has the flexibility to negotiate temporary entry provisions for highly skilled individuals, senior corporate executives, professional personnel (accountants, architects, educators, lawyers, health care personnel, as examples) and others with unique skills and experience, such as those who operate oil well drilling equipment. Not only will temporary entry provisions benefit U.S. service providers, they will also help increase the employment of Americans working overseas and, in many instances, will help create employment for U.S.-based workers who support those working abroad.

At a minimum, a bilateral trade agreement should include, in the case of business visitors, and in particular professionals, a binding for access to the most common short-term business activities and a prohibition of prior approval procedures, petitions, labor certification tests or numerical limitations. For intra-company transferees, neither party to the agreement should be subject to employment tests, labor certification or numerical limits.

The Bahrain FTA does contain some movement of personnel provision in its Chapter on Services as further described in the Agreement's Annexes on Non-Confirming Measures. These include provisions for up to three entries to Bahrain per year for periods of up to 12 months for some identified professional service providers, but do not include other services U.S. providers are eager and able to provide. These requirements are to be phased out over seven years. Though welcome, this may be longer than desirable and it is limited to the service sectors assured temporary licenses.

Transparency

The Bahrain Agreement continues the very useful U.S. drive to obtain bilateral commitments to transparency disciplines for domestic regulation. As has been more extensively described in previous ITAC reports on new U.S. FTAs, these disciplines are an important achievement, because they commit our FTA partners to apply transparency disciplines that have been extensively tested in the United States. The U.S. experience is that they have improved the quality of U.S. government regulation practices, which are governed by the U.S. Administrative Procedures Act. Many state governments have comparable procedures. Nowhere is this more important than in the services sector, where government regulation is prevalent and transparency requirements for government regulatory processes are well developed and well accepted by the agencies themselves. We can only hope that foreign government agencies and companies will find them equally useful.

B. Sectoral Issues. The Committee's opinions on specific service sectors follow.

Accounting

The international accounting networks are able to participate in the Bahraini market in a satisfactory manner through various arrangements with local practitioners and locally- and/or regionally based firms. Services Annex I to the Agreement indicates that the provision of accountancy services by U.S. CPAs to non-Bahraini clients in Bahrain would require the maintenance of a local place of business. This would limit the temporary presence practices of U.S. CPAs, which are especially important to small- and medium-sized firms and individual practitioners, who may not have the resources to establish a local place of business. However, the Annex indicates that U.S. accountants will be able to obtain temporary licenses to practice and that local presence requirements will be phased out over seven years. This is generally welcome, although the transition period may be longer than necessary.

Advertising

Bahrain has retained a number of non-conforming measures affecting the advertising sector; however, all restrictions will be phased out in three to five years. During the first three years of the Agreement, cross border provision of advertising will be permitted only if the service is supplied on behalf of a Bahraini enterprise; otherwise an advertising business will have to maintain a place of business in Bahrain to comply with commercial registration requirements. For the first five years of the Agreement, the form of commercial presence for advertising companies that wish to create or transmit advertising within Bahrain is limited to branches or to 100% foreign owned companies that use Bahrain as the principal place for distribution of its services. These restrictions on advertising services do not prohibit sales of advertising space to Bahraini advertisers on satellite signals transmitted into Bahrain via satellite. On balance, these restrictions do not appear to represent onerous restrictions for U.S. advertising service suppliers.

Architecture

The general provisions of Professional Services Annex 10B, on the development of professional standards, temporary licensing and review provide for equity and reciprocity

in this sector. In Annex 1, Bahrain schedule of Non-Conforming Measures, the exception to the requirement for establishment offered to professional service providers that are licensed in the United States, in addition to the availability of temporary licenses, eliminates any significant impediments to market access and national treatment. The seven-year fade-out of the local presence requirement further liberalizes this offer.

Asset Management

The Agreement advances market access goals in a country that may be of commercial interest to the U.S. asset management industry in the future. The Agreement includes a specific commitment, that the industry has sought in all recent trade agreements, to permit the cross-border provision of portfolio management services by asset managers of mutual funds. This commitment will allow a U.S. firm to achieve economies of scale in serving its clients in Bahrain. The financial services transparency commitments in the Agreement also will benefit the asset management industry.

Audiovisual

Bahrain has committed to provide full market access and national treatment for American audiovisual services. Bahrain is the only country to date which has not maintained some non-conforming measures in this sector. In related areas, Bahrain has clarified that its restrictions on advertising services do not prohibit sales of advertising space to Bahraini advertisers on satellite signals transmitted into Bahrain via satellite.

Computer and Related Services

The Agreement ensures full market access and national treatment for computer and related services since the services chapter adopts a negative list approach and Bahrain had taken no reservations in this important sector for the U.S. information technology industry. The Agreement covers all modes of delivery, including electronic delivery, such as via the Internet. The negative list approach also ensures that rapidly evolving computer services, driven by continual advances in technology, will be provided full coverage. Without the negative list approach, computer and related services definitions and commitments could quickly become obsolete as new services are introduced. The Committee also welcomes the commitments made in the Electronic Commerce Chapter, which compliment Bahrain's services commitments.

Electronic Commerce

The U.S.-Bahrain Free Trade Agreement includes an electronic commerce chapter which is based on the "digital products" text reflected in previous agreements. In the chapter, Bahrain and the U.S. reaffirm the importance of avoiding unnecessary e-commerce barriers and the applicability of WTO rules. The U.S. and Bahrain also agreed to non-discriminatory treatment of "digital products" providing a broad national treatment and MFN non-discriminatory provision. This is a step forward in securing liberal trade treatment of digital products. Moreover, the parties agreed not to impose customs duties on digital products transmitted electronically. This provision is similar to the WTO Moratorium on Customs Duties on Electronic Transmissions.

With respect to the physical delivery of digital products, Bahrain agreed to apply customs

duties on the basis of the value of the carrier medium, rather than on other subjective, revenue based criteria. Presently countries use different methods to apply customs duties which are often trade restrictive and raise the costs of products for consumers. While Bahrain has essentially allowed duty free treatment of all products making this provision not necessary in terms of U.S.-Bahrain trade, the provision is an important statement to the rest of the global trading community that this is the standard that should be applied where tariffs remain on such products.

Overall, the chapter includes all of the necessary provisions to promote free and fair trade in digital products and encourages e-commerce between the United States and Bahrain.

Energy Services

Although it produces only a modest quantity of oil, Bahrain is a growing and strategically located regional energy services center. Petroleum production and refining imported crude oil account for about 60% of Bahrain's export receipts, 60% of its government revenues, and 30% of its GDP.

Although some energy services providers have considerable experience working in Bahrain, the Bahrain FTA, and in particular its chapters on government procurement, cross-border trade in services, and transparency, provides a framework that can increase opportunities in Bahrain for many more U.S. energy services firms.

For energy services providers not working on behalf of a Bahraini enterprise, Annex I Services Non-Conforming Measures remove significant barriers to what would otherwise be onerous local presence requirements through exceptions offered to providers licensed in the U.S., and through the availability of temporary licenses. Further, the three and seven-year phase-outs of the local presence requirement eliminate this provision altogether within a reasonable period of time.

Engineering and Environmental Services

In summary, the Agreement appears to be positive for engineering and environmental services. Several aspects of the Agreement can be specifically called out in that regard, including Temporary Admission of Goods, Technical Barriers to Trade, Government Procurement, and Transparency. These are discussed in more detail below.

Market Access – Chapter 2

The provisions of the Agreement providing for temporary admission of goods remove many of the barriers to importation of specialized equipment required to support engineering and environmental services. The removal of these barriers to movement of goods will greatly facilitate development of trade in specialized areas of the engineering and environmental sectors.

Government Procurement – Chapter 9

Many of the engineering and environmental services tenders are for government contracts. This Agreement enhances the transparency goals through a well-defined open procurement process that we believe will provide substantial opportunities in the

engineering and environmental sectors.

Environment, Chapter 16

The environmental agreement provides a fair and equitable approach to growth in this sector. This section further enhances the overarching transparency objectives of this agreement, providing standards for establishing standing to bring claims for noncompliance, encouraging increases in public involvement and information sharing, and a mechanism for mediation of compliance challenges. This chapter is further enhanced by the attached Memorandum of Understanding on Environmental Cooperation that establishes a future environmental policy for cooperation, growth, enforcement and information exchange. The collaborative theme captured in this section provides a very real and firm basis upon which cross border trade in environmental services can grow.

Annex I – Non-Conforming Measures

We regret that in Annex I, Item 1, Local Presence, Bahrain retains residency requirements as a prerequisite for the conduct of business in Engineering Services, Construction and Construction Related Services, and Consultancy and Management Services, all sectors within which engineering and environmental services are provided. This requirement has the effect of limiting engineering and environmental services entry. While limited relief is provided in Paragraph 2 by allowing up to three 12-month temporary licenses for service suppliers in these sectors, the limited number of temporary licenses and the 12 to 24 month duration per supplier will restrict opportunities within the engineering and environmental sectors.

The phasing out this residency requirement, while generally positive, nonetheless does not remove the residency requirement for engineering services and construction and construction related services for seven years. The continuing 3 to 7 year time frame within which residency requirements are retained will serve as an unnecessary barrier to trade in this sector.

Financial Services (other than insurance and asset management)

Bahrain's commitments in the financial services sector contained in its proposed free trade agreement with the United States (insurance and asset management are considered elsewhere in this report) are comprehensive and strong, especially when considered together with the exemplary commitments made by Bahrain in its existing Bilateral Investment Treaty with the United States, which we understand will survive, and coexist with, the proposed free trade agreement. We commend Bahrain for its commitment to opening its financial services sector to foreign investment. We also commend both Bahrain and the United States for leaving in place a Bilateral Investment Treaty that contains exceptional protections for financial services investors, including the availability of investor-state dispute resolution for the full range of BIT protections. Such protections are not only important in their own right, but serve as a substantial incentive to foreign investment and are highly valued by the U.S. business community.

While greater commitments in the area of cross-border supply of services would be desirable, we recognize that this drawback is not unique to this agreement, but evidence

of the need for a broader policy discussion that needs to take place – sooner rather than later, as financial services become increasingly globalized.

Healthcare Services

The Bahrain FTA is generally silent on specific provisions regarding health care. In previous FTAs, particularly in several of the CAFTA agreements, USTR has been successful in negotiating market access through a temporary licensing process for physicians. The Committee believes that as a minimum step, temporary licensing has been an encouraging development in trade negotiations. In Bahrain, the current practices do allow for temporary licensing for American health care practitioners. Although exclusion of temporary licensing from the FTA is not harmful to American practitioners as long as the current policies are continued, inclusion of temporary licensing could have memorialized the practice and established a formal and transparent temporary licensing process. Health services are also excluded from the phase out requirements.

Insurance

The insurance commitments are generally good and in line with other FTAs. The agreement includes provisions addressing the importance of expedited availability of insurance products and permitting the introduction of new financial services. One non-conforming measure denies U.S. non-life insurers entry for six months, and a side letter provides this may be extended by mutual agreement. This committee would be strongly opposed to any further delay. Another side letter addresses standards required for cross border insurance suppliers and another assures that U.S. insurers will continue to be permitted to sell products through independent agents.

Legal Services

Legal services are covered by the Chapter of Services and are generally to be accorded liberal access on a national treatment and MFN basis, with significant provisions obligating the Parties to transparency of regulation. However, the Parties' commitments are conditioned by provisions in Annex I listing existing Non-conforming Measures and Annex II regarding continuing reservations of non-conformity.

In Annex 1, Bahrain has indicated that legal services cannot be provided to non-Bahrainis unless the provider maintains a local place of business. This is, effectively, a denial of “Fly-in/Fly-out” temporary presence practices that are the most likely form in which legal services would be provided within the territory of Bahrain by U.S. lawyers advising non-Bahrainis.

The Annex indicates that certain professional service sectors will be permitted to obtain up to three temporary licenses for an initial period of 12 months of local presence with the option to renew for an additional 12 months. Accountants, architects and engineers are entitled to obtain such licenses. Providers of legal services are not included. Similarly, the Annex includes an obligation to phase out all local presence requirements for some professional service providers within a defined term of up to seven years. Again, this is not available with regard to providers of legal services.

With regard to a separate section of the Annex regarding “legal services” as such, it would appear that foreign legal consultants will be enabled to establish local offices under familiar and appropriate rules. However, the scope of practice that such providers will be able to offer will be limited to the laws of the jurisdiction in which such providers are admitted. As we have repeatedly indicated with respect to similar provisions in the GATS and in other FTAs, limiting the advice lawyers can give to the law of their jurisdiction of admission, rather than to the law on which they are permitted to provide advice in their jurisdiction of admission, is far too limiting for the types of transborder legal practice in which U.S. lawyers presently engage.

The transparency provisions of the Agreement are highly desirable. These are a priority of the U.S. government for all services providers. However, it should be noted that the Annex II submitted by the United States includes the usual blanket reservation for all sub-federal regulations. As legal services in the United States are almost entirely a province of the States, the FTA has no binding commitment to Bahrainis seeking to offer legal services in the United States other than in those states in which foreign legal consultant rules and more recently, FIFO practice has been recognized. On the other hand, there is probably relatively little demand by Bahrain for access to the American market for legal services whereas Bahrain could well be an important location for the delivery of U.S. legal services.

Real Estate

Regarding the Cross-Border Trade in Services Annex I – Non-Conforming Measures, Schedule of Bahrain, the partnership requirement for the supply of real estate services recognizes the need for domestic licensing and the value of local knowledge. We are pleased that printed advertising materials may be imported without restriction. The Agreement specifies parallel treatment on the standards conformity assessment that would presumably apply to licensing of real estate practitioners. We applaud the development of mutually recognized professional standards.

Regarding government procurement, through lease or purchase, the Agreement appropriately limits participation to those who have the legal ability – such as licenses – to fulfill the requirements. Property management is a real estate specialty and results in the efficient operation of residential and commercial properties such as apartment buildings, office building and production and distribution facilities. While it is appropriate that the management of government-owned facilities be restricted for security reasons, the provisions in the Government Procurement Annex, SECTION D: SERVICES, Schedule of Bahrain, include exceptions to the rules regarding government procurement for the management of educational buildings, hospital buildings and warehouse buildings. This represents an area for development in the trading relationship between the United States and Bahrain.

VI. Membership of ITAC 10

A membership roster for the Industry Trade Advisory Committee on Services and Finance Industries (ITAC 10) is attached.

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