

**The Honorable Robert B. Zoellick
United States Trade Representative
600 17th Street, N.W.
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 Sector Advisory Committee on Energy for Trade Policy Matters (ISAC 6) on the U.S. -Australia Free Trade Agreement, reflecting consensus advisory opinion(s) on the proposed Agreement.

Sincerely,

(Original Signed)

**Raymond Bragg, Jr.
Chairman
Industry Sector Advisory
Energy for**

**Committee on
Trade Policy Matters (ISAC 6)**

The U.S.-Australia Free Trade Agreement (FTA)

**Report of the
Industry Sector Advisory Committee on Energy for Trade Policy Matters (ISAC 6)**

March 2004

March 12, 2004

Industry Sector Advisory Committee on Energy for Trade Policy Matters (ISAC 6)

Advisory Committee Report to the President, the Congress, and the United States Trade Representative (USTR) on the U.S. -Australia Free Trade Agreement

I. Purpose of the Industry Sector Advisory Committee on Energy for Trade Policy Matters Report

Section 2104 (e) of the Trade Act of 2002 requires that advisory committees provide the President, the USTR, 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 principle negotiating objectives set forth in the Trade Act of 2002.

The report of the appropriate sectoral or functional committee 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, ISAC 6 hereby submits the following report.

Executive Summary of the Industry Sector Advisory Committee on Energy for Trade Policy Matters Report

ISAC 6 has reviewed the U.S. -Australia Free Trade Agreement and our members agree that it will lead to improvements in the trade relationship between Australia and the United States.

ISAC 6 does note, however, a significant shortcoming of the Agreement in its Investment chapter: the lack of investor-state dispute settlement provisions, including international arbitration remedies, that we have previously recommended to the Department of Commerce and the United States Trade Representative as essential in free trade agreements and bilateral investment treaties alike to maximize investor protections.

Investment is an important element of the Agreement for energy companies given the extensive investments abroad that are necessary for U.S. companies in this sector. While the chapter includes many key protections, it fails to include perhaps the most important investment protections sought by this Committee – an investor-state dispute settlement mechanism and protections for investment agreements.

III. Brief Description of the Mandate of the Industry Sector Advisory Committee on Energy for Trade Policy Matters

ISAC 6 provides detailed policy and technical advice, information, and recommendations to the Secretary of Commerce and the USTR regarding trade barriers and the implementation of trade agreements negotiated under Sections 101 and 102 of the Trade Act of 1974, as amended, and Sections 1102 and 1103 of the 1988 Trade Act. ISAC 6 also 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 Industry Sector Advisory Committee on Energy for Trade Policy Matters

The principal area of negotiated Agreement of interest and concern to ISAC 6 is investment, and the related matter of investor-state dispute resolution.

Other areas of the Agreement appear to be satisfactory.

V. Industry Sector Advisory Committee on Energy for Trade Policy Matters Opinion on Agreement

Investment

The investment chapter of the Agreement includes a number of positive elements, including a broad definition of investment, most-favored nation and national treatment, the guarantee of prompt, adequate, and effective compensation for expropriation, fair and equitable treatment, full protection and security, the free transfer of capital, and no performance requirements. The chapter also makes progress on limiting Australia's investment screening mechanism, by increasing the thresholds at which new investment will be screened. The screening mechanism is retained for investments in existing Australia companies with assets of \$A800 million, with some exceptions. Most notably, however, the chapter lacks the investor-state dispute settlement and international arbitration provisions for investment agreements that ISAC 6 believes are essential in any free trade agreement or bilateral investment treaty if it is to maximize investor protections.

In our letter of December 23, 2003 to Secretary of Commerce Donald Evans and United States Trade Representative Robert Zoellick, we stated our strong position that:

Billions of dollars of U.S. companies' investment across many sectors in other nations warrants the most aggressive U.S. Government position on ensuring international arbitration provisions for investor-state investment agreements in bilateral investment treaties and other agreements.

We are therefore very disappointed that such a potentially important agreement as that with Australia omits these provisions. Our disappointment is compounded by the certainty that the current agreement will be examined carefully by other countries that are currently negotiating agreements and/or treaties with the United States or that hope to do so in the future. Absence of the investor-state dispute resolution provisions, including international arbitration, in the Agreement will compound the difficulty of including such provisions in other free trade agreements or bilateral investment treaties.

As well, while ISAC 6 recognizes that Australia's law and legal system are highly developed, the investment chapter negotiated is not particularly meaningful without investor-state dispute settlement. Since this agreement is not self-executing under Australian law, U.S. investors will not be able to challenge the breach of the investment chapter by the Australian government in Australia's courts. Rather, investors would have to seek the U.S. government to initiate a state-to-state dispute settlement process – a process that has rarely been used and is oftentimes politicized. Concerns such as those noted above led to inclusion of investor-state dispute resolution mechanisms, including international arbitration provisions for investment agreements, in various U.S. treaties and agreements beginning many years ago. And while ISAC 6 understands that the Australian Agreement holds the possibility of allowing such a mechanism on a case-by-case basis, we continue to believe that such investment protection should have been included as a general provision to provide the same protections as our competitors have under their governments' agreements and treaties with Australia.

VI. Membership of Committee

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