

The U.S.-Bahrain Free Trade Agreement

**Report of the
Trade and Environment Policy Advisory Committee (TEPAC)**

July 14, 2004

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Trade and Environment Policy Advisory Committee (TEPAC)

Advisory Committee Report to the President, the Congress and the United States Trade Representative on The U.S.-Bahrain Free Trade Agreement

I. Purpose of the Committee Report

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

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

Pursuant to these requirements, the Trade and Environment Policy Advisory Committee (“TEPAC” or “the Committee”) hereby submits the following report, which the Committee recommends be included in Congress’s record of deliberation on the Agreement, so that, among other things, it might provide guidance to deliberative bodies which will later examine the Agreement’s specific provisions on which we comment.

II. Executive Summary of the Committee’s Report

A majority of the committee members support the conclusion that the Agreement provides adequate safeguards to ensure that Congress’s environmental negotiating objectives will be met. However, as it noted in its report on the Australia FTA, TEPAC does not believe that “one size fits all” with regard to FTAs. This FTA lacks some provisions which have appeared in other agreements and which the Committee believes would have been appropriate to include in this agreement. Not only absent is the extensive public participation framework which appeared in the Central American Free Trade Agreement (CAFTA), but also not included are some more basic provisions which appeared in the Chile and Singapore agreements. TEPAC understands this is the result of the fact that the agreement is modeled after the United States-Morocco FTA. TEPAC believes that, as a whole and from its perspective, this FTA is an improvement over the Morocco Agreement. Nevertheless, this majority believes that the FTA would have benefited from the incorporation of certain additional provisions.

A majority of the committee members remains pleased to see environmental issues integrated into the drafting of a free trade agreement. A majority of the committee also continues to believe

that trade agreements can create opportunities to enhance environmental protection. Trade opens markets, creates business and employment opportunities, and can increase economic growth. This can lead to increased wealth, which provides opportunities to enhance environmental protection, including the creation of a political will in favor of such protection. However, trade can create and amplify adverse externalities which require enhanced regulatory oversight.

A majority believes that the Agreement's dispute resolution provisions are an improvement over those in the North American Free Trade Agreement (NAFTA). It also should be noted that this agreement does not provide an opportunity to comment on the investment issues which have given rise to many of the concerns historically raised from an environmental perspective. This is because the parties have previously entered into a bilateral investment treaty and therefore no investment provisions have been included in this Agreement.

A majority of TEPAC believes the public participation provisions in the agreement are acceptable. As it has alluded to in previous reports, TEPAC believes that public participation helps ensure that an agreement's provisions operate as intended and greatly increases opportunities to guarantee the effective enforcement of environmental laws and to enhance capacity building and sustainable development efforts. While believing that the public participation provisions of the agreement are acceptable, the majority of TEPAC nevertheless is concerned that they do not go as far as they should. Certain environmental provisions which exist in other FTAs are not present in the Bahrain Agreement. This majority believes that some of these provisions should have been included in this Agreement.

A similar majority of the members believe the dispute resolution procedures will help ensure that the FTA meets Congress's environmental objectives, but thinks that these procedures are not as effective as they could be. The majority is concerned about several issues related to these procedures, including the facts that the public submission process does not reflect a mandatory requirement for acceptance of such submissions and that the language regarding expert technical assistance for panelists is not as strong as it has been in the past.

The majority believes that the Agreement's monetary penalties of up to \$15 million per year for instances of non-compliance with rulings confirming violations of enforcement requirements is an adequate compromise position.

A majority of the Committee believes that the United States-Bahrain Memorandum of Agreement on Environmental Cooperation (Memorandum of Agreement) provides a reasonable basis for the fulfillment of Congress's objectives regarding capacity building and sustainable development. While it would be improved if it were an integral part of the agreement rather than a side agreement and had an available dedicated funding source, the majority believes that the areas listed for environmental cooperation cover a range of issues which they would like to see addressed in this arena.

The majority believes that the agreement's tariff reductions fulfill Congress's mandate to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services.

A majority believes that the FTA should include a statement on promoting sound corporate stewardship.

The majority also again expresses its position on a procedural issue: As it has expressed in prior reports, a majority of the Committee believes that the 30 days provided by Congress for it to produce reports is an inadequate period. It is pleased, however, that the agreement was declassified relatively early in this process. Declassification enables members to share the documents with other members of their organizations, others who may have even greater expertise in these matters than the members. It also increases the ability for general public input on the text, which the committee believes enhances the deliberative process.

Finally, a majority notes that this agreement has been negotiated with a friendly Arab government initiating steps toward democracy and situated near the heart of an extremely complex geopolitical region. This majority believes that this agreement, as well as the Administration's larger Middle East Trade Initiative, might help contribute to economic growth and stability and to positive national security outcomes in the region. On the other hand, if this and similar agreements are not viewed by citizens of these countries as demonstrably fair and beneficial, these Agreements will have the potential to have the contrary effect. A majority of TEPAC believes Congress should focus particular attention on this issue as it examines this and other future Middle East agreements.

Nevertheless, several differing viewpoints exist among committee members. These include the beliefs that 1) The Agreement's intellectual property provisions are harmful to consumers, 2) public participation in Bahrain may be prevented, 3) the Agreement's public submission provisions are not subject to the criticism suggested by the majority, 4) certain environmental provisions appearing in other trade agreements are not included in the Bahrain FTA is not a cause of concern, 5) FTAs should place a greater emphasis on the importance of trade as a means to greater economic growth and greater wealth, which can lead to more resources becoming available for environmental improvements, 6) it is inappropriate for FTAs to include investment provisions, 7) the Memorandum of Agreement should not be an integral part of the trade agreement, 8) the public submission process in dispute resolutions should not be modeled on the bureaucratic procedures in preceding FTAs, and 8) a "sound corporate stewardship" statement should not appear in the agreement.

III. Brief Description of the Mandate of TEPAC

As described in its charter, TEPAC's mandate is to (1) provide the U.S. Trade Representative with policy advice on issues involving trade and the environment and (2) at the conclusion of negotiations for each trade agreement referred to in Section 102 of the Act, provide to the President, to Congress, and to the U.S. Trade Representative a report on such agreement which shall include an advisory opinion on whether and to what extent the agreement promotes the interests of the United States.

IV. Negotiating Objectives and Priorities Relevant to the Report

As is made clear from its mandate, this committee's primary focus is on issues involving trade and the environment. In the Trade Act of 2002, Congress elucidated the principal trade negotiating objectives related specifically to environmental matters:

(A) to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental . . . laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party after entry into force of a trade agreement between those countries;

(B) to recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other . . . environmental matters determined to have higher priorities, and to recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources, and no retaliation may be authorized based on the exercise of these rights or the right to establish domestic . . . levels of environmental protection;

(C) to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development;

(D) to reduce or eliminate government practices or policies that unduly threaten sustainable development;

(E) to seek market access, through the elimination of tariffs and non-tariff barriers, for United States environmental technologies, goods, and services; and

(F) to ensure that . . . environmental, health, or safety policies and practices of the parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against United States exports or serve as disguised barriers to trade.

Moreover, two environmental objectives appear in Congress's overall negotiating objectives:

(G) to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources; and

(H) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental . . . laws as an encouragement for trade.

Finally, the Trade Act also provides for the promotion of certain environment-related priorities and associated reporting requirements, including:

(I) conducting environmental reviews of future trade and investment agreements consistent with Executive Order 13141 and its relevant guidelines and reporting to the Committees on the results of such reviews; and

(J) continuing to promote consideration of multilateral environmental agreements and consult with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing exceptions under Article XX of the GATT 1994.

In addition to these environmental objectives, which are core objectives relevant to TEPAC's mandate, there are other Congressional trade objectives which affect the achievement of these objectives. These other objectives, which have been the subject of frequent discussion and comment by the members of TEPAC include those related to investment, transparency, dispute resolution, capacity building, technical barriers to trade, intellectual property, agriculture, and sanitary and phytosanitary measures.

V. The Committee's Advisory Opinion on the Agreement

As expressed in its recent reports on the Australia and Central American Free Trade Agreements, a majority of the Committee continues to believe that trade agreements can create opportunities to enhance environmental protection. Trade opens markets, creates business and employment opportunities, and can increase economic growth. This can lead to increased wealth, which provides opportunities to enhance environmental protection, including the creation of a political will in favor of such protection. It is also noted that trade can create and amplify adverse externalities which require enhanced regulatory oversight. A majority of TEPAC notes with satisfaction that environmental issues continue to be integrated into the drafting of free trade agreements.

A. Strict Compliance With Congress's Mandated Objectives

As it has for other reports, in examining the Agreement for consistency with Congress's environmental trade objectives, TEPAC has looked beyond the issue of whether the Agreement simply recites those objectives to the question of whether those objectives will come to fruition. TEPAC recognizes that the Agreement incorporates the eight environmental trade negotiation objectives outlined above. Six of the nine ("A" through "C," "H," and "J" above) are explicitly referenced, almost verbatim, in Chapter 16 of the Agreement, two more ("D" and "F") are generally referenced in the Agreement's sustainable development and environmental definition provisions, another ("I") has been accomplished through the conduct of an environmental review for the FTA,¹ and the remaining one ("E") is reflected in the Agreement's tariff reduction schedules.

¹ The majority notes its approval that this environmental review has been conducted. The review was helpful in a number of respects, including a concern that possibly "82 percent of coral reefs in Bahrain's marine area are endangered due to bleaching events and pollution." However, TEPAC believes that there are issues related to environmental reviews in general which need to be examined more fully. To this end, TEPAC recently participated in a public forum in which

However, the question of whether these objectives will actually be achieved is dependent on the efficacy of the measures used to implement them, the enforcement measures necessary to secure them, and the funding provided to them. In the analysis of these factors, the Committee's unanimity breaks down. In examining these issues, some committee members believe that the provisions and mechanisms are adequate, while others believe that they are too weak or, conversely, too strong. As there was no unanimity in these analyses, they have not been presented as such. Instead, the opinion of the majority or minority is presented. Where a lengthy minority opinion was provided, that separate opinion is summarized and the full opinion attached hereto to give the reader a more detailed explanation.

B. Actual Achievement of the Mandate

1. Background

In the last ten years, the most contentious trade agreement provisions relating to the environment have been those relating to investment protection and dispute resolution. The Committee members' analysis of the environmental implications of these provisions is based largely on theirs and others' experience with NAFTA, bilateral investment treaties, and the emerging jurisprudence thereunder. Congress, for example, gave specific instruction to U.S. trade negotiators as a result of its concern that NAFTA's investment protection and dispute resolution provisions might hinder a Party's attempts to implement more stringent (but bona fide) environmental controls. By "bona fide," we refer to environmental controls which are not adopted for the purpose of arbitrarily or unjustifiably discriminating against a parties' exports or are simply disguised barriers to trade.

2. General Conclusion

a. General

With this background, a majority of the Committee believes that the Agreement's dispute resolution provisions are an improvement over those in NAFTA. The Committee believes that this provision reduces the possibility that there will be successful challenges to attempts to implement more stringent bone fide environmental controls while simultaneously protecting investment. The Agreement gives appropriate attention to integrating the achievement of enhanced environmental protection into more traditional notions of bilateral investment and trade, although this attention must be further nurtured. It also should be noted that this Agreement does not provide an opportunity to comment on the investment issues which have given rise to many of the concerns historically raised from an environmental perspective. This is because the parties have previously entered into a bilateral investment treaty and therefore no investment provisions have been included in this Agreement.

members of the government and non-governmental organizations discussed methods for improving the environmental review process. TEPAC notes with approval that USTR and EPA are developing a training course on environmental assessment of free trade agreements for potential US trade partners.

b. Public participation and implementation of the chapter

As it has alluded to in previous reports, TEPAC believes that public participation is an integral aspect of the implementation and ongoing operation of the environmental provisions of FTAs. In addition to helping to ensure that the provisions operate as drafted, public participation greatly increases opportunities to guarantee the effective enforcement of environmental laws and enhances capacity building and sustainable development efforts.

As with the other recent FTAs, the Bahrain Agreement includes a significant public participation provision. The FTA requires that the parties implement procedures for public dialogue on the implementation of the Chapter and that input received during this process from the public be provided to the other party and other members of the public. It also provides that procedures are to be implemented under which the public will have input into matters to be discussed by the Joint Committee established under Article 18.

As with the Morocco FTA, the chapter fails to establish an Environmental Affairs Council.² The majority of TEPAC believes this type of organization is valuable not only in ensuring the achievement of the broader objectives of this chapter (and, in turn, of Congress), but also in promoting public participation and enhancing environmental cooperation and capacity building, all of which lead to more effective and effectively-enforced environmental laws. The majority recognizes, however, that the parties have established a mechanism for the creation of an environmental subcommittee of the Joint Committee for this FTA; that, if created, the subcommittee would have a public participation element; that governmental resources are limited; and the trade and environment issues in every country may not rise to a level which, given the requisite trade-offs, necessitate the establishment of a cabinet-level council with annual meetings. Consequently, it believes that, in this instance, if established, the joint committee would be an adequate substitute for an Environmental Affairs Council. The Committee reiterates the suggestion it made in its report on the Morocco FTA that, as a potential solution, given the trade-offs described above, a regional Environmental Affairs Council for Israel, Jordan, Morocco, and Bahrain would be worthwhile.

² As created in some other Agreements, this council is a cabinet-level or equivalent body mandated to discuss the implementation and progress under the environmental chapter. The Council promotes public participation in its work and holds, at a minimum, an annual public session, and, in some instances, seeks public input on cooperative environmental activities.

c. Dispute resolution

A similar majority of the members believes the dispute resolution procedures will help ensure that the FTA meets Congress's environmental objectives, but believe these procedures are not as effective as they should be. The Agreement maintains the positive steps taken in prior Agreements in the transparency and, to some degree, in the participation of civil society during the settlement of disputes in trade cases. However, the majority is concerned that the public submission process does not reflect a mandatory requirement for acceptance of such submissions and the language regarding expert technical assistance for panelists is not as strong as it has been in the past.

As with the other recent FTAs, the transparency and participation of civil society during the settlement of disputes in trade cases are significant improvements over historic practices. Also significant is the inclusion of Article 19.7(4), requiring that members of panels examining environmental disputes have "expertise or experience relevant to the subject matter that is under dispute."

With regard to public submissions, however, a majority of TEPAC members believe that the dispute settlement provisions should make clear that submissions from persons and interested parties (both private sector and NGOs) should be accepted and considered to the extent appropriate as determined by the panel. This majority was pleased to see such a provision incorporated into the Central American and Australia FTAs; it is disappointed to see it absent from the Bahrain text. Similarly, the Memorandum of Agreement is not as strong on the issue of public participation as it could be. It addresses "facilitating linkages among representatives of academia, industry and government to promote the exchange of best practices and environmental information and data. . .", but does not include in this list all civil society, including NGOs. A majority of the Committee believes the inclusion of all civil society in such endeavors would enhance their possibilities for success.

Also troubling is the absence, in the provision regarding technical assistance to panelists, of any specific reference to "environmental, labor, health, [and] safety" matters. While it appears under the terms of the Agreement that this absence will not affect the ability of the panel to receive technical advice on these matters, its absence is notable nevertheless.

Finally, in line with its analysis in the Singapore, Chile, Central America, and Morocco FTA Reports, the majority believes that the Agreement's monetary penalties of up to \$15 million per year for instances of non-compliance with rulings confirming violations of enforcement requirements is an adequate compromise position. However, this majority stresses that it continues to examine the efficacy of this provision and notes that its past satisfaction therewith has been and remains based in large part on the finding of a proper balance between the size of the penalty on the one hand and the strength of environmental cooperation (and associated funding commitments) mandated by the Agreements and the need to ensure that parties commit the requisite resources to enforce domestic environmental laws and regulations on the other hand. At some point in the future, if the extent of those environmental commitments decline, this majority may view the size of the monetary penalty as inadequate.

d. Capacity building

A majority of the Committee believes that the Memorandum of Agreement provides a reasonable basis for the fulfillment of Congress's objectives regarding capacity building and sustainable development. It establishes a reasonable framework for the development of environmental cooperation projects and sets forth a reasonable range of areas for cooperation. As with other agreements, the majority would prefer that Congress provide a dedicated funding source to ensure that the potential inherent in the Memorandum of Agreement is realized. Also, the majority believes that an agreement with the significance of the Memorandum of Agreement should be an integral part of the FTA rather than a side agreement. This flaw is magnified by the fact that the side agreement is a draft not yet finalized or signed by the member countries. Should the Memorandum of Agreement change to any great degree, the majority's recommendation of its provisions would need to be reexamined. The majority is pleased to see that the Memorandum of Understanding includes issues related to pollution abatement and control and effective enforcement of environmental laws, unlike in the Morocco FTA. This is especially true in light of the concerns raised in the Interim Environmental Review.

e. Market access

In order to determine if the Agreement fulfills Congress's mandate to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services, TEPAC requested that USTR identify the extent of the Agreement's tariff reductions for such items. USTR's analysis concluded that tariffs on 100% of the environmental goods and technologies in the Agreement will immediately go to zero. Presuming the accuracy of these figures, the majority of TEPAC concludes that this reduction fulfills Congress's mandate on this issue.

f. Other Concerns

i. Corporate Stewardship

Some prior FTAs, including the Singapore FTA (Art 18.9) and the Chile FTA (Art 19.10) include a statement on promoting sound corporate stewardship. No such provision appears in the text of the Bahrain environment chapter. While there is text (in Art 16.4(1.b)) on incentives (such as market-based incentives and public recognition), a majority of the committee is of the opinion that this language is not a sufficient replacement for a more active provision promoting good corporate behavior. This majority believes a corporate stewardship provision should supplement the incentives provision in future FTAs.

ii. Background

Finally, a majority notes that this agreement has been negotiated with a friendly Arab government initiating steps toward democracy and situated near the heart of an extremely complex geopolitical region. This majority believes that this agreement, as well as the Administration's larger Middle East Trade Initiative, might help contribute to economic growth and stability and to positive national security outcomes in the region. On the other hand, if this

and similar agreements are not viewed by citizens of these countries as demonstrably fair and beneficial, these Agreements will have the potential to have the contrary effect. A majority of TEPAC believes Congress should focus particular attention on this issue as it examines this and other future Middle East agreements.

g. Procedural comment

In its more recent reports, the Committee expressed its belief that the 30 days provided by Congress for it to produce this report was an inadequate period, given the length and complexity of the Agreements, the diversity of viewpoints among the TEPAC members and the schedules of those members. It also expressed the belief that its efforts were unduly restricted by the classified nature of the documents in that the inability of members to share the documents with other members of their organizations, others who may have even greater expertise in these matters than the members, hindered these efforts.

For this FTA, efforts were made to respond to these concerns by USTR. TEPAC appreciates these efforts. The text of the FTA was provided to TEPAC in advance of the President's notification to Congress and it was declassified soon after that notification.

3. Other Points of View

As stated above, several committee members hold views which run contrary to the majority views presented above. They are summarized below and presented more fully in the memoranda attached hereto.

i. The Agreement's intellectual property provisions are harmful to consumers

A minority believes that, contrary to the Doha Declaration on the TRIPS Agreement and Public Health, the U.S.-Bahrain Free Trade Agreement's intellectual property provisions do not implement the TRIPS "in a manner supportive of public health and, in particular, to promote access to medicines for all." Indeed, this minority believes the agreement reduces access. It believes that the agreement will reduce access to affordable generic medicines for Bahrainian consumers.

ii. Public participation in Bahrain may be prevented

A minority believes that government imposed interference with freedom of expression will make it difficult, if not impossible, for civil society to participate in the implementation and ongoing operation of the environmental provisions of this FTA.

iii. The Agreement's public submission provisions are adequate

A minority believes that the public submission process as called for in the agreement is adequate. "One size does not fit all," and what might have been appropriate for Central America may not be so in the case of Bahrain. The country only recently – in 2000 – adopted a constitution and

now has universal suffrage. International trade can play an important role in supporting the opening up of political systems to more democratic structures. Besides the exchange of products and services, economic and social ideas can also flourish through trade with other countries.

- iv. That certain environmental provisions appearing in other trade agreements are not included in the Bahrain FTA is not a cause of concern.

It would be inappropriate to compare other U.S. bi-lateral trade agreements and offer one or more as the template for the environmental provisions for Bahrain. Each country is unique, with a unique relationship with the U.S. as well as unique national concerns.

- v. FTAs should place a greater emphasis on the importance of trade as a means to greater economic growth and greater wealth, which can lead to more resources becoming available for environmental improvements.

Rather than the need for more regulatory oversight, this minority would point to the role of institutions--especially property rights and the rule of law—that are key foundations for environmental improvements. In helping to build countries' capacity to improve the environment, strengthening these fundamentals should be encouraged.

- vi. It is inappropriate for FTAs to include investment provisions.

Such provisions are better handled through agreements directly and solely addressing those issues, as the U.S. and Bahrain have done in an investment agreement between the two countries.

- vii. The Memorandum of Agreement should not be an integral part of the trade agreement.

A minority believes that the Memorandum of Agreement should not be an integral part of the trade agreement, as espoused by the majority.

- vii. The public submission process in dispute resolutions should not be modeled on the bureaucratic procedures in preceding FTAs.

A minority does not support the need for the public submission process in dispute resolutions to be modeled on extensive bureaucratic procedures in preceding FTAs.

- viii. A “sound corporate stewardship” statement should not appear in the agreement.

A minority believes that what is or is not meant by this term is unclear and is not appropriate for inclusion in trade agreements.

VI. Membership of Committee

<u>Name</u>	<u>Organization</u>
Dennis Avery	The Hudson Institute
Joseph G. Block (Chair)	Venable LLP
Nancy Zucker Boswell	Transparency International
William A. Butler	Audubon Naturalist Society
Roger Lane Carrick	The Carrick Law Group
Patricia Forkan	The Humane Society of the United States
Mary Gade	Sonnenschein, Nath & Rosenthal
Robert E. Grady	The Carlyle Group
F. Henry "Hank" Habicht	Global Environment & Technology Foundation
Thomas B. Harding	Agrisystems International
Jennifer Haverkamp	
Rhoda Karpatkin	Consumers Union
Elizabeth Lowery	General Motors Corporation
Daniel Magraw	Center for International Environmental Law
Naotaka Matsukata	Hunton & Williams
John Mizroch	World Environmental Center
Thomas Niles	Council for International Business
Frederick O'Regan	International Fund for Animal Welfare
Anne Neal Petri	Garden Clubs of America and The Olmstead Society
Paul Portney	Resources for the Future
Jeffrey J. Schott	Institute for International Economics
Andrew F. Sharpless	Oceana, Inc.
Frances B. Smith	Consumer Alert
William J. Snape	Endangered Species Coalition
Irwin Stelzer	Hudson Institute
Alexander F. Watson	Hills & Company
Douglas Wheeler	Hogan & Hartson
Michael K. Young	University of Utah
Durwood Zaelke	Center for Governance and Sustainable Development

Attachment 1

Separate Statement of TEPAC Members

Rhoda H. Karpatkin
President Emeritus
Consumers Union of United States, Inc.

Joined By
William A. Butler, Audubon Naturalist Society
Daniel Magraw, Center for International Environmental Law
Durwood Zaelke, Center for Governance and Sustainable Development

July 14, 2004

I agree with some portions of the TEPAC Report and I disagree with others. I also have additional views on issues that are either not touched upon or referenced only briefly in the Report, but which I believe Congress should consider. I am thus submitting these additional comments based on a review of the U.S.-Bahrain FTA text.

Intellectual Property Protections for Pharmaceuticals

Section 2102(4)(b)(C) establishes the objective that trade agreements respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001.

The Doha Declaration on the TRIPS Agreement and Public Health, specified in this objective, recognizes the tension between the contribution of intellectual property to the development of new medicines and “the concerns about its effects on prices.” It calls on WTO members to implement the TRIPS “in a manner supportive of public health and, in particular, to promote access to medicines for all.”

As with prior free trade agreements, the relevant provisions of the Bahrain Agreement instead create roadblocks to such access. Access to medicines – affordability – in practical terms, equates to the availability of generics and to compulsory licensing in some cases. The Bahrain Agreement makes rules that delay and increase the difficulty of bringing generic drugs to market and, hence, reduce access to affordable medicines for Bahrainian consumers.

At first blush, concerns about access to medicines may seem to have no significance for American consumers and the Congress. But there are reasons to be concerned. The intellectual property provisions of this agreement, and those in other recently negotiated agreements, will create upward pressure on the prices of medicines globally.

These agreements create a danger for millions of people suffering from life-threatening diseases who may be denied access to essential medicines. This is of particular concern for the increasing number of people suffering from HIV/AIDS.

Despite medical advances over the last several years, the HIV/AIDS crisis continues. However, because of competition from generic drugs, the price of medicines has dropped dramatically. For instance, triple combination antiretrovirals that once cost between \$10,000 and \$15,000 per patient per year in developing countries can now cost as little as \$140 per patient per year. This makes lifesaving treatment available to millions who would otherwise go without.

Continued competition of this type will not be possible without flexibility to promote generics, including through the granting of compulsory licenses. But these recently negotiated free trade agreements – including the Bahrain Agreement – would impede generic competition by creating intricate market authorization and medicine registration procedures, and by limiting the grounds on which compulsory licenses can be issued.

The Bahrain Agreement demonstrates just how dangerous these provisions can be to public health. Under its intellectual property provisions, special five year monopoly protections would be created for pharmaceutical test data required to demonstrate safety and efficacy, and to authorize a drug's use (see Article 14.9.1). This would greatly delay and limit generic competition, even if no patent barriers exist. In addition, pharmaceutical patents would be extended beyond the 20 years required by the WTO (see Articles 14.8.6), further slowing the introduction of affordable generic drugs.

Unfortunately, this is not just a problem in the Bahrain Agreement – similar provisions are included in free trade agreements negotiated with Australia, Chile, Morocco and Singapore, as well as in the proposed Free Trade Area of the Americas agreement. They can also be found in the Central American Free Trade Agreement and other bilateral investment agreements. We are concerned that other trade agreements now under consideration will contain these provisions as well. Public health on a global scale will suffer as a result.

The United States made an international commitment in Doha. We should not systematically chip away at that commitment through regional and bilateral agreements with countries that are realistically left with no choice other than to agree to such provisions in order to reach valuable trade agreements with the United States.

The United States government should honor the commitment it made in Doha and, through that Declaration, should commit to protecting the lives of millions of seriously ill people in developing countries around the world who desperately need access to affordable, life-saving medicines.

In addition, the Bahrain Agreement does not benefit American consumers. While it has been suggested that such provisions will lower the price of medicines in the United States, this is unrealistic. There is simply no mechanism to translate higher prices for Bahrainians into lower prices for U.S. consumers.

Congress has been grappling with the issue of affordability of medicines for American consumers. A succession of bilateral trade agreements, expanding patent rights and introducing new limitations on the ways generics can be marketed, may well have a preemptive effect, intruding on the prerogatives of Congress to define national and global policy. Questions have already been raised about the interference of such provisions with the authority of Congress to enact drug re-importation legislation.

Congress should also note that provisions such as these exacerbate the view, widely held among so many of the world's consumers, that America wants to advance the profits of its drug companies at the expense of global public health. This view has been a stumbling block in recent trade negotiations. The Doha Development Round is already a difficult challenge for our credibility. The drug provisions of this Agreement fly in the face of the Doha Declaration on the TRIPS Agreement and Public Health and will only increase that challenge.

Public Participation

Public participation is indeed key to the implementation and ongoing operation of the environmental provisions of FTAs. In many countries public participation is inadequate owing to the limited capacity of civil society to engage in the process. In others, there are few meaningful mechanisms to promote and facilitate such participation.

Realistically, meaningful public participation cannot take place in a country that does not assure that its citizens and civil society have the right to free expression.

The U.S. Department of State's 2003 Country Reports on Human Rights Practices in Bahrain questions the ability of groups and individuals in Bahrain to freely express themselves publicly. For instance:

- “The Constitution provides for the right to express and publish opinions ‘under the rules and conditions laid down by law, provided that the fundamental beliefs of Islamic doctrine are not infringed, the unity of the people is not prejudiced, and discord or sectarianism is not aroused.’ In practice, the Government limited this right, especially in the media.”
- “The Constitution provides for the right of free assembly; however, the Government restricted its exercise by requiring permits for public events, which were not routinely granted. The law prohibits unauthorized public gatherings of more than five persons. The Government periodically limited and controlled political gatherings.”
- “Citizens do not have the right to change their Government or their political system.... The Political Rights and Election Law restricts the freedoms of speech and association....”

The State Department report provides valid reasons to question whether the public participation that TEPAC believes to be so important will, in practice, be permitted by the Bahrain government. It is not enough to merely write about procedures for public

dialogue in the agreement when the freedom to participate is so impaired by governmental interference. These concerns should be addressed in this FTA if we are to fully accomplish the agreement's goals regarding public participation.

I urge Congress to take these considerations into account.

Attachment 2



United States Council for International Business

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Serving American Business as U.S. Affiliate of:

International Chamber of Commerce (ICC)
International Organisation of Employers (IOE)
Business and Industry Advisory Committee (BIAC) to the
OECD
ATA Carnet System

Statement of Thomas M. T. Niles
President
United States Council for International Business
On the Environmental Provisions of the
U.S.-Bahrain Free Trade Agreement

I agree with the majority of my TEPAC colleagues that the agreement with Bahrain provides adequate safeguards to ensure that Congress's negotiating objectives are met. The agreement represents another step forward in our relations with individual countries in the Middle East. It should strengthen U.S. economic and political ties with a traditionally friendly Arab government.

The TEPAC report on this agreement refers to a majority view that "no one size fits all" with regard to FTAs, a point with which I fully concur. Consequently, I do not understand why the majority then goes on to insist that the omission of certain environmental provisions from earlier FTAs is somehow significant. While U.S. negotiators obviously work from a model text based on previous agreements, I do not find it at all surprising that there are slight differences in their environmental chapters including the agreement with Bahrain. So, among other things, I do not share my colleagues' concerns about the lack of a public submission process as called for in the agreement with the Central American countries. What might have been appropriate for Central America may not be so in the case of Bahrain.

Since the U.S. has a Bilateral Investment Treaty with Bahrain, the concerns I expressed with respect to the investment chapters of previously negotiated FTAs do not apply here.

Attachment 3

Comments of Consumer Alert on the Free Trade Agreement with Bahrain

Submitted by Frances B. Smith, July 12, 2004

General comments

Trade and Environmental Goals

In relation to the U.S.-Bahrain Free Trade Agreement and environmental goals, Consumer Alert would emphasize the importance of recognizing that higher environmental standards are best achieved through better economic and institutional conditions, and that trade and open economic systems can lead to improved economic performance, help to reduce poverty, and increase living standards for all participants. As people achieve greater wealth and more economic independence, more resources can be freed up to protect the environment.

Open and competitive markets are an essential part of democratic societies by creating opportunities and wealth that can help the disadvantaged. Economic systems in which people have choices and can make decisions based on their own preferences and values not only can bring better economic opportunities, but also can pave the way to more open and fairer societies.

Besides the exchange of products and services, economic and social ideas can also flourish through increased trade. As people achieve more self-determination in economic and political terms, they also are better able to protect their political freedoms.

Trade agreements should focus on their main purpose and not be overloaded with a range of issues that cannot (and should not) be solved by trade negotiators. Many of those issues might have an economic background, such as investment rules and intellectual property rights, while others might relate to other concerns such as food safety.

Those issues should be discussed and negotiated in the appropriate venues, and international and bilateral agreements can be forged through expert negotiations between countries.

Bahrain and Its Government

Bahrain is a strategically important country because of its position in the Persian Gulf. Its government consists of a constitutional monarchy, an independent judiciary, and a partially elected legislature. Its Constitution was adopted late December 2000, and in 2001 Bahraini voters approved a referendum on legislative changes. The Bahraini have universal suffrage for those 18 and over.

Due to its geographical location in the Persian Gulf, Bahrain is a gateway to other parts of the Arabic speaking world. While the overall amount of trade between the U.S. and Bahrain is comparatively small, a new trade agreement can help to develop new markets for Bahrain and the U.S. and can also bring closer economic ties between the two peoples.

Environmental objectives

Consumer Alert agrees with the majority report that the U.S.- Bahrain Free Trade Agreement provides adequate safeguards to ensure that the environmental objectives set forth in the Trade Act of 2002 are met.

Consumer Alert shares the view of the majority that FTAs are to be adjusted to individual countries and should not follow a “one size fits all” approach. However, we express concern with the majority report’s seemingly contradictory point that certain environmental provisions appearing in other trade agreements do not appear in the Bahrain FTA.

It is both logical and flexible that the FTA does not use a prior trade agreement as a template for the environmental provisions. It would be inappropriate to compare other U.S. bi-lateral trade agreements and offer one or more as the template for the environmental provisions for Bahrain. Each country is unique, with a unique relationship with the U.S. as well as unique national concerns.

Trade agreements are not made in a vacuum. In negotiating and reaching agreements, the Parties’ representatives must have knowledge of the other country’s social, economic, political, and legal systems. The history of the countries’ bi-lateral relationship in many dimensions is also important in providing the context for a trade agreement.

Therefore, Consumer Alert does not share the concern of the majority of the Committee about the lack of certain provisions that were included in other FTAs.

The most effective means of advancing environmental objectives around the world is to move toward free trade. Trade agreements should focus on this positive impact, not seek to use trade policy as a tool to force changes that might – or might not – actually advance some environmental objective. To hold hostage economic and technological growth to a regulatory agenda would weaken the forces that have done so much to move the world toward sustainable solutions.

Rather than the need for more regulatory oversight, Consumer Alert would point to the role of institutions--especially property rights and the rule of law—that are key foundations for environmental improvements. In helping to build countries’ capacity to improve the environment, strengthening these fundamentals should be encouraged. Environmental goals should not be pursued via restrictions to trade expansion.

Investment Provisions

We are pleased that there are no investment provisions in the FTA. The U.S. has a separate Bilateral Investment Agreement with Bahrain. Concerns about investments are better dealt with in an investment agreement-- if countries wish to do so--but should not necessarily be part of a bilateral trade agreement. Investment rules and challenges to domestic regulations should be considered, as far as possible, in the domestic legal systems of those countries.

Countries that fail to adequately address the concerns of investors will possibly face economic consequences in lower levels of foreign investments. While closer cooperation and facilitation between the Parties might help to bridge different concepts of investment and its protection, enforcement outside of the domestic legal system can pose significant problems and concerns relating to public acceptance, the rule of law, and national sovereignty.

Public participation

Consumer Alert strongly supports public participation as an integral part of the democratic political process that should be encouraged.

The argument that trade agreements should not be concluded with those countries that have not established certain standards for civil society, common in most democracies, cannot be easily dismissed. No one wants to disregard areas where the free expression of citizens and public participation may be curtailed. The question is rather whether a trade agreement can bring economic benefits to both countries and their citizenries.

The overall goal of trade agreements is to encourage trade among its citizens of two or a group of countries. The exchange of goods and services occurs among individuals and companies. Governments can encourage those exchanges through loosening impediments or discourage those by increasing restrictions.

Trade is generally regarded to be an important tool for economic development. And while economic development is not the exclusive road to a more open and democratic society, lessons from history show that the creation and preserving of an open society without stable and satisfying economic conditions is a very difficult task.

Open and competitive markets are an essential part of democratic societies by creating opportunities and wealth that can help the disadvantaged. Economic systems in which people have choices and can make decisions based on their own preferences and values not only can bring better economic opportunities, but also can pave the way to more open and fairer societies. As people achieve more economic independence, they become better able to protect themselves from exploitation.

International trade can play an important role in supporting the opening up of political systems to more democratic structures. Besides the exchange of products and services, economic and social ideas can also flourish through trade with other countries.

Consumers become exposed to higher quality products and standards. New technologies and new ways of doing business can stimulate change. As people achieve more self-determination in economic terms, they also are better able to protect their political freedoms.

This is also the realm where NGOs can operate to shine the light of moral decency on those countries and governments that restrict the rights of their citizens.

Another concern is that singling out trade agreements could also have adverse effects on other international agreements. For example, many would probably agree that it would be counter-productive to ostracize countries with less than ideal democracies from participation in other important international and bilateral agreements on issues such as health and safety, environment, and more. Why then does it make sense to ostracize the citizens of such countries from enjoying the benefits of open trade?

The refusal to engage economically with a country can lead to a general disengagement, which might bring more hardship for economies and societies.

Lack of an Environmental Affairs Council. The fact that the agreement does not establish an Environmental Affairs Council is not a cause of concern, as expressed in the majority report. Such councils, as outlined in some prior agreements, can focus more on procedural and bureaucratic minutiae that can deflect needed resources from addressing important issues.

Dispute settlement procedure. There is a general disagreement with the majority view that environmental disputes regarding this and other bilateral free trade agreements need a special dispute settlement procedure. Including a special procedure that only applies to environmental disputes provides a more prominent role to environmental issues in what is primarily a trade agreement and could undermine important trade-related issues.

The inclusion of monetary penalties of up to \$15 million per year is a matter of concern because of the lack of clear guidelines on how such money would be spent.

Memorandum of Agreement. The actions described in the Memorandum of Agreement should be able to achieve the objectives set forth by Congress. However, Consumer Alert does not regard the need for making the provisions part of the trade agreement. The FTA with Bahrain is a trade agreement that includes environmental provisions mandated by the Trade Act of 2002, including some regarding capacity building. Additional provisions relating to environmental capacity building is a complicated process that extends the reach of a trade agreement and would be better placed in environmental cooperation agreements; otherwise, the purpose of the free trade agreement may be diluted.

Sound corporate stewardship. Consumer Alert does not support inclusion of a “sound corporate stewardship” statement in the agreement. What is or is not meant by this term is unclear and is not appropriate for inclusion in trade agreements.