

**The U.S.-Bahrain Free Trade Agreement (FTA)
The Intellectual Property Provisions**

**Report of the
Industry Trade Advisory Committee on Intellectual Property
Rights (ITAC-15)**

July 14, 2004

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

Prepared By the

**Industry Trade Advisory Committee on Intellectual Property
Rights (ITAC-15)**

I. Purpose of the Committee Report

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

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement¹ 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 Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-15) hereby submits the following report.

II. Executive Summary of Committee Report

Notwithstanding that the Bahrain FTA (“BFTA”) was negotiated after the U.S.-Morocco FTA (“MFTA”), which, at the time, ITAC-15 had considered to be the most advanced IP chapter in any FTA negotiated to date, the obligations contained in the BFTA fall short in some respects from those found in the MFTA. Nevertheless, ITAC-15 supports the BFTA chapter on intellectual property, noting that many of the shortcomings that characterized the Chile FTA and CAFTA have been remedied in the MFTA and continued in the BFTA. Thus, the BFTA meets most of the negotiating goals and objectives contained in the Trade Act of 2002 and those of the U.S. intellectual property-based industries, creators and innovators.

¹ This report is based on a review of the intellectual property provisions of the BFTA dated June 18, 2004, and made available to the public on the USTR website on June 21, 2004. This text is not the “final” text, which at a minimum must undergo a legal “scrub” before it is submitted to the Congress and to the President. Accordingly, the final agreement may be different from the text upon which ITAC-15 has made these comments.

ITAC-15 commends both the U.S. and Bahrain negotiators, the latter, in particular, for their willingness to adopt high levels of protection, not only for U.S. right holders, but for their own right holders as well.

ITAC-15 wishes to underscore the importance that it attaches to a close working relationship between ITAC-15 and industry, on the one hand, and U.S. negotiators, on the other, in ensuring that the model FTA intellectual property text, which has been carefully developed through the course of negotiation of seven FTAs, continues to form the basis for these other agreements. Such relationship remains critical during the course of the negotiations as well.

ITAC-15 also expresses its continuing concern about the fact that the texts provided to the cleared advisors for their review have not gone through the “legal scrub process.” While ITAC members recognize the time and staffing difficulties that face USTR in this “completion” process, it is concerned that, given the recent practice of using the legal scrub process to negotiate substance, it is being asked to review texts that do not reflect the ultimate substance of the agreement between the FTA parties. For example, changes were made to the FTAs with Morocco and CAFTA during the legal scrub that substantively affected the obligations contained in those agreements. ITAC-15 urges U.S. negotiators to make every effort either to provide the cleared advisors with “final” text before ITAC-15 is asked to file its reports, or, at a minimum, to submit the “scrubs” for advisor review before they become final. Unfortunately, in the case of this FTA, ITAC-15 is again required to submit its report before the final text of the Agreement is available.

III. Brief Description of the Mandate of ITAC-15

As part of its mandate to provide detailed policy and technical advice, information and recommendations on trade-related intellectual property matters, ITAC-15’s predecessor committee, IFAC-3, advised U.S. negotiators on, and reviewed draft texts of, the Singapore FTA, the Chile FTA, CAFTA, the Australia FTA, and the Morocco FTA intellectual property chapters. In particular, IFAC-3 evaluated these FTA provisions in the context of the IP-related objectives contained in the Trade Act of 2002 and the objectives and achievements of other U.S. multilateral and bilateral initiatives on intellectual property.

IV. Negotiating Objectives and Priorities of ITAC-15

The negotiating objectives and priorities for ITAC-15 reflect those contained in the Trade Act of 2002 (Pub. L. No. 107-210, 116 Stat. 995 (codified at 19 U.S.C. Sec. 3802(b)(4) (2002), trade promotion authority legislation) which also provided the fast-track authority under which this Free Trade Agreement will be reviewed and voted on. Specifically, ITAC-15’s objectives and priorities seek to further promote the adequate and effective protection of intellectual property rights on a global basis. To accomplish this goal, the Committee works with the U.S. government to ensure full implementation of not only the substantive obligations in the TRIPS agreement but also the enforcement obligations as well. The

enforcement text is assuming increasing importance as countries improve their substantive standards of protection and especially in the context of increasing global trade in information and other innovative and creative products subject to intellectual property protection. The Committee also seeks to ensure that these standards of protection and enforcement keep pace with rapid changes in technology, including establishing that right holders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works. The Committee seeks to ensure the full range of protections for patented innovations, to eliminate any discrimination against U.S. right holders by any of our trading partners, and to secure deterrent enforcement against piracy, counterfeiting, cyber squatting and other infringements through significant improvements in civil and criminal remedies and penalties. Finally, the Committee seeks to establish strong precedents in these FTAs in order to raise the global level of protection and enforcement globally, nationally and in regional and in multilateral agreements.

The FTA process has become the principal process through which with the IPR-based industries are able to ensure that the standards of protection and enforcement keep pace with new developments.

V. Statement as to Whether Agreement Provides for Sectoral or Functional Equity and Reciprocity

The concept of sectoral equity and reciprocity is not relevant to the development of rules such as those in the chapter on intellectual property. The provisions on intellectual property apply equally to both Parties. ITAC-15 expects that Bahrain will equitably implement all of the intellectual property-related provisions of this agreement but will not hesitate to recommend U.S. action under the provisions of the dispute settlement chapter should Bahrain's implementation of the agreement fall short of its commitments.

VI. Advisory Committee Opinion on Agreement

Introduction:

The BFTA builds on the standards already in force in the TRIPS agreement, the NAFTA, the Jordan, Singapore, and Chile FTAs, updating these standards to take into account the wealth of experience operating under those agreements since their coming into force in 1995, 1992, 2001 and 2003 respectively. It also takes into account the many years of experience gained from bilateral engagement with countries under the Special 301 trade process through which the U.S. Trade Representative has sought to leverage both legal and enforcement reforms in countries posing particular intellectual property problems for U.S. industry and for the U.S. economy. Perhaps most important, the BFTA takes into account the significant legal and technological developments that have occurred since the TRIPS and NAFTA agreements entered into force and mirrors, and improves upon, the Singapore and Chile FTAs in order to establish clear precedents in most key areas of IP protection for future FTA negotiations. ITAC-15 notes that, in particular, the BFTA, along with CAFTA and the Morocco FTA, have been completed with countries that are not among the more

advanced developing countries; indeed some have relatively low per capita incomes and lower development levels. Notwithstanding that the obligations contained in the BFTA fall short of those contained in the Morocco FTA, the fact that Bahrain found it in its own interest to significantly increase its levels of IPR protection beyond that required by TRIPS is testament to the principle that high levels of protection benefit indigenous creators and inventors in the same manner as they do in developed countries. ITAC-15 urges the U.S. government to keep this in mind when negotiating with countries such as those in the SACU, which have much to gain from maintaining the high levels of protection negotiated to date.

We applaud Bahrain for agreeing to higher levels of protection, by incorporating in the agreement all the obligations set forth in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) which are so critical to creating the legal infrastructure for e-commerce, for the distribution and transmission of protected materials over the Internet and for products in digital format generally.

ITAC-15 welcomes the successful negotiation of the BFTA. While ITAC-15 recognizes that the negotiation of FTAs with individual countries and regions is labor-intensive, especially when compared with the negotiation of a multilateral agreement among the 146 Members of the WTO, FTA negotiations provide the most effective approach currently available to the United States for improving global intellectual property protection. The negotiation of an individual FTA provides the opportunity to deal with specific intellectual property concerns that U.S. industry may have in the particular negotiating partner. Our goal in the negotiation of an FTA is to set a new baseline for all future FTAs, including the FTAA. This baseline is continually reflected in the model FTA agreements, which are constantly changing based on what we learn through negotiating each of the FTAs.

ITAC-15 recognizes that, to a large extent, the negotiation of FTAs has become the primary focus of the U.S. trade agenda and supports the use of all policy tools to gain worldwide improvement in intellectual property protection. ITAC-15 urges U.S. negotiators to ensure that FTAs remain part of a coordinated, multi-dimensional program that not only includes multilateral and regional initiatives but also focuses on substandard intellectual property protection and enforcement in countries that are not parties to FTA negotiations.

ITAC-15 views the TRIPS Agreement as reflecting minimum international norms of intellectual property protection that most countries should already have in place. The role of the FTAs is to clarify, where necessary, those obligations and to improve upon them by enhancing the level of intellectual property protection in the negotiating partner.

The FTAs that the United States has negotiated since 1999 have facilitated national implementation of the TRIPS obligations and have provided the vehicle both for improved standards of intellectual property protection and enforcement and for significant clarifications of TRIPS obligations in the FTA partners. The continuum of intellectual property protection that links these FTAs has sent an important signal to

future FTA partners about U.S. intellectual property expectations and it is for that reason that ITAC-15 is disappointed that U.S. negotiators failed to negotiate an FTA with Bahrain that contained the same level of obligations as those found in the Morocco FTA, particularly given the more favorable socio-economic indicators in Bahrain.

ITAC-15 urges the U.S. government to continue to maintain a strong bilateral program to deal with IPR deficiencies in non-FTA countries, many of which are critical markets for our industries and which may never be FTA candidates. It is therefore essential that traditional trade tools such as Special 301, Section 301, the unilateral trade preference programs and WTO dispute settlement be aggressively employed to lift levels of intellectual property protection in those countries. Many of these countries have failed to recognize the clarifications and new standards that U.S. negotiators have been able to achieve in the FTAs, while others may not be implementing these clarifications and new standards lest they lose bargaining chips in any future FTA with the United States. Further, ITAC-15 notes that negotiating FTAs has an impact on the effectiveness of the overall bilateral program including with non-FTA countries.

While the BFTA contains important TRIPs clarifications and additional protections, industry will only gain the expected commercial benefits from the enhanced intellectual property protection contained in the FTA when the FTA is implemented in a proper and timely manner. ITAC-15 notes with much concern, for example, the problems that U.S. industry is already facing in Chile and, prospectively with the Dominican Republic, in respect of their implementation of those FTAs and urges the United States not only to monitor very closely the implementation by Bahrain (and our other FTA partners) of their FTA obligations but also to be prepared to act to ensure proper and timely implementation of those obligations.

ITAC-15 supports the BFTA chapter on intellectual property and believes that the agreement establishes precedents on many of the key issues to be included in the other FTAs now being negotiated, including the FTAA. It, however believes that the Morocco FTA, while negotiated prior to the BFTA, continues as the most advanced intellectual property chapter in any FTA negotiated so far and should be used as the benchmark (with, however, the transition provisions in the BFTA) for the expected future FTAs in the region under the Middle East Free Trade Area (MEFTA) initiative.

ITAC-15 further wishes to underscore the importance that it attaches to a close working relationship between ITAC-15 and industry, on the one hand, and U.S. negotiators, on the other, not only in the development of a model FTA intellectual property text, which would form the basis for these other agreements but also during the course of the FTA negotiations themselves.

ITAC-15 expects that the U.S. will insist, in any future FTA negotiations with countries that have yet to implement fully their TRIPS obligations, they not only do so before the launch of the negotiations, but also, where appropriate, provide a standstill specifically with respect to the approval of generic copies of pharmaceutical products.

The following summarizes the main provisions of the intellectual property text and highlights both the provisions that we believe provide strong protection, and those very few provisions which ITAC-15 views as deficiencies.

General Provisions:

These provisions require accession to a number of key treaties and contain the national treatment and other general provisions governing all of Chapter 15. ITAC-15 particularly applauds the absence of long transition periods for acceding to several of these treaties, which characterized the Chile FTA and CAFTA. With only two exceptions, discussed below, adherence to these treaties and to all the FTA obligations is required upon entry into force without any transition.

ITAC-15 is particularly pleased that the carve-out from the national treatment obligation afforded to Chile and Australia for certain elements of protection for sound recordings and performances was not repeated in the BFTA. The BFTA now affords, like the Singapore FTA, full national treatment without exception. The U.S. has always supported the principle of full national treatment without exception in the intellectual property field and ITAC-15 firmly believes that FTAs should not, under any circumstances, permit trading partners to discriminate against U.S. nationals.

Trademarks

Generally, the trademarks section includes major provisions that should assist trademark owners in protecting trademarks.

Article 14.2.1 provides that marks need not be visually perceptible to be registered. This leaves open the possibility of registering sound and scent marks, which is positive. It would be preferred, as in CAFTA as it relates to sound marks, that sound and scent marks be mandated as protectable. Nevertheless, removing the barrier to protection of sound and scent marks because they are not visually perceptible is a step forward.

Article 14.2.2 requires the Parties to protect certification marks. Collective marks are mentioned in the context of protecting geographical indications and thus would appear to be required to be protected although this is not explicit. Although not critical, it would be preferred that collective marks be likewise specifically considered trademarks and required to be protected.

Article 14.2.3 reaffirms TRIPS Article 20 in that the use of one's trademark shall not be encumbered. Thus, the Article clarifies and enhances existing TRIPS obligations prohibiting interference with the use of trademark rights in products such as pharmaceuticals that are also subject to requirements regarding the use of the generic or common name of the product.

Article 14.2.4 reaffirms the TRIPS requirement that the trademark owner's rights are

exclusive rights—that is, the trademark owner can prevent confusing uses of identical or similar signs, including geographic indications. This is a favorable provision and its inclusion is commended. The provision, however, does not include the presumption of confusion for identical signs for identical goods or services as has been included in prior FTAs. It is preferred that this presumption be included.

Industry is pleased with the broader scope of protection that will be required for well-known marks under 14.2.6. Similar to the Singapore, Chile and Morocco FTAs and CAFTA, the BFTA extends protection of well-known marks to dissimilar goods and services, whether registered or not, with the proviso that the expanded protection is based on an association between the goods/services and the owner of the well-known mark and when the interests of the trademark owner are likely to be damaged. In view of the frequency of infringements of well-known marks, the ability of well-known trademark owners to protect their marks on unregistered and dissimilar goods and services is critical to protecting these valuable assets.

Although the BFTA provides for greater scope of protection for well-known marks in 14.2.6, it does not meet the same level of protection for such marks as found in the Chile FTA. The BFTA does not have a provision that provides for owners of well-known marks to prohibit or cancel trademark registrations of marks that are identical or similar to the well-known mark. Rather the Agreement contains only the general provisions for opposing or canceling a registration with no specific mention regarding well-known marks.

Article 14.2.11 makes strides toward office automation and greater use of electronic means to interact with trademark officials and the establishment of accessible trademark databases.

The elimination of the requirement of trademark license recordals (Article 14.2.11) is a positive development. This change means that trademark owners and licensees can take steps to protect and enforce trademarks without unnecessary administrative hurdles. It eliminates an administrative requirement that has been a diversion of resources. This Article improves on the Chile text given the absence of such a provision in the Chile FTA; although the Singapore and Morocco FTAs and CAFTA do eliminate the trademark recordal requirement.

Geographical Indications

The BFTA provides a clear framework for the procedures involved in the registration of geographical indications and establishes the proper relationship between geographical indications and trademarks.

The BFTA, as with the Chile and Morocco FTAs and CAFTA, has a more extensive provision on geographical indications than does the Singapore text. As such, it builds upon and clarifies that language. Like the Singapore, Chile and Morocco FTAs and CAFTA, the BFTA includes a provision (Article 14.2.4 of the Trademark Section) that requires that the owner of a registered trademark must have the right to prevent the use, in the course of trade by third parties, of confusingly similar signs, including geographical indications. The BFTA, like the Chile and Morocco FTAs and CAFTA text, then improves upon this

language by also including a specific provision which would prohibit the protection or recognition of a geographical indication that is confusingly similar to a previously used, applied for or registered trademark, thereby unequivocally protecting prior trademarks against later geographical indications (Article 14.2.13). This is consistent with U.S. law and policy on the subject of the relationship of geographical indications and trademarks and is also consistent with the TRIPS agreement. As with the Chile and Morocco FTAs and CAFTA, to the extent that it lends clarity to the issue, it is a welcome addition to the Singapore FTA language.

ITAC-15 also supports this geographic indication text of the BFTA because it requires a very systematic and fair opportunity to object to the protection of geographical indications. One of the major problems with the protection of geographical indications is the lack of a clear mechanism to determine whether a geographical indication should be granted protection. The BFTA, as with the Chile and Morocco FTAs and CAFTA, provides clear language requiring such a mechanism.

Finally, the text broadens the definition of a geographical indication to allow for the protection of geographic indicia other than the actual names of geographic places (such as the outline of a state). This provides the opportunity to protect geographic indicia as geographical indications, which will benefit those organizations that seek such protection. Provided that the above-mentioned relationship between trademarks and geographical indications (trademarks are protected from infringement by later geographical indications) remains clear, the broadened definition for geographical indications is likewise welcome.

Domain Names on the Internet:

The BFTA provides two provisions regarding domain names: Article 14.3.1 requires that each Party shall provide for Uniform Domain Name Dispute Resolution Procedures for the country-code top level domains (ccTLDs) of the Parties. Article 14.3.2 requires each Party to provide public access to “reliable and accurate” contact information for each domain name registrant. These provisions combine to combat the problems of copyright and trademark cyber-piracy and are welcome. ITAC-15 prefers, however, (and mentioned this in its Chile FTA and CAFTA reports) that there be a direct reference to the “Whois” database and any additional contact information elements as available in the gTLDs namespace. Inclusion of this direct reference would clarify the type of information this database must contain. Reference to “Whois” was included in the Singapore FTA.

ITAC-15 wishes to underscore that the provisions regarding the establishment of Uniform Domain Name Dispute Resolution Procedures for ccTLDs in the BFTA address only trademark cyber-piracy, and not other alleged abuses such as the use in domain names of geographic terms. ITAC-15 commends the fact that challenges based upon the use of geographic terms as, or as part of, a domain name are not included.

As opposed to CAFTA, the BFTA, like the Chile and Singapore FTAs, does not include a

sentence providing that “due regard may be given to the Parties’ legislation protecting the privacy of its nationals” as it relates to domain name contact information. ITAC-15 is pleased that this provision is not included in the BFTA as such a provision could be used to limit or restrict right holders access to an accurate Whois database.

Copyright and Related Rights and the Protection of Certain Satellite Signals

The United States is the world’s largest producer and exporter of copyrighted materials and at the same time loses more revenue from piracy and other inadequate copyright protection than any other country in the world. High levels of copyright protection and effective enforcement mean more revenue and more higher-paying jobs benefiting all Americans. The copyright industries account for over 5% of U.S. GDP and have employed new workers at over three times the rate of the economy as a whole over the last 25 years.

Industry’s goal for the BFTA intellectual property negotiations, like its goal for the Singapore and Chile FTAs, CAFTA and Morocco, was to achieve a level of protection that in some areas improved on the standards in TRIPS and NAFTA and, in others, clarified provisions in those agreements. In addition, it was critical to achieve Bahrain’s agreement to fully implement the provisions of the WCT and WPPT along the same lines as the U.S. had in the DMCA in 1998. Finally, industry and the U.S. negotiators sought to clarify and build upon provisions of the TRIPS enforcement text in light of the U.S. copyright industries’ wide experience with copyright enforcement globally. This objective was, in almost all instances, achieved.

The first improvement sought was to ensure that the level of protection for record producers and performers in Bahrain as close as possible to the protection afforded other subject matter receiving Berne Convention levels of protection. While the Singapore FTA combines authors’ and related rights in one section and the Chile FTA to some extent perpetuated this dichotomy unnecessarily, the BFTA (as well as CAFTA and the Morocco FTA), however, returned to the formulation in the Singapore FTA. With digitization of all works and their transmission over the Internet becoming more important daily, the continued treatment of sound recordings in a manner different from other protected works no longer can be justified. ITAC-15 is pleased that the Chile formulation was not repeated and that it hopefully will not be perpetuated in any future FTA.

While the text repeats some obligations already contained in the TRIPS agreement without change, other language has been clarified, particularly in the enforcement text. The BFTA text does, however, contain detailed provisions that require implementation of the new obligations provided in the WCT and WPPT, to which both Parties to the agreement are now members. These include:

- Clear language assuring that temporary and transient copies (such as those made in the RAM of a computer) are nevertheless copies and fully subject to the reproduction right. This treatment is critical in a digital, networked world in which copyrighted material can be fully exploited without a permanent copy ever being

made by the user (Article 14.4.1);

- The right to control any technological manner of transmitting works, including interactive transmissions over electronic networks like the Internet, with only minor exceptions for analog performances and broadcasts of sound recordings and performances recognized in U.S. law (Articles 15.6 and 15.7.3);
- The requirement that Bahrain implement protection for technological protection measures (TPMs) used by right holders to protect against unauthorized access and exploitation of their works to do so in virtually the same manner as did the U.S. in the DMCA in 1998. In addition, the text provides for a list of narrowly crafted exceptions – in close consistency with how the U.S. Congress approved those exceptions in U.S. law. (Article 14.4.7).
- Full implementation of the WCT and WPPT provisions on prohibiting the removal or alteration of electronic rights management information along the lines set out in the DMCA (Article 14.4.8);
- The implementation of those specific provisions of the WPPT that seek to harmonize the rights afforded sound recordings with most of those rights afforded all other protected works. (Article 14.6);
- A repetition of the three-step test for circumscribing the scope of exceptions to copyright protection found in the TRIPS Agreement and the WCT and WPPT (Article 14.4.10(a));
- Reiteration of the TRIPS and WIPO treaties' obligation ensuring the full term of protection for pre-existing works (Article 14.4.5)

Other key provisions (and omissions and deficiencies) clarifying, or in some cases going beyond, the existing TRIPS obligations include:

- In a major advance, and continuing the precedents established in the Singapore and Chile FTAs, CAFTA, Australia and Morocco FTAs, Bahrain has agreed to extend its terms of protection closer to that in the U.S.—to life of the author plus 70 years for most works. While industry sought to have the term of protection for sound recordings and audiovisual works extended from 50 years from publication to a term matching the U.S. law's 95 years, a compromise was struck at 70 years. We urge that future agreements move that level to the full 95 years (Article 14.4.4);
- The text includes a provision (Article 14.4.3) that makes clear that there is no hierarchy of rights between those of authors and those of record producers, a problem characteristic of some Latin American countries;
- The language that appears in the Singapore FTA, CAFTA and Morocco FTA ensuring that countries cannot subject retransmission of television signals to a compulsory license also appears in the BFTA text (Article 14.4.10(b)). This continues an important precedent for the region;
- Unfortunately and inexplicably, the BFTA text does not contain a provision which follows U.S. law (17 USC §602) – a provision included in the Morocco FTA -- providing for the right of a copyright owner to prevent parallel imports of its products manufactured outside Bahrain that are not intended for distribution in that country. Obtaining such important protection, following the Morocco precedent,

- would have been another major advance in the copyright text;
- The text incorporates the important “contractual rights” provisions originally from the NAFTA agreement (also contained in the Singapore and Chile FTAs, CAFTA and Morocco FTA ensuring that Bahrain will give effect to transfers of rights and the treatment of monetary benefits resulting from such transfers that are contained in U.S contracts. (Article 14.4.6). The NAFTA provision was intended to safeguard the freedom of contract and to ensure that a country may not pass laws that undermine the intent of the parties to such contracts;
 - The text contains an all-important requirement that the two governments issue decrees or other similar orders mandating use of legal software by government agencies. The U.S. has already issued such an Executive Order and it is critical for all governments, Bahrain included, to ensure that their software use is fully licensed and that effective software management systems are established (Article 14.4.9);
 - Finally, the substantive text adds provisions, based upon a similar provision in the NAFTA, protecting against the theft of encrypted satellite signals and the manufacture of and trafficking in tools to steal those signals. (Article 14.7). The Singapore FTA made it a criminal offense to manufacture and trade in these tools and to “receive or further distribute” such encrypted signals. The Chile FTA, rather than subjecting all these acts to both civil and criminal liability as in the NAFTA text and in the Singapore FTA, permitted Chile to subject them to either civil or criminal liability. The Chile text was also drafted in a manner that the right holder or person holding an interest in the encrypted signal must prove that the act was done willfully to even subject the offender to civil liability. The BFTA (and MFTA) text fortunately returns to the Singapore formulation establishing both criminal and civil liability and removes the willfulness requirement.

Other than the few shortcomings noted, the substantive copyright text achieves all that U.S. industry sought in this negotiation and the negotiators are to be commended in achieving this most important result.

Patents

ITAC-15 notes that strong and effective patent regimes provide a legal framework for the protection of ideas. As a general rule, the level of patent protection found in the industrial countries, and especially the level of patent protection found in the United States, provides an appropriate level of incentives for innovation. ITAC-15 believes that it should be the U.S. objective in all FTA negotiations to ensure that our negotiating partners adopt a level of patent protection comparable to that found in key developed countries, including the United States. It is in light of these objectives that ITAC-15 provides its comments on the provisions relating to patents and to measures related to certain regulated products that are contained in the recently completed FTA with Bahrain.

With the recent passage of its Patent Act, Bahrain provides, as a general matter, TRIPS-level patent protection. ITAC-15 understands that Bahrain is currently considering draft

legislation on trade secrets that, when enacted, would provide TRIPS-level data exclusivity. In this regard, ITAC-15 wishes to underscore that, in moving ahead to the expected FTAs with the UAE and Qatar, which currently rely, with a few exceptions, on the GCC (Gulf Cooperation Council) patent law, U.S. negotiators should ensure that the GCC regime for patented and regulated products does not frustrate the implementation and enforcement of the higher levels of intellectual property protection that will be contained in those FTAs.

Furthermore, ITAC-15 believes that, as a general rule, future implementation problems with respect to all FTAs will be minimized by the use of, where possible, simple, straightforward language. Such language will help avoid any later misinterpretations of the FTA intellectual property obligations by governments of less-than-goodwill that seek to undermine those obligations.

The patent section of the BFTA provides a number of clarifications and improvements to the protection standards articulated in the TRIPS Agreement. Once implemented, these standards will improve the effectiveness of patent protection in Bahrain. Notwithstanding that the BFTA provides slightly lower protection than that found in the Moroccan FTA (MFTA), which preceded the BFTA, ITAC-15 believes that, taken as a whole, the additional protections and clarifications to those contained in the TRIPS Agreement provide strong protection.

Bahrain is not a Member of the WIPO Patent Cooperation Treaty (1970) and ITAC-15 welcomes Bahrain's commitment to accede to the PCT when the BFTA enters into force. In this regard, ITAC-15 notes that membership in the PCT reduces the costs of gaining patent protection in member countries through the filing of a single patent application under the PCT. Bahrain's adherence to the PCT will provide numerous administrative benefits for U.S. patent holders. For example, it allows U.S. patent holders to use the 30-month period following an initial filing in the U.S. or in the European Patent Office before further action and fees are required in Bahrain. It also allows patent holders to avoid complications from unique application requirements—most PCT members accept a PCT-formatted and compliant application without additional formal requirements. Given the economic benefits that countries at the economic development level similar to that of Bahrain gain from adherence to the PCT, ITAC-15 welcomes the decision made by U.S. negotiators to continue to make PCT membership a critical element of all FTAs.

ITAC-15 recognizes the significance of Bahrain's commitment to ratify or accede to the UPOV Convention (1991) by the entry into force of the FTA (Article 14.1.2). In this regard, ITAC-15 notes that, with the exception of the timelines provided for Bahrain's accession to certain international intellectual property agreements, Bahrain is required to meet all of its obligations with respect to patents and certain regulated products when the FTA enters into force.

ITAC-15 welcomes the pledge made by Bahrain to provide patent protection for plants and the confirmation made by both Parties that patents shall be available for any new

uses or methods of using a known product, including new uses or methods of using a known product, including products to be used for particular medical conditions. This will make available patent protection for transgenic plants that are new, involve an inventive step and are capable of industrial application. ITAC-15 notes its disappointment that this falls short of the commitment made by Morocco in its FTA to provide for patent protection for animals as well as plants. ITAC-15 urges U.S. negotiators to insist in all future FTAs that patent protection be made available to both plants and animals. ITAC-15 notes that the United States and many other countries provide for the patenting of animals that are new, involve an inventive step and are capable of industrial application and that the Singapore FTA also requires the patenting of both transgenic plants and animals. ITAC-15 also urges the U.S. Government to ensure that the commitment made by Bahrain results in reforms to its patent system as soon as possible. (Article 14.8.2)

The BFTA restricts, in Article 14.8.4, the grounds for the revocation of a patent or to the holding of the patent as unenforceable to those limited to the patentability of the invention as well as to fraud, misrepresentation or inequitable conduct. In this regard, ITAC-15 urges the U.S. Government to work with Bahrain in the implementation of this provision to ensure that it is consistent with “best practices” in key countries, including with U.S. practice. For example, the possibility of preventing enforcement of a patent due to actions that are found to constitute inequitable conduct should be limited to acts that are material to the patentability of the invention. ITAC-15 notes that the BFTA includes the prohibition of pre-grant opposition and urges U.S. negotiators to continue to include the prohibition of pre-grant opposition in all future FTAs where the potential for abuse exists.

The BFTA places restrictions, in Article 14.8.5, on how a third party may use a patented invention to generate data needed for the marketing approval of generic pharmaceutical products (so-called Bolar-type use) by limiting its use specifically for purposes related to meeting the marketing approval requirements, and if export of the generic pharmaceutical product is permitted, the product shall only be exported outside the territory of the Party for purposes of meeting marketing approval requirements of that Party. In view of the corresponding obligation to extend the term of a patent to compensate for lost effective patent term due to the regulatory approval of a new drug, these restrictions generally reflect “best practice” in many key countries, including in the U.S.

The BFTA recognizes, in Article 14.8.6(a), the delays that patent owners face in the issuance of their patents by the patent office and requires patent term adjustments to compensate for these delays. Subparagraph (b) of that Article also provides patent term restoration for the unreasonable curtailment of the patent term as a result of the marketing approval process.² ITAC-15 welcomes Article 14.8.7, which requires Bahrain to provide patent term extensions equivalent to any patent term extensions provided in a

² The obligation contained in Article 14.8.6 (b) had been found in previous FTAs in the Article on Measures Related to certain Regulated Products.

country for a patent on which Bahrain had based the grant of its patent.

The FTA requires (in Article 14.8.8) Bahrain to treat public disclosures of an invention that occur within 12 months prior to the filing date of the application in Bahrain to be non-patent defeating. The formulation requires the pre-filing disclosure of the invention to have emanated in some form from the patent application, which is a slightly narrower authority than U.S. law.

ITAC-15 welcomes Articles 14.8.9 through 14.8.11, which provide procedural definitions that will facilitate patent examination and ensure the transparency of that process.

ITAC-15 welcomes the above-mentioned FTA patent provisions; nevertheless, it notes that the BFTA fails to include explicit restrictions on a country's authority to grant compulsory licenses to situations that are needed to remedy anti-trust violations; national emergencies or other circumstances of extreme urgency; and to govern situations of public non-commercial use.

ITAC-15 is particularly disappointed that the BFTA does not contain the obligation that each country must provide effective legal means to enable a patent owner to prevent the unauthorized importation of goods put on another market by it or its agent. This provision, which ensures that a patent owner can prevent the international exhaustion of patent rights via a right of action to enforce contractual provisions that are violated outside the territory of Bahrain, is found in the Morocco FTA.

ITAC-15 believes that it is critical that future FTAs include these restrictions on compulsory licensing and international exhaustion.

Measures Related to Certain Regulated Products

The provisions of the BFTA clarify the obligations contained in TRIPS Article 39.3 with respect to data exclusivity and provide for additional protection with respect to pharmaceutical products subject to a patent. While this provision on data exclusivity does not impose any additional obligations beyond those contained in TRIPS Article 39.3, it does serve to clarify the intent of the negotiators of the TRIPS Agreement. These provisions continue the positive precedent of the Morocco FTA, though falling short of the obligation to protect clinical dossiers for ten years recently passed into law for the 25 states of the European Union.

To give effect to the data exclusivity obligations of Article 39.3 of TRIPS, the BFTA imposes an obligation of "non-reliance" on either the pioneer approval or the pioneer data package itself for a period of at least five years from the date of approval for a pharmaceutical product and ten years from the date of approval for an agricultural chemical product in Bahrain. In addition, it explicitly provides protection in cases where regulatory approval is conditioned on the demonstration of prior marketing approval in another territory. (Article 14.9.1)

The BFTA provides for at least three years of non-reliance for new clinical information (other than information related to bioequivalency) or evidence of prior approval of the product in another territory that requires such new information. ITAC-15 welcomes such protection, which is essential for the approval of a pharmaceutical product that uses a previously approved chemical component. (Article 14.9.2)

While these provisions on data exclusivity do not impose any additional obligations beyond those contained in TRIPS Article 39.3, they do serve to clarify the intent of the negotiators of the TRIPS Agreement. These provisions also reflect current law in the United States and many other countries, which does not permit any reliance on the pioneer data package for marketing approvals in either the U.S. or foreign markets during the period of non-reliance.

The BFTA also imposes a second set of obligations that explicitly restricts Bahrain from terminating the data protection period with the expiration of the underlying patent (Article 14.9.3); prohibits generic drug approvals during the term of the patent covering the pharmaceutical product (i.e., “linkage”) and requires the mandatory disclosure of the identity of the generic applicant that seeks marketing approval to enter the market during the patent term. (Article 14.9.4).

ITAC-15 welcomes these provisions with respect to certain regulated products contained in the BFTA and urges that they be included in all future FTAs.

Enforcement

ITAC-15 wishes to underline the importance that it attaches to the effective enforcement of the full panoply of intellectual property rights afforded in this agreement, which build upon the existing enforcement obligations in the TRIPS agreement. The updated protections afforded in this agreement will be of little value to U.S. companies without the capability and willingness of the Bahrain government – any government for that matter – to enforce those standards, particularly against commercial piracy, counterfeiting and other infringements that cause such a drain on the U.S. and the Bahrain economies.

Today, eight years after the WTO TRIPS enforcement obligations became effective in the developed world, and four years after those enforcement obligations became binding in the developing world, the U.S. creators, companies and industries which should be benefiting from TRIPS continue to suffer billions of dollars in losses due to global piracy, counterfeiting and other infringements of the rights provided in TRIPS (and in the various FTAs) – primarily due to ineffective enforcement by these trading partners. While, for the most part, the substantive provisions of the TRIPS agreement have been implemented in these countries, it is crystal clear that the enforcement obligations are not being met by many countries. The continued development and importance of new technologies, such as the Internet, and the accompanying greater ease with which piracy and counterfeiting can be accomplished, have made this situation even more acute. In addition, the alarming increase in the international trade in counterfeit pharmaceutical products is raising public

health concerns, especially in developing and least developed countries. It was the objective of the U.S. government, of ITAC-15 and of the entire U.S. intellectual property community to use the opportunity offered by the FTA process (the Doha Round in the WTO will not be considering changes in the TRIPS enforcement text) to use our enforcement experience over this period to improve and strengthen these enforcement obligations, with the goal of having them adopted on a global basis.

ITAC-15 notes that this task was particularly challenging since governments are most reluctant to bind themselves to specific performance standards in the area of enforcement. But it is precisely the day-to-day operation of the enforcement system and its ability to “deter further infringements” (the TRIPS standard) which will bring back to the U.S. and to other countries the billions of dollars lost globally to rampant piracy and counterfeiting, including counterfeiting of pharmaceutical products.

The BFTA makes some significant advances toward this goal, but again the proof will lie in the implementation of these new standards on the ground by police, prosecutors, judges and administrative agencies responsible for enforcement and implementation of the intellectual property rights protected in TRIPS and the BFTA.

ITAC-15 notes with approval the execution of a side letter requiring Bahrain to have in place a regime for licensing of optical disk production facilities. While we are not aware of any current problem with pirate optical disk production in Bahrain, these laws are in effect in many countries worldwide and the criminal syndicates that, for the most part, control this highly damaging pirate activity, are very adept at moving production facilities quickly and secretly to new countries. With this regime in place, Bahrain is unlikely to become one of these countries.

Some of these advances (clarifying or building upon existing TRIPS standards) and some areas where needed improvements were not achieved include:

General Obligations

- These general provisions clarify and expand, for the most part, existing TRIPS obligations;
- Article 14.10.3 clarifies an existing TRIPS obligation, that decisions by a country on how to distribute enforcement resources among different areas, including intellectual property enforcement, does not excuse a country from meeting its “deterrence” and related obligations under the agreement;
- Article 14.10.2 requires both parties to publicize information “that the party may collect” with respect to their enforcement efforts including making available enforcement statistics, if kept by each country. The keeping and publicizing enforcement information is a key to deterrence and permits industry and governments to evaluate performance and educate the public about the importance of intellectual property rights, and the risks attendant upon their infringement. ITAC-15 would prefer that this obligation be stronger, including provisions that would “require” the keeping of statistics on cases brought and outcomes reached;
- Article 14.10.4 is a significant advance for the copyright industries. This provision

lays out detailed presumptions that must be implemented in national law concerning the subsistence and ownership of copyright in all protected subject matter. Proving these preliminary issues in court, without the benefit of presumptions, makes enforcement more difficult, expensive and causes long and unnecessary delays, all to the detriment of expeditious and effective enforcement against the run-of-the-mill piracy and counterfeiting that causes most losses globally.

Civil and Administrative Procedures and Remedies

- Article 14.10.6 clarifies and expands upon TRIPS obligations, making clear that civil damages, at least in the area of copyright and trademark piracy and counterfeiting, must actually compensate the right holder for the damages suffered, including payment of the infringer's profits. Most important, unlike CAFTA but like in the MFTA, it requires the courts to use the suggested retail price of the legitimate product being infringed upon as a measure of the loss to the right holder, rather than merely ask the courts to "consider" using this measure;
- Article 14.10.8 establishes a system of statutory (or "preestablished") damages – only an optional remedy in the TRIPS agreement. The difficulty of proving "actual" damages in a piracy or counterfeiting case is well known; the U.S. has long had a statutory damages regime. It is a major goal of industry to see an effective statutory damages regime established in every country. The BFTA, like the Singapore FTA and MFTA (and the laws of many countries including the U.S. -- but unlike the CAFTA -- permits the rightholder to elect between statutory damages and proving actual damages. CAFTA left it to the judges to determine when and if to use it. The BFTA (and Morocco) language is superior. We also note that the text retains the Singapore FTA and CAFTA concept (though the language may be somewhat less strong) that statutory damages be "in an amount sufficient to constitute a deterrent to further infringements," and, unlike CAFTA it is not conditioned on the judge's exercise of discretion. It is a reference to the deterrence standard that is one of the key elements of an effective enforcement system. Noticeably absent from this Article – and a clear deficiency -- however, is the provision in the Morocco FTA providing judicial authorities the authority to award damages in patent cases of up to three times actual damages, except in exceptional circumstances;
- Articles 14.10.8-10 elaborate on many discretionary remedies from the TRIPS Agreement. Article 14.10.8 provides for mandatory payment (except in exceptional circumstances) of reasonable attorney's fees to the prevailing party; Article 14.10.9 makes clear the right of judicial authorities to order the seizure of suspected infringing goods, implements and other materials (and ITAC-15 hopes that this obligation will be interpreted to authorize courts to require the police to seize all infringing goods found at a site, even if not named specifically in a warrant). This provision only mandates the seizure of documentary evidence in trademark counterfeiting cases and ITAC-15 believes this obligation should extend to copyright piracy as well. Article 14.10.9 gives the authority to the court of order the destruction of infringing goods "at the right holder's request," a welcome improvement over the CAFTA text which leaves this to the judge's discretion. Unlike the Chile FTA and CAFTA, this text does not contain the right in certain circumstances to donate trademarked goods to charity where they might find their way back into the stream of commerce. Unlike the Chile FTA, this article mandates the destruction of implements used in the infringement and permits

disposal outside the channels of commerce only in “exceptional circumstances.” The language contains no qualifiers permitting additional judicial discretion, as in the CAFTA and Chile FTA which could be subject to abuse. ITAC-15 prefers this and the Singapore and Morocco formulation.

- Article 14.10.11 mandates that courts have the authority to order the infringer to identify other accomplices, suppliers and other third parties involved in the infringement at the risk of fines or imprisonment for failure to do so. The latter is particularly critical given the role that organized crime plays in today’s piracy and counterfeiting.
- Article 14.10.14 extends the panoply of civil remedies to circumventing technological protection measures and tampering with rights management information including the use of statutory damages at the election of the right holder. Destruction of devices is mandatory, except in exceptional circumstances, an improvement over the weaker CAFTA formulation;
- Article 14.10.16 adds that, if expert witnesses are required by the court and must be paid for by the right holder, the charges be related to the work performed, and not deter recourse to such relief. This seeks to remedy abuses found in many countries.

Provisional Measures

- Article 14.10.17 reflects the TRIPS requirement for *ex parte* provisional relief in civil cases and requires that such orders be issued “within 10 days, except in exceptional circumstances.” Quick *ex parte* search orders are critical to meaningful civil enforcement against infringements. ITAC-15 is gratified to see the substitution of a 10 day minimum in the BFTA from the “expeditious” standard appearing in some of the other FTAs and urges that this standard be carried forward in future FTAs;
- Article 14.10.18 again builds upon TRIPS by providing that any security required of the plaintiff be “reasonable” and not “deter” recourse to these procedures (experience in many countries is that the right to require bonds and security has been abused).

Special Requirements Related to Border Measures

- Article 14.10.20 permits the competent authorities to require information from right holders seeking border measures sufficient to establish a *prima facie* case of infringement. The text does, however, indicate that this additional information should be what can reasonably be expected to be known to the right holder. Industry hopes that the inclusion of this language will prevent unreasonable information requests that render the provisions impracticable. Industry welcomes the additional language, not appearing in other FTAs, making it explicit that upon acceptance of applications for border measures, enforcement measures would be effective for a minimum of one year, conditioned on the relevant intellectual property still having effect for that period of time;
- Article 14.10.22 requires that the competent authorities have the power to order the infringers to provide the right holder with information regarding the consignee, consignor and importer of infringing goods. ITAC-15 welcomes this provision (also in the Singapore, Chile and Morocco FTAs) and notes that TRIPS does not require that the competent authorities have this power;
- Article 14.10.23 streamlines the border enforcement measures and clarifies and

improves border enforcement powers found in the TRIPS Agreement. First, the Parties must provide for enforcement at the border without any formal complaint filing requirements. Second, the competent authorities must have the authority to initiate actions *ex officio* relating to suspect shipments being imported, exported or moving in-transit;

- Article 14.10.24 outlines the treatment and disposition of pirate and counterfeit goods found by the authorities at the border. Unlike TRIPS, this agreement outlines these measures and indicates that counterfeit and pirate goods shall be destroyed except in exceptional circumstances. It strengthens the disposition requirements for trademark counterfeit goods, clearly indicating that the simple removal of unlawfully affixed trademarks is not sufficient to permit release into channels of commerce and that, in no event, shall authorities permit export of counterfeit or pirated goods. These requirements also appear in the Singapore, Chile and Morocco FTAs as well as CAFTA.

Criminal Procedures and Remedies

- Article 14.10.26 again builds on the TRIPS provisions in this area. For the copyright and trademark industries, criminal remedies and effective border measures are key to reducing losses and piracy rates globally. The critical concept of piracy or counterfeiting “on a commercial scale” is clarified to include infringing acts without a profit-motive or commercial purpose but which cause damage “on a commercial scale” – the proper reading of this term in TRIPS. Thus, even where the person posting infringing material on the Internet is not charging the downloader/viewer/listener, such acts cause great damage to those right holders and must be covered. The text in Article 14.10.26 includes this concept (as does the NET Act in the U.S.).
- Article 14.10.26(a) seeks to reach one of the most serious problems for right holders globally – the failure of judges or other enforcement authorities to actually impose penalties at a level that effectively deters further infringements. The text is more specific with respect to the remedies that must be available but the language on actual imposition of penalties is not limited to Executive “encouragement” that deterrent fines be imposed (as in the Singapore FTA); it provides that the penalties in the law simply be “sufficient to provide a deterrent to future acts of infringement.” The text further requires the creation of policies and guidelines (including sentencing guidelines) that encourage such imposition of deterrent penalties. Industry would still prefer even stronger language in this area and, in particular, urges Bahrain to adopt sentencing guidelines that are tailored to ensure deterrence;
- Article 14.10. 26(b) deals with the endemic problem of the seizure by authorities of only product and implements named in a search order even though other clearly infringing products are at the search site. The language agreed upon is still somewhat limited and requires seizure of all products within the “general categories” in the search order. Search orders in many countries are written too narrowly and it remains ambiguous whether this provision would require seizure of pirate videogames, music, software or books found in a search requested by the movie industry looking for pirate DVDs, videos etc. It is incumbent upon right holders, judges and the governments implementing this provision to permit broad search orders that facilitate seizures of all pirate and counterfeit material found at a raid site. The provision also requires the seizure of implements used in committing the offense, and the seizure of assets and documentary

evidence without qualification. This mirrors the CAFTA and Morocco FTA text and is an advance on a weaker Chile FTA text;

- Article 14.10.26(c) expands on TRIPS and requires destruction of counterfeit and pirated goods, assets traceable to the infringing activity and, with respect to copyright piracy, any implements or other materials used in accomplishing the infringement. However, in view of the magnitude of product counterfeiting, industry prefers that the destruction of materials and implements be extended to those used for production of counterfeit trademarked products;
- Article 14.10.26(d) requires the appropriate authorities to act *ex officio* against piracy and counterfeiting. Many countries require a right holder to submit a formal complaint. This requirement is a major enforcement impediment and should be eliminated on a global basis. All countries should recognize that piracy and counterfeiting are “public” crimes. It is hoped that this provision will be read to be an explicit mandate for criminal authorities to so act.
- Article 14.10.27 adds an additional offense, not found in TRIPS, making it a crime to deal in counterfeit labels and documentation for certain products. This is also a positive advance.

Limitations on Liability of Service Providers

- Article 14.10.28 governs the key issue of the liability of, and limitations on the liability of, service providers that are involved in the hosting and transmission of infringing material over their facilities. The result of the negotiation follows what was achieved in Singapore, Chile, CAFTA, Australia and Morocco and is an excellent set of provisions that establishes the basic functional equivalent of the concepts and provisions embodied in U.S. law as found in Section 512 of the DMCA. We commend the negotiators for obtaining these specific obligations. ITAC-15 believes it is essential that these provisions be replicated in other FTAs, if U.S. protected material is to find its way safely into global e-commerce to the great benefit of the U.S. economy and to U.S. jobs. The only concern is to ensure that in implementing the “limitations” on liability provided in the agreement, Bahrain also ensures that its law fully implements the obligation to have in place a system of potential liability of ISPs as to which such limitations can apply, as is envisioned in the first sentence of Article 14.10.28. Having in place a system of potential liability of ISPs is the key to ensuring the cooperation that is essential to making the Internet safe for the transmission of protected copyright products. ITAC-15 is also pleased that the two countries have agreed, in a side letter, to a “notice and takedown” system modeled after the statutory system contained in the DMCA.

Transitional Provisions

The transitional provisions in the BFTA are a major advance over the Chile FTA and CAFTA, and even over the excellent Morocco FTA. As noted earlier, with two exceptions, adherence to treaties must occur upon “entry into force” of the BFTA. The exceptions for treaties include the Brussels Satellite Convention and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of

Patent Procedure with a deadline of one year after entry into force of the FTA. All other treaty obligations, and, indeed, all other obligations in the IPR chapter, must be implemented upon entry into force, making this FTA the most positive of all others in terms of transition periods, setting an excellent precedent for future FTA negotiations..

VII. Membership of the ITAC-15 Committee

Eric H. Smith
President
International Intellectual Property Alliance
Chairman

Jacques J. Gorlin
President
The Gorlin Group
Vice-Chairman

Catherine P. Bennett
VP, Federal Tax and Trade Legislation
Pfizer, Inc.

Hope H. Camp
Consultant
Law Offices of Hope H. Camp Representing Eli
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Susan K. Finston
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Timothy P. Trainer
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