

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 Intergovernmental Policy Advisory Committee on the US-Bahrain Free Trade Agreement, reflecting majority, minority and additional advisory opinions on the proposed Agreement. IGPAC members have also taken this welcome opportunity to express some recommendations with respect to the overall process for federal/state/local trade policy consultation. Thank you for your consideration.

Sincerely,

Kay Alison Wilkie

Chair  
Intergovernmental Policy Advisory Committee

# **The US-Bahrain Free Trade Agreement (FTA)**

Report of the

Intergovernmental Policy Advisory Committee

July 14, 2004

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**Intergovernmental Policy Advisory Committee**

**Advisory Committee Report to the President, the Congress and the United States Trade Representative on the US-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 Trade Representative, and Congress with reports required under Section 135 (e) 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, the Intergovernmental Policy Advisory Committee hereby submits the following report.

**II. Executive Summary of Committee Report**

America's economic growth and prosperity are best served by embracing strategies for more open and fair global markets, investing in innovative research and technologies that create the industries and jobs of the future, providing assistance to workers impacted by technology and trade trends, and engaging in, rather than isolating ourselves from, the challenges of international competition in this increasingly interconnected world. Thus, IGPAC members support the US-Bahrain Free Trade Agreement's strategically essential goals of trade liberalization and reduction of regional barriers to trade and investment, and take this opportunity to recommend improvements to the trade consultation process and to certain provisions. The laudable US-Bahrain Free Trade Agreement (FTA) objectives of economic growth, employment creation, sustainable development, geo-strategic market reforms and improvements to living standards and market opportunities should be pursued in a manner consistent with principles of US constitutional federalism and public policy obligations to state and local constituents. Consequently, this FTA should accord consideration for existing state and local level regulatory, tax, economic development and subsidy policies, and the social, economic, and environmental values those policies promote.

Statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by provisions in trade agreements. These concerns were reflected by Congress' inclusion of the “no greater rights” language in Trade Promotion Authority legislation. The principle that the United States may request, but not require, states to alter their regulatory regimes in areas over which they hold constitutional authority should be maintained. Full and effective coordination and consultation should include requesting authority from the appropriate state or local authority before a state or local rule, regulation, or statute is listed in a trade agreement, offer or other binding commitment. IGPAC would prefer a process that relies upon affirmative, informed consent from affected state and local entities, rather than negative opt-out.

IGPAC members appreciate that the USTR involved advisory committees in consultations during various FTA negotiations in recent months. Generally, the compressed timeframe for negotiations did not permit IGPAC members sufficient opportunity for analysis and comment. Recent developments in trade disputes impacting federal and state jurisdictions, such as the Antigua-Barbuda GATS challenge before the WTO to US federal and state internet gambling restrictions, and the NAFTA Chapter 11 arbitration claim filed by Grand River Enterprises Six Nations Ltd. seeking compensation related to the tobacco Master Settlement Agreement, are troubling to IGPAC members. While aware that such challenges do not directly overturn state or federal laws, the demands on state agencies' resources for legal preparation and policy response remain significant. It is welcome that this FTA includes clarifying side letters on gambling.

IGPAC members note that the US-Bahrain FTA does not include a chapter on investment, as the parties have a separate Bilateral Investment Treaty, signed in 1999. Some IGPAC members have expressed concerns about certain market access provisions. The IGPAC member representing North Carolina indicates that the state is opposed to this FTA on the grounds that it further accelerates the loss of textile jobs without additional protections for North Carolina's workers and communities. Though this FTA's procurement provisions do not include coverage of state or subcentral entities, IGPAC members have expressed concerns about certain language and implementation issues in the event that coverage may eventually expand to states. Public awareness of the implications of “outsourcing” or “offshoring” has been heightened as some US employment shifts overseas and across borders – while awareness of the benefits of international investment and foreign affiliate employment to the US economy seems less evident. Proposals under review by federal, state and local elected officials could further constrain international procurement markets. Given this context, IGPAC members suggest that relevant federal agencies provide information to the public and technical assistance to US firms regarding the benefits of market access to newly opened Bahraini procurement markets under this agreement.

As the US and Bahraini federal governments work toward implementation of this FTA, as well as collaborate on the creation of a broader Middle East Free Trade Area, IGPAC members would like to offer their support for remaining engaged with our federal and subcentral counterparts in the trade policy dialogue, and for collaborating on trade capacity building efforts and mutually beneficial trade development initiatives.

### **III. Brief Description of the Mandate of the Intergovernmental Policy Advisory Committee**

Established by the United States Trade Representative (USTR), pursuant to Section 135(c)(2) of the Trade Act of 1974 (19C. 2155(c)(2), as amended, the Federal Advisory Committee Act (5 C. App. II) and Section 4(d) of Executive Order No. 11846 dated March 27, 1975, the Intergovernmental Policy Advisory Committee (IGPAC) is charged with providing overall policy advice on trade policy matters that have a significant relationship to the affairs of state and local governments within the jurisdiction of the United States.

IGPAC consists of approximately 35 members appointed from, and reasonably representative of, the various states and other non-federal governmental entities within the jurisdiction of the United States. These entities include, but are not limited to, the executive and legislative branches of state, county, and municipal governments. Members may hold elective or appointive office. The Chair of the Committee shall be appointed by the US Trade Representative, and members shall be appointed by, and serve at the discretion of, the US Trade Representative for a period not to exceed the duration of the IGPAC charter. The US Trade Representative, or the designee, shall convene meetings of the Committee.

IGPAC's objectives and scope of its activities are to:

- Advise, consult with, and make recommendations to the US Trade Representative and relevant Cabinet or sub-Cabinet members concerning trade matters referred to in 19 C. Section 2155(c)(3)(A).
- Draw on the expertise and knowledge of its members and on such data and information as is provided it by the Office of the US Trade Representative.
- Establish such additional subcommittees of its members as may be necessary, subject to the provisions of the Federal Advisory Committee Act and the approval of the US Trade Representative, or the designee.
- Report to the Trade Representative, or the designee. The US Trade Representative or the designee will be responsible for prior approval of the agendas for all Committee meetings.

The United States Trade Representative, or the designee, will have responsibility for determinations, filings, and other administrative requirements of the Federal Advisory Committee Act. The Office of Intergovernmental Affairs and Public Liaison of the Office of the Trade Representative will coordinate and provide the necessary staff and clerical services for IGPAC. IGPAC Members serve without either compensation or reimbursement of expenses.

#### **IV. Negotiating Objectives and Priorities of the IGPAC**

Members of the IGPAC would like to express their gratitude to their USTR colleagues for their tremendously improved efforts to expand participation by state and local government representatives through the Intergovernmental Policy Advisory Committee on Trade (IGPAC) during the US-Bahrain Free Trade Agreement (FTA) and other recent FTA negotiations.

IGPAC members affirm that America's economic growth and prosperity are best served by:

- embracing strategies for more open and fair global markets;
- investing in innovative research and technologies to foster commercialization into the industries and jobs of the future;
- providing assistance to workers impacted by technology and trade trends, and
- engaging in, rather than isolating ourselves from, the challenges of international competition in this increasingly interconnected world.

Hence, as a general principle, IGPAC members support this agreement's trade liberalization objectives, with the recognition that those objectives must be carried out in a manner consistent with principles of US constitutional federalism and public policy obligations owed by the federal government to state and local entities. Consequently, the FTA should accord consideration for existing state and local level regulatory, economic development and subsidy policies, and the social, economic, and environmental values those policies promote. Statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by provisions in trade agreements. These concerns were reflected by Congress' inclusion of the "no greater rights" language in Trade Promotion Authority legislation. The principle that the United States may request, but not require, states to alter their regulatory regimes in areas over which they hold constitutional authority should be maintained.

Full and effective coordination and consultation should include requesting authority from the appropriate state or local authority during the policy formulation and negotiation process, before a state or local rule, regulation, or statute is listed in a trade agreement, offer or other binding commitment. In general, IGPAC would prefer a process that relies upon affirmative consent from fully informed, involved and affected state and local entities, rather than for them to be required to opt out of proposed coverage.

#### **Background and Context**

State and local government entities are at the front lines of the international marketplace: both by assisting businesses to engage in global competition through trade development assistance; and by working to mitigate the impact of technological change and trade dislocations on communities, businesses and workers through varied adjustment, training and assistance programs. States have typically been innovators in international economic development work to foster increased export activity by small and mid-sized firms. Though businesses may turn first to private sector contacts for trade assistance, research shows that the transaction costs for providing trade development assistance to small and medium-

sized businesses generally outweigh the benefits for most private sector service providers. Hence, federal, state and local government trade development agencies play a key role in filling this need by providing information, technical assistance, referrals, alliance-building and facilitative guidance to smaller firms lacking the internal resources to develop export expertise on their own. Still, the specific export and job creation/retention benefits from informational, capacity-building trade development assistance services remain difficult to measure. Moreover, many state and local trade development efforts are constrained by limited resources and competition from other budgetary priorities.

State and local governments have generally supported multilateral, regional and bilateral efforts to expand market access, both for local businesses reaching out to global markets, and for international investors engaged in the local economy and creating employment. By strengthening rules-based international trade and investment systems, and making the investment process more transparent both in the US and abroad, the ability of all parties to expand trade is enhanced. As trade liberalization efforts progressed in recent decades, however, their coverage and scope have increasingly extended beyond the federal-level, increasing the impact on state and local-level laws, practices and regulations.

Following the approval of Trade Promotion Authority in August 2002, the USTR is to be commended for expanding the IGPAC, and for engaging in active consultations with states and others on a wide array of trade agreements under negotiation. Still, in recent years, concerns such as the following have emerged:

- Given the comparative newness of states' involvement in the content of international trade agreement negotiations, and in their implementation and dispute resolution, states often lack a clearly defined institutional structure with experienced staff dedicated to handling requests from trading partners, federal agencies and other interested parties, and for articulating the state's position on trade issues. Despite the absence of a clear structure for federal-state trade policy consultations, the dialogue has gradually intensified and the role of state policy-makers has increased, as has the involvement of other interested parties.
- Though the State Point of Contact system was meant to create a clear conduit for two-way communications, the structure has not met expectations for a variety of reasons. Most would agree that a broader and deeper range of contacts with diverse state entities, and particularly with those bearing regulatory and legislative authority, needs to be created and maintained by the USTR. Further, requests from the USTR for information and comments related to agreements being negotiated need to allow sufficient time for an informed and meaningful state/local response in order to influence the initial development and articulation of US positions.
- The analytical challenge faced by state and local governments is significant as well: international trade and investment data at the state level are insufficient; and reporting on the results of trade agreements at the state/local level is scant. There is no information by state on services or merchandise imports; no detailed data on services exports and decreasing information on merchandise exports at the zip code level (given the discontinuation by the US Dept. of Commerce of the Exporter Location data series); and limited, delayed and highly aggregated international

investment information. The challenges of assembling national, not to mention subcentral, information on procurement contracts and merchandise and services trade render reporting on specific trade agreement results quite problematic for the US and other countries. These data gaps make it difficult to conduct an informed analysis of the specific costs or benefits of trade liberalization for a given industry or location.

- Legal experts in all branches of government at the state and local level are examining the evolving impact of deepening trade liberalization on federalism, as interpretations of trade agreements during trade disputes brought by investors, trading partners and others impact the historically established state-federal division of power and responsibility (e.g. Chapter 11 of NAFTA). Recent developments in trade disputes impacting federal and state jurisdictions, such as the Antigua-Barbuda GATS challenge before the WTO to US federal and state internet gambling restrictions, and the NAFTA Chapter 11 arbitration claim filed by Grand River Enterprises Six Nations Ltd. seeking compensation related to the tobacco Master Settlement Agreement, are troubling to IGPAC members. While aware that such challenges do not directly overturn state or federal laws, the demands on state agencies' resources for legal preparation and policy response remain significant.

Today as throughout history, the benefits of trade liberalization and its short, medium and long-term costs and benefits are being debated by academics, government leaders and the general public. Our increasing and intensifying globalization is occurring ever more rapidly, with factors of production more mobile and international interconnections more profound than ever before. Resulting advances in technology and productivity are having a major impact on employment trends in a variety of sectors and professions. Given the disparate trade flow impacts, those communities, businesses and workers gaining from greater international market access tend to be less visible, while those challenged by global competition tend to suffer disproportionately, evoking understandable public concern and calls for greater government intervention. Some industrial and agricultural sectors facing import competition may effectively organize for protection or special treatment, while other sectors may suffer more comparatively given their lack of connections and clout to gain preferential treatment. Additional factors often placing US smaller businesses at a competitive disadvantage are the substantial budgets and sophisticated export assistance infrastructure of our major trading partners -- at regional, federal and sub-central or sub-national levels. Though American awareness of the importance of effective trade development efforts has grown, greater attention to these matters will be crucial in upcoming years.

#### Recommendations:

Given this climate, it has never been more essential for international trade agreements, and the federal, state and local trade policy discussions surrounding these agreements, to be effective at opening markets and expanding the benefits of trade for US firms and workers. Bolstering the global competitiveness of the country's growth engine, small and mid-sized firms and their workforces, is at stake. Collaborative state/federal efforts for deepening international trade policy dialogue and fostering creative trade development strategies can help address this need.



IGPAC recommends that the Trade Promotion Coordinating Committee (TPCC), the Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC) be expanded or reconfigured to include state and local government representation (e.g. interested IGPAC members, designated State Points of Contact for the USTR, other relevant agency officials), academic experts and private sector representation. Issues for the attention and action on the part of a newly expanded trade promotion and trade policy consultative process might include:

- Establishing and fully funding a formal, regularly scheduled mechanism for US federal-state trade policy consultations in light of the increasing state role in trade policy formulation, negotiation and dispute resolution. Consultations would address trade and investment agreement negotiations that may impact state laws and practices, and would continue into implementation and dispute settlement phases. To be most effective and inclusive, this consultative mechanism would:
  - need a structure with sufficient budgetary support and resources to develop essential institutional capacity;
  - build upon the annual National Forum on Trade Policy (started by North Carolina in December 2003 and being supported by Centers for International Business Education and Research around the nation); and
  - be informed by best practices of trading partners, such as the Canadian federal-provincial model for trade consultations (C-Trade).

The creation of a consultative federal-state trade policy infrastructure could serve to bridge trade policy gaps between federal agency understanding of varied state processes and states' understanding of the scope of federal requests -- and between federal agency needs and expectations, and states' capacity to respond in a timely and effective fashion.

- Increasing awareness by state officials of the recent and on-going efforts on the part of USTR and other TPCC federal agencies to proactively discuss trade issues with national associations of state officials exercising regulatory functions (e.g. National Association of Attorneys General, National Association of Insurance Commissioners, National Association of State Procurement Officials, etc.). Particularly with respect to GATS, national associations of state regulators such as the National Association of Regulatory Utility Commissioners should play an important role in USTR consultations with states, given the vast scope of these negotiations, the number of agencies and sub-sectors involved, and complexity and range of services regulations. It would be helpful for the federal-state trade policy consultation process to foster links between the national associations' experts in trade law and state trade contacts, and among federal negotiators and federal/state/local agency contacts with expertise in the given issue area.
- Establishing a clear priority for federal support of high technology manufactured goods and services exports. This would build on a foundation of increased federal funding for research and development in emerging sectors such as biotechnology, nanotechnology, photonics, advanced materials, and other innovative technologies. US support for the infrastructure of advanced R&D and for the commercialization of new technologies has never been more crucial to our nation's economic survival in this century's globally competitive context. Such support, along with an educational system preparing the technology workers of the future, would spur the US economy to

generate high paying, high value-added employment. Some US trading partners, Singapore, for example, have multi-year plans to strategically target industrial development, devoting significant resources to accelerate their comparative advantages. In confronting the challenges of this century, the US has as much to learn from our global trading partners as they do from us.

- Assessing the comparative costs and benefits to the federal budget and US economy, particularly in terms of employment creation/retention and trade value, of the allocation of resources and trade protections to agricultural commodities, technology research and development, industrial goods, manufactured products, and services sectors. Policy revisions based on such analysis could lead to more effective and reasonable resource allocation.
- Collecting and disseminating better national, state, regional and zip-code level data on merchandise and services exports and imports, and on international investment flows, deploying mapping technologies and other tools to better inform analysis and planning. Such data would make it possible to benchmark state/federal trade performance against other major trading partners and regions with successful trade development agencies (e.g. Canada, European Union, Japan) by conducting regular evaluations of measured performance, program outcomes, and customer satisfaction at the sub-central or sub-national level. Having entities such as TPCC agencies, the General Accounting Office, Congressional Budget Office or others conduct empirical analysis and report on the trade development capacity and resources of selected trading partners would be an essential aspect of this benchmarking process.
- Encouraging TPCC federal agencies to: deepen the state/federal trade development partnership; prioritize support by overseas posts for state-led trade initiatives in global markets; increase cooperation in domestic trade development program delivery; and integrate further Eximbank trade finance and delegated authority activities with those of states and the private sector, improving small firms' awareness of and access to trade financing. Successful collaboration by federal agencies with state, local, public and private sector economic development partners should be acknowledged and rewarded.
- Substantially transforming, expanding and fully funding the Trade Adjustment Assistance program, perhaps renamed as the "Technology" or "Workforce Adjustment Assistance" program (TAA or WAA). A transformed workforce adjustment and retraining program could more effectively prepare our nation's future workforce for confronting and mastering this century's employment challenges. In the past just as in the present, the complex interactions of economic and industrial factors are more often the cause of employment dislocations than trade-related import competition alone. Many manufacturing and services industries are transitioning through wrenching adaptations to technological change, automation advances and productivity gains, in an intensely competitive global context. The significant job losses occurring in some sectors result from broad trends transcending time and borders. A reconstituted Technology or Workforce Adjustment Assistance effort, beyond aggressively implementing existing TAA provisions (e.g. wage insurance, job-search and relocation aid, health insurance), needs to create initiatives for continuous training, skill enhancement and other assistance (e.g. fully portable health and pension benefits, asset-value

insurance, tax incentives for companies' increased on-the-job training), offering a comprehensive safety net to cushion the adaptation of impacted workers and their communities. Such efforts, in addition to appropriately redistributing a small portion of the national gains from technology and trade to dislocated workers and communities, might foster more domestic understanding of, and support for, investments in education, research, technology, and an agenda of trade liberalization in the future. Moreover, in light of the rapidly changing characteristics of employment being relocated or displaced, the reconstructed program should serve the needs of our nation's wide and diverse workforce, assisting manufacturing workers at varied skill levels as well as workers in services industries. Specifically, the US government should allocate full funding for Technology and Workforce Adjustment Assistance for both blue and white collar workers, including information technology and other professionals whose jobs are being lost due to outsourcing or technological change.

- Emulating our nation's effective responses to natural disasters, in order to mobilize resources for economic disasters, TPCC and related entities should collaborate on the creation of an *Economic Federal Emergency Management Agency*. Such an agency would concentrate varied resources and programs to assist communities coping with sudden and severe workforce contractions following plant shut-downs.

In addition to the recommendations above for expanding state/local and private sector connections to the TPCC, TRPG and TPSC, IGPAC members suggest that the USTR:

- Intensify the focus of its consultative process on reaching out to State Points of Contact, advisory committees and other interested parties for their input as trade policy is being formulated and as trade agreement negotiations are being initiated – rather than after their conclusion. Given the economic distress and employment dislocations created in certain industries and communities due to trade liberalization, the USTR outreach process needs to include active participation by federal and state-level labor agencies and labor unions.
- Utilize the existing corporate, government, and academic relationships of the US states abroad as a bridge to foster cooperation and understanding in preparation for future trade policy, trade capacity building, program development and trade agreement initiatives and meetings, such as WTO Ministerials. Some illustrations of these collaborative ties in action would include: discussion of trade development best practices between state economic development officials and overseas counterparts; educational and technology exchanges and linkages among academic, corporate and government leaders; and, technical assistance and training offered by state courts system experts to enhance the efficiency, transparency and effectiveness of courts in other jurisdictions. These types of subcentral working relationships may provide linkages of benefit to Bahraini leaders working toward a more productive world trade system. Many states have formal and informal international connections that could advance our shared objectives for trade development and capacity building.

## **V. Advisory Committee Opinion on the US-Bahrain FTA**

### **General Observations:**

The US-Bahrain Free Trade Agreement is supported by most IGPAC members, as the agreement advances strategically critical and comprehensive trade development and market reform objectives in a manner generally beneficial to our national, regional and local economies. The IGPAC member representing North Carolina indicates that the state is opposed to this FTA on the grounds that it further accelerates the loss of textile jobs without additional protections for North Carolina's workers and communities.

This agreement with Bahrain, a long-standing ally of the US, would foster trade ties and deepen economic integration throughout the Middle East. The United States and the Kingdom of Bahrain have endeavored to promote closer economic ties, freer trade, and a stronger investment climate under a Bilateral Investment Treaty signed in 1999 and a Trade and Investment Framework Agreement reached in June 2002. The US-Bahrain FTA, and the countries' separate Memorandum of Understanding on Environmental Cooperation, are essential to the Bush Administration's strategy to create a Middle East Free Trade Area by 2013. IGPAC members understand that bipartisan efforts in Congress, such as the Middle East Trade and Engagement Act, indicate active federal support for economic reform and trade liberalization in the greater Middle East. Expanding global market access and broadening economic opportunity throughout this region are essential tools to address the potential socio-economic impact of demographic trends and to counteract the risk of terrorism.

Building upon prior FTAs with Israel and Jordan, as well as the FTA with Morocco signed 6/15/04, the US-Bahrain FTA should substantially improve the business environment and advance civil society development objectives, while increasing trade capacity and investment opportunities between the US and this critically important world region. The elimination of 100 percent of tariffs on consumer and industrial product exports to Bahrain at inception is most welcome, as are other market opening provisions for a wide range of technology, services, textile and agriculture products. US economic interests, entrepreneurs and employees would benefit from improved market access for goods, services, agricultural products, and from better access to government procurement opportunities. Improvements in market access, notably for some key agricultural and industrial sectors, will help US exporters compete more effectively. Provisions to promote workers rights, labor standards and environmental protections, and to advance regional development through trade capacity building, technical assistance and the integration of civil society, are appreciated and essential. IGPAC members note that the US, the Kingdom of Bahrain and the broader geo-strategic region are poised to benefit, both from greater access between markets, and from greater regional integration amongst smaller and larger nations in Northern Africa, the Middle East and Europe.

While supportive of innovative regional and bilateral trade liberalization agreements, IGPAC members remain hopeful that USTR leadership, in re-energizing the WTO Doha Round, will successfully advance multilateral efforts. Given limited trade policy time and resources at the state and local level, we are especially mindful of the considerable staff time involved in the analysis of trade agreements – whatever their scope and economic impact. Obviously, comprehensive multilateral agreements

encompassing all WTO member countries would offer comparatively significant trade development benefits for the investment of federal and subcentral staff time and resources involved. With demonstrable trade gains on a large scale from multilateral trade accords, the case for constituent support can be persuasively made at the subcentral level. It may prove more difficult for state and local officials to communicate the relative importance and potential benefits of free trade agreements with smaller, individual countries or regions.

Members of IGPAC support expanding trade and market access, while simultaneously maintaining a commitment to ensuring that trade laws, enforcement efforts and the dispute settlement process respect the authority of states and local governments to regulate, legislate and interpret land-use, labor, health, safety, welfare, and environmental measures. Some of the core principles that could facilitate international trade and investment agreements, and dispute resolution processes, without sacrificing constitutional standards, include:

- Inclusion of the phrase “no greater procedural or substantive rights” in trade agreements, notably with respect to international investment provisions. Such language would ensure that international businesses do not receive preferential treatment when compared to domestic businesses, and would reference the US Constitution as the benchmark with respect to competing language in international agreements. As evidenced by disputes arising from the NAFTA Chapter 11 *Methanex* and *Loewen* cases, generalized expropriation language has allowed some foreign investors to file frivolous takings claims that challenge laws traditionally in the purview of state and local governments. The construction of any investor-state provisions should be approached with extreme caution and after extensive consultation with state and local governments, in order to avoid unintended consequences akin to NAFTA Chapter 11. Since the US and Bahrain entered into a separate Bilateral Investment Treaty (signed 9/29/99), separate from this FTA, this agreement itself does not include a chapter with the investment provisions of concern to IGPAC members.
- Legal standards that are “rationally related to a legitimate governmental interest,” and that are consistent with the US Constitution and applicable case law, by ensuring state and local governments are not held to a higher standard in defending legitimate governmental interests with respect to international trade than domestic commerce. International agreements that include standards such as “least trade restrictive” or “least burdensome” for defining the permissible scope of governmental regulation are inconsistent with constitutional standards for evaluating legislation, and may affect a state or municipality’s ability to implement effective economic development programs and zoning laws.
- Transparency in claim and dispute resolution processes. Where it may still be appropriate to include investor dispute resolution procedures, greater attention must be paid to making these more accessible to both the public and any affected governmental entity. The United States and relevant international tribunals need to provide prompt notification to state and local governments when their regulation or law is being challenged, seek their input and assistance at all stages of the process, and allow impacted state and local governments to participate fully in the hearing and deliberation process. Affected state and local governments should be empowered to file *amicus*

briefs in matters before the tribunal and be able to work with the federal government in defense of their laws and regulations. Attention should also be given to making the proceedings open to the public. Recent developments in trade disputes impacting federal and state jurisdictions, such as the Antigua-Barbuda GATS challenge before the WTO to US federal and state internet gambling restrictions, and the NAFTA Chapter 11 arbitration claim filed by Grand River Enterprises Six Nations Ltd. seeking compensation related to the tobacco Master Settlement Agreement, are troubling to IGPAC members. While aware that such challenges do not directly overturn state or federal laws, the demands on state agencies' resources for legal preparation and policy response remain significant. IGPAC members also note and welcome this FTA's inclusion of clarifying side letters on gambling. Finally, further consideration should be given to the structural problems inherent in regulating important aspects of international trade through a process that uses *ad hoc* judges and eschews reliance on precedent. In view of the need of businesses for stability and predictability and, in light of the substantial impact that decisions may have, there is an imperative need to ensure that the decisions and decision-makers are viewed as having substantial institutional credibility.

- Improvement by USTR of the consultation process by implementing the recommendations for consultations outlined above, and by adopting the standard set out in Federalism Executive Order 13132, Section 6, (which requires federal agencies to consult with state and local officials and representatives of their respective national organizations *before* issuing proposed rules or submitting legislative proposals to the Congress) would help the USTR gauge the concerns of state and local governments in a timely fashion.
- No presumption of federal authority over state and local law, when dealing with matters of unclear constitutional authority. This would bolster due consideration for the principles of federalism, and the negotiating position of the US would be clarified if federal functions were clearly separated from those of state and local governments.
- Monitoring and enforcement by USTR and relevant federal agencies, to ensure Bahrain's compliance with commitments made under the FTA with respect to market access, labor standards, environmental protections and other provisions. Updated information on on-going US monitoring and enforcement efforts should be made readily and publicly available.

### Market Access

To the extent that state and local laws, regulations and other measures are, or may become, involved, IGPAC requests that, in concert with the consultation provisions between FTA parties, regular channels of communication and consultation between federal and subcentral governments be established as needed (note report recommendations in section IV) with respect to provisions of this Agreement, notably on agriculture and sanitary and phytosanitary measures (Chapter 6), technical barriers to trade (Chapter 7), government procurement (Chapter 9 and Annexes), cross border trade in services (Chapter 10), financial services (Chapter 11 and Annexes), telecommunications (Chapter 12

and Annexes), e-commerce (Chapter 13), intellectual property (Chapter 14), labor (Chapter 15), environment (Chapter 16), transparency (Chapter 17), and dispute settlement (Chapter 19).

### Government Procurement

IGPAC members note that sub-central, i.e. state, government procurement is NOT covered by this Agreement. As a matter of general principle, IGPAC members support the goal of improving transparency and increasing fair market access in government procedures and regulatory decisions that are related to procurement, while preserving the independent authority of state and local governments to adopt legislation, standards and procedures consistent with their experience and interests.

Still, concerns arise from the IGPAC perspective due to the fact that certain provisions in this FTA are inconsistent with language in the World Trade Organization (WTO) Government Procurement Agreement and with previous FTAs covering state procurement. Two examples:

- With respect to sole source procurements and documentation of the basis for non-competitive procurement, the Bahrain FTA requires the procuring entity to “prepare a report in writing” while the CAFTA requires the procuring entity to “maintain records or prepare written reports.” The Bahrain provision, if intended to be extended to states without modification, would represent a new reporting responsibility for state procurement officials;
- The Bahrain FTA requires notice of awards within 60 days and adds the date of the award as a mandatory data element, while the CAFTA requires prompt publication of notice of awards. Again, divergent terms and conditions present difficulty for state implementation.

In the event that future negotiations are undertaken to expand the Bahrain FTA’s coverage to include state procurement, state procurement officials would need to be actively consulted during the negotiation process. Moreover, the inconsistent provisions would need to be amended in order to conform with other relevant FTAs’ procurement provisions impacting states. Ensuring that FTA provisions on state procurement are consistent across agreements would avoid unnecessary confusion and complexity for implementation at the state level.

Currently, public awareness of the implications of “outsourcing” or “offshoring” has been heightened as some US employment shifts overseas and across borders – while popular awareness of the benefits of international investment and foreign affiliate employment to the US economy seems less evident. A wide array of proposals under review by federal, state and local elected officials could further increase limits on international procurement market access. Given this context, IGPAC members suggest that the USTR, the US Department of Commerce Export Assistance Centers, and other relevant federal agencies, provide information to the public to increase awareness of the benefits of procurement market liberalization, and provide technical assistance to US firms to encourage success in their reaching newly opened procurement markets under this agreement, other FTAs and the WTO Government Procurement Agreement.

## Services

State and local governments generally support objectives to liberalize trade in services industries as a means of increasing market access for US firms and for reaching trade development objectives. IGPAC members equally assert that the independent exercise of state and local legislative and regulatory power is critical to protecting citizens' interests and safeguarding the federal system. IGPAC appreciates that the USTR has agreed to our recommendation to invite the National Association of Regulatory Utility Commissioners (NARUC) to join IGPAC and its trade policy consultation process. NARUC's input could significantly enhance IGPAC's comments on services provisions from the state and local regulatory perspective, as NARUC includes governmental agencies engaged in the regulation of telecommunications, energy, and water utilities and carriers in the US, Puerto Rico and the Virgin Islands.

The USTR has diligently endeavored to identify various state statutes and local measures that may not conform to certain provisions in this agreement, excluding them from coverage by listing them in annexes of non-conforming measures. It should not be presumed, however, that these annexes are comprehensive, nor that future legislative and regulatory decisions must be consistent with commitments made in this agreement.

In this regard, IGPAC members reaffirm that international trade and investment agreements need to be structured in a manner consistent with the principles of US constitutional federalism. To the extent that the USTR may wish to negotiate liberalization of services and other matters under states' sovereign jurisdiction, it is essential to duly confer with states in order to gain their informed, explicit advice and consent. The general "blanket" exemption for "existing" and subsequent state and local measures that do not increase the degree of non-conformity could leave open a myriad of potential disputes about future changes. At a minimum, this matter highlights the critical need for the USTR to educate and consult with state and local entities so that they remain aware of the constraints that may be imposed upon future legislative actions. If future measures are not covered by current exceptions for existing laws, it would be necessary to fit them within other exceptions, many of which are far narrower and risk being subject to problematic standards, such as being "no more burdensome than necessary." The unintended consequence might be to freeze state and local legislation in ways that prevent it from adapting adequately to changing facts and circumstances. The difficulties that developed under energy deregulation in the Western states, and the discussions about whether to reconsider any aspects of current law in the area are indicative of such potential problems. This is particularly true where the interpretation of many of these terms and concepts continues to evolve and is subject to dispute within the WTO framework, as well as being subject domestically to the US Constitution's Commerce Clause. IGPAC members urge the USTR to act expeditiously to work with states and the global community on forging a common view on these issues, so that state and local governments can effectively assess their positions on future agreements.



Comment on Advisory Committee Process:

IGPAC members sincerely appreciate the dedication of USTR Intergovernmental staff in providing extensive information and assistance as we prepared this report. However, IGPAC members found the 30 day period allotted for review of each of the FTA documents (the US-Australia FTA, the CAFTA, the Morocco FTA, the Dominican Republic FTA and this Bahrain FTA) and creation of reports to be insufficient, given the complexity of the agreements, the time needed for consultation amongst members new to the Committee, the delay in making documents publicly available which hampered our discussions with other interested parties, and the coordination of members' schedules -- especially complex since some members are elected officials with legislatures in session.

IGPAC members emphasize that the creation of an institutional infrastructure, to foster on-going federal-state-local trade policy consultations before, during and after final trade agreement language is made available, would provide for a far more comprehensive, inclusive and valuable IGPAC review process. In view of the compressed schedule and the need to consult with a large number of constituent members, the representatives of the National Association of Attorneys General (NAAG) do not take a formal position on this Agreement at this time. The National Association of State Procurement Officials (NASPO) appreciates its participation in the IGPAC and the inclusion of its input regarding the procurement-related issues in this report. Because NASPO represents purchasing directors from all states, some of which may take differing positions on the Agreement itself, NASPO also does not take a formal position on this FTA at this time.

In light of the commitment of the USTR and Congress to receiving input from IGPAC and other advisory committees, lengthening this time frame and deepening the resources devoted to the entire process, as detailed in earlier recommendations (section IV of this report), would be most welcome.

## **VI. Membership of Intergovernmental Policy Advisory Committee (IGPAC)**

### **Roster as of July 2004**

<u>Name</u>	<u>Affiliation</u>
Rep. Sheryl Allen	Utah House of Representatives
Kent Allin	National Association of State Procurement Officials
Jill Arthur	City of Santa Ana, California
Representative Daniel E. Bosley	Commonwealth of Massachusetts
Peter Bragdon	Office of the Governor/ Oregon
James A. Brooks	National League of Cities
Teresa Brown	Arkansas Attorney General's Office
Brian R. Caldwell	Office of Consumer Counsel/ Northern Mariana Islands
Liz Cleveland	Mississippi Development Authority
Carol Colombo	State of Arizona
Karen Cordry	National Association of Attorneys General
Peter S. Cunningham	North Carolina Department of Commerce
Rep. Johnny Ford	Alabama House of Representatives
Robert Hamilton	Office of the Governor/ State of Washington
Kathy M. Hill	Iowa Department of Economic Development
Judge Rebecca Jackson	Jefferson County Judge/Executive/ Louisville, Kentucky
Chief Justice Judith S. Kaye	New York Court of Appeals
Governor Dirk Kempthorne	State of Idaho
Brian Krolicki	Treasurer, State of Nevada
Peter Owens Lehman, Esq.	South Carolina State Ports Authority
Rep. Peter Lewiss	Rhode Island House of Representatives
Tony Lorusso	Minnesota Trade Office
Cassandra Matthews	National Association of Counties
Robert R. Matthias	City of Virginia Beach, Virginia
James Mazzarella	State of New York, Office of Federal Affairs
Ron McMurray	State of Idaho
Jeremy Meadows	National Conference of State Legislatures
David Naftzger	Council of Great Lakes Governors
Mayor Meyera E. Oberndorf	City of Virginia Beach, Virginia
Senator Jose Ortiz-Dalio	Commonwealth of Puerto Rico
Veronique Pluvoise-Fenton	National League of Cities
Representative Clay Pope	State of Oklahoma
Mayor Miguel A. Pulido	City of Santa Ana, California
Lynne Ross	National Association of Attorneys General
MardiLyn Saathoff	Office of the Governor/ Oregon
Milton Segarra	Commonwealth of Puerto Rico
Ms. Hannah Shostack	Office of Legislative Services, New Jersey Legislature
Mr. Richard Van Duizend	National Center for State Courts
Governor Tom Vilsack	State of Iowa
Christopher Whatley	Council of State Governments
Kay Alison Wilkie	New York State Department of Economic Development