

Thailand-US FTA:  
A Roadmap to Negotiations

a service of  
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## Executive Summary

The politicization of the U.S. trade policy process regarding free trade agreements has created a complex landscape requiring careful navigation by U.S. trading partners. This report provides a comprehensive analysis of contemporary U.S. trade policy and of obstacles and opportunities facing Thailand.

Our approach includes sector-specific analyses of trade policies, regulations and laws, as well as emerging legislation influencing trade negotiations. Throughout the course of this report, comparative analyses of U.S. negotiating positions, objectives and achievements in the NAFTA, the recent FTAs with Chile and Singapore, and developments in the current negotiation of a U.S.- Central American Free Trade Agreement (CAFTA) are presented to chart the evolution of U.S. trade disciplines as they impact new negotiations. We've taken care to devote special attention to those sectors that would be highly sensitive in the event of an FTA negotiation between Thailand and the United States.

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## I. Executive and Legislative Branch Lobbying Program

This section provides a detailed review of attendant policy matters that impact and influence the U.S. FTA decision process. When pursuing an FTA with the United States, Thai leaders must remain cognizant at all times not to focus solely on matters of trade policy. Thailand should attend carefully to the much broader foreign policy platform to which the FTA decision-making process is now subject. Thailand should consider its overall relationship with the United States, improving weaknesses and emphasizing strengths, to generate the political support necessary for a U.S. commitment on an FTA. This section outlines the political context of U.S. trade policy and the links to broad foreign policy concerns, provides an overview of Congressional and Industry lobbying requirements, and lays out a program of advocacy for Thai officials to pursue through the first quarter of 2004.

### **The Outlook for October - Possible Outcomes at APEC**

Tasked specifically with examining the likelihood of an FTA announcement at the October APEC Leaders' Meeting, we've identified the following potential scenarios and their likelihood.

<b>Possible APEC Outcomes</b>	<b>% Chance</b>
Formal announcement that FTA negotiations will begin in 2004.	35%
Statement that capitals will open negotiations by 2005, if progress made on select issues.	35%
Statement that leaders wish to pursue an FTA, but by an unspecified future date.	25%
No reference to a Free Trade Agreement in bilateral ministerial or leaders' statements.	5%

A formal announcement of an intention to launch negotiations in the near term remains possible, given the myriad pressures upon the US Administration for a successful APEC summit in October. Given competing pressures on US policymakers and the impact of varied political and policy concerns upon the FTA process, however, our analysis concludes that the US will commit to the idea of a Thai-US FTA at APEC, without committing to a launch by a date certain.. The influences dictating such a course of action are outlined throughout this section. It is possible that Thai leaders could motivate the necessary political capital in Washington to secure a formal announcement at the APEC Leaders' meeting in October. Such a course of action, however, would require the mobilization of considerable resources. The more likely scenario, as indicated above and what this analysis is designed to plan toward, is the postponement of a definitive announcement until the winter months or the first quarter of 2004. We reach this conclusion given the acute politicization of the US policy process and the current state of the overall bilateral Thai-US relationship.

## **The Politicization of the Trade Policy Process**

The U.S. policy process for the consideration and approval of candidate countries for free trade agreements (FTA) is complex and extremely politicized. Although the process is nominally chaired by the Office of the United States Trade Representative (USTR), USTR's autonomy on FTA policy and decisions has been eroded in recent years due to the rise of national security and counter-terrorism concerns. Trade policy, once the sole realm of the USTR, is now an important tool of the United States' broader foreign policy mechanism. Due to this new operating context, trade policy is highly subject to political pressures from within the interagency community of the Executive Branch of government, from the Congress, and from organized industrial lobbies.

## **Trade Policy Subcommittee and Trade Policy Review Group**

The U.S. Trade Policy Subcommittee (TPSC), is a statutorily mandated body consisting of staff-level officials from 19 U.S. government agencies.<sup>1</sup> The TPSC reviews trade policy recommendations and action items put into play by USTR. Since September 11, the National Security Council, Treasury Department, State Department, and Defense have assumed increased weight in the staff subcommittee deliberations over policy. With regard to FTA policy, interagency negotiations have centered around anchoring decisions on trade to the primary foreign policy considerations on security issues.

The Trade Policy Review Group (TPRG) consists of Deputy USTR and Under Secretaries from the TPSC member agencies. TPRG members meet on an *ad hoc* basis to resolve policy stalemates referred upward from the TPSC. Politically sensitive issues such as trade sanctions on Burma, WTO cases against the EU, and FTA candidates are all recent examples of TPRG intervention. Each of these cases, of course, were further referred to a Deputies Committee chaired by the NSC, consisting of Deputy Secretaries from Cabinet-level agencies. In cases of extreme necessity, a "Principals" meeting consisting of relevant Cabinet secretaries, minus the President, would meet to resolve policy disputes. For example, in the recently concluded FTA with Singapore, the decision to include capital control language requested by Treasury in the final treaty text was decided by a rump group of principals including the USTR, and the Secretaries of State and Treasury.

Prior to September 11, the TPSC/TPRG processes were relatively smooth. The sea change in U.S. foreign policy caused by the attack in 2001 should not be underestimated as the primary mover of foreign economic policy debates. Policy linkage between security and trade is now a permanent feature of policy considerations.

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<sup>1</sup> TPSC Members: USTR, National Security Council, State Department, Treasury Department, Commerce Department, Defense Department, Agriculture, EPA, Council of Economic Advisors, White House Office of Management and Budget, Health and Human Services, Department of Justice, Department of Interior, US Patent & Trademark Office, Department of Energy, FDA, USITC (non-voting), USAID, Department of Labor

## **Recent Examples of Foreign Policy Issue Linkage and U.S. FTA Decisions**

Prospective FTA candidate countries are encouraged to view trade policy in the context of America's new security paradigm. Careful attention to relationships with industry, Capitol Hill and influential Executive Branch players is imperative throughout the full course of pre-FTA diplomacy, agreement negotiation, conclusion and implementation. The single worst mistake a candidate country can make is to assume an FTA negotiation with the U.S. will be a straightforward technocratic exercise.

To illustrate how other areas of foreign policy can and do influence U.S. trade policy decisions, we offer two recent examples of Egypt and Bahrain. In June, Egypt shared the common public assumption that it was "next in line" for a U.S. commitment on an FTA. Egyptian officials believed a launch announcement was imminent in the run up to the World Economic Forum hosted by Jordan in June. At the Forum meetings, however, USTR Zoellick castigated the Egyptians for renegeing on promised support regarding the EU biotechnology moratorium, and pushed Egypt from the list of FTA candidates. The move was also interpreted by many analysts as a U.S. reaction to a perceived lack of vocal support by Cairo for the U.S.-led Middle East peace process.

On the other hand is the case of Bahrain. Before the Iraq War, Bahrain was widely perceived as trailing FTA candidate. The Bahrainis, however, shrewdly parlayed their contributions to the Iraq War and war on terrorism into an FTA announcement in early August. In particular, Bahrain developed its positive relationship with the U.S. 5<sup>th</sup> Fleet and the Navy into strong Pentagon support for a U.S.-Bahrain FTA. In interagency debates, DoD and the State Department marshaled the support necessary to advance Bahrain's case before countries with arguably stronger trade relationships with the United States.

If nothing more, the cases of Bahrain and Egypt should make clear that free trade agreement policy is no longer a simple matter of progress on a host of bilateral trade issues. We can also look at New Zealand's decade-long failure to land an FTA with the United States. Despite ongoing U.S. negotiations with Australia for an FTA, New Zealand remains shut out of the deal due to a longstanding rift with the United States over visitation and hosting rights for nuclear-powered vessels of the United States Navy. Pentagon mistrust of New Zealand regarding regional security and power projection has held sway over all other opinions in three consecutive U.S. Administrations.

Given these examples, it should be clear that -- Thailand's progress on the current TIFA notwithstanding -- there is no guarantee that an FTA announcement will be forthcoming at the APEC Leaders' meeting in October. Much depends on the public and private perception of Thailand as a leading U.S. ally in Southeast Asia. Thailand should launch a number of diplomatic initiatives to secure its reputation within the Bush Administration and with the U.S. public at large from October, 2003, and continuing through the course of potential negotiations.

Much work must take place behind the scenes in Washington, as illustrated by the examples above, the decision-making process is no longer the direct purview of USTR Zoellick. The

involvement of multiple U.S. agencies and the primacy of other foreign policy issues in the FTA process indicates that the Thai Commerce Ministry must be able to draw readily upon the support of the Thai Ministry of Foreign Affairs, Ministry of Defense and the power of the Office of the Prime Minister to take a coordinated approach to lobbying the U.S. government. As the Thai Commerce Ministry undertakes its own advocacy efforts going forward, officials must at all times demonstrate their own sensitivity to the interdisciplinary issues that form the political context of the FTA process. This applies to interactions with members of the U.S. Administration, and the Congress, as well as industry and the media.

### **U.S. Security Concerns and Thailand's FTA Objective**

A chief concern facing the Thai Commerce Ministry is the state of affairs of the Thai-US security relationship. Despite quiet cooperation on counter-terrorism issues since 9/11 and the high profile arrest of Indonesian Al Qaeda figure Hambali in Thailand in August by Thai authorities, the U.S. defense and foreign policy establishment remain suspicious of Thai motives and actions.

#### *Regional Defense Outline*

From a strategic security perspective, both Thailand the U.S. enjoy an overarching mutual interest in a military-to-military relationship that addresses the rise of Chinese power. Thailand requires U.S. support to counterbalance China in Southeast Asia region, and on a tactical level to continue supplying arms and training. The U.S. values Thailand's strategic position to provide power projection platforms to contain Chinese militancy throughout the broader East Asia and Pacific theater of operations, and tactically in terms of an anchor to mainland Southeast Asia. The global security dilemma confronting the United States since 9/11, however, has caused all security relationships to be re-evaluated in a new light.

#### *Explaining the Linkage Between Defense and Trade*

It is essential that senior Thai leaders recognize and acknowledge the fact that the Bush Administration maintains a literal "scorecard" evaluating the support of countries of interest regarding the war in Iraq and the broader war on terrorism. This scorecard is carefully measured when determining aid, assistance and beneficial economic arrangements. This is particularly true of FTA policy. Every expression of support, every instance of shared intelligence and law enforcement cooperation, every negative opinion piece or editorial in the international and US media, every speech at the UN General Assembly or relevant international organization, is contributed to a running tally kept by the Pentagon and White House on how much countries are perceived to be, in the words of President Bush, "with us or against us".

The argument to extend an FTA to a country becomes easier for its advocates at USTR and the State and Commerce Departments -- not to mention within the Congress -- to make in this arena if the nation in question can boast a string of impressive positive accomplishments to cite and an absence of negatives that detract from the overall reputation of the country. Unfortunately for Bangkok, Thailand's reputation still suffers in the Pentagon over the Thai Cabinet's statement following 9/11 that in a U.S. war in Afghanistan, Thailand would remain neutral. The fact that this was a slightly misleading statement (the Cabinet meant that in the absence of evidence of

Afghanistan's wrongdoing, Thailand would reserve judgment on supporting the U.S.) and the fact that the Cabinet withdrew the statement a day later in favor of an unqualified expression of support have not shaken deeply-held convictions that Thailand is a "fair-weather friend" to the United States.

Thailand's FTA objective will similarly be harmed by misperceptions within several Administration agencies that the Thai Government is engaged in a dangerous effort to develop a Mahathir-like role in the region, and that the Ministry of Foreign Affairs has possibly endangered U.S. regional interests through efforts to engage in statecraft playing China, Japan, India, and the U.S. off one another. Finally, Thailand's decades-old opposition to having U.S. ships or troops stationed on its soil -- admittedly a hangover from the dreadful decision to launch the Mayaguez rescue mission from Thailand without informing the Thais first -- continues to frustrate U.S. security planners. This reluctance also provides Thailand's immediate competitors such as Singapore and the Philippines ample space to carve out special roles as the United States' primary military allies in Southeast Asia.

According to U.S. officials, Thailand's refrain since 9/11 when the United States has asked for support has been that Bangkok "can do more if it can say less", preferring quiet cooperation on the margins rather than public pronouncements of support. This very approach, however, is contra-indicated when working with an Administration so highly sensitive to the public appearance -- as well as actions -- of purported allies. Furthermore, the White House perceives the Thai Administration as a powerful national government with an enviably large popular mandate that suffers no perceivable threat to its continued leadership. Therefore, the White House would very much prefer vocal leadership in the manner of Philippine President Arroyo, who is consistently praised by White House officials. Senior U.S. officials are quick to note that, in contrast to the Thai Administration, royal interests have recognized publicly that -- despite initial protests from some of the Thai public -- the U.S. remains a more constant friend and ally to Thailand than most other countries throughout East Asia. If the Thai Government can take public steps to affirm the Thai-US alliance, then Thailand's reputation in Washington will be immeasurably strengthened.

Thailand's case as a vital ally remains a good one. From the U.S. perspective, the required "fixes" appear straightforward and simple. The Commerce Ministry, however, is no doubt aware that the internal Thai position on these matters is not nearly as clear cut as perceived in

#### *Defense Cooperation Options Menu*

Thailand's case as a vital ally remains a good one. From the U.S. perspective, the required "fixes" appear straightforward and simple. The Commerce Ministry, however, is no doubt aware that the internal Thai position on these matters is not nearly as clear cut as perceived in Washington. Nonetheless, the following list of options for Thailand to pursue to bolster the security relationship has been prepared through extensive contact with U.S. officials in the foreign policy community. Taken as a whole or selectively, actions in accordance with these recommendations would assist Thailand in its FTA bid.



### **Security Recommendations**

- Aggressively back US proposed UN Security Council resolutions calling for the deployment of an international force in Iraq. Initial deployment of some 443 troops to southern Iraq is a positive development, and should be publicized appropriately.
- Invite senior USG officials to Thailand to discuss practical ways for Thailand to contribute more to the SE Asian theater in the war on terrorism. Follow through on the recommendations immediately.
- Make public statements of support for the U.S. missions in Iraq and Afghanistan and call on other countries to do the same. Publicly acknowledge the benevolent purpose of the U.S. missions to Iraq and Afghanistan. Publicly praise and acknowledge the contributions of other countries who have sent troops.
- Send material support for the reconstruction of Iraq.
- Sign and ratify the remaining counter-terrorism conventions.
- Begin discussions at senior military levels of Thailand's desire to play a role in the future security and stability of Southeast Asia in close cooperation with its ally, the United States.
- Make statements acknowledging the alliance relationship with the U.S. frequently and publicly, without the qualifiers that have often modified such statements in the past.
- The above options should be undertaken without resort to accompanying phraseology that has the effect of insulting the United States, such as "in consultation with the UN" or "in accordance with UN resolutions". Thailand should make such efforts as an expression of the enduring strength of the Thai-US alliance and on their merits from a defense/security perspective

### **The Question of Burma (Myanmar)**

Thailand will face longstanding Congressional concerns regarding Thai policy on Burma. Leading senators, including Senator Feinstein of California and Senator McConnell of Kentucky, have invested substantial amounts of political capital in seeking democratic reform in Burma. In the Burma context, Thailand is not viewed in a favorable light on Capitol Hill. Thai reluctance to join the EU, U.S. and Japan to pressure Burma for reform will increasingly make it difficult for erstwhile Thai supporters in Washington to marshal a broad alliance for an FTA.

The current hunger strike by Aung San Suu Kyi serves to highlight the growing tensions over Thailand's role on Burma. Recent Thai public statements echoing official Burmese denials of the hunger strike not only contradict U.S. intelligence reporting, but also place Thailand as the chief defender of a regime that is universally loathed by the international community. Senior Thai leaders should realize that actions on Burma will impact decision-making in Washington. Lobbying efforts should necessarily anticipate this aspect of the U.S.-Thai relationship.

### **Industry Relations and Access**

It should come as no surprise that, given the substantial amount of U.S. foreign investment, U.S. exports and foreign market operations, the choice of FTA candidates is as important to U.S. industry and agricultural lobbies as is the actual negotiation of preferred economic outcomes. Industry plays a substantial role in the formulation of U.S. negotiating goals for each FTA negotiation, through an exhaustive and transparent outreach process involving formal trade

policy advisory committees that consult with USTR. External to these statutorily mandated bodies, industrial lobbies and trade associations aggressively lobby both Congress and the USTR throughout the negotiating process in order to achieve substantive market access goals. U.S. industry will pursue specific trade policy goals with the same zeal normally reserved for domestic tax and corporate governance issues.

### **Interagency Relations During Course of FTA Negotiations**

Despite the successful conclusion of two major FTA's with Chile and Singapore, U.S. interagency relations during the course of a given negotiation can remain fluid and dynamic. Industry, Congress and agency priorities can change during ongoing negotiations, forcing continued recourse to the TPSC and TPRG processes to resolve ongoing disputes. These disputes, such as policy battles over investment and competition texts in the Singapore and Chile negotiations, may frequently retard the overall progress of negotiations, but can often be ameliorated through Congressional pressure created by advocates for the agreement..

## Congressional and Executive Branch Lobbying Matrices

### **Congressional Leverage in Brief**

Congressional oversight of the trade policy process was strengthened by the landmark passage of Trade Promotion Authority in 2002. The House Ways and Means and Senate Finance Committees received greater latitude to inspect and inform the process of U.S. trade policy formulation. In particular, Trade Promotion Authority created a new Congressional Oversight Group (COG) on U.S. trade agreements. The COG's statutory powers have served to focus Congressional scrutiny on sensitive issue areas and to increase consultation between the U.S. Trade Representative and the Congress regarding the consideration of new FTA candidates, the prosecution of particular trade negotiations, and the implementation and management of completed FTAs.

This reality increases the vulnerability of the USTR to Congressional influence, with the net result that policy dialogues now include the need to rationalize additional, and often powerful, perspectives from Capitol Hill. The articulation of trade policy linkages to broader foreign policy goals also creates insertion points for the foreign affairs committees of both chambers of the legislature.

Many opportunities exist for Commerce Minister Adisai and other Thai leaders to engage in personal diplomatic efforts with key Congressional figures and cabinet members. We recommend multiple personal missions to Washington throughout the Fall and Spring to cultivate relationships with a core group of Senators, Representatives and Administration leaders. USTR Zoellick, in particular, would welcome an overture by Commerce Minister Adisai to help shoulder the burden of Congressional lobbying. If Thai efforts can develop a ready-made group of Congressional advocates for an FTA, USTR Zoellick will be able to preserve political capital to press Thailand's case to a greater extent with reluctant members of the Administration, and will enjoy greater leverage over the TPA Congressional Oversight Group. A Thai bid to work with USTR regarding Congress will be highly appreciated.

The Commerce Ministry should anticipate the engagement of the Ministry of Foreign Affairs in this process as well to gain the firm support of the departments of Defense, State, Treasury and the National Security Council. As demonstrated above, MFA and MoD efforts will be necessary to alleviate foreign policy and security-related concerns. As with the Congress, USTR Zoellick will welcome such high-level engagement, and will view these efforts at helping his own work to build a coalition of political support for an FTA.

**Congressional Outreach Timing and Matrix**

These charts focus on the “who” and “why” of a core group of constituents necessary to develop broad support for a Thai-US FTA. This core, once established, can then draw more members of Congress into its ranks to build a legitimate “Thai Caucus”, with permanent status on Capitol Hill, forming a ready vehicle for legislation supporting, passing and implementing a Thai-US FTA.

For the greatest positive effect, Thailand should begin planning lobbying missions and engage its Embassy staff to prepare the ground for sustained advocacy efforts that anticipate and complement the FTA process mandated by Trade Promotion Authority. Significant efforts will need to be made in October and November in anticipation of a formal notification of Congress by USTR in late 2003. The 90 day window opened by such notification should then be utilized again by Thai officials for repeat visits to draw upon relationships made in the first rounds of Autumn lobbying.

The following charts present:

- Recommended timeline for lobbying through the 1<sup>st</sup> quarter of 2004.
- Identification of core group of US Senators
- Identification of core group of US House Representatives
- Identification of core group of Administration figures

**Recommended Lobbying Timeline**

<u>Dates</u>	<u>Key Thai Participants or APEC Venue</u>	<u>Target Meetings &amp; Objectives</u>
October 1-10	Minister Adisai, MFA PermSec Dej Bunnag, Ambassador Sakthip, Embassy officials from MOC and MFA	<ul style="list-style-type: none"> <li>• USTR, State, NSC, Commerce core group</li> <li>• Introductory courtesy calls on Senate &amp; House core group - establish interest and support for FTA in terms over overall US-Thai alliance relationship</li> <li>• Media roundtable on message supporting APEC and introducing FTA</li> <li>• Meetings with US-ASEAN</li> </ul>

		Business Council leaders on developing parallel industry coalition (could be done in Thailand during APEC SOM/Ministerial)
October 14-18	Final APEC SOM and Ministerial	Seek and secure USTR and State Dept. support for forward leaning, indicative announcement at Leaders' meeting. Secure bilateral Ministers' statement pointing toward FTA as desirable goal.
October 20-21	APEC Leaders' Meeting	Secure POTUS statement, at minimum embracing FTA as a bilateral goal.
October 27-31	Ambassador Sakthip & staff	<ul style="list-style-type: none"> <li>• Development and hand delivery of letter from Prime Minister Thaksin to Congressional officials reporting on success of APEC, thanking for expressions of support on FTA, and outlining a call for collaborative approach to the Administration</li> </ul>
November 3-7	Minister Adisai; MFA and Embassy officials as necessary	<ul style="list-style-type: none"> <li>• US-ASEAN industry event on Capitol Hill recognizing APEC success; industry letter to Administration supporting FTA</li> <li>• Courtesy call DUSTR Shiner updating lobbying efforts</li> <li>• Small group meetings with Congressional core groups, goal is Congressional letter to Administration calling for FTA</li> <li>• Placement of opinion piece in major US print media outlet by Minister Adisai advocating FTA</li> </ul>
December 1-5	As required.	Return trips in December may be necessary by Thai officials to galvanize support within the upper reaches of the Administration. But the overarching goal should be to secure an announcement before the beginning of the primary election season in January.
*January -March, 2004	*To be determined as necessary	*Further trips and meetings by senior Thai officials will be necessary in the 90 day window following USTR notification to Congress of an intent to negotiate an FTA. Relationship and issue

		management will remain necessary throughout the negotiations.
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**U.S. Senate Core Group for Advocacy**

<b><u>Member</u></b>	<b><u>Committee</u></b>	<b><u>Issue Focus and Special Concerns</u></b>
Charles Grassley (R-IA)	Finance - Chair	Grassley is the chair of the most powerful committee in the Senate and is deeply engaged with the promotion of the Administration's free trade strategy. His tacit support for Thailand is a minimum requirement.
Max Baucus (D-MT)	Finance	Supports aggressive US support of FTAs, ranking minority member of committee. Baucus is important ally to develop Democratic support for Thailand, can champion the cause with Democrats.
Kit Bond (R-MO)	Appropriations	Although not on a trade-related committee, Bond has demonstrated past willingness to champion Thailand's cause in the Senate. This leadership role should be further cultivated, as Bond is generally highly regarded by members of both parties.
Trent Lott (R-MS)	Finance	Represents southern shrimp industry. Establishment of a personal rapport with Lott early in the FTA process will be necessary to ensure positive compromise on shrimp issue during negotiations.
Olympia Snowe (R-ME)	Finance; Commerce; Intelligence	Snowe's generally pro-trade stance and dual positions on Finance and Intelligence Committees make ideal potential supporter to speak knowledgeably about Thailand's defense and security contributions to fellow Senators.
Craig Thomas (R-WY)	Finance, Chair of International Trade Subcmte	Thomas' position as Chair of the trade subcommittee of Finance make his support indispensable for a Thai FTA bid.
Jon Kyl (R-AZ)	Finance; Chair of Judiciary Subcmte on Terrorism and Homeland Security	Kyl's work on Homeland Security and terrorism issues provide another contribution of knowledge regarding Thailand's assistance on security to debates on trade. Kyl also heads the Republican Policy Committee, and can garner broad GOP support.
Diane Feinstein (D-CA)	Appropriations, Agriculture	Feinstein spearheaded efforts to block passage of the Singapore FTA over concerns about excessive H1B visa entrants and the free movement of persons under the services chapter of the agreement. Her support will be necessary for carve outs regarding Thai chefs and other professionals. In addition, Feinstein focuses on market access for California's \$27 billion agricultural economy and will likely seek to protect a nascent California state sugarcane industry from Thai exports. Finally, Feinstein is a leader in the Senate behind Burma sanctions legislation.
Richard Lugar (R-IN)	Chair, Foreign Relations	Lugar is a leading Senator regarding the connection between trade and foreign policy in general. He has advocated in the past for FTAs with Singapore and the Philippines, and will likely back Thailand's bid due to the consideration that an FTA would bolster the US-Thai security relationship and benefit US regional interests.
Joe Biden (D-DE)	Foreign Relations	The ranking member of the foreign relations committee, Biden has a positive, centrist view on trade.

Joe Lieberman (D-CT)	Armed Services, Gov't Affairs	Lieberman, among all nine democratic presidential candidates, is the strongest advocate for free trade. His advocacy can deliver bipartisan support for Thailand and can possibly improve Thailand's reputation within the US defense community.
Sam Brownback (R-KS)	Chair, East Asia Subcommittee	Brownback runs Senate proceedings regarding foreign policy toward East Asia and hails from an important agricultural state.
Chuck Hagel (R-NE)	Foreign Relations	Past chair of the East Asia subcommittee, Hagel has traditionally been active on ASEAN issues as well as an advocate for free trade deals. He is a natural ally for a Thai FTA bid.
Mitch McConnell (R-KY)	Appropriations	McConnell is the leading proponent of US sanctions against Burma. Early work to develop understanding of the Thai positions on Burma, and to advise on ongoing Thai cooperation with the US on Burma throughout the course of FTA negotiations.

**U.S. House of Representatives Core Group for Advocacy**

<b><u>Member</u></b>	<b><u>Committees</u></b>	<b><u>Rationale</u></b>
Dennis Hastert (R-IL)	Speaker of the House	Thailand already has the basis of a relationship with Speaker Hastert stemming from his reception of Prime Minister Thaksin in June, 2003. Continued relationship development with the Republican leadership should be a fixture of advocacy efforts.
Bill Thomas (R-CA)	Ways & Means, Chair	Thomas is most powerful voice on trade in the House, and takes an intense, personal role in trade agreements and their negotiation. As a leading member of the Congressional Oversight Group formed by Trade Promotion Authority, his support is quintessential for a successful FTA bid and Congressional passage of an agreement. If Thomas takes a personal stake in the Thai bid, Bangkok will gain a powerful supporter.
Phil Crane (R-IL)	Ways & Means, Chair of Trade Subcmte.	Like Thomas, Crane's subcommittee position confers great power. Without crane's support, a Thai FTA will never get off the ground. Industry in his manufacturing-heavy district should generally be supportive of an FTA.
Jim Leach (R-IA)	International Relations, Chair, East Asia & Pacific Subcmte	Since before the Asian financial crisis of 1997, Leach has maintained a strong interest in East Asia's economic development. He will

		likely support a Thai FTA on foreign policy grounds, and can pull moderate Republicans to the cause.
Jim Kolbe (R-AZ)	Appropriations	A stalwart trade supporter, was nearly nominated for USTR by President Bush over Ambassador Zoellick.
Jennifer Dunn (R-WA)	Ways & Means	Dunn is an important representative for the US high tech industry that stands to benefit greatly from enhanced trade with Thailand.
Doug Bereuter (R-NE)	International Relations	Former chairman of the East Asia subcommittee, Bereuter maintains an affinity for Southeast Asia and is a solid backer of free trade. Will also provide important outreach to US agriculture.
Eric Cantor (R-VA)	Ways & Means	Cantor is a rising Republican leader, already Chief Deputy Majority Whip in only his 2 <sup>nd</sup> term in office. This position is unparalleled for its ability to generate a coalition of support for an issue. Formerly Chair of the special Congressional Task Force on Terrorism and from a district home to many Fortune 500 companies, Cantor's support of Thailand is important for long term value as well as the immediate benefit of support from a major GOP leadership figure.
Cal Dooley (D-CA)	Agriculture	Dooley is a Democrat who remains a vigorous free trader, a rare commodity essential to the bonafides of a legitimate bipartisan coalition on a Thai FTA. His support will also create inroads to the U.S. agricultural community.
Greg Meeks (D-NY)	Ways & Means, Financial Services	Meeks provides an essential link between the financial industry and trade that can broaden support generally for an FTA.
William Jefferson (D-LA)	Ways & Means	Jefferson is a prominent Democrat on the trade subcommittee who is a vocal supporter of new free trade pacts. His support was essential for the Singapore FTA for his ability to bring other Democrats on board.

Ron Paul (R-TX)	International Relations, Financial Services	From a defensive perspective, Thailand should pursue a relationship with Paul to mitigate potential damage regarding shrimp trade legislation. Paul's broader foreign policy interests should modify his current approach through effective personal diplomacy.
Charles Rangel (D-NY)	Ways & Means	Rangel is the ranking Democrat on the subcommittee on trade and could oppose a Thai FTA on labor policy grounds. For this reason, Thailand should develop a better personal relationship with Rangel stressing Thailand's labor sector improvements over the past decade.

**Executive Branch Outreach Plan**

<b>Official</b>	<b>Title</b>	<b>Rationale</b>
Ambassador Robert B. Zoellick	U.S. Trade Representative	As cited above, Zoellick is the key Cabinet member on FTA policy. Without his personal support, an agreement will not occur. The extent to which Thai officials can buttress Zoellick's personal efforts to build political support will influence somewhat flexibility during negotiations.
Ambassador Josette Shiner	Deputy USTR	The new Deputy USTR for Asia, Shiner's extensive contacts with the Washington media can be effective aid in promoting the agreement. Often, she will be senior U.S. official for the settlement of disputes during a negotiation.
Grant Aldonas	Undersecretary for International Trade, Dept. of Commerce	Aldonas continues to accrue increasing responsibility for trade in the Administration, and was point man on the global steel safeguard in 2001. His reach extends beyond Commerce and he can be a positive advocate with Congress and the White House.
Faryar Firzad	Senior Director for International Economics, National Security Council	Firzad is a former Assistant Secretary of Commerce and Trade Counsel on the Senate Finance Committee. His relationships in the White House and Senate make him an ideal champion for a Thai-US FTA.
Karen Brooks	Director, Southeast Asia, National Security Council	Brooks has White House lead on Thai foreign policy issues.



Jim Moriarty	Senior Director, Asia, National Security Council	A career Foreign Service Officer and China expert, Moriarty oversees Asia policy at the NSC.
James Kelly	Assistant Secretary, East Asia and the Pacific, State Department	SecState Powell's right hand on Asia, his support will be necessary to outflank critics in DoD.
Randy Quarles	Assistant Secretary, International, Treasury Department	
Ann Veneman	Secretary of Agriculture	While U.S. ag industry will generally support an FTA, Veneman's vocal support in building a coalition in Washington is necessary to provide political muscle to the Thai bid.
Peter W. Rodman	Assistant Secretary of Defense for International Security Affairs	Rodman is the principal staff assistant and advisor to the Under Secretary of Defense for Policy and the Secretary of Defense for formulating international security and political-military policy for Africa, Asia-Pacific, Near-East and South Asia, and the Western Hemisphere. He is the key policy-level official to complement military outreach on an FTA.
Admiral Thomas B. Fargo, USN	U.S. Pacific Command	Headquartered at Pearl Harbor, Hawaii, Fargo is theater commander of US forces in the Pacific. Fargo and his staff, including the 7 <sup>th</sup> Fleet, could be key factors in Defense Department evaluations of Thailand's bid for an FTA.

### Media Campaign and Indicative Messages for Outreach Efforts

A coordinated media campaign is recommended to develop a critical mass of interest in the U.S.-Thai trade relationship throughout the Autumn months and after the notification of Congress of an intent to open negotiations. Publication in major media outlets has the effect of legitimizing and validating policy ideas and proposals with decision-makers in Washington. Media coverage impacts the placement of an issue on the political agenda. At this point, the issue of a Thai FTA is likely to fall from the top of U.S. priorities, particularly as the autumn months take shape over the primary election season, pressing budgetary issues, Iraqi reconstruction, and the North Korean question. On trade, the Administration is currently consumed with the WTO ministerial in Cancun and with preparations for the final FTAA ministerial set for November 17-20 in Miami. So much is at stake on the U.S. trade agenda between now and December, that a Thai FTA could fall through the cracks if opportunities are not seized promptly.

With regard to media, we recommend an initial roundtable session for Minister Adisai in October or November with major U.S. media in New York and/or Washington, to introduce the FTA topic to a broad audience and illustrate Thailand's valued position as a key U.S. ally. Our practice can coordinate such a session with reporters and editors as necessary. Additionally, we would seek to provide language for and place opinion pieces by Minister Adisai advocating the FTA in Washington and New York media such as the *Wall Street Journal* and *Washington Post* to parallel the notification of Congress by the Administration of an intent to open negotiations. Press conferences should be utilized to kick off and close lobbying trips to Washington to focus media exposure and provide access for Members of Congress who will support the agreement.

Relationship building with the media early in the process will pay dividends during the negotiations when issues may require a public media push to generate leverage, and after the conclusion of negotiations to guarantee political support for passage in Congress. Thus Thai leaders should view a media campaign as a long-term endeavor.

### Sample Talking Points

At this time it would be premature to develop precise talking points for lobbying events, meetings and media vehicles when the political context and terrain could shift by the time these efforts are undertaken. Nevertheless certain messages will be enduring, and these tenets for strategic communication should guide talking point preparation. We note that much may depend on Thai actions regarding defense and security concerns outlined above. These themes are intended for Commerce Ministry officials who may benefit by being able to defer foreign policy and security issues - at least in the media - to MFA and MoD representatives. Publicly, Commerce officials can focus exclusively on the positive economic relationship.

### *General Themes*

- Thailand is one of America's oldest allies in Asia. The U.S.-Thai relationship is broad and deep.
- Our economic relationship reflects this closeness. Thailand is America's 20<sup>th</sup> largest trading partner, and we provide a platform for American trade and investment with all of Asia.
- The Thai and US economies are integrating to our mutual benefit, the time has come to take this relationship a step further.
- A free trade agreement is the logical extension of the US-Thai alliance in the economic sphere, and indicative of the US commitment to the economic development of the region.
- Depending on the technical level of expertise of the interlocutor, officials may introduce such concepts as a stepping stone approach to an ASEAN-US FTA and the complementary nature of an FTA for both the WTO and APEC programs.

### *Trade and Economic Guidance*

- When addressing US representatives, officials should stress the benefits to the American, rather than the Thai economy. We would anticipate targeted points for Congressional officials that note potential benefits for industries in their districts.

- Officials should be prepared to address sensitive sectors such as textiles by pointing out that a broad agreement, through compromise, benefits both economies, and by indicating general flexibility and a determination to reach a mutually beneficial pact.
- We note that the IIE/TDRI scoping study should provide quantitative assessments to allow for the projection of growth figures affecting GDP, employment and investment.

## Scorecard of Thai-US Relationship

To provide Thai leaders with a useful tool in analyzing the totality of the relationship, the chart below analyzes positive and negative developments in the bilateral relationship from a U.S. perspective. This analysis provides much the same evaluation as that maintained by the U.S. Administration when measuring FTA candidates.

### Thai-US Scorecard

<b>Issue Area</b>	<b>Positive Considerations</b>	<b>Negative Considerations</b>
<b>Security</b>	Troops deployed to Iraq & Afghanistan	Cabinet statement after 9/11 on Afghanistan
	Overflight clearances granted for Iraq War	Opposition to US basing or ships stationed in Thailand
	Arrest of Hambali and CT intel sharing	Lack of support for US initiatives at UN
	Traditionally strong mil-mil ties.	Deferral of political and material support to UN decisions
		Lack of sustained, strong <u>vocal</u> support for US-led war on terrorism
	Approach to China appears to question US-Thai defense alliance	
<b>Foreign Policy</b>	Excellent working-level relationships with senior State Dept. professional (Foreign Service) officers	Balance of power politics vis a vis India, China and US
	Perception of deep commitment to stable relationship by diplomatic corps	Burma policy
<b>Trade</b>	Progress under TIFA Work Plan	Lack of support versus EU on GMO issues
	Thai case vs. EU on sugar at WTO	Leadership for WTO GATS safeguard
<b>Trade</b>	Large volume of bilateral trade	Difference of opinion on GATS rules regarding Amity Treaty
	Significant regional hub for US manufacturers	Lack of strong, public commitment to Cancun Ministerial of WTO

## II. Trade Policy Areas of Inquiry I

### Methodological Note

Sections II through V provide analyses of major trade issue areas and disciplines as identified in the engagement scope of work. As appropriate, these sections incorporate comparative analyses of the NAFTA and other U.S. trade agreements (including the Chile and Singapore free trade agreements) in sector or product-specific discussions to provide a comprehensive perspective on indicated concerns, and to highlight potential negotiating obstacles, options and solutions in the course of a prospective negotiation.

### Trade in Industrial Goods

U.S. free trade agreement partners have found that the negotiation of industrial tariff reductions to be the easiest portion of an FTA with the United States. This is due to the fact that the U.S. enjoys a relatively low average simple bound tariff rate for industrial products of 4.5%; and only 7% of all 10,187 U.S. tariff lines exceed 15%<sup>2</sup>. The U.S. goals and intentions are simple, with the U.S. willing to bind industrial tariffs immediately at zero. In general, all major U.S. investors in Thailand will support immediate tariff elimination, as such an accomplishment would lower operating costs and allow for the expansion of current manufacturing businesses.

#### U.S. Negotiating Priorities

<b>Issue</b>	<b>Likely Approach</b>
Thai 20% average tariff on finished goods	Seek immediate elimination as this affects the bulk of bulk of U.S. manufactured exports
Thai 10% average tariff on semi-finished goods	Will be open to some gradual phase outs, but will focus attention on immediate reduction of tariffs affecting IT, electronic and automotive goods shipped to Thailand for value-added processing or for re-export in the region. Thai industry likely to support such moves.
Thai unbound tariff lines	U.S. will demand Thailand commit to reduce and bind the 31% of national tariff lines affecting industrial products that are unbound.
Thai tariff peaks	Will seek elimination of tariff peaks (as high as 60%) affecting motor vehicles and commitment to low average bound rates under 5%.
Overall goal for immediate tariff elimination	U.S. will likely not accept immediate elimination that covers less than the 90% obtained by Australia in Thai-Australia FTA

Thailand should take caution, however, to ensure peak rates on sensitive items are similarly bound at zero or reduced on an aggressive schedule. Particularly on major exports where Thailand would lose GSP duty free benefits under an FTA, Thai negotiators must seek immediate achievement of bound rates of zero: these include perennial peak rate items such as

<sup>2</sup> *Trade Policy Review - the United States. Report by the Secretariat.* World Trade Organization. 2001.

leather goods (up to 27.6%), ceramics and glass (31-38%), jewelry (6-13%) and footwear (several categories to 48%).

### **Indicated Thai Priorities**

Conversion of current GSP duty free items to immediate tariff reduction under FTA	Should not pose problem with United States; same treatment applied to Chile in US-Chile FTA.
Expanded access for light manufacturing goods.	U.S. will offer to cover in immediate tranche of tariff eliminations.
Eliminate US tariff peaks on footwear	Thailand should enlist support of US shoe manufacturers operating in Thailand to lobby for reduced tariffs on footwear as high as 37-48% plus specific rates of 90 cents/pair.

### **Thai-Australia FTA Provides Industrial Tariff Model<sup>3</sup>**

Generally speaking, the apparent agreement reached in the Thai-Australia FTA negotiations over industrial goods trade offers a baseline the United States will observe and pursue as minimum negotiating goals for a Thai-U.S. deal. The Thai-Australia FTA accomplishes the following:

- eliminates over 90% of tariff lines immediately upon entry into force
- covers 94% of Thailand's specific requests for tariff elimination
- the immediate elimination package represents 83% of tariff revenue foregone on Thai imports into Australia

Should Bangkok decide, however, that Thailand's own model of tariff reductions in its FTA deal with Australia does not suit its purposes with the United States, Thailand may wish to pursue a modified approach to that taken in the Central American Free Trade Agreement. Under the CAFTA, negotiators are formulating four baskets of industrial tariff reductions. These baskets are set for immediate, short-term, medium-term, and long-term transitions to duty free trade, spaced out over a 10-12 year timetable. The agreed upon working goal in the CAFTA is for 75% of two-way industrial goods trade to be covered in the first, or immediate basket of tariff elimination.<sup>4</sup> This type of reduction process will be less satisfactory to the United States, who will note the 90% coverage of industrial tariff elimination Thailand afforded to Australia. Given the slow pace of CAFTA negotiations, further delayed by the WTO Cancun ministerial, further information on this approach is not available at this time.

<sup>3</sup> Speech by Australian Trade Minister Mark Vaile. "New Directions in Australia-Thailand Trade and Investment". June 3, 2003. Australian Department of Foreign Affairs and Trade.

<sup>4</sup> Interview: Costa Rican Minister of Foreign Trade Alberto Trejos. BNA Inc. July 28, 2003.

## Trade in Agriculture

Improved agricultural market access will be a cornerstone of U.S. negotiating objectives for an FTA with Thailand. The U.S. Department of Agriculture has long identified the Thai market as a key regional growth target for U.S. agricultural exports and a prospective agreement will enjoy the support of most major U.S. farming interests. Thailand, however, will likely face objections from several key groups that will foster resistance to U.S. market liberalizations in major Thai export products. This section analyzes several sensitive areas, identifying likely U.S. positions and recommending objectives for Thai agriculture. Regarding agricultural tariff reduction and elimination, the Chilean model is noteworthy as the most liberal approach to date by the U.S., including a commitment for the phase out of sensitive U.S. agricultural tariffs over 12 years.

### U.S. Objectives

Thailand's robust growth over the past decade and substantial increases in per capita GDP (from \$6,100 in 1999 to \$6,900 in 2002) have made Thailand a strong candidate for agricultural trade liberalization with the United States. In particular, Thailand's growing share of income spent on food (21%) and large domestic markets denote an economic readiness the United States seeks in an FTA partner.

The U.S. will likely pursue market opening and tariff reductions in several import areas where the U.S. could offer price competitive exports under an FTA. These include cotton, dairy, soybean products, beef, pork, cheese, grapes, apples cherries, corn, flour, wine and alcoholic beverages, tobacco and wheat. Tariff reduction and elimination will therefore be the major focus of U.S. efforts on agriculture. Thailand's average bound tariff for agricultural products is 35% versus the average US agricultural tariff of 12%. A cogent USTR analysis of potential gains in the Thai market via tariff reduction reasons as follows:

The actual trade impact of high tariffs and other trade-distorting measures on individual product categories is difficult to assess. The annual value of U.S. agricultural exports to Thailand declined from nearly \$630 million before the financial crisis to \$535 million in 2001, for a variety of reasons, including reduced domestic demand, currency devaluation, and increased excise taxes and tariffs. U.S. industry estimates that potential U.S. agricultural exports to Thailand could reach as much as \$900 million annually if Thailand's tariffs and other trade-distorting measures were substantially reduced or eliminated and the economy recovered to pre-crisis levels.<sup>5</sup>

The U.S. will also seek to address concerns among the U.S. agricultural industry regarding a lack of transparency and perceived abuses of Sanitary and Phytosanitary (SPS) rules and regulations. The U.S. will likely seek to form an SPS Committee under the auspices of the FTA to act as an appropriate working and high level forum for the resolution of SPS disputes and to enhance technical cooperation these disciplines. Generally, this approach entails a commitment to the WTO SPS Agreement, followed by special text establishing a committee. Sample language is provided here, as culled from the US-Chile FTA:

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<sup>5</sup> United States Trade Representative. *National Trade Estimate and Report on Foreign Trade Barriers*, 2003. p. 373.

**Sample Text Regarding a Committee on Sanitary and Phytosanitary Matters**

- 1) The objectives of the Committee shall be to enhance the implementation by each Party of the SPS Agreement, protect human, animal, and plant life and health, enhance consultation and cooperation on sanitary and phytosanitary matters, and facilitate trade between the Parties.
- 2) The Committee shall seek to enhance any present or future relationships between the Parties' agencies with responsibility for sanitary and phytosanitary matters.
- 3) The Committee shall provide a forum for:
  - (a) enhancing mutual understanding of each Party's sanitary and phytosanitary measures and the regulatory processes that relate to those measures;
  - (b) consulting on matters related to the development or application of sanitary and phytosanitary measures that affect, or may affect, trade between the Parties;
  - (c) consulting on issues, positions, and agendas for meetings of the *WTO SPS Committee*, the various *Codex* committees (including the *Codex Alimentarius Commission*), the *International Plant Protection Convention*, the *International Office of Epizootics*, and other international and regional bodies on food safety and human, animal, and plant health;
  - (d) coordinating technical cooperation programs on sanitary and phytosanitary matters;
  - (e) improving bilateral understanding related to specific implementation issues concerning the SPS Agreement; and (f) reviewing progress on addressing sanitary and phytosanitary matters that may arise between the Parties' agencies with responsibility for such matters.
4. The Committee shall meet at least once a year unless the Parties otherwise agree, and may establish ad hoc working groups on joint issues of concern.
5. The Committee shall perform its work in accordance with the terms of reference referenced in paragraph 2. The Committee may revise the terms of reference and may develop procedures to guide its operation.
6. Each Party shall ensure that appropriate representatives with responsibility for the development, implementation, and enforcement of sanitary and phytosanitary measures from its relevant trade and regulatory agencies or ministries participate in meetings of the committee.

A key goal for Thailand will be the elimination of export subsidies in bilateral trade on agricultural products. The difficulty in the negotiation will stem from the fact that the U.S. utilizes several forms of subsidies that are not classified as export subsidies but that do have a trade-distorting effect. This report deals with an approach to the latter form of subsidies substantively in the section of Rice Market Access, below. We treat the more limited form of "export subsidies" here.

The U.S.-Chile FTA provides the most likely compromise model for language addressing export subsidies. The Chile FTA eliminates the use of export subsidies on U.S.-Chilean farm trade, but preserves the right to respond to third countries' (e.g., EU) use of export subsidies to displace U.S. products in the Chilean market (and vice-versa).<sup>6</sup> A subsidies reduction program, however, will likely involve a graduated phase-in period of subsidies reduction of 8-12 years. In ongoing negotiations of the Central American Free Trade Agreement, the U.S. and the Centrals are considering the development of a linkage mechanism between subsidies and the tariff base<sup>7</sup>, but negotiators have not revealed the specifics of this form of linkage; Thai embassies in Latin America should closely monitor these developments.

<sup>6</sup> Chile FTA Fact Sheet. U.S. Foreign Agriculture Service, May, 2003.

<sup>7</sup> *Costa Rican Minister of Trade Outlines Progress in CAFTA Talks. Daily Report for Executives*. Bureau of National Affairs Inc. July 28, 2003



**Indicated Language for Elimination of Export Subsidies  
US-Chile FTA text**

**Article 3.16: Agricultural Export Subsidies**

1. The Parties share the objective of the multilateral elimination of export subsidies for agricultural goods and shall work together toward an agreement in the World Trade Organization to eliminate those subsidies and prevent their reintroduction in any form.
2. Except as provided in paragraph 3, neither Party shall introduce or maintain any export subsidy on any agricultural good destined for the territory of the other Party.
3. Where an exporting Party considers that a non-Party is exporting an agricultural good to the territory of the other Party with the benefit of export subsidies, the importing Party shall, on written request of the exporting Party, consult with the exporting Party with a view to agreeing on specific measures that the importing Party may adopt to counter the effect of such subsidized imports. If the importing Party adopts the agreed-upon measures, the exporting Party shall refrain from applying any export subsidy to exports of such good to the territory of the importing Party.

**Rice: Market Access**

The following chart lays out recommend options Thailand pursue in an FTA regarding rice market access.

<b>Issue Objective</b>	<b>Model Agreement</b>	<b>Key Defensive Points</b>
<p><i>Tariff elimination</i></p> <p>In three stages:</p> <ul style="list-style-type: none"> <li>• immediate elimination for key products;</li> <li>• five-year reduction schedule for sensitive goods;</li> <li>• ten-year schedule for most sensitive items</li> </ul>	<p>US-Canada FTA, 1989. Marked most aggressive US tariff reduction formula on rice.</p>	<ul style="list-style-type: none"> <li>• US will seek rules of origin that block Thai use of US FTA as means of access to Canadian and Mexican rice markets.</li> <li>• US will seek commitments not to use SPS rules as de facto non-tariff barriers to US exports of rice</li> </ul>
<p><i>Subsidies</i></p> <ul style="list-style-type: none"> <li>• Address subsidies by limiting US exports of surplus rice (subsidized indirectly through counter cyclical payment programs) to key Thai rice export markets, as well as Thai domestic market if such product benefits from trade distorting subsidies of domestic US production.</li> <li>• Pursue limits on US short term export credit guarantees on rice to key Thai export markets.</li> <li>• Seek US pledge to unilaterally advance schedule of rice subsidy reductions as agreed in WTO Round.</li> <li>• Seek US commitment to eliminate application of Export Enhancement Program funding for US exports to Thailand.</li> </ul>	<p>None exists, Thailand would be carving out new ground, but such a negotiation would closely track with WTO Agriculture talks.</p>	<ul style="list-style-type: none"> <li>• US subsidies reductions are linked inextricably to the Doha Round. Thailand should seek to work affirmatively with US on agriculture under Doha to secure these goals.</li> </ul>

<p><i>Improving Thai competitiveness</i></p> <p>Seek US commitments on capacity building regarding marketing and trade promotion to improve Thai links to US wholesale market.</p>	<ul style="list-style-type: none"> <li>• The US-Chile FTA environment chapter contains technical cooperation programs applicable in this area.</li> <li>• USDA has comparable programs in cash crops throughout Asia, locating US buyers and assisting with business linkage and marketing.</li> </ul>	<p>US has committed ample resources to capacity building, should be relatively easy area for cooperation</p>
<p><i>Jasmine Rice</i></p> <ul style="list-style-type: none"> <li>• Support USTR to prevent the EU's pursuit of expanded geographical indications applications in the WTO in exchange for explicit jasmine rice protection in the course of an FTA.</li> <li>• Before opening negotiations, Thailand should improve pass the critical Geographical Indications Act domestically that has been stalled in the Thai Cabinet since June.</li> <li>• Seek Voluntary Export Restraints and labeling rules on potential US development of competitive strains of aromatic rice.</li> </ul>	<p>Essentially no similar provisions exist in existing FTAs. We propose a tactical alliance for Thailand in the WTO aimed at an improved bilateral trade regime. Since US industry is the technological leader in GMO development, the US relationship is the most important in terms of Thailand's ability to protect its future terms of trade in jasmine rice.</p>	<p>In the Singapore FTA, the US focused great attention on Singaporean plant varieties legislation that protected against future transgenic "copies" of existing plant species. Thailand should anticipate resolving similar issues in the IPR chapter.</p> <p>The US will resist the establishment of VER's on exports that have yet to be developed.</p>
<p><i>Tariff Rate Quota</i></p> <p>Establishment of a TRQ may serve to salve Thai concerns regarding long-term market access in the US. It serves little purpose for US exports to Thailand; in 2001, the US sold only \$49,000 of rice to Thailand. A TRQ may also serve a future vehicle to limit access of US transgenic rice products (GMO) to Thailand.</p>	<p>Most current US trade agreements include some form of TRQ. There are no indicative quotas that may best suit Thailand. MOC negotiators are in the best position to determine quantitative limits or minimum access commitments for bilateral rice trade.</p>	<p>US would look to use Thai proposal of a TRQ for Thai rice exports as a method of extending US tariff reductions over a longer period of time. Immediate, duty free access should remain chief Thai objective.</p>

## *Background*

Thailand remains by far the largest exporter of rice to the United States, supplying 75% of U.S. imports. The U.S. is, however, a major rice exporter. Nearly 40% of the U.S. rice crop is exported, down from 60% in 1980. The U.S. accounts for 12% of global trade in rice. The United States is losing market share in the Middle East and South Africa to Asian exporters, mostly Thailand and India.<sup>8</sup> Although competitors in several markets over high-quality indica shares, the U.S. is the only major exporter of rough rice. U.S. and Thai rice exports are largely complementary in nature. Thailand will necessarily seek to preserve competitive advantage in high-quality rice exports as well as securing against U.S. inroads in aromatic rice exports.

The U.S. views Thai efforts at rice price stabilization agreements with considerable skepticism, and will continue to avoid pricing agreements similar to that proposed by Thailand in 2002 under the bilateral Framework for Economic Cooperation, negotiated between the Thai MFA and the State Department. U.S. policy avoids “commodity agreements” as a rule, and has done so since the U.S. abandoned commodity agreements, such as the international coffee agreement, in the 1980’s.

## *U.S. Rice Tariffs*

U.S. rice tariffs for countries with permanent normal trade relations status (the MFN rate) range from 0.83 cents per kilogram to 2.1 cents per kilogram for rough rice imports depending upon the type of rice. Parboiled, semi-milled or wholly milled rice is charged an 11.2% tariff. The tariff for other semi- or wholly milled rice is 1.4 cents per kilogram.<sup>9</sup> For FTA partners, the US has generally committed to tariff elimination schedules that range from immediate to 12-year timelines of reduction and elimination.

Under the Uruguay Round the United States agreed to lower its rice tariffs by 36 percent in six equal installments by 2000 starting in 1995. The United States does not currently provide direct export subsidies for rice exports. The United States continues to include rice in international food aid shipments. The Export Enhancement Program (EEP) provided targeted export assistance in former U.S. markets, but there have been no EEP sales for rice in 4 years.<sup>10</sup>

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<sup>8</sup> USDA. Rice Trade Background, 2003.

<sup>9</sup> Brunke, Henrich. “Commodity Profile with an Emphasis on International Trade: Rice”. Agricultural Marketing Resource Center, University of California, August, 2002.

<sup>10</sup> Childs, Nathan W. “Upcoming World Trade Organization Negotiations: Issues for the U.S. Rice Sector”. Economic Research Service, USDA.

### *U.S. Rice Subsidies Programs*

It is a popular misconception that the 2002 Farm Bill subsidized US rice production by 60%. U.S. rice growers **do not receive export subsidies per se**. Rather, certain components of the US domestic subsidies programs foster trade distorting effects which Thailand may counter through provisions in an FTA.

The Farm Security and Rural Investment Act of 2002 (2002 Farm Act) provides rice producers access to direct payments, marketing loan benefits, and counter-cyclical payments.<sup>11</sup> Programs for counter-cyclical payments typically present the greatest trade distorting effect. The essential impact of these subsidy programs is the creation of de facto price floors that encourage surplus production. Farmers are paid increasing amounts as world prices drop below set targets. Surplus U.S. production caused by these artificial price supports is then exported, depressing global prices and harming foreign (Thai) exporters. This is the trade distorting effect. Surplus U.S. rice also forms an essential component of U.S. global food aid programs, which could contribute to generally low price levels. “The government's policy under the 2002 Farm Bill is to ensure that farmers reap a targeted price on 15 crops by making up with federal payouts for any shortfall in the market price. The 2002 bill increased the number of protected crops and sweetened subsidies.”<sup>12</sup>

The political implications of drastic subsidy reform create sever obstacles for the Administration to pursue such a policy course:

Experts agree lower, or tighter, limits on farm payments would hit cotton and rice growers the hardest, temporarily shifting some land into grains, soybeans and vegetables. There would be negligible declines in land prices -- the primary asset across rural America -- and in farm income...Up to 39 percent of rice output and 30 percent of the cotton crop would be ineligible for at least one form of farm subsidies if a "hard" limit of \$275,000 a year was in place, according to a University of Missouri think tank. Sen. Charles Grassley, a tenacious advocate of limiting subsidies, has yet to decide if he will fight during Congress' autumn session for lower limits, said a spokesman. Earlier this year, the Iowa Republican sponsored a limit of \$300,000. Instead of paying crop subsidies, several economists say the government could ease farmers into the free market by subsidizing their use of risk-management tools such as futures contracts.<sup>13</sup>

The political realities of the U.S. subsidy situation, however, may be tackled by Thailand if Thai negotiators can identify effective reforms that assist Thai-US rice trade development by making only surgical cuts in US subsidy programs. The table on the following pages provides the quantitative methodologies and descriptive impact of US farm subsidies programs, providing the analytical basis for recommended negotiating positions outlined at the beginning of this section.

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<sup>11</sup> *Foreign Agriculture Service. USDA. “Rice Policy Briefing”, 2003.*

<sup>12</sup> Kilman, Scott. “Is U.S. Farm Policy All Wrong?” *The Wall Street Journal*. August 19, 2002.

<sup>13</sup> Abbot, Charles. “Ag panel report may fuel US farm subsidy fight”. *Reuters/US Rice Producers Association*.

## U.S. Rice Subsidy Programs and Relevant 2002 Farm Bill Provisions

Program	Description
Direct payments	Farm legislation passed in 1996 established 7 year production flexibility contracts which amounted to direct payments to US farmers. Rice is an eligible crop. An eligible farm's "payment quantity" for a given contract commodity was equal to 85 percent of its contract acreage times its program yield for that commodity. A per-unit payment rate (e.g., per bushel) for each contract commodity was determined annually by dividing the total annual contract payment level for each commodity by the total of all contract farms' program payment quantity. The annual payment rate for a contract commodity was then multiplied by each farm's payment quantity for that commodity, and the sum of such payments across contract commodities on the farm was that farm's annual payment, subject to any payment limits. <b>For rice, the 2002 Farm Bill extended these direct payment programs and established a rice unit price for the payment calculations at \$2.35/hundredweight (cwt).</b> <sup>14</sup>
Marketing Loans and Commodity Loans	<b>Marketing Assistance Loans and Loan Deficiency Payments (LDPs)</b> were extended under the 2002 Farm Bill to minimize potential loan forfeitures and subsequent government accumulation of stocks. Marketing loans were started for rice and upland cotton in 1986 under provisions of the 1985 Farm Act. Subsequent legislation mandated the availability of marketing loans for soybeans and other oilseeds starting in 1991. Marketing loans for wheat and feed grains were implemented starting with 1993 crops, under the General Agreement on Tariffs and Trade (GATT) trigger provisions of the Omnibus Budget Reconciliation Act of 1990. The 1996 Farm Act continued marketing loans for all of these crops. The addition of marketing loan provisions significantly changed the operation of the commodity loan program. Loan placements under the commodity loan program with marketing loans may occur as described earlier under nonrecourse loan provisions. <b>Marketing loan provisions, however, allow farmers to repay commodity loans at less than the original loan rate (plus interest) when market prices are lower.</b> This feature decreases the loan program's potential effect on supporting prices by reducing the government's accumulation of stocks through forfeitures. Instead, marketing loans provide farmers economic incentives to retain ownership of crops and sell them (hence the term "marketing loan") rather than forfeit ownership of crop stocks. <sup>15</sup>
Counter-cyclical payments	The 2002 Farm Bill made counter-cyclical payments available to covered commodities -- including rice -- whenever the effective price is less than the target price. The effective price is equal to the sum of 1) the higher of the national average farm price for the marketing year, or the national loan rate for the commodity and 2) the direct payment rate for the commodity. The payment amount for a farmer equals the product of the payment rate, the payment acres, and the payment yield. <b>The Farm Bill set the target price for rice from 2002-2007 at \$10.50/cwt.</b> <sup>16</sup>

<sup>14</sup> Economic Research Service, USDA. *The 2002 Farm Bill: Provisions and Economic Implications*. [www.ers.usda.gov](http://www.ers.usda.gov)

<sup>15</sup> Westcott, Paul C. *Analysis of the U.S. Commodity Loan Program with Marketing Loan Provisions*. ERS Agricultural Economic Report No. 801. 26 pp, April 2001, USDA.

<sup>16</sup> Economic Research Service, USDA. *The 2002 Farm Bill: Provisions and Economic Implications*. [www.ers.usda.gov](http://www.ers.usda.gov)

<p>Short and medium term export credit guarantees</p>	<p><b>Export credit guarantee programs</b> facilitate commercial sales of U.S. agricultural products by providing short and medium term credit guarantees to U.S. suppliers. The Export Credit Guarantee Program (GSM -102) covers private credit extended for up to 3 years. The Intermediate Export Credit Guarantee Program (GSM-103) covers private credit extended for up to 7 years. The 2002 Farm Bill Extends the export credit guarantee programs and annual funding through 2007, and requires the Secretary of Agriculture and U.S. Trade Representative to consult regularly with relevant House and Senate committees on multilateral negotiations at the World Trade Organization and the Organization for Economic Cooperation and Development regarding agricultural export credit guarantee programs.<sup>17</sup> <b>This statutory requirement will ensure Congressional oversight and activism regarding potential subsidy changes under a Thai-US FTA.</b></p>
<p>Export Enhancement Program<sup>18</sup></p>	<p><b>Export Enhancement Program (EEP)</b> provides funding to U.S. exporters to help compete against subsidized prices and identified unfair trade practices in specific export markets. The 2002 Farm Bill extended annual funding through 2007 at current funding level of \$478 million per year. The Bill also expanded definition of unfair trade practices to include:</p> <ul style="list-style-type: none"> <li>• practices of state trading enterprises that "are not consistent with sound commercial practices conducted in the ordinary course of trade;"</li> <li>• subsidies that decrease market opportunities for U.S. exports or unfairly distort agricultural markets to the detriment of the U.S.;</li> <li>• unjustified trade restrictions or commercial requirements, such as labeling, that affect new technologies, including biotechnology;</li> <li>• unjustified sanitary or phytosanitary restrictions;</li> <li>• other unjustified technical barriers to trade;</li> <li>• rules that unfairly restrict imports of U.S. products in the administration of tariff-rate quotas; and</li> <li>• failure of a country to adhere to already existing trade agreements with the U.S.</li> </ul>

*The NAFTA Example*

The North American Free Trade Agreement provides an example of how the cumulative liberalizations under the agreement influenced US-Mexican rice trade. It should be carefully noted that much of current US subsidy practices evolved after the NAFTA implementation had begun. Given the composition of US-Thai rice trade -- the countries excel in generally non-competing products -- we estimate both US and Thailand would more equally benefit from broad rice liberalizations.

Prior to the implementation of NAFTA, Mexico charged a 10% tariff on imports of rough and broken rice and a higher 20% tariff on brown and milled rice. Under the tariff elimination schedule established under NAFTA, however, the Mexican import tariffs were set to decline by 1 percentage

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<sup>17</sup> Economic Research Service, USDA. *The 2002 Farm Bill: Provisions and Economic Implications*. [www.ers.usda.gov](http://www.ers.usda.gov)

<sup>18</sup> Economic Research Service, USDA. *The 2002 Farm Bill: Provisions and Economic Implications*. [www.ers.usda.gov](http://www.ers.usda.gov)

point per year for rough and broken rice and by 2 percentage points per year for brown and milled rice. At that rate, both tariffs will be completely eliminated on January 1, 2003.

For the year 2000, the duty rate has been reduced to 3% on rough and broken rice and 6% on brown and milled rice. As a consequence, the gap between the import tariffs on rough and broken rice and brown and milled rice has declined from 10 percentage points in the pre-NAFTA period to only 3 percentage points this year. The declining tariffs and the narrowing gap between the two tariffs have had implications for the level and composition of Mexican imports of U.S. rice. Since 1994, U.S. rough rice exports to Mexico have increased by 135% while those of parboiled and milled rice have declined by 41% and 66%, respectively. Several factors have contributed to the marked decrease in milled rice imports, even as tariffs on milled rice have been falling faster than tariffs on rough rice. First, rough rice still receives an advantage in terms of tariff rates. Purchasing patterns within Mexico likely changed as well, with the dismantling of the CONASUPO government purchasing agency and the reductions in domestic rice production. Mexican rice production declined precipitously in 1993, and although recovering somewhat in succeeding years, Mexican millers have sought supplemental sources of supply.<sup>19</sup>

### *Tariff Rate Quotas and Jasmine Rice Issues*

Regarding respective bilateral market shares in rice trade, Thailand should consider the establishment of a tariff rate quota on imported U.S. rice, with modest annual growth rates, as a means of sheltering the domestic sector. Thailand's leverage in this product derives from extensive U.S. use of TRQ's for sensitive agricultural products, the prominent role of Thai farmers in the power base of the Thai Rak Thai party, and as a means of defending Thai rice markets from potential future U.S. development of transgenic strains of aromatic rice.

This latter issue foresees the potential intersection of two volatile matters, biotechnology and rice market access. The *Thai Hom Mali* rice issue, translated into an FTA context, will create the need for language that addresses at once Thailand's position on genetically modified organisms while anticipating the potential emergence of a commercially viable strain of transgenic aromatic rice grown in the United States. Thailand must exhibit extreme care in analyzing the interdisciplinary issues involved: including SPS, TBT, agricultural market access, and IPR (geographical indications, protection of plant species, potential patent/trademark of transgenics). The U.S. will likely seek a back door for access for such rice strains in the IPR and TBT chapters; Thai negotiators may need to pursue explicit carve out language in several chapters to achieve sufficiently overlapping safeguards.

### *U.S. Domestic Political Considerations*

California, Arkansas and Louisiana are the three largest state producers of rice in the United States, with California alone growing nearly 20% of the annual U.S. rice crop. California produces over 90% of total US production of short-grain varieties of rice and 60% of total production of medium-grain varieties, but produces little long-grain rice. 83% of US rice exports

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<sup>19</sup> Salin, Victoria et al. "Structure of the Mexican Rice Industry, Implications for Strategic Planning" *Texas Agricultural Market Research Center Research Report No. IM 2-00*. February 2000.



are medium grain varieties. Louisiana and Arkansas are the sources of over 80% of US rice exports to the important Mexican market.

These factors have contributed to our design of the Congressional advocacy plan. In both House and Senate, we have included key Members who represent rice state interests. Thai leaders should be aware of these key Members' concerns regarding rice trade, and prepare to cultivate relationships accordingly on this sensitive issue.

- Diane Feinstein, California (Senate Agriculture)
- Blanche Lincoln, Arkansas (Senate Finance)
- Bill Thomas, California, (Chair, House Ways & Means)
- Cal Dooley, California, (House Agriculture)
- William Jefferson, Louisiana (House Ways & Means)

### **Sugar and the Tariff Rate Quota System**

Sugar and sugar-containing products are major Thai agricultural exports, yet the competitiveness of Thai sugar is limited by a U.S. tariff rate quota (TRQ). The TRQ strictly regulates market access for a total annual tonnage of raw sugar that is distributed among 40 traditional sugar exporters. Thailand will face considerable opposition from U.S. sugar producers during an FTA negotiation. The table below lays out specific options for Thailand to achieve greater long term access in the U.S. sugar market.

#### **Negotiating Alternatives for Sugar Market Access**

<b>Objective</b>	<b>Analysis</b>
Seek increase in annual TRQ allotments and growth rate for Thai raw cane sugar imports receiving duty free treatment.	Such an arrangement would provide Thailand essentially a unilateral quota amount separate from the general TRQ allotments furnished annually to 40 countries that are historical producers of sugar (a group now including Thailand). While providing a simple quantitative solution, this approach would "lock-in" incremental trade benefits and also alarm political defenders of the US quota system. (see Chile analysis below)
Seek bilateral reduction in out-of-quota ad valorem rate of 140% for Thai raw cane sugar. Scale reductions in over 5 years.	This option, furnished on top of the annual TRQ allotments, provides the best method for Thailand to rapidly grow market share on an annual basis by making Thai out-of-quota exports more price competitive.
Seek specific duty-free TRQ's for competitive Thai exports of processed products containing sugar.	Following the Mexican example in NAFTA, discussed below, Thailand should pursue these objectives to complement efforts to enhance raw cane sugar access and provide for broader market development opportunities for value-added food processing industries.

#### *The Chilean Example vs. NAFTA*

The example of the U.S.-Chile FTA provides guideposts for Thailand's bid to increase market access in sugar products. Throughout the process, Thailand should bear in mind that arguably, in

the FTA, Chile secured an inferior deal to that achieved by Mexico in certain sugar products in the NAFTA - but which the U.S. sugar industry would still find objectionable for an exporter of the magnitude of Thailand..

Prior to the negotiation of the FTA, Chile failed to qualify for the special U.S. TRQ on sugar because it was never a historically significant exporter of sugar to the United States. The US TRQ has been based upon historical bilateral trade flows and minimum commitments made under the Uruguay Round. Of the 40 countries receiving quota in FY 2003, Thailand received 14,743 metric tons of the U.S. raw cane sugar quota. Chile has traditionally been free to compete for the 7,000 metric tons of unassigned quota on a first-come-first-served basis - creating few opportunities for export growth. The Chileans addressed this issue in the FTA, but the achieved compromise language in the agreement promises to deliver little of real export value to Santiago until the 12-year transition period expires.

Essentially, the sugar deal in the Chile FTA provides Chile preferential access to the U.S. if and only if Chile runs a net trade surplus in sugar. The size of the surplus further determines Chile's preferential access.<sup>20</sup> A Chilean trade surplus in sugar would trigger the immediate release of 2000 tons of duty free exports, increasing to 3258 tons in year 11 of the agreement. If the trade surplus is less than the TRQ limit, Chile's duty free benefits may not exceed the amount of its' trade surplus. At the end of the 12-year transition phase, Chile and the U.S. both agreed that bilateral market access will be limited to the amount of each party's trade surplus in specified products.<sup>21</sup> During and after the transition period, duty free access will be limited to the amount of the net trade surplus.

Under the NAFTA, Mexico secured country-specific TRQ's for sugar-containing products and faster phase-in periods for duty free access, as follows.

- Due to Mexico's accession to NAFTA, Chapter 99 of the HTS (Note 18) establishes a duty-free TRQ for items of Mexican origin that contain more than 65 percent by dry weight of sugar and are imported in bulk as food ingredients. The TRQ for 2001 was set at 1,845 metric tons and increases to 1,900 metric tons in 2002. Flavored sugar products, cocoa powder, chocolate, bakery mixes and doughs, and mixed condiments and seasonings may be imported under the TRQ. Beginning in calendar year 2003, quantity limits were removed on these Mexican products.<sup>22</sup>
- Chapter 99 (Note 19) establishes a duty-free TRQ for blended sugar syrups of Mexican origin that are imported in bulk as food ingredients. The TRQ for 2001 was set at 1,845 metric tons and increases to 1,900 metric tons in 2002. Cane and beet sugar syrups, glucose, fructose, and chocolate syrup may be imported under the TRQ. Beginning in calendar year 2003, quantity were removed on these Mexican products.<sup>23</sup>

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<sup>20</sup> USTR defines a net trade surplus in sugar as total exports of sugar, sugar-containing products and high fructose corn sweetener minus total imports of these products. Importantly Chilean imports of HFCS from the U.S. do not count in the tally.

<sup>21</sup> USTR Responses to Questions Submitted For the Congressional Record by Senator Kent Conrad, Senate Finance Committee, July 10, 2003.

<sup>22</sup> Fact Sheet: The U.S. Sugar Program. Foreign Agricultural Service, USDA

<sup>23</sup> Ibid

- Chapter 99 (Note 20) establishes a duty-free TRQ for products of Mexican origin containing more than 10 percent by dry weight of sugar, such as candy, chocolate, and dry drink mixes. Products containing more than 65-percent sugar, which are imported in bulk, and blended sugar syrups are generally excluded, since they have been covered under Notes 18 and 19, respectively. Beginning in calendar year 2003, quantity limits were removed on these Mexican products.<sup>24</sup>
- Chapter 17 of the HTS (Additional U.S. Note 8) excluded all products from Mexico from a TRQ of 64,709 metric tons for products containing more than 10 percent by dry weight of sugar.<sup>25</sup>

Mexico's achievement -- of greater access for specified products -- highlights the political activism of the U.S. sugar-producing lobby since the passage of the NAFTA in 1992. Chile was unable to leverage its position as a relatively small sugar exporter to obtain greater U.S. flexibility on market access.

### *Sugar Politics*

**Thailand should be aware that its stature as a major sugar exporter will draw the ire of domestic U.S. industry.** The American Sugar Alliance (ASA), a federation of all US sugar producers, has aggressively protested against new bilateral trade agreements fearing increased access for foreign imports will “swamp” U.S. industry. The Alliance has reserved support only for WTO negotiations that will lower foreign export subsidies. The ASA has also dramatically increased its profile in Washington on trade in the past year, hiring retired USTR veteran Don Phillips, a former Assistant USTR for Asia-Pacific, and who negotiated much of China's accession to the WTO, as its chief trade lobbyist. American sugar growers are working to “make the Bush administration understand that there will be a ‘political cost’ if trade negotiators reach agreements perceived to hurt the sugar industry.”<sup>26</sup>

In the multilateral arena, the USTR has pledged to the Congress to take steps “addressing global distortions that affect sugar trade in the WTO negotiations”<sup>27</sup> In a bilateral negotiation with Thailand, USTR will resist an increase in annual TRQ allotments, delay offering language due to product sensitivity, and resist the use of the Chilean text as a model for Thai market access, having been warned by Congress that the Chilean provisions would be too lenient for an exporter of Thailand's magnitude<sup>28</sup>. A secondary alternative would be to seek a bilateral reduction for

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<sup>24</sup> Ibid

<sup>25</sup> Ibid

<sup>26</sup> *National Journal's Congress Daily*. “Stenholm, Sugar Growers Worry About Trade Talks”. August 6, 2003.

<sup>27</sup> *USTR Senate Finance Committee Responses, July 10, 2003*.

<sup>28</sup> Ibid. Senator Conrad noted for the record that the Chile provisions, if included with agreements with Australia, Central America, South Africa or Thailand, would “devastate” the U.S. sugar industry. Conrad's fears are that Thailand would easily run an annual net surplus, easily qualify for duty free access, and rapidly swamp US producers.

Thai products in the out-of-quota *ad valorem* tariff rates on sugar, which range up to 140%<sup>29</sup>. Such an arrangement would increase Thai competitiveness in the sugar market while ostensibly limiting political pressure regarding the TRQ. Before FTA talks open, Thailand should seek the explicit support of sugar importers and end-users who prefer the price competitiveness of Thai sugar and who can assist in political advocacy efforts. Substantial political support will be required to create meaningful flexibility in the U.S. position.

### **Shrimp Trade: Options and Obstacles**

In July, 2003, the U.S. International Trade Commission voted that Vietnamese catfish exporters had illegally dumped frozen fish fillets on the U.S. market. This victory for U.S. fishing industries has stiffened the resolve of the U.S. domestic shrimping industry to seek trade relief by political means. Thailand will face increasing U.S. political pressure against greater market access for Thai shrimp in an FTA.

### **Shrimp Trade Policy Agenda for Thailand**

<b>Key Issue</b>	<b>Analysis &amp; Recommendation</b>
Anti-dumping cases	The U.S. has never agreed, in any trade agreement, to provisions restricting the U.S. right to use trade remedies. An FTA does not provide a solution for current anti-dumping cases against Thai shrimp exports. The Thai government may consider providing for the legal defense of these exporters. Thailand should avoid negotiating Voluntary Export Restraints (VER) in this case as such a step would undercut Thai negotiating positions in the market access portion of an FTA.
Preserving and expanding market access	Political pressures on the US import market for shrimp indicate that Thailand may wish to pursue establishment of a Tariff Rate Quota for Thai exports at a duty free or reduced duty rate. Such an outcome is far more preferable to a VER. Over-quota shrimp exports should face a limited, MFN tariff rate. This method would preserve existing market share and offer political protection against future dumping cases.
Technical cooperation with USDA/FDA on SPS	Thailand should seek specific program of technical cooperation with the US Department of Agriculture and Food and Drug Administration under an FTA to facilitate clearance of Thai shrimp exports treated with antibiotics through establishment of mutual recognition protocols.
Legislative issues	As outlined in the advocacy plan in Section I of this report, Thailand should incorporate a relationship building exercise with prominent legislators from shrimping states during the course of FTA negotiations.

While prospective anti-dumping duties and SPS/food safety difficulties form immediate and classic trade policy challenges for Thai shrimp, the greater danger lies in the possibility that the U.S. Congress will grant trade relief through new legislation that would discriminate against Thai product. Developments at the political level could create *de facto* bargaining chips for the U.S. in the event of an actual FTA negotiation.

<sup>29</sup> *Trade Policy Review - United States: Report by the Secretariat*. World Trade Organization, 2001. p.28.

On June 10, 2003, Representative Ron Paul, of Texas, introduced the “Shrimp Importation Financing Fairness Act” into the U.S. House of Representatives. This legislation will be considered by the House Committee on Financial Services as well as the Committee on Resources and International Relations after the August recess. If passed, the legislation would deny OPIC investment insurance and EXIM Bank trade-related finance benefits to seven non-NAFTA foreign countries, including Thailand.

The draft bill cites a “developing crisis” in the domestic U.S. industry caused by those seven countries who exported in excess of 20,000,000 pounds of shrimp to the U.S. in the first half of 2002. The act would ban OPIC investment and finance services; EXIM assistance, and further ban IMF assistance to these countries on the basis of their shrimp exports. Furthermore, these bans would remain in place until countries lower their shrimp exports to the U.S. to less than 3,000,000 pounds per month for a period of 3 consecutive months.<sup>30</sup>

**Few WTO Options Regarding Shrimp Importation Financing Fairness Act**

Our analysis indicates Thailand and other shrimp exporters have little or no recourse to file a WTO complaint against the legislation should it be implemented. The legislation would not damage Thailand’s shrimp trade with the U.S. or deny other trade benefits to Thailand. The possible elimination of unilateral trade finance and investment insurance programs, as well as a ban on US-contributions to possible IMF assistance packages, does not appear to violate any WTO agreements.

The U.S. shrimp industry has aggressively supported this draft legislation, and become increasingly involved in the political process on the heels of the recent success of the domestic catfish industry. In late July, shrimp farmers from eight U.S. states joined public protests in New Orleans against the U.S. negotiations for a Central American Free Trade Area, on grounds that liberalization would further decimate the U.S. industry.<sup>31</sup>

Thailand should be prepared to address this new legislative issue when the U.S. Congress reconvenes for the Fall session in September. Advocacy efforts that elaborate WTO-related concerns over the draft bill should be undertaken on Capitol Hill as well as indicated executive branch agencies.

Thailand should develop as well advance plans for achieving graduated market access for shrimp in an FTA. Thai efforts should acknowledge the sensitivity of U.S. industry while staking out territory that would lead to the establishment of a tariff rate quota for Thai shrimp similar to that achieved for tuna in the Andean Trade Preference Act or Mexican sugar under the NAFTA. The TRQ should aim at preserving Thai market share and annual export growth for a predetermined

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<sup>30</sup> Text of HR 2406, Shrimp Importation Financing Fairness Act, as introduced in the House of Representatives. June 10, 2003.

<sup>31</sup> “Louisiana fisherman support shrimp tariffs” Associated Press, July 29, 2003.

transition period, after which Thai exports would suffer no quantity restrictions. Such a compromise may provide the only politically defensible solution for U.S. negotiators.

**Tuna and the Andean TRQ**

A free trade agreement would provide Thailand an ideal forum in which to obtain long term growth opportunities for a tuna industry constrained by a tariff rate quota system. These tables outlines key Thai negotiating objectives regarding the TRQ and lay out the US tariff structure.

**Negotiating Objectives for Tuna**

<b>Objective</b>	<b>Analysis &amp; Recommendation</b>
Immediate duty free treatment for annual “in quota” amount for Thai canned tuna	Offers Thailand immediate equal footing with Mexico, effectively guarantees market share for Thai canned tuna industry. Would be supported by US pacific tuna fleet.
Tariff reductions of over quota canned tuna exports from Thailand from 12.5% to zero within 8 years.	Offers Thailand long term advantages over competitors to grow market share. US will be sensitive to rapid cuts in over quota tariff stemming from concerns over Andean country trade benefits.
Thailand retains pouched tuna benefits from ATPDEA of 2002.	Although growth in this product has been nominal, Thailand should preserve a niche to which its factories retain a competitive edge over regional exporters.

**US Tuna Tariff Structure**<sup>32</sup>

<b>HTS#</b>	<b>Product Description</b>	<b>Tariff Rate</b>
16041410	Tunas and skipjack, whole or in pieces, but not minced, in oil, in airtight containers	35% X value
<b>16041420*</b>	Tunas and skipjack, not in oil, in airtight cont., n/o 7 kg, not of U.S. possessions, product within quota	<b>6% X value</b>
<b>16041430*</b>	Tunas and skipjack, not in oil, in airtight containers, n/o 7 kg, not of U.S. possessions, over quota	<b>12.5% X value</b>
16041440	Tunas and skipjack, not in airtight containers, not in oil, in bulk or in immediate containers weighing with contents over 6.8 kg each	\$0.011 X kilograms
16041441	Tunas and skipjack, not in airtight containers, not in oil, in bulk or in immediate containers weighing with contents over 6.8 kg each	\$0.011 X kilograms

**\* The tariff-rate quota for tuna canned, not in oil, is calculated at 20% of U.S. domestic production from the immediately preceding year, as reported by the National Marine Fisheries Service (NMFS).**

<sup>32</sup> source: FoodMarketExchange.com Data Center

### *Background*

The enlargement of the U.S. tuna quota achieved in the 2002 renewal of the Andean Trade Promotion Act provided limited growth opportunities for the Thai tuna industry. Although Thailand fared better than its ASEAN competitors in the deal, a shrinking tuna market and the growth of Latin American exporters threatens Thailand's ability to maintain market share in this important seafood product. In January, 2003, the U.S. certified Mexico's tuna industry as "dolphin safe", and lifted decade-old restrictions on Mexico's tuna exports. Mexican tuna in particular, benefiting from NAFTA arrangements, is well-positioned to cut into Thailand's market share in the United States.

The new market access for tuna in foil containers (pouch) has been of limited value to Thailand. In 2002, Thailand shipped over \$12 million of tuna/albacore in pouches to the U.S. These exports are less than 7% of the U.S. total imports of pouched tuna. Thai exports of canned tuna and albacores, meanwhile, decreased by nearly 50% from 2001 to 2002. The recommended negotiating objectives, outlined above, are intended to restore market share and rekindle growth in the Thai canning industry.

### III. Trade Policy Areas of Inquiry II

#### Textiles and Apparel

Thailand, as with any U.S. FTA partner, will be hard pressed to obtain significant market openings in the textile and apparel sector. The outlook for expanded market access to the U.S. revolves about several areas.

#### **Perspectives for Thai Market Access on Textiles & Apparel**

<b>Issue</b>	<b>Analysis</b>
Duty free access	Possible for apparel products. In Singapore and Chile FTAs, U.S. won agreements by partners that provided duty free access only to product areas in which FTA partners committed to use U.S.-made fabrics. Thai industry should examine pre-existing linkages to US fabric makers; Ministry of Commerce should request US demonstrate convincingly product-specific potential market gains from its proposals as a condition of Thai consideration.
Transshipment	U.S. will seek close collaboration and invasive inspection regime regarding Thai Customs' management of textiles export shipments. Thailand's current efforts under the Container Security Initiative should serve as good basis for this bit of the FTA
U.S. access demands	U.S. will expect reciprocal cuts to Thai textile/apparel tariffs in product areas where U.S. itself provides improved market access. U.S. will also look for improved enforcement of trademarks of U.S. clothing brands
Sources of Thai leverage	<p>Thailand's leverage on apparel will not originate within the sector itself, rather, Thailand should consider that its relatively protected positions in financial services, telecommunications, e-commerce and IPR provide leverage to gain greater access for apparel exports to the U.S.</p> <p>Additional, unlooked for benefits may stem from the collapse at talks in Cancun. A lack of broad US cuts in conjunction with a WTO round should yield greater political flexibility toward bilateral FTA partners on apparel.</p>

*Background: NAFTA vs. Singapore & Chile FTAs*

#### NAFTA Provisions

Under the NAFTA, the U.S. took a relatively liberal approach to opening the domestic market, which would generally benefit Thai exporters to a much greater extent than the Singapore or Chile models. NAFTA phased out tariffs in a maximum of ten years for products manufactured in North America that meet NAFTA rules of origin. Import quotas in the United States were lifted immediately for such "originating" goods, and gradually phased-out for non-originating goods (i.e., products that meet the normal U.S. rule of origin). Barriers covering over 80 percent of textile and apparel trade between the U.S. and Mexico were eliminated in six years or less. Regarding U.S. market access, NAFTA provides an example of how Thailand may itself minimize liberalization. NAFTA immediately eliminated tariffs on over 20 percent, or \$250 million, of U.S. exports to Mexico, providing open access to competitive producers in sectors such as denim, underwear, sewing thread and many household furnishings.



## Singapore and Chile Provisions

Thailand's status as a leading exporter of textiles and apparel will complicate the overall negotiations of an FTA. The Administration's positions in the Chile, Singapore, and ongoing FTAA and CAFTA negotiations indicate a significant political vulnerability to the lobbying efforts of the U.S. textile industry. The Chile and Singapore deals crafted qualified breakthroughs with regard to free trade in textiles and apparel. Under both agreements, textiles and apparel will be duty-free immediately if they meet the Agreement's rule of origin, promoting new opportunities for U.S. and Singaporean/Chilean fiber, yarn, fabric and apparel manufacturing. A limited yearly amount of textiles and apparel containing non-US or non-Singapore/Chilean yarns, fibers or fabrics may also qualify for duty-free treatment.

The critical qualification for duty-free treatment, however, stems largely from requirements that U.S. trading partners use substantial amounts of U.S.-manufactured yarns and fabrics in the manufacture of finished apparel. The composition of Thailand's apparel exports, however, indicates that these requirements would not deliver substantive benefits to the Thai economy. The U.S. will demonstrate considerable inflexibility on this issue; politically palatable options for Thailand may well be to seek relatively short transition periods to full-scale duty free market access for apparel goods.

### *Sources of Political Support*

In terms of private sector advocacy, major textile exporters have yet to utilize U.S. importers, wholesalers and retailers as a powerful lobbying coalition. Thailand should consider assembling a coalition of U.S. buyers to enhance its political position on the sector. Duty-free access for Thailand should draw foreign investment into the Thai apparel sector, particularly if Thai companies and ports can improve logistical management and processing/delivery times. This factor should be a leading component of a Thai marketing pitch to U.S. apparel buyers to support vigorously more aggressive outcomes in an FTA.

Additional sources of support may be found from specific Congressional delegations in textile producing states -- provided that Thailand find no objection to U.S. demands regarding use of U.S. yarns and fabrics. The Government of Singapore marshaled an impressive coalition of support from U.S. textile states during the course of negotiations by touting the degree to which FTA provisions would expand those states' exports of fabric to Singapore. If it chose to pursue such a course of action, Thailand would need to focus outreach efforts primarily on Congressional delegates from Deep South cotton-producing states (Mississippi, Georgia, Texas) as well as the "New South" states of North and South Carolina. These efforts would be conjoined with Congressional outreach timed after the launch of negotiations.

## Transparency

Transparency is a key element of the new U.S. free trade agreements, and a core complaint of U.S. industry regarding trade in Thailand. U.S. demands on transparency will resemble the following:

- Access for U.S. private sector, government and civil society groups to Thai regulatory and rule-making process via legitimate and timely comment procedures.
- Advance notification and online publication, in English, of proposed rules and regulations and implementing directives by Thai regulators and ministries to facilitate the comment process.
- Commitments to utilize WTO Committee and Subcommittee structures to submit proposed regulatory changes to groups of internationally recognized experts.

In the *2003 National Trade Estimate Report on Foreign Trade Barriers*, the UST cites lack of transparency concerns regarding import regulations, government procurement, goods price control mechanisms, general regulatory administrative procedures, and customs administration. The U.S. will approach transparency in a comprehensive manner, based on language now achieved in the Singapore and Chile agreements.

“Enhanced transparency is another important feature of this FTA. An entire chapter is devoted to notice and comment procedures that are modeled on the U.S. Administrative Procedures Act. In addition, many of the other chapters contain specific provisions to ensure regulatory transparency - e.g., in the chapters on services, financial services, competition, government procurement, customs administration, investment, telecom, and dispute settlement.”<sup>33</sup>

In general, U.S. objectives regarding on transparency attempt to extend U.S. regulatory practices -- administrative law doctrine -- to practically all disciplines covered by the trade agreement. In the case of Thailand, this will be particularly noteworthy with respect to the creation of real opportunities for comment and participation in the regulatory process by affected foreign companies. The U.S. seeks a regulatory policy process similar to its own.

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<sup>33</sup> Testimony of Assistant USTR Ralph Ives. *Trade in Services and E-Commerce: The Significance of the Singapore and Chile Free Trade Agreements*. House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, May 8, 2003.

The Chile FTA provides examples of transparency provisions that go well beyond the NAFTA. For example, the Chile text establishes an “Article on Transparency in Development and Application of Regulations” in the chapter on cross-border services, and in the investment chapter includes an “Article of Transparency of Arbitral Proceedings in Investor-State Disputes”. This latter article was not in the NAFTA and may, in fact, create transparency for US investors that goes beyond the Treaty of Amity and Economic Relations, as it includes requirements for open, public hearings, the protection of confidential information, and the possibility of *amicus curiae* submissions. In general, Thailand can anticipate pressure for much greater participation by U.S. interests in the Thai regulatory formulation and analysis process. see also: *Investment and Transparency Provisions in Chile’s FTAs with the E.U. and U.S.A.*. Presentation before the OECD Committee on International Investment and Multinational Enterprises, April 10, 2003. Ministry of Finance, Republic of Chile.

*The Chile Model Explained*

The basic elements of a transparency chapter are outlined here. Thai officials should note that the United States will pursue the inclusion of these elements within other chapters of the agreement as well to ensure all-inclusive coverage of the subject matter across all trade disciplines.

**Summary of U.S.-Chile FTA Transparency Chapter<sup>34</sup>**

This Chapter sets out a number of requirements designed to foster openness, transparency and fairness in the adoption and application of the administrative measures covered by the agreement. It should be noted that various other chapters of the agreement provide specific, detailed rules in this area. The Chapter is similar to Chapter 18 of the NAFTA.

Article 1 defines the term “administrative ruling of general application”

Article 2 requires each party to designate a contact point to facilitate communications between the governments on subjects covered by the agreement.

Article 3 provides that each government must promptly publish all laws, regulations, procedures and administrative rulings of general application concerning subjects covered by the agreement, or otherwise make them available to interested persons and the other party. Each party must, where possible, also publish such measures in advance and provide interested persons a reasonable opportunity to comment on them.

Article 4 provides that the parties should notify each other of measures that they believe might affect the operation of the agreement or each other's interests under the agreement. Furthermore, a party must provide information upon request from the other party concerning any action that it has taken or intends to take.

Article 5 requires each government to accord basic procedural guarantees to firms and individuals from the other party in specific types of administrative proceedings that affect matters covered by the agreement. These guarantees include reasonable notice of proceedings and the opportunity to present facts and arguments.

Article 6 provides for review and appeal of final administrative actions. Article 6 is similar to GATT Article X.3(b) and requires each government to establish or maintain independent administrative or judicial review procedures. These appeal rights must include a reasonable opportunity to present arguments and to obtain a decision based on evidence in the administrative record.

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<sup>34</sup> Office of the United States Trade Representative, Published Summaries of Chile FTA. 2003.

## Government Procurement

**U.S. Objectives in Government Procurement**

<b>Objective</b>	<b>Analysis</b>
WTO GPA minimum commitment	U.S. will demand Thailand accede to the WTO Government Procurement Agreement - or afford GPA benefits to U.S. on a bilateral basis
Public hospital sector	U.S. will seek access for U.S. pharmaceuticals to sell medicines to Thai public hospital sector , demanding as well elimination of discriminatory pricing arrangements in the sector.
Buy Thai	U.S. will argue the Buy Thai initiative contravenes Thai commitments under the Wto ITA. Will seek inclusion of non-discriminatory language for US firms' access to Thai public sector IT procurement deals
Buy America waivers	Thailand should request blanket waiver for Thai firms regarding Buy America Act by establishing certification process through the U.S. Federal Trade Commission as well as language mirroring US demands on non-discriminatory bidding processes.

**To date, all U.S. FTA partners have accepted the WTO Agreement on Transparency in Government Procurement (GPA) as the basis for commitments under an FTA. This is viewed by the United States as the minimum acceptable commitment for an FTA partner.** The government procurement chapters of the Singapore and Chile FTAs enshrine the WTO GPA as the foundation for further liberalization of the sector. The U.S. will seek to secure Thailand's agreement to accede to the WTO GPA as a primary objective. The Singapore agreement deals substantively with procurement issues of the city-state's "government-linked corporations", providing a template for the anticipated treatment of Thailand's public hospital groups for the purposes of pharmaceutical procurement. The U.S. remains highly critical of the Buy Thai Initiative, and will seek explicit language eliminating or sharply reducing the impact of Buy Thai on American vendors. It is unlikely the U.S. will entertain flexibility on formalizing counter trade practices in an FTA.

While the "Buy America Act" constitutes the greatest non-tariff barrier in the U.S. government procurement market, parties to the WTO GPA are qualified to receive waivers (*inter alia*, through the 1979 Trade Agreements Act) which would significantly open the U.S. procurement market to Thai suppliers. Some U.S. trading partners, however, are critical of the waiver process.<sup>35</sup> Thailand should seek to ease operability problems regarding waivers by securing a streamlined process in an FTA. Thailand should also take strides to address procurement issues at the sub-federal (state and local) levels of the U.S. government. The autonomy of state and local governments has led to uneven regulations regarding government procurement contracts at the sub-federal levels. To obtain comprehensive market access gains in procurement, Thailand must substantively address all vertical levels of the U.S. government. Under the U.S.-Singapore FTA, however, no U.S. states made obligations greater than those in the Uruguay Round or the

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<sup>35</sup> For a substantive treatment of barriers to access in the U.S. procurement markets, see also the European Commission. *Report on United States Barriers to Trade and Investment*. Brussels, November, 2002. pp.30-37.

WTO GPA. In addition, local governmental liberalizations were not addressed in the Singapore/Chile agreements.<sup>36</sup>

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<sup>36</sup> USTR. *U.S.-Singapore Free Trade Agreement: Impact on State and Local Governments*. 2003.

## Customs Administration & Trade Facilitation

While customs and trade facilitation issues in the WTO setting have been relegated to “Singapore issue” status, they assume a much more prominent position in U.S. negotiating objectives with regard to regional and bilateral agreements. Generally speaking, the U.S. will pursue these objectives aggressively in bilateral deals as a means to build slowly toward new broad WTO agreements on these disciplines.

It would be difficult to underestimate the impact of September 11, 2001, upon U.S. policy regarding customs and risk management in international trade. As a participant in Customs’ Container Security Initiative, Thailand is already developing a working relationship with U.S. Customs that should serve well during any future negotiations. **Thai officials should understand, however, that progress made under the Trade Investment Framework Agreement (TIFA) with the United States will not serve as a substitute for formal, substantive commitments under an FTA.**

### Key Issues for Customs and Trade Facilitation

Issue	Analysis
Cooperative mechanisms	<p>U.S. will seek to enshrine Container Security Initiative cooperative agreements within the FTA, develop joint mechanisms for risk management; seek Thai cooperation on aggressive search and seizure protocols of suspect ship and shipments that may go beyond current Thai regulations, and seek Thai commitments to boost law enforcement capacity with regards to customs</p> <p>Thailand can leverage current cooperation on CSI and US demands to obtain US commitments on capacity building and training</p>
Rules of origin	<p>U.S. will seek rules of origin that prevent backdoor through Thailand for export of Chinese, ASEAN and other third country goods to the United States under preferential FTA duty rates</p> <p>Thailand should seek similar protections against products manufactured in US NAFTA partner countries as well as guard against potential future exports to Thailand from FTAA countries shipping through the United States.</p>
Legal reforms	<p>U.S. will demand FTA commitment for Thailand to reform Article 11 bis. of the Thai Customs Act as amended in 2000 to close legal loopholes regarding uplift of customs valuations by Thai Customs officials. The current agreement under the TIFA by Thai Customs is viewed by US industry and US officials as a short-term solution at best.</p>
Duty drawback	<p>Barring a lobbying success by a US industry coalition attempting to keep duty drawback provisions in FTAs, the US will seek reciprocal gradual phase outs of these benefits in a US-Thai FTA. (see below)</p>
Trade facilitation	<p>U.S. will be open to creative Thai proposals such as the Integrated Sourcing Initiative or complementary Open Skies provisions. (see below)</p>

### *Cooperative Mechanisms and ROO's*

Following protocols established in the Chile and Singapore FTAs, the U.S. will seek to limit the autonomy of Thai Customs in the administration of procedures related to an FTA. The overall security stance of the U.S. regarding cargo shipments, coupled with traditional concerns over illegal transshipments, means that flexibility will be nearly nonexistent. Thailand should anticipate an exhaustive negotiation that will specify customs protocols on risk management, notification, search and seizure and hazardous materials. The U.S. will seek to strengthen the law enforcement role and capacity of the partner country's customs agency, and press for bilateral transparency and efficiency that includes requirements to publish laws and regulations on the Internet, to eliminate procedural uncertainties, and to mandate information-sharing arrangements.

Rules of origin (ROO's) will be simple but strict, adhering to three basic components regarding criteria for substantial transformation: change in tariff classification, clear value added/local content rules, and a clear process rule. Separate ROO's will be necessary for textiles and apparel and any potential forward-leaning arrangement such as the Integrated Sourcing Initiative.

### *Legal Reforms*

The U.S. will almost certainly insist on a binding legislative commitment by Thailand to redress apparent loopholes in the Thai Customs Amendment (2000) that allow for the subjective uplift of customs valuations. To facilitate this process, the U.S. will seek a written commitment that Thailand will submit new legislation to the WTO Committee on Customs Valuation by a date certain. The current, informal agreement reached in July, 2003, with Thai Customs regarding treatment of U.S. imports will be deemed insufficient for the purposes of a formal FTA.

### *Duty Drawback*

Major U.S. manufacturers are currently fighting for the restoration of duty drawback provisions in the customs chapters of U.S. free trade agreements. Current policy restricts and phases out drawback provisions. Some industries with high bilateral trade volumes and lengthy tariff reduction schedules consider drawback a vital source of rebate.

Duty drawback and deferral regimes rebate, defer or reduce duties paid on material inputs contingent upon exportation of the processed or finished goods. In the context of an FTA, where inputs are dutiable in the United States and in the FTA partner country, duty drawback programs can distort investment decisions by creating an incentive for investors to locate in the FTA partner country in order to benefit from duty drawback when exporting processed goods for sale in the U.S. market. These programs also can create "export platforms" for materials produced in third countries since they *de facto* provide duty free treatment negotiated under the FTA to inputs from third countries when the processed goods are exported to the territory of the FTA partner. For industries in FTA partner countries, the gains from tariff reduction under an FTAs on average far exceed any tariff refunds foregone under these programs. The NAFTA restricts duty

deferral and drawback to the lesser of duties paid on the imported input or duties paid on the processed good exported to a NAFTA trading partner. The United States-Chile FTA provides for a gradual phase out of the use of these programs for shipments between the Parties. U.S. proposals in ongoing FTA negotiations are modeled on the U.S.-Chile provision.<sup>37</sup>

### *Trade Facilitation and Creative Options*

The facilitation of trade between FTA partners can be a core achievement of a forward-leaning customs chapter. The U.S.-Singapore FTA adopted a model pilot program for innovative trade facilitation that could benefit key high-value Thai industries. The Integrated Sourcing Initiative (ISI) of the Singapore agreement provides a guidepost.

ISI allows for the duty-free admission of those products covered by the WTO Information Technology Agreement that are manufactured by Singapore-owned companies operating in Bintan and Batam provinces in Indonesia. The crucial factor for ISI is not duty-free treatment, however, but rather provisions that foster a drastic reduction in customs paperwork and bureaucratic red tape for the processing of indicated goods. This contributes to superior logistics and supply chain management capabilities that increase the attractiveness of these goods for U.S. buyers.

#### **Prospects for Thai High Tech Growth Through Trade Facilitation**

Thai exports of integrated circuit products could enjoy substantial growth under an ISI-type arrangement in a Thai-US FTA. Bilateral trade in certain circuit products has grown 277% since 2000. U.S. manufacturers of unmounted circuit chips are increasingly sending product to Thailand for processing into integrated circuit assemblies. These finished goods are then re-exported to U.S. end users, valued at an excess of \$500 million in annual Thai exports<sup>1</sup>. Burgeoning growth in this category, as well as Thai exports of “smart card” technology to the U.S. (valued at over \$3 million in 2002), should be protected and enhanced by state-of-the-art trade facilitation text that enshrines Thailand as a preferred provider of the U.S. digital economy.

### *Complementary Policies for Trade and Transport Facilitation: Express Delivery Services and Open Skies*

An ISI type of sub-agreement has the potential to create channels for rapid export growth in high value, high technology goods. Typically, such goods are delivered via air freight to meet the extreme supply chain demands of the digital economy. Thailand’s policy infrastructure regarding aviation and trade, however, inhibits the capacity for rapid growth in bilateral trade in technology goods. Two primary options -- which are not mutually exclusive -- can be pursued

<sup>37</sup> see also Federal Register Notice, “Trade Policy Staff Committee; Request for Public Comment on Duty Drawback and Deferral in Free Trade Agreement Negotiations” (Federal register, Volume 68, Number 127.) July 2, 2003.



under or alongside an FTA to enhance trade in high tech goods and to draw foreign direct investment into the technology sectors in Thailand.

The first vehicle involves explicit text in the services chapter of an FTA dealing with express delivery services. The USTR will consider express delivery services a priority target in the services chapter and a necessary element of enhanced digital trade. (see Section III) Core commitments exceeding the GATS on express delivery will allow for rapidly expanded investments in Thailand by such U.S. firms as UPS, Federal Express and DHL, as well as create growth opportunities for domestic Thai logistics providers.

The second policy option entails the U.S. and Thailand undertake a bilateral “Open Skies” aviation agreement in parallel with an FTA. The U.S. currently has bilateral Open Skies agreements with over 50 aviation partners, most of whom experienced dramatic growth in trade and aviation related logistics industries upon implementing the liberal policy environment mandated by the agreements. Fully liberalized 5<sup>th</sup> and 7<sup>th</sup> freedoms in particular, addressing beyond rights for passenger and cargo services, are essential for Thailand to utilize a U.S. FTA to address regional competitiveness issues in high value trade. In November, 2000, the U.S. signed a cutting edge Multilateral Open Skies Agreement with Brunei, Chile, Singapore and New Zealand. Thailand’s membership in this group agreement would take giant steps in addressing Thai policy goals regarding the development of regional transport hubs. Such an agreement would not fall strictly under the rubric of an FTA, as the USTR has no statutory authority over aviation. Rather, the U.S. Department of Transportation and the U.S. State Department would co-chair an Open Skies negotiation, which could then be packaged as a side letter agreement with an FTA.

## Trade Remedies and Dispute Settlement

Trade Promotion Authority legislation statutorily restricts U.S. trade negotiators from weakening or altering U.S. trade remedy laws in trade agreements. Since TPA, the Congress has gone further in defense of safeguards. In July, 2003, the bipartisan Congressional House Steel Caucus proposed new legislation to strengthen current trade remedies. HR 2365, the *Trade Law Reform Act of 2003*, would not only reinforce current trade remedies, but also lower the threshold of use, formally reducing the requirements that U.S. firms show just cause by demonstrating that excessive imports have caused injury.<sup>38</sup> This charged political context determines fully the U.S. negotiating posture. Thailand need look no further than the Singapore negotiations to understand the entirety of the U.S. position: for over two years of negotiations, the U.S. simply refused to allow a discussion of remedies and safeguards on the table. As a result, the issue was not included in the U.S.-Singapore FTA.

Extraterritoriality and unilateralism are the two most frequent charges made against U.S. trade remedies laws and safeguard provisions, with few exceptions, U.S. FTA partners are not immune to this treatment.<sup>39</sup> The U.S. will steadfastly refuse to alter Thai susceptibility to several items of legislation, including the *Helms Burton Act*, the *Iran Libya Sanctions Act*, and the various antidumping statutes contained in the *1916 Antidumping Act* and the *Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment)*. In addition, Sections 301-310 of the *Trade Act of 1974*, as amended, will continue to apply to the U.S. -Thai bilateral relationship after an FTA is completed. Indeed, these trade laws would then play a role in managing the implementation of Thai commitments under an FTA.

### *Understanding NAFTA Exclusions*

Only in the NAFTA did the U.S. confer a limited immunity to its trading partners regarding safeguards. In that case, the U.S. developed qualified exceptions for NAFTA partners in the event the U.S. undertook a global safeguard -- as opposed to a bilateral antidumping or CVD -- action. Mexico and Canada therefore escaped the sanctions of the Section 201 global safeguard on steel initiated in 2001. Neither Singapore nor Chile obtained such protections in their respective FTA deals. Given Thailand's sensitivity regarding this issue, the key portion of the NAFTA regarding global safeguards, Article 802, is reprinted here in its entirety to provide Thai officials with representative language. readers will note that Section 1, subsections (a) and (b) provide the specific language regarding limited immunity.

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<sup>38</sup> *House Members Offer Bill Establishing WTO Review Body, Reforming Trade Laws. Daily Report for Executives.* BNA Inc. July, 17, 2003.

<sup>39</sup> for fuller explanation, see the European Commission *Report on United States Barriers to Trade and Investment.* Brussels, November, 2002.

## NAFTA Article 802: Global Actions

1. Each Party retains its rights and obligations under Article XIX of the GATT or any safeguard agreement pursuant thereto except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article. Any Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:

(a) imports from a Party, considered individually, account for a substantial share of total imports; and

(b) imports from a Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

2. In determining whether:

(a) imports from a Party, considered individually, account for a substantial share of total imports, those imports normally shall not be considered to account for a substantial share of total imports if that Party is not among the top five suppliers of the good subject to the proceeding, measured in terms of import share during the most recent three-year period; and

(b) imports from a Party or Parties contribute importantly to the serious injury, or threat thereof, the competent investigating authority shall consider such factors as the change in the import share of each Party, and the level and change in the level of imports of each Party. In this regard, imports from a Party normally shall not be deemed to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from a Party during the period in which the injurious surge in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period.

3. A Party taking such action, from which a good from another Party or Parties is initially excluded pursuant to paragraph 1, shall have the right subsequently to include that good from the other Party or Parties in the action in the event that the competent investigating authority determines that a surge in imports of such good from the other Party or Parties undermines the effectiveness of the action.

4. A Party shall, without delay, deliver written notice to the other Parties of the institution of a proceeding that may result in emergency action under paragraph 1 or 3.

5. No Party may impose restrictions on a good in an action under paragraph 1 or 3:

(a) without delivery of prior written notice to the Commission, and without adequate opportunity for consultation with the Party or Parties against whose good the action is proposed to be taken, as far in advance of taking the action as practicable; and

(b) that would have the effect of reducing imports of such good from a Party below the trend of imports of the good from that Party over a recent representative base period with allowance for reasonable growth.

6. The Party taking an action pursuant to this Article shall provide to the Party or Parties against whose good the action is taken mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action. If the Parties concerned are unable to agree on compensation, the Party against whose good the action is taken may take action having trade effects substantially equivalent to the action taken under paragraph 1 or 3.

These NAFTA exclusions are supported by recent WTO jurisprudence regarding the relationship between free trade agreements and global safeguard actions:

Prior WTO rulings had already considered the issue of whether and how a safeguard measure should apply (and not apply) to free trade agreement partners. The (2002) Panel decision in the *United States Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* established that the United States could exclude Canada from measures taken under Section 201 against other, non-NAFTA countries. The dispute panel found in particular that since Article XXIV of GATT in 1994 authorizes free trade areas, it was reasonable that the NAFTA Implementation Act makes provisions for exclusions of NAFTA imports. Thus the United States was authorized to apply differential treatment to other WTO members by excluding a NAFTA partner.<sup>40</sup>

### *Dispute Settlement*

Regarding dispute settlement, the U.S. sought in the Chile and Singapore deals to craft a dispute settlement forum that reduced litigation through enhanced consultation between parties. Given the expense in time and resources caused by trade litigation, a streamlined consultation process should be in Thailand's interests. Given the difficulty of WTO litigation compliance issues for all members, the consultative approach preferred in new agreements may yield resolutions that interfere less with commerce.

The new FTAs provide for the establishment of *ad hoc* dispute panels, with shared responsibilities for the designation of panelists by the parties. Open public hearings, the public release of legal submissions and explicit third-party *amicus* rights further bolster a dispute system designed to foster transparency and confidence. All core obligations of the FTAs, including labor and environment, are subject to the dispute settlement provisions. Both Singapore and Chile accepted U.S. demands that the enforcement mechanisms of the commercial, labor and environment obligations include monetary penalties<sup>41</sup>. Thailand should consider this as the baseline from which the U.S. will begin new negotiations.

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<sup>40</sup> Verrill, Charles Owen, Jr. "NAFTA and the Steel Section 201 Safeguard Action". Wiley Rein and Fielding, LLP. May, 2003.

<sup>41</sup> In practice, the elaborate dispute settlement system is designed to bring about amicable resolutions through a lengthy panel and letter exchange process that ultimately circumvents the actual resort to monetary penalties. This loophole caused considerable resistance among Democrats in the Congress, but did not prevent the ultimate passage of the FTAs.

## IV. The New Economy: Developing Precedents in Digital Trade -- IPR, E-Commerce, and Telecommunications

The term “digital trade” reflects the tremendous growth of knowledge-based and communications industries in the United States over the past 15 years. Digital trade disciplines are those that extend the global market access and protect the value of American e-commerce, telecommunications and related services industries that formed the core of the country’s high tech boom of the 1990’s and that continue to enjoy substantial gains from technology-driven productivity increases. These sectors of the U.S. economy add value to traditional manufacturing and other services sectors and are increasingly reliant upon favorable regulatory and policy infrastructures for future growth.

### Why Thailand?

The U.S. views New Economy commitments in FTAs as the backbone of the future growth potential for much of the U.S. economy. That overwhelming objective meshes with a Thai economy that the U.S. e-commerce and telecommunications sectors have identified as a key target because of the following considerations:

- *The Thai domestic market is believed to hold significant future potential.* Despite low Internet penetration rates of 5.56%, Thailand’s rapidly expanding annual per capita GDP -- now at \$6,900 -- places the country on the cusp of rapid development of New Economy sectors<sup>42</sup>. This core development, coupled with official Thai Government focus on modernization and expansion of the transport, telecom and financial sectors, provide for significant potential growth of related e-commerce services where the U.S. enjoys competitive advantage (i.e. logistics, Voice over Internet Telephony, securities trading and management).
- *The Thai services sectors related to the New Economy are well sheltered and virtually closed to U.S. investors.* U.S. industry has been frustrated in attempts to develop inroads to New Economy sectors of the Thai market. Amity Treaty restrictions on telecommunications investments, government dominance of the sectors, high rates, and the nonexistence of independent regulators have contributed to deny U.S. investment to these sectors. U.S. corporate interests believe that substantial market development may take place with the sweeping liberalizations of an FTA.

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<sup>42</sup> **Thai Internet penetration is rapidly growing.** “At the end of 2000, total Internet users in Thailand equaled 2.3 million or 4% of total population and were fairly evenly divided by gender (Male = 51%, female = 49%). 50% of users are between 20-29 with the majority (72%) in college or holding a university degree or higher. To no surprise, the Thai Internet population is highly skewed towards the middle-upper SES class. Also of note, about 2/3 of Internet users are in Bangkok and vicinity areas.” *Asia Internet Demographics and Research*. Intage Express Magazine. Intage Co. Inc, Japan, June, 2001. By the end of 2001, Thai Internet penetration had already risen to 5.56%, according to Izumi Azuu. “A Comparative Study on Broadband in Asia” *Asia Network Research*. October, 2002.

### Broad U.S. Objectives for New Economy

Issue	Objective
Digital goods	Same customs treatment and tariff rates for goods purchased via electronic transaction as via physical trade
E-commerce	<ul style="list-style-type: none"> <li>• Moratorium on Internet taxation</li> <li>• Extension of all current WTO obligations to all facets of e-commerce</li> <li>• Commitment not to regulate in future in discriminatory manner against e-commerce</li> <li>• Rhetorical recognition of importance of free flow of information to global trade flows</li> <li>• Reaffirmation of APEC Electronic Commerce Steering Group</li> </ul>
Digital services	<ul style="list-style-type: none"> <li>• The US will demand market access commitments that will bilaterally open certain services sectors faster and to a greater extent than Thailand has agreed to do in the WTO GATS. Target sectors will include: communications, media, audio-visual, logistics and integrated express delivery, computer related, and all aspects related to electronic delivery of financial services, educational services and distribution services.</li> <li>• We note that many of Thailand's GATS exemptions indicate that these exemptions will change provided for reciprocal treatment by prospective future trading partners. This forms positive basis for new FTA negotiations with the US.</li> </ul>
Telecommunications	<ul style="list-style-type: none"> <li>• Elimination of state-owned CAT and TOT duopoly, see Telecommunications section below</li> <li>• Elimination of 25% maximum foreign investor limits in the sector</li> <li>• Full access for US entities to basic telecom network</li> <li>• Full US access for value added telecom services such as online services, database services and computer services</li> <li>• Creation of a viable, independent regulator separate from Ministry of Commerce and the Cabinet.</li> <li>• Commitment to allow free market to determine technology use (i.e. no government controlled determination of 3G wireless technology)</li> </ul>
Intellectual Property Rights	<ul style="list-style-type: none"> <li>• Substantive "TRIPS plus" and enforcement improvement designed to preserve and protect knowledge-based industries, see IPR section, below</li> </ul>

### U.S. Domestic Sources of Digital Trade Objectives

Since the conclusion of the plurilateral WTO Information Technology Agreement in 1996, the United States has pursued an ambitious agenda to comprehensively liberalize a number of trading disciplines related to digital trade. Wary of slow progress on e-commerce and related disciplines under the GATS, the U.S. has sought to use bilateral and regional free trade agreements, as well as other international venues to establish liberal precedents for global digital trade and to stave off European Union initiatives that threaten the competitiveness of American "new economy" industries.

In crafting a policy approach, USTR and other foreign affairs agencies have been highly responsive to a coordinated industry lobby demanding a comprehensive set of goals addressing e-commerce transactions, e-business relationships, and e-commerce enablers that span a variety

of goods, services and IPR-related trade disciplines.<sup>43</sup> The USTR-led strategy consciously promotes a series of linked policy issues with the objective of liberalizing substantially global digital trade. AOL/Time Warner provides a clear elaboration of industry goals:

“We support the free flow of goods and services across a range of sectors that make up the e-commerce value chain. This begins with lower tariffs on the goods and services that form the building blocks of the Internet architecture, and include reducing barriers to advertising, financial services and internet billing and payments, distribution of content – including movies and music, express delivery services and customs modernization. We must address these "barriers" to e-commerce in a holistic and comprehensive fashion. Without such a commitment, even one weak link in the e-commerce value chain can undermine the potentially explosive growth of e-commerce and productivity enhancement, new job creation and expanded consumer choice and opportunity.”<sup>44</sup>

-- Mr. George Vradenburg  
Executive Vice President Global and Strategic Policy  
AOL/Time Warner

The U.S. Congress enshrined this relatively new trade priority in the Bipartisan Trade Promotion Authority Act of 2002, instructing USTR to “conclude new agreements that anticipate and prevent the creation of new trade barriers that may surface in the digital trade environment.”<sup>45</sup> TPA provided a statutory mandate to policy trends that were well underway, and culminated in the successful negotiation of FTAs with Chile and Singapore. Precedents developed in these agreements will form the baseline of U.S. negotiating objectives -- as well as text -- of forthcoming FTAs. From a strategic perspective, USTR will utilize the Singapore and Chile precedents to develop a network of similar FTAs in Asia and Latin America, respectively. These agreements are, in turn, intended to catalyze a multilateral process at the WTO complemented by U.S. achievements going forward under the APEC Blueprint for Electronic Commerce. The APEC work, was begun in 1998, and reinforced in 2002 at the Los Cabos APEC ministerial with the “Statement to Implement APEC Policies on Trade and the Digital Economy”<sup>46</sup> In short, the U.S. is pursuing nothing less than a global regulatory environment on digital trade that closely mirrors U.S. domestic laws and regulations.<sup>47</sup>

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<sup>43</sup> *Digital Trade Policy: Ensuring Access to Digital Markets*. Information Technology Industry Council, February, 2001.

<sup>44</sup> Congressional testimony of Mr. George Vradenburg on “Impediments to Digital Trade”, a hearing of the Subcommittee on Commerce Trade and Consumer Protection, House Committee on Energy and Commerce, May 22, 2001.

<sup>45</sup> Sacha Wunsch-Vincent, *The Digital Trade Agenda of the U.S.: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization*. Aussenwirtschaft, 58. 2003. Institute for International Economic, Washington, DC.

<sup>46</sup> see Wunsch-Vincent, p.34.

<sup>47</sup> This is particularly clear in the cases of the 1998 Digital Millennium Copyright Act, and the 1998 Internet Tax Freedom Act.

## Components of Digital Trade Policy

Broadly speaking, the U.S. digital trade initiative focuses primarily on the e-commerce, telecommunications and IPR provisions in new trade agreements, as well as specific commitments in goods and services trade areas. These specific liberalizations form a framework for enhanced digital trade.<sup>48</sup>

### Digital Goods Trade

Goods trade objectives begin with a base commitment to the WTO Information Technology Agreement, to which Thailand is already a signatory. The U.S. seeks as well to extend ITA treatment to new goods on a reciprocal basis and reduced non-tariff barriers to all manner of IT goods. The U.S. also seeks to base custom duties on products delivered on physical carrier media on the value of the carrier media rather than the actual content of the product. Given the high intellectual property value of many digital products, this customs valuation determination is key to lowering trade transaction costs. Under the Singapore FTA, the creation of the so-called Integrated Sourcing Initiative (ISI) provided an additional boost to bilateral trade in digital goods. (see Section III. *Customs Administration*)

### Digital Services Trade

Services trade objectives begin with a negative list approach to the services schedules in new trade agreements. This creates a favorable, liberalized environment for the development and growth of new products, which will, under a negative list, be ensured the most liberal treatment by FTA partners.

A special emphasis is placed on audiovisual and telecommunications services, reflecting the rapid increase in export value of the U.S. entertainment and knowledge-based industries. While seeking the elimination of trade-distorting subsidies, the U.S. has not requested trading partners remove other existing cultural exceptions regarding financial supports, nor have content related controls (screen quotas) been major issues for the U.S. Instead, the U.S. seeks strict scheduling of commitments that freezes current restrictions, promises not to initiate new, trade-distorting regulations, and commitments on new and emerging audiovisual services.<sup>49</sup> These objectives deliver long-term value to innovative developments.

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<sup>48</sup> see also Barshefsky, Charlene. *Information Technology And Trade Policy: a Look Back, A Look Ahead*. Speech to Computer and Communications Industry Association, Washington, DC, June 5, 2000.

<sup>49</sup> See Wunsch-Vincent, p.11



The U.S. digital trade commitment extends to other sectors that increasingly utilize electronic means to deliver services. As a result, the U.S. will seek substantial liberalizations in financial services, express delivery, legal and other professional services.

## Electronic Commerce

E-commerce and telecommunications lay at the heart of the U.S. comparative advantage in new economy trade. Accordingly, the U.S. secured in the Chile and Singapore FTA's unprecedented liberalizations in these sectors. U.S. industry, however, fears that liberalizing the Internet sectors in Thailand will be a significant challenge given the sheer size of the government stake in the sector. The International Telecommunications Union observes that:

The Thai Internet market is complex and dynamic. From a regulatory point of view, archaic laws restrict the direct provision of telecom services by anyone other than two government owned organizations. As a result, the 18 Internet Service Providers (ISPs) in Thailand cannot have their own international or domestic infrastructure and must lease it from others. One of the government-owned telecom organizations also has stakes in all of the ISPs. Another unique aspect of the Thai Internet market is that the majority of subscriptions are pre-paid.<sup>50</sup>

The U.S. will necessarily focus great attention on this issue of government control of the sector. Consequently, negotiating objectives are geared to accommodate these industry concerns. A major feature of U.S. objectives is to secure pledges from trading partners that they will not create new regulations that harm e-commerce. Where new regulation is necessary, the U.S. seeks commitments that deliver the least trade restrictive results in a non-discriminatory, transparent fashion. The U.S. will also demand a rhetorical acknowledgement of the importance of the free flow of information to global commerce and bilateral trade.

While mainstream media frequently heralds the U.S. and WTO moratorium on taxation of e-commerce transactions as the defining factor of digital trade, U.S. policy advances quite beyond tax treatment. A bilateral extension of the tax moratorium is but one plank of the U.S. e-commerce platform. Regarding e-commerce, the first objective for new agreements is to establish language that extends a trading partner's current WTO obligations to all facets of e-commerce, and to ensure that products and services delivered via e-commerce receive no less favorable treatment than like products delivered in physical form.<sup>51</sup> The text on e-commerce thus requires a significant amount of language devoted to customs classification for e-commerce related goods and services.

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<sup>50</sup> Gray, Vanessa, et al. "Bits and Bahts: Thailand Internet Case Study". International Telecommunications Union, Geneva, March, 2002.

<sup>51</sup> Wunch-Vincent. p.12

### **Clarifying U.S. Policy on Internet Taxation**

Current U.S. law **prohibits states from taxing Internet transactions.** Although this federal statute is set to expire in November, 2004, the House of Representatives is expected to pass new legislation that will make this moratorium permanent in September. The new bill, HR 49, the Internet Tax Nondiscrimination Act, is receiving expedited processing in the House reserved for “non-controversial” legislation and should pass the House by wide margins. Companion legislation, S 150, also named the Internet Tax Nondiscrimination Act, has already been marked up by the Senate Commerce Committee and is also expected to pass easily.

## Telecommunications

The telecommunications is the foundation from which all other Internet and value-added services spring. Thus cost-savings and future profits for many key U.S. sectors, including financial services, IT, and educational services, hinge upon free access to telecommunications networks and the ability to develop those networks further to accommodate new areas for business development.

The Thai telecom market has been widely recognized as ripe with potential in a region already experiencing dramatic growth:

The sustained 10-year "bull market" for Asia's mobile phone industry will provide an excellent platform for the take-up of the m-commerce market in the Asia Pacific region. Wireless handsets and appliances are fast becoming preferred method of accessing the Internet, contributing further to high subscriber rates. APRG research shows that subscriber growth rates in developed Asian countries will continue at a very steady rate (over 20 percent CAGR during the next 5 years). Growth in emerging nations such as China, Philippines, Thailand and Vietnam will accelerate rapidly as mobile penetration continues to reach some of the highest levels in the world.<sup>52</sup>

The telecommunications provisions of the new U.S. agreements break new ground too, moving past commitments made in the WTO's Basic Telecommunications protocols. The chief U.S. negotiator of the Singapore FTA observed that “the telecommunications chapter achieves significant advances over the work undertaken in the WTO. The full range of telecommunication issues, i.e., reasonable and non-discriminatory access to networks, transparent rule making by an independent regulator, and adherence to the principles of deregulation and operator choice of technology - are addressed in a way that opens Singapore's market, while recognizing the U.S. and Singapore's respective right to regulate these sectors.”<sup>53</sup> In terms of the services portion of

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<sup>52</sup> *The Asian Cellular Market*. www.researchandmarkets.com 2003.

<sup>53</sup> Testimony of Assistant USTR Ralph Ives. *Trade in Services and E-Commerce: The Significance of the Singapore and Chile Free Trade Agreements*. House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, May 8, 2003.

the telecommunications commitments, this equates to extensive expansion of liberalization regarding basic telecoms, value-added telecoms (online information services, database retrieval, data storage, etc.) and for computer services.<sup>54</sup> The mandatory share ownership of the Communications Authority of Thailand of all licensed Internet Service Providers will likely form a significant obstacle in negotiations on e-commerce.

USTR will seek hard commitments on the full liberalization of Thailand's telecommunications sector. Thailand can anticipate pressure to devolve or dissolve the control over international links retained by the Communications Authority of Thailand and for the creation of a transparent, open regulatory system over the domestic market currently controlled by the Telephone Organization of Thailand. The U.S. will seek to scale back equity and revenue-sharing requirements on Thailand's International Value Added Network Service, maintained by CAT. The corporatization and eventual privatization of CAT and TOT will come under intense scrutiny before and during FTA negotiations, U.S. telecommunications firms will lobby aggressively for merger and acquisition access as FTA-party investors in the potential privatization of CAT and TOT. Logically, these industries will also consider the 25 percent limit on foreign ownership under the Telecom Business Law unacceptable. The lack of a centralized authority over telecommunications regulation, as required by the Frequency Allocation Act of 2000, will present another stumbling block in the negotiation of a telecommunications chapter or side agreement.

### **U.S. Concerns Over Thai State Monopolies**

The U.S. will focus to a great extent on the liberalization of CAT and TOT's market dominance. Thailand should anticipate the U.S. to seek the following:

- Creation of neutral licensing authority for telecom and Internet Service Providers
- Elimination and/or implementation of open bidding for build-transfer-operate concessions as they expire throughout the next decade.
- Creation of the National Telecommunications, empowerment as independent regulator
- Elimination of CAT monopoly on interconnection
- Waive 25% limit on foreign ownership in sector for US firms and commit Thai Government to reduce stake in sector further than current 30% commitment
- Removal potential vested interests in telecom sector from Competition Commission or any new competition authority

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<sup>54</sup> Wunsch-Vincent, p.11

Working in Thailand's favor regarding this sector is the U.S. history of negotiating lengthy transition periods, of up to 10-12 years, for sensitive sectors. Under such a scheme, Thailand could manage a gradual transition to a fully liberalized telecommunications sector if the regional market could bear it. Most market analysts, however, observe that major digital investments in Asia will flow to the most open regulatory environment to the detriment of slow liberalizers. From a domestic political standpoint, the FTA could offer the Thai Government with the political cover necessary to push through ambitious regulatory reform on telecommunications and e-commerce.

### *Thai Objectives in U.S. Telecommunications Sector*

The U.S. telecommunications sector, given US industry interest, is more open than most other markets. The World Trade Organization observes that in terms of GATS commitments the United States:

Commits to open markets for essentially all basic telecom services (facilities-based and resale) for all market segments (local, long distance and international), including unrestricted access to a common carrier radio licenses for operators that are indirectly foreign owned. Offer also covers, for example, satellite-based services, cellular telephony and other mobile services. Limitations on market access include no issuance of radio licenses to operators with more than 20% direct foreign ownership and Comsat retains exclusive rights to links with Intelsat and Inmarsat satellite capacity. Commits to the Reference Paper on regulatory principles. Submitted an M.f.n. Exemption List on telecommunications services involving the one-way satellite transmission of DTH and DBS television services and digital audio services.<sup>55</sup>

Consequently, Thailand should observe the following potential objectives and market niches when considering the sector in the context of an FTA.

- Removal or explicit waiver of foreign ownership restrictions for Thai firms on satellite and radio/TV foreign ownership, licensing and broadcast (this would provide Thailand treatment beyond US GATS)
- Preserve joint venture/minority share requirements on Internet services involving development and use of Thai-language interfaces<sup>56</sup>
- Limit Thailand's vulnerability to ORBIT Act regulations (see Investment section of this report)
- Preserve Thai access to frequencies for 3G services
- Streamline Federal Communications Commission treatment of Thai applications for spectrum allocations and licensing

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<sup>55</sup> World Trade Organization, Telecommunications Services Commitments and Exemptions. [www.wto.org](http://www.wto.org)

<sup>56</sup> Regarding mobile data and Internet usage via cellular means, the International Telecommunications Union notes: "the biggest barrier is language. Surprisingly, to date, no Thai language interface has been developed for GSM mobiles, meaning that it is not possible to input Thai text." see Gray, et al. p.11 US firms will likely seek to introduce Thai language interfaces for GSM, a potential lucrative market for Thai partners that Thailand should preserve in the FTA by limiting foreign ownership for 8-10 years.

## Intellectual Property Rights

Since pushing through the controversial WTO TRIPS Agreement to conclusion during the Uruguay Round in 1994, the United States has remained at the forefront of a group of developed countries seeking a highly rationalized set of global rules on intellectual property known generally as “TRIPS Plus” provisions. Given the backlash within the WTO against further IPR commitments, bilateral and regional FTAs have become the chief means for the U.S. to pursue these goals.

Legally, the USTR is under strict guidance from the Congress - in the form of the 2002 Trade Promotion Authority legislation - to undertake new agreements that build upon the bases established by the TRIPS agreement. The Congressional mandate dovetails with the interests of U.S. industry as well as traditional free traders who passionately believe strong IPR protections are necessary to preserve innovation in the marketplace.

Thailand should understand that the U.S. will demand IPR provisions in any forthcoming FTA that are “TRIPS plus” in nature, and that seek to extend as well U.S. regulatory models toward governance of bilateral digital trade. We include a discussion of the “WTO plus” nature of new U.S. IPR objectives due to their intrinsic ties to new economy and digital trade issues, as evidenced by the treatment here. The table on the next page presents the TRIPS Plus elements of U.S. negotiating objectives.

### What Is “TRIPS Plus”?

The WTO TRIPS Agreement essentially created minimal global standards related to IPR. Simply stated, **TRIPS Plus “refers to policies, and policy-making processes, that embody commitments which go beyond” these minimum standards.**<sup>57</sup> TRIPS Plus provisions have been vigorously protested by various NGOs, civil society entities and various developing countries. Given Thailand’s recent history regarding IPR provisions and the NGO community, Thai leaders should be aware that intense pressure to resist U.S. objectives will emanate from the international NGO community. A representative sample of NGO criticisms is provided here:

There are many different kinds of TRIPS-plus agreements.... We have found TRIPS-plus provisions in free trade agreements, bilateral investment treaties, scientific and research cooperation agreements, development or technical assistance agreements, multifaceted “partnership” agreements and plain old intellectual property agreements. Because they are drawn up behind closed doors, they skirt public scrutiny. And because they are negotiated independently, outside the constraints of the WTO, they are an powerful tool for rich countries to get what they want from poor countries. The bottom line is that these bilateral treaties are clandestinely creating new, *de facto* international standards for IPR protection worldwide....they are effectively setting new and standardised norms that go well beyond the minimum prescriptions of the WTO.<sup>58</sup>

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<sup>57</sup> “TRIPS-plus: Where are We Now?” An Informal Report from GRAIN for the Third SAARC Peoples Forum. Bangladesh, August, 2003.

<sup>58</sup> Ibid.

**TRIPS Plus Commitments in U.S.-Singapore FTA**

<b>Discipline</b>	<b>TRIPS Plus Commitment</b>
<b>Copyright</b>	<ul style="list-style-type: none"> <li>• Both sides will provide strong anti-circumvention provisions prohibiting tampering with technology designed to prevent piracy of copyrighted works over the Internet. (TRIPS not refer to technology tampering)</li> <li>• Both sides agree to criminalize unauthorized reception and re-distribution of satellite signals. (TRIPS not require criminalization)</li> <li>• Both sides will provide immunity to Internet service providers for complying with notification and take-down procedures when material suspected to be infringing are hosted on their servers. (notification and take-down procedures emerged post- -TRIPS at behest of US computer industry)</li> </ul>
<b>Patent</b>	<ul style="list-style-type: none"> <li>• Singapore will accede to the International Convention for the Protection of New Varieties of Plants (UPOV) to better protect new plant varieties. (UPOV not required by TRIPS)</li> <li>• Both sides commit to its current regime on allowing all inventions, including bio-inventions to be patentable, so long as they do not contradict public order or morality. (never addressed in TRIPS)</li> <li>• Both sides agree to limit the use of compulsory licenses to safeguard against anti-competitive practices, public-non commercial use, national emergencies and other circumstances of extreme urgency. Singapore has, to date, not issued any compulsory licenses. (compulsory licensing limits have emerged post-TRIPS, the FTA appears more restrictive than recent Access to Medicines compromise in WTO TRIPS Council as part of the Doha Round)</li> <li>• Both sides will also introduce safeguards to strengthen patent protection, especially for pharmaceuticals. In particular, both sides will <ul style="list-style-type: none"> <li>○ grant originators a data exclusivity period of up to 5 years from the date of marketing approval, instead of the date of application. (TRIPS not commit to specific data exclusivity periods, 5 years would equate roughly to a highest international standard)</li> <li>○ extend patent protection period if there is an administrative delay during the marketing approval process. (not secured by TRIPS)</li> </ul> </li> </ul>
<b>Trademarks</b>	<ul style="list-style-type: none"> <li>• All trademarks, including sound trademarks, will also be registrable in Singapore. (not addressed in TRIPS, affords better protection to US marks)</li> <li>• Both sides will accord stronger protection for well-known marks. (goes beyond Article 6 <i>bis</i> of Paris Convention, basis for TRIPS minimum standards on well-known marks)</li> <li>• Trademark licensees no longer need to register their trademark licenses in order to assert their rights in a trademark. (TRIPS required prior registration)</li> </ul>
<b>Enforcement</b>	<ul style="list-style-type: none"> <li>• provide an additional avenue for right owners to opt for compensation based on a pre-determined range of statutory damages for civil proceedings against copyright and trademark infringements. (TRIPS provides recourse only to judicial authorities not a special avenue for IPR holders)</li> <li>• prevent and enforce against the illegal manufacture, import and export of pirated goods. In this connection, Singapore will formalize its regime of regulating optical disc manufacturing activities through the imprint of Source Identification Code on optical discs unless specifically exempted by the right owner. (this provides specifics to otherwise ambiguous provisions in TRIPS Art. 41-50)</li> <li>• criminalize companies that make pirated copies from legitimately purchased products (TRIPS provisioned for civil penalties (fines &amp; recompense), versus criminal penalties)</li> </ul>

***\*\*\*The United States objectives regarding Thailand will mirror the table above, below we provide an explanatory summary of what these objectives delivered in the Chile and Singapore agreements.***

*Summary of IPR Provisions of Chile and Singapore Agreements*<sup>59</sup>

### General Provisions

The chapter will require Chile and Singapore to ratify or accede to several agreements on intellectual property rights, including the International Convention for the Protection of New Varieties of Plants, the Trademark Law Treaty, the Brussels Convention Relating to the Distribution of Programme-Carrying Satellite Signals, and the Patent Cooperation Treaty. The chapter also includes full national treatment commitments, with no exceptions for digital products. It also requires each Party to publish its laws, regulations, procedures, and decisions concerning the protection or enforcement of intellectual property rights.

### Trademarks and Geographical Indications

The chapter imposes rules with respect to the registration of collective, certification, and sound marks, as well as geographical indications and scent marks. The chapter also imposes rules for domain name management that require a dispute resolution procedure to prevent trademark cyber-piracy. Each Party must provide full protection for trademarks with respect to later geographical indications by providing a “first-in-time, first-in-right” rule for trademarks.

### Copyrights and Related Rights

The chapter articulates rights that are unique to the digital age, affirming and building on rights set out in several international agreements, including the WIPO Internet Treaties. For instance, the chapter clarifies that the right to reproduce literary and artistic works, recordings, and performances encompasses temporary copies — an important principle in the digital realm. It also calls for each Party to provide a right of communication to the public, which will ensure that authors have the exclusive right to make their works available online. To curb copyright piracy, the chapter requires the two governments to use only legitimate computer software, setting an example for the private sector. The chapter also includes provisions on anti-circumvention under which the Parties commit to prohibit tampering with technology used by authors to protect copyrighted works. In addition, the chapter sets out obligations with respect to the liability of Internet service providers in connection with copyright infringements that take place over their networks. Each Party must also provide copyright protection for the life of the author plus 70 years (for works measured by a person's life), or 70 years (for corporate works).

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<sup>59</sup> combined sources: summary and analyses documents published by U.S., Chilean and Singaporean governments.

Recognizing the importance of satellite broadcasts, the chapter ensures that each Party will protect encrypted program-carrying satellite signals. It obligates the Parties to extend protection to the signals themselves, rather than solely to the content contained in the signals.

### Patents and Trade Secrets

The chapter requires patent term extensions to compensate for unreasonable administrative or regulatory delays (including for marketing approval) that occur while granting the patent<sup>60</sup>. To guard against arbitrary revocation of patents, each Party must limit the grounds for revoking a patent to the grounds that would have justified a refusal to grant the patent. In addition, the chapter offers protection against unfair commercial use of test data that a company submits in seeking marketing approval for certain regulated products<sup>61</sup>. It precludes other firms from relying on the data for specific periods – five years for pharmaceuticals and ten years for agricultural chemicals. The chapter also limits the exceptions to patent protection<sup>62</sup>.

### Enforcement Provisions

The chapter imposes obligations with respect to the enforcement of intellectual property rights. Among these, it requires the Parties, in determining damages, to take into account the value of the legitimate goods as well as the infringer's profits. The chapter also provides for damages fixed in advance (i.e., "statutory damages"), at the option of the right holder. Such pre-established damages help to deter piracy by ensuring an appropriate remedy in cases where, for instance, records of actual damages are inadequate. The chapter provides that the Parties' law enforcement agencies must have authority to seize suspected pirated and counterfeit goods, the equipment used to make or transmit them, and documentary evidence. Each Party must give its courts authority to order the forfeiture and/or destruction of such items. The chapter also requires each Party to empower its law enforcement agencies to take enforcement action at the border against pirated or counterfeit goods – including those in transit – without waiting for a formal complaint. In addition, the chapter provides that each Party must make counterfeiting and piracy subject to criminal penalties.

### *TRIPS Plus and Jasmine Rice*

Jasmine rice and other traditional Thai products are of significant future value to the Thai economy. Certain TRIPS Plus provisions with regard to the patenting of life may be helpful to Thailand while others may undermine native jasmine rice in favor of transgenic varieties. our

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<sup>60</sup> The U.S. would seek such language with explicit intent toward Thailand's pharmaceutical market entry regulations.

<sup>61</sup> This item, too, would be a priority to address perceived shortcomings in Thailand's implementation of TRIPS Article 39, regarding unfair commercial usage.

<sup>62</sup> It is in this portion of the chapter that the U.S. addresses the ongoing WTO TRIPS negotiation regarding access to medicines. Thailand can expect language in the FTA that will adhere to original U.S. positions in the WTO TRIPS Council regarding this matter.



analysis yields the following recommendations for Thai officials to pursue a favorable course of action with regard to jasmine rice.

### **TRIPS Plus and Jasmine Rice Recommendations**

<b>Discipline</b>	<b>Recommendation</b>
Patenting of plants	Thailand should condition agreement on US demands on plant patenting upon explicit guarantees that Thailand may patent Thai hom mali rice under the FTA
Patenting of plant varieties and UPOV standards	Same as above
Patenting of biotechnological inventions	Thailand should agree to phase in such patent protections only after full patent protection for hom mali rice is obtained; this may prevent transgenic strains from being patented as “jasmine rice”. Thailand should also introduce labeling requirements for future transgenic strains so that they be prominently marked as “Genetically modified jasmine rice” in US and Thai markets.
Traditional knowledge	Seek US inclusion of traditional knowledge language, explicitly linking such protection to jasmine rice
Well known marks and Geographical Indications	Agree to TRIPS Plus well-known marks commitments conditioned upon protection for jasmine rice under these provisions.  Agree to support US in WTO generally on geographical indications in exchange for explicit GI protection for Thai jasmine rice in the FTA.

### Emerging Issue: Digital Trade and Data Privacy

Data privacy issues may well become identified as the “third rail” of digital trade policy. The U.S. has not pursued formal arrangements regarding information privacy issues -- critical to most e-commerce businesses -- in an FTA context, preferring the plurilateral route of APEC. But as U.S. industry opinion coalesces about concrete data privacy principles, prospective trading partners should anticipate the conclusion of privacy protocols within U.S. negotiating objectives regarding digital trade.

The United States and the European Union have been engaged for the past decade in a battle for control of the global trading system. One key EU tactic has been to use regulatory initiatives to establish de facto global standards that undermine the competitiveness of U.S. industry. The EU has already pursued this strategy successfully to impede U.S. trade in the biotechnology, computer hardware, and electronic instrument and appliance sectors.

The EU has launching a broader campaign, using data privacy as its weapon. The EU Directive on Data Protection (1998) restricts competition from foreign businesses in Europe. Article 25 of the directive goes further to encroach on business interests globally. By restricting the export of personal data to countries lacking “adequate” data protection, it threatens to block international information flows and creates a significant incentive for non-European countries to adopt similar laws so that they will be judged “adequate” by the EU. This strategy has already succeeded in non-EU countries, including Canada.

The U.S. system, with its highly contextualized reliance on a complex web of state and federal statutes, regulations, and constitutional and common law provisions, has not provided a viable

alternative for countries looking for data protection models. As a result, the U.S. has not been able to check the spread of the European approach or to articulate a consistent standard of privacy protection. Much is at stake in the battle over international standards of data privacy, including access to global markets and the very viability of business models that assume access to and use of consumer and employee data.

Data privacy issues are of growing concern to the international NGO community. Considering the activism of a number of these organizations in Thailand, the lack of cohesive, global standards on the rights of consumers and the responsibilities of corporate users of consumer information could become an additional flashpoint for media attention in the event of a US-Thai FTA negotiation. An affirmative attempt by Thailand to address this issue in the context of an FTA could become a source of valuable NGO approval as well as an initiative welcomed politically by the United States.

## V. Addressing Services Trade Issues

The U.S. Administration places a premium in FTA negotiations on creating maximum market access for the services, and particularly the financial services sector. This is due to the rapid growth of the service sector in relation to U.S. export growth and the belated development of a political lobbying organization with exceptional reach throughout official Washington.

Growth in services trade is the result of the gradual accumulation of market opening exercises that began in the late 1980's. U.S. trading partners now must recognize the increasing sophistication of U.S. domestic industry that pursues FTAs to create an optimal policy environment for sustained growth.

### Services Sector Importance to U.S. Trade Balance

The service sector is of increasing economic and therefore *political* importance to the U.S. economy. From 1980 to 2001, U.S. services exports increased by nearly 700%, from \$38 billion to \$263 billion.<sup>63</sup> The U.S. now exports 20% of the world total in commercial services, and services account for 65% of U.S. exports. Much of this increase, particularly in terms of financial services, has been accelerated due to landmark agreements such as the NAFTA. Between 1999-2000 alone, U.S. cross-border exports of financial services increased 26.5%, from \$15 to \$20.5 billion.<sup>64</sup> The ability of industry to continue such impressive growth in international markets is constrained by multiple trade barriers that differ from country to country. Therefore, growth of financial services exports remains directly dependent upon the U.S. Government's successful negotiation of free trade agreements throughout the world.

***Note: to supplement this section and to aid the comprehension of Thai policy makers, we have provided the complete language of U.S. exemptions from the services chapters of the US-Singapore FTA to serve as a representative sample of the language Thailand might encounter in the course of an FA negotiation, and to denote the remaining sheltered sectors of the US services market. See Annex I.***

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<sup>63</sup> WTO figures, World exports of commercial services by selected region and economy, 1980-2001.

<sup>64</sup> Congressional Research Service figures.

## Core U.S. Services Goals and Perceptions

Broadly speaking, U.S. goals in various trade agreements are to secure the following for all services industries and to provide an open regulatory environment that anticipates the emergence of new services industries:

- across the board national treatment ,beyond MFN status<sup>65</sup>, for all services sectors;
- substantial packages of specific market access commitments per industry;
- and overall sector-specific regulatory transparency (achieved by the general chapter on transparency in the FTA as well as specific commitments in services chapters).

These broad goals are juxtaposed against a general U.S. perception that questions the overall Thai commitment to services liberalization. American policy-makers have noted that, since the GATS, Thailand has joined with other ASEAN members in seeking to slow services openings as committed under the GATS. Thailand’s endorsement of ASEAN efforts to curb, or even rollback, services liberalization, is a “red flag” for U.S. negotiators.

Bolder and more far-reaching commitments have been made in GATS rather than under the AFAS....the liberalising content of commitments members made in GATS have been often watered down, rather than furthered in AFAS. The lack of progress can be contributed to four key factors namely, the lack of political will and genuine commitment to open up the service market, weaknesses in the negotiation framework, legal restrictions and institutional limitations.<sup>66</sup>

The U.S. will seek to use the FTA to reverse this course in Thailand and to set similar regional precedents that will nudge Malaysia, Indonesia and the Philippines in particular toward further services liberalizations.

## Specific U.S. Sectoral Goals for Thailand

The U.S. will seek to secure bilateral commitments from Thailand that would provide access to U.S. firms better than granted by Thailand under the GATS. The following chart analyzes specific sectoral deficiencies in Thailand’s GATS commitments that the U.S. will seek to liberalize bilaterally. *[Note: telecommunications, e-commerce, express delivery and financial services are treated separately in this report in much greater detail given U.S. priorities]*

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<sup>65</sup> National treatment is when a government accords foreign firms the same treatment as it does to a country’s own domestic firms. Most Favored Nation status commits a government to treat one trading partner no less favorably than any other.

<sup>66</sup> Nikomborirak, D. and Stephenson, S. “Liberalization of Trade in Services: East Asia and the Western Hemisphere”, Paper prepared for the Pacific Economic Cooperation Council (PECC) Trade Policy Forum on Regional Trading Arrangements, Bangkok, Thailand (12-13 June, 2001).

## How U.S. Will Address Thai GATS Reservations<sup>67</sup>

Sector	Thai GATS Reservation	U.S. Objective
Accounting & Auditing	Made no Mode 1 (cross border) commitments	Binding national treatment for U.S.-based providers and US multinationals (MNCs)
Architecture	Made no Mode 1 commitments	Binding national treatment for U.S.-based firms and (MNCs)
Education	<ul style="list-style-type: none"> <li>• Primary Education made no Mode 1 commitments</li> <li>• Secondary Ed. made no Mode 1 commitments</li> <li>• Higher Education: offered MFN only to technical and vocational education</li> <li>• Adult Education: offered MFN only to companies operating technical and vocational schools</li> </ul>	<ul style="list-style-type: none"> <li>• Primary Ed: national treatment for natural persons of US (educators)</li> <li>• Secondary Ed: national treatment for natural persons of US (educators)</li> <li>• Higher Ed: national treatment for all types of education</li> <li>• Adult Ed: national treatment for US firms to own/operate all types of schools</li> </ul>
Management Consulting	Made no Mode 1 commitments	National treatment for US-based firms and MNCs
Market Research & Public Opinion Services	Made no Mode 1 commitments	National treatment for US-based firms and MNCs
Urban Planning	Made no Mode 1 commitments	National treatment for US-based firms /MNCs
Newspaper Publishing	Thailand requires treaty with trading partner liberalizing on reciprocal basis	U.S. will specifically seek market access commitments bound in FTA - national treatment for US publishers
Maritime and air transport sales	7% Value Added Tax (VAT)	Elimination of 7% VAT
Maritime International Cargo	Thai GATS commitment offered 10 year national treatment exemption to US firms under the AER	Carve back national treatment for US firms that they enjoyed under AER
International Road Transport	Requires treaty covering passenger, freight and vehicle rental services on reciprocal basis	U.S. will seek specific national treatment on reciprocal basis
Business services	Granted 10 year exemption for the AER, granting US natural persons national treatment to operate businesses and provide services	Carve back national treatment for US natural persons as under AER.  Will also seek to eliminate foreign minority ownership limits and joint venture requirements on these services <sup>68</sup>
Aircraft maintenance and repair	Requires reciprocal treaty	U.S. will seek specific national treatment on reciprocal basis
Banking/finance	Requires reciprocal treaty	See financial services section below

<sup>67</sup> see also “The General Agreement on Trade in Services”, *Vereniging van Vlaamse Studenten*. 2003; as well as WTO schedule of GATS exemptions - [www.wto.org](http://www.wto.org)

<sup>68</sup> Thailand included a large number of business services in its GATS Schedule of Specific Commitments; the current regulatory framework allows foreign presence essentially through joint ventures with minority foreign control. *1999 WTO Trade Policy Review of Thailand*

## How the U.S. Will Propose to Liberalize for Thailand

The best way to address Thailand's broad goals and concerns is by laying out thoroughly U.S. services liberalizations commitments obtained by Singapore in the USSFTA, and then to discuss particular U.S. exceptions that will be of interest to Thai firms. The U.S. will utilize the Singapore agreement as a model for its approach to Thailand on services.

To accommodate the further understanding of Thai officials, we have provided the comprehensive exemptions obtained by the United States in the Singapore FTA in a separate Annex. (See Annex I, U.S. -Singapore Services Exemptions)

**Importantly, the liberalizations discussed below are reciprocal. That is, the U.S. will expect to receive the same liberalizations it grants Thailand.**

### *U.S. Services Commitments in the Singapore FTA*

In general, the U.S. provided full national treatment in all services sectors, with few exceptions. The Singapore Government observes that, under the agreement, 'service suppliers from both sides assured of fair and non-discriminatory treatment and market access unless specifically exempted in writing - the so-called 'negative list' approach. " Other key U.S. commitments included:

- **Immediate national treatment (better than GATS) in substantially all services sectors, with posted exemptions.** This will be viewed as a minimum liberalization commitment.
- **Sub-federal and local market opening commitments:** U.S. States are to give a Singapore service supplier the same treatment that it gives to a supplier of that State or of another U.S. State.<sup>69</sup>
- **Full, future liberalization of exemptions.** U.S. locked in timetables to liberalize all measures originally exempted from the agreement, including future liberalizations of U.S. State-level restrictions. This means that, generally within an 8 year time period, the entire U.S. services market will be fully open to Singapore.
- **Regulatory transparency:** Regulatory authorities are bound to high standards of openness and transparency, including consultations with interested parties, advance notice, reasonable comment period, and publication of regulations.<sup>70</sup>

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<sup>69</sup> Singapore Ministry of Trade and Industry. *Information Paper on the US-Singapore Free Trade Agreement (USSFTA)*, 16 May 2003

<sup>70</sup> Singapore Ministry of Trade and Industry. *Information Paper on the US-Singapore Free Trade Agreement (USSFTA)*, 16 May 2003

## Protecting Thai Interests: GATS Issues and U.S. Barriers to Services Trade

- **The United States took no MFN exemptions under the WTO GATS. The basis for all Thai objectives should therefore be to obtain national treatment in all services sectors.**
- Although the United States made rather comprehensive liberalization commitments under the WTO GATS in 1993, several areas of particular importance to Thai services industries maintain barriers that will require attention in an FTA.

### *Communications Is the Most Protected U.S. Services Market*

Of primary interest for Thailand will likely be U.S. barriers on communications services. In the satellite services sector, Federal Communication Commission proceedings on spectrum allocation and licensing may be non-transparent and discriminatory for foreign companies, while national security considerations may be cited under the “Open Market Reorganization for the Betterment of International Telecommunications Act” (ORBIT Act of 2000) to bar foreign competition in the privatization of Intelsat and Inmarsat and succeeding entities. The U.S. mobile services market, meanwhile, restricts foreign investment as well as foreign-owned company access to 3G services, as well as lengthy, difficult licensing procedures for new competitors.

### *GATS Services Safeguard*

Thailand should expect that the United States will not demonstrate the kind of flexibility toward a services safeguard in a bilateral FTA that it has shown recently in the WTO GATS process of the past two years. Indeed, the United States’ view that bilateral agreements should provide commitments greater than those made by partners in the WTO guides its negotiating objectives in the FTA. **Therefore, even should Thailand and ASEAN countries succeed in crafting a GATS safeguard on services, Bangkok should anticipate that the U.S. will utilize an FTA to craft a bilateral exemption to that safeguard for U.S. services providers in the Thai market.**

In the context of ongoing WTO GATS negotiations, the U.S. has shown marginal movement toward ASEAN initiatives demanding the creation of a services safeguard for developing countries harmed by perceived “surges” in services trade flows. WTO Services Working Group negotiations on an Emergency Safeguard Mechanism were extended in March, 2003 for another year to March, 2004. Depending on the timing of WTO negotiations, it is entirely probable that USTR would seek language in a Thai FTA that rules out the creation of a services safeguard and thus creates a bilateral precedent to curb the development of the safeguard in the GATS.<sup>71</sup>

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<sup>71</sup> See *Negotiations on Emergency Safeguard Measures: Report by the Chairperson of the Working Party on GATS Rules*. WTO S/WPGR/9, World Trade Organization, March 14, 2003.

*Congressional Involvement on Movement of Persons (H1-B issue)*

Free Movement of Persons is a core Thai objective. The US-Singapore FTA achieved the following model that Thailand should also pursue, with some qualifications noted below.

Creates separate categories of entry for citizens of each Party to conduct a wide variety of business and investment activities on a temporary basis. Singapore citizens who are business visitors can enter US to conduct business activities for up to 90 days without the need for labor market test, subject to usual immigration and security measures.

The most serious threat to passage of the Singapore and Chile FTA's came not from a particular industry, but rather from due to the inclusion of immigration worker provisions in the agreements that threatened the primacy in immigration policy set aside for the Congress by the U.S. constitution. In July, 2003, a bipartisan group of U.S. Senators demanded the Administration withdraw the treaties from congressional consideration to strip out immigration language included to facilitate the movement of persons under the services chapter.<sup>72</sup> Previously, the House Judiciary Committee passed the implementing legislation, but vowed to "never" pass a bill with similar immigration provisions to that contained in the Singapore and Chile texts.<sup>73</sup> Previously, the House Judiciary Committee passed the implementing legislation, but vowed to "never" pass a bill with similar immigration provisions to that contained in the Singapore and Chile texts.<sup>74</sup>

Although the Senate group failed to achieve it's goal, it did succeed in obtaining an important concession from the Administration with regard to future negotiations, as USTR Zoellick defended the temporary entry provisions of the trade agreements as fundamental to services trade growth, but pledged in Congressional testimony to consult more closely with Congress on immigration provisions of future agreements<sup>75</sup>. Given Thailand's interest in securing greater

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<sup>72</sup> Senators Feinstein (D-CA), Sessions (R-AI) and Graham (R-SC) cited Article I, section 8, clause 4 of the U.S. Constitution, as well as Supreme Court decision *Galvan v. Press*, 347 U.S. 522, 531 (1954); and *Kleindienst v. Mandel*, 408 U.S. 753,766 (1972). The legal position of the Senate group was unassailable regarding the Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." source: [www.feinstein.senate.gov](http://www.feinstein.senate.gov) In addition, during consideration of the entry provisions in the Judiciary Committee on July 17, several Senators, including Senators Kyl, Chambliss, and Graham, all of whom voted to favorably report the bill, were also highly critical of the USTR's insistence that substantive immigration provisions be included in these underlying trade treaties and, subsequently, their implementing legislation. see U.S. Senate Republican Policy Committee "Legislative Notice" of July 24, 2003.

<sup>73</sup> *House Committee Amends Visa Plan in FTAs*. [Inside U.S. Trade](#). July 11, 2003.

<sup>74</sup> *House Committee Amends Visa Plan in FTAs*. [Inside U.S. Trade](#). July 11, 2003.

<sup>75</sup> The Senate passed an amended version of the treaty bill that addressed the issue of temporary persons with a political and financial fix. The House Judiciary Committee approved its part of the draft bill with one amendment, which USTR Zoellick said was entirely acceptable, concerning what are called H-1B waivers for temporary U.S. work visas for persons from Chile and Singapore. Under the draft as modified, the number of H-1B waivers issued  
(continued...)



access to the annual H-1B quotas, set to decline (return to normal levels) in September, the developments described here require the anticipation of substantial Congressional resistance to greater numbers of temporary Thai entrants to the U.S. in a prospective FTA.

### Analysis of Thai Priorities for Movement of Persons

Thai officials have identified Thai chefs and skilled culinary workers as the highest priority regarding Mode IV (movement of persons) services openings in the U.S. market. The Thai request is therefore quite different from Singaporean demands for greater market access for engineering, financial services and high technology-related services. This is in Thailand's favor.

Thailand may justifiably claim that Thai culinary workers are uniquely skilled to fill jobs of that capacity in the United States. Furthermore, few native born American citizens can fill positions requiring expert knowledge of Thai culinary arts. Expanded market access for these areas should not pose serious problems to the negotiation of the FTA. However, Thailand should court Congressional support for these categories using a strategy outlined below.

### Crafting a Compromise with Congress

Thailand should wait until after the formal launch of the negotiations before approaching Congress regarding the generally politically sensitive area of movement of persons. This is to prevent causing undue Congressional criticism of the FTA before it can get off the ground. Once negotiations are underway, however, Thai officials should begin seeking support by explaining their case to pro-trade Senators such as Grassley, Baucus and Bond, and then utilizing that group as a springboard to approach the critical group of Feinstein, Graham, Chambliss and Kyl, who opposed movement of persons language in the Singapore FTA.

Thailand should focus on the following key points regarding message:

- Thailand understands the statutory role that Congress plays in determining U.S. immigration policies. Therefore we are *first* seeking Congressional approval for our modest goals in the FTA.
- Thailand's priority is greater market access for Thai professionals in the culinary arts. We believe this opening of the U.S. market is to the mutual benefit of both societies.
- Importantly, greater access for Thai chefs will not cause job losses in the U.S. economy. Few American citizens seek jobs in Thai cuisine, nor do American cooking schools generally address Thai cuisine in their curricula.
- We therefore are requesting Thai chefs be allowed to fill this natural niche in the US economy.

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annually would remain capped and employers would have to pay a \$1,000 fee per temporary worker and submit "attestation" statements to ensure that U.S. workers were not displaced by foreigners. see *Congressional Committees Advance Chile, Singapore Trade Deals*, Washington File, Department of State, July 10, 2003.

We recommend multiple meetings with the targeted group of Senators throughout the negotiation on this issue. USTR will not object to Thai demands in this area on economic grounds, and will appreciate Thai efforts to develop support within the Congress. On a factual note, Thai chefs and culinary works would only qualify for temporary entry to the U.S. under the “H” category of visa. The “L” visa category applies only to intracompany transfers of managerial personnel from a Thai parent company to its US subsidiary. Chefs and culinary workers do not meet the defined criteria for the “L” visa.

## Financial Services Liberalization

The United States pursues an underlying policy that utilizes bilateral FTAs as essential tools to construct a global financial infrastructure that benefits U.S. Within this context, the Thai-US FTA would follow the US-Singapore Agreement *not only* in setting important global regulatory precedents for U.S. multinationals, *but also* in taking important strides toward constructing the rules of an integrated global financial system.<sup>76</sup>

An FTA addresses the following areas of financial services:

- asset management;
- insurance;
- banking (depository services);
- securities;
- and financial information activities.

The U.S. will expect comprehensive liberalization in all areas of the financial services sector due to the industry’s dominant influence upon the overall U.S. economy.

### *Strategic Value of Financial Services to the U.S. Economy*

Financial services liberalization is the greatest priority for U.S. services trade negotiators. This reflects not only the sector’s growing importance to U.S. exports, but also the fundamental role of the banking system in underpinning the domestic economy. The vitality of the U.S. economy in large part remains dependent upon an open financial system. Liberalization of the U.S. financial markets has in turn provided unparalleled market depth and liquidity, resulted in lower costs of capital and a wide range of financial instruments, and stimulated trade and growth in other sectors reliant upon access to finance.<sup>77</sup> The U.S. Government therefore regards financial

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<sup>76</sup> Miller, Eric, *Financial Services in the Trading System: Progress and Prospects*. Occasional Paper 4, Inter-American Development Bank, 1999.

<sup>77</sup> Thomas L. Farmer, General Counsel, Bankers’ Association for Finance and Trade, testimony before House Ways & Means Subcommittee on International Monetary Policy and Trade, June, 2001.

services liberalization as an important contributor to the country's economic security as well as a welcome source of increased U.S. exports.

## U.S. Perceptions and Objectives in Financial Services

The U.S. notes that the Thai financial services market remained sheltered and relatively closed under Thailand's GATS commitments. U.S. financial services firms are further disadvantaged in the Southeast Asia region by limited market openings Thailand conferred to ASEAN partners under the ASEAN Framework Agreement on Services (AFAS) in 1995. The U.S. however, does not view the AFAS model as an acceptable basis for liberalizations in an FTA.

Under the AFAS, Thailand has made no commitments in banking and insurance services but it has made commitments in the area of securities brokerage, securities dealing, and underwriting services, as well as in collective investment schemes involving asset management companies. A maximum foreign equity participation of up to 100 percent of paid-up capital is allowed in these areas. However, the schedules indicate that there are significant limitations on market access and on national treatment in these areas, mostly like those prevailing in its GATS schedule. Notably, market access share is limited to the acquisition of existing companies and has been unbound for new licenses. Overall, Thailand's AFAS commitments in financial services have not really been GATS-plus offers in the sense that far fewer sub-sectors have been committed for liberalisation by Thailand under the AFAS compared to those under the GATS. The only possible GATS-plus feature observed under the AFAS commitments made in the financial services sector pertains to limits on foreign equity shareholding of up to 100 percent of paid-up capital, compared to 49 percent under the GATS.<sup>78</sup>

With this in mind, U.S. goals in financial services shape up along the following broad lines.

- National treatment in all primary areas of financial services: banking, securities, asset management, insurance, financial information.
- Grant of rights to US firms for ability to obtain new licenses (enter market as new firms rather than acquire existing Thai firms)
- Creation of independent regulator for licensing issues
- Elimination of maximum foreign equity requirements for US financial services firms.
- Elimination of requirements of percentage of Thai nationals in senior management or board of director positions.
- Minimum depository requirements on banks on national treatment basis.
- Increase rights of minority foreign shareholders regarding corporate governance

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<sup>78</sup> Rajan, Ramkishan S. and Sen, Rahul. "Liberalisation of Financial Services in Southeast Asia Under the ASEAN Framework Agreement on Services" University of Adelaide, Australia. 2002. .

## Thai Interests in Financial Services

***Note: Here we provide a broad brush regarding financial services coverage for Thailand. For a detailed treatment, please see Annex I for complete list of U.S. financial services exemptions in the US-Singapore FTA as a representative example of US method of limited protection for the sector and preservation of regulatory rights.***

Regarding financial services, the Thai banking industry will likely desire the government to secure in an FTA language formally granting Thai banks a Federal Reserve waiver of “leverage ratio” requirements in order to qualify as financial holding companies under the “Gramm-Leach-Bliley Act of 1999, that broke down to a certain extent firewalls between traditional securities companies and banks established in the 1920’s. In the insurance sector, Thai insurers will be disadvantaged by the sub-federal fragmentation of the insurance market into some 54 different licensing jurisdictions. To promote the competitiveness of Thai insurers, negotiators should seek a similar “one stop” seal of approval for universal licensing of Thai providers in US markets. Finally, Thai negotiators should become sensitized to the requirements of the Sarbanes-Oxley Act of 2002, which increases the audit and corporate governance requirements on financial firms operating in the United States.

## V. The Remaining “Singapore Issues”: Investment, Competition, Labor & Environment

This section groups the so-called “Singapore issues” together in observation of their unique standing in the current WTO Doha Development Agenda. Policy stances carved out in new U.S. bilateral agreements denote the furthest limits of U.S. policy with regard to either bilateral or multilateral commitments.

### Investment

Most analysts of Thai-US economic relations acknowledge the solid foundation provided by the Treaty of Amity and Economic Relations. Although disappointed to lose the special status conferred by the treaty, U.S. officials appear resigned to Thailand’s anticipated announcement that it will abrogate the treaty and extend AER provisions to all WTO members via the GATS in January, 2004. With the AER thus essentially “out of the way”, the U.S. will focus attention in an FTA on obtaining commitments that go well beyond the AER’s limited conferral of national treatment.

### Key U.S. Goals for Investment Market Access

<p>Amity Treaty “Plus” Liberalizations</p>	<p>Open key sectors for national treatment that are currently excluded by the Amity Treaty and will likely be similarly excluded from Thailand’s GATS commitments:</p> <ul style="list-style-type: none"> <li>• Communications sector</li> <li>• Transportation sector</li> <li>• Fiduciary functions (the Thai text of the treaty translates “fiduciary functions” as “taking care of the property of others” and therefore sees businesses such as warehousing and guard services to be included in this category and are not granted protection with regards to this treaty).<sup>79</sup></li> <li>• Banking involving depository functions (financial services)</li> <li>• Exploiting natural resources or land</li> <li>• Domestic trading in indigenous agricultural products</li> <li>• The liberal professions</li> </ul> <p>In addition, US will seek reduction/elimination of restrictions that apply to foreign ownership of “public limited companies” -- companies listed on the Stock Exchange of Thailand</p>
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<sup>79</sup> Siam Global Associates, Treaty Guide, www.sgalegal.com

Investment Facilitation	Streamline registration & licensing process for investors currently implemented by Ministry of Commerce and Board of Investment under Amity Treaty guidelines
Extension of minimum investment threshold waiver	Preserve indefinitely for US investors the current waiver of Alien Business Law minimum investment thresholds that exists for Amity Treaty parties through December 31, 2004.
Land ownership	Ease land ownership restrictions for U.S. investors in commercial and residential markets as currently apply under the Thai Land Code and 1999 Property Leasing Bill.
Dispute Settlement and Investor Protections	Will seek language similar to protections established in Singapore FTA. U.S> will demand use of ICSID Convention on the Settlement of Disputes Between States and Nationals of Other States (ICSID Convention) and the <i>ICSID Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes</i> as a basis for dispute settlement. Therefore, US will seek to obtain Thai commitment to ratify the ICSID Convention (signed in 1985). <b>prior to implementation of the FTA.</b>

Similar to its approach on services obligations, the U.S. goal for all new agreements is a negative list approach to investment commitments. This follows a pattern that seeks to achieve the greatest present and future market liberalizations.

#### *U.S. Investment Barriers and Thai Objectives*

Domestically, Thai leaders will need to confront public misperceptions that Thailand does not enjoy national treatment or most favored nation status in the United States regarding investment. This sentiment is not grounded in fact. The Treaty of Amity and Economic Relationship may appear to not provide special treatment to Thai investors, but this is only due to the fact that the United States has traditionally been one of the singular most liberal countries concerning receptivity to foreign direct investment. The U.S. framework for FDI *already* provides access for foreign investment far greater than that secured for U.S. investors in most foreign markets.

In general, foreign investors are free to establish a U.S. branch or subsidiary without substantial control or review by any government authority. The absence of foreign exchange controls also facilitates such investment. Existing restrictions are limited to specific sectors deemed to be sensitive or related to national security, such as maritime transportation, communications and defense. Foreign investments are also subject to various disclosure requirements under federal laws, which exist mainly for statistical purposes.<sup>80</sup>

The U.S. maintains few barriers to foreign investment, with the notable exception of national security. This national security issue is the only major barrier to investment cited by the EU and Brazil in their respective annual government publications on bilateral trade with the United States<sup>81</sup>. *Section 5021 of the 1988 Trade Act*, also known as the “Exon-Florio Amendment to

<sup>80</sup> *Formal and Informal Investment Barriers in G-7 Countries*. Industry Canada Microeconomic Policy Analysis Staff. Occasional Paper No. 1, Volume 1, 1996. Industry Canada

<sup>81</sup> *Report on United States Barriers to Investment, 2002*. European Commission, Brussels, November 2002. see also *U.S> Barriers to Brazilian Goods, Services & Investment*. Brazilian Embassy, Washington, DC, October, 2002.

the Defense Production Act” authorizes the President to investigate the national security implications of mergers, acquisitions and takeovers that could result in foreign control of U.S. interstate commerce. The *1993 Defense Authorization Act* further expanded the powers of the Committee on Foreign Investment in the U.S. (CFIUS) to cover pending transactions on U.S. international technological leadership in areas effecting U.S. national security. An FTA is the only vehicle through which Thai investors might receive conditional waivers of these processes.

Other U.S. investment barriers include restrictions on coastal and domestic shipping under the *Jones Act* and the *U.S. Outer Continental Shelf Lands Act*. Under the *America Fisheries Act of 1998*, fishing vessel-owning entities must be minimum 75% owned and controlled by U.S. citizens to obtain a fishery endorsement. Other sectors, including telecommunications (cable landings), power utilities, geothermal activities and nuclear energy related activities are restricted by licensing restrictions mandating U.S. majority ownership and control. Accordingly, Thailand should focus on the following areas of investment market access.

### Prospective Areas for Thai Investment Market Access

Sector/Issue	Related U.S. Legislation
Telecommunications	Submarine Cable Landing License Act of 1921 (cable license) Open Market Reorganization for the Betterment of International Telecommunications (ORBIT Act of 2000) (satellite) Communications Act of 1934/Communications Act of 1996 (radio/mobile and broadcast)
National security assessment of investments by Thai firms	<i>Section 5021 of the 1988 Trade Act</i> , also known as the “Exon-Florio Amendment to the Defense Production Act”
Aviation	Federal Aviation Act of 1958 - prohibits foreign interest from higher than 49% share in US airlines
Maritime transport	Merchant marine Act of 1920 (the Jones Act)
Agriculture/fishing	American Fisheries Act of 1998
Performance requirements as means of conditioning national treatment	The US will waive all performance requirements that may limit access for Thai investors; model text is Chapter 15 of the US-Singapore FTA on investment. The US will demand reciprocity.

### *Explaining the U.S. Regulatory Focus*

These restrictions and U.S. positions on investment market access reflect the difficulties recently faced by U.S. regulators, who, for the first time in new FTAs, are confronted with the possibility of foreign investments challenging the sovereignty of U.S. regulatory powers. For these reasons, much weight is placed upon investor-state provisions modeled closely after Chapter 11 of the NAFTA, the groundbreaking treaty on the relationship between the rights of the firm and the rights of the public interest in a globalizing world economy. The U.S. developed the NAFTA investor-state provisions as a “necessary corrective for an underdeveloped legal system in

Mexico”<sup>82</sup>. As such, most U.S. investors will lobby for similar protections as they regard the Thai legal system as largely an unknown entity, despite the long existence of the AER.

The actual experience under the NAFTA investment provisions has been mild when compared to the dire predictions of the NGO community before the treaty came into effect in the 1990’s<sup>83</sup>. “Eight years of experience with NAFTA Chapter 11 have generated some twenty-three complaints, of which only five have, to date, led to arbitral decisions; others have either been settled, withdrawn, or remain pending.”<sup>84</sup> Thai negotiators would likely benefit from a legal analysis of the history of NAFTA disputes to understand the links between the NAFTA investor provisions and U.S. policy.

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<sup>82</sup> Hart, Michael M. and Dymond, William A. *NAFTA Chapter 11: Precedents, Principles and Prospects*, as presented at the 3<sup>rd</sup> Academic Colloquium on Latin America, United Nations Economic Commission for Latin America and the Caribbean, October, 2002.

<sup>83</sup> “while the broadly worded substantive obligations of NAFTA states in Chapter 11 may be capable of being applied in a manner that would impose significant constraints on sovereignty, they have not been applied to do so. So far only egregious state actions which were either arbitrary, clearly unfair or overtly protectionist have been found to be contrary to obligations under Chapter 11. ... Where tribunals have created some problems in their decisions, judicial review or intervention by the Free Trade Commission with a binding interpretation have restored the necessary balance.” see Tony Van Duzer. *Investor-state dispute settlement under NAFTA Chapter 11: The Progress of a Work in Progress* in Whose Rights? The NAFTA Chapter 11 Debate (Centre for Trade Policy and Law, 2002).

<sup>84</sup> Hart, Michael M. and Dymond, William A. *NAFTA Chapter 11: Precedents, Principles and Prospects*, as presented at the 3<sup>rd</sup> Academic Colloquium on Latin America, United Nations Economic Commission for Latin America and the Caribbean, October, 2002.



## Competition Policy

For the purpose of FTAs, competition chapters form a qualitative as opposed to quantitative negotiation. The legal focus of a competition chapter entails strengthening **antitrust** (i.e. addressing monopoly power, anticompetitive mergers, etc.), **fair trade** (i.e. price fixing, bid rigging etc.) and **consumer protection** disciplines to ensure the equitable treatment for FTA partners in each others' markets.

The substantive matters of competition policy cut across all market access measures, offering complementing market access provisions and ensuring the fair implementation of treaty clauses to allow the parties to mutually benefit from the deeper access afforded by the FTA. From the U.S. perspective, Thai competition policy, laws and enforcement are relatively weak in comparison to U.S. norms. Consequently, U.S. industry will seek to address competitive disadvantages in the Thai marketplace through concrete commitments in a competition chapter.

### U.S. Objectives on Competition

Objective	Analysis
Statutory Changes	<p>US will likely seek to secure commitments that strengthen the Thai Trade Competition Act (1999) to complement and support targeted liberalizations in the communications, transport and other sectors the US seeks to liberalize under the investment and services provisions of the FTA. The US will also seek to obtain new amendments to the Act that refer explicitly to the state-owned sectors of the Thai economy.</p> <p>US industry will likely judge Thai provisions regarding mergers as overly broad and ambiguous, and will resist allowing merger decisions to remain within the purview of the Competition Commission.</p>
Enforcement Agency	<p>US will seek establishment of an independent enforcement agency regarding competition. Explicitly, this means US will seek wholesale transformation of the current Thai Competition Commission, including its removal from the auspices of the Ministry of Commerce and Cabinet, and its establishment as a statutorily empowered independent regulator.</p> <p>US will insist an enforcement agency be empowered to prosecute anticompetitive behavior by state-owned enterprises as well as direct government entities.</p>
Adjudicating Authority	<p>The US will seek to ensure private firms have recourse to appeal and arbitration processes through a neutral forum, or to establish similar procedures through the Ministry of Justice. The FTA will necessarily include language for the selection of a suitable panel of experts with competition policy and legal expertise to administer adjudications of disputes.</p>
Side Letters	<p>US may seek explicit side letters to address concerns regarding competition issues in the telecommunications and pharmaceutical sectors. With regard to telecoms, this may include language detailing privatization and divestment as well as "fair treatment" of US firms and third party service providers regarding access to backbone infrastructure. On pharmaceuticals, Thailand can anticipate US requests regarding competition implications of minimum access guarantees and pricing arrangements in the public hospital sector.</p>

### *Understanding U.S. Motivations*

U.S. trade negotiators now have the benefit of having constructed a comprehensive chapter in the Singapore FTA addressing the complex problems posed by Singapore's Government-Linked Corporations, which effectively dominate approximately one-third of the city-state's economy. This model is now utilized as the norm for all current U.S. negotiations.

Although Thailand's economy does not enjoy the same level of state ownership or linkage as does Singapore, the primacy of state-owned companies in several sectors of high interest to U.S. industry form the basis of concern regarding competition policy in the agreement. Government control of the telecommunications, including Internet service, and pharmaceutical markets in particular will ensure a tight focus by U.S. regulators on securing competition language to support and extend Thailand's basic market access commitments.

As noted in the discussion of the telecommunications sector in the Services section of this report, industry concern regarding the perceived political interest in telecommunications liberalization stems from the administration of the Competition Commission by the Ministry of Commerce.<sup>85</sup> Formation of an independent fair trade body, such as the U.S. Federal Trade Commission, will be a *sine qua non* of the U.S. objectives. Similarly, the U.S. will concomitantly demand formation of a specific judicial capacity to address competition issues in the Thai economy. Without these twin achievements, U.S. industry and the Congress will view competition commitments as unenforceable, and fear the *de facto* existence of non-tariff barriers across multiple sectors.

### *The Singapore and Chile Models*

The competition texts in the Chile and Singapore agreements were driven largely by a U.S. reaction to the prominence of Government Linked Corporations in Singapore. Once established in the Singapore text, U.S. negotiators had to develop parallel language in the Chilean context to ensure parity between the agreements.

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<sup>85</sup> "The 'Competition Commission' (hereafter called 'the Commission') which consists of the Minister of Commerce as Chairman, the Permanent-Secretary of the Ministry of Commerce as Vice-Chairman, the Director-General of the Department of Internal Trade as Member and Secretary, and the Permanent-Secretary of the Ministry of Finance, and no more than twelve other qualified persons as members shall be responsible for the enforcement of the Act. These qualified persons appointed as members must not be political members, holders of political positions, executive members or holders of positions with the responsibilities in the administration of political parties. They shall hold office for a term of two years and not more than two consecutive terms in case they are re-appointed. The Commission shall have the powers and duties to consider complaints, to prescribe rules for dominant position, to consider an application for permission to merge business, or to initiate the joint reduction or restriction of competition to give orders for suspension, cessation, correction, or variation of activities by business operation. The Office of the Commission was established in the Department of Internal Trade, Ministry of Commerce, with the Director-General of the Department as the Secretary who is responsible for the official affairs of the office." see *OECD Global Forum on Competition, Contribution from Thailand: Competition Law and Policy*. Centre for Cooperation with Non-Members, Directorate for Financial, Fiscal and Enterprise Affairs. OECD, 9/26/2001.

The competition chapter committed Singapore to enact a law regulating anti-competitive business conduct and to create a competition commission by January 2005. Chile, which already possessed competition laws and a dedicated competition agency, committed merely to maintain these institutions and enforce its own law. The Chilean already law promotes economic efficiency and consumer welfare, thus making the appropriate objective of competition law clear. The Chilean already law promotes economic efficiency and consumer welfare, thus making the appropriate objective of competition law clear. Both agreements required parties to control and regulate state enterprises and officially-designated monopolies. Such firms may not abuse their official status to harm the interests of U.S. companies, and must not discriminate in the sale of goods or services. Singapore was also burdened with a commitment to provide annual information on government enterprises with substantial revenues.

Examples of national competition authorities, including the relevant competencies in the United States, are presented here for evaluation and review by Thai officials:

### **Representative Sample of National Competition Authorities**

#### **Australian Competition and Consumer Commission**

This Commission administers the Trade Practices Act 1974 which covers anti-competitive and unfair market practices, mergers or acquisitions of companies, product safety/liability, and third party access to facilities of national significance and is the only national agency dealing generally with competition matters.

#### **Canada's Competition Bureau**

Responsible for administration and enforcement of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. Its role is to promote and maintain fair competition so that Canadians can benefit from lower prices, product choice and quality services. The Bureau's operating principles can be summarized in five words: Confidentiality, Fairness, Predictability, Timeliness and Transparency.

#### **New Zealand's Commerce Competition**

Exists to bring about awareness and acceptance of, and compliance with, the Commerce and Fair Trading Acts, so that consumers and producers benefit from healthy competition.

**Japan's Fair Trade Commission (JFTC)** [http://www.jftc.go.jp/e-page/f\\_home.htm](http://www.jftc.go.jp/e-page/f_home.htm)

#### **United States Federal Trade Commission** <http://www.ftc.gov>

The Federal Trade Commission (FTC) works to ensure that the nation's markets are vigorous, efficient and free of restrictions that harm consumers. Experience demonstrates that competition among firms yields products at the lowest prices, spurs innovation and strengthens the economy. Markets also work best when consumers can make informed choices based on accurate information.

#### **United States Department of Justice AntiTrust Division** <http://www.usdoj.gov/atr/index.html>

For over six decades, the mission of the Antitrust Division has been to promote and protect the competitive process — and the American economy — through the enforcement of the antitrust laws. The antitrust laws apply to virtually all industries and to every level of business, including manufacturing, transportation, distribution, and marketing. They prohibit a variety of practices that restrain trade, such as price-fixing conspiracies, corporate mergers likely to reduce the competitive vigor of particular markets, and predatory acts designed to achieve or maintain monopoly power.

*Key Points for Thailand Regarding U.S. Competition Policy*

The U.S. strongly prefers the use of American competition law as a model for FTAs and for developing competition policies in third countries. Although U.S. competition law enjoys the appreciable benefits of a 110 year history of jurisprudence, Thailand should be aware of observed concerns among the international community regarding U.S. competition laws that could impact the formation of a competition chapter in an FTA.

**U.S. Competition Policy Critique**

<b>Issue Area</b>	<b>International Criticism</b>
Criminal penalties	The U.S. provides for criminal penalties for price fixing, bid rigging and antitrust violations. Within the EU, however, only three countries provide for criminal penalties. <sup>86</sup> The U.S. will press for Thailand to adopt considerable criminal penalties for competition law violations. This will have a direct impact upon enforcement provisions of the FTA.
Pricing policy	Some antitrust practitioners that the price discrimination provisions of US law often have the perverse effect of promoting economic inefficiencies <sup>87</sup>
Class action lawsuits	U.S. law permits class action suits that award plaintiffs treble damages. Yet the possibility of expensive class actions can often serve as a deterrent to anticompetitive behavior. <sup>88</sup> Many opportunities to abuse the system and discourage efficiencies occur when plaintiffs can use the system to sue competitors.

*Political Considerations*

As noted above, a sound competition chapter will have the backing of three extremely strong political constituencies within the United States: the financial industry, which will focus on gaining market share in Thailand through mergers and acquisitions as well as the establishment of US-owned subsidiaries; the telecommunications industry, which views Thailand's telecoms sector as extremely sheltered yet ripe for market penetration and expansion; and the pharmaceutical industry, which views Thailand's market potential as a viable long term target that currently remains closed to foreign penetration due to a significant state presence in the sector. Thai officials should be aware that these three industries possess powerful lobbies in Washington that will utilize the U.S. trade policy process to marshal Congressional support for forceful competition commitments in an FTA.

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<sup>86</sup> Smith, David and Sun, Su. "Introducing Competition Policy Into Developing Economies: Lessons Learned" *Overseas Young Chinese Forum*. Volume 2, No. 4, February, 2001.

<sup>87</sup> Ibid

<sup>88</sup> Ibid.

## Trade and Labor<sup>89</sup>

The often tense US-Thai relationship regarding trade and labor rights could set the tone for a negotiation marked by American union activism and keen Congressional interest. At several instances during the 1990's, the United States considered suspension or revocation of Thai benefits under the Generalized System of Preferences due to a perceived lack of progress on labor reform in Bangkok. These enduring concerns, coupled with Congress' heightened, election-year sensitivity to inexpensive foreign labor factors and the U.S. trade deficit, sets the stage for what could be a politically difficult chapter of the FTA.

### *Constraints of U.S. Fast-Track Authority*

The ability of U.S. negotiators to accommodate the priorities of its FTA partners, particularly their opposition to FTA labor rights, is limited in a number of respects by the terms of Congressional fast-track authorization.<sup>90</sup> 2002 enactment of the Bipartisan Trade Promotion Authority Act (BTPAA) entailed a substantial compromise, and Congress was careful to retain some ability to question the internal provisions of trade agreements. It did this by conditioning fast-track treaty ratification voting on progress toward specified BTPAA objectives.

In order to accord U.S. negotiators appropriate bargaining latitude, BTPAA negotiating aims are stated as "objectives" and "principles" rather than rigid requirements. To assure that recommended treaties receive fast-track voting treatment, however, the President and the U.S. Trade Representative must satisfy two important criteria: (1) notify, consult and report to Congress about progress in achieving applicable "purposes, policies, priorities and objectives" of the Act, and (2) satisfy Congress that each FTA is "making progress in meeting the applicable objectives."<sup>91</sup> If it deems that either of these criteria is not satisfied, Congress may deny an FTA fast-track treatment.<sup>92</sup>

With respect to labor provisions, the BTPAA is quite specific as to the objectives and principles that the USTR shall variously "promote", "seek", "foster," "encourage", "recognize" and "strengthen".<sup>93</sup> The combination of specifically stated goals on one hand, and the somewhat ambiguous and precatory requirements for attaining them on the other, is the essence of the

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<sup>89</sup> The text of the labor section of this report is adapted from the work of the Labor & Employment Practice and Latin American Practice Groups of Hunton & Williams, LLP, specifically Thomas Manley and Luis Laredo. "International Labor Standards in Free Trade Agreements of the Americas". copyright Hunton & Williams, LLP, 2003.

<sup>90</sup> 19 U.S.C. secs 3802-3806.

<sup>91</sup> *Id.*, sec 3803(b)(2)(3).

<sup>92</sup> *Id.*, sec. 3805(b)

<sup>93</sup> See, e.g., 19 U.S.C. sec. 3802(a)(3-9)

“carefully constructed bipartisan compromise” that supports U.S. advocacy of labor standards in the FTAA.<sup>94</sup> Though the compromise may have achieved its purpose of preventing narrow interest gridlock from blocking trade promotion, it is plain there will be much more Congressional debate on the precise scope and strength of labor provisions in new FTAs.<sup>95</sup>

### *Emerging Principles of a New FTA Model for Labor Standards*

The BTPAA labor objectives are both shaped by, and shaping of, a new model for internationalizing labor standards. The model it frames is necessarily a flexible one, beginning as it does with the diverse domestic laws and economies of prospective trading partners. The model aspires to the qualitative character of the ILO core labor standards, however, and seeks to encourage the upward harmonizing of labor standards toward those internationally enforceable norms. This approach will by no means put an end to the argument between those who fear trade-distorting mischief of labor disputes and those who desire firm judicial enforcement of quantitative international standards from the outset.<sup>96</sup> It has the advantage, however, of transforming that debate from an objection to the formation of FTAs into a discussion over the means and timetables for implementing them.

### *The NAFTA Approach: Enforcing Domestic Labor Laws*

The base principle of the new FTA labor model – the idea that each party to a trade agreement commits to the effective enforcement of its own domestic labor laws – first appeared in the North American Agreement on Labor Cooperation (NAALC) side letter to NAFTA.<sup>97</sup> By this simple device, and because the commitments were subject to dispute resolution procedures between the parties, NAFTA for the first time “internationalized” labor standards – even though the standards subject to inter-nation enforcement were internal domestic ones.<sup>98</sup>

The NAALC did not incorporate ILO or other international labor standards, and the parties were careful to reaffirm that their respective domestic laws were already highly protective of labor rights. There are also no restrictions on the parties’ sovereign abilities to change their respective labor laws. The agreement does enumerate aspirational principles of universal labor standards, as well as obligations to effective compliance features such as transparency, public education and access to enforcement procedures. The NAALC dispute resolution system, however, was

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<sup>94</sup> DLR July 16, 2003, supra; Bruner, supra at 48-50.

<sup>95</sup> See, Altieri, supra at 855; DLR, July 16, 2003, supra.

<sup>96</sup> Compare, e.g., Fisher, “Changing Labor Markets” supra, and Guzman, “Trade, Labor, Legitimacy,” supra. with Palley, “Economic Case for Labor Standards,” supra, Collingsworth, “Essential FTAA Enforceable Social Clause,” supra, Weiss, supra

<sup>97</sup> Supra, fn 3.

<sup>98</sup> See Weiss, supra at 707.

restricted to “trade-related” cases involving “patterns and practices” of government failure to enforce laws. The actual NAALC enforcement experience has been criticized as ineffectual.<sup>99</sup>

*The U.S.-Jordan Innovations*

The labor provisions in the 2000 trade agreement between the U.S. and Jordan expanded on the NAFTA/NAALC model and created some useful precedents for future FTA’s and for the BTPAA itself.<sup>100</sup> The basic premise of the Jordan labor provision, like the NAALC, is that the parties commit to enforce their own respective labor laws. There are significant additions, however.

Unlike the NAFTA “side letter” approach, the labor provisions of the Jordan agreement are included in the body of the treaty; and there is no separate dispute mechanism for labor matters<sup>101</sup>. The labor provisions are thus subject to the same dispute mechanisms as other trade issues – a “parity of enforcement” principle later incorporated into the BPTAA.<sup>102</sup> The Jordan agreement also contains a “no-relaxation” clause that recognizes it is inappropriate to waive or reduce labor protections as a means to encourage trade.<sup>103</sup> Perhaps its most important feature, though, is the parties’ agreement to “strive to ensure” that internationally recognized standards on specific labor matters are “recognized and protected by domestic law.”<sup>104</sup> This clause may mark the first time that parties have agreed to incorporate external standards of international labor law into a trade agreement.

Whether or not they were intended to address criticized parts of the NAALC experience, the U.S.-Jordan labor provisions are seen to have shortcomings of their own, in the eyes of labor advocates. They have been criticized as too narrow in coverage excessively conditioned, too weak on compliance and due process measures, and too indulgent of a modest starting point in the labor protections of one of the parties.<sup>105</sup> Even if the labor innovations of the Jordan FTA are theoretical as applied to Jordan itself, however, they served to raise the visibility of a number of key issues for future FTA’s, and to lay the groundwork for the BTPAA itself.<sup>106</sup>

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<sup>99</sup> Weiss, *supra* at 702-711.

<sup>100</sup> See Agreement on the Establishment of a Free Trade Area, Oct. 24, 2000, U.S.-Jordan, 41 *I.L.M.* 63 (US-Jordan FTA).

<sup>101</sup> *Id.*, article 6.

<sup>102</sup> Compare *Id.*, articles 16, 17 with 19 U.S.C. sec. 3802(b)(12)(G). There are indications, however, that the parties agreed to avoid using trade sanctions to enforce labor provisions. See Bruner, *supra* at 48; Weiss, *supra* at fn 126

<sup>103</sup> US-Jordan FTA, article 6(2).

<sup>104</sup> *Id.*, article 6(1)

<sup>105</sup> See Weiss, *supra* at 715-718.

<sup>106</sup> Bruner, *supra* at 47-48.

### *The Bipartisan Trade Promotion Authority Act Labor Objectives*

The 2002 BTPAA incorporated the key elements of both the NAALC and Jordan labor provisions.<sup>107</sup> It thus poses squarely for FTAA negotiators the problem of finding the areas of potential accommodation between (1) the demands of U.S. labor advocates for higher international labor standards and (2) the intent of Latin American parties to insulate their comparative labor cost advantages and domestic laws from international interference.<sup>108</sup>

One feature of the BTPAA which may allow U.S. negotiators some latitude is the division of labor priorities into “overall” vs. “principal” objectives. Items most apt to intrude on party sovereignty – incorporation of ILO core labor standards, restriction on relaxing domestic laws and ratification of ILO Convention 182 on the “Worst Forms of Child Labor” -- are included among the overall objectives. The USTR appears to regard these as somewhat more flexible priorities than the items included among the principal objectives.<sup>109</sup> The principal objectives, on which the USTR appears more ready to insist, are more diplomatically tailored to the sovereignty-respecting “enforce your own laws” model that originated with the NAALC:

#### **The BTPAA Labor Mandate**

“(11) The principal negotiating objectives of the United States with respect to labor ... are--

- (A) to ensure that a party ... does not fail to effectively enforce its ... labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade....
- (B) to recognize that parties ... retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory and compliance matters....
- (C) to strengthen the capacity of ... partners to promote respect for core labor standards...., and
- (D) to ensure that labor... policies do not arbitrarily or unjustifiably discriminate against United States exports or serve as disguised barriers to trade....

“(17)The principal negotiating objective of the United States with respect to the trade-related aspects of the worst forms of child labor is to seek commitments by parties to trade agreements to vigorously enforce their own laws prohibiting the worst forms of child labor.”<sup>1</sup>

<sup>107</sup> See 19 U.S.C. secs 3802(a) (6), (7), (9) and (b) (11), (12)(G), (17).

<sup>108</sup> See Bruner, *supra* at 50-51.

<sup>109</sup> See 19 U.S.C. secs 3802(a)(6)(7)(9) and see DLR July 16, 2003, *supra*.



Including labor provisions in the main body of FTA's seems also to be a high U.S. priority since the "Dispute Settlement and Enforcement" provision is itself included among "principal" objectives and contains a specific "parity of enforcement" obligation with respect to other principal negotiating objectives.<sup>110</sup>

While the USTR urges that this differentiation in negotiating objectives was a key part of the "carefully constructed bipartisan compromise" on BTPAA labor provisions,<sup>111</sup> it seems clear from the subsequent Chile FTA and the current debate over CAFTA negotiations that labor proponents in Congress will continue to press for stronger FTA labor clauses – including the incorporation of ILO core labor standards.<sup>112</sup>

### *The Labor Chapter of the Chile FTA*

The 2003 U.S. FTA's respectively with Singapore and Chile, constitute the first examples of labor provisions concluded after enactment of the BTPAA guidelines.<sup>113</sup> The Chile provisions are somewhat more fulsome than those in the Singapore agreement, and they are more pertinent to the prospects for a Thai-US FTA. They reflect both compromises with, and embellishments upon, the objectives of the BTPAA.

The Chile FTA recognizes the ILO core labor rights but, in an apparent effort to avoid incorporating the international jurisprudence associated with those rights, the text is careful to couch treaty commitments in terms of respective domestic laws. The parties "reaffirm their obligations as members of the *International Labor Organization (ILO)* and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)*," for example; but it is the separately stated (though almost identical) "internationally recognized labor rights set forth in Article 18.8" with which each party pledges it will "strive to ensure" its labor standards are "consistent."<sup>114</sup>

There is also an anti-relaxation provision in the Chile FTA, as well as compliance awareness and procedural guarantees.<sup>115</sup> Access to the treaty dispute resolution procedures, though, requires exhaustion of separate "Cooperative Consultation" procedures,<sup>116</sup> and is reserved for failures to

<sup>110</sup> 19 U.S.C. sec 3802(b)(12).

<sup>111</sup> See fn 29, supra.

<sup>112</sup> *Id.*

<sup>113</sup> United States-Singapore Free Trade Agreement, May 6, 2003 (hereafter Singapore FTA), found at [www.ustr.gov/new/fta/singapore.htm](http://www.ustr.gov/new/fta/singapore.htm); United State,-Chile Free Trade Agreement, June 6, 2003 (hereafter Chile FTA), found at [www.ustr.gov/new/fta/chile.htm](http://www.ustr.gov/new/fta/chile.htm)

<sup>114</sup> Chile FTA, Article 18.1.

<sup>115</sup> Chile FTA, Article 18.2(2), Article 18.3.

<sup>116</sup> Chile FTA, Article 18.6(8).

enforce Article 18.8 domestic labor laws “through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties...”<sup>117</sup> Article 18.8 specifically exempts minimum wage laws, and ILO Convention 182 on the *Worst Forms of Child Labor (1999)* is referenced only in connection with the Article 18.5 “Labor Cooperation Mechanism”.<sup>118</sup>

The Chile FTA also contains a novel remedial provision that allows fines (up to \$15 million) to be substituted for trade sanctions where violations of labor provisions are involved.<sup>119</sup> This is opposed by some labor advocates, who see it as a retreat from the trade sanction remedy theoretically available in the U.S.-Jordan FTA. Its intent, though is to promote real remedial reforms in labor matters, rather than the damage payments customary to commercial disputes.<sup>120</sup> The monetary assessments, which may continue to be assessed against a non-complying country, are meant both to encourage compliance and to provide funds for implementing the remedy ultimately agreed upon.

As their Congressional ratifications attest, the Chile and Singapore FTA’s seem certainly to have satisfied the principal labor objectives of the BTPAA, and to have made progress on the overall objectives as well. Already Congressional labor advocates are warning, however, that they do not view the model created by the Jordan, Singapore and Chile FTA’s to be sufficient for countries, like those in the CAFTA talks, that are not viewed as having a history of respecting ILO core labor standards.<sup>121</sup> The warnings presage just a few of the issues that arise as the U.S. seeks to extend its new FTA labor model into the more diverse multilateral economies of the FTAA parties.

### *U.S. Domestic Politics and Labor*

Another risk, of particular relevance to labor standards, is the loss of public support if rapid trade liberalization is seen to threaten worker prosperity. Although the evidence is plain that U.S. trade agreements have promoted long-term growth of higher paying jobs,<sup>122</sup> changing patterns of employment can nevertheless be highly disruptive at the local level. These risks are evident in the U.S. now, when a “jobless” recovery from recession focuses public trade debate on fears of job losses to trading partners with lower wage and labor standards.<sup>123</sup> The emotional effects of plant closings and job losses are strong; and the same fears that cause U.S. workers to press for “higher” labor standards abroad cause potential trading partners to resist them all the more.

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<sup>117</sup> Chile FTA, Articles 18.6(7), 18.2(a), 18.8.

<sup>118</sup> Chile FTA, Articles 18.8, 18.5.

<sup>119</sup> Chile FTA, Article, 16(2).

<sup>120</sup> See Weiss, *supra* at 722.

<sup>121</sup> See DLR July 23, 2003, *supra*.

<sup>122</sup> See Fisher, *supra*.

<sup>123</sup> See, e.g., Weintraub, Sidney, “The United States and the Future of Free Trade in the Americas,” 6 NAFTA: Law and Business Review of the Americas 303, 304 (SMU, Summer 2000); Fisher, *supra*.

Based on these employment fears and their own commercial self-interests, certain U.S. industries in key electoral states have for the time being succeeded in carving out protectionist exceptions to the overall U.S. free trade initiatives.<sup>124</sup> These, too, create risks – that potential trading partners will justify their own trade barriers on the apparent hypocrisies of U.S. free trade rhetoric.<sup>125</sup>

### *U.S. Union Opposition to Trade Liberalization*

Organized labor in the U.S., also, is generally resistant to rapid trade liberalization; and it is a powerful political influence – particularly in the Democratic party.<sup>126</sup> U.S. unions are heavily concentrated in many of the very industries, such as automobiles, trucking, steel and certain public services, that are vulnerable to international competition.<sup>127</sup> In this context U.S. union advocacy for FTA labor provisions can be seen as an important accommodation of its domestic protectionist interests with those of trade liberalization and international union solidarity.<sup>128</sup>

### *CAFTA Labor Provisions Slow to Develop*

Regarding labor, the CAFTA is shaping up as potentially the most nuanced agreement. USTR Zoellick noted that, in CAFTA, the negotiation of the core labor text is but one of three parts elements in the U.S. labor strategy for the agreement. The agreement is likely to include regular, formalized bilateral consultations to improve labor laws and enforcement, as well as a labor technical cooperation program aimed at capacity building in CAFTA countries to protect labor rights. Most labor discussions remain off the table at present in the course of CAFTA negotiations; more information is not available at this time from CAFTA parties. Considering the often difficult U.S.-Thai history regarding labor relations, including GSP suspension petitions in the 1990's, it is likely that the USTR will come under significant pressure to maximize the labor chapter in an FTA along the lines of the model being developed in the CAFTA.

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<sup>124</sup> See Phillips, WSJ July 29, 2002, supra; King and Murry, WSJ Oct. 25, 2002, supra; Becker, "U.S. Begins Talks for Trade Pact With Central America," The New York Times (Jan. 9, 2003); Zoellick Senate Finance Testimony, supra.

<sup>125</sup> See, e.g., Altieri, supra at 864.

<sup>126</sup> See, e.g., Jackson, Karla Shantel, "Is Anything Ever Free? NAFTA's Effect on Union Organizing Drives and Minorities and the Potential of FTAA Having a Similar Effect," 4 Scholar: St Mary's Law Review on Minority Issues 307 (Spring, 2002); Hoffa, supra; Collingsworth, supra; and see Pascoe, William F., "Déjà vu All Over Again? Collective Bargaining and NAFTA: Can Mexican and United States National Unions Foster Growth Under the NAALC?," 19 Arizona Journal of International and Comparative Law 741 (Summer, 2002).

<sup>127</sup> See Phillips, WSJ July 29, 2002; Phillips, Michael M., "Latin Trade Pact Poses Political Peril for Bush," The Wall Street Journal (Dec. 31, 2002).

<sup>128</sup> See, e.g., Weintraub, supra; Cooper, supra; Palley, supra; Collingsworth, supra; Jackson, supra; Pascoe, supra; Hoffa, supra.

## Trade and Environment

Regarding the environment, BTPAA Article 2101(b)(11)(D) instructs negotiators to pursue "strengthening the capacity of U.S. trading partners to protect the environment." BTPAA Section 2102(a)(7) states that negotiators will "ensure that domestic environmental protection policies are not weakened or reduced to encourage trade."<sup>129</sup> Accordingly, the Chile and Singapore FTAs are the first to include environment obligations as part of the core text of the agreements. The methodology behind the core text, however, reveals the policy dilemmas facing the United States<sup>130</sup>. The Chile and Singapore texts commit all parties to reaffirm their environmental commitments, ensure that their domestic laws provide for high levels of protection of the environment, and agree that it is inappropriate to reduce or weaken these domestic environment provisions to encourage trade and investment. Essentially, all parties agreed to enforce their existing laws without undertaking new obligations.

### Singapore FTA Core Environment Text

#### **CHAPTER 18 : ENVIRONMENT**

##### **ARTICLE 18.1 : LEVELS OF PROTECTION**

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws, each Party shall ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws.

##### **ARTICLE 18.2 : APPLICATION AND ENFORCEMENT OF ENVIRONMENTAL LAWS**

1. (a) A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

(b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

2. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

<sup>129</sup> Audley, John. *Evaluating Environmental Issues in the U.S.-Singapore FTA*. Carnegie Endowment for International Peace., April 2003)

<sup>130</sup> According to the NGO "us-trade.org", It would be difficult or impossible for the United States to demand that trading partners enforce ILO standards and conventions which we ourselves have not ratified. The United States is party to only two of the eight "core conventions" of the ILO (No. 105, Forced Labor, and No. 182, Worst Forms of Child Labor) The United States is party to only 12 of over 150 ILO conventions currently in force. The U.S. has refused to ratify several ILO core conventions because U.S. labor laws and practices are inconsistent with provisions in those conventions. Certain U.S. laws are not consistent with ILO conventions on collective bargaining and age standards for child labor. See "TPA Labor Standards", www.us-trade.org, 2001.

In the Chile Agreement, the U.S. found a more flexible partner regarding Congressional demands on the environment. Under the FTA, the U.S. and Chile developed a joint Environmental Affairs Council to monitor environmental issues, identified specific joint projects on the environment for future work, and agreed to negotiate a separate bilateral environmental cooperation agreement.

### US-Chile FTA: Environment Council Text

#### **Article 19.3: Environment Affairs Council**

1. The Parties hereby establish an Environment Affairs Council comprising cabinet level or equivalent representatives of the Parties, or their designees. The Council shall meet once a year, or more often if the Parties agree, to discuss the implementation of, and progress under, this Chapter. Meetings of the Council shall include a public session, unless the Parties otherwise agree.

2. In order to share innovative approaches for addressing environmental issues of interest to the public, the Council shall ensure a process for promoting public participation in its work, including by seeking advice from the public in developing agendas for Council meetings and by engaging in a dialogue with the public on those issues.

3. The Council shall seek appropriate opportunities for the public to participate in the development and implementation of cooperative environmental activities, including through the United States - Chile Environmental Cooperation Agreement, as set out in Annex 19.3.

4. All decisions of the Council shall be taken by mutual agreement and shall be made public, unless the Council decides otherwise, or as otherwise provided in this Agreement.

The annex referred to in the text forming the Environment Affairs Council sets out a program of work on the environment that commits the parties to cooperation on the following goals:

- *Developing a Pollutant Release and Transfer Register (PRTR) in Chile*. The PRTR is a publicly available database of chemicals that have been released to air, water and land or transferred off-site for further waste management.
- *Reducing Mining Pollution*. The United States will assist Chile in reducing contamination and pollution resulting from past mining practices by working with Chile to identify sources of pollution and explore cost-effective remediation methods;
- *Improving Environmental Enforcement and Compliance Assurance*. The Parties will provide training and exchange of information to enhance each Party's capacity to enforce its environmental laws and regulations.
- *Sharing Private Sector Expertise*. The Parties will seek to increase environmental stewardship by inviting enterprises of each Party to share their experiences in developing and implementing programs that have reduced pollution.
- *Improving Agricultural Practices*. To help reduce pollution from agricultural practices in Chile, the Parties will adapt and implement a training program for Chilean farmers and other workers to promote appropriate handling of chemical pesticides and fertilizers, and to promote sustainable agriculture practices.
- *Reducing Methyl Bromide Emissions*. To mitigate methyl bromide emissions the Parties will seek to develop effective alternatives to that chemical,

- *Improving Wildlife Protection and Management.* To protect wildlife in Chile and the Latin American region, the Parties will work together to build capacity to promote the management and protection of biological resources in the region.
- *Increasing the use of cleaner fuels.* The Parties will work to improve the environmental quality of fuels, especially diesel fuel and gasoline, used in their territories by providing joint training and technical assistance on a variety of fuels-related environmental issues.

*Political Considerations*

Thai officials should appreciate the environmental cooperative agreement not only as a useful trade policy mechanism, but also as a political device of much import on Capitol Hill. Such a sub-agreement can generate legitimate bilateral progress on environmental issues of mutual interest to both Thailand and the United States, an achievement that will be recognized and applauded in the Congress, and that will have demonstrable value in crafting an agreement that will pass the U.S. legislature.

In all likelihood, the U.S. would pursue with Thailand an environmental model more closely resembling the Chile, rather than the Singapore FTA, to facilitate long term cooperation on the environment and in recognition of the political obstacles to passage of the agreement.

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