

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

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

November 15, 2005

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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.-Oman Free Trade Agreement (FTA or Agreement).

I. Purpose of the Committee Report

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

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and 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 Oman, in combination with the agreement with Bahrain, continues the implementation of the President's Middle East Free Trade Initiative and thus has significance greater than might be indicated by the size of the Oman and Bahrain economies and two-way trade between the Parties.

The Oman Agreement chapters on services and investment may be considered as close to a "model" for any FTA to be concluded. It contains the fewest non-conforming measures.

Foreign direct investment is also particularly important for trade in services because many services can only be "traded" by establishing a commercial presence (investing) in a foreign market. The chapter in the Oman FTA should provide significant new opportunities for market access for investment (as discussed in a sector-by-sector manner below) and includes high standard protections for such investment, including investor-state arbitration, the free transfer of capital and protections related to expropriation and fair and equitable treatment and respect of "investment agreements" based on the development of resources.

For these reasons ITAC 10 recommends the implementation of this Agreement.

However, certain aspects of this Agreement are disappointing to ITAC 10 and deserve specific mention. The Agreement continues to obligate the parties to designate negotiating groups to develop further details of commitments not included in the text. However, in many sectors of the economy, including in particular professional services, in which U.S. regulation is a matter of state law, such groups do not exist and their creation and empowerment to negotiate such treaty enhancements may be questionable.

In addition, both in the text and side letters, the USTR is advising Oman that temporary entry provisions are not included in the Agreement. This feature undermines a critical element of commitments regarding the market access for the provision of services that often requires temporary access for providers to the territory of the recipient. The Committee urgently asks Congress to examine this issue to facilitate the further conclusion of FTAs and similar international agreements. As noted below, services are now by far the largest and fastest growing sector of American business. “Temporary access” is essential to the continued vitality of the industries and professions that comprise that sector.

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 persons who provide services. Without similar U.S. commitments extended to our trading partners, U.S. service providers will be less able to realize the full opportunities this Agreement and others like it appear to offer.

With respect to the protection of U.S. investment abroad, ITAC 10's objective is to ensure high levels of protection for U.S. investors abroad. These include: assurance of national treatment and most-favored nation treatment, protection against expropriation without prompt and full compensation; the free transfer of capital both into and out of the country, fair and equitable treatment and full protection and security by local agencies and courts, a prohibitions of performance requirements on foreign investors, and effective and efficient investor-state dispute settlement procedures.

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.

V. Advisory Committee Opinion on Agreement

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

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

Investment

The Agreement will help promote a secure and predictable legal framework for U.S. investors in Oman. Such provisions are of particular interest to service providers, whose services often require a local presence.

With respect to ensuring access to U.S. investment, the Agreement makes substantial progress in reducing the barriers to such investment. Overall, the Agreement assures U.S. investors greater opportunities to establish, acquire and operate investments in

Oman in all sectors, except where a country has taken reservations, as discussed below in each of the sectoral areas. Such investors are to be accorded equal treatment with local investors and may not be subjected to special or discriminatory requirements for the use of local inputs or export obligations or to extend licenses to local companies. Rights to manage and direct such investments with personnel other than from the host country are also provided.

With respect to the protection of U.S. investment, the investment chapter of the Agreement generally contains the primary protections sought by the Committee and included in the Trade Promotion Authority legislation, enacted as part of the Trade Act of 2002. These, include a broad definition of “investment”, guarantees of prompt, adequate and effective compensation for expropriation, fair and equitable treatment and full protection and security by local authorities, the free transfer of capital into and out of the country, a ban on performance requirements, and assurances of national treatment and most-favored nation provisions. Very importantly, the Agreement includes the investor-state dispute settlement mechanism that is vital to afford U.S. investors the opportunity to ensure that their investments are protected against arbitrary, discriminatory and unfair government actions. In addition, the Agreement importantly provides for investor-state dispute settlement with respect to the breach of existing and prospective investment agreements that a U.S. investor has entered into with the government of Oman. At the same time, the Agreement protects the legitimate exercise of each government’s regulatory authority to protect “public welfare objectives, such as public health, safety, and the environment” that does not rise to the level of an expropriation. The Agreement also seeks improved transparency in investor-state mechanism as sought by the Trade Act of 2002 and provides for the consideration of a bilateral appellate mechanism after three years.

Nevertheless, the Committee remains disappointed by provisions in the Financial Services chapter that could allow governmental restrictions on financial services activities through the operation of a prudential carve-out for financial services measures taken by the host government. The procedure developed to review whether a measure properly falls within the prudential carve-out is extremely lengthy and onerous, allowing not only a government-to-government review, but also a separate dispute settlement proceedings if the two governments cannot agree that the measure taken properly fits within the prudential carve-out.

Movement of Personnel

The U.S.-Oman Free Trade Agreement does not include provisions that will facilitate business travel, that is, the temporary entry of key business personnel. 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, a commercially significant

trade agreement should contain meaningful personnel mobility provisions.

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 the U.S. and in other countries. Increasingly, 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 other Agreements because of Congressional view that it should not do so. The responsible committees of Congress should develop guidelines for the negotiation of business travel facilitation provisions for future FTAs so that USTR has the flexibility to negotiate 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.

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.

Transparency

The Oman Agreement continues the extremely valuable U.S. drive to obtain bilateral commitments to transparency disciplines for domestic regulation. 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, companies, and consumers will find them equally useful.

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

Architecture and Engineering Services

The general provisions of Professional Services Annex 11.9, on the development of professional standards and criteria, temporary licensing and review, provide for equity and reciprocity in this sector.

Further, the lack of any restrictions or exceptions for national treatment, most-favored-nation treatment, and market access, the absence of a local presence requirement, and the fair and transparent treatment of domestic regulation provide a welcoming and a virtually unrestricted environment for professional service providers. There are an exceptionally low number of nonconforming measures that affect professional services.

The sole concern is in Chapter 11 where an 80% Omani nationality requirement appears. However, this is adequately ameliorated in the next paragraph with an explicit, well-defined exemption for managers, board members and specialty staff. Nevertheless, we would like to see this restriction removed over time.

Asset Management Services

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 Oman. The financial services transparency commitments in the Agreement also will benefit the asset management industry.

Audiovisual Services

Oman has committed to provide full market access and national treatment for American audiovisual services, with the only exception being in the area of free to air television and radio transmission. This limited national treatment restriction does not prevent U.S. audiovisual products from accessing the Omani market. In related areas, Oman has clarified that with respect to news agency services, foreign entities are allowed to own up to 70% of an entity supplying such services in Oman, which gives U.S. companies majority control of such operations, if so desired.

Education Services

Similar to its neighboring countries in the Gulf, Oman is experiencing the necessity for private providers to carry the increasing need for education in the country. Although the Ministry of Higher Education has made significant efforts to provide for a national quality assurance infrastructure for providers in higher education, the FTA's restriction related to 80% "ownership" without the national capacity to provide a well qualified professoriate at tertiary levels serves to undermine the national planning to provide the population access to education, a necessity to a healthy economy.

Energy Services

Although the government has made diversifying the country's economy a top policy priority, Oman continues to be heavily dependent on oil revenues, which account for around 75% of the country's export earnings and almost 40% of its gross domestic

product (GDP).

Natural gas has become the chief focus of Oman 's economic diversification strategy with Liquefied Natural Gas (LNG), in particular, constituting a large part of its plan to develop this sector. The country is investing heavily in LNG development and is using foreign companies in doing so.

Domestically, Oman faces growing demand for electricity due to population growth, industrialization, and rising incomes. Consumption is now increasing by as much as 5% a year, and the government forecasts that electricity demand will be 75% higher in 2015 than it is today.

Taken together, these conditions provide energy services providers with increasing Oman-based opportunities. While some U.S. energy services providers have considerable experience working in Oman, the Oman FTA, and in particular its chapters on investment, government procurement, cross-border trade in services, and transparency, provides a framework that can increase opportunities in Oman for many more U.S. energy services firms. Overall, we believe that the Oman FTA improves the conditions under which energy services will operate and provides for equity and reciprocity.

Financial Services (other than insurance and asset management)

Oman's commitments in the financial services sector contained in its proposed FTA with the United States (not including its commitments in insurance and asset management which are considered elsewhere in this report) are relatively strong. In particular, we are pleased that Oman has agreed to permit U.S. financial services firms to choose whether to establish in the form of a branch or subsidiary and that foreign firms are to be permitted to own 100% of such newly established entities. However, in this connection, we are disappointed that Oman has determined to limit to 70% foreign equity participation in existing, as opposed to newly formed, Omani financial services companies. We believe such a limitation on foreign ownership, especially one set at 70%, is likely to distort the financial marketplace. We also note with dismay that this Agreement, like most of the recently negotiated U.S. Free Trade Agreements, contains a provision granting Oman the right to require that up to 80 percent of the employees of a U.S.-owned financial services entity in Oman be Omani nationals. Under those circumstances, we believe U.S. Treasury should be given credit for having successfully limited the application of this provision so as to enable newly established U.S.-owned financial services entities to hire U.S. nationals on an unrestricted basis during the first three years of their existence. In addition, Oman has committed not to restrict the nationality of senior management or essential personnel of any financial institution of the U.S.

We are pleased that this Agreement contains what has now become a rather robust "standard form" set of financial services regulatory transparency provisions – albeit, in this case, with phase-in periods on the notice and comment obligation and the obligation of regulators to address public comments in writing. We prefer inclusion, as here, of the

full set of transparency provisions with phase-in periods to diluted transparency provisions or no provisions at all.

Finally, while we are pleased by the cross-border commitments in asset management and financial information contained in the Oman Agreement, we believe that greater commitments in the cross-border supply of capital markets services would be desirable. Nevertheless, we recognize that this drawback is not unique to this Agreement, but evidence of the need for a broader policy discussion about cross-border supply of financial services to take place – sooner rather than later, with the rapidly increasing globalization of financial services.

Financial Services (insurance)

Insurance companies will greatly benefit from the U.S. FTA with Oman. U.S. insurance companies will have the right to establish subsidiaries, branches and joint ventures in Oman. Oman will allow U.S. based firms to supply insurance on a cross border basis (through electronic means) for key markets including marine, aviation, and transportation insurance, reinsurance, services auxiliary to insurance and insurance intermediation. Oman committed to approve new non-life insurance products within 30 days and new life insurance within 60 days. Oman took no non-conforming measures on insurance, making for excellent commitments in this sector.

Healthcare Services

The Oman FTA is generally silent on specific provisions regarding healthcare. However, some provisions are seen as positive developments. They include: a process for the joint discussion of procedures to establish temporary licenses in various professional services categories, including healthcare; provisions for a 50-year renewable lease of land throughout Oman, and ownership rights in certain tourist areas; and the exemption of managers and specialty personnel from the workforce rule that 80 percent of employees must be Omani nationals.

These provisions are important to healthcare organizations who plan to open hospitals, outpatient facilities, rehabilitation centers, etc. and need to station specialty personnel or managers in Oman. They also allow for land ownership or long-term leasing options so American owned medical facilities could be built.

One area in which the FTA could have been strengthened was in permitting temporary licenses for medical personnel, rather than simply establishing a process to develop such licenses.

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. (The latter Annex includes no specific provision regarding “Legal Services.”).

In Annex 1, Oman has indicated that legal services providers must be at least 30% Omani owned. This may hinder “Fly-in/Fly-out” temporary presence practices of U.S. lawyers, that are the most likely form in which legal services would be provided within the territory of Oman by U.S. lawyers advising non-Omanis. Further, it requires ownership rights for a professional service without realistic assurance that such owners are appropriately qualified for participation in the ownership of an enterprise that, above all, is required to be “competent” in the provision of its services. Moreover, to the extent that such Omani persons are not “lawyers,” their ownership would breach the rules of most U.S. states requiring law firms to be owned and managed exclusively by lawyers. The Omani FTA will, in effect, require the organization of separate local law firms that could then affiliate with U.S. firms through, for example, a single common U.S. partner.

This Annex also limits the printing and publication of “written materials” for distribution to Omanis or enterprises owned by Omanis. The extent to which this principle may inhibit the preparation and distribution of alerts and newsletters - - a widespread practice of U.S. legal service providers - - is uncertain.

Otherwise, Annexes I and II are free of specific limitations applicable to legal service providers, but for the continued application of the rule of the U.S. Patent and Trademark Office limiting practice before that agency to U.S. citizens and residents - - a derogation from national treatment that the United States has also scheduled in the GATS.

A separate Annex 11.9 on Professional Services that is a part of Article 11 of the Agreement obligates “relevant bodies in the respective territories” of the parties to develop “acceptable standards and criteria for licensing” professional service providers. The standards include education, examination, experience, professional development, scope of practice, local knowledge and consumer protection. Each of these standards is relevant to lawyers. But the identification of the “relevant body”: for developing such standards within the U.S. or on behalf of U.S. lawyers wishing to offer services in Oman is unclear. No national authority exists that regulates such issues within the U.S. and state rules are generally adopted by the courts, whose judges would not engage in these types of negotiation. Experience with such provisions in the NAFTA and other FTAs has not been satisfactory to enable lawyers to remove local restrictions on legal service providers. On the other hand, as a practical matter, it would appear that foreign legal consultants will probably be enabled to establish local offices in Oman under familiar and appropriate rules and without undesirable limits on the scope of practice limited to the laws of the jurisdiction in which such providers are admitted. This FTA may set an important precedent by avoiding any limit on the advice lawyers can give to the law. On the other hand, its list of criteria for further “development” includes subjects that in the past have not been addressed by rules applied to foreign lawyers in most countries, such as “local knowledge” (which may imply local language proficiency) and “consumer protection” (that might require minimum insurance or bonding).

The transparency provisions of the Agreement are highly desirable. These are a priority of the U.S. government for all services providers. 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 genuine commitment to Omanis 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 Oman for access to the American market for legal services whereas Oman could well be an important location for the delivery of U.S. legal services.

Real Estate Services

The Oman FTA contains provisions pertaining to both real estate investment and real estate brokerage services. In particular, we are pleased that Oman has agreed to permit U.S. real estate investors to own real estate in designated tourist areas (DTAs) and enter into lease agreements in all areas of Oman.

However, real estate investment typically has a long-term time horizon, and we are disappointed that Oman has determined to limit actual real estate ownership to a period of ten years and only in specific DTAs. We are also disappointed that lease agreements have a fifty-year limitation. Such limitations on foreign ownership are likely to discourage foreign investment and development and should, on that basis, be discouraged.

We also note that this Agreement contains a provision that would restrict real estate brokerage services to Omani nationals. We believe every effort should be made to permit U.S. nationals, on a reasonable basis, to provide real estate brokerage services.

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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