AMCHAM Malaysia / U.S. Chamber of Commerce

Public Submission for the Proposed U.S.-Malaysia Free Trade Agreement (USMFTA)

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The U.S.-Malaysia Free Trade Agreement (USMFTA)

U.S. Trade Representative Robert Portman and Dato' Seri Rafidah binti Aziz, Malaysian Minister of International Trade and Industry, announced on March 8, 2006 in Washington, DC that Malaysia and the United States would undertake negotiations for a U.S.-Malaysia Free Trade Agreement (USMFTA).

This is a significant opportunity for Malaysia and the United States to strengthen further their close economic and political relationship. A resulting agreement would not only benefit companies from both nations, who would enjoy better access to both markets, but it would also result in the creation of more and better-paying jobs, and the supply of higher quality goods and services at lower prices for the American and Malaysian consumers.

The benefits of an FTA for both countries are clear:

1. **Increased trade flows**: Malaysia is the United States' largest trading partner in Southeast Asia and its 10th largest trading partner in the world. Two-way trade between both countries in 2005 was more than RM 167 billion (USD 44 billion), with the U.S. being Malaysia's largest export market. More than 20% of Malaysia's exports are destined for the United States. An FTA would further enhance these already very strong trade flows.

2. **Significant consumer potential**: Malaysia is an upper middle income economy of 27 million people, with a GDP of almost $250 billion in 2005. This represents a significant market for American companies, especially since the U.S. is the largest investor in Malaysia. The country's increasing importance as a regional center for shared services would make it an excellent gateway for U.S. companies seeking to access Southeast Asia, a market valued at RM 11.4 trillion (USD 3 trillion).

3. **Increased awareness**: An FTA would help educate Malaysian companies on the opportunities and possible benefits of doing business in United States, and the potential for access to its 297 million consumers. The Agreement would also significantly raise the profile of Malaysia among American businesspeople, policymakers, and consumers, resulting in increased U.S. investment and tourism in the years after the Agreement is ratified.

4. **New opportunities**: A comprehensive FTA between the United States and Malaysia, which seeks to liberalize various market sectors, would enable firms in both countries to benefit from these opportunities. Increased U.S. investment in Malaysia would also create opportunities for Malaysian companies to become partners and suppliers in these firms' regional and global supply chains.

5. **Supporting Malaysia's national development**: As Malaysia continues toward fulfillment of its Vision 2020 objectives, it recognizes the need to diversify its economy, which has been built successfully on manufacturing in the electrical and

electronics (E&E) industry. An important component of this growth will also be further developing the country's human capital to meet the needs of the Knowledge Age.

Liberalized trade and investment policies, which can be achieved through the FTA, would spur greater and more diversified investment in Malaysia, resulting in more hiring of local graduates and other Malaysians. Because American companies typically invest significantly in their workforces, the training and knowledge instilled would help to build further a long-term, diversified Malaysian human capital infrastructure that is technically skilled and globally competitive.

6. **Economic expansion**: With greater levels of foreign direct investment (FDI) resulting from the USMFTA, and more two-way trade than ever before, Malaysia's economy will expand to meet its development goals. Similarly for the United States, its companies will find increased export opportunities in the Malaysian market.

   As an example, U.S. FDI in Mexico tripled after NAFTA (RM 16.7 billion / USD 4.4 billion prior to the FTA, and RM 50.2 billion / USD 13.2 billion after the FTA was signed). Singapore and Australia also experienced increased FDI after signing FTAs with the United States. In the case of Singapore, local SMEs/SMIs were made more aware of the United States because of the FTA, and began to explore much more the possibility of investing in the U.S. and/or doing business with American partners.

7. **Jobs**: Growth in investments and exports will create more jobs – and better paying jobs. Studies have shown that workers in firms concentrating on exports are more productive and can earn higher wages than those in companies which are producing mainly for domestic markets.

8. **IPR**: Malaysia would gain significantly from the adoption of strong IPR measures through the FTA. This would help the country be viewed globally as an important center for IPR protections, and could encourage greater investment from the software, motion picture, pharmaceutical, and biotech industries. IPR adoption would fit well into Malaysia's plans to become a hub for biotech investment.

9. **Muslim Products**: As the United States' Muslim population continues to grow, the demand for halal products and Islamic banking services could be a key market opportunity for Malaysian companies. Also, agreement on halal certification standards and procedures would represent a tremendous opportunity for Malaysian companies exporting to the U.S., and for American companies thinking about producing products and services for Muslim customers in Malaysia.

10. **Sectoral Opportunities**: A comprehensive FTA could enable American investors in several important sectors (e.g., automotive, express delivery services, financial services, ICT, pharmaceuticals) to benefit from increased access, through which they could expand their services for Malaysian consumers.

The USMFTA enjoys broad, bilateral support from more than 40 U.S. business associations and numerous private-sector companies, including AMCHAM Malaysia, the U.S. Chamber of Commerce, and the U.S.-ASEAN Business Council. Malaysian business groups, Congressional leaders, and senior Administration officials in both countries also support the idea of an eventual FTA between both countries.

We believe that successful negotiation of a comprehensive agreement in the best interests of both nations will result in significant economic and business opportunities in the coming decades.

Background on AMCHAM and the U.S. Chamber of Commerce

AMCHAM Malaysia

AMCHAM Malaysia (The American Malaysian Chamber of Commerce) is an international business association comprised of more than 750 members representing over 330 American, Malaysian, and other international companies.

Since its inception in 1978, AMCHAM has been the voice of American business in Malaysia. As an advocate for its members' interests, the Chamber serves as a platform to raise key issues with the Malaysian and U.S. governments. AMCHAM also serves to gather information and feedback on policy issues, and seeks to promote bilateral trade and investment between both countries. It is affiliated with the Asia Pacific Council of American Chambers of Commerce (APCAC) and with the U.S. Chamber of Commerce.

AMCHAM's mission encompasses four main principles: advocacy, information dissemination, networking, and community outreach. The Chamber supports member business interests and Malaysia's economic growth through proactive and effective representation, communication and information sharing. This mission is achieved by developing mutually beneficial relationships and ongoing programs and dialogues among its members with the Malaysian and U.S. governments.

U.S. Chamber of Commerce

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses of all sizes, sectors, and regions. It includes hundreds of associations, thousands of local chambers, and more than 100 American Chambers of Commerce in 91 countries.

The Chamber provides the business community with a voice of experience and influence in Washington, D.C., and around the globe. Its core mission is to fight for business and free enterprise before Congress, the White House, regulatory agencies, the courts, the court of public opinion, and governments around the world.

From its headquarters near the White House, the Chamber maintains a professional staff of more than 300 of the nation's top policy experts, lobbyists, lawyers, and communicators. The Washington staff is supported by eight regional offices around the country, offices in New York and Brussels, an on-the-ground presence in China, and a network of grassroots business activists.

The U.S. Chamber's members include businesses of all sizes and sectors—from large Fortune 500 companies to home-based, one-person operations. 96% of the Chamber's membership encompasses businesses with fewer than 100 employees.

1. EXPLANATIONS

The following items provide further clarification and explanation to terms and references used within this submission.

1.01 Acronyms

Although not exhaustive, the following is a list of acronyms that are used in this paper:

BNM	Bank Negara Malaysia (Central Bank)
CP	Competition Policy
DOE	Department of the Environment (U.S.)
DOE-M	Department of the Environment (Malaysia)
DOI	Department of Immigration, Malaysia
DOL	Department of Labor, Malaysia
EDS	Express Delivery Services
GOM	Government of Malaysia
ICT	Information Communications Technology
MAEI	Malaysian American Electronics Industry, AMCHAM's electronics industry committee
MDTCA	Ministry of Domestic Trade and Consumer Affairs
MITI	Ministry of International Trade and Industry
MOH	Ministry of Health
MOHE	Ministry of Higher Education
MOHR	Ministry of Human Resources
SIRIM	Standards and Industrial Research Institute (of Malaysia)
TBT	Technical Barriers to Trade
USG	U.S. Government

1.02 Currencies

All references to currencies and values are quoted in Malaysian Ringgit (RM) and U.S. Dollars (USD). Where such comparisons are not made, the reader should assume a conversion rate of USD 1.00 = RM 3.70.

2. GENERAL ISSUES

2.01 Negative-List Approach

AMCHAM and the U.S. Chamber recommend using a negative-list approach with respect to discussions on the USMFTA. A negative-list approach would only include those items that require addressing, or where tariff reductions/eliminations need to be agreed-upon.

All other areas not included in the FTA language produced would be deemed acceptable to the Malaysian and U.S. governments, i.e., those sectors not covered within the scope of the FTA would be completely liberalized.

3. CUSTOMS ADMINISTRATION

Customs-related issues will be primarily covered under the sectoral discussions on Express Delivery Services (Section 8.05) and ICT (Section 8.07).

4. TECHNICAL BARRIERS TO TRADE

4.01 Malaysian Standards Development

Malaysia has a strong standards development regime through its Standards and Industrial Research Institute of Malaysia (SIRIM). While SIRIM works closely with major international standards bodies (e.g., ANSI, ISO) in standards development, AMCHAM and the U.S. Chamber would like to ensure that Malaysian standards being developed do not lead to domestic policies which would restrict the ability of American companies to export and/or sell their products into Malaysia, if their goods are certified to non-Malaysian standards.

It would be beneficial to U.S. industries – whether within the FTA process, or separate from these discussions – if the U.S. Department of Commerce, which is looking to promote adoption of U.S. standards in Asia, were to provide technical assistance and support in working with SIRIM on development of standards for industries in Malaysia where such standards or regulations currently do not exist. These standards developed should be based on compatible U.S. standards.

4.01.01 U.S. Safety/Electrical Standards

Understanding of U.S. standards, particularly safety requirements for consumer and household electrical products (which usually fall under the testing requirements of Underwriters Limited (UL) in Raleigh, North Carolina) by Malaysian businesses is critically important for their future success exporting and selling products into the United States.

If Malaysian companies are developing products to Malaysia-specific standards, and not to international norms (such as ANSI or ISO), they will not be able to sell their products successfully in the U.S., as their domestic standards might differ significantly from UL specifications, or those of other U.S. standards testing organizations.

4.01.02 HVAC/R Standards

Malaysia exports 60% of all air-conditioning products produced in ASEAN. While AMCHAM and the U.S. Chamber do not know if Malaysia has its own set of domestic standards for the HVACR (heating, ventilation, air-conditioning, and refrigeration) industries, they would recommend that the U.S. look to see how it can work with Malaysia to help Malaysia adopt U.S. performance standards for the HVACR industry.

The Air-Conditioning & Refrigeration Institute (ARI), an Arlington, Virginia-based trade association representing more than 90% of all industry manufacturers in North America, is recognized globally as a leader in the development of standards, which are increasingly becoming integrated into ANSI and ISO standards.

In the mid-1990s, ARI and the Beijing-based China Refrigeration & Air-Conditioning Association (CRAA) signed an MOU in which ARI gave CRAA copies of its standards, which the Chinese government then adopted as-is to Chinese standards for the HVAC/R industry. This has enabled American investment in this sector to flourish significantly in China, and has resulted in increased penetration in what was traditionally a Japanese-dominated market.

Malaysia could foresee similar economic benefits, as would U.S. manufacturers of HVACR products, if it were to become aligned with the U.S. through adoption of these types of standards.

4.02 Halal Certification

One of Malaysia's goals is to become a global center for halal products. "Halal" refers to products or goods which are officially sanctioned for use by Muslim consumers. The certification process and requirements would be comparable to those for kosher products for Jewish consumers in the United States and in other countries.

AMCHAM and the U.S. Chamber support the Malaysian government's initiative to develop the country as a center for halal products, and believes that this could foster tremendous bilateral business opportunities with the growing Muslim population in the United States.

However, the current implementation of the halal labeling system and other requirements has caused confusion and resulted in foreign companies being penalized for not being able to comply with contradictory government policies.

4.02.01 Halal Logos

Halal products produced outside of Malaysia must be certified by a JAKIM-equivalent body in that country. JAKIM is the Malaysian government agency responsible for the halal certification process. Products outside of Malaysia can have their relevant country's halal certification logo put on them before they are imported into Malaysia.

For companies in Malaysia that are producing halal products, if those products are being manufactured in one state and distributed only within that same state, the manufacturer can use a halal logo for that state. However, if the products are being distributed in other states, the company must use a "federal" JAKIM logo, which is of the same basic design as the individual state logos, but indicates that it is a federal certification.

AMCHAM believes there should only be one halal logo for all transactions in Malaysia, as having 13 state-specific logos, in addition to a federal one, can cause problems and lead to confusion surrounding which logos are valid. In addition, there must be a clear reporting authority and responsibilities for ministries and agencies involved in the halal certification process.

4.02.02 Certification vis-à-vis Other Countries

Malaysia is viewed as having of the strictest policies on halal certification around the world. AMCHAM and the U.S. Chamber support ensuring that Malaysia's requirements on halal products are similar to internationally-accepted halal standards, and that Malaysia's policies are not unduly restrictive, and do not make it more difficult for goods from overseas to enter the market, particularly if they are certified by their own countries' Islamic halal-certification bodies.

4.02.03 Application and Renewals Process

If Malaysia is going to develop itself as a global halal hub, then it must develop efficient, streamlined procedures for applying for, and renewing, halal certifications. AMCHAM is aware of situations in which companies needing to renewal the certifications on their halal products faced delays of more than six months.

Such lengthy, bureaucractic processes would only serve to discourage foreign investment in the halal industry in Malaysia, and would make it more difficult for U.S. firms to produce and sell their halal products in the country.

5. INVESTMENT

5.01 General Investment Recommendations

The United States is the largest foreign investor in Malaysia. AMCHAM estimates that cumulative U.S. investment in Malaysia is around USD 28.8 billion (2004 statistics). While American companies are generally doing well and looking to invest more in Malaysia in the coming years, there are several areas of concern which will be addressed in more detail throughout this FTA paper:

5.01.01 Malaysia's Domestic Labor Laws

While it is important to protect the rights of workers, Malaysia's current employment laws are too restrictive and unbalanced against companies, thus making it very difficult for employers to terminate underperforming employees.

AMCHAM and the U.S. Chamber understand that the minimum time needed for labor relations cases to be resolved through Malaysia's Industrial Relations Court is one year. AMCHAM and the Chamber would like to see Malaysia's domestic labor laws and its Industrial Relations Court reviewed to take into greater consideration the needs of employers and the ability of companies to remain competitive and productive through proper management of their workforces.

5.01.02 National Treatment / Restrictive Equity Participation Policies

Malaysia currently imposes a limit on the equity participation of a foreign-owned company (FOC) with the stipulation that it must include 30% Bumiputera (Malay) ownership. Although the limitation has been relaxed for certain industries, there remains a number of industries not under exemption.

In addition, the approval of equity participation in a foreign company is under the purview of the Foreign Investment Committee (FIC), and approvals are also at the discretion of the Committee. The process is complicated as well as cumbersome; thus, many companies hire agents to assist with the voluminous documentation.

This national treatment issue is further complicated by special policies which exist for certain sectors, which are not consistent with other sectors.

Such policies hamper the ability of American companies to do business in Malaysia, and greatly discourage future investment in the country, because

of the different treatment of foreign versus local companies, and the unstable and unpredictable regulatory environment.

5.02 Investor-State Issues

AMCHAM and the U.S. Chamber support provisions in an FTA that would recognize investor-state issues (i.e., Malaysian companies investing in the U.S. would be treated similarly as U.S. companies, with respect to legal rights, investment requirements/protections, etc., and that U.S. investors in Malaysia would be treated equally with Malaysian firms).

This should include equal treatment with respect to bidding on government contracts, no minimum local equity requirements, etc.

6. TELECOMMUNICATIONS

The U.S. telecommunications industry is deeply concerned by the current Malaysian telecommunications landscape:

- It restricts foreign national equity options to no more than 49% in a Malaysia telecom operator;

- Malaysia needs to improve further its regulatory environment, to ensure clear and consistent policies are adopted.

The USMFTA could provide an opportunity to address the current restrictions on American telecommunications providers and vendors operating in Malaysia, and to ensure a transparent regulatory regime for the benefit of American investors and Malaysian consumers.

Specific Requests:

6.01 MCMC

The Malaysian government should examine closely the Malaysian Communications and Multimedia Commission (MCMC), which is part of the Ministry of Energy, Water and Communications. MCMC should be transformed into a more independent and transparent body, one which sets clear guidelines, and is itself free of all financial interests and potential conflicts-of-interest with the industry.

6.01.01 MCMC needs to develop a clear and transparent process for the allocation and use of scarce telecommunications resources. For example, the allocation of radio frequency and numbering block.

6.01.02 There must be a transparent process in services, licensing, and other regulatory business activities in the telecommunications industry in Malaysia; this does not currently exist.

6.01.03 There also should be a stated policy which limits the number of regulations imposed on the telecommunications sector (e.g., current policies restrict the ability of companies to have flexibility in their choice of technologies). Currently, only Wideband Code Division Multiple Access (WCDMA) is recognized as a 3G technology, but not the American developed CDMA2000. Thus, the CDMA2000 radio frequencies were not gazetted for 3G networks usage in Malaysia.

6.01.04 Stricter enforcement of the number portability and equal access is needed. Currently, customers in Malaysia are not allowed to transfer their residential, business, or mobile phone numbers to another telecom provider, if they decide to shift to a different provider.

6.02 Removal of the Type Approval Process for Telecommunications Equipment

The type approval results in all telecommunication equipment, which need to be approved by SIRIM, incur additional costs and delays in time-to-market.

If SIRIM demands physical hardware review, then it requires the company to bring in samples, which may cost millions to build, and further delay the process.

6.03 Import Taxes

The American telecommunications industry would like to see the complete removal of all import taxes on telecommunications equipment, because most of the telecommunication equipment being used are comprised of high-power computer servers.

Unlike computers or IT equipment, there are different import taxes if hardware spares or partial hardware systems are imported (an exception to this is complete hardware systems.) Note that Brunei and Singapore do not impose any import taxes for telecommunication equipment.

6.04 Removal of Withholding Tax

The industry would like to see Malaysia remove the withholding tax for professional services done abroad. Withholding tax is usually built into the cost of services sold, because the withholding tax refund process can be lengthy. Withholding taxes increase the American professional services cost, and also increases the burden on Malaysian companies who are requiring American professional services.

Table 6.04 shows Malaysia's withholding tax, as compared to other countries in Asia.

Table 6.04 Withholding Tax for Malaysia and Other Countries

Country	Category	Withholding Rate	VAT rate
Malaysia	Payment for services under a contract from resident to non-resident (where non-resident has permanent establishment in M'sia)	15%	NONE
	Payment for services (technical) from resident to non-resident, if the services is carried out in M'sia	10%	NONE
	Payment for royalty / interest from resident to non-resident	10%	NONE
Australia	All	NONE	10%
New Zealand	All	NONE	12.5%
Hong Kong	All	NONE	NONE
Brunei	All	NONE	NONE

6.05 Interconnection

American telecoms carriers should be granted the right to access, interconnect with, and use the telecommunications transport network and services in Malaysia, including unbundled services, leased circuits, and access to facilities for such use, in a non-discriminatory manner.

Specifically, the USMFTA should **include Article 9.3 from the USSFTA (Page 80)**:

ARTICLE 9.3 : INTERCONNECTION WITH SUPPLIERS OF PUBLIC TELECOMMUNICATIONS SERVICES

1. Each Party shall ensure that suppliers of public telecommunications services in its territory provide, directly or indirectly, interconnection with the facilities and equipment of suppliers of public telecommunications services of the other Party.

2. In carrying out paragraph 1, each Party shall ensure that suppliers of public telecommunications services in its territory take reasonable steps to protect the confidentiality of proprietary information of, or relating to, suppliers and end-users of public telecommunications services and only use such information for the purpose of providing public telecommunications services.

6.06 Convergence

Malaysia is currently among the world's leading sites for semiconductor assembly, testing and packaging, as well as other ICT industries including notebook PC manufacturing. Many multinationals (MNCs) have manufacturing operations in the country, and Malaysian companies are playing an increasing role in the industry, mainly as contract manufacturers, service support and in logistics.

Convergence continues to impact ICT goods and many products are performing functions that are common to more than one World Customs Organization's Harmonized Code classification, thereby allowing governments to classify certain ICT goods as consumer products not covered by the ITA. In addition, a number of new products have come on the market that are not included within the original ITA. In response to this, Malaysia, a signatory to the ITA, has joined discussions to expand the product coverage of the ITA i.e., ITA-2.

In the context of the USMFTA, Malaysia and the U.S. should discuss the convergence of technologies and how this is impacting on classification regimes in Malaysia. AMCHAM lobbied in 2004-2005 when a 10% sales tax was applied to personal digital assistants (PDAs) with wireless connectivity (i.e., PDAs having WiFi, Bluetooth, and other capabilities.)

It was argued that these "convergent" PDAs were reclassified and put under the 8525.20 900 tariff code (telephones), which would incur a 10% sales tax. However, personal computers and laptops, many of which also come with WiFi or Bluetooth features, do not fall under this reclassification.

While PDAs were eventually re-classified with these technologies under a duty-free HS code, it brought up concerns about whether the ICT industry might experience similar difficulties in the future, if other similar types of converging technologies are wrongly or inaccurately classified under categories which would result in their being assessed with duties.

7. FINANCIAL SERVICES

7.01 General Issues

Malaysia's financial services sector has made progress in recent years, through continuing liberalization efforts by Bank Negara, the country's central bank. However, significant restrictions still exist, which make it difficult for international financial services (FS) firms to start up in Malaysia, and to expand their operations once they are doing business in the country.

There are a number of issues affecting all companies across the board, regardless of whether they are local or international financial services firms:

7.01.01 **Price controls**: BNM sets price controls on both foreign and local financial products. The industry would like to see these removed, so that market forces and competition can determine pricing within the industry.

Some examples :

a. Interest rates on consumer savings accounts and fixed deposits in Malaysia are mandated, and are significantly higher than in other Asian countries. They are also higher than the marginal cost of funds in the financial markets. This was done in part to help ensure that Malaysians would have some savings for their retirement, in addition to what they would get through the country's Employees Provident Fund (EPF), which is similar to Social Security in the United States.

Current annual interest rates on 12-month fixed deposits in Malaysia are mandated at 3.7%, which is higher than the 12-month interbank rate of around 3.4%. This results in banks having to incur a loss as they take deposits at 3.7%, and place them out at 3.4%.

b. **Fees on transactions** (money transfers, check collections, letter of credit charges, guarantee commissions, etc.) are technically determined by the Association of Banks (ABM). However ABM is not permitted to vary these fees without approval from BNM, and BNM does not give approval to increase any charges that impact individuals or the SME industry.

c. Credit card interest rates are capped at 18% per annum (p.a.) In addition, while permission has been granted to allow "pricing for risk" (i.e., charge higher lending rates for riskier loans) on paper, in actual fact, any rates over 20% (roughly) are discouraged, notwithstanding the underlying risk class.

d. Any proposals to change rates/fees must be submitted to BNM for approval. BNM uses moral suasion to guide the rates before providing approvals.

7.01.02 **Foreign Talent**: It is very difficult for FS firms to hire foreign talent and to bring them into Malaysia, even in situations where it is clearly demonstrated that there is insufficient local talent (quality and/or quantity-wise) for the position that the local or foreign company is seeking to fill. One example that has been given is the great need for actuaries at insurance companies in Malaysia.

7.01.03 **Offshore investing / exchange controls**: Funds managers are only permitted to invest 30% of their assets-under-management offshore, and insurance companies only 5%, with the balance needing to be invested in local markets.

7.02 Cross-Border Trade in Financial Services

7.02.01 **Mutual Funds**: Currently, mutual funds providers are restricted from being able to come into Malaysia and market/sell their products.

International fund managers have to go through a local house who establishes a "feeder" arrangement. This is essentially to allow the local fund houses the opportunity to play an intermediary role, with no real value-add.

7.02.02 **Article 10.5 of the US-Singapore FTA (USSFTA)** states that each Party to that agreement shall allow cross-border financial service suppliers of the other Party to supply the services it has specified such as insurance and reinsurance services, which are specified in Annex 10A. The American financial services industry would like to see language similar to Article 10.5 in the USSFTA used in the USMFTA.

7.02.03 **Application of Article 10.5, USSFTA (Annex 10A, Page 109)**
The FS industry would like to see the text of the aforementioned Application of Article 10.5 from the USSFTA included in the USMFTA, because of the positive impact this would have on American insurance companies and banks seeking to do business in the country (purple text below):

Insurance and insurance-related services

1. For the United States, Article 10.5 applies to the cross-border supply of or trade in financial services as defined in subparagraph (a) of the definition of cross-border supply of financial services in Article 10.20 with respect to

(a) insurance of risks relating to:

(i) maritime shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: the goods being transported, the vehicle transporting the goods and any liability arising therefrom; and

(ii) goods in international transit;

(b) reinsurance and retrocession, services auxiliary to insurance as referred to in subparagraph (d) of the definition of financial service, and insurance intermediation such as brokerage and agency as referred to in subparagraph (c) of the definition of financial service.

2. For the United States, Article 10.5 applies to the cross-border supply of or trade in financial services as defined in paragraph (c) of the definition of cross-border supply of financial services in Article 10.20 with respect to insurance services.

7.02.04 **Data Processing / Offshoring Services**: Malaysia has become a very attractive destination in recent years for shared services and business process outsourcing (BPO) investments. In a 2005 study by A.T. Kearney, Malaysia was ranked #3 in the world, behind China and India, for the most attractive destinations for SS/BPO investments.

Despite this, BNM prevents FS companies who are operating in Malaysia from having offshore data processing centers, web sites, and/or related technologies. Banks which operate in Malaysia (whether they are local or foreign) cannot have servers, web sites, or other technologies which might contain their Malaysian consumer data or related information or services which support the Malaysian operations, in locations outside of Malaysia.

AMCHAM and the U.S. Chamber believe that including Part 3 of the **Application of Article 10.5, USSFTA (Annex 10A, Page 109)** in the USMFTA, and requiring the Malaysian government to comply with this provision, would be helpful toward solving the problem:

Banking and other financial services (excluding insurance).

3. For the United States, Article 10.5 applies with respect to the provision and transfer of financial information and financial data processing and related software as referred to in subparagraph (o) of the definition of financial service, and advisory and other auxiliary services, excluding intermediation, relating to banking and other financial services as referred to in subparagraph (p) of the definition of financial service.

7.02.05 **Insurers – cross-border investments**: Foreign insurers in Malaysia are limited to a maximum of 5% of their assets for overseas investments.

7.03 Innovation

7.03.01 **Onerous partner limitations**: Currently in Malaysia, there are severe restrictions on the ability of foreign banks and insurance firms to team up with local institutions.

Specifically, foreign FS institutions can only choose one local bank or insurance firm to partner with (i.e., to market their products or services). They are not allowed to have more than one local partner at a time, and FS institutions are not allowed to partner with each other (e.g., an American bank cannot partner with an American insurance firm, or a Swiss insurance firm, or any other foreign-owned insurance company.)

These restrictions prevent companies from being able to offer a greater range of innovative products to Malaysian consumers. With fewer choices, Malaysian consumers will either not be able to invest as much of their savings into alternative instruments (i.e., non-savings accounts) or they might remit more monies abroad, where they do have greater choices.

The industry would like to see all such restrictions removed, so that local and foreign FS institutions operating in Malaysia can freely partner with as many companies as they would like, in order to afford Malaysian consumers with a much better range of products and services.

7.03.02 **Banking Products**: For banking products coming into the market, products are categorized as either “modifications to existing products” or “new products,” with the first category requiring notification and the second requiring approval.

In reality, the requirements for new product approval are onerous, and require several cycles going back and forth. Clubbing two existing

products (e.g., a loan to a time deposit) is treated as a new product, as are products that are commonly available in other markets, though not in Malaysia. Securities-related products are even more difficult, because they also need to be approved by the Securities Commission. These approval times can take several months.

7.04 Labor

As mentioned in 7.01.02 above, there is a great need for more liberal policies on movement of experienced, foreign FS industry professionals into Malaysia, particularly in situations where the country does not have adequate talent to fill those positions.

7.05 Market Access

Despite a recent policy shift by BNM, which allowed foreign banks in Malaysia to open up an additional four branches, there is still a great need for further liberalization and market access for American banks and insurance companies operating in Malaysia, and for those wanting to enter the market.

7.05.01 **Article 10.4 of the USSFTA** (page 97) should be adopted on both points (a) and (b), which state:

ARTICLE 10.4 : MARKET ACCESS FOR FINANCIAL INSTITUTIONS

A Party shall not adopt or maintain, with respect to financial institutions of the other Party,[10-2] either on the basis of a regional subdivision or on the basis of its entire territory, measures that:

(a) impose limitations on

(i) the number of financial institutions whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(ii) the total value of financial service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(iii) the total number of financial service operations or the total quantity of financial services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; or

(iv) the total number of natural persons that may be employed in a particular financial service sector or that a financial institution may

employ and who are necessary for, and directly related to, the supply of a specific financial service in the form of a numerical quota or the requirement of an economic needs test; or

(b) restrict or require specific types of legal entity or joint venture through which a financial institution may supply a service.

7.05.02 **Licensing Restrictions**: Significant restrictions exist in Malaysia which either make it very difficult, or impossible for foreign companies to obtain licenses. Industry would like to see all restrictions removed in the following areas:

- **Asset Management** – In 2005, BNM made available five licenses for foreign stockbrokers and other asset managers, in order to try and encourage more growth in this area. Only one license had been issued so far.

- **Stock Brokerage**

- **Reinsurance** – companies are required to do more than 50% of reinsurance in Malaysia. Industry would recommend using text from the **USSFTA, Annex 10A, Section 1b**, as shown in Section 7.02.03 above, to address the reinssurance issue.

  Malaysia also imposes other reinsurance requirements, including mandatory 5% cession and local retention policy.

- **Banking**

- **Islamic Banking** – there are tremendous opportunities for banks, with the increased focus on Islamic financial solutions for Malaysian and other global Muslim consumers. Malaysia, which has become very well known Middle Easterners for tourism, is also seeking to become a global Islamic banking center.

  Industry would recommend including language from the **USSFTA, Section 10.4b**, as shown above.

- **Takaful** (Islamic insurance products) – There are restrictions with foreign ownership only allowed at 49%, and the company must have a local bank partner, who makes up the other 51%. Takaful products also require a separate license for foreign companies that would like to offer them.

7.05.03 **Equity Restrictions**: Industry would like to see completely removed, restrictions which currently exist in Malaysia for:

- **Percentage ownership requirements** for local vs. foreign companies. In many cases, foreign companies are not allowed to have majority ownership in an FS enterprise. This includes the following:
    - **Commercial banking**: A single foreign shareholder is limited to 20%, with total foreign share-holding limited to 30%; any holding over 5% requires BNM approval
    - **Stock-broking, investment banking**: Foreign shareholding is limited to 49%.
    - **On the consumer finance side**, foreign companies looking to setup these services in Malaysia cannot have majority control of a company established in Malaysia.

  BNM classifies FS firms as "foreign" if they have more than 50% overseas ownership.

- **Acquisitions**

7.05.04 **Branching**:

Banks: In Jan/Feb 2006, BNM allowed foreign banks to open four additional branches throughout Malaysia. However, there were significant restrictions with this, which included designating how the branches could be setup (i.e., in urban centers, secondary cities, and rural areas).

The policies also did not allow foreign banks to setup new branches within 1.5km of an existing local bank. This makes it very difficult for foreign banks to find suitable commercial locations at which to establish branches.

Industry would like BNM to allow foreign institutions to setup branches, with no restriction on the number of branches allowed, nor restrictions on the geographic locations of these branches.

Insurance companies: Foreign insurers that exceed 51% ownership cannot open new branches. Foreign insurers that do not exceed 51% ownership are allowed to open two branches per year without prior approval.

Malaysian insurers can open an unlimited number of branches with prior approval.

7.05.05 **Offsite ATMs**: Foreign banks in Malaysia are not allowed to setup ATMs offsite (i.e., stand-alone ATMs). They can only setup ATMs at locations where they have branches. Industry would like to have no restrictions imposed on how many ATMs foreign banks can setup offsite, and no restrictions on where these ATMs can be located.

7.05.06 **Partnership Limitations**:
As discussed under Section 7.03.01, there are great restrictions in Malaysia on the ability of foreign banks and insurance firms to have partnership opportunities.

Insurance firms: Refer to "Foreign-Foreign Partnerships" and "Foreign-Local Partnerships" below.

Banks:

Foreign-Foreign Partnerships**:**
It does not appear to AMCHAM and the U.S. Chamber that tie-ups between foreign insurers and foreign banks are permitted, regardless of whether they are locally incorporated.

In addition, recently issued guidelines impose additional restrictions on existing tie-ups, including with credit and charge card on bancassurance. This applies to other alternative distribution channels such as direct and tele-marketing. Any relaxation is likely to require localization, and possibly a reduction in foreign equity.

Industry would like BNM's policies to be relaxed to allow foreign-foreign partnerships without any restrictions.

Foreign-Local Partnerships:
Foreign insurers (i.e., companies having have more than 51% foreign ownership) are limited to one (1) local banc-assurance relationship.

Foreign banks - presently foreign banks are not allowed to open RM Correspondent Bank Account with local banks as this can be deemed as local banks being used as conduit for "branching" by foreign banks. Correspondingly, local banks are hesitant to partner with foreign banks to provide joint and seamless solution to US multinationals.

Bancassurance:
Because of the bancassurance restrictions in Malaysia, foreign companies have faced a difficult operating environment, and may become locked in place, while other insurers (both foreign and domestic) are freer to take advantage of new opportunities, including bancassurance tie-ups, Takaful insurance, and branch expansions.

7.06 National Treatment

As described above, given the differences in treatment for local versus foreign FS companies, AMCHAM and the U.S. Chamber would like to include language similar to the **USSFTA, Article 10.2, Page 96**, in the USSFTA submission:

> ARTICLE 10.2 : NATIONAL TREATMENT
>
> 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords to its own investors, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory.
>
> 2. Each Party shall accord to financial institutions of the other Party and to investments of investors of the other Party in financial institutions treatment no less favorable than that it accords to its own financial institutions, and to investments of its own investors in financial institutions, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments.
>
> 3. For purposes of the national treatment obligations in Article 10.5.1, a Party shall accord to cross-border financial service suppliers of the other Party treatment no less favorable than that it accords to its own financial service suppliers, in like circumstances, with respect to the supply of the relevant service.

7.07 New Financial Services

As noted in Section 7.03 above ("Innovation"), industry would favor measures in the USMFTA which allow FS companies to supply new and more innovative products to Malaysian consumers more easily, and with fewer restrictions. It is recommended that the USMFTA include text from **the USSFTA, Article 10.6, Page 96**:

> ARTICLE 10.6 : NEW FINANCIAL SERVICES
>
> Each Party shall permit a financial institution of the other Party to supply any new financial service that the first Party would permit its own financial institutions, in like

circumstances, to supply without additional legislative action by the first Party. Notwithstanding Article 10.4(b), a Party may determine the institutional and juridical form through which the new financial service may be supplied and may require authorization for the supply of the service. Where a Party requires such authorization of the new financial service, a decision shall be made within a reasonable time and the authorization may only be refused for prudential reasons.[10-3]

7.08 Payment Systems

7.08.01 **Local ATM Networks/Costs**:
Foreign banks are prevented from joining the local ATM network altogether. Technically, the local ATM network is managed by a company (Malaysian Electronic Payment Services, or MEPS) which is independent of BNM. However, MEPS is majority-owned and controlled by the local banks, the biggest of which are state-owned.

7.08.02 **Correspondent Bank Accounts**:
Foreign banks are not allowed to open correspondent bank accounts in Malaysia – i.e., they cannot open accounts with local banks for the purposes of facilitating clearing and settlement of their Ringgit payments at a national level. In contrast, all local Malaysian banks hold clearing accounts with U.S. banks to facilitate clearing and settlement of their USD payments. AMCHAM and the U.S. Chamber would like foreign banks to be allowed to open correspondent accounts with local banks and without restriction.

7.08.03 **Interbank GIRO**
Where foreign banks have been permitted access to the payment system (e.g., interbank GIRO), the charges for this are discriminatory, and far in excess of what the local banks pay. Again, this is technically done by MEPS; however, as referred to above, MEPS is controlled by the local state banks.

The American financial services industry would like to have language included in the USMFTA that would allow this access to happen in the future (**USSFTA, Article 10.13, page 102**):

> ARTICLE 10.13 : PAYMENT AND CLEARING SYSTEMS
>
> Under terms and conditions that accord national treatment, each Party shall grant to financial institutions of the other Party established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This

paragraph is not intended to confer access to the Party's lender of last resort facilities.

7.09 Self-Regulating Organizations

Questions have arisen from the foreign FS community in Malaysia about the nature of local self-regulating industry organizations for companies in these sector. In particular, the structures of these organizations and their Boards does not necessarily guarantee foreign companies participating in these bodies an equal seat or voice in the associations.

Additionally, concerns have been raised about the nature of these private-sector organizations and whether they are independent of (or indirectly tied to) the Malaysian government.

AMCHAM would like to see **Article 10.12 from the USSFTA** (page 102) be adopted in the USMFTA:

> ARTICLE 10.12 : SELF-REGULATORY ORGANIZATIONS
>
> Where a Party requires a financial institution or a cross-border financial service supplier of the other Party to be a member of, participate in, or have access to, a self-regulatory organization to provide a financial service in or into the territory of that Party, the Party shall ensure observance of the obligations of Articles 10.2 and 10.3 by such self-regulatory organization.

7.10 Senior Management and Boards of Directors

FS companies are concerned about BNM pressure on firms in this industry regarding:

7.10.01 **Composition of senior management** in companies and Boards of Directors, specifically with respect to racial/ethnic background. In particular, much emphasis is on having certain Bumiputera quotas (e.g., 30%) in organization's senior leaderships and Boards.

While this is a very sensitive cultural and political area in Malaysia, AMCHAM and the U.S. Chamber believe that such composition requirements and racial quotas should not be mandated in any sectors in Malaysia.

Article 10.8, USSFTA (page 98) should be incorporated into the USMFTA:

ARTICLE 10.8 : SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

1. A Party may not require financial institutions of the other Party[10-4] to engage individuals of any particular nationality as senior managerial or other essential personnel.

2. A Party may not require that more than a simple majority of the board of directors of a financial institution of the other Party be composed of nationals of the Party, persons residing in the territory of the Party, or a combination thereof.

7.10.02 **Approval of Board CEOs**:
Starting in 2005, BNM needs to approve CEOs chosen to run foreign and local FS firms' operations in Malaysia. They also need to approve CFOs, and the companies' Directors.

BNM should dispense the foreign banks from setting up the Nomination, Remuneration, and Risk Management Committees. The three U.S. banks in Malaysia have single shareholders (i.e., owned by their respective parent companies) with no minority shareholders in Malaysia. Hence, the compensation of key managers, business policies, strategies, and the appointment of the country CEO and local Boards are determined by the firm's head office or regional offices.

AMCHAM and the U.S. Chamber believe that acceptance of a new CEO for financial services companies should not be contingent on approval by BNM, and that it and other Malaysian government agencies should not interfere with private companies' decisions in this area.

7.10.03 **Local/offshore Board requirements**:
Some have indicated that they are concerned about pressure by BNM on foreign companies to "ensure" that their Malaysian Boards of Directors play a greater role and that they be given more authority in the running of the companies' Malaysian operations. Some firms indicated that even though their regional or global Boards (i.e., in the United States or United Kingdom) are supposed to set policy for the company, BNM would still like the Malaysian companies' Boards to be making these decisions.

Again, AMCHAM and the U.S. Chamber believe that these decisions should be left to the appropriate people within each company, and that BNM should not be regulating companies' internal processes in this manner.

7.11 Tax Treatment

Per Section 7.09 ("Self Regulating Organizations") above, American FS companies do not believe it is appropriate for BNM to set mandatory taxes or levies on FS industry players.

7.12 Transparency

Foreign financial services companies in Malaysia have expressed concerned about the lack of transparency in how some policies are set in the FS sector, how licenses are issued, and in other areas:

7.12.01 **Off-shoring reciprocity** – BNM's guideline, dated June 2000, discusses how outsourcing requires "reciprocity" investment from banks (both local and foreign) if they would like to outsource part of their functions to non-residents. On this note, banks' global servers, located outside of Malaysia, are considered "outsourcing to non-residents."

This guideline is a challenge to U.S. banks, because as global banks, the servers of the three U.S. banks in Malaysia are located in multiple sites in US, Europe and Asia. The localization of the servers in Malaysia will result in increased cost, personnel, and will deprive the U.S. banks of global best practices, which can benefit Malaysian consumers.

7.12.02 **License approvals** – this is an area of considerable concern to FS firms

7.12.03 **Government-tendered business** – i.e., government procurement. Only local companies are given consideration, making market penetration via government tenders virtually impossible for foreign companies.

7.12.04 **Foreign Investment Committee (FIC) approvals** - Approval of investments in land and other assets is problematic. Bank Negara has said that submission and acceptance of a definitive localization proposals are required.

7.12.05 It is recommended that USTR include **Article 10.11 from the USSFTA** in the USMFTA:

ARTICLE 10.11 : TRANSPARENCY

1. The Parties recognize that transparent regulations and policies governing the activities of financial institutions and cross-border financial service suppliers are important in facilitating the ability of financial institutions located outside the territory of the Party, financial

institutions of the other Party, and cross-border financial service suppliers to gain access to and operate in each other's markets. Each Party commits to promote regulatory transparency in financial services. Accordingly, the Financial Services Committee established under Article 10.16 shall consult with the goal of promoting objective and transparent regulatory processes in each Party, taking into account (1) the work undertaken by the Parties in the General Agreement on Trade in Services and the Parties' work in other fora relating to trade in financial services and (2) the importance for regulatory transparency of identifiable policy objectives and clear and consistently applied regulatory processes that are communicated or otherwise made available to the public.

2. In lieu of Article 19.3.2 (Publication), each Party shall, to the extent practicable, (a) publish in advance any regulations of general application relating to the subject matter of this Chapter that it proposes to adopt; and (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations.

3. Each Party's regulatory authorities shall make available to interested persons their requirements, including any documentation required, for completing applications relating to the supply of financial services.

4. On the request of an applicant, the regulatory authority shall inform the applicant of the status of its application. If such authority requires additional information from the applicant, it shall notify the applicant without undue delay.

5. A regulatory authority shall make an administrative decision on a completed application of an investor in a financial institution, a financial institution or a cross-border financial service supplier of the other Party relating to the supply of a financial service within 120 days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until all relevant hearings are held and all necessary information is received. Where it is not practicable for a decision to be made within 120 days, the regulatory authority shall notify the applicant without undue delay and shall endeavor to make the decision within a reasonable time thereafter.

6. Each Party shall maintain or establish appropriate mechanisms that will respond to inquiries from interested persons regarding measures of general application covered by this Chapter.

7. Each Party shall ensure that the rules of general application adopted or maintained by self-regulatory organizations of the Party are promptly

published or otherwise made available in such a manner as to enable interested persons to become acquainted with them.

8. To the extent practicable, each Party should allow reasonable time between publication of final regulations and their effective date.

9. At the time it adopts final regulations, a Party should, to the extent practicable, address in writing substantive comments received from interested persons with respect to the proposed regulations.

8. SECTORAL ISSUES

8.01 Automotive

Malaysia has become a large trading partner of the U.S., and is one of the largest and healthiest automotive markets in Southern Asia. The American automotive industry will work closely with the U.S. government and U.S. trade negotiators to help open up new opportunities for American companies and vehicles to be a part of Malaysia's automotive market, and to secure an FTA that will create enhanced business and economic ties for both nations.

AMCHAM, the U.S. Chamber, and the automotive industry welcome the announcement of the National Automotive Policy (NAP) by the Malaysian Government, and the framework it will provide for future opening and liberalization of the automotive sector.

8.01.01 **Taxes on Motorcycles**

Malaysia currently imposes very high excise duties on completely-built up (CBU) motorcycles. This is a market barrier to more international motorcycle companies being able to sell their products and compete in Malaysia.

As of November 2005, the current excise tax on CBU motorcycles above 800cc was 110% (40% import duty, 60% excise duty, 10% sales tax), making Malaysia one of the most expensive places in the world to own a motorcycle. By comparison, a similar bike in Singapore would only be assessed around SGD 600.00-800.00 for a COE (Certificate of Entitlement).

This Malaysian excise tax was implemented on January 1, 2004 without any prior notification to the industry or consultations with the relevant bike manufacturers. Although MITI announced in 2005 a 10% reduction on import duties for CBU motorcycles, this still makes it very cost-prohibitive for many Malaysians to buy foreign-made motorcycles.

AMCHAM and the U.S. Chamber do not believe that removing this tax would pose a threat to local industry, as it is our understanding that there are not any local companies producing motorbikes in this category (800cc and higher).

While some government officials cite the need for high tariffs on these classes of motorcyles as a means for raising revenues, it would seem that by the small number of motorcyles imported (MITI figures cited fewer

than 200 motorcycles in all classes being imported into Malaysia in 2004) are having a negligible effect on Malaysia's revenues, and that by lowering the tariff/duty structures significantly, more consumers could afford to buy larger CBU motorcycles, thereby generating significantly more revenue for Royal Malaysian Customs than is currently generated under the presently-high tariff structure.

Recommendation:
AMCHAM and the U.S. Chamber recommend an elimination of all taxes on CBU motorcycles (excluding the 10% sales tax).

8.02 Broadcasting Industry

8.02.01 **Communications Platforms**

The American broadcasting industry seeks disciplines with respect to access to communications platforms as follows:

8.02.01.01 Technology-neutral commitments for both basic and value added services

8.02.01.02 Commitments to ensure cost-based, non-discriminatory access to unbundled elements of basic telecommunications networks and services (including leased lines, circuit capacity, and local access services on a wholesale, flat rate basis)

8.02.01.03 Non-discriminatory, cost based access to all communications platforms used in the provision of value added services (including wireline, wireless, cable and satellite networks)

8.02.01.04 Fair, transparent and pro-competitive policies for access to cable and satellite networks for broadcasting services

8.02.01.05 Strong competition safeguards on incumbent communications platform owners to prevent such carriers from abusing their dominant position in the provision of basic communications services or cross-subsidizing affiliates in downstream market segments

8.02.02 **E-Commerce**

Disciplines with respect to electronic commerce and trade treatment of digital products, however classified, that guarantee national treatment and full market access

8.02.03 **Intellectual Property Rights (IPR)**

08.02.03.01 Strengthened enforcement provisions addressing Optical Disc Piracy:

This is a significant problem in Malaysia, despite some concrete steps taken recently by the Malaysian government to address the situation. Until recently, Malaysia was one of the leading exporters of pirated optical discs to the world,

especially Europe. However, it is still a major producer of these pirated products.

The Malaysian government recently tightened inspections at its borders, and cracked down on air freight exports. Pirated DVDs and VCDs from Malaysia are still being intercepted in Australia, the U.K., the U.S., South Africa and throughout Europe.

Licensed and unlicensed factories continue to produce pirated products, and recent crackdowns have made these operators more vigilant. However, industry sources have indicated that while Malaysia has 46 licensed optical disc factories in the country, domestic consumption could be supplied by four factories. It is essential that enforcement authorities root out the ultimate owners of pirate optical disc plants, by following the money trail.

08.02.03.02 Commitments that ensure full adoption of the WIPO Digital Treaties are consistent with language included in all previous U.S. FTAs.

Industry is concerned about problems with the legal framework that will guide Internet usage in Malaysia. The Copyright Act amendment falls short on WIPO Copyright Treaty provisions. Malaysia should therefore make commitments, consistent with those previous U.S. FTA partners (e.g., Singapore) have made to provide sufficient remedies against piracy of audiovisual product over the Internet, including notice and take-down provision, temporary copy protection, making available rights, and protection for technological protection measures.

08.02.03.03 Agreement to Copyright Term Extension

Malaysia should commit to longer periods of protection, rather than the 50 years currently extended to audiovisual works. By doing so, Malaysia would be joining a growing international consensus toward longer periods of copyright protection (more than 80 countries have extended their term of protection beyond the Berne Convention, which is a minimum of 50 years), and would be consistent with other leading countries.

Term extension would also directly benefit Malaysian films, sound recordings and performers, particularly those dating back to the 1950s and 1960s. Such extended copyright protection serves to encourage copyright owners to not only invest in new works but also to distribute, preserve and reissue older works in the new formats that consumers want.

Currently, Malaysia offers protection for authors for 50 years from death and producers for 50 years from first publication. All U.S. FTAs negotiated to date have include terms of protection of 70 years and greater, and should have similar provisions in the USMFTA.

08.02.03.04 Commitment on Anti-Camcording:
Illegal camcording has been traced to Malaysia, and it is expected to increase, due to its illicit lucrative nature. As authorities crackdown on camcording in one country, it moves to another.

Malaysia should commit to making the possession and/or use of recording equipment and devices in movie theaters a crime. If Malaysian law currently does not treat theft of film prints as a serious crime, it should be brought up in the provisions of the USMFTA.

08.02.03.05 Implementation of the WIPO Internet Treaties upon entry into force of the USMFTA, including prohibitions against the circumvention of technologies that are used to protect copyrighted works and commitment that all copyright owners have the exclusive right to make their works available to the public online.

08.02.03.06 Rules incentivizing cooperation between copyright owners and internet service providers (ISPs) to prevent infringement on the Internet, including limitations on liability and an expeditious notice and take-down procedure, consistent with the Digital Millennium Copyright Act (DMCA).

08.02.03.07 Increased criminal and civil protection against the receipt, retransmission or other use of the signal of any television channel or program (or any part of it) without the express authorization of the copyright owner of that signal, whether encrypted or unencrypted, unless that television signal is

generally offered by the copyright holder of that signal without payment or subscription."

08.02.03.08 Clear governmental authorization for the seizure, forfeit, and destruction of pirated products and the equipment used to produce them.

08.02.03.09 Enforcement against goods in transit, to deter violators from using ports or free trade zones to traffic in pirated products.

08.02.03.10 Agreed criminal standards for copyright infringement and stronger remedies and penalties.

8.02.04 Market Access, Investment Barriers, National Treatment

08.02.04.01 Made-in-Malaysia Advertising Requirements:
Malaysia has a "Made in Malaysia" requirement for all ads (foreign and local) shown on content broadcast in the country. If the ads on programming networks are not made in Malaysia (e.g., produced, shot, post-produced), they cannot be aired. Cutting off this critical investment stream ultimately limits the amounts of money that can be invested in the market to encourage its growth. No such requirements exist in the U.S., and these restrictions should be removed in Malaysia.

08.02.04.02 Elimination of the Broadcast Quota:
Broadcast stations are required, through a licensing agreement, to devote 70 to 80% of airtime to local Malaysian programming. Broadcast stations are also banned from broadcasting foreign programming during prime time, between 8:30 pm and 9:30 pm. Such restrictions significantly limit the expansion of the television sector, and it should be left to the market to determine programming allocations.

08.02.04.03 Removal of Foreign Ownership Restrictions: Foreign investment in terrestrial broadcast networks in Malaysia is strictly prohibited. The government also imposes a 30% limit on foreign investment in cable and satellite operations, through licensing conditions. Such restrictions stifle competition and impede expansion of the television industry. With respect to terrestrial network foreign

ownership restrictions, USTR should seek reciprocity, consistent with US investment caps at 25%, and no foreign investment cap for all other networks.

08.02.04.04 Elimination of Labeling Requirements:
In January 2003, provisions of the Trade Practices Act were extended to the sale of audio, audiovisual, and other optical media by requiring the affixation of "originality stickers" on all such product distributed in Malaysia.

The broadcasting industry is concerned about the lack of parity in costs for holograms being used in the industry versus other industries that have undergone similar measures (e.g., pharmaceuticals). The broadcasting industry would also like to see better measures taken to ensure proper auditing of companies that the stickers are provided to, in order to ensure proper controls over the hologram issuing process.

U.S. business seeks full market access, national treatment, and no ownership restrictions for the following services:

08.02.04.05 basic or value added telecom services, and the full adoption of the basic telecom reference paper

08.02.04.06 computer and related software implementation services

08.02.04.07 terrestrial broadcast and cable networks

08.02.04.08 news agency services

08.02.04.09 print media and publishing services

08.02.04.10 film and home video entertainment promotion/advertising services, production, projection services (including cinema theater management and ownership) and distribution services (defined as licensing for the exhibition, broadcast or other transmission)

08.02.04.11 film, home video entertainment and consumer product distribution (both retail and wholesale services) for both physical and digital delivery

08.02.04.12 video leasing and rental services

08.02.04.13 sound recording production/entertainment services and music publishing services

08.02.04.14 music product distribution (both retail and wholesale services) for both physical and digital delivery

08.02.04.15 full market access and national treatment for advertising services (including advertising conducted online, i.e. no cross communication platform restrictions on advertising)

8.02.05 <u>Tariffs</u>

The industry also seeks zero tariffs on all relevant products, including:

08.02.05.01 equipment used to build global networks (data centers, cache sites, call centers)

08.02.05.02 devices used to access networks (satellite decoders, computers, handsets, other Net-enabled devices)

08.02.05.03 film and magnetic tape, including cinematographic film 370610

08.02.05.04 paper products, including books 490110, 490199, and 490300 and newspapers/periodicals 490210 and 490290

08.02.05.05 packaged media (movies, music, software) on all carrier mediums, including cassettes 852452, disk for laser reading systems 852439, and 6.5mm 852453

08.02.05.06 all products, equipment and props used in the production of movies and music

08.02.05.07 broadcast transmission equipment, including transmission equipment 8525

08.02.05.08 movie and music promotional materials

08.02.05.09 electronic transmissions

08.02.05.10 The U.S. broadcasting industry also seeks Malaysia's full participation in the WTO's Information Technology Agreement, with zero tariff bindings on all products in HSC Chapters 84, 85 and 90.

08.02.05.11 Industry would also like the Malaysian government's commitment that customs valuations will be based on the value of the carrier medium.

8.02.06 Transparency

08.02.06.01 Commitment to an effective, transparent, regulatory body**:** The GOM recently formed the Malaysian Communications and Multimedia Commission (MCMC), which is independent of all operators, but not independent of the government. Although the creation of the MCMC indicates a stronger commitment by Malaysia to develop more favorable market access for foreign broadcasters, it needs to be a much more transparent entity.

8.02.07 National Treatment

There have been rumors of a proposed foreign film levy in Malaysia, from which the proceeds of this tax would be used to support local film production. While the American broadcasting industry has no objection to the subsidization of the Malaysian (and other local) film industries, this action should not be funded by a discriminatory tax on imported entertainment products. There should be a level playing field (national treatment) for imported and domestic films and videos, particularly with respect to taxation and/or related levies and fees.

8.03 Direct Selling Industry

8.03.01 Standardized ID Card for Distributors

Ministry of Domestic Trade & Consumer Affairs (MDTCA) officials met with industry representatives on February 25, 2005 to announce the Ministry's intention to require all direct selling companies (DSCs) in Malaysia to comply with a standardized identification card system for their distributors.

Under Section 18 (1) of the Direct Sales Act of 1993, DSC distributors in Malaysia who are doing door-to-door sales are required to produce to the prospective customer their national registration identification card (NRIC) and an authority card with his/her particulars. Each DSC is currently responsible for issuing its own authority cards to its respective distributors. MDTCA's proposed ruling/legislation would be to mandate that all DSC distributors would need to be issued with a standard authority card approved by MDTCA, and produced by one supplier, who has been identified to produce these IDs.

Concerns:

The industry is concerned that MDTCA's proposal could have a detrimental impact on the RM 5.8 billion* direct selling industry in Malaysia (*this statistic is an estimated 2005 turnover by MDTCA)*:

- The current ID system works very well for individually-licensed DSCs in Malaysia, and consolidating this process under one source adds little value or improvement. It also does not provide any additional protections to the consumer, as compared to the current regulatory environment, where consumers approached by distributors can verify their legitimacy from the relevant information displayed on DSC-issued identification cards. A generic, standardized ID card has no such information, and is a loophole which could be taken advantage of by unscrupulous individuals.

- The proposed solution risks long delays in issuing the cards to DSC distributors, because of the additional bureaucracy involved, and because all distributors would need to go through a sole source, as opposed to going through their DSCs who already have efficient processes in place for issuing authority cards.

- DSCs issue authority cards at relatively minimal cost to their four million registered distributors* (*MDTCA statistic*). The standardized ID proposal risks huge cost increases, since only one company is producing and issuing them (i.e., it can set higher prices and DSCs will have to absorb or pass the costs back to their distributors, or risk penalties imposed by the government). Industry associations estimate that the standardized ID cards could cost as much as 15-20 times that of the existing ones.

- Similar to the concerns raised recently on the mandatory hologram labelling issue in the pharmaceutical industry, AMCHAM and the U.S. Chamber believe that the Malaysian government has not adequately engaged industry players and associations on this matter. Industry believes that the Ministry is seriously considering implementing this initiative, and there are concerns that AMCHAM's and U.S. Chamber's members will be forced to comply with a ruling that may not be practical.

- Adoption of such regulations without adequate consultation of industry and transparent, open processes will hinder the ability of both countries to negotiate successfully an agreement that is in the best interests of both nations. It will also deter international investors from coming to Malaysia, because of the additional costs and other negative aspects which would arise from the standardized ID proposal.

Recommendations

AMCHAM, the U.S. Chamber, and their respective members in the direct selling industry believe that the current regulatory environment (in which DSCs that have been approved by the Malaysian government for operation in the country and are responsible for issuing their own authority cards to their distributors) should not be changed.

8.04 Distributive Trade

8.04.01 **Guidelines on Foreign Participation in the Distributive Trade**

AMCHAM and the U.S. Chamber are concerned with several aspects of MDTCA's proposed *2004 Guidelines on Foreign Participation in the Distributive Trade Services*, and subsequent amendments made in September 2005, and January 2006. These aspects are listed below.

The Chambers believe that these guidelines should not be implemented, as they would cause significant harm to Malaysia's foreign direct investment (FDI) attractiveness, and could also result in current American and other foreign investors in Malaysia leaving the country.

AMCHAM lauds the commitment by MDTCA to address the concerns which industry has raised, and looks forward to consulting further with the Ministry after it reaches and makes public its decisions regarding industry inputs to these guidelines.

8.04.01.01 The requirement for manufacturing companies distributing their products in Malaysia's domestic market to establish a separate marketing arm with 30% bumiputera equity.

Most of the foreign manufacturing companies already operating in Malaysia have not set up a separate entity to market their manufactured goods. This policy could negate incentives given by MITI and MIDA to manufacturing companies to establish their operations in Malaysia, as it would require them to undergo additional legal and bureaucratic procedures, resulting in additional costs. This also runs contrary to the policies allowing foreign manufacturing companies to operate in Malaysia with 100% foreign ownership, and the retrospective element in these guidelines could also put the credibility of the Malaysian government at risk.

The problem of transfer pricing may also arise, as the transfer of products from a manufacturing company to a marketing company will need to reflect the transfer pricing rules under the income tax legislation. The patent and trademarks agreements would make the system more complex.

8.04.01.02 Industry also has concerns about the requirements imposed on hypermarkets through the Guidelines, and whether these

would deter U.S. hypermarkets from wanting to invest in Malaysia.

These requirements mandate that 30% of products on shelf space must be bumiputera products. Additionally, AMCHAM also has concerns about the requirement that 30% of products sold in hypermarkets' must be bumiputera products.

AMCHAM and the U.S. Chamber believe that stocking and sales of products in stores should be determined by consumer preferences, and by the quality and prices of products. Artificially imposing restrictions on the ability of hypermarkets to stock/sell certain products will hurt competitive manufacturers whose products are being given limited access to the market.

These policies will ultimately hurt Malaysian consumers, who would not have as large a selection of products to choose from, and who might be negatively impacted if products available are of lesser quality and/or higher prices.

8.04.02 **Price Controls**

Manufacturing companies in the FMCG industry, including AMCHAM members, were notified in mid-April 2006 by several hypermarkets and other large retailers operating in Malaysia, that these firms had recently met with the Ministry of Domestic Trade and Consumer Affairs, and that these companies were abiding by the Ministry (MDTCA)'s desire to have a six-month long "Keep Retail Prices Low for Malaysian Families" campaign. As such, retailers were asking manufacturers and other suppliers not to raise their prices until after this period.

Because of the recent decision by the Malaysian government to reduce subsidies on fuel prices, the country had begun to see increases in the prices of products (as a result of logistical costs and related factors becoming larger, and forcing up prices of various goods and services). MDTCA did not want to see companies passing along price increases (which were necessary if the costs of their inputs were rising due to the increasing fuel costs) to consumers.

However, manufacturers and other suppliers would still be faced with a situation where the costs of the inputs for their products would be higher (due to the rising fuel costs), but they could not charge more, resulting in lower profits for those companies.

AMCHAM and the U.S. Chamber are alarmed by these attempted price controls. These policies contradict clearly MDTCA's goal of wanting to establish Competition Policy in Malaysia. Price controls would result in a business environment that is not competitive.

8.05 Express Delivery Services (EDS)

The Express Delivery & Logistics Association (XLA), contributed feedback on behalf of the EDS industry to AMCHAM and the U.S. Chamber, in response to the Office of the U.S. Trade Representative's solicitation of comments on the proposed free trade negotiations with Malaysia (71 Fed Reg. 14558).

XLA is the trade association representing the express delivery services (EDS) industry; its members include large firms with global delivery networks, such as DHL, FedEx, Purolator, TNT and UPS, as well as smaller businesses with strong regional delivery networks, such as International Bonded Couriers and Midnite Express. Together, XLA's members employ approximately 510,000 American workers.

Worldwide, XLA members have operations in over 200 countries; move more than 20 million packages each day; employ more than 800,000 people; operate 1,200 aircraft; and earn revenues in excess of $60 billion annually. XLA strongly supports free trade negotiations with Malaysia, just as it has strongly supported earlier FTA initiatives.

The Malaysian government has previously undertaken measures to promote the liberalization of air transportation as an important promoter of foreign trade, including the establishment of a comprehensive network of airports and an open skies policy. The Malaysian government's air transport policies have allowed for the development of a strong EDS industry, which is deeply engaged in the supply chains of U.S. and Malaysian manufacturers and businesses.

The nation's main airport, Kuala Lumpur International Airport (KUL) is a major hub for air cargo, handling up to 650,000 tons of cargo per year. The airport is expected to handle three million tons of cargo per year by the year 2020, and up to six million tons of cargo thereafter. In addition to KUL, Malaysia has successfully established a network of secondary airports to manage its growing trade volumes and foster regional development.

XLA has worked closely with U.S. policymakers to ensure that each FTA contains certain core provisions designed to address overarching issues for our industry. Rather than reiterate the contents of XLA's earlier submissions, which outlined these issues, it would like to comment on how it can build on the core provisions in existing FTAs to obtain important commitments for its industry (represented locally by the Conference of Asia Pacific Express Carriers - CAPEC Malaysia) in an FTA with Malaysia.

In this regard, XLA believes that the Peru FTA provides an important starting point. It includes a chapter on customs with an article specific to EDS shipments. These provisions provide an important baseline and should be included in the Malaysia FTA. However, as detailed below, XLA's members face additional customs barriers in the Malaysia market, and it believes additional provisions addressing these barriers will be necessary to provide its members with the streamlined customs procedures needed for EDS carriers to provide the fast, reliable service that businesses and consumers need.

Furthermore, the Peru FTA includes in its services chapter an article on EDS. This article includes an appropriate definition of EDS that applies to the service, rather than the supplier. This means that all entities providing EDS (including private operators and public postal administrations) should be treated alike. The article also includes a standstill provision, which will help ensure market access for EDS suppliers. It also includes provisions limiting monopoly abuse and potential cross-subsidization by postal administrations from their monopoly services into competitive EDS operations. XLA believes the Malaysia FTA should include these same provisions on EDS.

8.05.01 Customs Provisions for the U.S.-Malaysia FTA

The EDS industry is crucial to fast-cycle logistics, e-commerce and rapid global transactions, and, therefore, expedited customs clearance is crucial to our business. Furthermore, reduction in trade impediments caused by customs procedures can increase trade, which in turn increases demand for trade in EDS. We recommend the following customs provisions as key elements in reducing impediments to trade by the Malaysia government:

- Under normal circumstances, provide that for shipments valued at US$200 or less, no duties or taxes will be assessed, and no formal entry documents will be required (that is, establish a *de minimis* level of $200). Currently, Malaysia's *de minimis* level is RM 500 (approx. USD 136.00);

- Provide for uniform brokerage and customs processes, so that duties, taxes, processes, legal and regulatory requirements, etc. are the same at all three international gateways into Malaysia – KUL, Penang, and Johor Bahru - to avoid inconsistencies and inefficiency. Currently, each gateway operates independently and maintains somewhat different customs and brokerage procedures;

- Make customs service available 24 hours per day, 365 days per year, at all Malaysian ports. Currently, 24-hour customs service is putatively available - but, in reality, this is not the case. Round-the-clock availability is necessary to support the needs of Malaysia's burgeoning economy and is particularly critical to express shipments, which operate under tight delivery deadlines;
- Enhance pre-clearance capabilities at Malaysian airports by allowing for the submission of only manifest data prior to flight arrival and allowing 30 days for import declaration and duty/tax payment (i.e., separating fiscal control and physical clearance through a surety bond system);
- Regarding Electronic Data Interchange (EDI), introduce competition into the provision of this service, standardize EDI for all Malaysian ports, and provide that final approval of clearance be electronically validated;

- Provide an absolute paperless environment, including the Customs auditing process. Currently, while customs declarations may be made electronically, paper forms must also be maintained because Malaysian customs audits rely on hard copies for verification;

- Provide for a system where customs duties can be paid electronically 24 hours a day;

- Eliminate the requirement that, for a company to obtain and renew an annual customs clearance license, Bumi "participation in the company with regards to equity, partnership and employee/staff (management, executive and regular staff)" must be at least 51 percent, and provide for foreign ownership, management, and staffing requirements that are in line with U.S. law;

- Provide that permit applications for controlled items are handled through the EDI process, that such a process is electronically integrated with all permit offices and with Customs, and that offices are located at every major port. Currently, express operators must apply in person for special permits for personal-use consumer electronics, telecommunications devices, films, and certain other products. This process is costly and time-consuming; and

- Provide transparent and predictable customs procedures through, among other things, advance customs rulings, administrative and judicial appeal of customs decisions, and Internet-based publication of customs rules and regulations. Also, ensure that any fees are non-discriminatory, cost-based, and proportionate to services rendered.

8.05.02 Other Provisions for the U.S.-Malaysia FTA

We also recommend the following non-customs provisions which will remove impediments to trade by the Malaysian government, and will enhance the services provided by XLA members:

- Abolish Free Commercial Zone (FCZ) Processing Fees at KUL and PEN, as no service is provided to justify these fees, FCZ Processing fees are not standard practice in the region, and the EDS industry is already paying rental costs, terminal charges, and EDI transaction fees.

  Notwithstanding these facts, Malaysia Airports Holdings Berhad charges an FCZ processing fee of USD 1.32 per declaration in KUL and Malaysian Airline System is charging USD 0.80 per declaration in PEN. Given the large volumes express operators carry, this fee could total more than USD 140,000 (RM 518,000) annually per XLA member operating in Malaysia. Such fees make the cost of doing business more expensive and inhibit trade.

- Provide for a separate, independent entity to serve as the Free Zone Authority in Penang. Currently, the Malaysian Airline System, a competitor of express companies and air cargo carriers, controls the Free Zone Authority - an unacceptable competitive situation;

- Eliminate the requirement, under the Malaysian Postal Services Act of 1991, that EDS firms pay a biennial fee based on their annual revenues. This fee ranges from USD 133 to USD 3,979, and constitutes an unwarranted intrusion on EDS companies' business by their competitor, Malaysia Post;

- Eliminate current foreign investment requirements of at least 30 percent ownership by Malay nationals and at least 30 percent Bumi representation on the board of directors and in management, and provide for 100 percent foreign ownership, board representation, management, and staffing;

- Revise the strict licensing system regarding the regulation of trucks, especially the requirement that only Malay nationals or Malay-incorporated companies can obtain A-permits, provide that foreign EDS companies be afforded full national treatment consistent with GATS so they can receive the necessary permits directly from the Vehicle Licensing Board, and provide for an exemption to the regulation for trucks under 5 tons.

  Currently, all vehicles carrying third-party goods must receive an A-permit - but only Malay nationals or Malay incorporated companies qualify to receive them. This imposes a costly and time-consuming constraint on EDS companies, who rely on trucks as an important part of their intermodal service; and

- Provide legal transparency to ensure that a level and fair playing field is maintained so the regulations governing business are clear to all parties, and to prevent discriminatory practices in the market and ensure uniform implementation.

8.05.03 Conclusion

XLA believes that the negotiation of an FTA with Malaysia offers an important opportunity to obtain liberalizations important to many U.S. sectors, including EDS. We urge U.S. negotiators to address the issues we have highlighted in this statement, and we look forward to working with them to find appropriate mechanisms for doing so.

8.06 Hospitality Industry

8.06.01 **Labor Issues**

AMCHAM and the U.S. Chamber are concerned about the difficulty of their members in the hospitality industry (e.g., hotels, restaurants) who are unable to staff their operations with adequate foreign talent. For hotels in particular, they have often been unable to find enough Malaysian workers who are interested in employment in certain categories (e.g., line staff, supervisors, etc.), and have needed to recruit talent from abroad.

The current policy only allows hotels in Malaysia to bring in foreign staff for a maximum of six months, and then the staff must be sent back to their original countries. By the time hotels spend a lot of money and effort training staff; they lose them, and need to start over again.

AMCHAM also learned in early 2006 that hotels are now having caps imposed on how many foreigners they are allowed to employ in their Malaysian operations.

Recommendations:
As Malaysia continues to build more hotels and to position itself as an international hub for business and entertainment, having suitably-trained and qualified staff for their operations will be essential. The Malaysian government should amend current laws to allow hotels to employ expatriates and other foreign staff as per the normal Immigration procedures for expatriates (e.g., for two years and subject to renewal), rather than only for six months.

Also, if hotels are genuinely unable to find enough well-qualified local talent (or local talent who are willing to work in the hospitality industry), then they should not be restricted to only being allowed to bring in a certain number of expatriates.

8.07 Information Communications Technology (ICT)

8.07.01 E-Commerce

8.07.01.01 Customs Duties on Digital Products

Per Article 16.3 of the USAFTA (Page 16-1), The USMFTA should include this text:

ARTICLE 16.3 : CUSTOMS DUTIES

Neither Party may impose customs duties, fees, or other charges on or in connection with the importation or exportation of digital products, regardless of whether they are fixed on a carrier medium or transmitted electronically.

8.07.02 Government Procurement

8.07.02.01 Background

The Malaysian government continues to be an important purchaser of goods and services, with the government-procurement market equivalent to 20% of GDP in 2004. In addition, the government continues to have a strong presence in most sectors of the economy, mainly through over 40 listed and non-listed GLCs, with combined assets equivalent to more than half of Malaysia's GDP.

Preferential government procurement procedures continue to favor locally-owned businesses, especially for smaller contracts. International tenders are invited only if goods and services are not available locally, and in the majority of cases these have to go through a Malaysian-owned intermediary, through the concept of reserved contracts. This has been based on affirmative action policies dating from 1970, after significant social unrest in Malaysia in 1969.

While recognizing the economic, cultural, and political sensitivities on government procurement by the Malaysian side, AMCHAM and the U.S. Chamber believe that such policies need be phased out within an agreed timeframe under the USMFTA.

8.07.02.02 WTO Government Procurement Agreement (GPA)

Malaysia has not signed the WTO Government Procurement Agreement (GPA), and has not entered negotiations, nor does it have observer status. Malaysian government officials might not realize the seriousness of how their non-participation in GPA is having a negative impact on U.S. companies in Malaysia, who cannot sell into U.S. government procurement channels.

One of AMCHAM's ICT members, an American company that has extensive manufacturing operations in Malaysia and is one of the country's largest investors, is unable to sell its products into the U.S. government procurement channels in Washington, DC, because of Malaysia not having acceeded to the GPA.

Besides preventing American companies from selling to the U.S. government, it would seem that Malaysia's not signing of the GPA would also prevent Malaysian companies from being able to apply to U.S. government tenders, unless this area can be resolved through the USMFTA.

8.07.02.04 Open Source Software

AMCHAM Malaysia believes that, on the question of open source software (OSS) versus proprietary software, marketplaces such as Malaysia should maintain an open policy. Quotas or targets for adoption of particular technologies or software preferences should not be set, as this can lead to a distortion in the market which may have a negative impact on one type of software solution versus another.

AMCHAM further feels that Malaysian government procurement policies on OSS versus propriety software should be neutral and transparent. Market forces (i.e., supply/demand and consumer choice) should determine which types of technologies or solutions are best for particular needs.

8.07.02.05 Unlimited Liability in Government Contracts

The Malaysian government does not accept limitations on liability by companies bidding on government contracts. As a result, many of the established information technology companies are not willing to contract directly with the government or include substantial risk premiums in their prices. Many of these firms' legal departments will also not allow their organizations to sign-on to these types of agreements (i.e., unlimited liability = unlimited risk).

AMCHAM and the U.S. Chamber feel that the Ministry of Finance should adopt – in consultation with the private sector – a standard (across-the-board) reasonable limitation of liabilities in contract terms for government contracts.

8.07.02.06 Performance Bonds in Government Tenders

In most government tenders, the bidder is required to arrange for the issuance of a performance bond by a financial institution. Typically, such bonds act as a guarantee of the performance of the various obligations of the bidder throughout the life of the contract. The amounts range for a certain percentage (e.g., 5% to 10%) of the contract sum. Such bonds are usually unconditional in effect, in that the moment notice is issued by the government for a claim under the performance bond, the financial institution is obliged to pay almost immediately.

Potential Issues

While on the surface, it may seem logical to insist on a performance bond, so that performance obligations are guaranteed, the following perspectives need to be considered as well, especially within the context of information communications technology (ICT) procurement:

a. Where a bidder is simply supplying products by a specified date, which in most cases is almost as soon as the award is made, it is not necessary for such a requirement.

b. If the request for proposal (RFP) already has payment terms which hold a substantial payment until a late stage in the project, as is the case of

many Malaysian government contracts, then a performance bond should not be necessary.

c. In the context of an ICT system implementation, the imposition of a performance bond may not be fair to the bidder. A system implementation is not straightforward, and its success is often linked to various dependencies or contingencies, which may not be entirely within the control of the issuer. It does not seem reasonable to decide summarily that a default has taken place, thereby triggering the bond.

d. Recent changes in accounting rules in countries like the United States mean that publicly traded companies have to publicly disclose their total amount of outstanding performance bonds and such bonds or bank guarantees are viewed as debt by the investment community.

From an industry perspective, the non-insistence of a performance bond as a condition of the tender is ideal. However, in recognizing that the Malaysian government has a duty to ensure prudent spending of public funds, a compromise option is proposed to ensure fairness in the process.

Recommendations

1. In addressing the issues above, it is proposed that in all performance bonds required by the Malaysian government (also referred to hereafter as "the Government") for ICT procurement, the following qualifications are incorporated:

a. The bidder should be given the opportunity to remedy the breach before the Government calls on the performance bond. Currently, this is not a consistent practice in all Government tenders. To balance the risk to the Government, a mutually agreeable time frame could be inserted for taking action toward remedying the problems (e.g., 30 days).

b. The Government should only be able to call on the performance guarantee if a default is directly and solely attributable to the bidder.

c. The Government should only be able to call on the performance guarantee if it has duly and punctually performed its obligations under the contract.

d. A monetary limit is imposed for the obligations of the Guarantor under the performance guarantee, or subsequent service-level penalties. Example: 5% of the value of the contract of the project

As these conditions are between the Government and the bidder, these requirements can be inserted in the contract between the Government and the bidder.

2. An alternative to performance bonds by financial institutions is to allow performance guarantees to be issued by related companies of the bidder. This is common practice elsewhere. For example, under the Australian Government Information Technology Contracts (GITC), there is an option for such a guarantee, either on a conditional or unconditional basis. The proposal is to allow the option for a conditional performance guarantee to be issued. Essentially, this covers the following:

a. If the bidder fails to execute and perform its undertakings under the Contract, the Guarantor will -- if required to do so by the Government -- complete or cause to be completed the undertakings contained in the Contract.

b. If the Contractor commits any breach of its obligations, and the breach is not remedied by the Guarantor as required by this clause,

and the Contract is then terminated for default, the Guarantor will indemnify the Government against costs and expenses directly incurred by reason of such default.

c. A monetary limit is imposed for the obligations of the Guarantor under the performance guarantee, or subsequent service-level penalties. Example: 5% of the value of the contract of the project

d. On the issue of software escrow, most companies will have a custodian nominated in their respective home countries. It is therefore not necessary to nominate another local custodian, especially since each government tender might have different requirements or that it might stipulate nominating its own custodian.

Rationale

Through the recommendations listed above, AMCHAM and the U.S. Chamber would like to assist the Malaysian government in attracting potential bidders for tenders from the largest possible pool of candidates. By having a larger pool of competitive bidders, the government will ensure that it can choose from the best and most cost-effective ICT solutions to meet its needs.

The current practices regarding performance bonds will limit the number and quality of firms which can compete for Malaysian government tenders. Many corporations' legal departments will not allow their organizations to sign contracts in which the bidders could potentially face unlimited liability, or in which bidders are expected to guarantee 100% absence of defects in their particular software products. The resulting smaller pool of potential bidders will result in higher costs and less innovative ICT products and services for the Malaysian government. This could result in a long-term shift of creative technologies and solutions away from Malaysia to other nations.

Another way to help maximize the pool of potential bidders for tenders is to ensure that bidders can be eligible and work more directly with the Malaysian government on tenders, rather than needing to go through intermediaries or by acting as a subcontractor to projects, instead of being the main vendor for possible tenders.

Additionally, the current performance bond structure places additional financial burden and risks upon suppliers. Suppliers will naturally factor the increased burden into their tender price, resulting in a final price to purchasers of ICT services that will exceed normal commercial rates. It is reported[1] that suppliers often factor in a contingency of approximately 20% of the contract price, just to account for risk of this type.

Total liability in the form of performance bonds places an additional and overly burdensome risk on suppliers of ICT products and services, with the effect that many potential suppliers may not join the tender. As has been seen in the ICT industry in the past, the best and most innovative suppliers are not necessarily the largest companies, or those best able to cover all possible liabilities.

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[1] *S. Newcomb, "Computer Contracts Using the GITC (Government Information Technology Contracts) Approach," paper delivered at the Institute of Municipal Management Conference, 31 October 1996.*

The immense increase in productivity gained by IT users in recent years could never have been achieved if IT suppliers had, in the process, to accept total liability for all malfunctions. Technology development would have slowed and product prices would have been significantly higher.

The Malaysian government, in its 2006 Budget announcement, included a measure in its second strategy to provide a business-friendly environment is to intensify the ICT sector. The current situation

regarding performance bonds actually detracts from this goal, making Malaysia's ICT industries less competitive, less innovative, and not as attractive to foreign investors.

AMCHAM Malaysia and the U.S. Chamber recognize the need to protect customers and end-users of ICT products and services, and to ensure that ICT firms do their best to rectify any problems arising from a breach of their obligations.

However, it would be in the best, long-term interests of Malaysia to find a solution to this issue which balances the need to protect the public interest, while ensuring top-quality government tenders through a maximum number of highly-qualified, competent bidders.

8.07.02.07 Transparency

- Procedural Improvements
  Greater transparency is needed in the tendering and bidding process. There should also not be any requirements for foreign companies to have 30% Bumi equity stakes, and they should also not be required to use a "middleman" to bid on the tender for them.

  Also, there should not be any discriminatory conditions against foreign companies when registering with MOF. In order to be eligible for Malaysian government tenders (in nearly all sectors), companies must pre-register with MOF. In the case of the ICT industry, foreign companies are at a disadvantage and/or are not allowed to be registered with MOF, unless they are 30% Bumi-owned.

- GLCs
  Companies bidding on ICT tenders should be allowed to bid directly to the Malaysian government agency who is offering the tender. Currently, GLCs are given priority (greater opportunity) in being able to get tenders, particularly if it is close to the three-year deadline by which they must show their key performance indicators (KPIs). During this period, GLCs will be much more likely to bid on ICT contracts,

and would stand a greater chance of winning these tenders.

The only way for many private companies to have access to these types of tenders would be to go in under the wings of a GLC.

- Awarding of Contracts
  As per both points above, AMCHAM and the U.S. Chamber would like to see much greater transparency about how contracts are awarded, including a model similar to what exists in Singapore (i.e., Ministry of Finance posts all tenders online, indicates which companies were chosen for the tenders, and what criteria determined why they were selected.)

8.07.02.08 Treatment of local vs. foreign companies

Foreign companies are not allowed to bid directly on Malaysian government contracts. They must either have a 30% Bumi equity stake, or go through a suitably qualified local (generally Bumi-owned) company to be able to tender on government projects.

8.07.03 Intellectual Property

8.07.03.01 Background

The Malaysian government has strengthened its intellectual property regime in recent years. It has sought to improve the enforcement of intellectual property rights, in particular to curb infringement of copyrights and trade marks. The Malaysian authorities maintain that they have had considerable success in eradicating optical disc product piracy, although piracy would seem to remain a problem along with counterfeiting.

While Malaysia's enforcement efforts have improved, there are, as mentioned above, a number of government policies (e.g., procurement policies, compulsory third party intermediaries, etc.) that could have severe negative effects on American IPR holders.

It is essential to establish mutually agreeable benchmarks to allow measuring of results. The health and effectiveness of the entire IP ecosystem depends heavily upon legislative framework, vigorous enforcement, successful prosecution and deterrent sentences imposed. **Key Performance Indicators**, of a conducive and successful IP environment, should be measured based on the successful prosecutions and deterrent sentences imposed and merely not on the number of raids conducted alone.

With this in mind, AMCHAM, the U.S. Chamber, and the American software industry strongly support the inclusion of an IP chapter in the FTA.

This chapter should establish adequate, comprehensive, and effective standards for intellectual property protection and enforcement in Malaysia as this would be one of the key determinants for a commercially meaningful FTA that can provide significant opportunities for the industry and business community. Further, a holistic and pragmatic approach as well as the adoption of best practices in dealing with enforcement of intellectual property is a necessary and key ingredient for the FTA to be the "gold standard" of U.S. trade and investment agreements.

The USMFTA's IP chapter should reflect a strong commitment to the preservation of all forms of IP protection, including patents, copyrights, trade marks and trade secrets. Efforts should be made to harmonize Malaysian IP protection levels with those of the United States, to the extent possible. In no way should any provision adopted under the USMFTA weaken existing IP protections in either country.

AMCHAM and the U.S. Chamber also feel that more assertiveness is needed in dealing with issues challenging IPR. Harsher penalties are strongly needed, and Malaysia's legal framework needs to be well-developed and concise, so that offenders do not elude punishment easily.

As detailed below, the American software industry believes strengthening the following five areas would make Malaysia a globally-recognized hub for IP investment, and would enable the country to attract more U.S. and other foreign investment in the coming years.

1. Legal Framework

One of the key challenges for the software industry is the burdensome documentary requirements and method of proving copyright subsistence and ownership under the existing provision of the Copyright Act 1987.

Issues encountered include inconsistent and unpredictable requirements made by different courts as to whether a representative of the copyright owner has to be physically present during trial to give evidence on the subsistence and ownership of copyright and the manner in which such evidence could be challenged or rebutted by the defence without having to adduce any evidence to the contrary.

Recommendations (Legislative Reform):
Revisions should be made to Section 42 of the Copyright Act 1987 to address the limitations of the existing system in proving copyright subsistence and ownership. Industry is fully prepared to provide all necessary assistance including providing a proposed draft incorporating the appropriate wordings and changes to be made to the existing provision.

2. Enforcement Actions

There is a critical need to streamline and raise the standards of conducting search and seizure, evidence gathering exercise, maintaining a proper chain of evidence from collection to storage to the stage of tendering the evidence collected during court proceedings.

3. Prosecution

It is commendable that the Malaysian government has invested substantial resources in conducting numerous enforcement actions, resulting in many of these cases being registered in courts. One of the challenges encountered is that very few criminal cases are prosecuted by Deputy Public Prosecutors

from the Attorney General's Chambers who are legally qualified and trained prosecutors.

However, lack of legally qualified and experienced prosecutors in conducting the trial may result in such cases being discharged or dismissed summarily for various reasons, including grounds of technicality.

Recommendations (Capacity Building):
The industry recognizes and appreciates the challenges the current technologies imposed on the enforcement authorities in carrying out their duties in enforcing various IP laws.

The industry is committed to working closely with enforcement authorities, to enable them to attain the status of a world class organization, by developing a comprehensive program of IPR technical assistance and capacity building. This includes assisting authorities with establishing standard operating procedures in conducting search and seizure, investigation skills and techniques in gaining, gathering and managing evidence as well as enhancing their prosecution skills and techniques.

Measures to provide for IP cases, to be prosecuted by Deputy Public Prosecutors of the Attorney General's Chambers – or alternatively to establish a prosecution unit comprising legally qualified prosecutors within the Ministry of Domestic Trade and Consumer Affairs – rather than relying on prosecuting officers who develop their prosecuting skills in an ad hoc and trial-and-error manner or by attending periodic courses.

4. Adjudication and Judicial Process

The industry is indeed very encouraged by the recent announcements made by YB Datuk Haji Mohd Shafie bin Haji Apdal, Minister of Domestic Trade and Consumer Affairs, on Malaysia's intention to establish specialized IP courts in Malaysia by June 2006.

The industry strongly supports such initiatives as such specialized IP courts would:

- Provide and create an effective and conducive protection and enforcement environment of IPR in Malaysia;

- Help to manage challenges of complexity involved in IP cases and consequently, decrease litigation costs and hearing times for litigants and improve the efficiency and standard of the entire legal system involving IPR;

- Enhance efficiency, improve precision and predictability of adjudication involving IP cases and provide unification and consistent legal doctrine in IP field;

- Increase the flow of FDI into Malaysia.

- It is hoped and anticipated that such establishment of specialized IP Courts would address the substantial backlog of cases and significant delay in criminal cases currently encountered.

<u>Recommendations (IP Courts)</u>:

- The process for establishing the Specialized IP courts should be expedited.

- Such specialized courts must have the jurisdictions to cover both civil and criminal cases and should be expanded throughout Malaysia, not be limited to Kuala Lumpur alone.

  In order for the FTA provisions to be effective for the industry and business community, they must be properly implemented and enforced. Accordingly, specific obligations and measures should be addressed in the FTA rather than adopting general and vague terms in order to

ensure that the new FTA partner meets its obligations both in implementation and enforcement.

8.07.03.02 International Agreements

In the **U.S.-Australia FTA (USAFTA), Article 17.1 (Part 2, Page 17-1)** should be adopted. These international treaties should be included in the USMFTA:

ARTICLE 17.1 : GENERAL PROVISIONS

1. Each Party shall, at a minimum, give effect to this Chapter. A Party may provide more extensive protection for, and enforcement of, intellectual property rights under its law than this Chapter requires, provided that the additional protection and enforcement is not inconsistent with this Agreement.

International Agreements
2. Each Party affirms that it has ratified or acceded to the following agreements, as revised and amended:
(a) the *Patent Cooperation Treaty* (1970);
(b) the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974);
(c) the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989);
(d) the *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1980);
(e) the *International Convention for the Protection of New Varieties of Plants* (1991);

The USMFTA should also require that Malaysia accede to the Hague Agreement on Industrial Designs.

AMCHAM and the U.S. Chamber support Malaysia's accession to the aforementioned agreements. However for the Madrid Protocol, there may be a need for further study as to the benefits and disadvantages in acceding to the same. In any event, the Malaysian Trademark Office needs to have proper infrastructure, facilities, and manpower in place before the Protocol can be implemented in Malaysia.

8.07.03.03 Patent Issues

The current patent issuance process in Malaysia is quite slow. The USMFTA should include language from the **USAFTA, Article 17.9, Paragraph 8(a), Page 17-16**:

If there are unreasonable delays in a Party's issuance of patents, that Party shall provide the means to, and at the request of a patent owner, **shall, adjust the term of the patent to compensate for such delays**. An unreasonable delay shall at least include a delay in the issuance of a patent of more than four years from the date of filing of the application in the Party, or two years after a request for examination of the application has been made, whichever is later. For the purposes of this paragraph, any delays that occur in the issuance of a patent due to periods attributable to actions of the patent applicant or any opposing third person need not be included in the determination of such delay.

Malaysia is already in general compliance with most requirements as found in other FTAs (Australia and Singapore). Additional requirements for consideration will be:

(a) the extension of the duration of a patent in the event there is a delay in the processing of a patent application by the local patent office;

(b) in the case of a pharmaceutical product that is the subject matter of a patent, an extension of the duration of a patent in the event there is a delay in the processing of an application by the relevant regulatory body for marketing approval of the product.

AMCHAM and the U.S. Chamber support the introduction of the aforementioned changes to local legislation.

Industry also supported including the following language from **Article 17.9 of the USAFTA (Page 17-14)**, which deals with language on patents, into the USMFTA. In

particular, AMCHAM's ICT members felt that Paragraph 14 (Page 17-16) was extremely important:

14. Each Party shall endeavour to reduce differences in law and practice between their respective systems, including in respect of differences in determining the rights to an invention, the prior art effect of applications for patents, and the division of an application containing multiple inventions. In addition, each Party shall endeavour to participate in international patent harmonisation efforts, including the WIPO fora addressing reform and development of the international patent system.

8.07.03.04 Trademarks, Including Geographical Indications

For **Article 17.2, Paragraph 10 of the USAFTA (page 17-3)**, language stating that neither party may require recordal of licenses for marks should be included:

10. Neither Party may require recordal of licences for marks.

Malaysia is already in general compliance with most requirements as found in other FTAs (Australia and Singapore). One issue of note is the requirement that neither party will require recordal of licences of trade marks.

AMCHAM and the U.S. Chamber support the removal of the need for recordal of licences for trade marks.

8.07.03.05 Copyright – Legal Remedies

Article 17.4, Paragraph 8 of the USAFTA (page 17-10), regarding effective criminal procedures and penalties to protect rights management information, should be included in the USMFTA's IPR Chapter:

8. In order to provide adequate and effective legal remedies to protect rights management information:
(a) each Party shall provide that any person who without authority, and knowing, or, with respect to civil remedies, having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of any copyright:

(i) knowingly removes or alters any rights management information;
(ii) distributes or imports for distribution rights management information knowing that the rights management information has been removed or altered without authority; or
(iii) distributes to the public, imports for distribution, broadcasts, communicates, or makes available to the public copies of works, performances, or phonograms, knowing that rights management information has been removed or altered without authority, shall be liable and subject to the remedies specified in Article 17.11.13. Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for purposes of commercial advantage or financial gain in any of the above activities. Each Party may provide that these criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity; (b) each Party shall confine exceptions to measures implementing sub-paragraph (a) to lawfully authorised activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar government purposes;
(c) **rights management information** means:
(i) electronic information that identifies a work, performance, or phonogram; the author of the work; the performer of the performance; the producer of the phonogram; or the owner of any right in the work, performance, or phonogram; or
(ii) electronic information about the terms and conditions of the use of the work, performance, or phonogram; or
(iii) any electronic numbers or codes that represent such information, when any of these items is attached to a copy of the work, performance, or phonogram or appears in connection with the communication or making available of a work, performance, or phonogram to the public. Nothing in this paragraph shall obligate a Party to require the owner of any right in the work, performance**,** or phonogram to attach rights management information to copies of the work, performance, or phonogram, or to cause rights management information to appear in connection

Malaysia is already in general compliance with most requirements as found in other FTAs (Australia and Singapore). The following matters will however require some change in local legislation for Malaysia:

(a) term of protection for work (life plus 70 years);

(b) circumvention of effective technological measure;

(c) unauthorised alteration of rights management information.

AMCHAM and the U.S. Chamber support the introduction of the aforementioned changes to local legislation.

8.07.03.06 Copyright – Extension of Protection

USAFTA, Article 17.4, Paragraph 4 (page 17-6), regarding the term of protection for IP works, should be included in the USMFTA:

4. Each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated:
(a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and
(b) on a basis other than the life of a natural person, the term shall be:
(i) not less than 70 years from the end of the calendar year of the first authorised publication of the work, performance, or phonogram; or
(ii) failing such authorised publication within 50 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.

8.07.03.07 Protection of Encrypted Programme-Carrying Satellite Signals

USAFTA, Article 17.7 (page 17-13) should be included in the USMFTA:

ARTICLE 17.7 : PROTECTION OF ENCRYPTED PROGRAMME-CARRYING SATELLITE SIGNALS

1. Each Party shall make it a criminal offence:
(a) to manufacture, assemble, modify, import, export, sell, lease, or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding an encrypted programme-carrying satellite signal without the authorisation of the lawful distributor of such signal; and
(b) wilfully to receive and make use of, or further distribute, a programme-carrying signal that originated as an encrypted programme-carrying satellite signal knowing that it has been decoded without the authorisation of the lawful distributor of the signal.
2. Each Party shall provide for civil remedies, including compensatory damages, for any person injured by any activity described in paragraph 1, including any person that holds an interest in the encrypted program-carrying signal or its content.

The requirement here is to make it a criminal offense to manufacture or deal in a system of device which can decode encrypted programme-carrying satellite signals and to distribute such signals after the same has been unlawfully decoded. The need will be for Malaysia to consider and where necessary modify existing legislation to give effect to the above requirement.

AMCHAM and the U.S. Chamber support the introduction of the above changes to local legislation.

8.07.03.08 Pre-established Damages

AMCHAM members indicated that they felt pre-established damages **should be included** in the USMFTA. The language which members referred to was in the **USAFTA, Article 17.11, Page 17-19**.

8.07.03.09 Counterfeit Goods

The USMFTA should include language relating to counterfeit trademarked goods, from the **USAFTA, Article 17.11, Paragraph 10(c), Page 17-21**:

10. Each Party shall provide that:

(c) in regard to counterfeit trademarked goods, the simple removal of the trademark unlawfully affixed shall not be sufficient to permit the release of goods into the channels of commerce.

8.07.03.10 Limitations on Liability for Service Providers

The USMFTA should include language relating to limitations on liability for service providers, as detailed in the **USAFTA, Article 17.11, Paragraph 29, Page 17-25 to 17-29.** *(The text of Paragraph 29 was quite lengthy and has not been included with this submission.)*

8.07.03.11 Enforcement of IPR

While Malaysia might be in general compliance with most requirements as found in other FTAs (e.g., Australia and Singapore), there is a critical need to streamline and raise the standards for conducting search and seizure, evidence gathering, and maintaining a proper chain of evidence from collection to storage to the stage of tendering the evidence collected during court proceedings.

AMCHAM and the U.S. Chamber recognize and commend the fact that substantial resources have been invested in conducting numerous enforcement actions, resulting in many of these cases being registered in courts. However, very few criminal cases are prosecuted by Deputy Public Prosecutors from the Attorney General's Chambers who are legally qualified and trained prosecutors. The status quo results in many such cases being discharged or dismissed summarily for various reasons, including grounds of technicality.

AMCHAM and the U.S. Chamber offer the support of a bilateral public-private partnership, including strong industry commitment of resources, to cooperate closely with enforcement authorities to enable them to attain the status of a world class organization by developing a comprehensive program of IPR technical assistance and capacity building including assisting them in establishing standard operating procedures in conducting search and seizure, investigation skills and techniques in gaining, gathering and managing evidence as well as enhancing their prosecution skills and techniques.

It is important to ensure IP cases are prosecuted by Deputy Public Prosecutors of the Attorney General's Chambers or alternatively to establish a prosecution unit comprising legally qualified prosecutors within MDTCA, rather than relying on prosecuting officers who develop their prosecuting skills in an ad hoc and trial-and-error manner or by attending periodic courses.

It is also essential to negotiate a timeline, to ensure the expeditious establishment of the specialized IP courts and that such specialized IP courts must have the jurisdictions to cover both civil and criminal cases and should be expanded throughout Malaysia, that is to say they should not be limited to Kuala Lumpur.

Additional requirements for consideration will be:

(a) the introduction of pre-established and effective deterrent damages in civil proceedings in the event of any enforcement of IPR. The USMFTA should include language similar to that adopted in the USSFTA, Article 16-9, Pragraphs 5, 8-10, among others.

(b) in the case of counterfeit trademarked goods, the simple removal of the trade mark unlawfully affixed shall not be sufficient to permit the release of the goods into the channels of commerce.

An additional requirement will be the limitations in the law regarding the liabilities of service providers for copyright infringement which they do not control or initiate and that take place through systems or networks controlled or operated by them or on their behalf.

AMCHAM and the U.S. Chamber support the introduction of these requirements.

8.07.03.12 <u>Legal Framework</u>

a. Amend and revise the unnecessarily burdensome documentary requirements and method of proving copyright subsistence and ownership under the

existing provision (Section 42) of the Copyright Act 1987.

b. Remove or redress inconsistent and unpredictable requirements made by different courts as to whether a representative of the copyright owner has to be physically present during trial to give evidence on the subsistence and ownership of copyright and the manner in which such evidence could be challenged or rebutted by the defense without having to adduce any evidence to the contrary.

c. Offer support in the form of necessary assistance including a proposed draft incorporating the appropriate wordings and changes to be made to the existing provision, as follows:

Section 42: Affidavit Admissible in Evidence
(proposed language)

1. An Affidavit or statutory declaration by or on behalf of any person claiming to be:

   a. the owner of the copyright in any works eligible for copyright under this Act stating that:

      i. at the time specified therein copyright subsisted in such work;
      ii. he or the person named therein is the owner of the copyright and
      iii. a copy of the work annexed thereto is the true copy thereof; or

   b. the performer in a live performance eligible for performers' right under this Act stating that:

      i. at the time specified therein performers' right subsisted in such live performance;
      ii. he or the person named therein is the performer; and
      iii. a copy of the document annexed thereto is the document which proves

that he or the person named therein performed in the live performance,

shall be admissible in evidence in any proceedings under this Act and shall be conclusive proof of the facts contained therein, until contrary is proved.

2. Any person who is authorized to act on behalf of the owner of the copyright or performer for the purposes of subsection (1) shall be required to produce such authorization in writing.

3. For the purpose of this section and notwithstanding any provision to the contrary in any other written law, any affidavit or statutory declaration made in any proceedings under this Act shall be made and subscribed as follows:

a. in the case of an affidavit,

i. in Malaysia before a Commissioner of Oaths;
ii. in any other part of the world before a notary public, consular officer, or any other persons authorized by law to administer oath.

b. In the case of a statutory declaration,

i. in Malaysia, in accordance with the provisions of the Statutory Declarations Act 1960;
ii. in any other part of the world before a notary public, consular office , or person authorized by law to administer oath.

4. An affidavit or statutory declaration purporting to have affixed, impressed, or subscribed thereto or thereon the seal or signature of any person authorized by subsection (3) to officiate an affidavit or to take declaration may be admitted without proof of the genuineness of the seal or signature or of the official character of the

person or his authority to officiate the affidavit or to take declaration.

8.07.04 **Trade in Goods & Services**

8.07.04.02 Zero-Tariff Commitment for Malaysia

Given Malaysia's interest in expanding the product set included within the ITA, AMCHAM and the U.S. Chamber recommend that the USMFTA include an immediate zero-tariff commitment for all products that make up WCOHC Chapters 84, 85, and 89, but are currently not covered in the ITA.

Both economies have advanced IT and telecommunications sectors, and, in addition to the direct trade and welfare effects of lowering these tariffs, there is likely to be a strong demonstration effect to other regional trading partners engaged in bilateral and multilateral negotiations with either party, e.g. the recently announced US-Korea FTA negotiations, or the Doha Development Round.

8.07.04.03 Background on Services

Malaysia's services accounted for 60.3% of constant-price GDP in 2004. In 2005, this comprised 58% of GDP (according to Bank Negara's annual report issued March 2006), or 50% after government expenditures and employs almost half of the Malaysian workforce. (Statistics/references provided by CompTIA.)

Malaysia's current WTO schedule and its new Doha Round Services (DDR) offer covers only 30% of commitments in all possible sectors in the General Agreement on Trade in Services (GATS). Malaysia submitted its initial DDR services offer only in January 2005, nearly two years past the deadline. The initial offer extends coverage by only 2%, to 32% of all possible sectors. Malaysia's revised offer, submitted in December 2005, has very little new content.

Specifically, Malaysia's WTO commitment on computer-related services (CPC 841-845, 849) Malaysia has committed to full market access and national treatment for all sectors, modes 1-3, with limitations on mode 4, Unbound except as indicated in 1 (a) and (b) and 2 (a) and (c) in the horizontal section

It would be expected that Malaysia would agree to at least a similar commitment in the FTA. AMCHAM and the U.S. Chamber would also recommend similarly comprehensive commitments for Management Consulting Services (CPC 865) and Services Related to Management Consulting Services (CPC 866).

8.08 Pharmaceutical Industry

8.08.01 Introduction

The Pharmaceutical Research and Manufacturers of America (PhRMA), AMCHAM, the U.S. Chamber, and America's innovative life sciences companies welcomed the announcement on March 8, 2006 of President Bush's decision to launch negotiations for a free trade agreement (FTA) with Malaysia.

Although the pharmaceutical market in Malaysia is currently relatively small at USD 430 million (RM 1.59 billion), Malaysia is considered to be one of the leaders in the promotion of life sciences innovation in the region and, as a dynamic member of the ASEAN community, one of the fastest growing economies in Southeast Asia. Malaysia's focus on innovation as a driver of economic growth was highlighted as host of the Second APEC Life Sciences Innovation Forum in Penang in 2004, a meeting that attracted considerable high level participation by industry and top academics involved in world class research and innovation, participation that has continued to this day. Importantly, under Malaysia's leadership that year, the forum finalized the APEC Life Sciences Innovation Strategic Plan, considered by industry as a landmark document that charts the course for innovation well into the future.

We applaud Malaysia's goals to become a hub for world class biotechnology research and health care delivery and look forward to working within the FTA to help Malaysia create the necessary environment for top quality investment to achieve those goals. We also applaud the focus of the Ninth Malaysia Plan (2006-2010) on health promotion, life-long wellness, and disease prevention. Early detection, prevention, and treatment are the hallmarks of our members' research and development efforts. We look forward to working in full partnership with our Malaysian colleagues, as Malaysia seeks to evolve its science and health policies as part of the Ninth Malaysia Plan, and in the future to meet emerging needs and challenges.

PhRMA represents America's leading research-based pharmaceutical and biotechnologies companies. The United States is a global leader in discovering and developing innovative medicines that enable patients to live longer, healthier, and productive lives, and offer new hope to those suffering from life-threatening disease or disability. Last year, PhRMA member companies invested over USD 37 billion (RM 136.9 billion) dollars in advanced biomedical research to understand the underlying causes and pathways of disease, test potential new medicines for safety and clinical efficacy, and refine complex chemical molecules and biotechnology processes to manufacture new medicines.

PhRMA member companies have been conducting clinical research in Malaysia for many years, thus enhancing the capabilities of local medical researchers. However, to date, they have not made significant manufacturing and/or research and development investments.

To support investment that promotes continued advances in life sciences discovery, America's pharmaceutical research companies seek a commercial and regulatory environment that (1) recognizes the value of medical innovation; (2) provides strong protection for intellectual property rights (particularly patents, trademarks, and proprietary data); and (3) ensures timely, transparent, and science-based regulatory policies that accord with common international practices.

While the environment in Malaysia for innovative pharmaceuticals is relatively favorable, there are improvements that need to be made for Malaysia to attract the type of world class investment that would underpin and support the achievement of the country's biotechnology and health care delivery goals and thereby also assure Malaysian citizens of continued timely access to high quality, cost-effective treatment and care.

Specifically, PhRMA and its member companies look forward to working with our government and our colleagues in Malaysia to achieve outcomes in the following areas:

8.08.02 Intellectual Property Rights (IPR) Protection

Enhanced IPR regulatory and legal infrastructure including implementation of data exclusivity, patent term restoration and patent linkage will help encourage the development and promotion of innovative pharmaceuticals and patient access to cutting edge, cost effective treatments. In addition, increasing the penalties on counterfeiting and adulteration and establishing a dedicated IP court will help Malaysia achieve world class status as a hub for biotechnology and health care delivery.

PhRMA supports close coordination between the U.S. and Malaysian governments on the implementation of data exclusivity, patent linkage, patent term restoration and the establishment of IP courts and anti-counterfeit initiatives, including enhanced penalties for offenders and training for regulatory and enforcement officials.

8.08.03 Efficient and Expeditious Regulatory Processes

Early access to new innovative medicines is critical in a world class biotechnology research and health care delivery environment. Although the Client's Charter on the National Pharmaceutical Control Bureau of Malaysia's web site states that the registration timeline for New Chemical Entities is not more than 12 months, in practice it can take up to 24 months. Reducing this delay will enable patients who need the medicines to have early access. PhRMA looks forward to working with USTR, the U.S. Food & Drug Administration (FDA), and the Malaysian regulatory authorities to implement clear, transparent processes that will help expedite registration of innovative medicines.

8.08.04 Transparent, Science-Based Regulatory Standards

Generic and innovative medicines each have their place in a country's health care system. However, the safety, efficacy and quality of generics must be therapeutically equivalent to the original product. This will ensure that the patient's health is not compromised at any time and they will have confidence in their medicine leading to potentially better compliance and health outcomes. While bioequivalence standards and requirements have been introduced, the list of therapeutic areas for which data is required is minimal.

We look forward to working with USTR, FDA and the Malaysian regulatory authorities to build a world class, science-based Malaysian drug regulatory system which can serve as a model for ASEAN and promote the development of a world class life sciences industry in Malaysia.

8.08.05 A Transparent, Consultative Regulatory and Policy Environment

In summary, the research-based pharmaceutical and manufacturing industry looks forward to working with the U.S. and Malaysia towards the successful conclusion of the FTA negotiations. We see significant synergies emerging if the policy and regulatory environment is improved under the FTA and a consultative process established under which our two countries and respective industries can continue to support and promote innovation in the Malaysian health care system. We look forward to an enduring partnership with Malaysia to support patient health and advanced 21st century biomedical discoveries.

9. COMPETITION

9.01 Introduction

AMCHAM and the U.S. Chamber strongly support Malaysia's efforts to develop Competition Policy (CP) and an eventual competition law, and both associations believe that such policies would enhance significantly the country's ability to attract increased levels of American and other foreign direct investment (FDI) in the coming years.

It is critical that a Competition Policy chapter be included in the USMFTA. Failure to do so could undercut the competitiveness of American companies investing in Malaysia, and would likely lead to a domestic regulatory framework which is skewed against foreign investors, in favor of government-linked companies (GLCs), local SMEs, and other local players.

9.02 USMFTA – Implications and Recommendations

MDTCA has assured the industry that development of competition law from its proposed CP passed by Cabinet will take a long time, and that the private sector will be consulted during the process.

AMCHAM and the U.S. Chamber believe that it is critical to include a Competition Policy chapter in the USMFTA, stipulating that Malaysia would need to develop this (perhaps using similar language as was put into the U.S.-Singapore FTA) and which would include the following areas:

1. **The proposed legislation should be de-linked from the Official Secrets Act**, so that the private sector can analyze thoroughly the provisions being considered, and to provide the most appropriate feedback. By keeping the specific provisions of the competition policy secret, the Malaysian government might inadvertently cause legislation to be adopted which is not in the best interests of consumers and businesses, and which would need significant amendments after it has been gazetted.

2. **Public comment period**: If the details of the proposed legislation can be made openly available for public comment, MDTCA should include the information on its web site, so that consumer and associations will have an opportunity to study it, and to make recommendations.

3. The CP should provide a **level playing field for both local and foreign players**. AMCHAM's assessment has been that the CP would be skewed against foreign multinational corporations, and would result in an (even more) inequitable playing field in Malaysia.

4. The CP should contain **minimal government intervention** in the marketplace; market forces and consumer choice should be allowed to prevail.

5. The CP **should have minimal exemptions**. It is believed that the legislation (as being written) could benefit unfairly some government-linked companies and other firms, at the expense of local SMIs/SMEs and international companies. This could detract from foreign investors coming to Malaysia, as they would perceive other countries' markets to be more equitable for conducting their business operations.

AMCHAM and the U.S. Chamber understand and support the need to exclude some critical sectors common to all markets which play a critical function (e.g., utilities, defense/security, etc.), but that industries such as automotive, financial services, and telecommunications – in which there are legitimate foreign players who are operating (or who would like to operate in the market) should not be exempted.

6. The CP should **be the principal act** on consumer protection, anti-monopolistic policy, etc. Other related or existing legislation (e.g., Price Control Act), or legislation which might conflict with the CP, should be repealed. Where such legislation does exist, the CP should have overarching authority.

7. **A Competition Commission should be established** to implement the CP, and to adjudicate where conflicts arise or if parties have questions as to the interpretation of the Act.

8. This Commission **should be independent** from any ministries or agencies, and should **report directly to Prime Minister's Department**.

9. **Firm deadlines** should be put into the USMFTA for when Malaysia would need to develop its CP and by when Cabinet or Parliament would ratify the legislation. This would be consistent with the deadlines put in the U.S.-Singapore FTA chapter on Competition Policy.

10. GOVERNMENT PROCUREMENT

Recognizing that government procurement will be one of the most sensitive issues in the USMFTA negotiations, AMCHAM and the U.S. Chamber understand the sensitivities of this issue, but believe it is still very important to include a chapter on government procurement (GP) in the final agreement.

The American business community's concerns about GP in Malaysia can be broken down into two main areas, as noted below.

a. Transparency
b. Effects on Malaysia-based companies selling to the United States

10.01 **Transparency**

Most countries will have some form of bias or preferential treatment for certain types of companies in government procurement processes. Malaysia's allowing of various types of government tenders to go to qualified bumiputra companies can be seen in a similar light as the U.S. government procurement process, in which certain projects might be allocated for bidders from qualified minority-owned companies, or those companies would get additional "points" when tendering decisions are determined.

AMCHAM and the U.S. Chamber recognize the concerns about Bumi tendering in Malaysia and how this ties into the country's National Economic Policy (NEP) considerations for greater distribution of wealth throughout the economy. However, the key issue of concern to American businesses is on the transparency aspects of how these tenders are awarded.

As with many countries, if Malaysia were to openly state that certain projects were being allocated to qualified bidders from particular ethnic groups or via other criteria, this could be widely understood. However, there have been cases in which the Malaysian government has awarded contracts or shortlisted contractors without having gone through a proper bidding process. There are also instances of government agencies being directed to purchase products through designated local/bumi firms (e.g., Ministry of Finance's directive in October 2005 on "Roadway, Decorative, and Outdoor Lighting Fittings for Government Projects").

Questions have also arisen whether certain projects or tenders are being given out on the basis of political patronage, and not necessarily based on the best-qualified and/or lowest-cost bidder.

Such practices will ultimately lead to the Malaysian government (and taxpayers) paying higher sums for projects which might not deliver the best technologies or solutions, because other qualified companies were not allowed to bid for them, and/or because the cost of the tender might not be solely determined on market forces.

AMCHAM and the U.S. Chamber believe addressing and resolving the transparency questions surrounding the GP process in Malaysia is critical for the future ability of American (and Malaysian) companies to be able to compete on a fair playing field for local government projects.

10.02 **Malaysia-based Companies Selling to the United States**

AMCHAM and the U.S.Chamber believe it is critical for Malaysia to sign onto the WTO's Government Procurement Agreement (GPA). Because Malaysia is not party to this agreement, AMCHAM knows of American companies in Malaysia who are not allowed to sell into the U.S. government procurement channels in Washington, DC. If the USMFTA were passed and Malaysia were not a signatory to the GPA, presumably Malaysian firms would also not be able to sell into U.S. government procurement channels, because the FTA might not be able to contain provisions allowing this.

11. LABOR

11.01 Expatriate Policies

Malaysia's process for allowing of expatriate talent and other skilled foreign workers to reside and work in the country has improved in recent years, but there still exist problems and delays for companies trying to bring in foreign talent into Malaysia:

11.01.01 **FIC**:

Many foreign companies are restricted by the Foreign Investment Committee (FIC) policies, which can mandate everything from bumiputra equity stakes (usually 30%) in foreign investments in Malaysia, to paid-up capital requirements in order for companies to be allowed to bring in expatriates/foreigners.

11.01.02 **Different Ministries / Agencies**

Different Malaysian ministries and agencies have overlapping jurisdictions regarding how expatriate visa applications are handled.

Applicants can apply directly to the Department of Immigration (under Ministry of Home Affairs), where an average expat work permit takes 3-4 months to process. If their companies are looking at special investments under Malaysian government incentives being offered by MIDA or MDC, these agencies can help to facilitate more relaxed numbers of expat worker permits to investors who come under their schemes (and the visa applications in these instances are usually expedited).

Applicants for positions in the financial services sector require approval by Bank Negara and/or the Securities Commission if appropriate.

11.01.03 **Time Delays**

The average expatriate visa application takes 3-4 months to be approved, primarily because the inter-agency committee which meets to review visa applications (there is a separate MDTCA Immigration Committee for FIC-related expat applications) only meets once a month. If applicants do not get their paperwork in at the right time, they would miss having their credentials reviewed at the meeting, and would need to wait another 4-6 weeks before their information would be reviewed and approved.

AMCHAM and the U.S. Chamber would like to see Malaysia's process for allowing foreigners to live and work in the country improved and streamlined, to be more transparent, user-friendly, and timely. Failure to do so will only further serve to drive foreign investment to neighboring countries that have better immigration mechanisms in place.

11.02 Educational Visa Restrictions

Since at least 2001, American scholars and students coming to Malaysia under the Fulbright academic exchange program have been required to secure a visa, called a **Multiple-Entry Professional Visit Pass**, from Malaysia's Immigration Department after their arrival in Malaysia. When proper steps are taken, this visa is not difficult to secure.

However, proper steps **now** for the multiple-entry visa begin before the American scholar or student arrives in Malaysia. Obtaining the correct visa for first entry into Malaysia facilitates the subsequent issuance of the multiple-entry visa. Procedures for securing the proper first-entry visa—and the type of first-entry visa required—have apparently changed in recent years.

A detailed explanation of visa difficulties faced by American scholars and students is summarized below, in a format subdivided by periods when differing procedures were followed.

11.02.01 **Prior to 2001 and through 2003**

It has been a longstanding requirement that before any visa is issued, or the Fulbright scholar/student is officially invited to Malaysia, a local university must agree to host the scholar or student. Through this process, American scholars and students are attached to Malaysian institutions before coming to Malaysia, and – among other things – the host institution acts as the local agent for visa purposes (in addition to any other responsibilities that the host institution might be required to undertake).

From some time before 2001, American scholars and students traveling from the U.S. to Malaysia under the Fulbright program were directed to secure at their point of entry into Malaysia, usually the Kuala Lumpur International Airport, a **Social Visit Pass**. This visa is valid for any American passport holder and is generally used by short-term visitors and tourists. The **Social Visit Pass** is valid for 90 days from the date of entry.

Within that 90-day period, each Fulbright scholar/student's host university presented the passport of the Fulbright scholar/student to the Immigration Department, where the **Social Visit Pass** was replaced with the **Multiple-Entry Professional Visit Pass**.

By virtue of the Immigration Department's continued acceptance of this process, it was presumed that the process was proper and followed policies and/or practices established

by the Department itself. Fulbright scholars and students were instructed in writing to follow the procedures summarized above.

11.02.02 **2003-2004 Transition**

American scholars and students coming to Malaysia during the 2003-2004 grant cycle were the first to encounter difficulties with the system described above.

- For some grantees, the **Multiple-Entry Professional Visit Pass** was issued as in the past.

- Other scholars or host universities were fined because the scholar/student entered the country using the wrong visa (**Social Visit Pass**).

- In a few cases, multiple-entry visas were never obtained because the Fulbright grantees' (a) periods of time in Malaysia were less than 90 days or (b) research plans took them out of Malaysia at intervals of less than 90 days, meaning that the social visit passes in their passports were always current.

11.02.03 **2004 to the Present**

The current set of procedures for Fulbright applicants to enter Malaysia are:

a. Application packages are submitted to the Vice Chancellor's office at the intended host university.

b. Upon completing its internal review processes and agreeing to host a Fulbright scholar or student, the university next presents the application to the Immigration Department.

c. Based on the host university submission, the Immigration Department prepares a letter to the Malaysian Embassy or Consulate in the US (with copy to the host university) authorizing the issuance of a **Single-Entry Professional Visit Pass** for the specified scholar or student.

d. The host university next must forward a copy of the authorization letter directly to the American scholar or student waiting in the United States. Or the host university may send the letter to the U.S. sponsoring organization in Malaysia, to forward it to the scholar or student.

e. Once the American scholar/student receives the copy of the authorization letter, it is attached to the visa application submitted to the Malaysian Embassy in Washington, DC, or to one of the Malaysian consulates located in other cities.

f. The Malaysian Embassy or Consulate must match the copy of the authorization letter as attached to the visa application with the original sent from the Immigration Department before proceeding.

g. Following instructions contained in the letter, the Malaysian Embassy in Washington or the Consulate where application has been made inserts a **Single-Entry Professional Visit Pass** in the passport of the Fulbright scholar or student.

h. The Fulbrighter is then ready to travel to Malaysia.

11.02.04 **Problem Definition**

While (in theory) there should be little reason why this system will not work, in practice it has worked only irregularly. For example, industry data indicates that only the University of Malaya and Universiti Sains Malaysia have been able to manage this academic exchange system.

Overall, however, the system has worked for only **eight of a total of 26** American Fulbright scholars or students in the past two years. Under the best of circumstances, the process is cumbersome and time consuming. Some of the delay points have been:

a. There is confusion, as the Immigration Department website, for example, states that "**No visa is required for U.S.A. citizens visiting Malaysia for social, business or academic purposes (except for employment)**."

b. Fines for entering Malaysia on the wrong visa have increased to approximately RM500 (USD 135), with additional amounts for dependents.

c. Interdepartmental communications at the host university, among the Vice Chancellor (VC)'s office, the appropriate academic unit including the appropriate professor, and the International Affairs Office, are slow and frequently break down.

d. Communication between the host university (generally, the International Affairs Office) and the Immigration Department is slow or breaks down. At some universities, it just never happens.

e. Return communications from Immigration to the host university are not timely and sometimes does not happen at all, or the host university neglects to follow-up on its submission.

f. The Immigration Department letter may not be received by the Malaysian Embassy or Consulate in the United States.

g. The Malaysian Embassy or Consulate may not be able to match the application copy of the authorization letter with original provided by the Immigration Department.

h. The Immigration Department letter, although copied to the host university, may not be received by the Fulbright grantee waiting in the United States.

i. The Malaysian Embassy or Consulates in the U.S. are not informed of the substance of the Immigration Department letter or the procedures to be followed for issuing the **Single-Entry professional Visit Pass**.

j. Cost additionally has been an issue pertaining to both the amount and as to questions of which institution (the host university in Malaysia, or the American organizations in Malaysia which help facilitate that scholars' visits) should be responsible for payment.

Perhaps the most pervasive culprit is the press of time. There are too many bureaucratic steps in this process to allow for a reasonable likelihood that visas can be secured within the window of time available from the point of Fulbright approval of a grantee to the intended start-dates for most of the Fulbright grantees coming to Malaysia.

11.02.05 **Recommendations**

The American educational industry would like to see significant improvements made in the Malaysian educational/immigration process that would make it much smoother for Fulbright scholars and academics to come to Malaysia for research and study.

Malaysian government leaders, local and foreign business executives, and others recognize the problem that many Malaysian professionals entering the workforce are not prepared for the "real world," as the courses they have taken (e.g., engineering) might be outdated and/or are not relevant to what is happening in business. There is also a significant lack of qualified teachers in the country.

One proposal to address these problems has been through allowing Malaysian educators to be seconded to industry, in order to get practical training and experience with the latest industry trends. It would seem that making it easier for American academics to enter Malaysia would also contribute to expanding and upgrading the knowledge sharing that could be communicated to Malaysian students and academics. Through allowing Fulbrighters and others to enter and work in Malaysia more easily, the country would be developing a strong foundation for educational and intellectual capital, which would serve well to further the HR capital in Malaysia, and encourage the best and brightest from the United States to study and teach on a temporary basis in the country.

11.03 Professional Visit Pass (PVP)

11.03.01 **Issues**

Foreign talent seeking to enter Malaysia for temporary business assignments (e.g., computer engineers coming to troubleshoot network problems at a company in Malaysia, business consultants entering the country to assist their clients on 1-2 day projects, etc.) must apply for a Professional Visit Pass (PVP), in order to be allowed to work in the country on a temporary basis, even if this is only an internal project (i.e., engineer from XYZ company comes to Malaysia to assist the KL office with an internal project).

Companies have complained that the amount of time required for obtaining a PVP, which can sometimes take several weeks or longer, makes it unwieldy for firms to apply for PVPs, particularly if their consultants or foreign staff are needed urgently.

Some companies prefer not to go through the hassle and time delays, and have their staff or consultants come to Malaysia on a Social Visit Pass (SVP – a tourism/visitor visa). However, this is not legal, and can cause problems for the company and their workers if they are caught.

Where PVP applicants are from particular, "restricted" countries (e.g., China, India, Vietnam), the process of obtaining a PVP is longer and has more restrictions, thus making it very difficult for many AMCHAM members, including electronic companies in Penang who are among the largest foreign investors in the country, to bring in talent temporarily.

11.03.02 **Recommendations**

1. Enhance the PVP application process, by allowing Malaysian state immigration offices (e.g., those in Penang and/or Alor Setar) to approve PVPs for citizens of restricted countries (e.g., China, Vietnam, etc.) Currently, PVPs for citizens from these countries can only be approved by the Department of Immigration's headquarters in Putrajaya.

2. Enhance the PVP application process by reducing the thru-put-time for PVP approval for citizens of restricted countries (China, Vietnam etc), from the current 30 working days to 14 working days or less.

12. DISPUTE SETTLEMENT

AMCHAM and the U.S. Chamber support including a chapter in the USMFTA on Dispute Settlement – i.e., establishment of a joint committee and other administrative mechanisms and procedures for reviewing the USMFTA on an annual basis, and for resolving any disputes arising from lack of implementation of various aspects of the FTA by either party.

A good model to use in this respect would be Chapter 20, "Administration and Dispute Settlement" from the USSFTA. It is important that both parties agree on annual (or other regularly-scheduled) meetings to review the USMFTA and to discuss any disputes or other disagreements.

13. AGRICULTURE / BIOTECHNOLOGY

Malaysia has significant influence among developing and Islamic nations, and recently has publicly promoted the benefits of biotechnology and its associated industries. As a result, AMCHAM, the U.S. Chamber, and their respective members view negotiations toward a U.S.-Malaysia Free Trade Agreement as an important opportunity to encourage practical, science-based, and transparent biotechnology trade processes in Malaysia as well as an opportunity to positively influence global biotechnology trade.

13.01 Access

The FTA should ultimately ensure access and non-discrimination for U.S. business ventures in Malaysia. More specifically, efforts should be made in the Agreement to improve access to the Malaysian market for the agricultural biotech industry and its products.

The Government of Malaysia should adopt and implement reasonable rules for imports of products of agricultural biotechnology consistent, with a practical science-based approach and generally recognized international trade standards. Malaysia's import requirements should not discriminate against products of agricultural biotechnology, whether seed or grain or foodstuffs, and should be no more trade-restrictive than required for appropriate sanitary or phytosanitary (SPS) protection, consistent with the disciplines of World Trade Organization agreements. SPS issues should not be used as non-tariff barriers to trade.

13.02 Benefit Sharing and Disclosure

Regarding the subject of requiring special disclosure of the origin, source, or legal provenance of genetic resources and associated traditional knowledge in patent applications, the international agricultural biotechnology industry has fully supported the aims of the United Nations Environmental Program (UNEP) Convention on Biodiversity (CBD) in recognizing the sovereign rights of states to control access to their own genetic resources and has called for the fair and equitable sharing of benefits arising out of the utilization of genetic resources.

However, special disclosure requirements would be very difficult to practically meet, would allow nations to deny patent applications on grounds unrelated to the pure merits of the invention, and would lead to unjustified attacks on company patents. In fact, mandatory patent disclosure has been demonstrated to be counter-productive to the provider country in that it increases uncertainty and thereby discourages Foreign Direct Investment.

The biotechnology industry continues to address the disclosure issue in a number of international fora. AMCHAM and the U.S. Chamber suggest that the debate concerning disclosure should most properly occur in the World Intellectual Property Organization (WIPO), rather than in a bilateral FTA.

13.03 Biosafety Issues

Malaysia should be complimented on its active participation in the CBD and Biosafety Protocol (BSP) processes, and specifically for its strong support of the Biosafety Clearing House (BCH).

As an important information sharing tool, the BCH facilitates transparency in the trade of genetically modified organisms (GMO). The U.S. should encourage Malaysia to continue its positive role in the CBD and BSP, and to ensure that Malaysia's regulations for the transboundary handling, transport, packaging, and identification of genetically modified products are not restrictive beyond the guidance of BSP Article 18. Further, the U.S. should strive to gain agreement with Malaysia on a practical science-based adventitious presence threshold to facilitate a predictable and reasonable business environment for trade and development.

13.04 Counterfeiting and Piracy

Malaysia is commended for its recent accomplishment in combating the theft, piracy, and illegal commercialization of foreign technology. The U.S. should urge Malaysia to specifically focus on improving enforcement efforts against counterfeiting and piracy. Malaysia must also emphasize coordination between health, environment, and patent authorities to prevent patent-infringing products and technologies that threaten social health and the environment.

13.05 Intellectual Property

Malaysia should be commended for its recent firm efforts toward the establishment of intellectual property (IP) courts and for IP education and training within the government. However, the Malaysian government must place a stronger emphasis on enforcement and on imposing stricter IP penalties for violators.

Malaysia should press for cooperation and simplified patent registration procedures through the development of regional patenting arrangements and agreements. As a WTO member, Malaysia must meet its obligations under TRIPS Agreement Article 39.3 to provide a period of data exclusivity for safety and efficacy studies submitted by biotech industries to obtain regulatory approval.

13.06 International Policy

Agricultural biotechnology issues are fundamentally linked to the functions of several Malaysian government ministries (i.e., Agriculture and Agro-Based Industry; Finance; Foreign; Health; International Trade and Industry; Natural Resources and the Environment (MONRE); Science, Technology, and Innovations). Often, the positions advocated by representatives of MONRE in international environmental fora, such as the CBD and BSP, conflict with the positions of other Malaysian governmental ministries and the public statements of Malaysian senior governmental leaders.

Malaysia is very influential, not only regionally in ASEAN, but also globally as an active and vocal member of the G77 and China. Similarly, Malaysia is clearly a leader among developing, "megadiverse," and Islamic nations. As a result, the inconsistencies of Malaysia's international biotechnology policy positions have detrimental effects for the advancement of biotechnology domestically, relations with their trade partners, and negotiations in international fora.

On April 28, 2005, the government of Malaysia launched a National Biotechnology Policy and formed the Malaysian Biotechnology Corporation (MBC) as a one-stop agency tasked with spearheading the development of the biotechnology sector. The FTA should strive to clarify the roles and responsibilities for biotechnology policy within the Malaysian government, gain consistency in Malaysia's international biotechnology trade positions, and confirm the MBC as the government's lead agency for biotechnology policy.

13.07 Labeling

Malaysia's impending Biosafety Act would require mandatory labeling of food products produced with biotech ingredients. This regulatory change would considerably disrupt U.S. agricultural exports to Malaysia and should be firmly opposed by the U.S. in the FTA negotiations. The cost of complying with labeling and traceability rules such as requiring farmers to segregate seed, crops, and feed and use complex record keeping systems would raise prices and consequently make U.S. producers of corn, soybeans, and processed products less competitive.

Perhaps more significant is that mandatory labeling of biotech foods will often mislead consumers by implying biotech foods are either different from conventional foods or present a potential risk. Malaysian consumers would likely perceive labels as health warnings and demand products free from labeling. Food companies and feed compounders would be forced to respond to this perceived threat by reformulating their products or seeking new sources of supply of food products without biotech ingredients.

13.08 Legislation

AMCHAM's and the U.S. Chamber's members desire legislation in Malaysia that promotes a transparent and predictable business environment. Similarly, we desire aggressive anti-piracy legislation, backed with strong enforcement measures. We ask the government of Malaysia to review and immediately move forward obstructed biotechnology legislation, and to ensure that future biotechnology legislation is crafted via practical science-based discussions with appropriate governmental ministries and organizations. The Biotechnology Bill should progress to law with disciplined regulation requirements for biotech imports and without mandating the labeling of biotech food.

13.09 Liability

In the continuing CBD discussions related to liability, the MONRE has promoted an expansive definition of "damage" and called for a strict (not fault-based) international liability regime

relative to biosafety. Such proposals would impose extensive obligations of liability and redress. AMCHAM and the U.S. Chamber suggest that the U.S. government oppose such suggestions concerning liability from Malaysia, because it would inhibit trade in biotechnology agricultural products.

13.10 Regulatory

AMCHAM and the U.S. Chamber desire a transparent, practical, and science-based regulatory structure consistent with WTO disciplines for timely approvals of agricultural biotech products in Malaysia. Malaysia should develop a biotech regulatory regime that does not disproportionately favor domestically produced products.

With full respect for Malaysia's sovereign right to control access to its genetic resources, we suggest Malaysia consider the "mutual recognition" of biotech products already approved in other countries or in international testing organizations for acceptance in the Malaysian market. Malaysia should ensure that current biotech crop registrations do not expire before any potential new regulations are established.

Finally, the U.S. should demand Malaysia consistently apply transparent and science based sanitary and phytosanitary standards.

14. ENVIRONMENT

AMCHAM and the U.S. Chamber would like to ensure that the Malaysian government does not impede the development of environmental preferred products, and thus should **eliminate any duties from the import of poly lactic acid (PLA)** into Malaysia.

15. GOODS

15.01 Market Access Issues

15.01.01 Coal

Malaysia is looking to bring in more coal-powered plants in recent years. Because Tenaga National, Malaysia's state-owned power company, has a monopoly over coal imports, this is causing concerns among American businesses, particularly those who could import coal into Malaysia, but are prevented from doing so by the current arrangements.

15.01.02 Steel

AMCHAM and the U.S. Chamber would like to see the process for approving and issuing import licenses (i.e., approved permits) for goods, particularly for steel, to be less cumbersome, more transparent (and eventually that these import licenses would no longer be needed). Steel falls under the monopoly of a particular company in Malaysia, which can result in difficulties and lack of transparency for American and other foreign companies trying to import steel into Malaysia.