

Overview

I. Importance of Special 301 and Effective Intellectual Property Protection

During the Uruguay Round negotiations that produced the World Trade Organization (WTO), the United States made significant progress toward more consistent and effective intellectual property protection globally. The result of this effort was the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement requires all WTO members to establish functional intellectual property systems. Its obligations extend to rights such as patents, undisclosed information, data, trademarks and copyrights. It also requires efficient registration procedures and effective enforcement regimes. Under TRIPS, intellectual property owners must be given rights promptly, must gain certain minimum assurances of the characteristics of the rights, and must have recourse to effective means for enforcing those rights. All of these obligations must be implemented in practice as well as through laws and regulations.

The TRIPS Agreement was a major achievement in strengthening the worldwide protection and enforcement of intellectual property rights by creating an international minimum standard, rather than an optimal level of protection for intellectual property rights. The Agreement was premised on the view that its obligations, if faithfully implemented by the diverse WTO Membership, would create the policy and legal framework necessary for innovation-based economic development of WTO members by rewarding innovation with reliable rights-based systems and permitting the flow of its attendant commercial benefits. We believe that this has been borne out by improvements in public health and in the general economic performance of a number of middle income developing countries in every region of the world that have met or exceeded their WTO TRIPS obligations. Because it concerns both the definition and enforcement of rights, the TRIPS Agreement is an important step toward effective protection of intellectual property globally.

One of the concessions made by the United States in the Agreement was to provide developing countries with a number of extended transition periods to implement the Agreement. The developing country WTO Members were given a five-year grace period to implement most of their obligations, while the least developed WTO Members were given an eleven-year transition period. Additional concessions were made to developing countries to allow delay of product patent protection for pharmaceutical products, and more recently to least developed countries to allow a further transition for patent protection until the year 2016. The first of these transition periods ended on January 1, 2000, and as of January 1, 2005, all but the least developed of the world’s developing

countries – which include many of the world’s largest developing economies -- are subject to all provisions of the TRIPS Agreement. These trading partners have benefited tremendously from the trade liberalizations of the Uruguay Round, many of which represented significant U.S. concessions. These countries are also home to industries that aggressively compete with U.S. industries dependent on effective intellectual property protection – particularly in the pharmaceutical sector – because they have not provided effective intellectual property systems.

Despite the end of the transition period on January 1, 2005, for the full implementation of the TRIPS Agreement by most WTO member countries, a review of PhRMA’s individual country submissions, demonstrates that many countries have significantly failed to meet those obligations in significant ways. The actual protection and enforcement of intellectual property rights on the ground in those countries fall far short of the standards contained in TRIPS. Especially troubling is the failure of almost all the developing countries on which we report to implement their TRIPS Article 39.3 obligation on data exclusivity. PhRMA members believe it is now time to refocus on core commercial priorities, and that U.S. commercial interests would be best served by a strong high-level and consistent commitment to full implementation of TRIPS including those provisions concerning data.

An important area of concern is counterfeit drugs. Weak IP enforcement regimes in some countries contribute to this problem which increases health risks to patients, particularly those in poor populations. PhRMA believes this area of concern will increase in significance and that the assistance of the United States throughout the Special 301 process and through other forums will be essential to ensuring delivery of safe medicines to patients.

In addition, ensuring implementation of FTA obligations is an increasing need. The 301 process is an important tool in ensuring that these important agreements are complied with.

In late 2004, Milken Institute released a study entitled Biopharmaceutical Industry Contributions to State and U.S. Economies, which underscores the importance of advocacy on behalf of one of America’s leading edge high-technology industries. According to this study, America’s biopharmaceutical companies are responsible for creating over 2.7 million jobs across the United States and \$172 billion in total output. The report contains a state-by-state breakdown of these figures, demonstrating why so many U.S. states are actively competing to attract biopharmaceutical companies. These new figures highlight the critical importance of the work of U.S. trade negotiators to open foreign markets, level the playing field and promote innovation in the global trading regime. High technology industries such as the biopharmaceutical industry are the engine of U.S. growth, and it is more critical than ever that the United States

takes a strong stand in favor of the open trading rules that will allow such growth to continue.

II. Government Price and Access Controls Undermine IP Rights, Innovation and Health Care Access

In addition to seeking improvements in IPP around the globe, it is important for the U.S. Government to address other market access barriers like price controls which, in effect, taxes U.S. citizens and allows foreign governments to free-ride on American innovation. PhRMA members believe that the “Special 301” review process can be a particularly useful trade tool which can be utilized to address the use of price controls and other market access barriers in priority markets.

Despite significant academic and government research outlining the dangers of government-imposed price and access controls on pharmaceuticals, this damaging practice continues unchecked throughout foreign markets. Without U.S. Government action, price and access controls will threaten innovation, delay and deny market access and diminish U.S. intellectual property rights.

These concerns have been underscored in high profile studies and hearings in recent years, including a recent speech given by Deputy Secretary of Health and Human Services (HHS), Alex Azar, in November 2005, where he aptly summed up the situation: “My message is simple. Government actions affect prices, prices affect investment, investment affects innovation, and innovation affects health. The more free competition there is in the pharmaceuticals and medical devices market, the more innovation the world will enjoy.”

These words echo the points made in a February 2005 Senate Health, Education, Labor and Pensions Committee hearing on Prescription Drug Safety. In that hearing, Committee Chairman Michael Enzi (R-NY) argued that price controls, “...could endanger the future of drug innovation by limiting the financial resources available for drug research and development.” Chairman Enzi’s comments represent growing concern in Congress about the effects of foreign price controls on American consumers and industry. A 2004 Commerce Department Report (“The Commerce Report” or “Report”) , *Pharmaceutical Price Controls in OECD Countries: Implications for U.S. Consumers, Pricing, Research and Development, and Innovation*, supported Chairman Enzi’s assertion by stating “To encourage the continued development of new drugs, economic incentives are essential...without such incentives, private corporations, which bring to market the vast majority of new drugs, would be less able to assume the risks and costs necessary to continue their research and development (R&D).

The risks inherent in pharmaceutical innovation are staggering. For every 5,000 to 10,000 compounds screened, only 250 enter preclinical testing, five enter human clinical trials, and one is approved by the Food and Drug Administration. The Commerce Report provides evidence that foreign price controls suppress revenues, in turn reducing worldwide private R&D investment by 11 to 16 percent (i.e., \$5-8 billion) annually. This reduction in global R&D means that up to four fewer new drugs are launched each year, reducing worldwide patient access to innovative medicines. Given that the FDA approved only 30 new drugs from 2000 to 2003, a reduction of four new drugs in a year (or more than 50% of those approved by FDA in that period) is a significant setback in innovation and potential patient care. The Report also points out that U.S. consumers could benefit over time from the elimination of price controls abroad through the enhancement of global price competition.

The Commerce Report addresses the serious detrimental effects of price and access controls in the countries using them. Ironically, these measures suppress the use of generic medicines and generic prices are on average much higher than those in the United States. According to the Report, altering these policies could result in a savings of \$5 to \$30 billion annually depending on the country, which could significantly or fully offset the effects of allowing market-based pricing for innovative medicines. The Report also states that government price controls and related measures impede in-country R&D and patient access to the most effective medicines.

USTR's 2005 Special 301 annual report correctly connected the protection of intellectual property rights and financial incentives to innovation:

“The United States is firmly of the conviction that intellectual property protection, including for pharmaceutical patents, is critical to the long term viability of a health care system capable of developing new and innovative lifesaving medicines. Intellectual property rights are necessary to encourage rapid innovation, development, and commercialization of effective and safe drug therapies. Financial incentives are needed to develop new medications; no one benefits if research on such products is discouraged.”

PhRMA welcomes the Administration's view of the dangers inherent in foreign government price and access controls and looks to the Administration and USTR specifically to take action by continuing to develop its strategy to address such practices. Such a move would be consistent with congressional directives found in the Medicare Modernization Act and the Trade Promotion Authority Act.

The conference report accompanying the Medicare Modernization Act of 2003 recognized the negative impact of price and market access controls and directed that “[t]he United States Trade Representative, the Secretary of Commerce, and the Secretary of Health and Human Services...shall develop a strategy to address such issues in appropriate negotiations.” Congress provided a similar policy direction in the Trade Promotion Authority Act of 2002 by directing USTR to seek “the elimination of government measures such as price controls and reference pricing which deny full market access for United States products.”

In light of these directives, PhRMA has and continues to call on the Administration to use the Special 301 process to advance a multi-front strategy. First, as recognized in USTR’s 2005 Special 301 Report, bilateral consultations should be pursued to promote sustainable innovation by addressing government price controls and related measures. The 2005 Report stated that:

The Department of Health and Human Services, along with USTR and other U.S. health and economic policy agencies, are jointly approaching individual OECD countries through bilateral consultations, such as with Germany and Canada. . . . These discussions are tailored to the specific circumstances of each country, but utilize a common set of principles aimed at advancing U.S. interests, including promoting innovation in the pharmaceutical sector and enhanced patient access to innovative and generic drugs.

USTR, HHS, the Commerce Department and other agencies should move rapidly to formalize a structured, bilateral dialogue with Germany, one of PhRMA’s highest priority countries. As detailed in our submission, Germany’s approach to regulating innovative products represents a substantial impediment to innovation in one of the biggest and most developed pharmaceutical markets in the world. PhRMA has placed Germany in the priority foreign country category to highlight its significance for our members. Our objective with this placement, at this time, is to underscore the importance of an opportunity for progress in the bilateral consultations. With the new German government in place under Chancellor Merkel’s leadership, there is reason to believe Germany could be poised to undertake policies that promote, rather than impede, innovation and that recognize the value of innovative medicines for patients. In advancing these bilateral consultations, the U.S. government dialogue with Japan on pharmaceuticals under the 1998 “Birmingham Agreement” provides an important example of how to structure and implement such talks. If, as last year, it is determined to continue this dialogue without according Germany any specific status under Special 301 and the consultations do not progress, Germany’s status under Special 301 must be revisited.

Bilateral consultations should also be pursued in other OECD countries (such as France, Italy, and Canada) to address government-imposed price and access controls and other trade distorting measures. Similar to the situation in Germany, the market access barriers maintained in these developed countries undermine intellectual property rights and deny patients access to the most innovative medicines.

Second, USTR and other agencies should make use of the priority foreign country designation for Poland based on the government-imposed price and access controls and other trade distorting measures. As detailed in the section on Poland that follows, these government practices are “onerous or egregious,” as provided in section 182 of the Trade Act of 1974. Moreover the market access barriers our members encounter violate a number of Poland’s international obligations. In these circumstances, we believe it is critical that USTR utilize the market access barriers prong of the Special 301 statute in making a priority foreign country designation for Poland. Such a designation is only strengthened by the fact that Poland also fails to provide effective intellectual property rights for our members.

Third, the Administration should use ongoing and new bilateral and multilateral trade negotiations to pursue a positive agenda on pharmaceutical pricing and access issues. For example, the outcome of the U.S. – Australia FTA negotiations benefited from a two-way discussion on Australia’s complex and discriminatory listing system. The outcome was an FTA that included provisions on pharmaceuticals and specific steps to improve the transparency and accountability of the Pharmaceutical Benefit Scheme process. The Australian Government agreed to an independent review of listing decisions, which will enhance the accountability of the process. The Administration has an important opportunity to build on this approach this year in other important FTA negotiations advancing this year, such as the U.S.-Korea FTA.

Fourth, the Administration should ensure that U.S. trading partners are abiding by national and international commitments in the area of pharmaceuticals. PhRMA commends USTR’s work thus far to ensure that countries adhere to Article III of the GATT 1994, as well as the TRIPs and TBT agreements. In recent years, USTR invoked paragraph 9 of Article III in requesting in the context of the WTO Trade Policy Review of the European Union that the EU identify the steps being taken at the supra-national and member-state levels to ensure their price control regimes “avoid to the fullest practicable extent effects prejudicial to the United States,” as required by Article III. PhRMA strongly encourages USTR to remain vigilant in pressing the EU and its member states to fully comply with WTO rules and the EU’s transparency directive, neither of which have been fully followed in key EU markets. Similarly, countries in other regions that do not abide by their international obligations should be held accountable.

Special 301 Covers Market Access Barriers

The Special 301 statute requires USTR to address in its review foreign country practices that deny fair and equitable market access to U.S. persons that rely upon intellectual property protection.” A country cannot be said to adequately and effectively protect intellectual property rights within the meaning of the trade statutes if that country puts in place regulations that effectively nullify the value of the patent rights granted. A patent gives the patent holder the exclusive right to sell his invention in a market, but that right can be undermined by government policies which work to push the price down toward the marginal cost of production.

In these circumstances, the Special 301 statute calls upon USTR to designate a trading partner as a priority foreign country *even if* there were no apparent clear-cut violations of the country’s TRIPS Agreement obligations in the operation or enforcement of its intellectual property rights laws. Section 182(b)(4) of the Trade Act of 1974, as amended, requires USTR, in making a PFC designation, to take into account whether a country is providing “adequate and effective protection . . . of intellectual property rights.” A country that maintains IPR laws on the books but eviscerates the value of patented inventions through other regulations cannot be said to provide “adequate and effective protection.” This is further reinforced in section 301(d)(3)(F)(ii) of the Trade Act of 1974, as amended, which “includes restrictions on market access related to the use, exploitation, or enjoyment of commercial benefits derived from exercising intellectual property rights”

Foreign Price and Access Controls Diminish Intellectual Property Rights

The Special 301 statute is designed to identify and address intellectual property rights practices and enforcement measures that injure American companies and workers, including those that impede market access for IP-intensive products. The very concept of intellectual property rights breaks down if a patent holder loses the ability to sell his or her product at a market-determined price. Instead, the patent holder must sell the patented product at a government-prescribed price, which government monopsonist purchasers have an incentive to drive down toward a product’s marginal cost of production – which, in effect, totally ignores the value of innovation inherent in new products. Such a scheme takes value away from the patent and is the equivalent of expropriating intellectual property.

When such a scheme is put in place, a patent holder loses the ability to gain a reasonable, market-based return on investment for the risks assumed in the course of innovation. Moreover, a country that utilizes such pricing schemes cannot be said to adequately and effectively protect intellectual property rights as defined in the applicable trade statutes. Accordingly, it is important that the

Special 301 report highlight those countries that engage in price and access control policies that effectively deny or delay the rights of companies and workers to benefit from their intellectual property.

For at least the past two decades, the United States has routinely treated weak foreign intellectual property laws as a major trade issue. It is commonly accepted that widespread piracy and counterfeiting of products like sound or movie recordings, software or pharmaceuticals undermines the longevity and economic strength of those American industries. Foreign laws that allow free-riding through other means -- *i.e.*, price and volume controls -- equally diminish the value of U.S. intellectual property rights and hurt U.S. exporters that rely on intellectual property protection.

One of the most egregious measures used by foreign governments is “reference pricing,” which is the indexing of innovative drug prices to older, related medicines that are often off-patent. These systems are designed to pay the same price for innovative products, usually developed by foreign companies, as generic products that are often produced by domestic companies. For example, many countries use “therapeutic reference pricing,” which links reimbursement rates for patented and non-patented products within a defined therapeutic class. The effect of such practices is to undermine the value of pharmaceutical patents in that market and to push risk and costs of R&D on to the backs of American consumers, where market prices are not artificially constrained.

Foreign Price and Access Controls on Pharmaceuticals Serve as a Barrier to Trade

Price and market access control mechanisms imposed by foreign governments deny pharmaceutical companies the ability to market or sell their products in many countries. Those control mechanisms usually delay or deny the availability of new products to patients, often in favor of generic drugs produced domestically. Given that national health insurance schemes typically dominate country markets for pharmaceuticals, a product effectively cannot be marketed in a country until the national authorities have determined its reimbursement price, a process which can be cleverly used to delay a drug’s market entrance for years. Moreover, because governments know that developers of new drugs face a ticking patent clock, they routinely confront them with the Hobson’s choice of either a lower price (see above) or a delay in launch. In short, market access delays are often the other side of the price control coin.

The price control entity in almost every country is a highly opaque bureaucracy and the process of obtaining a government-approved price can be lengthy. Sometimes these delays become so lengthy that they become effective denials of market access. Governments often delay adding new products to national reimbursement lists merely to avoid the cost of providing those treatment

options to patients or to benefit domestic generic drug makers. It is not uncommon for some foreign governments to make a policy decision to close reimbursement lists altogether, to innovative pharmaceuticals.

These processes operate to delay market access (and to diminish the effective patent term) for many U.S. medicines. The Commerce Department Report evaluated 11 OECD countries and determined that bureaucratic obstacles prevent companies from “charging a market-based price” for pharmaceuticals. The Report also noted that these price and market access control methods “tend to be nontransparent, as the criteria and rationale for certain pharmaceutical prices or reimbursement amounts are not fully disclosed even to the pharmaceutical companies seeking to market their drugs.”

Foreign Price Control Systems Often Discriminate against Imports and/or Foreign Innovative Producers

Foreign governments often use price and access controls on pharmaceuticals to favor domestic producers, which tend to be manufacturers of non-innovative pharmaceuticals (i.e., generic drugs) and other local players in the health care system. Countries without a domestic innovative industry tend to rely heavily on price controls on patented pharmaceuticals to balance their health care budgets. Local interests -- such as generic producers, wholesalers and pharmacists -- generally occupy a politically-favored position within these systems and have significant sway in the policy decisions of the domestic health system.

Ironically, price and access controls result in market distortion that makes the cost of generic pharmaceuticals -- often produced primarily by domestic companies -- quite high. Many foreign generics markets are characterized by a lack of true market competition, which tends to raise prices above what they would be in free market. In addition, many foreign systems actually mandate high prices for generics products, requiring them to be reimbursed at rates as high as 70% or even 90% of the price of original branded products. In the United States, where there is intensive price competition in the generics market, prices of generic pharmaceuticals tend to be much lower. In a letter to Congress that accompanied the Commerce Study, the Secretaries of Commerce and Health and Human Services asserted that “[i]n fact, U.S. consumers would pay, on average, 50 percent more for their generic medications if they bought them abroad.”

The country chapters of PhRMA’s 2006 submission provide numerous examples of the above pricing and reimbursement policies and practices.

Americans Continue to Pay the Price for Foreign Price and Access Controls

As academic and government research mounts against price and access controls, American consumers continue to carry the burden of funding the vast majority of the world's research and development costs for pharmaceuticals. Moreover, research indicates that the world's R&D investment is lower than it would otherwise be without foreign price controls, leading to the development and distribution of fewer lifesaving and life-enhancing medicines. Additionally, economic literature explains that U.S. prices may be higher because of the absence of these new drugs, many of which could increase market competition thereby driving down prices in many therapeutic classes of medicines. Put more simply, basic economy theory points to the fact that Americans are effectively subsidizing other countries' health systems through higher prices, while having fewer medicines from which to choose.

While the negative effects of these controls on American patients are significant, the long-term and negative effect on the U.S. economy may be just as bad in the form of reduced exports, less employment and direct harm to the American pharmaceutical industry and its stakeholders. The pharmaceutical industry is a cornerstone of America's high-tech economy and depends on continued innovation and market access for growth. Moreover, pharmaceutical companies continue to be the most research-intensive industry in the U.S. having invested nearly \$49 billion in discovering and developing new medicines in 2004 alone. In fact, nearly one in five dollars in U.S. sales goes toward R&D, while the risks of pharmaceutical innovation continue to be highly significant. Price controls provide a disincentive for stakeholders to put resources into pharmaceutical companies and the innovation they foster, which is distorting markets and hurting patient care.

In 2003, the biopharmaceutical industry directly employed 406,689 people in the U.S. For each job directly created by biopharmaceutical companies, an additional 5.7 jobs were created in the overall economy – substantially above the average for all industries. That means the biopharmaceutical industry was responsible for creating over 2.7 million jobs in the U.S., which represents 2.1 percent of total U.S. employment. Jobs in the biopharmaceutical industry are high quality, and well paying with an average annual wage of \$72,600 in 2003. The biopharmaceutical industry was directly responsible for \$63.9 billion in real output in 2003 and a total output of over \$172 billion when the economic multiplier effect is considered.¹ The value of medicinal and pharmaceutical product exports from the U.S. exceeded \$16 billion in 2002, while biopharmaceutical exports increased almost four and a half times from \$3.7 billion in 1989 to approximately \$16.2 billion in 2002.²

Americans continue to bear an unfair burden in the form of higher drug costs, fewer jobs and less innovation in medicines, because foreign governments

¹ "Biopharmaceutical Industry Contributions to State and U.S. Economies," The Milken Institute, October 2004, available at: www.milkeninstitute.org.

² Bureau of the Census: HS-Based Schedule B, Annual Historical U.S. Domestic Trade Data.

impose price and access controls on U.S.-produced pharmaceuticals. PhRMA strongly urges the Administration and USTR to utilize the Special 301 process to address the trade distorting aspects of these foreign government price and access controls.

Summary of Selected Countries and Issues

To emphasize priorities of PhRMA members for this collaboration, we provide in the following paragraphs summaries of the issues in selected countries from our more detailed reports.

Priority Foreign Countries

PhRMA recommends that Canada, Germany, Philippines, Poland, The Peoples Republic of China and Turkey be designated Priority Foreign Countries under "Special 301" for 2006, in accordance with relevant provisions of the Trade Act of 1974, as amended:

- **Canada**

Deficiencies in intellectual property protection and confiscatory market access barriers make Canada a free-rider on American innovation. Canada's regulatory regime for IP protection continues to be inadequate, ineffective and discriminatory against pharmaceutical patentees, especially the failure to provide for the protection of test data, and refusal to provide patent term restoration. The adverse economic impact of these deficiencies and failures to comply with TRIPS and NAFTA continues to increase as the general environment for pharmaceutical patentees has deteriorated further in the last year. A growing number of PhRMA member companies are fighting claims for damages in the Canadian Courts for having legitimately availed themselves of enforcement procedures in an effort to prevent patent infringement as a result of early working.

- **Germany**

Germany maintains several measures that discriminate against innovative pharmaceutical products as compared to generic products, thereby denying fair and equitable market access to U.S. persons that rely on IPR protections. The new Fixed Reference Price (FRP) system constitutes a major threat and barrier to biomedical innovation in Germany, and restricts access by German patients to advanced life-saving medical treatments developed by U.S. companies. Germany's mandatory rebates on pharmaceutical companies, which must rebate to the Government a fixed percent of their sales outside of the FRP

system, forces burden of this rebate falls disproportionately on innovative companies based outside of Germany.

- **Philippines**

The Philippines continues a trend towards policies that erode intellectual property protection for pharmaceuticals. PhRMA members are confronted with an uncertain operating environment through the introduction of legislation or administrative orders that serve to block or decrease market access and diminish intellectual property rights. The introduction and expansion of parallel imports, the elimination of patent linkage, presence of pharmaceutical government price controls and inadequate enforcement against counterfeit medicines unfairly discriminate against U.S. manufacturers of innovative pharmaceuticals and also serve as impediments to U.S. trade and investment in the Philippines.

- **Poland**

Poland's lack of adequate protection of intellectual property rights and procedures that discriminate against multinational companies are most egregious. Poland's non-transparent and discriminatory government pricing policies, lack of adequate protection of intellectual property rights, failure to remove patent violating generics, failure to implement the new EU data exclusivity rules, reimbursement of patent infringing copies, and refusal to grant the patent holders standing in the regulatory process unduly burden US pharmaceutical companies.

- **The Peoples Republic of China**

In China, PhRMA members are concerned with fundamental problems in intellectual property rights, particularly with regard to widespread production and distribution of counterfeit pharmaceuticals; repeated government price cuts in the absence of broader health care reform; hospital bidding rules set by the government that do not value innovation; and excessively long registration periods for bringing new products to market.

- **Turkey**

The Turkish Government has implemented a series of health cost containment measures that disproportionately affect international research-based pharmaceutical companies, such as price controls that

discriminate against imported pharmaceutical products. In addition, it has failed to implement fully data exclusivity in line with TRIPS and the requirements of the European Customs Union.

Priority Watch List Countries

PhRMA believes that 29 countries should be included in the 2006 Priority Watch List. PhRMA urges USTR to take aggressive action to remedy these violations, including the consideration of WTO dispute settlement, as necessary. The following paragraphs provide snapshot-summaries of issues in selected countries in this category.

For the Asia-Pacific Region:

- Australia PhRMA members have strong concerns with actions taken by Australia after the negotiation of the U.S.-Australia Free Trade Agreement (FTA). Deteriorating intellectual property protection for pharmaceuticals and government pricing policies that do not reward innovation are unjustifiable, counterproductive, and violate Australia's international obligations. More specifically, the potentially heavy penalties under the amendments that would apply only to holders of pharmaceutical patents who seek to enforce their patent rights appear to discriminate against a field of technology in violation of Australia's WTO TRIPS Article 27.1 obligations.
- South Korea's significant market access barriers continue to impede the growth of the U.S. research-based pharmaceutical industry in Korea. In addition, the Korean Food and Drug Administration (KFDA) inadequately ensures that competitors do not market products covered by existing patents. We are deeply concerned with the absence of patent linkage, inappropriate patentability requirements, inappropriate restrictions on reimbursement, actual transactional prices, government pricing controls, and other market access issues.

For Europe:

- France's healthcare system employs a number of cost-containment mechanisms that create market access barriers harming products heavily dependent on intellectual property rights. Specifically, the numerous cost containment tools and strict budgetary limits for pharmaceutical expenditures substantially reduce research and development incentives in France. Delays in access to market for innovative medicines still represent a weakness of the French pharmaceutical pricing and reimbursement scheme, which further penalizes the research-based industry. Furthermore, repeated changes in the rules governing the

commercial aspects of the pharmaceutical market create an environment that is unpredictable and unstable. French health care budget growth has been capped at 1 percent for each of the next three years. This is inadequate. PhRMA members will be expected to bear a disproportionate level of the inevitable budget overruns that result from this decision, as compared to other health care players.

- Italy's lack of a transparent and open, dialogue-based, decision-making process that recognizes industry as a valuable healthcare contributor and provides for a stable and predictable environment for doing business within the country is deeply troubling. The level of the industry's concern has risen so high as to merit action against the Government of Italy for infringements of the EU Transparency Directive. A complaint was brought to the European Commission in September 2002 and is still pending.

For the Middle East/Africa region:

- Egypt's implementation of IP law number 82/2002 remains a concern to PhRMA members, particularly the implementation of unfair commercial use of undisclosed data. PhRMA members find the market and legal system unfair and discriminatory as Clinical data is relied upon by the MOH to confer an unfair benefit to the generic producers.
- Israel's intellectual property protection deteriorated over the last year. The recently-enacted patent term extension (PTE) and data exclusivity (DE) legislation, taken together with Israel's continued pre-grant opposition and its attempts to exclude intellectual property infringement from the scope of its unjust enrichment doctrine, guarantees that Israeli generic producers will be free to manufacture in Israel for export, primarily to the United States.

For South Asia:

- India The industry remains concerned about several last-minute amendments to the Third Patent Amendments Act of 2005 (the "Act"), which may undermine India's ability to comply with its international obligations. India failed to include in the Act any TRIPS-compliant protection for commercially valuable data provided to regulatory authorities when seeking marketing authority. PhRMA members are also concerned about the government's proposal to expand its price controls on pharmaceutical products.

For the Western Hemisphere:

- Brazil continues to undermine the pharmaceutical industry's intellectual-

property rights. A series of bills in the Brazilian Congress threaten IP rights on pharmaceutical products. In violation of TRIPS Article 39.3, copies of medicines continue to receive sanitary registrations based on undisclosed tests and other data. The recent Presidential decree allows the granting of compulsory licenses in broadly and poorly defined situations of national emergency and national interest, with no definitions or limitations provided. The decree gives broad discretionary powers to officials below the presidential level. The definition-related problem clearly allowed the Brazilian Government to threaten Abbott, the makers of Kaletra®, with a compulsory license and may allow state run laboratories to manufacture patented drugs without previous authorization and/or compensation to the patent holder. Bill 139/99 would allow parallel importation into Brazil.

- Chile has failed to adequately implement TRIPS Article 39.3 and FTA Article 17.10.1 related to the protection of certain test data, as well as two parts of FTA Article 17.10.2 often referred to as “linkage” requirements. The failure to provide implementing legislation that is consistent with its obligations has been compounded as the Chilean Institute of Public Health has approved copies on the basis of test and other data submitted by third parties in a manner that is inconsistent with Chile’s obligations under the FTA and does not satisfactorily identify any legitimate authority for such approvals.

Watch List Countries

The PhRMA submission identifies 14 countries which we believe should be included on the "Special 301" Watch List in 2006. These are countries that will require continued or enhanced monitoring by USTR. In this context, the importance of public diplomacy has never been greater. In many cases, we understand that very real political barriers to legal reforms needed to provide rule-of-law protections such as data exclusivity. Successful precedents only take root with repetition and this requires a commitment from the U.S. Government to promote the truth and the success of the WTO TRIPS Agreement.

COUNTRY CHAPTER SUBMISSIONS

PRIORITY FOREIGN COUNTRIES

CANADA

For the reasons summarized below and that are described in more detail in the sections that follow, PhRMA requests that Canada be designated as a Special 301 Priority Foreign Country in 2006. As well, PhRMA requests that the 2006 Report specifically note the matters set out herein and that the USTR take the actions suggested below to secure necessary changes to the Canadian regime.

The regulatory regime for the protection of intellectual property rights in the pharmaceutical sector in Canada continues to be inadequate, ineffective and discriminatory against pharmaceutical patentees as a result of:

- the failure to provide for the protection of test data as required in Article 39.3 of TRIPS and Article 1711 of NAFTA;
- systemic deficiencies in the protection of pharmaceutical patents in the context of the Canadian early working scheme, contrary to Canada's obligations under Article 41 and related provisions of TRIPS and Article 1714 and related provisions of NAFTA;
- refusal to provide patent term restoration, notwithstanding the fact that early working by generic producers is allowed and regulatory approval procedures are long; and
- the potential imposition of unfair and inordinate liabilities on patentees merely for pursuing legitimate enforcement actions, contrary to the requirements and standards of Articles 41 and 48 of TRIPS and Articles 1714 and 1715.2(f) of NAFTA.

Indeed, the adverse economic impact of these deficiencies and failures to comply with TRIPS and NAFTA continues to increase and the general environment for pharmaceutical patentees has deteriorated further in the last year. For example:

- A growing number of PhRMA member companies are fighting claims for damages in the Canadian Courts for having legitimately availed themselves of enforcement procedures in an effort to prevent patent infringement as a result of early working. These companies may be liable for damages even if infringement ultimately is proven.
- Regulatory changes proposed by the Canadian government in 2004 would further undermine the protection of patents in the context of the early working regime by imposing additional restrictions on the listing

of patents in the Canadian Patent Register (equivalent to the “Orange Book” in the U.S. system).

- Although regulatory changes were proposed ostensibly to finally implement data protection in Canada, they were not enacted in 2005 and their future status is unknown given the election of a new government on January 23, 2006.

In addition, a lack of patent term restoration and the existence of government price controls, regulatory delays, restrictions on formulary listing, and other bureaucratic processes such as the Common Drug Review also continue to have a negative effect on the industry. Finally, while the details are still unclear due to governmental secrecy, elements of the long-awaited National Pharmaceutical Strategy (NPS) are beginning to emerge. The available information suggests that the NPS will constitute an extremely serious threat to the business environment in Canada.

In sum, the deficiencies in intellectual property protection and confiscatory market access barriers make Canada a free-rider on American innovation. PhRMA urges the U.S. Government to institute high level consultations to address these issues as a commercial priority.

Intellectual Property Protection

Data Exclusivity

Until recently, the Canadian government has resisted pressure to fully implement protection for confidential test data submitted by innovators for regulatory approval purposes, as required by TRIPS Article 39.3 and NAFTA Article 1711(5) and (6). Although the government made provision for data protection in Section C.08.004.1 of the Canadian *Food and Drug Regulations*, interpretation of that Section by regulatory authorities and the Courts rendered it meaningless. In particular, the Federal Court of Appeal in *Bayer, Inc. v. Canada* held that when a generic producer files an Abbreviated New Drug Submission referencing an innovator’s product, Section C.08.004.1(1) does not apply unless the Minister physically examines and relies directly on the confidential data of the reference product. As it has been the Minister’s practice not to examine or directly rely on an innovator’s data, the data protection provision has never been applied. This is in stark contrast to full implementation of data protection in the United States, Europe, and other developed countries.

Canada’s continued inaction on data protection has not been lost on certain developing countries that also would like to avoid their obligations in this regard. Some have cited Canada’s interpretation as the TRIPS-consistent model for their “implementation” of Article 39.3. Canada therefore stands as a major obstacle to gaining implementation of data protection in countries such as Israel

and India. This is one of the reasons that it is more important than ever to insist that Canada fully meets its obligations according to the spirit and letter of TRIPS and NAFTA.

As mentioned, the government did publish in the December 11, 2004 edition of the *Canada Gazette* (pages 3712 to 3717) proposed amendments to the *Food and Drug Regulations* with the stated purpose of implementing Canada's data protection commitments under TRIPS and NAFTA. A 75-day consultation period, ending on February 24, 2005, was provided for the submission of comments. However, Canada did not implement these proposals in 2005, and their future status is unknown given the election of a new government on January 23, 2006.

The previous Canadian government's initiative was a positive step and we hope that the new government will finally resolve this long-standing problem. We note, however, that certain inadequacies in the proposal are immediately apparent. For example, as discussed below, it is made clear that generic producers can continue to submit Abbreviated New Drug Submissions and have those applications reviewed during the period of exclusivity. This cannot be done in the United States. It also appears that data protection will not be triggered if certain alternatives to the normal reference products are used.

The Regulatory Impact Analysis Statement (RIAS) accompanying the proposed regulations states that the proposals are intended to enhance data exclusivity. PhRMA supports Canada's efforts to improve data exclusivity and to comply with its obligations under TRIPS Article 39.3 and NAFTA Section 1711. In some respects, the proposed regulations make significant improvements, including by increasing the duration of protection to eight-years (with an extra six months based on submission of pediatric studies) and eliminating the requirement that the Minister of Health actually examine the data to grant a notice of compliance (NOC). Nevertheless, there appear to be several areas where the proposed regulations differ from the elements of protection in the U.S.

Review of Applications During the Period of Exclusivity: Contrary to U.S. law, a generic applicant can submit an ANDS at any time during the period of exclusivity that would be reviewed by the Canadian authorities at any time. This means that the Canadian government may in fact "rely" on the data at any time during the exclusivity period (although an ANDS should not receive final approval during the exclusivity period). Given Canada's checkered history in this area, this derogation from U.S. practice causes real concern to industry. In addition, the proposed linkage regulations may provide incentives for generic applicants to file their applications early in the exclusivity period, as discussed below. This is only possible because there is no restriction on when a generic company can submit an ANDS, either in the status quo or under the proposed regulations. It would be preferable to have a time certain of 6 years where no submission

making a comparison to the innovative product can be filed. This would allow ample time for proceedings to take place under the proposed Linkage Regulations (which have a 24 month maximum time period, during litigation, during which no NOC will issue). We recognize that Canada supports the ability to be able to file an ANDS at any time after the innovator has obtained an NOC for the purposes of export under the access to medicines legislation, the Jean Chrétien Pledge to Africa.

No Protection for Current Subject Matter: Health Canada recognizes that there is no effective protection for existing, qualifying products in the present system, but has done nothing to remedy the situation. The new rules would not even apply to a New Drug Submission (NDS) for a new medicinal ingredient if the NDS were filed prior to the day on which the Regulations are registered (come into force). This means that all currently marketed products, as well as all pending applications and some future applications would be subject to the old rules. In effect, this perpetuates the existing problem for more than 5 years, without any relief. This would constitute a continuing violation of Canada's TRIPS obligations to cover existing subject matter under TRIPS Article 70.2. Given that the purpose of the new regulations is to ameliorate the acknowledged problems in the status quo, there is no justification for failing to provide effective data protection to all products.

Possible Approval During the Exclusivity Period: In addition, the proposed regulation would permit approval of an ANDS during an existing exclusivity period if the drug identification number for the innovator product is cancelled, i.e., the drug is no longer being marketed. This differs from the situation in the United States, where if an innovator product is withdrawn from the market for reasons other than safety or effectiveness, the generic applicant can submit an application but it is subject to the Hatch-Waxman exclusivity and patent provisions. The Canadian proposal is contrary to NAFTA and TRIPS obligations.

Lack of Protection for New Uses Coming after the Period of Protection: The proposal does not provide for a separate period of exclusivity for new uses (three years in the United States). Rather, the Canadian proposal suggests that the equivalent three-year period is effectively added to the prior 5-year period to create the 8-year period. PhRMA members appreciate the creation of a minimum 8-year term which comes closer to growing international practice (e.g. the EC 8+2+1, and Japan's proposal for an 8-year term). However, this fails to recognize that many socially valuable new uses may not be developed until after the first few years of product life. The Canadian proposed regulation could leave important innovations unprotected, e.g., new dosage forms, delivery systems or therapeutic uses that are implemented later in the life of the product with regulatory submissions, including clinical data, unless they are also protected by patent.

Failure to Ensure that Data Exclusivity Applies Comprehensively: It is not clear how the regulations would apply in the case of paper-NDSs or hybrid applications not based on bioequivalence assessments, where the sponsor is required to conduct independent clinical studies on safety and effectiveness. Specifically, the proposed regulation refers to the comparison to the innovator product forming the basis on which the manufacturer seeks the issuance of an NOC. In the United States, 505(b)(2) applications as well as ANDAs are subject to the exclusivity provisions. Canada should ensure that all applications for a medicinal ingredient other than those of the innovator are subject to the exclusivity regulations.

Proposed Regulations Amending the Patented Medicines (Notice of Compliance) Regulations

With regard to the proposed patented medicines regulations (linkage regulations), PhRMA members have several concerns with the approach taken. The stated intent of the proposed changes is to restore the original policy intent and to reduce the number of court cases that can affect generic entry. As such, the regulations cut back on procedural protections for innovator companies in ways that could reduce incentives for innovation. The proposed Canadian regulation takes a different approach to counter perceived “evergreening” than in the U.S. In the U.S. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Congress limited the availability of 30-month stays. The proposed regulations would not limit Canadian 24-month stays, but rather would restrict the patents to which they could be applied. The stated rationale for this is that the Canadian system permits multiple challenges, and that separate stays are part of the culture of the system.

One primary effect of the proposed regulations would be to reduce the number of patents registered in Canada in the equivalent of the FDA’s *Orange Book*. This would be done by addressing the relevance and the timing of the listings. As to relevance, the proposed regulations would restrict the patents registered to those that are the subject of the submissions. This is similar to the approach generally taken by FDA. But the proposed regulation would place undue limitations on the subject matter of patents that can be registered. For example, the RIAS states that patents on the medicinal ingredient itself may not be submitted with a Supplemental New Drug Submission (SNDS), on the basis that patents on such an ingredient can only be relevant to the original NDS. The RIAS states specifically that patents on polymorphic forms of the medicinal ingredient may not be listed with an SNDS. To the extent that an ANDS could be submitted for a different polymorphic form, this would provide inadequate protection for the innovator company.

The proposed regulation is also unduly restrictive in limitations in terms of which patents may be registered. Under the proposed regulation, the listing of patents is limited to those patents for which the application was filed prior to the

filing by the innovator of its New Drug Submission and that are directly relevant to the NDS. This takes an unduly narrow view on what patents may be relevant for a product. It could also create a perverse incentive for innovator companies to delay filing an NDS to make sure that they submit all potentially relevant patent applications prior to filing the NDS. This problem is compounded with SNDSs.

The proposed regulation would apply the following general rule to SNDSs: that only patents that are relevant to a change in formulation or use applied for in the SNDSs may be submitted. However, the proposed regulation reduces protection too much when it provides that an ANDS applicant does not need to update its submission to address patents submitted with an SNDS if the ANDS was filed prior to the SNDS. These timing requirements could create an incentive for generic applicants to file applications sooner in the product life in order to avoid having to address patents that are relevant to the innovator product. As noted above, this magnifies the problem caused by not having a period of time during which an ANDS may not be submitted.

Like with the proposed amendments to the Food and Drug Regulations, it is not clear to what types of applications the patent allegation provision applies. It is necessary that it apply to all applications that are not full NDS submissions. This would be consistent with U.S. law, where the Hatch-Waxman exclusivity and patent provisions apply to 505(b)(2) applications, as well as ANDAs.

Like with the proposal for exclusivity in the proposed amendments to the Food and Drug Regulations, the procedures would not apply if the drug identification number for the innovator drug were cancelled. This is inadequate protection for the intellectual property of the innovator company. Eliminating the procedural protections of the patent challenge process for such a product would be an unwarranted reduction in the protection of the patents for the product.

The transition period would be different than for the exclusivity regulation and would be based on whether patents were on the register on the day the regulations come into force. In that respect, it may operate differently than that for the Food and Drug Regulations. In particular, those patents which are to be added on the basis of current NDS's which have not yet received an NOC will be listable under the new more restrictive regime. However, under the current transitional rules for data protection, those NDS's will not benefit from data protection.

We urge USTR to take this opportunity to actively engage with the Canadian government to ensure that it enacts amendments to the *Food and Drug Regulations* that provide for full protection of confidential test and other data at the earliest possible date. In addition, we request that USTR engage the Canadian government on the proposed amendments to the *PM(NOC) Regulations* that would impose further TRIPS and NAFTA inconsistent restrictions on the listing of patents in the Patent Register. The previous government's proposal, originally made in December of 2004, has yet to be

enacted and steps need to be taken to alter certain elements of these proposed regulations before their enactment.

Enforcement of Pharmaceutical Patents and Linkage

Canada is required under both TRIPS and NAFTA to ensure effective enforcement of the standards of patent protection provided for in those Agreements.

In particular, Article 28 of TRIPS and Article 1709 of NAFTA require Canada to confer on patent owners the exclusive right to prevent third parties not having the owner's consent from making, using or selling the product or process that is the subject of the patent. Article 41 and related Articles of TRIPS and Article 1714 and related Articles of NAFTA require Canada to "ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of intellectual property rights ... including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."

In 1993, Canada implemented an early working regime in the pharmaceutical sector based on the U.S. Hatch-Waxman Act. An early working exception identical to that contained in Hatch-Waxman was enacted under Section 55.2(1) of the Canadian *Patent Act*. The *Patented Medicines (Notice of Compliance) Regulations* (the *PM(NOC) Regulations*) were then promulgated for the stated purpose of preventing the infringement of patents by the premature market entry of generic drugs as a result of the early working exception.

Systemic deficiencies in the *PM(NOC) Regulations* and their administration, however, have led to frequent failures to achieve this purpose. There is ample evidence that the *PM(NOC) Regulations* do not reliably provide "expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements," as required under TRIPS and NAFTA. For example:

- Patent owners are prevented from listing their patents in the Patent Register established under the *PM(NOC) Regulations* if the patents do not meet certain arbitrary timing requirements or are of a type not eligible for listing (e.g., certain formulation patents). Most of these restrictions are not present under Hatch-Waxman. Moreover, as discussed above, on December 11, 2004, the Canadian government proposed amendments to the *PM(NOC) Regulations* that would further limit the listing of valid patents (see *Canada Gazette Part I*, pages 3712 to 3717). The effect is to deny innovative pharmaceutical companies access to enforcement procedures in the context of early working for any patent not meeting these arbitrary listing requirements.

- With respect to patents that are listed on the Patent Register, when a generic producer files an Abbreviated New Drug Submission seeking marketing approval on the basis of a comparison to an already approved brand-name product, it must address any such listed patents that are relevant. In doing so, the generic producer may make an allegation that patents are not valid or will not be infringed. It must notify the patentee of any such allegation. The patentee then has a right to initiate judicial procedures to challenge any such allegation. If procedures are triggered, approval of the generic drug is stayed for a period of up to 24 months pending judicial review.
- The system under Hatch-Waxman is similar up to this point (although, as mentioned, many of the restrictions on the listing of patents do not apply and the stay is for 30 months). In the U.S., however, a challenge to an allegation of non-infringement or patent invalidity proceeds as a full action for infringement. Under the Canadian scheme, a challenge proceeds by way of judicial review aimed only at determining if the allegation is “justified.” The burden is on the patentee to prove that it is not. As a result of the summary nature of the proceeding, however, there is no discovery and there may be constraints on obtaining and introducing evidence and cross-examination. This, in combination with various other limitations and shortcomings, can make it difficult for the patentee to prove its case.
- The patentee does not always have a right of appeal if it is not successful in the first instance. This is because the generic product may be approved following a decision by the Court in favor of the generic producer. The patentee is then left with no alternative but to commence an action for infringement once the generic enters the market, essentially having to restart a case it had already spent up to two years litigating. (It should be noted that a right of appeal is available to the generic producer if it is the patentee who initially prevails in a summary proceeding under the *PM(NOC) Regulations*). The deficiencies in the summary proceeding described above and the absence of a consistent right of appeal for the patentee constitute a lack of the due process requirements under TRIPS Article 42 and NAFTA Article 1715.1(d).
- Moreover, as mentioned, if the patentee is unsuccessful in a summary proceeding, for whatever reason, and the approval of the generic drug was delayed as a result of that proceeding, the patentee may face an absolute liability for the payment of damages to the generic producer under Section 8 of the *PM(NOC) Regulations*. We are concerned that the Court might not find it has discretion as to whether or not damages should be paid where, for example, the patentee acted in good faith and had strong grounds upon which to base the infringement claim. In

fact, the patentee might be liable for the payment of damages even if an action for infringement after market entry of the generic product proves that it is infringing. Absolute liability would contravene Article 41 of TRIPS and Article 1714 of NAFTA, which require that enforcement procedures be “fair and equitable,” and Article 48 of TRIPS and Article 1715.2(f) of NAFTA, which provide for the payment of compensation to defendants only for injury suffered by a generic producer “wrongfully enjoined or restrained” as a result of abuse of enforcement procedures. It is not fair and equitable that Section 8 holds Patentees liable simply for having initiated enforcement proceedings that are provided for under the *Regulations*. There are currently in excess of a dozen Generic-initiated actions before the Federal Court seeking damages under Section 8. Estimates have put the liability of Patentees at over \$2 billion Canadian dollars. We urge the U.S. Government to initiate discussions with the new Canadian government to bring section 8 into compliance with TRIPS and NAFTA.

- In the event a patentee must pursue an action for infringement, it may apply for an interlocutory injunction to maintain its rights and, in particular, to prevent the market entry of the generic product or to seek its withdrawal from the market. These applications, however, rarely succeed even if there is compelling evidence of infringement. This is because the extremely high standard applied by the Canadian Courts for the necessary finding of “irreparable harm” is essentially impossible for innovative pharmaceutical companies to meet. This lack of availability of interlocutory injunctions calls into question Canada’s compliance with Article 50 of TRIPS and Article 1716 of NAFTA, both of which call for “prompt and effective” provisional measures, i.e., including interlocutory injunctions, to prevent an infringement of any intellectual property right and in particular to prevent the entry into the channels of commerce in their jurisdiction of allegedly infringing goods.
- Finally, it generally takes four to six years before an action for patent infringement is tried. By then the innovative company’s market share has been severely eroded. Provincial policies mandating the substitution of generics for brand-name products guarantee rapid market loss. Moreover, there is an incentive for brand name companies to settle cases in the belief that that Canadian courts may be reluctant to grant the large damage awards that they would be owed in such cases.

These various deficiencies and failures to comply with TRIPS and NAFTA frequently result in violations of the patent rights of PhRMA member companies with attendant economic losses. These losses are serious and of growing concern. Also of concern is the fact that Canada continues to set a negative example for developing countries. Canadian practices create dangerous

precedents that need to be addressed before they are adopted in other jurisdictions.

In addition, we request that USTR engage the new Canadian government on the amendments proposed by the previous government to the *PM(NOC) Regulations* imposing further TRIPS and NAFTA inconsistent restrictions on the listing of patents in the Patent Register. The previous government's proposal, originally made in December of 2004, has yet to be enacted and steps need to be taken to have them amended prior to enactment.

Patent Term Restoration

Patent term restoration provides additional patent life to compensate for the crucial time lost due to lengthy delays caused by clinical trials and regulatory approvals. Many countries, including the United States, Members of the European Union and Japan, offer patent term restoration generally allowing patent holders to recoup a valuable portion of a patent term where regulatory approval has kept the patentee off the market. In these countries up to five years of lost time can be recovered. Canada continues to refuse to provide patent term restoration, notwithstanding the fact that it allows early working by generic producers. This is iniquitous and adversely affects the interests of pharmaceutical patentees. Efforts should continue to encourage Canada to make patent term restoration available.

Cross-Border Trade in Pharmaceuticals

Over the past several years, significant volumes of prescription drugs intended for Canadian patients have been diverted to the United States through the cross-border trade in pharmaceuticals. These shipments have occurred even while current U.S. law prohibits imports from Canada.

In the United States it is illegal under the Federal Food, Drug, and Cosmetic Act to import an unapproved drug into this country. As the FDA points out, it is illegal for anyone, including a foreign pharmacy, to ship prescription drugs that are not approved by FDA into the U.S. even though the drug may be legal to sell in that pharmacy's country. Prescription drugs available from a foreign pharmacy include products that FDA has not approved; products with similar, but not identical formulations as FDA-approved products; products not made under the quality standards required by U.S. law or labeled according to U.S. requirements; or products not stored or distributed under the quality conditions required in the U.S. None of these can be legally sold in the U.S. The Federal Food, Drug, and Cosmetic Act also prohibits the "reimportation" into the United States of drugs manufactured here and then shipped to foreign countries. Congress added this prohibition in 1981 in light of evidence that reimported drugs were often counterfeit or substandard.

Aside from the quality and safety questions triggered by cross-border trade of pharmaceuticals, there are problems related to Intellectual Property (IP) as well. Given that the Canadian government has not put in place legislative or regulatory mechanisms to prevent the diversion of supplies intended for Canadian patients to U.S. buyers, there is no way of assuring that the products shipped from Canada are compliant with the US IP legislation. This is particularly a problem for generic products which have earlier patent expiries in Canada.

On June 29, 2005, Canada's then Health Minister Ujjal Dosanjh, announced his intention to introduce legislation to ban bulk exports of pharmaceuticals to the United States as well as clarify the doctor/patient relationship. Consultations on the proposed legislation were completed in October. PhRMA members were pleased that the previous Canadian government tabled legislation on November 25, 2005 (*C-83 An Act to amend the Food and Drugs Act (drug export restrictions)*). However, the Bill was not passed prior to the beginning of the federal election campaign, and its status following the election of a new government is uncertain. Furthermore, some aspects of the proposed legislation require modification or clarification. The United States Government should urge the new Canadian government to pass effective legislation banning exports of pharmaceuticals without delay.

Canada's Implementation of the August 30, 2003 WTO General Council Decision on TRIPS and Public Health and Chairman's Statement

On November 6, 2003, Canada introduced legislation to implement the WTO Decision on TRIPS and Public Health and the accompanying Chairman's Statement, which is effectively a waiver of a number of TRIPS obligations to which Members would otherwise be bound in issuing compulsory licenses subject to certain key conditions spelled out in the Chairman's Statement (e.g., licenses must be for public health, not commercial purposes, and steps must be taken to avoid diversion to third countries). Canada was the first country to seek enactment of domestic legislation to permit its generic manufacturers to export under the compulsory license provisions of the Decision. Bill C-9 was passed in the House of Commons on May 4th, 2004, and the final regulations appeared in the Canada Gazette on May 10, 2005 and came into force on May 15, 2005.

While PhRMA appreciates Canada's desire to be responsive to the HIV/AIDS and other such health crises in developing and least-developed countries, it must ensure that its legislation is implemented in a manner consistent with the TRIPS Agreement as well as with the provisions of both constituent parts of the August 30th Decision--the Perez Motta text and the Chairman's Statement. Of particular importance will be the need to effectively monitor activity under the legislation and to guard against abuse.

Market Access Barriers

Government Price Controls

The Patented Medicine Prices Review Board (PMPRB) continues to work toward revising its overall approach to setting price ceilings. PMPRB asked stakeholders to participate in a discussion regarding the “Excessive Price Guidelines” as outlined in a March 2005 discussion paper entitled “Price Increases for Patented Medicines.” The discussion paper outlines several proposed frameworks for new government limitations on price increases. PhRMA believes that there is no justification for this review and that the proposals would significantly increase the regulatory burden on our member companies. We are particularly concerned about the proposed frameworks that would require justification for, and prior approval of, price increases. We do not believe that these measures are within the statutory authority of the PMPRB. Instead of further limiting price increases for patented medicines, government policy should be pricing in Canada that is responsive to market conditions, allowing Canadian patients greater access to innovative products and putting in place more favorable conditions for our member companies to invest in research and development in Canada.

The continued use of international price comparisons and the establishment of price ceilings on patented medicines are counterproductive to initiatives to provide high quality health care, and thus improve the health of patients, or to help contain health care spending. The following are among the principal policy concerns regarding such practices:

- *Using international comparisons ignores valid reasons for price differentials across countries.* The prices of pharmaceutical products, as well as all other types of goods and services, differ widely across countries, for many legitimate reasons. These include living standards, income levels, consumer preferences, disease and drug consumption patterns, product volume, exchange rates, product liability, regulatory requirements, as well as the degree of competition in the various health services and pharmaceutical markets. Superimposed on these factors are government-mandated reimbursement and price controls, which affect prices throughout the distribution chain. As a result, government-established price ceilings using prices from other countries ignore prevailing local market conditions and could impede biomedical innovation by prohibiting each innovator from establishing prices for its medicines based on market factors.
- *There is little evidence that international price benchmarking leading to price controls actually curbs overall pharmaceutical spending.* Government-set prices preclude the benefits of price competition. In these circumstances, such government interventions in the market have little, if any, positive impact on the rate of growth in pharmaceutical expenditures over the long term. Under market conditions, however, price competition

has proven to be an effective way to hold overall spending down and to provide high quality health care.

- *International price benchmarking threatens patients' health by dampening incentives to improve on today's treatments, thus threatening health care quality.* In order to fund critical long-term activities to discover and develop and improve upon potentially life-saving drugs, pharmaceutical companies must be able to fairly and adequately recoup investment in research and development. Price control practices that prevent innovators from covering their costs will create conditions unfavorable to biomedical innovation and could jeopardize high quality health care for future patients.

In deciding how best to allocate health care resources and resolve the tension between, on the one hand, controlling health care spending, and, on the other, improving the health of the population and ensuring that the research-based pharmaceutical industry can continue to deliver cost-effective innovations for patients, the PMPRB's proposed approach of further restricting pricing flexibility has the potential of adversely affecting each of these objectives.

Other Barriers

Innovative products face additional regulatory and policy-based impediments in Canada, notably a slow drug approval process as well as limited and inconsistent provincial listing decisions. These impediments, combined with a lack of patent term restoration and stringent price controls, further disadvantage U.S. pharmaceutical companies operating in Canada.

Regulatory Approval of New Medicines

In April 2004, Bill C-212, An Act Respecting User Fees, a Private Members' Bill, received Royal Assent in the House of Commons. This Bill calls for, among other things, the establishment of standards which departments and agencies must adhere to or risk a reduction in the user fee collected - equivalent to the unachieved performance. This provision is particularly important on the issue of drug approvals given that pharmaceutical companies pay a fee to have their submissions reviewed but Health Canada has consistently failed to meet its performance target.

Canada's record on the amount of time it takes to review and approve drug submissions, after showing some improvement in the mid 1990s, has been deteriorating since 1997. By 2004, the average number of days to approval for new active substances had increased to 789 days (26 months). This is more than 13 months longer than the performance of the U.S. Food and Drug Administration (12.9 months – 6 months for “priority” drugs) and well beyond Health Canada's own target of 355 days (11.7 months).

Access of New Medicines to Formularies

There is substantial variability among the provinces in the decisions to list (with or without restrictions on use) and the time taken to review submissions for adding drugs to provincial formularies. This is particularly important since governments account for 47% of all prescription drug expenditures in Canada.

In September 2001, the Federal/Provincial/Territorial, (F/P/T) Conference of Ministers of Health announced a commitment to increased collaboration related to pharmaceutical benefits plan management. One component of that plan was the establishment of a single, common drug review, (CDR) process. The CDR is a single process for undertaking reviews and providing listing recommendations for new drugs to participating F/P/T drug benefit plans in Canada. All jurisdictions, except Quebec, are participating in this exercise. While each jurisdiction makes its own decision to list the product, there is consensus that a “no (recommendation) means no while yes means maybe”, thus effectively further reducing the number and quality of listings.

Although the stated objectives of the CDR focus on drug review activities aimed at consistency, efficiency, and equality, there are some real dangers associated with this process, which officially began in September 2003. A review of CDR’s performance, published in late September 2005, highlights some of these concerns. The report illustrates that the CDR is not succeeding in meeting its goal of providing more timely and efficient access to new medicines. In addition to the average of 789 days for initial approval of the drug by Health Canada, the combined CDR review and provincial formulary review decisions average an additional 363 days. The report also reveals that almost two thirds of new medicines (61%) were not recommended for listing on federal, territorial and provincial drug plans. The rejection rate is even more concerning for biologics, where 7 out of 10 biologics have been given negative recommendations for listing, 2 given conditions and only 1 was recommended for listing. Indeed, CDR has rejected all biologics where no alternatives exist. Of those drugs even recommended for listing, even fewer are recommended for full listing, and even fewer still are actually listed by the provincial formularies. Since May 2004, provinces have listed an average of 19% of the 30 new medicines reviewed by CDR.

PhRMA does support the recommendations, contained in the review that a number of improvements be made to the CDR system including increased transparency and the development of a process for public input into the decision making process. In the event that the CDR continues to constitute a barrier to access to pharmaceuticals, PhRMA believes that the underlying rationale for CDR should be called into question and Canadian F/P/T governments should seriously consider its ongoing viability and utility to the Canadian healthcare system.

CDR is only one component of the F/P/T governments' National Pharmaceutical Strategy (NPS), a multifaceted program whose main aim is the reduction of expenditures on pharmaceutical products. The NPS views pharmaceutical products as a significant cost driver within Canada's public health system, and has no regard for the economic benefits created by the innovative pharmaceutical industry or the importance of access to new products for patients. The initial NPS report and action plan is due in June 2006, and it is anticipated that several NPS initiatives will have a negative impact on the business environment for PhRMA member companies in Canada. Accordingly, the United States Government should express its concern with respect to NPS to Canadian authorities and carefully monitor the development of NPS during 2006.

Damage Estimate

Canada's continuing failure to implement data exclusivity, which has served as a negative model and caused damage to PhRMA members in key markets ranging from Asia to the Middle East and Western hemispheres. PhRMA members estimate that the 2005 damages in Canada are equal to 4.5% of the total market share. The damages are calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The estimate does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

GERMANY

Market access barriers are the area of greatest concern for PhRMA members operating in Germany. Germany maintains several measures that discriminate against innovative pharmaceutical products as compared to generic products, thereby denying fair and equitable market access to U.S. persons that rely on IPR protections. These German measures relate to, among other things, the reimbursement price for pharmaceutical products, mandatory payments by pharmaceutical companies, and restrictions on patient access to information about pharmaceutical products.

In 2004, Germany instituted reference pricing for new, innovative, patented pharmaceuticals. The new Fixed Reference Price (FRP) system constitutes a major threat and barrier to biomedical innovation in Germany, and restricts access by German patients to advanced life-saving medical treatments developed by U.S. companies. Moreover, the process by which Fixed Reference Price groupings are established and implemented raises significant questions about the transparency and openness of the Joint Committee of Doctors & Sick Funds that oversees the FRP system.

The German Government also has imposed mandatory rebates on pharmaceutical companies, which must rebate to the Government a fixed percent of their sales outside of the FRP system. In 2005, the mandatory rebate was 6 percent. As approximately 60% of the products sold outside the FRP system belong to US innovative pharmaceutical companies the burden of this rebate falls disproportionately on innovative companies based outside of Germany.

In addition, the EU ban on patient information, as applied nationally in Germany, bars companies from providing product information that would allow German patients to make more informed choices about their healthcare. This has a direct and disproportionate impact on new and more effective innovative medicines, which increasingly are being developed outside of Germany in the United States.

In light of these adverse measures and the commercial importance of Germany to PhRMA's members, we have identified Germany as one of our highest priority countries for this Special 301 submission. We recognize and fully support the bilateral consultations with Germany called for in the 2005 Special 301 report and initiated by USTR, HHS, Commerce, and other agencies last year. As detailed in the overview section to this submission, we have placed Germany in the priority foreign country category to highlight its importance and the unique opportunity for progress in the bilateral consultations at this time. With the new German government in place under Chancellor Merkel's leadership, we believe Germany is poised to undertake policies that promote, rather than impede, innovation and that recognize the value of innovative

medicines for patients. In advancing these bilateral consultations, the U.S. government dialogue with Japan on pharmaceuticals under the Birmingham Agreement provides an important example of how to structure and implement such talks. If, as last year, it is determined to continue this dialogue without according Germany any particular status under Special 301 and the consultations with the German government do not progress, Germany's status under Special 301 must be revisited. We describe below the core issues that we believe the bilateral consultations should focus on in Germany.

Market Access Barriers

Government Reference Pricing – Jumbo Groups, “Additional Therapeutic Value”

In January 2005, the German Government formally established a new Fixed Reference Price (FRP) system for determining the reimbursement of new medicines. The system creates broad product groups based on therapeutic class that group or “reference” together patented products with older generic drugs and sets a uniform reimbursement price for all products within the class.

The establishment of these reference or “Jumbo Groups” undermines the value of product patents, and the ability of companies to harness marketplace forces to capture the relative value of their products to consumers. Instead, the reimbursement price of patented products in Jumbo Groups is pushed down while the reimbursement price of older generic drugs is pushed up to meet the reference price of the group. In essence, the domestic generic drug industry in Germany benefits from the establishment of Jumbo Groups while the innovative pharmaceutical industry, located predominantly outside of Germany is disadvantaged.

The German healthcare reform law that established the FRP system permits a procedure for “novel” patented products to be excluded from the system by demonstrating “added therapeutic value.” The process for proving such value is so seriously flawed, however, that it constitutes a market access barrier for U.S. developers of innovative products. For example, objective and verifiable scientific criteria for excluding novel products have not been issued to date, leaving companies uncertain about what information is required to obtain an exemption and raising concerns about the basis upon which decisions are being made. Those that have been denied may appeal a decision, but are discouraged from doing so because of their inability to respond to decisions of the Joint Committee, which are not published.

Like previous measures, the FRP system was implemented to control healthcare costs in Germany. Yet pharmaceutical expenditures by the German Statutory Health Insurance Fund (SHI) have remained constant at approximately 1.5-1.7 percent of German GDP for seven years, and expense increases for pharmaceuticals in Germany have been among the lowest within the German

healthcare system for the past decade. The financial burden placed upon the sector by the FRP system and other financing measures relative to other healthcare sectors raises questions of proportionality and undue market restraint.

Joint Federal Committee of Doctors & Sick Funds – Process and Transparency

Implementation of the FRP is managed by the Joint Federal Committee of Doctors and Sick Funds. The Committee determines the FRP product groupings as well as whether patented products should be excluded from the FRP. The Committee's procedures for making these determinations are flawed in the following ways:

- The Committee lacks transparency as it is not clear what a party needs to provide in order to demonstrate “added therapeutic value” to be exempted from the FRP system;
- Its procedures do not allow for a meaningful dialogue between the developer of a new drug and individual who evaluates it, to discuss the science behind an evaluation of its innovative therapeutic value;
- Decisions are being made on the basis of expert opinions that are not published or available to interested parties;
- The Ministry of Health is not exercising its authority to effectively control compliance of the Committee with transparent decision-making procedures.
- There is no effective legal protection or control over the implementation of the FRP. Any actions relating to this system must be brought in the Social Security Courts, which apply very strict requirements for summary proceedings or injunctions. (Two U.S. companies and two E.U. companies filed suits in German Social Court in December 2004.)
- In effect, German Sick Funds are operating a purchasing cartel and are jointly fixing an upper reimbursement limit through the FRP system that aims to prevent, restrict or distort competition. An effective remedy against this was denied to manufacturers by the German Supreme Court and a similar view was shared by the European Court of Justice.

U.S. companies in Germany account for 60 percent of the innovative product market and so will be disproportionately affected by these procedural barriers.

In Germany, these government policies force innovative U.S. pharmaceutical companies to lower their market prices to the reference price recommended by the Joint Committee (and adopted by Sick Funds) or accept significant erosion in the market share of their individual products. Since German Sick Funds provide healthcare to approximately 90 percent of the German population (and, conversely, only 10 are privately insured), the impact of the FRP system on research-based pharmaceutical companies has been and will continue to be considerable. This may have serious consequences for Germany and for PhRMA members as this FRP system has created an environment that discourages research and development.

Mandatory Rebate

In 2003, Germany imposed a 6 percent mandatory rebate on the industry to help it cover its healthcare budget shortfall. In 2004, the rebate was increased to 16 percent. In 2005, the rebate was lowered back to 6 percent. Approximately 60 percent of the revenue generated by the rebate over the years has come from U.S. companies that have the most innovative product portfolios on the German market. Conversely, only 20 percent of the rebate has fallen on German companies. The rebate is clearly not based upon science, is fiscally driven, and falls disproportionately on innovative pharmaceutical companies located outside of Germany. At any time, the German Government could raise the rebate level or impose other funding measures on the industry to bridge its recurring healthcare budget shortfalls.

Ban on Information to Patients

Like other EU Member States, Germany has transposed strict prohibitions on the marketing and advertising of innovative medicines from European to German law. Specifically, Article 88 of European Parliament and Council Directive 2001/83/EC requires EU Member States to prohibit all advertising of prescription medicinal products to the general public. Under a strict interpretation of the Directive, pharmaceutical company web sites directed to the general public may contain only unedited copies of the labeling and assessment reports produced by government agencies, without any product-specific information from the company itself -- no matter how accurate, up-to-date and balanced that information may be. Such key product information also cannot be available through other mechanisms, such as print media.

A ban on such helpful information has many adverse consequences: It prevents patients from making informed choices, it impedes market access of new innovative medicines that are least familiar to patients in terms of their beneficial properties (and which often are imported), and it puts non-English speaking German patients at a huge disadvantage because they can not obtain valuable information in their own language.

Additional Market Access Barriers

The FRP system as well as mandatory rebates are only the latest measures taken by Germany to control healthcare costs. Other German healthcare cost containment measures exist that, taken collectively, further undermine German patient care, discriminate against healthcare innovation and raise barriers to trade for innovative U.S. pharmaceutical companies in the country. They include:

- Establishing a quota that pharmacists must meet for dispensing “parallel imports” – mostly patented products from outside the country that are imported and sold at a minimum discount of €15 (or 15 percent, whichever is less) within Germany.
- Establishing strict dispensing guidelines for physicians and pharmacists on a patient, speciality, region and yearly basis. Physicians or pharmacists who might otherwise prescribe a patented product are instead encouraged to prescribe a generic product or face possible review.
- Forbidding patients from receiving information about patented products, all the while permitting patients to receive information about over-the-counter medications about which information is more generally known.
- Mandating across-the-board price cuts and/or payments on non-reference priced products, in addition to paying mandatory company rebates noted above.
- The new Institute for Quality and Economic Efficiency in the Healthcare System (IQWiG) conducts benefit assessment of drugs and issues recommendations to the Joint Committee and Sick Funds. The criteria for making these evaluations are non-transparent and arbitrary, and stakeholder input is limited for representatives of the pharmaceutical industry as a whole and for individual manufacturers of drugs being reviewed.

PHILIPPINES

PhRMA continues to observe an increasing trend by the Philippine Government towards policies that erode intellectual property protection for pharmaceuticals. Despite a previous commitment by President Arroyo to strengthen the overall intellectual property environment, PhRMA members conducting business in the Philippines are confronted with an uncertain operating environment through the introduction of legislation or administrative orders that serve to block or decrease market access and significantly diminish intellectual property rights.

The introduction and expansion of parallel imports, the elimination of patent linkage, presence of pharmaceutical government price controls and inadequate enforcement against counterfeit medicines unfairly discriminate against U.S. manufacturers of innovative pharmaceuticals and also serve as impediments to U.S. trade and investment in the Philippines. Given these concerns, we recommend that the Philippines be designated as a 2006 “Special 301” Priority Foreign Country.

Intellectual Property Rights

Proposed Legislation to Weaken Intellectual Property Rights

Of significant concern to the U.S. innovative pharmaceutical industry is Senate Bill No. 2139, filed on October 13, 2005. The provisions of the Bill seek to amend the intellectual property Code of the Philippines, including:

- Establishing a patent life that will expire concurrently with the corresponding patent in the first market to grant a patent for that particular pharmaceutical.
- Legalizing parallel importation.
- Liberalizing compulsory licensing procedures.

PhRMA questions the intent of this legislation and its capacity to provide meaningful improvements to healthcare in the Philippines. The legislation undermines the value of intellectual property rights and provides unfair commercial advantages to domestic firms.

Elimination of Patent Linkage

“Patent Linkage” is a term used to describe the “link” between patents in a country and the generic drug approval process. Because so many new drugs are protected by patents in one form or another, this mechanism prevents a drug

approval agency unwittingly approving a generic form of a patented pharmaceutical before such patent has expired.

The Philippine Government, through a Department of Health Administrative Order, A.O. No. 2005-0001, has eliminated patent linkage and intellectual property protection, in general, from the responsibilities of the Bureau of Food and Drug Administration (BFAD). The A.O. permits BFAD to accept and process applications for product registration without the need to verify whether or not the pharmaceutical being submitted for registration is under patent protection. Moreover, even if BFAD is made aware of a valid patent, it is “exempted” from honoring such patent and can grant approval for marketing of the infringing product. As a consequence, companies are forced to pursue legal remedies to protect their products from infringement, which in the current legal system can result in great expense, long delays and economic injury before a decision is made.

In addition to the prevention of unnecessary and costly litigation, a system of patent linkage has a number of advantages that enhance pharmaceutical development by: (1) providing transparency and predictability of the process for both the pioneer and the generic company; (2) helping both sides make better and more efficient investment decisions; and (3) ensuring timely redress of genuine disputes. Better and more efficient investment decisions mean faster development for life saving inventions and better healthcare.

Market Access Barriers

Parallel Importation

The Philippine pharmaceutical market is being unfairly distorted through the Government’s administrative order permitting the Philippine International Trading Corporation (PITC) to import pharmaceuticals from India and, in 2006, Pakistan. Products that enter the country through parallel importation carry health risks associated with counterfeits, improper handling and packaging. These risks include sub-standard drug efficacy, such that the product may not contain an active ingredient, may not have enough active ingredient to be effective, or may contain an improper ingredient.

A pharmaceutical manufacturer cannot guarantee the safety of a product that is purchased from an unlicensed distributor because the manufacturer cannot control the conditions under which the product is shipped or stored. There is no way of ensuring that a third party attempting to benefit from price arbitrage between markets will take adequate precautions to handle pharmaceutical products appropriately.

Administrative Order (A.O.) No. 85 enables the government, through the PITC, to import branded, off-patent medicines and exempts the PITC from

complying with standard regulatory requirements and permits an expedited review for pharmaceutical registration. This A.O. provides an unfair advantage to PITC, which directly competes with U.S. pharmaceutical companies, by permitting PITC to import and sell medicines to the public without complying with strict registration and testing requirements required of pharmaceutical companies. The Philippine Government must also address inconsistencies between parallel importation and established Philippine law. Section 8203 of the Republic Act classifies medicines that are not approved by the BFAD as counterfeits. As such, the parallel importation of drugs usurps the BFAD regulatory approval process that ensures medicines consumed by patients are, in fact, safe. The introduction of parallel importation fails to adhere to this well established safeguard and potentially exposes the medicine distribution channel to risks associated with counterfeits.

Counterfeit Drug Enforcement

Counterfeits continue to be a major public health problem due to weak enforcement by government agencies and an extremely slow justice system. PhRMA member companies have reported delays in prosecution up to nine years for persons charged with violating Philippine laws to protect against counterfeiting.

Proposal to Regulate Drug Prices

There are proposed bills in the House of Representatives to regulate drug prices through the creation of a Drug Prices Regulation Board. Proposed measures include:

- Establishing maximum retail prices of medicines on the regulated drug list.
- Enacting laws to direct manufacturers to sell medicines in bulk form to third-party manufacturers.
- Requiring that prices be displayed on pharmaceutical packages.

The bill to regulate drug prices alarms the pharmaceutical industry as it disrupts free market forces. If the legislation is passed, the Government will have the power to indiscriminately set the prices of medicines, potentially removing the ability of pharmaceutical companies to recoup the costs associated with bringing a pharmaceutical to market. Government price controls unfairly discriminate against research-based pharmaceutical companies who continue to incur research and development costs to bring new treatments to market.

Damage Estimate

At the time of reporting PhRMA is not able to provide a specific estimate of

the damages incurred in 2005 attributable to trade barriers related to intellectual property protection and market access.

POLAND

U.S. and multinational research-based pharmaceutical companies face many barriers to operating in a fair and transparent business environment in Poland in 2006. A significant number of these barriers are linked to a lack of adequate protection of intellectual property rights and procedures that discriminate against multinational companies, such as:

- Government-imposed reimbursement and pricing policies that are discriminatory and non-transparent
- Inadequate legislature and legislative framework for protecting intellectual property rights
- Failure to remove patent-breaching generic copies of centrally-registered patented drugs following Poland's accession to the EU
- Failure to remove generic copies registered in violation of data exclusivity rights
- Failure to implement the new EU data exclusivity rules by the October 2005 deadline
- Reimbursement of patent-breaching copies of innovative drugs by the state and other regulatory decisions that breach IP rights
- Refusal to grant the patent holders standing in the regulatory process to investigate patent infringements
- Discriminatory action begun by the previous government against multinational and US pharmaceutical companies, based on a defunct pricing law deemed discriminatory by the European Commission

Despite the fact that small improvements have been made in the IP area regarding other industries, the situation facing the innovative pharmaceutical industry in Poland has failed to improve and therefore at the beginning of 2006 has reached a crisis point. For this reason, PhRMA requests that Poland be identified as a 2006 Special 301 Priority Foreign Country.

Discriminatory and Non-Transparent Government Reimbursement and Pricing Systems

A key barrier to trade for U.S. companies is that the Polish government's registration, reimbursement and pricing systems lack transparency and undermine equitable market access to foreign products and manufacturers in favor of locally-produced copies. As the Polish system relies on public purchasing with a very limited private market, marketing authorizations alone do not guarantee access to medicines for patients who increasingly are being denied access to the most recent innovative treatments for many medical conditions. Generic copies of U.S. innovative products, which are held to infringe patent rights,, are often added to, or maintained on, the reimbursement list. In addition, generic copies which aren't even available on the market are utilized by

the Government to launch delisting procedures.

Another key barrier is the Polish government's use of a therapeutic reference pricing (TRP) system for setting reimbursement rates where patented and non-patented products are grouped together based on therapeutic class and the reference price is set at the level of the cheapest generic product in the class. Not only is this contrary to the WHO guidelines on how to use its therapeutic class system it is also discriminatory as it forces prices for imported patented products towards those of domestically produced generics and undermines the value of pharmaceutical patents in that market segment.

Regulatory Decisions Breaching IP Rights

Generic drugs without a European Market Authorization, which are copies of innovative medicines centrally-registered in the European Union, became illegal starting May 1, 2004, when Poland joined the EU. However, the Polish authorities have failed to withdraw the local marketing authorizations for such products and continue to maintain them on the reimbursement lists. In addition, they have granted "Conditional Market Authorization" to many illegal copies, in breach of patent or data exclusivity rights often with a retrospective effective date prior to Poland's accession to the EU in order to take advantage of a derogation in the Accession Treaty yet Polish law does not recognize "conditional" marketing authorizations.

Innovative companies have also faced significant obstacles in the market authorization process, which have undermined their intellectual property rights. For example, the registration process for Merck's **Fosamax** took 15 months (instead of 6) and was substantially delayed by continuous actions by the MOH and its dependent agencies that complicated that process without any clear reason. In the same period, two generic copies of **Fosamax 10** were registered in just 3 months.

Discriminative Fines Against Research and Innovation Companies

Another significant barrier to market access faced by the innovative pharmaceutical industry in Poland is the 'customs audit'. This is the review by the Polish government of the customs value of medicines imported into Poland during recent years with a view to executing assessed differences from individual pharmaceutical companies. Legal advisers working with the pharmaceutical industry in Poland have shown that this intended action by the government is unconstitutional, an opinion supported by the country's leading constitutional experts. The action is also in violation of GATT Article III. Civil cases regarding the redress of damages based on the questioned customs value are currently underway against several US-based pharmaceutical companies.

A clearer picture of the impact of this discriminatory business environment can be seen if we compare revenues from 2003 and 2004. IMS data show that the six largest American companies operating in Poland (Pfizer, Janssen-Cilag [Johnson & Johnson], Lilly, Merck, Abbott and BMS) had a combined average revenue decline of 13%. During that same period, the two largest Polish generic companies (Polpharma and Adamed) had a combined average revenue increase of 32%.

MARKET ACCESS BARRIERS

1. GOVERNMENT REIMBURSEMENT AND PRICING SYSTEMS FUNCTION AS MARKET ACCESS BARRIERS

1.1 Reimbursement Decisions Discriminate Against Innovative Products

The Polish government undermines the value of the intellectual property rights of R&D companies by blocking reimbursement of innovative products. With the exception of a few products approved during an election (all of which were hypertension drugs), the Government of Poland has systematically failed to include new, innovative U.S. pharmaceuticals on the reimbursement list for seven years, denying market access for U.S. companies and denying Polish patients access to new medicines. While 111 new molecules had Polish market authorizations between December 1999 and December 2003, only a few have received reimbursement approval. This discriminatory practice has the effect of blocking innovative products from the market as the Polish system relies on public purchasing. The practice also represents a violation of Polish obligations under Article III:4 of GATT 1994, as well as Articles 2.1 and 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT). More specifically, the reimbursement list represents an unnecessary and unjustified barrier to international trade because it discriminates against and functions as an obstacle to innovative products, the vast majority of which are imported, and is without scientific or technical justification.

The Polish government's refusal to add new innovative medications to the reimbursement list discriminates against innovative foreign products, which are more likely to be recently developed. This practice violates GATT Article III:4 because it accords innovative products, which are primarily imported, treatment less favorable than generic (and often patent infringing) like products, which are predominantly of domestic origin. Innovative products and their generic counterparts are "like products" for WTO purposes, even though the innovative product is of superior quality, because the products compete in the same market, have similar physical characteristics, treat the same illness, are administered in the same manner, and have the same tariff classification. As between these like products, the refusal to add innovative imports to the reimbursement list treats

such products less favourably than domestic products by closing the market to innovative products in the public reimbursement system.

This practice also violates Articles 2.1 and 2.2 of the TBT Agreement. The reimbursement list is a “technical regulation” under the TBT Agreement because it is set forth in a “document” (*i.e.*, the list of reimbursable medications), which “lays down product characteristics” (*e.g.*, product names and therapeutic effects) with which “compliance is mandatory” (*i.e.*, reimbursement are fixed and binding for all products in same category). The system violates Article 2.1, which requires technical regulations to accord innovative imports treatment no less favorable than like generic products of domestic origin, for the same reasons described above for GATT Article III:4.

The reimbursement system also violates Article 2.2 which proscribes technical regulations “more trade restrictive than necessary to fulfil a legitimate objective.” If the objective of the system is to curb health care costs in Poland, that objective could be achieved in a number of ways less trade restrictive than a measure that burdens imports but not domestic products.

1.2 Government Reimbursement and Pricing Processes Not Transparent

A key barrier to trade for U.S. companies is that the Polish government’s registration, reimbursement and pricing systems lack transparency and undermine equitable market access to foreign products and manufacturers in favor of locally-produced copies. Since October 1, 2004, the reimbursement rules have been provided by the new law on healthcare services funded from public finances (previously the rules were laid out in the law on health insurance in the National Health Fund (2003)). The main changes are as follows:

- New requirements for reimbursement application (the producer should enclose analysis of clinical efficacy and a budget impact model)
- The reimbursement list is to be updated every 6 months.

The Minister of Health created the MTAA (Medical Technology Assessment Agency) on September 16, 2005. One of the agency’s key roles is to make recommendations concerning medical technology to the Ministry of Health (MOH).

Reimbursement is currently determined by the MOH based upon a recommendation from the Drug Management Committee, which has non-transparent membership, including three representatives from each of the MOH, Ministry of Finance, Ministry of Economy and non-obligatory representation of the Health Insurance Funds. The roles of each of these representatives are unclear. Under the law, the decision process cannot take longer than 90 days from a price submission or 180 days if both pricing and reimbursement submissions are made. Nevertheless, these timeframes are not adhered to by the Ministry, the

decision criteria are not transparent, and the appeal system is inadequate.

Neither the timeframe nor the merits of reimbursement decisions are subject to any effective judicial control because the MOH issues reimbursement decisions through a regulation, i.e., a legislative act.. Decisions are not made on individual applications and, therefore, cannot be challenged or reviewed by an independent court. The final decision as to reimbursement results from this act and not from the reimbursement resolution of the Drug Management Team. Moreover, nothing in the law links the resolution with the reimbursement regulation. There is also no obligation to remove a particular product from the reimbursement regulation until the positions of all interested parties are heard by the administrative court.

A new pricing law came into effect on December 12, 2001. The provisions currently concern reimbursed drugs but there is a possibility that the system will be extended to drugs dispensed in hospitals. Prices are set by the Minister of Health together with the Minister of Finance.

The pricing criteria include the: level of prices in countries with a similar per capita GDP; degree of price competition; impact on direct healthcare costs; volume of achieved and declared sales; costs of production; proven effectiveness of the product; and the importance of the product in combating diseases of significant epidemiological concern.

The provisions of the Price Law of 2001 are not transparent:

- ⇒ Pricing and reimbursement criteria are not fully objective and verifiable;
- ⇒ No explanation is obligatory for negative price/reimbursement decisions;
- ⇒ No appeals to an independent court;
- ⇒ Possibility for prolonging of process beyond the 90/180 days by unsubstantiated demands for “additional information”; and,
- ⇒ The process often is extended beyond 90/180 days because the decisions effectively take place on the date of communication by ordinance publication, rather than on the specified reimbursement date.

Similar to reimbursement decisions, pricing decisions are also formally taken in the form of a regulation, i.e., an act which cannot be appealed to or reviewed by an independent court.

1.3 Reference Pricing System Arbitrary and Discriminatory

Other non-transparent areas of regulation include a reference price system grouping similar products, which is applied inconsistently and in an arbitrary fashion. Contrary to WHO guidelines, the Polish government uses the

Anatomical Therapeutic Chemical (ATC) / Defined Daily Dose (DDD) system, which was developed as an instrument to measure drug consumption, for pricing purposes. The MOH uses DDD as a reference dose for establishing reference price limit in therapeutic clusters. The drug with the cheapest DDD is taken as a price limit for reimbursement for other products in the cluster. This system assumes that DDDs reflects therapeutic equivalence, but the WHO guidelines state that "DDD's are not necessarily designed to reflect therapeutically equivalent doses and are therefore not suitable for comparing drugs for reimbursement and pricing decisions". As stated in the Guidelines for ATC classification and DDD assignment 2001, "therapeutic reference pricing and other pricing decisions on ATC/DDD classification are a misuse of the system".

Furthermore, the Polish government's use of a therapeutic reference pricing (TRP) system for setting reimbursement rates for medicines is discriminatory. Reference prices are set at the level of the cheapest generic product in the class. This system discriminates against imports in violation of Polish obligations under Article III:4 of GATT 1994, as well as Articles 2.1 and 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT). More specifically, this regulation represents an unnecessary and unjustified barrier to international trade because it discriminates against and functions as an obstacle to innovative products, the vast majority of which are imported, and is without scientific or technical justification.

A TRP system clusters products into therapeutic groups. A patient prescribed any of the medicines in a cluster will be reimbursed the same amount (usually the price of the cheapest product in the cluster) no matter whether the product is patented, off-patent or an infringing copy. If the government sets the reimbursement limit for a drug below the market price, patients must make up any difference out of their own pocket. Whenever reimbursement limits result in significant co-payments, these co-payments inherently and negatively target innovative imported drugs, as the innovative U.S. company is either forced to lose its market to low-priced generic competitors, or to meet the price of the cheapest generic in the group. When a new generic enters a therapeutic group, it can trigger reimbursement cuts for all products in the group, including not only the branded counterpart to the generic, but also other products still protected by patents.

Grouping patented products with generics and linking reimbursement for patented and generic products forces prices for imported patented products towards those of domestically produced generics. Such linkage undermines the value of pharmaceutical patents in that market segment. Through the operation of this regulation, the Ministry of Health (MOH) and the insurance funds are effectively operating a purchasing cartel and are jointly fixing a maximum price that aims to prevent, restrict or distort competition. At the same time, it heavily favors the local generic manufacturers, who almost always are producing the generic competitors to imported patented drugs.

The TRP system violates GATT Article III:4 because it accords innovative products, which are primarily imported, treatment less favorable than generic like products, which are predominantly of domestic origin. Innovative products and their generic counterparts are “like products” for WTO purposes, even though the innovative product is of superior quality, because the products compete in the same market, have similar physical characteristics, treat the same illness, are administered in the same manner, and have the same tariff classification. As between these like products, the TRP system treats innovative imports less favourably than generic domestic products by effectively reducing prices for innovative products toward the level of generic products

The TRP system also violates Articles 2.1 and 2.2 of the TBT Agreement. The system is a “technical regulation” under the TBT Agreement because it is set forth in a “document” (*i.e.*, statute and regulation), which “lays down product characteristics” (*e.g.*, ingredients and therapeutic effects) with which “compliance is mandatory” (*i.e.*, reimbursement are fixed and binding for all products in same category). The system violates Article 2.1, which requires technical regulations to accord innovative imports treatment no less favorable than like generic products of domestic origin, for the same reasons described above for GATT Article III:4.

The TRP system also violates Article 2.2 which proscribes technical regulations “more trade restrictive than necessary to fulfil a legitimate objective.” If the objective of the system is to curb health care costs in Poland, that objective could be achieved in a number of ways less trade restrictive than a measure that burdens virtually all imports and no domestic products.

1.4 Other Pricing and Reimbursement System Barriers

Other recent barriers in the government’s pricing and reimbursement system include the expansion of official hospital products prices for products procured by inpatient care facilities, which applies to new products with a “significant portion of the costs of health care services.” The hospital price list creates a considerable problem for products sold both on hospital and retail markets. The same product (dose, package, EAN code) are sold with two different prices. It appears that the MOH will continue to introduce pricing controls in the hospital sector. A further barrier involves a requirement for companies, as entities applying for reimbursement of drugs, to formally submit cost information in order for the government to determine the official price for reimbursement. However, there is no definition of “production costs” for companies to apply and there is no direction in the legal authorities as to how such costs should be calculated.

Intellectual Property Protection

2. VERY WEAK ENFORCEMENT OF INTELLECTUAL PROPERTY AND PATENT RIGHTS

2.1 Inadequate Legislature and Legislative Framework

TRIPS Article 41 requires Poland to provide for fair and equitable enforcement of intellectual property rights. Enforcement of intellectual property rights is extremely insufficient in Poland:

- ⇒ Intellectual property judicial proceedings are often delayed by more than three years
- ⇒ There are no intellectual property specialized judges or courts in the Polish judicial system
- ⇒ There are considerable procedural barriers to obtaining preliminary injunctions against patent breaches. The Industrial Property Law states that the patent holder can apply to the court *but not to the patent office* in cases of infringement. This law does not introduce discovery rules (provided in Copyright Law for instance), which are aimed at facilitating the establishment of the patent breach
- ⇒ The current damages awarded for intellectual property rights violations are poor and inadequate compensation for infringements. The infringer is only rarely ordered to pay the right holder's expenses associated with the defense, and the right holder is rarely permitted to recover its profits. This clearly fails to comply with TRIPS Article 45
- ⇒ There is no patent section in the Supreme Administrative Court, and no legislative framework to make this possible
- ⇒ Article 71 of the law allows a party who, in good faith, is using an invention at the time a patent precedence is established to continue to use the invention without charge – even when patent precedence by another party is confirmed

2.2 State Reimbursement of Patent-Infringing Products

Despite preliminary injunctions and administrative measures against violators of IP rights, several companies face significant barriers to the execution of their rights as a direct result of the Ministry of Health's decisions to include or maintain certain generic products that infringe patent rights in the reimbursement list. One of the most striking examples of this is the case of Janssen-Cilag (Johnson & Johnson)'s treatment for schizophrenia patients, **Rispolept** (risperidone). An illegal copy was included on the reimbursement list in Poland, and in addition **Rispolept (risperidone)** was reference-priced to the illegal copy. Apart from the commercial losses resulting from this disregard of patent rights, this also results in a high co-payment ratio for Polish patients. The situation developed in 2005 when, after a three-year legal battle by Janssen-Cilag, the Appeal Court in Cracow confirmed this infringement of exclusive rights. However, this court decision continues to be disregarded by the Ministry of Health, the body responsible for drug registration and reimbursement: The illegal copy

remains on the reimbursement list.

Another example is the case of Eli Lilly and Company's drug **Zyprexa** (*olanzapine*). Despite the ongoing patent proceedings, in December 2003 the generic copy, manufactured by a Polish company, was included in the reimbursement list, as a consequence of which the reimbursement limit for olanzapine was lowered to the price level of the domestically produced-copy. According to public reports, as a result of loss of sales in Poland (approximately US\$40 million in 2004) due to the Polish government's reimbursement of the illegal copy, Eli Lilly was forced to carry out a restructuring of its Polish affiliate at the beginning of 2004, which affected 27% of its workforce.

2.3 Roche-Bolar Clause Used as Justification for Supporting Patent Violations

Polish Industrial Property Law provides for a very broad definition of the "Roche-Bolar" exception. Article 69.1.4 states that: "*The patent shall not be deemed as breached by the use of the patented product, to the necessary extent to execute all legal actions required in order to authorize the medicinal product*" (*Roche-Bolar limitation*). The regulatory bodies do not interpret the Roche-Bolar provision strictly for the purpose it was intended, and continually treat it as an exception justifying all of their decisions, regardless of whether the patent is to be extended (as originally intended in Roche-Bolar clauses in other jurisdictions), is in the filing process, or is in the middle of the protection period. This wording contravenes TRIPS as well as the amended EU Directive 2001/83/EC. The interpretation used by regulatory authorities is additionally harmful to innovative companies, because in Poland immediate market access is granted at the time of marketing authorization.

2.4 Patent-Holders have no standing to challenge Generic Marketing Authorisations

Moreover, regulatory bodies still do not recognize the owner of the patent as a party entitled to access the generic dossier, in order to verify whether its patent is infringed or not. This was the case for Novartis Pharma in challenging the registration of a generic copy of its drug **Zometa**. In the current situation, the patent owner is not informed about the pending generic authorization proceeding, and the authorities do not recognize its status (as Novartis Pharma attempted to claim) as a party with legal interest.

The generic applicant is not required to certify that a generic does not breach any patent rights. Furthermore, where there are doubts as to patent infringement, generic authorization proceedings are never suspended to allow the parties' time to agree on patent issues. In addition, the Registration Office does not check the patent status of products filing for registration.

2.5 Refusal to grant second medical use patents

The Polish patent office has objected to the issuance of medical use patents on the grounds that second medical use inventions are not allowed.

3. ILLEGAL COPIES OF CENTRALLY APPROVED PRODUCTS (CAPs) AND SO-CALLED “GHOST” PRODUCTS ON THE EU ACCESSION TREATY

3.1 Failure to Remove Illegal “Ghost” Drugs After EU Accession

Before accession, drugs centrally authorized in the EU had to be granted local authorization certificates in Poland. At the same time, because the Polish law before accession allowed only a 3-year, and not 10-year, data exclusivity period, generic copies of innovative CAPs are found on the Polish market, and Poland’s pharmaceutical Registration Office has considered many applications for the authorization of generics of CAPs..

As a result of Poland’s accession to the EU, generic copies without a European Marketing Authorization that are copies of CAPs (in accordance with Regulation No. 2309/93) became illegal starting May 1, 2004, the day of Poland’s accession and Poland has the obligation to withdraw such generic products from the Polish market, whether or not they are included in the reimbursement list.

The EU Accession Treaty granted Poland a derogation from complying with certain regulatory provision contained in EU law relating to marketing authorizations in respect of authorizations that had been granted prior to the accession date and were contained in a list annexed to the Treaty. Immediately prior to joining the EU on May 1, 2004, the Government of Poland granted “conditional” marketing authorization for approximately 400 “ghost” copies of innovative pharmaceutical products in order to benefit from this derogation. Polish law does not recognize “conditionality” in this situation, and in addition, this was wholly inconsistent with EU rules and Polish pre-accession regulations. Furthermore additional conditional authorizations have been issued with retrospective grant dates preceding the date of EU accession and supposedly brought within the derogation by way of published amendments to the original list so that the list now covers over 1000 drugs.

This situation affects many PhRMA member companies. For example, an illegal copy of Pfizer’s **Accupro** has been entered onto the reimbursement list. Novartis Pharma’s appeal against the marketing authorization of a generic version of **Zometa** was denied. Several illegal copies of Merck’s **Fosomax 10** and **Fosomax 70** have been introduced on the market without fulfilling necessary regulatory requirements. These products were not tested for bioequivalence and bioavailability or the tests they underwent were not conducted by the authorized laboratories. Similarly, copies of Merck’s **Zocor** do not cover the same indications for which **Zocor** is registered in Poland. Other companies, whose IP rights are violated by the “Ghost List” include Sanofi-Aventis (**Plavix**), Schering-

Plough (*Rebetol* and *IntronA*), and GSK (*Avandia*). Companies that have tried to challenge the grant of marketing authorization for “host” copies have been denied standing to challenge the validity of the registration.

4. NON-COMPLIANT REGULATORY DATA PROTECTION

4.1 Failure to Implement New Data Exclusivity Rule

The new European pharmaceutical legislation has introduced a longer data exclusivity period (8+2+1 years), whereas prior to accession to the European Union, Polish law provided for only a three-year period of data exclusivity. The Polish government requested a 15-year derogation period from the data protection provisions of the new pharmaceutical legislation, but the EU Commission rejected this request. The Polish government was obliged to implement Directive 2004/27 (which introduces the 8+2+1 data exclusivity rule) by the end of October 2005. ***Due to the political situation, this process has been suspended, and the new data exclusivity rule is still to be introduced. The Ministry of Health is working on an amendment to the pharmaceutical law, which still provides for a 15-year derogation period from the data protection provisions.***

5. CUSTOMS/MARGINS CASE

5.1 Discriminatory Action Against Multinationals and US Companies

The Government of Poland is also discriminating against the US and multinational innovation-based industry by seeking to reinterpret existing regulations and retroactively fine companies large sums of money for previously accepted import procedures. The potential financial damage impact on the multinational R&D industry is assessed at \$1.3 billion, a sum articulated by Polish officials as their “goal” for realizing fines. Civil damage claims have already been started by National Health Fund against 31 pharmaceutical companies (including many US companies present in Poland).

For the past two years, the pharmaceutical industry has been subject to additional audits and investigations. The current government is attempting to execute as fines amounts they consider ‘unduly charged’ by Western pharmaceutical companies. These audits, investigations, and fines violate GATT Article III because they discriminate against innovative imported products in favor of domestic products. Moreover, constitutional experts on Polish law have declared the government’s intended actions as unconstitutional with respect to execution of funds from individual pharmaceutical companies.

5.2 Defunct Discriminatory Pricing Law Basis for Harmful Action

The Polish Government's basis for the audits and fines is a former pricing law which discriminates against importing pharmaceutical companies by not recognizing the status of importer and assimilating the separate activities of importers and wholesalers. Under this law, importers and wholesalers were attributed the same maximum wholesale margin of 11%, out of which importers had to cover not only their wholesale expenses, but also the additional costs of importation. This margin was not sufficient to cover the importers' operating expenses and in order to be able to stay in business, their parent companies made financial contributions, often by issuing credits in one form or another, to their Polish affiliates. Although the Polish customs authorities accepted this practice for years, this changed in 2001, when the authorities took the position that such credits should be deducted from the customs value – in contravention of numerous treaty obligations. The discriminatory character of the old law has now been acknowledged, as was confirmed by the European Commission in 2002, in a progress report on Poland (2002 Regular Report on Poland's progress toward accession (COM(2002)700 final).

6. OTHER BARRIERS

6.1 Patients Denied Access to Information

The ability to communicate with patients in Poland about individual prescription medicines is prohibited. Combined with the failure to reimburse over 100 innovative medicines in Poland for seven years, limitations on the ability to communicate with patients in Poland about medicines have led to many patients in Poland not having access to the latest treatments for both chronic and acute conditions. A ban on such helpful information has many adverse consequences: It prevents patients from making informed choices, it impedes market access of new innovative medicines that are least familiar to patients in terms of their beneficial properties (and which often are imported), and it puts non-English speaking Polish patients at a huge disadvantage because they can not obtain valuable information in their own language.

DAMAGE ESTIMATE

Poland's intellectual property regime, inadequate protection of original filing data and the considerable market access barriers for foreign pharmaceutical products have a significant adverse impact on the U.S. research-based pharmaceutical industry operating in Poland. Preliminary estimates suggest that potential increase in exports per annum if the trade barriers described were removed is approximately 23.1% of sales.

TURKEY

While the Government of Turkey is to be commended for approving data exclusivity legislation in 2005, the situation for PhRMA members doing business in Turkey remains precarious. The problem stems from the failure to implement fully data exclusivity in line with TRIPS and the requirements of the European Customs Union. The Government has not confirmed the data exclusivity status of as many as three dozen new products. In addition, the Turkish Government has implemented a series of health cost containment measures that disproportionately affect international research-based pharmaceutical companies and has imposed price controls that discriminate against imported pharmaceutical products. Finally, the Turkish Government is currently engaged in the reform of its health care insurance system in a non-transparent manner that discriminates against innovation. PhRMA therefore requests that Turkey be designated Priority Foreign Country for 2006.

Intellectual Property Protection

Data Exclusivity

Until early in 2005, Turkey refused to provide any legislative or regulatory protection for commercially valuable clinical data (known as data exclusivity). Under its international obligations, Turkey should have provided data exclusivity no later than 2001.

The language in Turkey's recently implemented data exclusivity regulations represents a welcome, if partial step forward. According to the new amendment, data exclusivity will be granted for 6 years to products that were registered after January 1, 2005 within the European Customs Union (ECU). Data exclusivity in Turkey is, however, substantially curtailed by the 210 "working" day delay between European and Turkish product approvals. The law specifies 210 days, but officials have orally communicated in subsequent discussions that they interpret this to mean "working" days. Effectively, this working day registration may translate into a one calendar year delay. The combined effect of a bare minimum term of data protection and long regulatory delays discourages investment, and could undermine Turkey's ability to develop as a global competitor in the biomedical sector.

It is not clear whether products already on the market within the ECU will receive data exclusivity protection in Turkey. PhRMA member companies are concerned that a number of products that were registered in the ECU between January 1, 2001 and December 31, 2004 will prematurely face copy products on the Turkish market. PhRMA is also concerned about the fate of a number of other new products that were registered in the ECU during this period but were registered for sale in Turkey only after 1 January 2005. As of this writing, the

data exclusivity status of these products is unclear. Nearly three dozen products eligible for data protection are in limbo at this time.

Absence Of Coverage For Existing Subject Matter

The Government of Turkey appears to be signaling that it will allow approval for all copy products for which registration applications were filed in Turkey before January 1, 2005.³ PhRMA members are concerned that this exception will be defined liberally, to allow as many copy products as possible onto the Turkish market.

Curtailed Periods Of Data Exclusivity

Turkey's recently implemented data exclusivity regulations inappropriately shorten the period of protection by having the starting date of the 6 year protection in Turkey tied to registrations outside of Turkey. In the case of an originator product registered in Europe before 2005 that does not have a generic application in Turkey, Turkey treats the period for purposes of calculating the 6 year term as if it were approved in Turkey on the date of its first registration in Europe, as opposed to the date on which it received effective marketing approval in Turkey. Given that mutual recognition is not in effect, and the fact that some originator products may not have been launched in Turkey, there is a strong possibility that the effective data exclusivity term in Turkey will be greatly circumscribed.

As explained, the six years of data exclusivity that products registered in Europe after January 1, 2005 will receive in Turkey are shortened by the fact that six year period will be counted from the first European registration. In addition to the anticipated 210 working day delay between Turkish and first European registrations, pharmaceutical products will face further delays due to government pricing and reimbursement procedures, which appear to be lengthening and in need of greater transparency. As a result, the actual period of time to market for many products will be closer to 18-36 months. Current rules do not compensate innovators for the period lost in extended regulatory procedures. In effect, more than 25% of the data protection period can be diluted due to regulatory barriers, with no prospect of compensation.

DE Term Limited to Patent Term

In a welcome step, regulations have been amended to remove limitations that improperly terminated the data exclusivity term with the expiration of data exclusivity in the first ECU registration country. The data exclusivity period remains linked, however, to patent protection in Turkey. Accordingly, data exclusivity will end at the expiration of the patent period of the underlying Turkish

³ Article 9a.3 denies data exclusivity in Turkey for products already on the European market for which generic applications were filed before January 1, 2005 in Turkey.

patent. This may be a violation of TRIPS, which provides data exclusivity as an independent form of intellectual property protection.

In summary, PhRMA members express lingering doubts about Turkey's commitment to provide data exclusivity in a manner consistent with its TRIPS and ECU obligations. There are 35 new products whose data exclusivity status has not been confirmed by the Government of Turkey. Almost 70 copy products were granted regulatory approvals by the Ministry of Health (MOH) from 2000-2004. It is estimated that dozens of copy products are currently in the registration process—perhaps well more than 100 as several products are known to face multiple copies. The absence of effectively implemented data exclusivity in Turkey, which permits generic companies to unfairly utilize the valuable data generated by innovative companies to obtain approval for their copy products, has a disproportionate adverse impact on U.S. companies, as they are the leading force for pharmaceutical research and development in Turkey. Despite clear improvements in 2005, unresolved problems and continuing uncertainty work to undermine Turkey's competitiveness in global biomedical development, and incentives for US firms working and investing there.

Patent Linkage

Turkey does not have a patent linkage system. A number of generic registrations for patented products are pending at MOH. At least one of these registrations is pending pricing approval, which represents the last step prior to marketing approval. Implementation of a patent linkage system, in which generic product registrations undergo automatic reviews to ensure that copy products are not infringing the patents of original products, would eliminate the unnecessary expenditures associated with removing patent infringing products from the market.

Market Access Barriers

Under IMF scrutiny and pressure, the Turkish Government has implemented a series of reforms that seek to contain costs in health care and has targeted pharmaceuticals in particular. The Turkish Government tends to favor local generic pharmaceutical companies through policies that tend to disproportionately affect international companies. For example, the Government has forced international research-based companies to reduce their prices by about 20%, whereas the generic industry has been asked to cut prices by about 2.5%. The draft of the new reimbursement guidelines is much more restrictive towards innovative products. New and burdensome obstacles are also being placed on patients and doctors seeking the use of these products, including additional hospital reports, visits to specialists and restrictions on general practitioner prescribing. The government is looking for further cuts to the reimbursed price of prescription medicines, in an environment where

government-imposed costs have resulted in innovative products being sold below the cheapest EU benchmark prices.

Industry has advocated for policies to address waste and misuse in the reimbursement system. Industry has pointed out how hundreds of millions of dollars could be saved each year through changes in current reimbursement based on policies that involve scientific, evidence-based measures of efficacy.

There is insufficient transparency in the evaluation of applications and even where officials may be well intentioned, PhRMA members do not receive any reasons or explanations for rejections or partial approvals in a manner that meets the accepted standards for transparency and scientific rigor found in many other countries.

PhRMA members would welcome the establishment of an independent process to establish a fair and transparent reimbursement system. Industry recognizes the pressure that governments face to manage healthcare budgets, and would like to serve as a partner to the government to solve healthcare challenges..

Government Imposed Price Controls

Despite the fact that a pricing decree, implemented in early 2004, is based on a reference price system, it represents a marginal improvement over the previous cost-plus pricing scheme. The new pricing decree, however, does not eliminate the discrimination against imported products:

- The referencing system works by assigning the lowest price in any of five identified EU reference countries. Companies are forced to sell at the lowest price for every product in their portfolio, thereby foregoing the opportunity for internal equilibrium among their products. Moreover, as a result of this pricing decree, only original product prices are referenced to selected EU countries, and generics are only referenced to a certain percent (80%) of the original, once it is priced in Turkey. Meanwhile, in the U.S. where there is generic competition free of government price controls, generics are sold at commodity-like prices, in many cases far lower than Turkish levels.
- More positively, products manufactured with the use of local raw material are no longer eligible for increased prices (by 10%), meeting Turkey's WTO obligations which prohibit such import substitution subsidies and discrimination.

The principal problem is that MOH does not have in place a highly transparent procedure for the evaluation of price applications. Generally, it can be expected that, if the application relates to a higher unit price product, MOH will

ask companies to make an additional reduction despite the fact that price applications comply with the price regulations. The request is transmitted verbally and not in writing. When MOH rejects applications, they do not provide reasons to support the rejection. A number of new drug applications have been delayed by this kind of unfair, behind the scenes price reduction requests. As a result, companies cannot predict with any reliability the approval of new products due to the arbitrary nature of price reduction requests that do not seem to be grounded in any kind of tangible analysis or transparent criteria.

Reimbursement

The Turkish government is preparing a reform of its overall insurance systems, in which healthcare insurance and retirement funds will be separated. As a first step, MOH, the Ministry of Labor and Social Security and the Ministry of Finance have jointly published a “Positive List,” which will list products and their respective prescription limitations for all sick funds (SSK, Emekli Sandigi, Bag-Kur) in Turkey. But in an atmosphere that lacks clear and consistent transparency, no one can say for sure what the scientific or medical criteria are behind the imposition of additional restrictions on access, except that there appears to be a strong bias against easing access to newer medications.

Neither the research-based pharmaceutical industry nor key medical opinion leaders have been invited to serve as meaningful partners during the development of the list. The draft list --completed under IMF pressure to contain health care budgets-- contains many discriminatory measures against products marketed by research-based companies. Among these measures are:

- Undefined criteria and periods for original drug review (whereas generics can immediately be added onto the list); and,
- More restrictive regulatory standards for reimbursement of products without generics or copies (although generics/copies and/or products with generics/copies can be much more widely used). These include additional layers of approval for patients; restricting prescribing to specialists; reducing the prescribing authority of general practitioners; and additional waiting times and visits to hospitals or facilities with specialist staff (not easily found in all areas of the country, particularly in more rural areas).

The list has no discernable scientific basis and has not been prepared under transparent conditions. Industry was invited to share comments, but the published lists rarely reflect any changes and do not indicate clear medical criteria that would explain or justify the new restrictions or why an additional burden must be placed on patients and doctors.

In parallel to the positive list preparations, the Turkish Government requires additional discounts from the pharmaceutical industry in order to

implement another important government project. This concerns the dispensing of drugs to SSK patients through retail pharmacies in contrast to the previous onerous system where these patients could only obtain drugs from SSK in-hospital pharmacies. The government asked companies to provide a 10-15% discount over the retail prices, on top of the reduction of prices to the level of the cheapest of the EU price (and in many cases even less, due to the capping applied in Turkish lira).

The government is currently in the process of reviewing its reimbursement policy. Industry continues to appeal for clear, consistent and evidence-based decisions. Industry has argued that recent decisions are not prioritizing patient interests, and are causing unbalanced pressure on the research and development-based companies, including U.S. based firms in Turkey. A non-transparent cost containment approach discriminates against innovative, newer products. And where sacrifice is demanded, the burden falls disproportionately on research-based firms. PhRMA member companies continue to receive very strong signals from the government that its cost-containment targets are original products that cannot be replaced by bio-equivalent FDA-quality generics or copy products.

While some progress deserves praise in 2005, generally the environment continues to be unpredictable and lacks transparency. This works to limit access to innovative U.S. medicines in Turkey. At the same time, these factors erode Turkey's prospects as a global competitor in the innovative pharmaceutical and biomedical industry.

Damage Estimate

PhRMA members estimate that the 2005 damages in country Turkey are equal to 21.8% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Turkey	1159926	205216	1365142	6258556	21.8%

**CONTINUED MONITORING
(Section 306)**

THE PEOPLE'S REPUBLIC OF CHINA

The PhRMA member companies operating in China recognize the efforts of the Chinese government to improve the operating environment, both as a result of World Trade Organization (WTO) accession and generally. However, companies continue to face many fundamental problems which need to be addressed in order for the market to continue to develop and for China to adequately fulfill its WTO commitments.

Our outstanding concerns include: inadequate enforcement of intellectual property rights, particularly with regard to widespread production and distribution of counterfeit pharmaceuticals; repeated government price cuts in the absence of broader health care reform; hospital bidding rules set by the government that do not value innovation; and excessively long registration periods for bringing new products to market. These issues are described in more detail in the following sections. For these reasons, PhRMA requests that China remain in its current status under Section 306 monitoring for 2006 and that the U.S. Government continue to seek assurances that the problems described herein are quickly and effectively resolved.

Intellectual Property Protection

In China's WTO accession agreement, a number of provisions were agreed to with regard to pharmaceuticals that require statutory and regulatory improvements in a number of important areas, including:

Implementation of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

China agreed to implement TRIPS immediately upon accession to the WTO. This commitment requires not only that Chinese laws and regulations comply with TRIPS, but also that the provisions are enforceable at the agency level as well as in the courts. A more thorough discussion of current intellectual property issues is provided below.

Data Exclusivity

The Government of China has agreed to provide data exclusivity according to the following criteria: 1) protection of no less than 6 years commencing from the date of marketing approval in China; 2) protection that is independent of any other intellectual property right that the product might enjoy in the marketplace; 3) prohibition of the unauthorized commercial use of data submitted to government agencies; and 4) no reliance on data provided to authorities, whether that data was generated in China or in other countries. We applaud China's commitment on this matter and are pleased that the Chinese State Council has approved language that appears to meet this commitment.

However, there remain questions about implementation. For example, there have been suggestions that the data exclusivity provisions:

- Only apply to previously non-disclosed data;
- Do not apply automatically, but rather must be applied for; and
- Lack transparency and consistency in application from product to product and company to company.

Patent Linkage

There has been progress on patent linkage in China, however the system needs improvement. Currently when there is an application made by a generic company for a clinical trial and for drug registration, a notice is posted on the SFDA public website. SFDA requires a letter from the generic company claiming non-infringement of the existing patent. The patent holder is supposed to be a “cc” on this letter, however there have been instances where the patent holder has not been copied. Although this system allows the patent holder greater flexibility to make preparations for filing a patent infringement case, the patent holder must wait until after an infringement occurs to file the case in court.

Patent Term Restoration

Globally, on average, the patent and regulatory approval process for new drugs often takes between 8 and 15 years. As a result, many drugs have very few years of patent protection remaining after the regulatory authority grants marketing approval. Many countries, including the U.S. and EU, have established mechanisms to restore patent terms for pharmaceutical patents to recover time lost due to regulatory delays.

As a result of regulatory delays in China, drugs often do not receive marketing approval until 3 to 4 years after approval in other major markets -- yet China does not currently have patent term restoration for pharmaceuticals. In order to promote advanced bio-pharmaceutical research, reward innovation, and encourage new product launches, China should initiate a patent term restoration system that is consistent with international standards.

Counterfeit Pharmaceutical Products

PhRMA member companies are deeply concerned with the significant increase in counterfeit pharmaceutical products in China, which poses a direct threat to patient welfare. There are an increasing number of examples of serious health risks posed by counterfeit products in China, including the loss of life. It is difficult to estimate the economic damage of counterfeit pharmaceuticals in

China. The growing presence of counterfeit products on the Chinese market should become a top priority for public health officials in China. Increasing indications that counterfeit Chinese products are being smuggled abroad only increase the urgency of the issue as it creates health risks for citizens of other countries. In fact, the easy availability of counterfeit prescription drugs even in highly public areas shows how much needs to be done in this area. From an industry perspective, we note that legitimate producers of pharmaceutical products are doubly prejudiced by counterfeits – not only do they suffer the direct undermining of their market share by counterfeits, but legitimate products in the market are compromised, if consumers lose confidence in the drug supply, and thus shy away from it.

PhRMA has taken an active and cooperative approach in trying to reduce counterfeit pharmaceuticals in China. A number of member companies have joined the Quality Brands Protection Committee (QBPC) in which participant companies jointly conduct proactive market sampling and surveillance, as well as raids on suspected counterfeit manufacturers and distributors. Detection and enforcement, however, are expensive and difficult, and cannot be accomplished by industry alone. We would like to work as a partner with the Chinese Government to eliminate counterfeit pharmaceuticals, and urge the Chinese Government to make this a high priority issue.

While the State Food and Drug Administration (SFDA) has promulgated an administrative sanctions law and established an anti-counterfeiting office, a comprehensive effort must be implemented to reduce the amount and scope of counterfeit pharmaceuticals in China, including:

- The allocation of more resources to anti-counterfeit pharmaceutical initiatives on an on-going basis;
- A commitment by SFDA, along with the Public Security Bureau, to random, unannounced searches of suspected counterfeit pharmaceutical operations;
- Promotion of public awareness and education on counterfeit drugs; and
- Most importantly, enactment of mandatory criminal prosecution and incarceration for convicted counterfeiters. Imposing effective deterrent penalties on parties engaged in producing fake pharmaceuticals is the most important first step the Chinese government could take to stem the tide of counterfeits. An effective criminal deterrent is a requirement of TRIPS Article 61.

Also important, the production and trading of a medication's active ingredient in bulk form needs to fall under the same regulations governing production and trading of pharmaceuticals. At this time, such coverage is

obtained only through chemical regulations and thus these products are not subject to SFDA's quality and safety controls. Because chemical companies that sell API in bulk form are not regulated by the SFDA, they do not have to comply with SFDA manufacturing standards. In addition to the safety concerns this raises, it also makes it extremely difficult to enforce action against the producers of bulk ingredients for a medication with a legal protection other than a product patent (i.e. use patent, process patent, administrative protection). There are instances of local bulk active producers advertising product using the MNC brand name. These producers understand the penalties for such an offense, if applied, are low.

Where appropriate, PhRMA is prepared to support U.S. and Chinese Government initiatives designed to address the important issues of counterfeiting and data protection with resources and expertise. PhRMA and its member companies wish to work in partnership with all stakeholders in helping to ensure all parties benefit from a more rules based trading system.

Market Access Barriers

Reimbursed Drug Lists

In 1994, China began experimenting with healthcare insurance reform in two cities. The experiment was subsequently expanded to 57 cities in 1996 and to 87 cities in 1998. By the end of 2004, medical insurance reform had been implemented in about 250 healthcare insurance administrative units, covering approximately 130 million people. This figure continues to grow. PhRMA was also pleased that China updated its National Drug Reimbursement List (NDRL) in September 2004 after a six-year lapse. We hope China will maintain its commitment to update the NDRL every two years.

Government Price and Profit Controls/Protectionism

Pharmaceutical products are considered special commodities in China and thus subject to government price controls. In short, while China as a whole moves toward market-based pricing in its economy, this cannot be said of the pharmaceutical market.

In 1997, pharmaceutical price jurisdiction was vested in the State Development and Planning Commission (SDPC, subsequently renamed the National Reform and Development Commission, NRDC). Since that time, the NRDC policy for establishing pharmaceutical prices has been in a continuous state of change and this has therefore become an area of great concern and unpredictability for pharmaceutical companies. Experience has proven that government price controls discourage pharmaceutical innovation and high quality manufacturing. Often, this results in unintended consequences such as discouraging the timely introduction of innovative products in the marketplace

and maintaining artificially high prices in the generic pharmaceutical sector. NRDC pricing policy has changed significantly in the past two years and reflects some of the recommendations advocated by the international industry. While the NRDC originally intended to set rigid margin controls at each stage of the distribution chain, a policy change implemented in 2000 focused on the end retail price while continuing to monitor margins at the distributor and hospital level. In the event that the NRDC found distributor and hospital margins to be excessive, it reserved the right to cut the product's retail price.

In July 2000, the NRDC promulgated the Guidelines for Drug Price Administration which set forth the following principles for consideration by the government in establishing pharmaceutical prices:

- Innovative v. Generic; GMP v. non-GMP; and Brand v. non-Brand; and
- Imported drug prices should be referenced to locally manufactured drug prices or to the prices in countries at roughly the same level of economic development as China.

One encouraging aspect of the new government policy is that it allows free market pricing of products not on the reimbursement lists. However, of considerable concern for the innovative (multinational) industry is that as products come off patent protection they are being priced at a premium of only 30% to 35% of the cost basis of local generics. This price level does not recognize that the drug quality of the innovative products typically meet the higher international standards of the innovator company as compared to the emerging national drug standards in China. Nor does it reflect that the investment by the innovator into manufacturing facilities in China considerably exceeds investment by the local generic companies. Although there is a mechanism for application of an independent price in recent government re-pricing, the price is first cut, and only many months later may the results of the independent price hearing be published.

The amount of investment in research and development, including the cost of educating healthcare professionals in the use of a new product, and the investment in quality assurance continues to be largely discounted by the Chinese government in determining prices. And we understand that the emerging Representative Product Scheme will continue to arbitrarily tie innovative prices to those of generics. Therefore, the new scheme will continue to discourage innovation.

From 1997 to the end of 2005, there have been 17 government price cuts on pharmaceutical products. Innovative products' market share has been consistently declining in China, according to data from IMS. In the first quarter of 2001, the market share of multinational companies was 37%, while the local companies held 63% of the market share. By the fourth quarter of 2004, the

market share of multinational companies had declined to 32%, while the local companies' market share increased to 68%.

Hospital Bidding

PhRMA is concerned that under the existing government bidding system in China, there is less recognition of the quality of innovative products. In addition, there is limited supervision of locally implemented bidding procedures.

Hospital bidding began in China with pilot projects in 1999 – 2000 where by the end of 2002 the goal of the Ministry of Health (MOH) was to have 70% of public hospitals purchase 50% of the value of their pharmaceutical portfolio through bidding. A recent supplemental regulation extends the use of bidding to all non-profit medical institutions, to purchase more than 80% of the types of drugs on their procurement lists. Simultaneously with the implementation of hospital bidding, NRDC removed the controls on each separate margin within the distribution chain, thereby allowing hospitals to grow their portion of the total distribution margin. Although the supposed purpose of hospital bidding is to benefit the patient, NRDC had to promulgate a subsequent regulation ordering hospitals to give a certain percentage, as determined by provincial authorities, of the extra margin captured to patients. We have not seen any published statistics to know to what extent patients are benefiting. In essence, hospital bidding represents a transfer in revenues from manufacturers and distributors to hospitals.

As part of this process, MOH established bidding categories for “patent”, GMP (generic), and non-GMP products. However, the regulation is unclear whether drugs still protected by international patents, but not Chinese patents (China only recognized product patents for pharmaceuticals beginning in 1993), will be placed in the “patent” category, or be placed in the GMP generic category. PhRMA believes that Chinese authorities should recognize a transition period in hospital bidding for products still under international patent protection.

Requirements for Clinical Studies in China

China requires extensive in-country clinical trials for new drug approval. Many of these products, however, were the subject of comprehensive clinical testing in several other countries/regions, and received marketing approval. Furthermore, the process to get approval to conduct the studies is unduly lengthy and burdensome. Overall, these requirements can delay market access in China for as much as 2-3 years, and lead to significant additional drug development expenditure. PhRMA considers that the SFDA should reform its requirements for clinical trials in line with international norms, requiring additional studies only when scientifically necessary. Furthermore, the process for approval of clinical trials should be amended to allow China to participate in multinational multi-center clinical trials, an option that is currently precluded due to the length of the

process and associated data requirements. The overall goal is for earlier participation by Chinese authorities in clinical testing for new products, and eliminating clinical testing for older products already extensively tested elsewhere.

Local Analytical Testing Requirements

The SFDA requires significant local analytical testing of products imported for clinical trials, products submitted for approval, and imported products. These requirements are excessive, unscientific, and are also not required in any other major market. Furthermore, the testing is sequential with respect to other activities, and therefore causes further delays in the registration and approval processes.

In addition to these testing requirements, the SFDA also changes the specification and analytical test methods or imposes Chinese compendium specifications to existing products that are inconsistent with the sponsor's specifications. These actions can cause compliance difficulties, are a resource burden, and are not scientifically valid. The requirements result in delays in clinical trials, lengthy drug approval processes and hence impede market access in China. Furthermore, the sample quality requests for vaccines and biotechnology products for full testing by the SFDA can be prohibitively expensive and are unnecessary.

PhRMA contends that the SFDA should reduce the testing requirements for drug products and substances to internationally accepted standards, accept sponsors' specifications for established products, and remove unscientific local testing requirements for vaccine and biotech products. Ultimately, the SFDA should develop a risk based and experience based system of regulatory priorities whereby manufacturers who have consistently provided SFDA with accurate information, and have consistently provided China with safe, effective, high quality drugs, would be exempted from these local analytical testing requirements.

New Drug Registration Requirements

PhRMA is pleased with many of the changes announced in the recently adopted Drug Administration Law and its Implementing Regulation. Positive changes such as the extension of the import drug permit term to five years from three and the ability to use a free sales certificate from a market other than the source point are encouraging. Although there are some positive improvements in these regulations, the time period for new drug approvals far exceeds what would be considered the international norm. Requirements for clinical trials, new drug approvals, product manufacturing and analytical standards are all sequential, lengthening the overall approval time.

Services – Pharmaceutical Distribution

During China's WTO accession negotiations, the U.S. secured groundbreaking commitments with respect to pharmaceutical trading and distribution.

National Treatment – Prohibition of De Facto or De Jure Discrimination. The WTO Working Party Report states that China will eliminate any measures which discriminate *de facto* or *de jure* against imported pharmaceuticals with respect to reimbursement, price controls, listing, formularies and other government measures.

Import Licensing. China agreed not to approve or deny import licenses for protectionist purposes. This was designed to end the practice of refusing to extend import licenses whenever there was a domestic competitor.

Distribution. In its GATS Services Schedule, China agreed to allow foreign entities to engage in pharmaceutical distribution services after a three year transition period.⁴ This step would help reduce high distribution costs, benefiting both patients and industry.

Under the terms of China's WTO Accession, China was to liberalize pharmaceutical distribution rights by December 2004. These commitments, however, have not fully materialized in China. Currently, foreign pharmaceutical companies must apply for distribution licenses in order to distribute their imported products. Thus far, no U.S. companies have received distribution licenses. To date, no implementing regulations have been issued to extend distribution rights to companies seeking to import finished products. PhRMA member companies want to be able to import finished products directly from the United States and store such products in their own facilities without paying fees to licensed "importers." They also want to have the discretion to distribute their own imported products in China without the requirement of hiring a pharmaceutical wholesaler. In addition, China requires that domestically produced products and imported products must be marketed by separate medical representative teams. U.S. pharmaceutical companies feel this is a discriminatory tactic because it signals to doctors and hospitals that a particular medicine is imported (i.e., foreign).

In order to meet WTO obligations, it is critical that MOFCOM fulfill their accession commitments as soon as possible.

Damage Estimate

⁴ Report of the Working Party on the Accession of China, Part II Schedule of Specific Commitments on Services List of Article II MFN Exemptions, Section Four "Distribution Services," WT/MIN (01)/3 (Ministerial Conference, Fourth Session, Doha, Nov. 9-13, 2001).

PhRMA members estimate that the 2005 damages in China are equal to 34.2% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class for Priority Foreign Countries and Priority Watch List countries. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
China	2396652	695546	3092198	9047642	34.2%

PRIORITY WATCH LIST COUNTRIES

ASIA-PACIFIC

AUSTRALIA

PhRMA members support the U.S.-Australia Free Trade Agreement (FTA), and thus have strong concerns with actions taken by Australia after the negotiation of the agreement to undermine the intellectual property provisions of the agreement and impose arbitrary, across-the-board government price cuts to broad therapeutic classes of medicine.

While PhRMA believes that the FTA represents an important step forward in improving access to innovative medicines for Australian patients, and making Australia a more attractive destination for life sciences investment and research, due to apparent backsliding on intellectual property protection for pharmaceuticals and government pricing policies that do not reward innovation, we recommend that Australia be placed on the 2006 "Special 301" Priority Watch List.

Intellectual Property Protection

Patent Protection

Australia traditionally has maintained a strong intellectual property regime for protecting innovative biomedical discoveries, including patent term restoration. Accordingly, PhRMA is deeply concerned by actions taken by the Australian Senate after the negotiation of the FTA to weaken and undermine intellectual property provisions that were agreed to during the negotiations.

PhRMA understands Australia's compliance with some key intellectual property provisions of the FTA was discussed in the process of certifying implementation of the agreement. We understand that U.S. negotiators sought and received an assurance that Australia's implementation of these FTA provisions within the existing arrangement of the Therapeutic Goods Administration and the Pharmaceutical Benefits Scheme (PBS) would ensure patent-holders received advance notice to enable them to seek injunctive relief prior to patent infringing products entering the market, as required by the agreement. The good faith implementation of these assurances is critical to ensuring that Australia's intellectual property regime remains strong, and that the agreement is implemented as originally negotiated.

We have also been informed that the U.S. Government made it clear that Amendments to Australian law weakening patent protection for pharmaceuticals, which were passed by Australia after the FTA was completed, are unjustifiable, counterproductive, and violate Australia's international obligations. More specifically, the potentially heavy penalties under the amendments that would apply only to holders of pharmaceutical patents who seek to enforce their patent rights appear to discriminate against a field of technology in violation of Australia's WTO TRIPS Article 27.1 obligations. We are disappointed that the Australian Government, which expressed concern with these very amendments when they

were introduced, is not taking immediate action to repeal them. As the Australian Government itself has said, these amendments are unnecessary and undermine Australia's patent laws. In fact, their ultimate impact could be to create an environment that makes it more difficult for Australian patients to get access to state-of-the-art treatments, and that fails to encourage advanced biomedical research and life sciences investments in Australia.

Market Access Barriers

Anticompetitive Practices

In the Trade Promotion Authority Act of 2002, Congress directed USTR to seek “the elimination of government measures such as price controls and reference pricing which deny full market access for United States products.” The reduction or elimination of such barriers and distortions is of critical importance to the future of the research-based pharmaceutical industry. The United States is the world's leader in discovering and developing new cures for life-threatening disease, disability, and aging. America's pharmaceutical industry supports over 1 million high-wage, high-skill U.S. jobs. U.S. leadership in the life sciences continues to expand as European and Japanese firms transfer some of their most advanced research and development to U.S. laboratories, and launch their most promising drugs in the U.S. market.

PhRMA believes that regulatory and health care systems, including those which control the pricing and reimbursement of innovative medicines, should be transparent, accountable, and science-based. Price controls and restrictions on access to innovative medical treatments hurt patients around the world, who could benefit from advanced medical treatments and continued advances in biomedical science. Notice and comment procedures, and consultative and appeals mechanisms, should be established to provide meaningful opportunities for U.S. life sciences companies to submit their views regarding policies, regulations and decisions that directly or indirectly affect the pricing, approval, and regulation of their medicines.

In the Pharmaceuticals Annex to the FTA, the U.S. and Australia agreed on breakthrough provisions for increased transparency and accountability and enhanced consultation in the operation of Australia's PBS. Under Australia's National Health Care System, the PBS accounts for over 96 percent of Australia's sales of prescription medicines. Accordingly, the PBS effectively controls access to the Australian pharmaceutical market. Annex 2-C of the FTA establishes four basic obligations.

First, the Agreement establishes agreed principles to highlight the importance of biomedical innovation and research and development, including:

- Recognition of the role of innovative pharmaceuticals in high-quality health care;
- Recognition of the importance of pharmaceutical research and development;
- Recognition of the need to support timely and affordable access through transparent, expeditious, and accountable procedures; and
- Recognition of the need to recognize the value of innovative pharmaceuticals through operation of markets or procedures to objectively value therapeutic significance.

Second, in Annex 2C and an Exchange of Letters regarding the PBS, Australia agreed to improve the transparency of the PBS as follows:

- Disclosure of procedural rules, methods, principles, and guidelines;
- Timely opportunity for applicants to provide comments; and
- Detailed written information regarding recommendations or determinations for the listing of new pharmaceuticals or reimbursement amount.

Third, Australia agreed to establish an Independent Review Process that may be invoked by an applicant directly affected by a recommendation or determination.

Fourth, the Parties agreed to establish a bilateral Medicines Working Group to discuss issues relating to Annex 2C, including the importance of pharmaceutical research and development.

These provisions will improve the transparency of decision-making by the Pharmaceutical Benefits Advisory Committee (PBAC) and the Pharmaceutical Benefits Pricing Authority (PBPA), including (1) opportunities for sponsors of an innovative medicine to appear before the PBAC, present evidence and scientific experts, and respond to questions, (2) transparent disclosure of the reasons for PBAC non-recommendations, so that a sponsor is in a position to respond, (3) a more transparent and objective PBPA process, including disclosure of rules and methodologies on which decisions are based, and (4) an independent appeals mechanism, including merits review. At the same time, as the Australian Government has made clear, the PBS will continue to provide reliable and affordable access to medicines for Australian citizens.

The FTA represents an important step toward improving access to innovative medicines for Australian patients, and making Australia a more

attractive destination for global life sciences investment and research. We are pleased that the FTA will advance reforms to make the PBS more open, expeditious, and accountable. Such reforms have been discussed in Australia for many years, and will benefit Australian patients.

Medicines Working Group

The FTA represents an important step toward building an enduring U.S.-Australia partnership in the 21st century life sciences. A successful FTA will:

- Provide U.S. companies with better market access for their products through a simpler and more transparent PBS;
- Ensure timely access for Australian patients to the latest medicines including the new generation of biotechnology-based therapies, under the PBS;
- Maintain Australia's strong intellectual property regime;
- Reinforce Australia as an attractive location for advanced global biomedical research and development, with resultant benefits to the Australian economy through the creation of highly skilled jobs, exports, and R&D investment; and
- Expand U.S.-Australia cooperation in the life sciences.

In order to realize the full promise of the FTA, it must be implemented in good faith. In addition, it is critical that the U.S. closely monitor the implementation of the pharmaceutical provisions of the FTA. While the FTA is designed to advance specific reforms of the PBS process, its ultimate goal is to build a new and productive relationship between Australia and U.S. research-based pharmaceutical companies, and avoid the type of long-term disinvestment that occurred in New Zealand as a result of PHARMAC's abusive pricing policies. Building a productive future partnership between government and industry depends on good faith implementation of the FTA and meaningful consultation regarding future PBS policy. PhRMA hopes that the Medicines Working Group will become a key mechanism for enhanced bilateral dialogue and for raising and concretely addressing the challenges of making the FTA into a "win-win" for global biomedical research, Australian patients, and U.S.-Australia trade. We look forward to a positive dialogue with the Australian authorities on shaping PBS policy to support biomedical innovation, improve patient access to innovative medicines, and advance U.S.-Australia cooperation in the 21st century life sciences.

Damage Estimate

PhRMA members estimate that the 2005 damages in Australia are equal to 6.8% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class for Priority Foreign Countries and Priority Watch List countries. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Australia	231489	199828	431317	6311851	6.8%

INDONESIA

PhRMA member companies face significant market access barriers in Indonesia related to poor intellectual property protection. A proposed trademark rule raises national treatment concerns, as it appears to favor domestic generic companies over branded multinational companies. In addition, excessively long registration periods, the lack of data protection and inadequate enforcement against counterfeit medicines unfairly discriminate against PhRMA member companies. Given these concerns, we recommend that Indonesia be placed on the 2006 “Special 301” Priority Watch List.

Intellectual Property Protection

Counterfeiting

Pharmaceuticals that are pirated, counterfeited, or unregistered are widely available in the Indonesian market, and pose a serious health danger to the public. The annual turnover of counterfeit drugs is estimated to be worth 10% of the total market (nearly US\$200M).

With the turbulent economic and political conditions impacting Indonesia, as well as the lack of coordination amongst the authorities, no significant improvement is envisaged in the short term. The Badan POM (BPOM), the Indonesian regulatory authority, has initiated some actions; however, these can still be considered inadequate as violators suffer only light penalties that do not act as a deterrent. For example, convicted counterfeiters commonly receive only 6 months of imprisonment.

Data Exclusivity

TRIPS requires WTO Members to preclude their regulatory authorities, for a fixed period of time, from relying on or otherwise using the data submitted by the originator for regulatory approval of subsequent applications. As a Member of the WTO, Indonesia was required to implement adequate data exclusivity protection, in accordance with Article 39.3 of TRIPS. To date, Indonesia has not passed a data exclusivity law.

Generic Labeling

The Ministry of Health (MOH) issued Ministerial Decree No. 524/Menkes/Per/IV/2005 as an amendment to Ministerial Decree No. 988/Menkes/SK/VIII/2004, which requires any pharmaceutical product manufactured and distributed in Indonesia to state its generic name with its trade name. The generic name must be placed exactly below/under the trade name with letter size at least 80% of the size of the trade name, same font and color.

PhRMA member companies have two concerns regarding this requirement. First, bioequivalence and bioavailability studies from independent and international credible sources are not visibly enforced; therefore, consumers may be misled since generic products may not have the same quality, efficacy and safety as the original product. Second, this requirement undermines pharmaceutical trademark rights, insofar as the rule is contrary to Article 20 of TRIPS, which states that trademarks in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form, or use in a manner detrimental to its capability to distinguish the goods or services. Because the innovative products available in Indonesia are marketed exclusively by multinational companies, this regulation appears to favor the local generic industry.

Market Access Barriers

New Drug Registration

Registering new drugs in Indonesia is a lengthy process, although there are certain timelines for the evaluation process. Greater transparency is needed with respect to the fees charged for submitting an application and the specific guidelines for registering a new chemical entity. In order to reduce the time it takes to bring a new product to market, the BPOM agreed to issue pre-approval letters prior to final marketing authorization that would allow companies to begin manufacturing and labeling the product's packaging materials; however, this pre-approval system is still not in place. The registration time period continues to be long and the ASEAN harmonization for Indonesia is only expected by January 2008.

Bioequivalence Requirement

BPOM has recently established the necessity of providing bioequivalence test data from generic applicants for marketing approval. Today there are approximately 5 laboratories that have the technical capacity to carry out bioavailability/bioequivalence (BA/BE) studies. PhRMA is concerned that the other testing facilities in Indonesia used to assess the bioequivalence of the generic product may not be adequate. Full implementation of the BA/BE requirement is planned by December 2007.

Government Controls on Pharmaceutical Pricing

Despite having the largest economy in Southeast Asia, Indonesia spends less per capita on healthcare than many countries in the region. The Government of Indonesia does not currently reimburse patients for pharmaceutical expenses – nor is private healthcare insurance available. Patients pay 100 percent out-of-pocket for pharmaceutical products.

Although Indonesia does not currently impose price controls on pharmaceutical products, it does consider the manufacturer's suggested retail price as a determining factor in granting marketing approval for new products. Thus if the government deems the proposed price to be "too high" it can deny or delay marketing approval. In the last year the government has proposed implementing formal price controls on pharmaceutical products to alleviate the burden on patients. PhRMA member companies recognize the Government's desire to ensure affordable healthcare. We would appreciate an opportunity to consult with MOH to determine the best way to promote quality care without stifling the market for innovative pharmaceutical products.

Customs Duty Drawback Concerns

Customs duties are levied at the time pharmaceuticals are imported. They can be reclaimed if the goods are subsequently exported. However, government departments involved make it an extremely difficult and drawn-out process to have customs duty drawback claims paid. This can cause companies to have significant funds tied up in outstanding claims in these departments.

Promotional Practices

In an effort to curb local corruption, the Government of Indonesia mandated that all pharmaceutical companies, both multinational and local, adhere to the Code of Conduct of Pharmaceutical Marketing Practices of Ethical Products. Multinational companies have implemented this code. Unfortunately the code is not followed by many local companies, and the Government of Indonesia is not seriously enforcing nor monitoring the practices of local companies, further burdening the overall healthcare cost. For example, the contracting of doctors and cash rewards for prescriptions is a common practice amongst local companies. These discriminatory practices impose significant losses on our industry, and also lead to over-prescription of medicines to the public.

Tax Treatments

Unilateral/arbitrary tax levies for tax paying industry creates a major discomfort to PhRMA member companies. As good corporate citizens, PhRMA member companies are diligent taxpayers. However, different implementation approaches by the tax office discriminate against the multinational companies and present many hassles to overcome.

Damage Estimate

At the time of reporting PhRMA is not able to provide a specific estimate of the damages incurred in 2005 attributable to trade barriers related to intellectual property protection and market access.

NEW ZEALAND

The Government of New Zealand remains the primary purchaser of pharmaceuticals in New Zealand. Pharmaceutical Management Agency (PHARMAC) continues to operate stringent cost containment strategies⁵, and issues of transparency, predictability and accountability remain unresolved. New Zealand has created a commercially hostile market for innovative medicines. Given these concerns, we recommend that New Zealand be placed on the 2006 “Special 301” Priority Watch List.

Intellectual Property Protection

In 2000, the Government initiated a review of the Patents Act of 1953. Although a draft Bill was released in early 2005 for consultation, it has yet to have its first reading in the legislature. The stated purpose of the Bill is to ensure that New Zealand’s patent regime takes account of international developments.

One such development is the international trend for countries to strengthen intellectual property protection through patent term restoration. Globally, on average, the patent and regulatory approval processes for new drugs often take between 8 and 15 years. As a result, many drugs have very few years of patent protection remaining after the regulatory authority grants marketing approval. Many countries, including the U.S. and EU, have established mechanisms to restore patent terms for pharmaceutical patents to recover time lost due to regulatory delays. The research-based industry urges the New Zealand legislature to amend the current bill to include patent term restoration in keeping with international best practices.

The research-based industry supports the 2003 recommendations of the Government’s Biotechnology Taskforce to ensure that matters of intellectual property protection, effective patent life and the value of innovation, are addressed in the forthcoming review of medicines policies and PHARMAC (see below).

Biotechnology

The Government’s Biotechnology Taskforce also made other recommendations in 2003 to enhance the Government’s relationship with the pharmaceutical industry and stimulate research investment:

⁵ Reference pricing and parity pricing; cross-therapeutic deals; tendering, sole supply, price/volume contracts; special authority and restricted indications; delayed listing (on average 3 times longer than Australia)

- Introduce certainty and predictability into PHARMAC's funding by setting on-going three-year funding rather than year-to-year funding.
- Develop an action agenda for the industry on public policy issues building on the local industry association's report "Bio-pharmaceuticals - A Pathway to Economic Growth"; and
- Review the channels through which the Government engages with the pharmaceutical industry.

As reported last year, the first recommendation has been achieved with an announcement in September 2004 of annual budgets through 2007. It should, however, be noted that each annual budget is discrete, i.e., savings from one year cannot be carried over to the next, nor can out-year funding be accessed for current year expenditure. District Health Boards and the Minister of Health can also review and adjust budgets part way through the year as happened during the 2003/04 financial year when the budget was reduced from NZ\$566 million to NZ\$541 million.

To date, the Government has made no move to implement the second and third recommendations beyond the interdepartmental "Pharmaceuticals Overview Paper" that was undertaken during 2003. While this paper examined a number of the public policy issues affecting the pharmaceutical industry, it did not recommend any changes to the current public policy framework, nor did it support a whole-of-government approach to the industry.

Market Access Issues

Government Pricing and Reimbursement

Under PHARMAC's management, only 66 new medicines were approved for government reimbursement from 1998/99 – 2003/04⁶. In PHARMAC's view, a pharmaceutical must achieve a cost per QALY (quality adjusted life year) of about NZ\$10,000 to NZ\$15,000 to be considered cost effective⁷, and thus eligible for reimbursement. This policy, combined with the need to stay within a capped budget, means that many effective medicines are not available to New Zealand patients.

During 2005, the medical profession, general public and patient groups have been increasingly vocal regarding New Zealand's limited access to medicines. This issue featured highly in the build up to the General Election in September. As a result, the United Future Political Party is instigating a review of the Government's pharmaceutical policy.

⁶ Direct General of Health's *Annual Report* (year ending 30th June 2005)

⁷ PHARMAC – *Information on Clinically Reviewing Economic Analyses for PHARMAC*

The innovative pharmaceutical industry continues to advocate for the following key policy reforms in New Zealand:

1. A more realistic and flexible budget for funding medicines and an annual growth target closer to first world standards;
2. Government policies encouraging the development of private purchase healthcare, in particular medical insurance and a co-payment system for medicines;
3. Requirement that PHARMAC consider aspects beyond its operational silo and recognize the potential for savings elsewhere in the health sector;
4. Adjustment of New Zealand's low cost effectiveness benchmarks to enable recognition of medicines with significant health benefits;
5. Timeline standards for decisions on the subsidy of medicines so that patients, clinicians and companies know what is happening;
6. A Government and industry policy forum to encourage open exchange of ideas and solve public policy problems;
7. The repeal, or at least the narrowing, of PHARMAC'S exemption from Part II of the Commerce Act⁸;
8. The recognition of the value of innovative pharmaceuticals, both in subsidy decisions and government reference pricing policies; *and*
9. Improvement of PHARMAC'S and PTAC's (Pharmacology and Therapeutics Advisory Committee) transparency and accountability, with an independent review process.

Regulatory Issues

The establishment of a joint regulatory agency with Australia is being considered and would allow a single point of entry for both markets with a dual country product license. Government funding of prescription medicines will, however, continue to be determined independently by the government of each country and the different reimbursement structures and mechanisms in Australia and New Zealand will not form part of the harmonization process.

Damage Estimate

⁸ A Private Members Bill to remove PHARMAC's exemption from Part II of the Commerce Act was drawn from the ballot on December 8, 2005 and will be debated by Parliament in 2006.

PhRMA members estimate that the 2005 damages in New Zealand are equal to 4.0% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class for Priority Foreign Countries and Priority Watch List countries. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
New Zealand	20879	8123	29002	718026	4.0%

KOREA

Despite regular, structured and in-depth U.S. Government engagement with the Government of Korea and a commitment to enhance transparency and provide additional opportunities for consultation with the research-based pharmaceutical industry, significant market access barriers continue to impede the growth of the U.S. research-based pharmaceutical industry in Korea.

The Ministry of Health and Welfare (MOHW) considered significant short-term regulations throughout 2005 that could adversely impact innovative pharmaceuticals. These discriminatory, non-transparent regulations mark a significant departure from trade commitments made by the U.S. and Korean Governments and continue to send a negative signal about the ability to achieve implementation of commitments secured in an FTA with Korea.

Every effort needs to be made to avoid adoption of measures that would result in unnecessary delays in market access through anticompetitive practices that undermine intellectual property, which erect restrictive standard requirements and that disproportionately discriminate against PhRMA member companies operating in Korea. It is PhRMA's belief that these measures also would impede the development of biomedical research in South Korea – the development of which is a stated goal of the Government in Korea.

Recent bilateral quarterly trade talks have emphasized pharmaceutical issues, and there has been some enhanced understanding by the trade officials in Korea of the industry's difficulties in achieving a better operating environment. This is very positive, however, the market share of U.S. research-based pharmaceutical companies in Korea continues to lag behind global norms.

The most serious trade barriers facing the U.S. research-based pharmaceutical industry in South Korea are set forth below. Given these concerns, we recommend that Korea be placed on the 2006 "Special 301" Priority Watch List.

Intellectual Property

Patent Linkage

PhRMA member companies have encountered instances of generic products being registered and brought to market while patents are still in force. This reflects an apparent lack of support for the principle of patent linkage on the part of the Korean Government. Patent Linkage describes the "linkage" between patents in a country and the new drug approval process. This mechanism prevents the registration of a generic form of a patented pharmaceutical while a patent is still in force, thereby preventing unnecessary litigation and confusion.

In addition to the prevention of unnecessary and costly litigation, a system of patent linkage has a number of advantages that enhance pharmaceutical development by: (1) providing transparency and predictability of the process for both the pioneer and the generic company; (2) helping both sides make better and more efficient investment decisions; and (3) ensuring timely redress of genuine disputes. Better and more efficient investment decisions mean faster development for life saving inventions and better healthcare. By establishing and ensuring adequate “linkage,” the Korean government could contribute significantly to an environment that attracts investment in research and development and encourages growth in the life sciences sector. It also avoids confusion in the marketplace caused by the removal of an infringing product.

While the Korean Food and Drug Administration (KFDA) holds responsibility for safety and efficacy review, it does not adequately ensure that competitors do not market products covered by existing patents. The Korean Government should ensure linkage between the regulatory approval agency and patents to prevent patent infringements during the product approval process. In doing this, parties seeking marketing approval must certify under their own obligation that their products are not in infringement of existing patents, and health authorities should not approve marketing new products that infringe existing patents.

Patentability Requirements

Unduly strict barriers have been placed for patent specification description requirements applied to chemical/pharmaceutical inventions (particularly “selection inventions”) in Korea. Specifically, quantitative data (e.g., clinical trial data) is required to be incorporated in the originally filed specification, while no opportunity is provided to later submit such data to support patent validity. Such a practice is unduly restrictive and places a heavy burden on patentees (which often cannot be met due to the intrinsic nature of pharmaceutical research and development which requires lengthy studies). Further, such burdens are not found in the patent systems of other major jurisdictions. Details of these requirements are set forth below.

1. For a medicinal use invention (pharmaceutical composition), quantitative data for pharmacological effect (not necessarily clinical data, but *in vitro* test data are acceptable) are required to be included in the originally filed specification. Later addition of such data to the specification is not allowed and submission of the data in a response to an office action does not cure the defect. Also, qualitative descriptions of the pharmacological effect or the test methods are not enough to meet this requirement. This patentability requirement has been upheld by the Korean Supreme Court and is strictly applied by the Korean Intellectual Property Office.
2. For a selection invention (of a species from a previously known genus), if the selected species has a different effect from the genus invention,

then there is no separate patentability requirement for the selection invention. The patentability requirement is the same as other types of inventions. Therefore, if the selection is from a known pharmaceutical product but is for a new medicinal use, the same patentability requirement of above section 1 would apply. If the selected species have the same type of effect as the genus invention, the superiority and criticality of the effect over the genus invention must be proven. The proof (e.g., experimental data) can be submitted later when the patentability of the invention is questioned. However, the original specification must include some qualitative description of the superior effect of the selection invention in comparison with the prior art genus. In this regard, in one recent case, the Patent Court held that a mere qualitative description of the effect is not enough. According to the Patent Court, at least minimum experimental data for confirming the superior effect must be provided in the original specification, thereby making the standard stricter. This case is currently under appeal to the Supreme Court, and thus, the final and conclusive decision is yet to be rendered.

A number of the major pharmaceutical companies have suffered because of these strict patentability requirements for a pharmaceutical invention in Korea. Since the above requirement was upheld by the Supreme Court, it would take considerable cost and effort to overturn the precedent as it must eventually involve an appeal to the Supreme Court.

Market Access Barriers

Inappropriate Restrictions on Reimbursement

A number of U.S. research-based pharmaceutical companies have experienced the imposition of unduly restrictive reimbursement guidelines or denial of reimbursement entirely. Denial of reimbursement entirely is a recent new development by MOHW and Health Insurance Review Agency (HIRA) and it significantly impedes Korean patient access to the latest new innovative medicines. The result of a 2005 survey conducted by the local industry association, KRPIA, indicates that in 2005, 50% of the new chemical entities newly registered with KFDA by the U.S. and EU research-based pharmaceutical companies have been denied reimbursement.

HIRA continues to unilaterally impose reimbursement guidelines that unduly restrict or unreasonably delay treatment with the most effective, appropriate medicine.

These guidelines do not reflect accepted scientific or clinical guidelines, restrict market access for innovative medicines, and disproportionately target U.S. research-based pharmaceutical companies. The guidelines continue to be

developed in a non-transparent manner and are imposed without adequate consultation with industry or other stakeholders, such as patients.

Any arbitrary or restrictive reimbursement guidelines used as a short-term cost containment mechanism at the expense of market access for innovative medicines researched and developed by U.S. companies severely limits Korean patient choice for the best possible treatment.

A joint task force comprised of representatives of the MOHW and industry agreed to a set of recommendations in 2003 to establish a more transparent and science-based process to develop these guidelines. These recommendations were never implemented. In the absence of a science-based process to develop such guidelines and to provide better care for Korean patients, PhRMA has recommended that HIRA simply reimburse the uses specifically approved by the KFDA.

Actual Transaction Pricing

In 1999, the Korean Government eliminated discriminatory hospital dispensing margins (“kickbacks,” which were encouraging the sale of locally manufactured products) applied on pharmaceuticals, through the implementation of a system for reimbursement at Actual Transaction Price (ATP). Under the ATP system, the reimbursement price would be the same as the ex-manufacturer price to medical institutions (hospitals, pharmacies and clinics).

Unfortunately, ATP has never been appropriately implemented as it lacks clear guidelines on operational details, specifically:

- A lack of clear guidelines on prices set directly by companies;
- A lack of clear guidelines on acceptable wholesale margins;
- A lack of representativeness of data used to reduce prices;
- A lack of full disclosure of data used to reduce prices;
- A lack of meaningful company consultation for verification of data to reduce prices; and
- A lack of meaningful and independent appeal system.

Under any transaction pricing system, the Korean Government needs to prohibit practices such as non-transparent rebates and non-transparent margins, which provide an unfair advantage to those companies and institutions engaging in them. To be effective, it must actively enforce those prohibitions, and any violating parties, both companies and institutions involved, should be subject to stringent penalties.

Due to the lack of transparency and the lack of effective penalty provisions under the ATP system, U.S. research-based pharmaceutical companies continue to be adversely affected in a disproportionate manner, and prices for research

based medicines are reduced unfairly. These problems have even escalated in 2005.

A Korean Government agency has recently recommended providing margins to hospitals to incentivize purchase of pharmaceuticals at lower prices. The incentives recommended are at a certain percentage of the difference between actual transaction price and MIP. This however poses a concern to the U.S. research-based pharmaceutical industry since allowing incentives or margins on pharmaceuticals will violate the original intent of the ATP system. U.S. research-based pharmaceutical industry has consistently urged that the Korean Government strengthen implementation of the ATP system.

The Informed Patient

It is nearly impossible in Korea to communicate information to patients about diseases and specific pharmaceutical products due to legal controls. This has led to significant resources being expended on ineffective treatments, often produced in Korea, at the expense of more innovative products in the marketplace produced by PhRMA companies. The restrictions on provision of information on diseases and products in Korea should be liberalized to provide patients with better information so that they may take more responsibility for their own health.

Government Pricing of New Drugs

On the recommendation of the Ministry of Foreign Affairs and Trade (MOFAT), MOHW committed in 1999 to grant new innovative products prices which are equal to an average of the ex-factory prices in seven industrialized countries plus distribution margin in Korea ("A-7" price).

Notwithstanding the original purpose of the A-7 regulation, implementation of A-7 has been conducted in a non-transparent and arbitrary manner. The judgment of what is considered as "innovative" is determined in a Drug Expert Review Committee. With the lack of clear definition and criteria of innovativeness, the Drug Expert Review Committee often does not recognize the value of innovative medicines based on scientific data of safety, efficacy and quality of drug. PhRMA has urged MOHW to grant A-7 prices to all products registered by the KFDA as "new chemical entities."

This has led to a disproportionately negative impact on new innovative products of research-based U.S. and European pharmaceutical companies. A July 2004 survey by KRPIA indicates that only 33.8 percent of new products launched between 2000 and July 2004 have received an A-7 price. Nine products were not launched during the same period because of unacceptable prices. A 2005 comprehensive survey of KRPIA shows that it is only 13.9% of KFDA's approved new chemical entities that have actually received A-7 prices

since the implementation of A-7 pricing regulation. Furthermore, the formula to calculate the ex-factory prices in the A-7 countries often does not reflect the actual price level in those countries particularly for new innovative hospital drugs which do not carry normal distribution margins.

In addition, there are cases in 2005 where MOHW and HIRA revised pricing rules in an arbitrary manner without consulting with industry. A recent example is a new pricing rule for combination products, and HIRA has put it in place to only allow 80% of the original compound price. This has impacted adversely the U.S. research-based pharmaceutical industry.

Pharmacoeconomics

HIRA and MOHW have increased the importance of pharmacoeconomic data in the process of making a decision on whether to reimburse a new innovative medicine and at what price. Recently many new innovative medicines have been denied reimbursement because of the alleged lack of cost effectiveness, in which pharmacoeconomics appears to be required to get reimbursement. This approach has had the consequence of negating the spirit of A-7 pricing for new medicines.

PhRMA is concerned that HIRA has moved toward proposing the use of pharmacoeconomic data as an upfront prerequisite to reimbursement approval and pricing for new and innovative medicines. This is because pharmacoeconomic and health outcomes information on a particular product can only be accurately discerned after a product has been on the market for several years. Requiring this data before the product is launched and widely available to patients would create lengthy delays in getting the product to patients.

Furthermore, given the lack of pharmacoeconomic infrastructure, expertise, and transparent review process in Korea, the official adoption of a pharmacoeconomic guideline by HIRA is inappropriate and should be delayed.

Triennial Repricing

In September 2002, MOHW announced a repricing scheme for all products registered on the National Reimbursement List by the end of 1999. While MOHW claims this regulation reflected changes in A-7 prices over a period of time, the methodology disproportionately reduces the price of products manufactured by PhRMA companies compared to Korean generic manufacturers. While this discriminatory feature has been resolved in 2004, MOHW has proposed in 2005 adjusting this formulary to lead to even more onerous and arbitrary price cuts.

Given the structure of the Korean pharmaceutical market, the triennial repricing scheme serves to protect domestic manufacturers and provides a

potential market advantage for Korean generic companies. In addition, it appears this mechanism is used as a one-way ratchet to cut prices, but not to raise them if A-7 prices have risen, which is in itself a discriminatory feature.

Interpretation of ICH E-5

International standards exist for evaluation of clinical trial information related to potential differences in safety or efficacy of a drug due to ethnic differences. By this standard (ICH-E5: International Conference on Harmonization Section E-5), drugs are considered not ethnically sensitive unless a characteristic of a compound is such that a difference would be expected and is evident in the prior clinical study results. It is a widely known fact that variability in response to drugs varies more among subjects within a particular ethnic group than between ethnic groups. However, the KFDA requires Korean ethnic data to prove ethnic insensitivity for almost all new chemical entities (NCE) and even for biological products recently without taking into account a compound's characteristics or if it has been proven that ethnic differences do not exist in other Asian ethnic (e.g., Chinese or Japanese) groups. This interpretation results in unnecessary additional clinical trials that add cost and delay to introduction of innovative medicines to patients.

In line with the international standard, KFDA should accept Asian data for bridging purposes, and expand exemption from submission of bridging data for compounds known to be ethnically less sensitive based on drug properties.

Pharmaceutical Equivalency Testing

KFDA is requiring pharmaceutical equivalency testing at the time of registration and for any post-approval changes. The purpose of this test, as defined by KFDA, is to prove the equivalency of drugs with the same amount of active ingredient and dosage form as the comparable standards. The test includes testing for bio-equivalency, a comparative dissolution test, and a comparative disintegration test. The comparative dissolution test is presenting a significant challenge to the innovative drug industry because the KFDA requirement is not science-based, does not adequately protect confidential data, and can unnecessarily prolong approval timelines.

First, for the dissolution test, KFDA requires a methodology generated by KFDA, not a methodology that has been validated for a particular product. This means that a company's validated methodology—used internationally—will not be accepted in Korea. Second, KFDA requires the dissolution profile at registration which can cause a delay in registration of approximately 3 months. Third, KFDA treats post approval changes of the innovator drug the same as generics (i.e., requires the same testing methods and criteria) which will result in significant problems with regard to sourcing for multinational, innovative drug

companies. Finally, KFDA can disclose dissolution data to the public which has significant issues for confidential data protection.

KFDA has begun to show some willingness to modify these requirements.

Drug Master File (DMF) Requirements

The DMF requirements were implemented by the KFDA in June 2002. These requirements oblige manufacturers to submit significant quantities of proprietary manufacturing data to KFDA as part of the drug approval process. The requirements were instituted by KFDA in an effort to assure product quality (including compliance with GMP – Good Manufacturing Practice). Originally these requirements applied only to new drugs and hence almost uniquely applied to foreign innovator pharmaceutical companies. Subsequently, KFDA has amended these requirements to cover a list of active pharmaceutical ingredients (APIs), thus including both generic and innovative products. Therefore, the discriminatory nature of the scope of the requirements has been resolved.

Although the primary objection to implementation of the DMF appears to have been resolved, PhRMA continues to be concerned with the nature of the data requirements with respect to intellectual property and the problems associated with providing these data for older products. In addition, inspections appear to be automatically required as part of the DMF which will be particularly problematic to innovative companies with multiple APIs. PhRMA believes that KFDA should consider taking a risk-based approach to inspections, relying on the manufacturer's history of GMP compliance.

Local Testing of Imported Products

KFDA requires importers to perform a full set of QC tests for each imported batch prior to market release and to retain the locally prepared Certificate of Analysis (CoA) for each subsequently imported batch on file. The testing should follow completely the Korean approved testing specification and methods.

Local test results from 3 lots are required at the time of submission for vaccines, biologics, and also chemical based products. In addition, for vaccines, KFDA tests all commercial lots imported after approval. The requirement for local testing at submission has meant that specifications and methods submission can lag behind the safety and efficacy submission and therefore the overall product licensing is delayed.

Local testing is particularly costly to vaccines and biopharmaceuticals because of the costs of the samples used in the testing and the inherent difficulty in transferring and validating complex biochemical/immunochemical methods from the laboratories where the product was developed (typically EU and U.S.) to

testing sites in Korea. Other associated barriers include the limited availability of laboratories that are suitably equipped, staffed and trained to conduct the biochemical/immunochemical methods developed to control and release the vaccine and biotechnology products that are currently being developed.

Certification of Pharmaceutical Production (CPP) Requirements

KFDA and regulatory agencies in many countries require a CPP from one or more major markets such as the U.S., EU or Japan as part of its regulatory approval process for new drugs. PhRMA welcomes that KFDA now only requires one CPP. However, PhRMA is concerned that the CPP is still required at the time of new drug application (NDA) submission, which can delay submission by up to a year as a sponsor waits for the major market to issue the CPP. PhRMA strongly encourages KFDA to accept the CPP at any point during the review of an NDA to expedite the approval and availability of new drugs to Korean patients.

Damage Estimate

At the time of reporting PhRMA is not able to provide a specific estimate of the damages incurred in 2005 attributable to trade barriers related to intellectual property protection and market access.

THAILAND

The U.S.-Thai FTA negotiations offer an historic opportunity to improve the current business environment in the country and help Thailand meet its obligations under WTO rules. Market access and intellectual property-related challenges facing the innovative pharmaceutical sector are described below. Given these concerns, we recommend that Thailand be placed on the 2006 “Special 301” Priority Watch List.

Intellectual Property Rights

Data Exclusivity

The development and bringing to market of a new drug requires the originator to conduct extensive chemical, pharmacological, toxicological and clinical research and testing, at an average cost of US \$400 million - \$800 million. The research and testing generally take 10 to 15 years to complete. The data generated by such work, while proprietary to the originator, are required to be submitted to regulatory authorities in order to obtain marketing approval for the drug.

TRIPS requires WTO Members to preclude their regulatory authorities, for a fixed period of time, from relying on or otherwise using the data submitted by the originator for the unauthorized approval of copies of the drug.

The Thai Parliament passed a Trade Secrets Act in April 2001. Chapter 3, Section 15 of the Trade Secrets Act provides for the “Preservation of Trade Secrets by Government Entity.” It is the legislative vehicle through which Thailand seeks to meet its obligation to enact data protection consistent with TRIPS Article 39.3. Although the Act was passed by the legislators nearly three years ago, the Thai FDA, which is charged with implementing and enforcing the legislation, did not issue draft implementing regulations until February 2004. The Thai FDA’s draft regulations do not fully protect undisclosed information from unfair competition. Protection is applied only to data related to new chemical substances (not to new dosage forms or new indications) and protection is only available if the product is patented in Thailand. The term of protection is only two years starting from the submission date, not the date of marketing approval as in the laws of other countries, such as the U.S. and EU. Given that it takes one to two years to receive marketing approval in Thailand, the term of protection could already have expired before a company receives marketing approval.

PhRMA encourages Thailand to adopt new implementing regulations that do not permit non-originator companies to rely on the originator’s data, without the originator’s authorization, for at least five years from the date of approval of the originator’s product in Thailand, as this has been adopted as the minimum

standard for such protection in nearly all countries. The protected data may include, but should not be limited to, the originator's laboratory, pre-clinical and clinical data, such as information regarding product indications, efficacy, tolerability and safety, pharmacokinetics, drug interactions, side effects, contraindications, precautions, warnings, adverse effects, dosage and product administration.

In addition, the regulations should not differentiate between whether the originator's data was generated within or outside of Thailand. The regulations should require state officials to protect information provided in confidence by the originator by ensuring that information is not improperly made public or made available for use or reliance by a subsequent producer of a similar pharmaceutical product. The regulations should impose liability for state officials who receive the information and disclose it to third parties or the public.

Patent Delays

It currently takes 5 to 6 years to obtain a patent in Thailand, far longer than the period taken in the U.S. and other countries where a two-year approval process is standard. When combined with regulatory approval delays, the effective patent term in Thailand can be significantly reduced by this process. PhRMA encourages Thailand's Department of Intellectual Property to increase its manpower and resources in order to examine fully patent applications within 2 years. Patent holders should be compensated with an appropriate extension of the patent term for undue delays that occur.

PhRMA encourages Thailand to join the Patent Cooperation Treaty (PCT), which has been adopted by 128 countries. The PCT, enacted in 1978, offers advantages to patent applicants, national patent offices, and the public in the countries that have joined the system. Instead of filing separate national patent applications with the office of each country in which a patent is sought, the PCT allows an inventor/applicant to file one "international" application in one language and to seek protection simultaneously in all its member states. The effect of such an international application in each "designated state" is the same as if a national or regional patent application had been filed with the national patent office of that country or the relevant regional patent office. The PCT helps substantially reduce the burden on the patent office as the system offers centralized and detailed, high-value information on which approval decisions can be made without having to locally duplicate the information gathering and evaluation process.

Market Access Barriers

Safety Monitoring Period (SMP)

All new chemical entities registered and approved for marketing in

Thailand must undergo a mandatory Safety Monitoring Period from 2 to 4 years. During the SMP, only doctors in hospitals and clinics can prescribe the product and only hospital and clinic pharmacies can dispense it. During the SMP, the product cannot be sold in drug stores and cannot be included in the National List of Essential Drugs (NLED) and thereby is unlikely to receive reimbursement by Thailand's various health schemes. Once the FDA has granted marketing approval there are no legitimate safety reasons for restricting distribution. Because the products under SMP face difficulties receiving reimbursement from government health schemes, physicians are less likely to prescribe them. Because this policy only applies to new chemical entities which are exclusively introduced by multinational companies and not by local Thai generic companies, this policy appears to violate WTO national treatment provisions.

Damage Estimate

PhRMA members estimate that the 2005 damages in Thailand are equal to 12.4% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class for Priority Foreign Countries and Priority Watch List countries. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Thailand	95356	61085	156441	1258451	12.4%

EUROPE

CROATIA

PhRMA members appreciate the continued efforts of the U.S. Government to engage with Croatia to seek greater compliance with international treaty obligations, including the WTO and bilateral agreements. However, despite these efforts, the government of Croatia continues to practice significant market access barriers to sales of pharmaceutical products in a number of ways: The government severely interferes with the market value of innovative products by applying a double-marginalization of innovative medicines via the regulation of maximum prices for wholesalers, which must be set at 85% of the average wholesaler price in Italy, France and Slovenia. In Slovenia in turn, wholesaler prices are already fixed by the government at 85% of the average of the wholesale price in Italy, France and Germany. PhRMA companies must either comply with these low price levels or face removal of their products from the reimbursement list, although there is no legislative act that regulates the conditions for obtaining reimbursement status. This highly opaque pricing and reimbursement regime results in delays of reimbursement for innovative products between one and four years from the submission of the respective application and therefore operates as a significant market access barrier.

Furthermore, innovative pharmaceutical companies operating in Croatia continue to suffer from other important market access barriers due to a lack of transparency in product registration and a government policy to protect locally produced products when deciding on pricing and reimbursement of pharmaceutical products.

Despite improvements in intellectual property protection, the Government of Croatia continues to fall short of implementing the bilateral Memorandum of Understanding and thus of providing for effective pipeline protection as well as proper patent enforcement procedures for pharmaceutical products. PhRMA therefore requests that Croatia be placed on the “Special 301” Priority Watch List for 2006.

Intellectual Property Protection

MOU Partially Implemented

In May 1998, the U.S. and the Croatian Governments signed a Memorandum of Understanding concerning protection of Intellectual Property Rights (MOU). Unfortunately, to the detriment of the PhRMA members and other industries, after seven years the effectiveness of the MOU is questionable. In March 2004, under the pressure of the “Special 301” review, it was finally ratified by Croatian parliament. Unfortunately, despite the persistent efforts of the U.S. Government and PhRMA members, Croatia has made legislative changes that

only partially address this issue as it did amend the data protection but failed to implement pipeline protection.

Data Exclusivity and Linkage

In December 2004, the Croatian Pharmaceutical Act was amended to include regulatory data protection⁹. The new rules, which are based on Article 10.1 (a) (iii) of the Human Use Directive, came into force on December 23, 2004. All applications filed after this date are subject to the new rules. However, the Croatian Agency has stated that generic applications submitted before December 23, 2004, are not subject to data exclusivity and therefore original data on which they rely will be not protected.

There is no linkage between patents and the central health regulatory authority to ensure that the health regulatory authority does not provide marketing authorization for unauthorized copies of products subject to patent protection. As a result, copies of patented products are easily registered. This lack of protection has allowed and continues to allow local and other companies to routinely copy pharmaceuticals patented in the U.S. and EU.

Enforcement

TRIPS Article 41 requires WTO Members to ensure that their enforcement procedures permit “effective action” against intellectual property infringement acts and include “expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Although mechanisms for implementation of legal instruments intended for an immediate relief of the plaintiff/applicant or, at least, prevention of greater damage (like temporary measures) do exist in available procedural laws (Law on Enforcement and enforcement clauses of other substantial legislation), the judiciary in Croatia is quite reluctant to apply those mechanisms in patent infringement cases. In addition to that, the system is slow and final resolution of an IP infringement case cannot be expected earlier than an average of four years.

Market Access Barriers

Discriminatory Government Pricing and Regulation

The current pricing regulation is discriminatory and imposes a significant trade barrier on innovative medical products that rely on intellectual property

⁹ Official Gazette 177/2004, *Zakon o izmjenama i dopunama Zakona o lijekovima i medicinskim proizvodima NN 177/2204.*

protection: prices for innovative (imported) products are curbed to artificially low levels by international comparison, while, in comparison, the government allows generic – mostly locally manufactured products – to maintain prices artificially high by international comparison.

According to the pricing regulation in force since July 6, 2004, the maximum wholesale (WHS) price for medicines on the reimbursement list may not exceed 85% the level of the average WHS price in Slovenia, Italy and France. This results in artificially low prices because the Slovenian government also controls prices of innovative products already at 85% of the average of wholesaler prices in France, Italy and Germany. Prices are further pushed down due to the fact that the Croatian price regulation does not take into account the different and leaner structure of wholesale prices in reference countries compared to the wholesale margin structure in Croatia where the wholesale price is composed of the CIP price + customs processing fees of up 2% (not defined by the law) + WHS margin of 8.5%. While the wholesale price setting mechanism applies to both imported and domestically produced products, only in the case of imported products must the customs processing fees be absorbed by the manufacturer. The practice thus discriminates against producers of innovative imported products vs. locally produced products.

Moreover, wholesale prices must be set in local currency by using exchange rates set by the government once a year (usually in July). The price decree does not provide for the possibility of price adjustments reflecting changes in the exchange rate. This discriminates against imported products as they are predominantly affected by this pricing regime whenever the Croatian currency devaluates against hard currency.

The reimbursement process of pharmaceutical products

The reimbursement decisions of the Croatian national sick fund lacks any kind of objective and verifiable criteria for the inclusion on the reimbursement list. There is no legislation regulating the reimbursement procedure in Croatia and it does not follow Transparency Directive guidelines. Reimbursement decisions cannot be appealed to a judicial authority. There is no administrative procedure, nor any guidelines given by the Government or the national sick fund regarding the reimbursement procedure and the timeline of the process. There is no formal time frame for the Government to review applications for reimbursement.

Where reimbursement is sought to be maintained from one year to the next, the government often periodically requests random price concessions in a legal vacuum to the disadvantage of imported innovative products favoring locally produced products: for example, over the last three years, under the threat of being removed from the reimbursement list, innovative products suffered several government mandated price reductions in the 10-20% range, while, at the same time, mostly locally produced generic products were allowed to maintain prices at

the previous level or to even increase their prices. For the 2005 reimbursement list, 15 reimbursement applications for imported innovative products were summarily rejected based on a cost estimate of \$3.5 million that would otherwise occur, while at the same time, 32 older and locally manufactured products were added to the reimbursement list with a price increase and a budget impact of approximately \$6 million.

These practices of the Croatian government translate into delays for reimbursement of innovative imported medicines, and pose serious market access hurdles that could result in delays for patients to access innovative medicinal therapies.

This discriminatory price and reimbursement mechanism violates Croatia's international obligations under the WTO and the U.S.-Croatian Treaty on the Encouragement and Reciprocal Protection of Investment.

Every imported batch undergoes analysis

The Institute for Drug Control continues to analyze every single batch of drugs imported to Croatia, a requirement that only negatively affects imported products by increasing costs and causing delays for months before being admitted to the Croatian market.

Payment currently processed in 170-190 days

Producers and wholesalers are de-facto financing the deficit of the Croatian health system due to the fact that they are receiving payments for delivery only with a delay of 170-190 days for medicines delivered by pharmacies and 230-280 days for hospital drugs. This delay period has been growing continuously over the past three years from an initial delay period of 120-180 days. This represents another significant trade barrier and causes interruption in the supply of medicines.

CZECH REPUBLIC

Market access barriers are the area of greatest concern for PhRMA members operating in the Czech Republic. The Czech systems for determining pricing and reimbursement levels for pharmaceutical products constitute significant and discriminatory barriers to imported biomedical innovation, particularly innovation of U.S. origin. These and other market access barriers in the Czech system restrict access by Czech patients to advanced life-saving medical treatments developed by U.S. companies.

In light of these measures and others discussed below, PhRMA members recommend that US government agencies identify the Czech Republic as a Priority Watch List country under the 2006 annual “Special 301” review process and initiate high-level consultations to resolve these issues as a commercial priority. We applaud the increased attention to these difficult issues by USTR and other U.S. agencies, and strongly support their efforts.

Market Access Barriers

A range of Czech Government market access barriers deny innovative, patent-protected pharmaceuticals full access to the Czech market. The most important barrier, and the issue of greatest concern to the pharmaceutical industry, is the Czech government’s use of “therapeutic reference pricing,” which links reimbursement for patented and non-patented products. The Czech government’s maximum pricing system for pharmaceuticals also discriminates against all imported products. The reimbursement and maximum pricing systems are completely non-transparent. Other choices made in the Czech regulation of pharmaceutical products – such as positive lists, prescribing limitations, and individual physician prescribing budgets – also directly or indirectly limit access to the market for innovative pharmaceuticals.

Reimbursement Criteria

The Czech Government uses a therapeutic reference pricing (TRP) system for setting reimbursement rates for medicines. This system discriminates against imports in violation of Czech obligations under Article III:4 of GATT 1994, as well as Articles 2.1 and 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT). More specifically, this regulation represents an unnecessary and unjustified barrier to international trade because it discriminates against and functions as an obstacle to innovative products, all of which are imported (the Czech Republic produces none), and is without scientific or technical justification.

The TRP system clusters products into therapeutic groups. A patient prescribed any of the medicines in a cluster will be reimbursed the same amount

(usually the price of the cheapest product in the cluster) no matter whether the product is patented, off-patent or an infringing copy. In rare cases, the government does award a reimbursement premium to a patented molecule. However, any reimbursement cut for the generic molecules nearly always triggers corresponding reimbursement cuts for the branded molecule.

If the government cuts the reimbursement for a drug below the market price, patients must make up any difference out of their own pockets. Whenever reimbursement cuts target innovative drugs for significant co-payments, these co-payments inherently and negatively target imported drugs, as the innovative U.S. company is either forced to lose its market to low-priced generic competitors, or to meet the price of the cheapest generic in the group. When a new generic enters a therapeutic group, it can trigger reimbursement cuts for all products in the group, including not only the branded counterpart to the generic, but also other products still protected by patents.

- For example, after the first Czech manufactured generic sartan entered the Czech market, the Czech government reduced reimbursement of all sartans by 60%. As a result, the patented imported sartans collectively lost 70% of market share to generics within 6 months. Since 2001, as new Czech generic statins have entered the market, the government has cut reimbursement for statins over ten times, leading to direct losses incurred by U.S. based firms of more than \$14 million in 2003, and cumulative losses of more than \$36 million.
- Since the launch of a locally produced generic, reimbursement for ACE Inhibitors has been reduced over the past three years by up to 26%, which has led to direct losses for U.S. based firms estimated at US\$1 million in 2003.
- In the case of proton pump inhibitors, reimbursement is referenced to a domestically-produced generic omeprazole, even for innovative, patent protected molecules. New molecules are not able to access the market at all, leading to losses estimated at nearly \$2 million in 2003 alone.

Grouping patented products with generics and linking reimbursement for patented and generic products forces prices for imported patented products towards those of domestically produced generics. Such linkage undermines the value of pharmaceutical patents in that market segment. Through the operation of this regulation, the Ministry of Health (MOH) and the insurance funds are effectively operating a purchasing cartel and are jointly fixing a maximum price that aims to prevent, restrict or distort competition. At the same time, it heavily favors the local generic manufacturers, who almost always are producing the generic competitors to imported patented drugs. An effective remedy against this is denied to manufacturers at the local level (see below) and whether a remedy

may be available under European law is subject to a referral to the European Court of Justice.

The TRP system violates GATT Article III:4 because it accords innovative products, which are exclusively imported, treatment less favorable than generic like products, which are predominantly of domestic origin. Innovative products and their generic counterparts are “like products” for WTO purposes, even though the innovative product is of superior quality, because the products compete in the same market, have similar physical characteristics, treat the same illness, are administered in the same manner, and have the same tariff classification. As between these like products, the TRP system treats innovative imports less favourably than generic domestic products by effectively reducing prices for innovative products toward the level of generic products

The TRP system also violates Articles 2.1 and 2.2 of the TBT Agreement. The system is a “technical regulation” under the TBT Agreement because it is set forth in a “document” (*i.e.*, statute and regulation), which “lays down product characteristics” (*e.g.*, ingredients and therapeutic effects) with which “compliance is mandatory” (*i.e.*, reimbursement are fixed and binding for all products in same category). The system violates Article 2.1, which requires technical regulations to accord innovative imports treatment no less favorable than like generic products of domestic origin, for the same reasons described above for GATT Article III:4.

The reimbursement system also violates Article 2.2 which proscribes technical regulations “more trade restrictive than necessary to fulfil a legitimate objective.” If the objective of the system is to curb health care costs in the Czech Republic, that objective could be achieved in a number of ways less trade restrictive than a measure that burdens virtually all imports and no domestic products.

Government Price Control Discrimination

The Czech Republic’s pharmaceutical price controls also discriminate in violation of Article III: 4 of GATT 1994 and Articles 2.1 and 2.2 of the TBT Agreement. The Czech Ministry of Finance has its own separate system of maximum price controls for all pharmaceutical products sold in the Czech Republic. The Ministry’s price regulation states that maximum prices for domestically produced drugs are to be determined based on “economically justified cost and adequate profit” in the prior year, “adjusted by reasoned development of economically justified cost and adequate profit” in the following year. But the maximum price for imported products is set by the Ministry using a non-transparent process, and then every year, the Ministry again reviews maximum import prices using a non-transparent process with no clear criteria. In the case of imported products, the cost of production and the profits generated by the manufacturer are clearly not incorporated into the Ministry’s pricing

decision because such data is not requested by the Ministry. The annual review frequently leads to government-mandated decreases in maximum prices for imported products.

This preferential pricing system for domestically produced drugs represents a clear *de jure* violation of the Czech Republic's obligation under GATT Article III:4 because all imported pharmaceuticals are afforded less favorable treatment than all like domestically produced pharmaceuticals. The system is also inconsistent with Article III:9 because it is an internal price control measure that, by exclusively burdening imports, makes no attempt to avoid the prejudicial effects on the export interests of other WTO Members.

As with the TRP system, the Czech price controls also violate Articles 2.1 and 2.2 of the TBT Agreement. First, the pricing system is a "technical regulation" as it is a "document which lays down product characteristics" which include the basic ingredients of the drug and the method by which the drug is administered. Second, compliance with the product characteristics set forth in the measure is mandatory. If a drug matching the characteristics of a drug listed in the measure is to be placed on the market in the Czech Republic, the price of that drug cannot exceed the price listed in the measure.

The TRP system violates Article 2.1, which requires technical regulations to accord imports treatment no less favorable than like products of domestic origin. The reimbursement system also violates Article 2.2 which proscribes technical regulations "more trade restrictive than necessary to fulfil a legitimate objective." Indeed, by burdening all imports while favoring all domestic products, the Czech pricing system is arguably the most trade restrictive alternative, not the least.

Lack of Transparency

Both the Czech reimbursement and price control processes are non-transparent. The implementation of the reimbursement process is managed by a so-called Categorization Committee, which is an administratively-established advisory body to MOH. The Categorization Committee recommends the level of reimbursement for various therapeutic groups to the Minister of Health, who then sets final levels of reimbursement by Ministerial Decree. The Czech Government's procedures for making these determinations lack basic safeguards for fairness and transparency:

- no criteria for determining what level of reimbursement particular therapeutic groups will receive; decisions are arbitrary and unexplained ;
- no meaningful dialogue between the manufacturer and the evaluators to discuss the science behind an innovative drug's additional therapeutic value;

- no defined timelines for the categorization process, and
- no effective legal protection or control over the implementation of the reimbursement process. Any appeals to reimbursement decisions may only be made to MOH, which is the original deciding body, and there is no opportunity for appeal to independent judicial bodies.

The Categorization Committee's findings are only recommendations, and the Minister may make any changes to the levels of reimbursement without consulting Committee, and discriminate in favor of domestic generic producers. Industry cannot be a member of Categorization Committee. In the past, although industry had no voting rights, industry could participate at Categorization Committee meetings as observers. This represents a deterioration in the situation.

Like the reimbursement process, the government's process for controlling maximum import prices is non-transparent, with no established criteria, no defined process for determining the level of maximum prices, no established criteria for determining possible annual reductions in maximum prices, no consultation between the decision makers and affected companies, and no possibility for appeal. The EU Commission has officially taken up industry's Transparency Directive complaint on these issues.

Delays in Reimbursement

The Czech reimbursement system operates with a so-called "positive list". Only drugs specifically included in the Categorization Decree may be reimbursed regardless of whether they have regulatory approval. The government has no defined timelines for inclusion of new molecules in the reimbursement system, and frequently intentionally delays inclusion of new, innovative drugs in the Categorization Decree without valid reasons. For example, in the latest Categorization Decree, MOH refused to include one new molecule despite the fact that the manufacturer had submitted all required data on time, the drug had regulatory approval, there were no other therapeutically equivalent products on the market, and the drug treated a critical health condition. These delays violate Article 2.2 of the WTO TBT Agreement, because the decrees are "technical regulations" that the Czech Republic has "prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade." The failure to observe appropriate deadlines also runs afoul of the EU Transparency Directive. During the delay, the clock keeps ticking on the period of patent exclusivity, shortening the period of patent-protected market access.

Demand Controls

The Czech government also artificially suppresses demand for pharmaceuticals, targeting imported innovative, patent-protected molecules. The

government uses a system of prescription and indication limitations, limiting which medical specialties may prescribe certain medications. These limits severely suppress demand for the products they restrict, lack any medical basis, and are applied in a discriminatory fashion. The government typically removes all prescribing restrictions on a drug when the patent expires on an imported drug, and a generic product (almost always domestically produced) enters the market. For many years, general practitioners were only permitted to prescribe the generic antidepressant fluoxetine, and all imported patent-protected antidepressants could only be prescribed by psychiatrists. As soon as the patents on the other antidepressants expired, and the local manufacturers launched generic versions, the government immediately removed all prescribing limitations on antidepressants. The same type of discriminatory changes happened with sartans.

The prescription limitations violate GATT Article III:4 and TBT Articles 2.1 and 2.2. As with the measures discussed above, the prescription limitation clearly accords innovative imported products treatment less favorable than like products of domestic origin. In addition, the prescription limitations are covered by and inconsistent with the TBT Agreement. They are “technical regulations” because they document that set forth “product characteristics” (*i.e.*, ingredients) and “applicable administrative provisions” (*i.e.*, the naming of medical specialties) “with which compliance is mandatory.” These technical regulations discriminate against innovative imports as compared to like products of domestic origin, in violation of TBT Article 2.1. In addition, by disproportionately burdening imports, the prescription restrictions impose an unnecessary obstacle to international trade.

Finally, the Czech government operates a system of individual physician prescribing budgets, under which each physician’s prescribing of drugs is monitored and compared with previous prescribing levels. An individual physician who prescribes more in a given period than in the previous period faces substantial financial penalties, and a physician who prescribes less is financially rewarded. This system serves as an effective brake on demand, particularly for higher priced drugs, because the budget is based on the price of drugs, not on the volume of drugs prescribed. While this system affects demand for all pharmaceuticals, because imported innovative drugs are generally more expensive than domestically produced generics, they are disproportionately affected. Thus, the measure accords innovative imports treatment less favorable than like products of domestic origin, in violation of GATT Article III:4. Physicians are controlled and assessed not only on the basis of their previous prescription budget, but in terms of a comparison to the average budget in the previous period of other physicians in the same area of specialization.

FRANCE

France's healthcare system employs a number of cost-containment mechanisms that create market access barriers harming products heavily dependent on intellectual property rights. French policies could have a long-term detrimental effect on the development of the innovative pharmaceutical industry by weakening the environment for pharmaceutical research and innovation worldwide.

Specifically, the numerous cost containment tools and strict budgetary limits for pharmaceutical expenditures substantially reduce research and development incentives in France. Delays in access to market for innovative medicines still represent a weakness of the French pharmaceutical pricing and reimbursement scheme, which further penalizes the research-based industry. Furthermore, repeated changes in the rules governing the commercial aspects of the pharmaceutical market create an environment that is unpredictable and unstable.

In addition, the EU ban on patient information, as applied nationally in France, bars French patients from making informed choices about their healthcare. This has a direct and disproportionate impact on access of new and more effective innovative medicines, to the French market.

PhRMA is encouraged that the French Government recognizes the seriousness of the problem, and is taking steps to reform its healthcare system and to improve French competitiveness. We recommend that the U.S. Government elevate these issues in the bilateral commercial agenda with France to achieve measurable progress in advancing U.S. commercial priorities. PhRMA therefore requests that France be placed on the "Special 301" Priority Watch List for 2006.

Market Access Barriers

Unsustainable Healthcare Budgets

The French global healthcare budget, which is set annually by the Government, consistently fails to reflect actual expenditures based on realistically assessed needs. Because the budget is set at unrealistically low levels, it is exceeded every year, and the cost of budget overruns is routinely passed on to industry. This means that PhRMA members are required to fund a significant part the Government of France's regular and expected health care expenditures on a recurring basis. More specifically, as part of the healthcare reform law that passed in August, French health care budget growth has been capped at 1 percent for each of the next three years. This is inadequate. PhRMA members

will be expected to bear a disproportionate level of the inevitable budget overruns that result from this decision, as compared to other health care players.

In addition to the foregoing, the French Government has proposed an increase in the turnover tax from 0.6 to 1.96 percent in the French 2006 Social Security Financing Bill. This new tax would add an additional €300 million tax burden on industry.

Finally, there are additional cost-containment measures proposed in the 2006 Bill which affect medicines sold by hospitals, including a so-called “safeguard clause” for drugs for ambulatory patients, as well as growth targets for high end products. These measures violate the spirit of the Hospital Framework Agreement because they were imposed upon industry outside of the agreement.

PhRMA members ask that the U.S. Government raise these issues as a commercial priority in bilateral consultations, and would suggest that the Government of France build on past reforms in the following areas to achieve additional budgetary savings in a fair and rational way:

- Better utilization of rational prescribing guidelines to reduce over-prescribing;
- Further delisting from reimbursement of homeopathic and other non-traditional treatments, as was effective in reducing cost-overruns in Germany;
- Promotion of generic competition within therapeutic classes and reduced utilization of branded generic products which entail a price premium; and
- Expansion of private insurance options and use of co-payments to encourage more informed choices by patients in France.

Government Price Controls

Government-imposed price controls fail to recognize and reward innovation and constitute an additional market access barrier which harms makers of pharmaceutical products dependent upon intellectual property protection. In France, prices of reimbursable pharmaceuticals are fixed by the state. To be reimbursed by the national health insurance fund, reimbursement status must be granted by the Transparency Committee (Commission de Transparence), and a reimbursement price must be negotiated with the Economical Committee for Health Products (CEPS).

All registered pharmaceuticals are subjected to Evaluation of Therapeutic Benefit Improvement (Amélioration du Service Médical Rendu: ASMR) which

determines the level of Government reimbursement for the product. The Transparency Committee has the competence in assessing the efficacy and the safety of a product; the ASMR evaluation is based on the expert judgment, itself exclusively based on clinical criteria. While this evaluation is rarely contested, the industry often disputes the ASMR classification made as a result of the data analysis. Currently, several relevant elements are not taken into account such as the social utility, overall public health interest, and the impact on the health care system.

PhRMA members believe that the evaluation process should include more innovative products to provide reward for innovation. For example, under the present system, only a limited number of patented pharmaceutical products fall under the favorable ASMRs and most products instead fall under the undesirable ASMR IV category which does not provide premiums for innovation. The criteria used to limit the number of products included in ASMR I and II should be relaxed to better reflect innovation, broaden the number of relevant parties in the review process and provide effective due process, including an appeal process. Medicines receiving the ASMR I and II ratings, and for ASMR III with sales of less than €40 million, can be placed in the market following the price notification procedure at the European average price, PhRMA members believe that this process should be extended beyond five years to ensure an adequate return on investments in innovative products.

Ban on Information to Patients

Like other EU Member States, France has imposed strict prohibitions on the marketing and advertising of innovative medicines from European to French law. Specifically, Article 88 of European Parliament and Council Directive 2001/83/EC requires EU Member States to prohibit all advertising of prescription medicinal products to the general public. Under a strict interpretation of the Directive, pharmaceutical company web sites directed to the general public may contain only unedited copies of the labeling and assessment reports produced by government agencies, without any product-specific information from the company itself -- no matter how accurate, up-to-date and balanced that information may be. Such key product information also cannot be available through other mechanisms, such as print media.

A ban on such helpful information has many adverse consequences: it prevents patients from making informed choices, it impedes market access of new innovative medicines that are least familiar to patients in terms of their beneficial properties (and which often are imported), and it puts non-English speaking patients in France at a huge disadvantage because they can not obtain valuable information in their own language.

Additional Market Access Barriers

The Government of France at times has imposed artificial limitations on the quantities of specific pharmaceutical products that may be sold. In many cases, this may pose a direct threat to human health, particularly in areas where a large cross section of society may gain a preventative health benefit from access to medicines. Statins are an important example of this. Volume constraints should be based on medically justifiable quantities (number of patients eligible to be treated for approved indications) and not on financially affordable quantities.

The authorities should also strive to eliminate delays in providing market access for PhRMA members' new, most innovative products. Such access takes an average of 360 days, way beyond the EU statutory limit of 180 days.

Overall, PhRMA members request that the U.S. Government engage in dialogue on all of the above issues, and urge that the Government of France not adopt policies that would worsen the existing situation through measures such as:

- Additional volume constraints,
- Pushing more products to ASMR III, IV and V. and,
- Making existing price/volume constraints on hospital sales more restrictive.

Finally, as is the case in other EU countries, the inability to communicate with patients poses a significant market access barrier. We urge the French Government to work at the European level to modify the prohibition against information to patients in Europe.

ITALY

PhRMA members are deeply concerned over trends in the government regulation of pharmaceuticals in Italy. During the last four years, the Italian Government has tried to control pharmaceutical expenditure through price reductions, price cuts, reference pricing for some drugs, reviews of formularies and mandatory discounts. These constant changes have reversed a trend toward a more market-driven environment.

What is most troubling is the lack of a transparent and open, dialogue-based, decision-making process that recognizes industry as a valuable healthcare contributor and provides for a stable and predictable environment for doing business within the country. The level of the industry's concern has risen so high as to merit action against the Government of Italy for infringements of the EU Transparency Directive. A complaint was brought to the European Commission in September 2002 and is still pending.

The EU ban on patient information, as applied nationally in Italy, also merits mentioning. It bars Italian patients from making informed choices about their healthcare. This has a direct and disproportionate impact on new and more effective innovative medicines, which increasingly are being developed outside of Italy in the United States. PhRMA therefore requests that Italy be placed on the "Special 301" Priority Watch List for 2006.

Market Access Barriers

Government Pricing and Restrictive Reimbursement Policies

In June 2004, the Government adopted a law establishing a ceiling for pharmaceutical spending. Pharmaceutical spending at the pharmacy level cannot exceed 13 percent of 2004 healthcare expenditures (or 16 percent including hospital sales). If these ceilings are exceeded, the "excess" amount that the Government spent on pharmaceutical purchases for Italian patients must be paid by the pharmaceutical industry (60 percent) and the regions (40 percent). These government paybacks were a significant concern for the industry, because local Italian interests, such as pharmacists and wholesalers and/or distributors, were not required to pay the payback.

Payback was accomplished through a mandatory discount of 6.8 percent in ex-factory price of pharmaceutical products, equivalent to 4.12 percent of the retail price, VAT included. Application of this mandatory discount started on July 2004 and ended in October 2005.

The Italian Government measures to cover pharmaceutical overspending in 2005, include a price cut of 4.4% to be applied to all drugs and a mandatory

discount of 1% to be applied to ex-factory price to retail sales. based on a €500 million/13 percent pharmaceutical cap or €800 million/16 percent pharmaceutical cap when hospital sales are included. These measures are a part of the 2006 Financial Act.,

Drug Formulary Revision

In 2002 and 2004 the Government introduced revisions of the National Formulary that includes all the drugs reimbursed by the National Healthcare system to the Italian citizens.

The first list, in 2002, introduced a cut-off limit to the reimbursement inside several therapeutic classes, damaging high priced innovative drugs.

The second revision was addressed to those drugs that have registered a sales increase higher than the industry's average, in the first half of 2004. Starting January 2005, government reimbursement prices for these products were cut by up to 10 percent (in addition to the 6.8 percent discount on the ex-factory price). Wholesaler and pharmacist margins were only partially impacted. These government imposed price reductions affected 56 active ingredients. Innovative drugs are among those most targeted for price cuts. They included statins, proton pump inhibitors, sartans, diuretics, beta-2 adrenergic and ACE-I. The reimbursement list ended at the end of 2005.

Discrimination vis-a-vis Other Parts of Healthcare System

The Government's focus on controlling pharmaceutical expenditures is unique relative to other expenditures within Italy's National Healthcare System (NHS). While pharmaceutical expenditures are capped at 13 percent of the NHS budget, no other category of healthcare expenditures faces similar budgetary restraints or limitations.

The Government's singular focus to realize cost-savings within the pharmaceutical sector has been further compounded by the fact that, as mentioned previously, pharmaceutical companies alone have been mandated to pay the payback/price cut while pharmacists and pharmaceutical wholesalers remain untouched. In 2006, pharmacists and wholesalers are included in the price cut, for the first time.

Ban on Information to Patients

Like other EU Member States, Italy has imposed strict prohibitions on the marketing and advertising of innovative medicines from European to Italian law. Specifically, Article 88 of European Parliament and Council Directive 2001/83/EC requires EU Member States to prohibit all advertising of prescription medicinal products to the general public. Under a strict interpretation of the Directive,

pharmaceutical company web sites directed to the general public may contain only unedited copies of the labeling and assessment reports produced by government agencies, without any product-specific information from the company itself -- no matter how accurate, up-to-date and balanced that information may be. Such key product information also cannot be available through other mechanisms, such as print media.

A ban on such helpful information has many adverse consequences: It prevents patients from making informed choices, it impedes market access of new innovative medicines that are least familiar to patients in terms of their beneficial properties (and which often are imported), and it puts non-English speaking Italian patients at a huge disadvantage because they can not obtain valuable information in their own language.

Regulatory Approval Delays and Reimbursement Limits

In the period 2002-2004, the average time to market in Italy for drugs approved by the European Medicines Evaluation Agency has increased from 6 to 18 months. The creation of the new Italian Drug Agency (AIFA) has partially reduced timings, but they still remain significantly above the EU average.

Delays occur when a drug is presented to the Agency for pricing and reimbursement. Some PhRMA members cite delays of six months just between the time submissions are first made to the Agency and the beginning of negotiations with the Agency. In addition, if a new drug belongs to one of the classes that was or is being reviewed and its price is severely cut back, there is minimal reward for developing or marketing the drug in Italy.

Additional restrictions to the market access come from the reimbursement limitations such as:

- Notes for GPs that exclude reimbursement for several indications;
- Special programs or projects that limit reimbursement of new drugs to clusters of patients selected by local health authorities
- Classification of those new highly innovative drugs to H class, that limits the delivery of those drugs inside public hospitals

Referring to this last limitation at regional and local level, hospitals need an additional time of 3-6 months to include the new drugs, already approved by the National Drug agency, in their formularies.

Industry Complaint against the Government of Italy under EU law

In late 2002, PhRMA filed a complaint with the EU concerning an Italian decree that, among other things, imposed a 5 percent reduction in the selling prices of all medicinal products, a 50 percent reduction in spending on scientific

conferences held outside of Italy, and new labeling requirements for the outer packaging of medicinal products. These measures contravened a variety of EU laws, particularly EU rules on transparency. While EU authorities have taken some steps to pursue this complaint, no final action has been taken to address the Italian measures. The legal changes described above have only made matters worse. PhRMA members remain concerned about Italy's practices in regulating pharmaceuticals and believe it is important for the EU to take appropriate action to ensure its members are acting consistently with EU rules.

RUSSIA

Trade in the Russian pharmaceutical sector continues to be impeded by the failure to protect commercially valuable test data, poor enforcement of intellectual property rights, and non-transparent regulatory procedures in registration and quality controls. New adverse regulations for pharmaceuticals were introduced or were under consideration by the Russian parliament and government bodies in 2005 despite WTO accession negotiations. PhRMA therefore requests that Russia be placed on the “Special 301” Priority Watch List for 2006.

Intellectual Property Protection

Data Exclusivity

Russia currently does not provide data exclusivity. The current Russian Law on Medicines does not distinguish between originators and copiers and, in theory, requires both to provide “results of clinical and preclinical tests” to gain marketing approval of their drugs. In practice, generic companies register their drugs and do so in the absence of any serious clinical or preclinical data through an arbitrary procedure.

Contrary to TRIPS Article 39.3, this legal regime fails to ensure that no person may, without the permission of the person who generated and originally submitted the data, rely on such test data in support of an application for product approval. This has left the U.S. research-based pharmaceutical industry vulnerable to copying by domestic and foreign generic companies prior to the end of a term when proper data exclusivity would have expired.

Current proposals for changing the Russian Medicines Law would permit Russian authorities to continue their current practice of accepting - on their face - the validity of documents provided by Russian generic manufacturers without looking into the validity of the documents for registration or their claims. Such a “positive approach” rests on the premise that Russian MOH officials will act in good faith in implementing the proposed law. However, recent statements and discriminatory actions by Russian MOH officials that favor local companies over importing companies in determining access to the newly launched federal reimbursement program demonstrate that Russian officials are determined to favor local over imported pharmaceutical products.

To be compatible with TRIPS Article 39.3, Russian law needs to be amended to require non-reliance for a period of at least five years and non-disclosure of confidential information and to provide for procedural safeguards that will permit the proper and timely enforcement of the law.

Neither the Russian Law on Medicines, nor the Russian Law on Trade Secrets, nor the Russian Competition Law contains specific provisions regarding the non-disclosure of test data on new drugs. In fact, rule changes in February 2005 by the agency overseeing dossier submissions weakened protection for confidential data.

Enforcement Concerns

The current legal system is not equipped to penalize violations of intellectual property rights and problems remain in the administration and adjudication of patent disputes and violations of registered patents. Current penalties for intellectual property rights violations are not adequate to compensate for the injury the rights holder has suffered from the infringement of their intellectual property rights.

Trademarks

Trademark infringement has been permitted and sanctioned through the registration of trademarks very similar to the original trademark. There have been some positive signs of enforcement in court cases on trademark infringement, but overall enforcement remains a problem.

Ban on Use of Pharmaceutical Trademarks in Prescribing

New federal reimbursement rules arbitrarily issued by Russia's Roszdravnadzor in May 2005 require doctors to only prescribe medicines using non-proprietary names and not use trademarks. Furthermore, an amendment to the Law on Medicines was approved by the Russian parliament in July 2005 that intends to ban the use of pharmaceutical trademarks completely in all prescribing, as well as in government purchases. President Putin has indicated his opposition to this legislation.

Counterfeiting

There is weak enforcement against counterfeit medicine producers, three quarters of which are produced domestically representing 4 to 12% of the market. Russian law does not specifically criminalize pharmaceutical counterfeiting and injunctions are not applied. A definition of a "pharmaceutical counterfeit" was introduced in the Law on Medicines in August 2004, however, no related prosecution articles have been added in the criminal and civil legislation. There is no procedure for evidence gathering and acceptance by courts to facilitate court proceedings in counterfeit cases. Penalties for trademark infringement are completely inadequate to serve as deterrents and compensation to trademark owners is not commensurate with losses. The main article of Russian legislation currently applicable in cases of pharmaceutical counterfeits is the one that addresses trademark infringement. However, the Criminal Code can

only be applied in cases of numerous violations or involving a large damage, and even so the liabilities are inadequately low (\$5000 to \$8000 maximum). The liability set in the Administrative Violations Code is even less (\$1400 maximum). The Russian parliament has been debating a potential increase in criminal and administrative liabilities for several years but nothing has been done so far.

Market Access Barriers

Reimbursement Procedures

Government reimbursement decisions are not made based on objective and verifiable criteria. Mechanisms for purchases of reimbursed drugs and tenders are non transparent. Foreign firms are often discriminated against in tender processes. Lists for state purchases are drafted with virtually no transparency and little concern for quality and safety interests. Such criteria are neither contained in the legislation nor practiced by the authorities. In addition, no appeal procedures for reimbursement decisions are provided.

The drug listing/delisting process for the new federal drug reimbursement program instituted in 2005 was highly opaque with little information available in written form. No criteria were announced. No recourse or independent appeal procedure was available.

Marketing Approval

Significant delays for marketing approval exist in part because the lengthy, non-transparent local process requires duplicate clinical trials. Arbitrary fees are discriminatory to foreign companies and are not charged directly by the state registration body but instead by a third-party not stipulated in the Law on Medicines. Unnecessary requirements for re-registration (every five years) and corresponding discriminatory fees for foreign companies are imposed. An Amendment to the Law on Medicines adopted in first reading by parliament in July 2005 imposed a requirement for the re-registration of medicines in case "other data" submitted during registration changes. This vague terminology opens room for corruption.

Quality Assurance and Mandatory Certification

Rules regarding state control of medicines are excessive, administered arbitrarily, and not harmonized with international practice. Control procedures are carried out in a non-transparent manner: not by the responsible state body but by various opaque third parties who obtain access to confidential data on preclinical and clinical trials and impose their fees and terms on applicant companies unilaterally. Companies have no recourse since if they don't comply they would not obtain registration or other required certification. Control procedures entail

provision at cost to manufacturer of samples, which are not returned to the company. The number of samples is set arbitrarily.

Clinical Trials Tax

Medicines imported for clinical trials incorrectly receive a VAT levy of 18% instead of 10% levied on medicines imported for sales because the Russian Government has failed to issue a list of medicines, pursuant to the tax code. Issuance of such a list would eliminate custom officials' ability to levy the wrong 18% VAT levy on medicines imported for clinical trials. This higher tax rate impinges the ability of companies to perform obligatory clinical trials, represents a clear barrier to trade, and may result in a loss of opportunities for Russia to attract a greater number of clinical trials.

Import Regulation

In July 2005, the Russian government issued new rules regarding import of pharmaceuticals where instead of a widely expected lifting of the import license it set a new provision allowing a restriction on import of pharmaceuticals on an unspecified ground by a government decision or an international treaty. No justification, criteria, procedure or any further details are provided in that decree with regard to its application. In addition, the Ministry of Health (MOH) indicated it was contemplating changes to the Law on Medicines that would ban import of pharmaceuticals by foreign companies.

Import License for Medicines

The current procedure for obtaining a pharmaceutical import license is duplicative and involves unjustified costs. To obtain a license, according to the July 2005 decree issued by the Russian Government, an applicant has to go now through three agencies: i) Narcotic Committee; 2) Roszdravnadzor and 3) Ministry of Economy (MEDT). Then a license has to be registered with the Federal Customs Service. Associated fees include: i) a fee collected by a third party appointed by Roszdravnadzor which is not commensurate with service but rather is unfairly calculated as a percentage of the contract value, and ii) a fixed nominal fee collected by the MEDT. The MEDT has often stated their view of this license as unnecessary, however, a government decree issued in July 2005 has reinstated the requirement for that license instead of eliminating it. The Decree also failed to specify a fee or a full timetable for the license issuance.

SLOVENIA

The Government of Slovenia has managed to a substantial extent to align national pharmaceutical legislation with the EU standards. However, it continues to fall short of fully providing transparency especially in the area of clear deadlines and possibility to appeal. PhRMA members continue to suffer from market access barriers, including a lack of transparency in the government pricing and reimbursement systems for pharmaceuticals and also a mandatory 85% price level compared to EU countries, while generic products are rewarded with a 95% price level. PhRMA therefore requests that Slovenia be placed on the “Special 301” Priority Watch List for 2006.

Intellectual Property Protection

Data Exclusivity

As a Member of the European Union (EU), Slovenia was obligated by November, 2005 to implement the new harmonized regulatory data protection contained in the Future of Medicines Legislation (so-called “8/2/1” protection) that was enacted on May 1, 2004. At the time of this submission, Slovenia had still failed to implement the appropriate legislation. Under “8/2/1,” a subsequent applicant that seeks to rely on the originator’s data may not file an application during the eight years following marketing approval of the originator’s product. If the applicant files after eight years, it may not market its product until ten years following marketing approval of the originator’s product. Thus, an application for marketing approval of a subsequent product based on the same active ingredient may not rely on the originator’s data during the first eight years of the exclusivity. The legislation also provides for one additional year of exclusivity for all indications, if the originator conducts additional clinical research to develop a new indication of significant clinical benefit over what is available and receives marketing approval for the new indication during the first eight years of marketing authorization. “8/2/1” protection will significantly improve the level of data protection in Slovenia.

Enforcement

Attempts to enforce existing process patents in the Slovenian courts have been largely unsuccessful. The Slovenian courts have repeatedly denied TRIPS enforcement measures such as preliminary injunctions and the reversal of the burden of proof. Several cases on intellectual property against domestic pharmaceutical companies have been pending in Slovenian courts for four to seven years, due to inaction by the courts or inappropriate delays. This results in a de facto denial of fair and equitable enforcement of intellectual property rights as provided for in TRIPS Article 41.

In addition, current damages for intellectual property rights violations are not adequate to compensate for injuries, and it is also rare that the infringer is ordered to pay the right holder's expenses associated with the defense of its intellectual property rights, or ordered to pay profits. These problems are especially acute in pharmaceutical IP litigation due to the strength of local producers. Slovenia should be required to act in compliance with TRIPS Article 45.

Appeals periods can be as short as 8 days and may not be extended even after years of litigation. This often prevents a non-Slovenian speaking plaintiff from effectively analyzing and preparing a proper appeal. This creates unfair conditions for foreign plaintiffs and favors local defendants, which goes against the TRIPS Article 41 requirement for fair trials. Practice in Slovenian court limits choice of experts (pharmaceutical, chemical or other) whose opinion is often decisive for the outcome of the litigation, to experts from Slovenia. Given the limited number of experts available in an environment dominated by the influence of the local copy industry, this often guarantees experts aligned with the local industry. Overall, the enforcement system inherently favors local companies and obviates fair enforcement of intellectual property rights against local infringers.

Lack of Pipeline Protection

Product patent protection became available in 1993, and there is no pipeline protection in Slovenia. The majority of currently marketed pharmaceutical products, as well as those that will be launched in the next few years, are protected in Slovenia only by a process patent, and are exposed to easy copying by local firms. The Slovene regulatory authority, Agency for Drugs, does not consider patents held by the originator when a generic is submitted for registration. Unless appropriate pipeline protection is provided, it will not be until 2013-2018 (20 years from introduction of product protection plus up to five years patent term restoration) that the full product portfolio of research and development companies will enjoy the same level of protection available today in the U.S. and most of the EU. This lack of protection has allowed and continues to allow local and other companies to copy pharmaceuticals patented in the U.S. and EU. The absence of pipeline protection in Slovenia has contributed to a situation where there is little effective protection for patented pharmaceutical products.

Market Access Barriers

Lack of Transparency of Government Pricing and Reimbursement

In August 2005, Slovenia issued new pricing regulations, but they are not followed in a transparent and predictable manner; government pricing decisions are not based on objective and verifiable criteria.

Particularly burdensome for innovative industry is the Government's practice of setting the wholesale price of medicines at 85% of the average price (ARP) in 3 reference countries (France, Italy and Germany).

The first product registered in Slovenia or in the EU at the ATC IV level is calculated at 96% of the average of the three reference countries, but usually only for a period of one year. When a second drug in the same class (even if it is a different molecule) enters the market, both products' prices must be adjusted to 85% of the ARP. The same system also applies to early copies of original medicines which are primarily locally produced and which are priced as high as 77.5% of the average wholesaler price of the original product still under patent in France, Italy and Germany. As a result, prices of local copies are only slightly lower than the price of the original medicine, which denies the Slovenian health system savings that could otherwise be achieved by generic competition. These regulations create an environment that could discourage research and development investment in Slovenia.

Contrary to WHO guidelines, the Ministry of Health uses the Anatomical Therapeutic Chemical (ATC)/ Defined Daily Dose (DDD) system as the basis for establishing reference price limits in therapeutic clusters. The drug with the cheapest DDD is taken as the price ceiling for reimbursement for other products in the cluster. This system assumes that DDDs reflect therapeutic equivalence, but WHO's guidelines state that "DDD's are not necessarily designed to reflect therapeutically equivalent doses and are therefore not suitable for comparing drugs for reimbursement and pricing decisions". The guidelines also state "therapeutic reference pricing and other pricing decisions on ATC/DDD classification is a misuse of the system".

The Interchangeable Drug List (IDL), which was introduced in November 2003, serves as a reference for reimbursement of the "interchangeable" drugs in their group. Physicians are obligated to prescribe the cheapest drugs on the list. The Sick Fund completely reimburses drugs with the lowest price in their group on the IDL. In cases in which a patient wishes treatment with a drug that does not have the lowest price on the interchangeable drug list, he or she must fully co-pay the difference between prices. In cases in which a physician prescribes an original drug which is priced higher than the lowest-priced drug from the interchangeable group, pharmacists are obliged to switch it for the cheaper generic or copy drug if the patient does not want to co-pay.

This policy resulted in serious damages to international - particularly U.S. based - research and development pharmaceutical companies. These policies contribute to an environment that could discourage research and development investment in Slovenia.

In addition to the problems described above, the Sick Fund is misusing its monopolistic position in the market (implementing the official IDL) and increasingly adopting behaviors and policies with the aim to intimidate and misinform physicians. In order to avoid open legal or political confrontations, these activities are declared as “recommendations” or educational programs. The Sick Fund’s one-sided doctrine of instructions place Sick Fund savings over patients’ needs. The Sick Fund denies the free flow of information to healthcare professionals by prohibiting visits by professional sales representatives during working hours.

Finally, the Government is also preparing policies to implement therapeutic / class reference pricing, which will compound the damages to U.S. innovative pharmaceutical companies, and which will favor local generic companies.

Damage Estimate

PhRMA members estimate that the 2005 damages in Slovenia are equal to 10.9% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Slovenia	35948	20117	56065	513365	10.9%

UKRAINE

PhRMA members continue to suffer from inadequate and ineffective intellectual property protection, particularly the lack of data exclusivity and patent linkage. PhRMA members also suffer from market access barriers in Ukraine, including double quality control measures, non-transparency and unfairness in the drug registration process and public tendering by state Hospitals and Ministry of Health (MOH), duties on imported pharmaceuticals, and a 20% VAT for investigational drugs for clinical trials. PhRMA therefore requests that Ukraine be placed on the “Special 301” Priority Watch List for 2006.

Intellectual Property Protection

Data Exclusivity

At the time of its accession to the WTO, Ukraine will be required to implement TRIPS Article 39.3, which obligates WTO Members to protect against “unfair commercial use” of undisclosed test and other data submitted to governments as a condition for obtaining marketing approval of pharmaceutical products. Ukraine does not have a special legal regime similar to those found in other industrialized countries. These regimes, which are codified either in the Patent or Medicines Laws, go beyond the mere protection of commercial secrets and ensure that no person may, without the permission of the person who generated and originally submitted the valuable data, rely on such test data in support of an application for product approval during the pendency of the registration application and for a specified period from the marketing approval date of the original product.

Registration of Patented Drugs/ Need for Patent Linkage

MOH has approved generic copies of pharmaceutical products under patent in Ukraine. Ukraine should implement patent linkage.

Market Access Barriers

Quality Control Measures that Discriminate Against Imported Pharmaceutical Products

A recently-enacted Cabinet resolution on the quality control of medicinal products (Resolution No. 902 of September 14, 2005) provides for special procedures and corresponding fee payments for imported products that do not apply to medicinal products produced nationally in Ukraine, essentially imposing double quality control procedures and fees for imported medicines, to which national products are not subject. Thus, imported measures go through the

quality control procedures applicable to domestic medicines as well as procedures applicable only to imported medicines. The additional procedures and fees levied on pharmaceutical imports products clearly violate the national treatment provisions of GATT Article 3, which requires that imports be treated no less favorably than the same or similar domestically-produced goods once they have passed customs.

In addition, the differential treatment violates Articles 2.1 and 2.2 of the WTO Standards Agreement (“Agreement on Technical Barriers to Trade”), in which WTO members pledge that, in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and that technical regulations shall not be prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

Lack of Transparency and Unfairness in the Drug Registration Process and Public Tendering by State Hospitals / Ministry of Health

The lack of transparency in the state bodies that regulate pharmaceutical products makes it difficult to identify potential conflicts of interest that lead to discrimination against the research-based pharmaceutical industry in the registration of their products and in the awarding of state tenders. The decision-making process for state purchases is not transparent and, should the winner not agree to the underlying unfair terms, he is declared non-compliant. In one instance, the tender was withdrawn when the lowest bidders were Western branded companies and not local generics. The public tendering system was so “opaque” that the Global Fund was forced to cease its AIDS-related operations in Ukraine. While the Global Fund recently resumed its operations following the change of government, in reality little has changed.

Duties on Imported Pharmaceuticals

Current duties for imported pharmaceuticals range from 5.2 % to 10.2%. The actual amount that is paid is left to the discretion of authorities, since there are no clear rules for assessing duties. The Ukraine Government basically discourages use of modern therapies, since the primary concern of the authorities, in assessing the actual amount of duties, appears to be the protection of local manufacturers and not the “life-saving” status of the products.

20% Value-Added Tax (VAT) for investigational drugs for clinical trials

Investigational products for clinical trials have no commercial value, unlike registered medicinal products, yet Ukraine’s customs collect 20% VAT prior to customs clearance (i.e., a form of import taxation). This practice is damaging to international research and development pharmaceutical companies operating in Ukraine and performing clinical trials.

**MIDDLE EAST/ AFRICA/
SOUTH ASIA**

ALGERIA

Algeria, which is not a member of the World Trade Organization (WTO), lacks basic trade disciplines, including minimum international standards for protection of intellectual property relating to pharmaceutical products. While, in 2003, Algeria enacted legislation providing product patent protection for pharmaceutical products, it does not provide for adequate data exclusivity as required by the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). In addition, Algeria continuously limits access of foreign pharmaceutical companies to its market. As a result, PhRMA requests that Algeria be included in the 2006 “Special 301” Priority Watch List.

Intellectual Property Protection

Patent Protection

In anticipation of its accession to the WTO, Algeria adopted product patent legislation, (Ordinance Number 03-07 dated July 19, 2003) which became effective July 2003. While this represents a major improvement in intellectual property protection in Algeria, there are still major shortcomings in that protection. In particular, the new law does not provide a linkage process to ensure that health regulatory authorities refrain from providing marketing approval to products that would infringe patents, or pipeline protection.

In the absence, until 2003, of statutory-based patent protection, the Algerian Government had committed itself to provide administrative protection for existing international patents by respecting, in practice, the patent status of pharmaceutical products in their sourcing countries. Foreign investors including PhRMA members, have been relying on this oral commitment and practice by the Algerian government to bring their innovative products on to the Algerian market for Algerian patients. However, recently the Algerian health authority abandoned this commitment and started approving rapidly copies of innovative products that are still patented in sourcing countries. Algeria’s recent movement contradicts the initial verbal commitment, which provided an effective transitional arrangement on intellectual property protection that both benefited Algerian patients and recognized patents of innovative companies.

Data Exclusivity

In the absence of pipeline protection and any transitional mechanism to protect intellectual property for pharmaceutical products, Data Exclusivity is needed urgently and will be the only way to protect innovative products from unfair infringing copies from generic companies.

PhRMA requests that the U.S. Government ensure that Algeria immediately implements formal and effective data exclusivity that would prevent

the approval, for a reasonable period of time, of pharmaceutical products relying on either the data filed by research-based pharmaceutical companies and/or on prior approval of innovative products of research-based pharmaceutical companies. Algeria should implement data exclusivity in the course of its WTO accession process, as required under TRIPS Article 39.3.

Linkage

Further support is also requested to secure linkage between patents and health regulatory authorities. While the Algerian Government has committed itself to provide administrative protection for existing patents it has only done so orally. The “informal” protection proposed by the Algerian authorities, is discretionary, without the support of a legal or statutory text. It is non-binding and not authoritative. Furthermore, this verbal commitment was denied by the Health Minister himself who confirmed that Algeria would not respect any IPR which is not in their current law. It is therefore reasonable to conclude that the Ministry Of Health is applying its own vision and discretionary health policy choices, all the while issuing written instructions or decrees totally inconsistent with this protection (see MOH Instruction #5 of 7 September, 2003, discussed below).

Standstill Agreement

PhRMA seeks U.S. Government support to clarify Algeria’s commitment to prevent copy products from entering the market in the course of Algeria’s WTO accession process. More specifically, we request that Algeria issue a transparent and non-discriminatory written transition rule to provide effective protection for Intellectual Property related to pharmaceutical products until a data exclusivity regime and the new patent protection law provide adequate coverage for new medicines.

Market Access Barriers

Government reference pricing

A Reference pricing regulation was issued in 2001. It mandates reimbursement of a list of medications based on the least expensive *generic* on the market. This regulation has not been enforced. However, there are very strong signs that the government is planning to implement the law in early 2006. This implementation is being done in a non transparent and discriminatory manner, in a market where, at present, there is no intellectual property protection. Once implemented, reference pricing could have a devastating effect on pharmaceutical business.

PhRMA requests that the U.S. Government urge the Algerian government to suspend reference pricing until a strong intellectual property protection system is in place, especially Data Exclusivity for pharmaceutical products.

Regulatory Approval Delays

The relevant law applicable for pharmaceutical product registrations in Algeria is the Executive Decree (Décret exécutif) Number 92-284, dated 6 July, 1992 relating to registration of pharmaceutical products for human use. Legally the approval of a pharmaceutical product is granted – or refused – within a 120-day period from the date of filing the scientific and technical application. In exceptional cases, this period can be extended for an additional period of 90 days.

In violation of this regulation there has been an almost complete registration block for more than three years and a backlog of an estimated 1000 pending registration files at the MOH. During this period, only about 10 new chemical entity registrations were granted for special medical needs or other very specific reasons (such as a factory opening). This prevents patients' timely access to innovative treatment options for critical diseases.

Preferential Treatment

During the same period mentioned above numerous generics (imported and locally produced) got registration licenses, many of which submitted doubtful bioequivalence data and/or GMP certificates. PhRMA requests U.S. Government support in demanding that the Algerian government end this discriminatory market access barrier and restart a transparent, non-discriminatory registration process in line with local regulations and international standards.

On September 7, 2003, the Ministry of Health issued a Decree, "Instruction # 5 for the generalization of generics," which violates numerous Algerian intellectual property-related obligations and fair trade rules and restricts access to the Algerian market in a discriminatory way. This decree stipulates that medicines for which local production is sufficient to cover the local demand may no longer be imported (since 2004, this has been applied to 128 products). The MOH offers assistance to local generic manufacturers for priority registration and production process approval. Branded products imported can only be registered, if there are no generics of the same molecule already registered and if the proposed price for the branded product is within a certain range (application unclear).

PhRMA requests that the U.S. Government urge the Algerian government to end this discriminatory market access barrier by canceling "instruction #5".

Volume Controls

Additional market access barriers include the government's imposition of an annual import quota for medicines with the requirement to have the quota

approved and later followed by a MOH clearance ('déclaration statistique') for each shipment; and the government practice of temporarily blocking importation as a cost-containment tool. PhRMA members are also concerned about current government plans to negotiate medicine by medicine the prices and volumes for the annual import quota and to deny the importation of medicines considered by an anonymous MOH commission as non-essential medicines.

The Algerian Government needs to end these existing and nascent discriminatory market access barriers by canceling the above mentioned import control mechanisms.

EGYPT

Egypt is the largest producer of pharmaceutical products in the region; domestic production represents 93% of the market share. The research – based companies represent 65% of the total output in Egypt, with direct production by companies equaling 30% and production sublicensed to with local companies equaling 35%. However, PhRMA members are facing an unsatisfactory environment in Egypt due to market access barriers such as continuing price controls by MOH and insufficient price adjustments due to devaluation that started in 2003. This indicates the importance of the activation of Ministerial Decree number 314/1991. On the other hand, the implementation of IP law number 82/2002 remains a concern to PhRMA members particularly the implementation of unfair commercial use of undisclosed data.

PhRMA expressed interest in promoting the negotiations and the implementation of a comprehensive, high standard, commercially meaningful FTA between Egypt and the US, particularly, in the area of Intellectual Property Rights under the following conditions:

- IP concerns to be addressed while the initiation process of negotiations is moving forward.
- IP provisions / DE must be timely and appropriately implemented and enforced. In addition, current ambiguity in the Egyptian IP law to be addressed.
- No further authorizations of copy products to take place consistent with the Egyptian IP laws.
- Flexible mechanism on pricing to ensure that the system can automatically allow for adjustments in the future to reflect fluctuation in exchange rates. Additionally, the current pricing problem has to be addressed in line with Ministerial Decree number 314/1991.

Recently, a new Cabinet was formed and a new Minister of Health joined the government to continue working closely with the Economic team at the Cabinet. Until issues and concerns raised by PhRMA are redressed, PhRMA requests that Egypt be listed in the 2006 “Special 301” Report Priority Watch List.

Intellectual Property Protection

Protection of Clinical Data

Clinical data is protected under Articles 55 to 62 of the Intellectual Property law No. 82 of 2002 (the IP Law), from misappropriation, divulgence and unfair commercial use. The protection extends for five years from the date of

application or until the data is no longer secret, whichever is earlier. Article 56 specifically mentions data submitted to regulatory bodies to obtain a marketing approval for a new chemical entity and makes it the responsibility of the Ministry of Health (“MOH”) to ensure the data is not disclosed or leaked to a third party.

Prior to 2004, the MOH gave effect to the law by not granting marketing approvals for generic drugs based on the undisclosed clinical data submitted by PhRMA members for five years. In mid 2004 however, this started to change and the MOH insisted that its liability under the law is limited to non-disclosure of the clinical data. Accordingly, the Minister of Health issued decree no. 113/2004 requiring the recording in a special register of all transfers of the undisclosed clinical data from one department to another. As a result, the MOH prematurely allowed generic drugs in the market, which were clearly approved based on the MOH’s reliance on the clinical data submitted by PhRMA members.

In addition, the MOH rendered the protection under Article 56 ineffective by refusing to accept any clinical data that is stamped with the words “Secret & Confidential” from PhRMA members and other R&D multinational companies, and requiring no clinical data except if the chemical entity is universally new.. There are reports indicating that a few copy products were registered before issuing the marketing approval of the original products, which confers an unfair commercial benefit to the generic producers in contradiction of the law, and demonstrates the MOH’s favoritism towards generic producers. The government thereby failed to provide meaningful protection and effective implementation of the provisions of the law, while undermining the intellectual property protection afforded to PhRMA members.

PhRMA members find the market and legal system in Egypt is unfair and discriminatory. Clinical data, for instance, is relied upon by the MOH to confer an unfair benefit to the generic producers. The situation needs to be addressed promptly on three main fronts: first, by clarifying the new drug approval mechanism with fairness and transparency. Second, by giving effect to Article 56, and in particular disallowing MOH’s reliance on undisclosed clinical data submitted by PhRMA members for the unfair commercial benefit of other applicants and finally, by enacting executive regulations to the law that stipulate with transparency the new drug approval procedures, and effective protection of undisclosed clinical data.

Patent Protection

The grace period afforded under TRIPS for non-compliance with the requirement of granting patents for pharmaceutical products ended in January 2005. Starting with this date, Egypt was required to open the “black box” and examine the applications filed during the grace period. Currently, the patent office predicts the first patent will be granted within two to three years with no patents

issued to date. The new Egyptian IP Law No. 82 of 2002 now provides the full product protection of pharmaceuticals for 20-year term.

Market Access Barriers

Government Price Controls

The Egyptian government controlled pricing system is not transparent and the pharmaceutical sector is the only one in the country under price control. This system has negatively impacted access to new pharmaceutical products and competition in the market. More importantly, the existence of such a government imposed system while prices are facing devaluation in exchange rates is of great concern to PhRMA members. No significant compensation is granted by the government due to devaluation. The compensation process is slow, started recently and doesn't reflect the actual losses, especially given that Ministerial decree number 314/1991 for price adjustments due to devaluation is not activated yet.

Regulatory

Due to the non transparent regulations of the registration of pharmaceutical product, PhRMA members are facing long delays in new products registration, in some cases as long as 3-years or more. This deprives patients of access to new medicines and constitutes a serious trade barrier for foreign manufacturers.

Damage Estimate

PhRMA members estimate that the 2005 damages in Egypt are equal to 23.8% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Egypt	128557	73825	202383	851221	23.8%

INDIA

PhRMA members acknowledge and appreciate the positive steps India has taken towards complying with its TRIPS obligations by enacting the Third Patent Amendments Act of 2005 (the "Act"), which provides important patent protection for pharmaceuticals. However, industry remains concerned about several last-minute amendments to the Act which may undermine India's ability to comply with its international obligations. In addition, PhRMA is concerned that India failed to include in the Act any TRIPS-compliant protection for commercially valuable data provided to regulatory authorities when seeking marketing authority. These outstanding problems may require new legislation to remedy; indeed, an interministerial consultative committee is currently studying data legislation. PhRMA also believes that technical assistance will be required to ensure that the discretion provided under the Act by some of the amendments is exercised consistently with international norms and practice.

Beyond issues related to the Act, PhRMA members are quite concerned that, while there has been some progress in resolving technical trade barriers which disproportionately affect U.S. -Industry, India recently has moved to broaden government price controls to cover patented products.

To address these serious challenges to intellectual property in India, the US should both pursue a high-level dialogue to promote compliance with WTO disciplines across the board, including intellectual property, and at the same time expand international assistance opportunities for the training of patent examiners along with other urgently needed technical cooperation to prepare India to meet its TRIPS obligations. To help fulfill this request, PhRMA recommends that India be designated as a Priority Watch List country in 2006.

Intellectual Property Protection

PhRMA members have two priorities in India in the intellectual property area: effective protection for pharmaceutical product patents and for clinical dossiers.

Patent Protection

Despite passage of the Act , India must take the following steps to fully comply with all TRIPS obligations relating to patents:

- ✓ Rectify the provision for Mandatory Compulsory Licensing for Mail Box Patents, which does not allow the patent holder of a mailbox patent to preclude generic manufacturers manufacturing the patented product.

- ✓ Conform standards for patentability and scope of patentable subject matter to bring India into the mainstream of patent practices. In particular, India should unconditionally allow so-called “second use” pharmaceutical patents. Furthermore, India should follow the example of China and other countries at a similar stage of development by not imposing additional requirements for patentability beyond the requirements of novelty, commercial applicability, and non-obviousness ;
- ✓ Lay down transparent and clear guidelines through the Patent Practice Manual for assessing subjective yardsticks of ‘inventive step’, ‘technical advance’ and ‘economic significance’. As evidenced by the recent rejection of patent actions, these terms are being interpreted in an overly strict manner that is inconsistent with international standards.
- ✓ Reform the patent opposition rules. Other major Asian markets provide for post-grant opposition; India is alone in providing for pre-grant opposition. India should either move to a post-grant opposition system or tighten its pre-grant opposition rules to prevent frivolous claims and ensure speedy resolution of non-frivolous claims. For example, there is evidence that some claimants are filing pre-grant opposition one after the other as a means of delaying grant of a patent; where delay does occur, the patent term should be extended. In addition, pre-grant opposition should be brought and resolved within a specified time period, so that there is no inordinate delay in granting a patent;

Ensure that the compulsory licensing (CL) provisions comply with TRIPS by:

- ✓ Clarifying that importation satisfies the “working” requirement (TRIPS Article 27.1);
- ✓ Either eliminating mention of price as a trigger to CL or clarifying what is meant by ‘reasonably affordable price’; and,
- ✓ Removing the numerous triggers that provide a low hurdle to seeking a CL.
 - In case of CL for exports, ensuring that proper anti-diversion measures are taken and the CL itself is granted for humanitarian, non-commercial use.

Data Protection:

India needs to amend its laws to protect clinical dossiers as required by WTO TRIPS Article 39.3. Under current law, India does not require submission of clinical dossier for providing marketing approval for a new drug and, **if a drug is already approved/marketed in another country, a second applicant need only prove bioequivalence** after it provides phase III data on 100 patients

distributed over 3-4 centres primarily to confirm the efficacy and safety of the drug in Indian patients.

An interministerial consultative committee constituted in 2004 has been hearing the views of the Industry and various stakeholders on the data protection issue. Though the certain government ministries are supportive of industry's position on the issue, there is broad disagreement within India about the obligations under Article 39.3. In particular, there is no consensus within India on whether Article 39.3 merely obligates India to provide for protection against disclosure of the clinical dossier or whether it also obligates regulatory authorities to provide affirmative protection against unfair commercial use, with an emphasis on non-reliance of data submitted to regulatory authorities in other WTO member countries. It is critical that the US Government continue to press this issue toward a successful conclusion that accurately reflects the obligation contained in TRIPS Article 39.3

Lack of Adequate IP Infrastructure

PhRMA members are concerned by the absence of resources needed to upgrade India's capacity in the patent area. In anticipation of the improvements required by the TRIPS Agreement, there has been a surge in the filing of patent applications and many more are expected. The Indian Patents Office, based on its size, degree of modernization, and past practices, may prove unable to cope with these filings. Recent statistics show a considerable amount of backlog of patent applications under scrutiny at different field Patent Offices in India.

While we appreciate India's current efforts to invest approximately \$20 million USD in new and improved facilities, underlying problems in India's patent law appear to render effective patent administration and enforcement impossible. The Government of India needs to follow up on its modernization efforts at the administrative and legislative level to make it possible to operate a modern patent office in India. The US Government should provide needed assistance to India as a developing country WTO member for capacity and infrastructure in this area.

Market Access Barriers

Government Price Controls

The research-based pharmaceutical industry is extremely concerned about the proposed requirement, under the Draft National Pharmaceutical Policy 2006 Part A, for mandatory price negotiations prior to marketing approval of patented drugs launched in India after January 1, 2005. PhRMA members feel that this proposal represents an effort to effectively nullify the benefits of product patent protection.

The draft policy contravenes the Government's stated goal of liberalizing the pharmaceutical sector by reducing the span of government control over pricing of pharmaceutical products in India. (See, e.g., the Finance Minister's Budget Speech in Parliament in 2002.) Under the draft policy, it is anticipated that all 354 drugs in the National Essential List of Medicines will come under the pricing regime. This expands coverage from the 2002 drug policy (now mired in litigation), which envisaged only 37 drugs to be under price control, as well as from the current pricing policy, established in 1994 which covers only 74 drugs. Furthermore, it is anticipated that Part B of the draft policy will include measures that would discriminate against foreign medicines in violation of GATT Article III.

Import Policies

PhRMA member companies operating in India face high (44%) effective import duties for active ingredients and 66% for the finished products. Moreover, excessive duties (up to 68%) on the reagents and equipment imported for use in R&D and manufacture of biotech products make biotech operations unsustainable. The import duty needs to be brought down to enable this sector to realise its potential. The Government of India has stated its intention to progressively lower import tariffs on pharmaceuticals. Duty rates, however, remain unacceptably high, given that a countervailing duty of about 18% is imposed on all such imports. In addition, the duty is still often being applied in a non-transparent manner, in violation of national treatment, to the benefit of domestic producers. In 1996, tariffs were brought down to 85% with plans to further decrease rates to 25% by the end of 1999. Progress has been slow and tariff rates remain currently high. PhRMA urges U.S. negotiators to insist that tariffs be brought down to zero, the level of many WTO signatories.

Standards, Testing, and Labeling

India has little or no modern regulatory framework for clinical trials. Though the Government has made a genuine attempt to reform drug manufacturing practices in the country through rules for Good Manufacturing Practices (GMP), the non-transparent and labyrinthine procedures in the Drug Controller's Office continue to be significant obstacles to PhRMA members.

Trademark Protection

PhRMA companies continue to face discrimination in the area of trademarks, particularly regarding the size and placement of the generic name on medicines in India. In addition, companies have experienced difficulty in enforcing court orders, thereby undermining the value of trademark protection.

Regulatory Approvals

Finally, PhRMA member companies operating in India have reported that state-level FDA decisions are often made in an arbitrary manner. Such regulatory decisions should be transparent and rules- and science-based and all efforts should be made to shorten approval delays and other bureaucratic obstacles.

Damage Estimates

PhRMA members estimate that the 2005 damages in India are equal to 78.4% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
India	2477479	1003933	3481412	4439092	78.4%

ISRAEL

The intellectual property situation in Israel deteriorated over the last year, as the Government of Israel enacted legislation that, contrary to the internationally-recognized territorial principle of intellectual property protection, effectively linked the term of intellectual property protection for pharmaceutical products in Israel to that found in the major markets, primarily the United States, of its generic manufacturers. The recently-enacted patent term extension (PTE) and data exclusivity (DE) legislation, taken together with Israel's continued pre-grant opposition and its attempts to exclude intellectual property infringement from the scope of its unjust enrichment doctrine, guarantees that Israeli generic producers will be free to manufacture in Israel for export, primarily to the United States, unencumbered by any intellectual property protection in Israel for the originator products. In addition, Israel's policies continue to be cited and, in some cases, emulated, both in the region and around the world by others as an excuse for not meeting their international obligations. The Government of Israel has also assembled an array of market access barriers that substantially impede access of Israeli patients to new, innovative products. For these reasons, PhRMA members recommend that Israel be designated as a Priority Foreign Country in the course of the 2006 "Special 301" Review Process. In addition, PhRMA urges that the United States oppose Israel's candidacy for OECD membership until Israel has brought its intellectual property protection to the level found in the developed country members of the OECD. Furthermore, given the continued systematic discrimination against the products of its member companies in the Israeli market, PhRMA urges the United States to review US drug approval regulations to ensure reciprocity between US regulatory practice and that of other countries whose companies enjoy the benefits of the open US market for pharmaceutical products.

Intellectual Property Protection

Introduction

The situation facing PhRMA members in Israel can best be summarized by the comment made by the Chairman of the Knesset's Constitution, Law and Justice Committee during the Committee's consideration of the Patent Term Extension (PTE) Legislation, which shortened Israel's patent term extension period: "We have a local industry that we want to protect."

In addition to enacting legislation that shortened the patent term extension period, the Government of Israel enacted legislation that provided inadequate protection of regulatory registration data (data exclusivity) and continued to permit substantial delays in the grant of patents through a system of pre-grant patent opposition.

Patent Term Extension – Amendment No. 7 to Article 64 of the Israeli Patents Act

The net effect of Amendment Number 7 is that an originator product will not be under a patent term extension in Israel if its combined patent term and extension have expired in one of Israel's key markets. Amendment Number 7 achieves this objective by mandating the following cumulative conditions:

1. The extension period in Israel is to be equal to the shortest extension period given to a "reference patent" in a "recognized country" (Australia, United States, Iceland, Japan, Norway, Switzerland, and the 15 countries of the EU); and
2. The term of the patent extension in Israel may not be more than five years; and
3. The total period of exclusivity in Israel may not exceed fourteen years from the earliest registration approval date in one of the recognized countries; and
4. PTE in Israel ends with the lapse of the first PTE in any recognized country (not necessarily the same recognized country referenced under the earlier conditions).

Amendment Number 7 also adds complex and cumbersome procedures that will make it difficult to actually get PTE in Israel. PTE will only be available in Israel if PTE had been granted in both the United States and at least one of the 15 EU countries. Finally, the provisions of the law will apply retroactively to all pending applications for patent term extensions and to patent term extensions already granted (Amendment Number 7 will, however, not apply to patents that have already expired and are in their extension period.) By doing so, Amendment Number 7 unfairly injures the interest of patentees who have already launched new drugs in Israel based on the assumption that a substantial term extension will be granted.

Regulatory Data Protection – Amendment to Article 47 of the Pharmacists Ordinance – Market Exclusivity Bill

As a member of the World Trade Organization, Israel was required to fully implement all of its TRIPS obligations, no later than January 1, 2000. TRIPS Article 39.3 obligates WTO members--that is, governments--to protect the registration files of innovative pharmaceutical companies against unfair commercial use. This protection is known as "data exclusivity." Israel enacted sub-standard DE legislation in March 2005 after drawn-out negotiations with the US Government that ultimately proved fruitless in gaining effective protection for clinical dossiers in Israel. The legislation curtailed the period and scope of non-reliance in the Israeli market, while at the same time effectively permitting reliance on the originators' dossiers for export.

New Subsection D (2) of Article 47 of the Pharmacists Ordinance does not ban outright reliance during the exclusivity period. During the less than five year period, the MOH may rely on the innovator data (i) to register generic products for domestic marketing after the exclusivity period and, more important, (ii) to register generic products for immediate export to other markets.

Furthermore, the cumbersome Israeli drug registration process makes the effective marketing exclusivity period much shorter than the five and-a half years provided by the statute (see below for a fuller discussion). The MOH requires that a product be registered in a “recognized country” before a registration application may be considered in Israel. In addition, contrary to the territorial principle of intellectual property protection, the five and a half year term begins not with first registration in Israel but on the earliest registration date in any of the “recognized countries” (US, EU, Canada, NZ, Australia, Japan, Switzerland and Norway). The five and a half year term presupposes that it takes six months or less, after a foreign registration, to get an Israeli registration. This is not borne out by the facts. While it may be true that it still takes only four to six months for an MOH examiner to review a drug registration application, MOH officials freely admit that, due to serious understaffing, registration applications are kept in a queue of more than one year before reaching an examiner. Thus, a five and a half year exclusivity term, which presupposed a six month lag between the first foreign and Israeli registrations, may actually translate into an exclusivity term of less than four years. Such a term is far shorter than the 5 years of data exclusivity provided by the US and the 10 years (8 years of data exclusivity plus 2 years of marketing exclusivity) provided by the EU.

The statute offers no protection for new indications, which are protected for three years and one year, respectively, in the United States and the EU. Furthermore, the statute only protects the data of products that were registered in any of the recognized countries after the July 2005 effective date of the statute. Thus, the statute excludes from protection new products that had already been marketed elsewhere before that date and that PhRMA member companies had intended to register in Israel.

Substantial Delays in the Grant of Patents – The System of Pre-Grant Patent Opposition

Under Israeli law, patents are thoroughly examined by technically competent examiners. It normally takes four to six years until the examination is completed. The duration of a patent is twenty years from the date of filing the application. As a result of the examination, the patentee “loses” a significant part of the period of exclusivity to which it is entitled. After examination and acceptance of the application, it is published for possible oppositions in the Patent Gazette. One would have assumed that, once the examiner deems that the invention is worthy of patent protection and accepts the application, the patent will finally be granted. However, under Article 30 of the Israeli Patents Act,

any competitor may block patent grant simply by filing an opposition to the patent application.

The resolution of the opposition may take many more years so that the patentee is actually deprived of the remainder of the period of exclusivity to which it is entitled. During the opposition proceedings the patent is not registered and not yet valid. The legal situation in Israel is diametrically opposed to the legal situation worldwide. In most (if not all) OECD countries, any opposition proceedings are conducted post registration (e.g., in the EPO) and it is not possible to block the registration of the patent. The deeply flawed pre-grant opposition system applicable under Israeli law has been rejected in the vast majority of developed countries, including in the EU and the United States. Third parties can be given an opportunity to challenge the validity of the patent, but as recognized elsewhere, any such action should be done post-grant. Indeed, the Patents Act already provides a system for post-grant challenge. Additionally, a potential infringer is also entitled to challenge validity in infringement proceedings. However, a system of pre-grant oppositions, which blocks patent grant for many years, actually nullifies patent protection. Such a system has been rejected worldwide.

Ministry of Justice Proposal to Exclude Unjust Enrichment Principle From Intellectual Property Litigation

The Ministry of Justice has recently revived a 2003 recommendation of the now disbanded Patent Advisory Committee to exclude the principle of unjust enrichment from litigation concerning intellectual property issues. Since the unjust enrichment principle has been the only enforcement tool available to PhRMA member companies for use against generic infringers when faced with pre-grant opposition, the exclusion has been high on the wish list of Israeli generic manufacturers. Revival of a recommendation of an advisory committee, whose recommendations had not been accepted by the then Minister of Justice precisely because it had been demonstrated at the time that the Committee had been under the influence of the Israeli generic industry, is a cause of concern for PhRMA member companies, especially when coupled with enactment of the recent PTE and DE legislation and the continued maintenance of pre-grant patent opposition.

Market Access Barriers

In addition to the whittling away of the exclusivity provided by patent protection and data exclusivity, PhRMA member companies continue to face market access barriers in Israel that delay the launch of new medicines in Israel.

Regulatory Approval Delays

The delay in gaining regulatory approval for pharmaceutical products is the most serious market access barrier facing the industry in Israel. The registration process for a product in Israel cannot begin until it has been approved by the health regulatory authorities in the EU or the United States (EMA or FDA). Over the last five years, the Israeli registration process has been extended from an average of six months to the current average of eighteen to twenty four months. Dossiers are detained and placed in long queues before examiners actually begin their examinations of the dossiers. As explained above, the current eighteen to twenty four month registration delays raise serious questions about the linkages found in the new PTE and DE bills between DE in Israel and the marketing authorization dates of new products abroad.

Government Proposal to Reduce Maximum Prices for Prescription Drugs

Since 2001, the Government of Israel has used the “Dutch Model” to set maximum retail prices for prescription drugs. In doing so, the GOI has set the maximum prescription drugs retail prices in Israel as the lowest of either the retail price in the Netherlands or the average of the retail prices in the United Kingdom, Germany, France and Belgium. The Government of Israel has proposed new legislation, included in the Omnibus Law of Arrangements that has yet to be enacted, to further reduce official retail drug prices in Israel. The new formula chosen by the GOI seeks to take into account Israel’s purchasing power relative to that found in Europe (“Purchasing Power Parity” model). To do so, the Government would divide the current Dutch model-based price by a ratio of Israel’s price level to the average price level of Belgium, France, the United Kingdom and Germany. The proposal, driven by the Finance Ministry’s search for greater budgetary savings, raises many technical issues, including the application of such a Purchasing Power Parity price index to a specific sector like pharmaceuticals and the impact that lags in the OECD-generated price data will have on the index. It has been calculated that use of the new pricing model will result in a 35% reduction in the official retail price list of all drugs in Israel. Such a reduction will further deteriorate the investment climate in Israel for the pharmaceutical industry and could discourage innovative companies from maintaining existing products or launching new products in the Israeli market.

Role of Formularies and Sick Funds

The registration of a new, innovative pharmaceutical product by Israel’s Ministry of Health (MOH) is a necessary, but far from sufficient, condition for successful commercial launch in Israel. The technical approval by MOH is meaningless unless and until the product is “priced” by the Government of Israel, included by the Government of Israel in the “Pharmaceutical Basket List,” and, purchased for distribution by one of four Sick Funds that control the vast majority of pharmaceutical sales in Israel.

After MOH registration and receipt of its official government “price,” a pharmaceutical product can be sold only in the private market, which represents less than 5% of the already small Israeli market. PhRMA members can only gain access to the largest portion of the market (95% of all pharmaceutical purchases) if the Government of Israel officially includes their pharmaceutical products in the “Pharmaceutical Basket List.” Only five per cent of pending products have been included in the “Pharmaceutical Basket List” for the past two years, with the Government’s own Ombudsman for the National Health Insurance Law finding that over 400 new medicines and technologies remain outside the effective formulary.

Furthermore, the four Sick Funds which control the market are not obligated to provide patients access to the remaining 95% of products not included in the basket – and in fact do not. Even after a product is included in the official basket, each of the four Sick Funds negotiates a new effective wholesale price with the innovator (usually much lower than the wholesale price officially submitted by the manufacturers as part of the registration dossier), causing further delay. Even then, there are significant complaints by patients that Sick Funds refuse to purchase and provide innovative products, not to mention Sick Fund pressure on physician prescription practices.

Violation of National Treatment

PhRMA member companies continue to be adversely affected by a WTO-inconsistent amendment to the Pharmacists Ordinance passed two years ago that allows for fast-track registration of generic products based on FDA or European Medicine Evaluation Agency (EMA) approval. Generic products approved by these authorities are granted an automatic marketing authorization unless the MOH objects within 70 days. This amendment primarily benefits local generic producers and thus appears to be inconsistent with Article III obligations relating to National Treatment.

Damage Estimate

PhRMA members estimate that the 2005 damages in Israel are equal to 10.9% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent	Total Data Protection	Total Damages	Total Sales	Damages % of Sales
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	Protection Damages	Damages			
Israel	26414	9673	36087	332103	10.9%

Jordan

Despite the fact that Jordan is a WTO member and signed an FTA with the US, the investment environment in the pharmaceutical sector is deteriorating. On the IP front, the health authorities are not effectively implementing article 22 footnote 10 of the FTA. Also, some unsupportable adverse interpretations on the protection of data are being applied. In addition, PhRMA members are facing some market access barriers, particularly, the current government pricing directives and regulatory requirements. Therefore, PhRMA members request that Jordan to be placed on the 2006 "Special 301" Priority Watch List.

Intellectual Property Protection

Data Exclusivity

The FTA with the US requires 3-years of Data Exclusivity (DE) for new indications for previously approved chemical entities. However, the Jordanian Food and Drug Administration (JFDA) does not have a system in place to apply the additional 3- year protection for new indications. Moreover, JFDA applies DE on active ingredient(s) but does not take into consideration combinations, forms, strength and new technology. In 2005, JFDA granted special approval to King Hussein Cancer Center (KHCC) to import a copy product, of a product originated by one of our members, despite the fact that the marketing authorization of the original product was issued on March 13, 2001 and still enjoys protection till March 13, 2006.

Patents

Before 2000, patents were granted on the manufacturing process but not on the finished product. The current patent law that was amended in the year 2000 recognizes only patents on the finished product. Therefore, patents granted before the year 2000 are not recognized.

Market Access Barriers

Regulatory

Some regulatory requirements by JFDA are market access barriers such as registration directives mandating at least 1-year for marketing and pharmacovigilance of a new product prior to accepting the product submission file which will deprive the Jordanian patients innovative products for an additional 1-year. Also, the JFDA is considering more than one country of origin if the product is manufactured at 2-sites or more with the objective of selecting the lowest price among countries of origin. Moreover, several supporting documents are being required although they can't be provided such as price structure for products of US origin.

Government controlled Pricing

Current pricing directives are lacking transparency i.e. referring to non existing criteria, such as certifying that a submitted price is reimbursed. JFDA is applying cross country comparisons; price alignment is tied to the lowest price of Saudi Arabia, country of origin or the median price of the seven reference EU countries. However, they are not considering price increase for pharmaceuticals when CIF prices in Saudi Arabia are higher. Moreover, Jordanian Health Authorities require innovators to submit documentation for re-pricing every two years. Further deterioration in the implementation of the current pricing directives took place by the decision of the JFDA to modify the current European basket countries to exclude Germany and include Belgium which is a low price market. Although PhRMA members were obliged to abide by the pricing directives imposed by the JFDA, however, some requirements of the JFDA for pricing and registration are not consistent with their pricing directives.

LEBANON

Lebanon continues to ignore basic principles and regulations concerning Intellectual Property and appears to be reluctant to apply or enforce IP laws. Key outstanding implementation issues need urgent resolution before PhRMA members may benefit from a generally improving investment climate. These include clarification of the data exclusivity provisions in the 2000 patent law, establishment of linkage between health regulatory and industrial property officials, and a firm stance against standard parallel imports. Although assurances were given by the Lebanese Prime Minister, Minister of Health, Minister of Justice and Minister of Economy that the deficiencies in the patent law and safety concerns regarding parallel imports would be addressed, no legislation to deliver on these commitments has been passed to date. PhRMA members remain troubled by the continuing practice of registering unauthorized copies of innovative and patented pharmaceutical products, despite passage of a new patent law in the year 2000 that should preclude such registrations. Moreover, Ministry of Health issued recently two pricing ordinances with confusing sections which if they remain unchanged will have a negative impact on PhRMA members. For these reasons, PhRMA asks that Lebanon continue to be placed on the 2006 “Special 301” Priority Watch List.

Data Exclusivity

The data exclusivity provisions, as they apply to commercially valuable clinical dossiers, are ambiguous and unenforceable. In an effort to address the deficiencies in the data exclusivity provisions, local affiliates of PhRMA members have provided the Ministry of Health and Ministry of Justice with a briefing paper outlining the industry’s concerns and options for amending the legislation and the basis for enforcement of data exclusivity. The submission remains under consideration and it is unclear what the final position of the Lebanese authorities will be.

Article 47 of the Patent Law provides only a partial definition of confidential information, leaving the identification of such information to interpretation and legal precedent. A comprehensive provision identifying protected information as it pertains to the drug technical file submitted to the Ministry of Health is required to protect the proprietary information from unauthorized use. It should require that:

- The Ministry of Health protects such information from unfair commercial use by not approving any application for the marketing of a pharmaceutical product filed by another party that relies on the same data or conclusions without the consent of the party that produced the data for a reasonable period of time.

- The Ministry of Health protects such data from disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use.

Recently, the Ministry of Justice, and the Director General of the Ministry of Health concluded inappropriately that Article 47 cannot be used for the protection of commercially valuable clinical dossiers. In April of 2004, the Health Ministry issued Ministerial Decree number 212 requesting the submission of all clinical data, bioavailability/bioequivalence data, pharmacology data, and toxicology and other related data, and requiring a completed questionnaire for every site involved in the manufacturing process and the product inserts. Full implementation of these requirements, is still pending. This creates a discriminatory hardship for PhRMA members operating in Lebanon and may be causing delay of necessary Ministry of Health approvals for new pharmaceutical products.

Patent Protection

PhRMA remains committed to supporting the government's efforts to modernize the copyright, trademark and patent laws in advance of WTO membership through continued dialogue with the Lebanese authorities and sponsorship of workshops. In July 2000, the Lebanese passed a new industrial property law, which represents a major improvement over the 1924 law. It provides a basic level of product patent protection with a 20-year term of protection and will provide incentives for new foreign direct investment generally, as well as technology transfer specifically, to the pharmaceutical sector. However, a number of amendments will be necessary in order to bring the patent bill into full compliance with TRIPS. For instance, in its present form, the patent law does not provide any immediate protection for the products of PhRMA companies due to requirements for submission and issuance of a Patent in Lebanon to ensure exclusive marketing rights, and the lack of pipeline protection.

Copy Products

PhRMA members continue to be plagued by the registration of unauthorized copies by the Ministry of Health. As an example; two PhRMA members have challenged the marketing of a pirate version of their product in court based on unfair competition. Verdicts may be reached by the end of the 2006. In addition, several infringing copies were approved by the Ministry of Health during 2005.

At the same time, the Ministry of Health is accepting applications for marketing licenses submitted by local companies with limited data regarding the efficacy, safety and tolerability of such products. This facilitates the registration of unauthorized copies and increases public health risk.

If the Ministry of Health maintains this position, the door will remain open for Lebanese companies to register, import and market unauthorized copies even before the registration of the innovative original products. Given that the new law is subject to interpretation, it is anticipated that local companies will continue their attempts to register unauthorized copies of patented pharmaceuticals belonging to U.S. companies.

Trademark Protection

A draft legislation was submitted to the Lebanese Parliament, the purpose of which is to eliminate the protection that is currently available to exclusive distributors / agents. The draft legislation is still at the Parliament awaiting further review and passage. The importation of these products is justified as a "cost containment" measure, yet senior ministry of health officials privately acknowledge that the resultant parallel importation will fail to produce any savings on medicines for patients. Moreover, due to the porous supply chain outside the manufacturer's control, parallel importation poses serious health and safety risks to Lebanese patients.

Parallel importers, distributors, wholesalers, and retail pharmacists do not customarily pass on any "savings" associated with exchange rate arbitrage. Senior health officials recognize that parallel importing puts the drug supply at risk, but have failed to stop the practice. Industry has argued that it is very hard to police the supply of medicines once the chain of supply from manufacturer to authorized importer is broken. Counterfeiting and/or poor quality goods easily enter the drug supply, harming patients and undermining the value of trademarks. Additionally, in case of product withdrawal or recall, it would be very difficult to recall the parallel imported drugs as it would be impossible for the manufacturer to identify the parallel importers to alert them to the recall decision, and there is no guarantee that the parallel importers can keep accurate records of the distributed parallel imported drugs.

During meetings with senior officials, PhRMA members have received personal assurances that bureaucratic requirements will effectively make the parallel importation of pharmaceuticals unfeasible. However, it is clear that until legislation regulating the parallel import of pharmaceuticals is introduced, local importers will attempt to take advantage of legislative loopholes.

Conclusion

PhRMA members appreciate continuing U.S. Government high-level advocacy in support of the following objectives:

- Ensuring that the Lebanese authorities pass the proposed amendment to amend the patent law that would allow foreign patent holders to obtain Lebanese patents even after the passage of 12 months after the first patent application;
- Ensuring that the Government of Lebanon enforces 2000 patent law, with special attention to data exclusivity for pharmaceuticals, and implement the suggested amendment; and
- Encouraging the Ministry of Health to require, for the purpose of registration, the submission of a patent or license as part of the registration filing of a new product (or full clinical data that does not rely on the originator's file). This precedent has recently been set by the UAE in its recent patent law.

Market Access Barriers

Violation of National Treatment

It is widely acknowledged that locally produced products have "priority standing" over imported products in Ministry of Health registration procedures, which translates into preferential waiting periods for obtaining marketing authorization.

Regulatory Approval Delays

Research-based companies are urging the Ministry of Health to develop a "fast track" approval process for New Chemical Entities (NCE) and their associated line extensions. This would speed the introduction of new, innovative and often life and/or cost- saving medicines to patients. Unfortunately, a lack of resources, outmoded regulatory requirements, and the lack of criteria for distinguishing between innovation and imitation contribute to unnecessary delays in the registration of new products. Delays of up to two years are common, while in neighboring Cyprus, new products are often approved in as little as 90 days (based on prior "reference country" approvals, e.g., FDA or European agency approvals). To date, the Government has failed to take any action regarding industry proposals, meaning Lebanese patients often must travel abroad or rely on risky, uncontrolled "suitcase" importation to obtain the latest medicines on the black market.

In a positive move, a new registration law in line with international regulatory standards was published in July 2003 and a new ministerial decree 212 was issued in April 2004. To date, this new registration law number 530 remains ineffective due to delayed approval of the implementation regulations. When effective, this law will facilitate the registration of products by multinational

pharmaceutical companies and address some of the bureaucratic delays experienced by U.S. industry in introducing innovative medicine. In addition, the registration of generic products still relies on the innovator's data in spite of the issue of ministerial decree 212. The implementation of its standards is yet to be equally across the board to both local and foreign companies.

In June 2005 Ministry of Health issued two pricing ordinances with confusing sections relating to price comparison, mandating alignment of the export prices to Lebanon to the lowest export prices between Saudi Arabia and Jordan and referencing the comparison to the lowest prices in seven European countries. This creates comparison with countries that have different health care coverage and different Intellectual Property (IPR). Also, it takes different points of references as the export price is not a common standard in European countries.

PAKISTAN

The over-all investment environment is improving in Pakistan but PhRMA members are disadvantaged by the lack of implementation of IPR and the existence of significant market access barriers. With regard to intellectual property protection, serious concerns exist about amendments made to the new patent law in October 2002 that cause significant injury to the U.S. research based pharmaceutical Industry.

PhRMA and its member companies also remain concerned by TRIPS-inconsistent trademark policies and the failure to provide data protection. However, PhRMA has noted that the Government of Pakistan appears to understand that a sound intellectual property regime is a prerequisite for developing the national economy and for attracting foreign direct investment. In September, 2005, the government amended the drug Act of 1976 to provide IP protection to pharmaceutical products. No implementation has occurred. The establishment of the Intellectual Property Office (IPO) is a good start but has had no impact yet on improving the IP environment.

In the context of the Administration's renewed focus on South Asia, and the Government of Pakistan's apparent willingness to improve the IP environment, PhRMA supports allocation of foreign assistance resources towards capacity building in Pakistan to support technical assistance and training towards the adoption and/or implementation of TRIPS obligations. This would be of great benefit for Pakistan in particular at the IPO and to activate the amended drug Act 1976 in terms of providing patent examination and the implementation of effective DE.

Because of Pakistan's failure to implement data exclusivity protection,, PhRMA requests that Pakistan to be listed in the 2006 "Special 301" as a Priority Watch List.

Intellectual Property Protection

Data Exclusivity

As a WTO member, Pakistan is required to implement TRIPS Article 39.3 by providing effective DE to data relating to pharmaceutical products efficacy and safety. To date, Pakistan has not provided protection against unfair commercial use of data. Such protection should preclude direct and indirect reliance by the Ministry of Health on the data package used to support initial marketing approval of the originator product for a period lending not less than 5 years following market approval in Pakistan. Protection should extend to the data itself as well as to conclusions based on that data, so that an application not filed by the originators could not be made until the full term of protection has expired unless

such party generated its own supporting data or got consent of the party that produce / own the data.

Patents

In January 2001, a new patent ordinance was promulgated which made incomplete, though promising, strides towards recognizing Pakistan's TRIPS obligations. Amendments made to the act in 2002 prevent U.S. based pharmaceutical companies from obtaining and exercising effective meaningful patent protection in Pakistan. The new amendment to the patent act, effective from October 2002:

- Eliminates use patents;
- Restricts patent filings to single chemical entities for pharmaceutical and agrochemical inventions;
- Restricts the protection for derivatives or salts;
- Introduces onerous barriers to patenting bio-technology based inventions;
- Allows for parallel importation by parties unrelated to the patentee including a compulsory licensee; and
- Establishes a mechanism for compulsory licensing if an invention has not been worked in a manner that promotes the "transfer and dissemination of technology".

Together, these amendments seriously devalue intellectual property rights in Pakistan and are inconsistent with the spirit and law of Pakistan's current and future TRIPS obligations.

Furthermore, the Ministry of Health continues to register generic copies of patented products of U.S. and other multinational pharmaceutical companies. In all practical matters, current and expected patent protection in Pakistan remains inconsistent with WTO obligations and disadvantages U.S. based multinationals.

PhRMA seeks the timely issuance of appropriate and transparent rules and regulations that underlie the Patent Act and the immediate withdrawal of the newly implemented, TRIPS inconsistent patent law amendments.

Trademark Protection

The Pakistan Government issued a notice dated August 24, 1994, which requires a non-proprietary or generic name of the substance to be printed on the label of an originator's or innovator's product with at least equal prominence as the brand name. The addition of the generic name in equal prominence to the trademark undermines the proprietary rights of the originator. This is intended to dilute brand names and their associated assurances of source, quality, efficacy and safety. It also incorrectly implies total interchangeability and equality of two different products.

In fact, Pakistan does not require generics to submit effective bioequivalence or bioavailability data. In this context, erosion of trademark protections constitutes a public health threat to Pakistan’s citizens and unfairly compromises justifiable commercial interests of PhRMA members.

PhRMA asks the U.S. Government to notify the Government of Pakistan that these laws conflict directly with Pakistan’s obligations under WTO TRIPS rules protecting trademarks (TRIPS Article 20, indicating that “[t]he use of a trademark shall not be unjustifiably encumbered by special requirements . . .”), and therefore should be amended to comply with TRIPS.

Pricing

The current government controlled pricing system in Pakistan is another major market access barrier. Despite fulfilling all the requirements requested by the health authorities to set prices of pharmaceutical products, such as price at the country of origin, regional prices and the product cost data sheet. However, these were overlooked and the government fixes prices at 40%-50% less than the original submitted price. Also, officials responsible for pricing at the MOH don’t have the required expertise, technical know-how and experience in making this vital decision.

There is a lack of transparent pricing directives for pharmaceutical products. Although a discussion took place on a policy to adjust prices in order to compensate for devaluation and/or exchange rates fluctuation, nothing has materialized.

Damage Estimate

PhRMA members estimate that the 2005 damages in Pakistan are equal to 10.5% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Pakistan	82233	30770	113003	1080822	10.5%

SAUDI ARABIA

The Saudi Government issued a Patent Law at the end of 2004 and started a retroactive implementation in 2005. Due to novelty requirements in this law, pending applications at King Abdul Aziz City for Science and Technology (KACST) that were accumulated due to backlog for several years will be rejected.

Market access barriers still exist in the Kingdom such as pricing directives formulated with a lack transparency, or fairness, and government reference prices to other countries that are not economically comparable to Saudi Arabia. In addition, other regulatory requirements cause delays to registration of innovative products. Therefore, PhRMA members request that Saudi Arabia to be listed in the 2006 "Special 301" Priority Watch List.

Intellectual Property Protection

Despite the extensive problem of a backlog of patent applications for the past decade, PhRMA members were able to seek patent protection in Saudi Arabia for already granted foreign patents through filing applications for patents for the remaining term of the foreign patent. The maximum patent term allowed in Saudi Arabia is 15 years from the date of the original Patent. However, in practice a very small number of patents were granted prior to the enactment of a new law in July 2004 which provided for absolute novelty. Consequently, a large number of pharmaceutical inventions were pending with the Saudi Patent office awaiting examination. The Saudi government applied the new law retroactively, thus disallowing and rejecting hundreds of pending patent applications including those pertaining to pharmaceutical products. Taking into consideration that those applications were pending for more than 10-years without any action, applicants were punished twice, one time by delaying the examination process and eventually by denying such applications any proper protection. During the past few months, a number of applications, that have the same status, were treated differently i.e. some were rejected because of loss of priority, some were rejected because of lack of novelty, and others were accepted. It is obvious that dealing with the backlog while there is a new patent law is creating confusion and has exacerbated the previous problem. PhRMA members are asking that the new law should not be applied retroactively and King Abd El Aziz City for Science and Technology (KACST) should keep respecting patents granted in the country of origins of the products.

In the case of two of our member companies, copy products were given marketing authorization by the Ministry of Health although the patent applications of originals were pending with KACST. In spite of several representations that it would act, no remedial action has been taken by the Ministry of Health to withdraw the earlier authorization. PhRMA members are looking forward to working closely with the US government to ensure that the Saudi government meets its commitments in this case of violation.

Market Access Barriers

Saudi Arabia still applies pricing directives formulated in a manner that lacks transparency, which prohibit competition. Thirty two countries that are not at all comparable to Saudi Arabia in terms of living standards, income levels, consumer choices, exchange rates, regulatory requirements and/or drug consumption patterns, are being referenced by the MOH and the lowest price is being adopted. Moreover, the health authorities are delaying the registration of innovative drugs by requesting unnecessary laboratory analysis even for products approved by FDA and the European Medicine Evaluation Agency (EMA). This deprives Saudi patients of access to new medicines.

Foreign ownership is still an issue in Saudi Arabia and foreign investors are required to partner with local distributors who are the actual legal representatives of the company in the Kingdom. Accordingly, foreign companies have no legal status in the Kingdom of Saudi Arabia. Saudi nationals must control or own 51% of enterprises. This requirement and mandatory local hiring rules drive up the cost of business. This disproportionately burdens PhRMA member companies.

The health authorities discriminate in favor of local or regional (GCC) companies by providing them with faster registration, preferential pricing, and re-pricing criteria. These practices favor local manufacturers over imported products. In addition, the prices of imported products are reviewed every four years (new prices are always lower), while such review for local manufacturers is done every five years. In tenders a 10% advantage is granted to local or regional GCC companies in comparison to multinational companies. Moreover, the Department of Health has stopped or delayed payments remitted on pharmaceuticals sold to Government-run institutions (Ministry of Defense, National Guard, Ministry of Interior and Faisal specialized Hospitals).

Tunisia

Although a World Trade Organization (WTO) member since 1995, Tunisia has not complied with basic WTO requirements under the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) to the detriment of research-based pharmaceutical companies.

The key issues affecting U.S. research based pharmaceutical companies in Tunisia can be grouped into two major areas:

- inadequate protection of intellectual property rights associated with pharmaceutical products, and
- barriers to market access, as outlined below.

While Tunisia has only been obligated to provide product patent protection as of January 1, 2005, it has been required to provide data exclusivity since January 1, 2000. Tunisian patent law N°2000-84 dated August 24, 2000, however, does not provide for adequate data exclusivity, as required by Article 39.3 of the WTO TRIPS Agreement.

In addition, through what it calls the “Correlation Rule”, Tunisia mandates local manufacturing for pharmaceutical products under the threat of an import ban on foreign produced pharmaceutical products. Due to the growing impact of these market access barriers, PhRMA requests that Tunisia be included in the 2006 “Special 301” Priority Watch List.

Intellectual Property Protection

Data Exclusivity

Tunisia does not provide a formal legal regime for protection of undisclosed test or other data, i.e. data exclusivity. Tunisian authorities argue that data exclusivity and non-disclosure requirements are secured by existing Tunisian laws and regulations, including those on public servants’ professional secrecy. There is however, no clear understanding of the concepts of unfair commercial use and non-reliance in Tunisian law or practice. Of particular concern to PhRMA members is the third party/competitor reliance on test data used to gain market access by a pharmaceutical importer. The Tunisian Government provides competitors of research-based pharmaceutical manufacturers the ability to use or rely on original test data at any time, despite the data being incurred at considerable cost and effort to the original manufacturers. This is in violation of Article 39.3. of TRIPS, which requires Tunisia to provide protection of such data against unfair commercial use. Tunisian Ministry of Health issued a new circular (#40) to address DE issues, however, it is unclear when it will be enforced. In addition, this circular is not specific enough in its language to obviate the existing system described above. The Ministry of Health (MOH) has rejected new regulatory submissions for new products which include statements such as “product covered by the Data

Exclusivity circular n°40". In fact the MOH refused to take the covering note stating that this should go the Head of Drug Agency and this should not be included in the file.

PhRMA requests U.S. Government support to secure a formal and effective Data Exclusivity regime that would prevent approval of pharmaceutical products relying directly on proprietary data filed by research-based pharmaceutical companies or prior approval of products of research-based pharmaceutical companies. Further support is also requested to secure linkage between industrial property authorities and health regulatory authorities.

Patent Protection

With the exception of Article 78, which authorizes compulsory licenses in the case of a pharmaceutical product "offered to the public at an abnormally high price", the Tunisian patent law should, when implemented, provide effective product patent protection for pharmaceutical products, consistent with obligations under TRIPS. However, there is no transparency on how the Tunisian industrial property authorities will implement the law. U.S. Government support is needed for speedy, effective and transparent implementation of Tunisia's patent law and all of its Intellectual Property obligations under the TRIPS Agreement.

Trademarks

The MOH has started to approve locally copied products for which the trademark is close to that of the original products or is close to the INN, which is contrary to WHO regulations.

Market Access Barriers

National Treatment and Quantitative Restriction

The Tunisian Government grants preferential treatment to locally manufactured pharmaceutical products, through the working of the "Correlation Rule," which operates as an import ban on foreign produced innovative pharmaceutical products. The Rule permits domestic production and access to the market without competition from imports.

The Correlation Rule was introduced by the Tunisian Ministry of Health in 1996. Circular N°13, dated February 18, 2004 is currently the version of the rule in force. This allows the monopolistic state importer, "Pharmacie Centrale de Tunisie" ("PCT") to restrict or ultimately ban imports of innovative pharmaceutical products, as soon as any local manufacturer is able to supply the market with a locally manufactured copy and demonstrate that it can maintain a minimum inventory equivalent to the stock that PCT would maintain in relation to the

product at stake. Thus, as soon as a locally manufactured generic copy becomes available, the monopolistic state importer, PCT, no longer imports the branded product, thus releasing itself from the financial burden of carrying minimum inventories and/or absorbing exchange rate losses (since in-market prices are fixed in Tunisia).

The suspension or prohibition of imports pursuant to the Correlation Rule constitutes a quantitative import restriction in violation of Article XI of the General Agreement on Tariffs and Trade of 1994 ("GATT") it also constitutes preferential treatment to local producers, to the clear detriment of the U.S. research-based pharmaceutical companies, in violation of GATT Article III obligations on national treatment.

There are already multiple generic copies of innovative PhRMA-member products available in the Tunisian market. To remain on the Tunisian market, the innovative products that can no longer be imported have to be locally manufactured. Although some negotiation is possible to effect the transition to local manufacturing, this transition period often leads to the depletion of stocks of the branded product and leaves the market free for exploitation by the local generic.

To be able to compete with local generic manufacturers, the owner/importer of the branded product has the option to:

- Abandon the marketing of its product;
- Switch to local manufacturing at its plant (if it owns one), with a lead time that very often leaves the market open to the generic; or
- License its product to a local manufacturer (which very often will be the manufacturer of the generic copy).

The MOH has stated that correlation would end by Jan 1 2006, but later revised its statement to Jan 1, 2007.

Government Price Controls

The Tunisian Government policies on pricing of pharmaceutical products lack transparency. Prices of imported pharmaceutical products are based on :

- prices at origin and
- prices of other products of the same therapeutic class.

To be accepted for filing of a registration dossier, Tunisian health authorities require a price proposal based on source of supply price minus a discount of a minimum of 12.5 percent.

Prices of imported pharmaceutical products are fixed by the government in Tunisian Dinars irrespective of variations in exchange rates. Accordingly, PCT (a monopolistic state company importer) sells to wholesalers at a fixed price without adjustment for exchange rate variations. PCT negotiates rebates and/or free goods from importers in order to compensate for losses due to exchange rate variations. In a second step, incentives to local production are then provided as a preliminary to the Correlation Rule coming into play.

Preference is given to local generic production irrespective of the price of the generic copy compared to the price of the imported branded or generic pharmaceutical products. Furthermore, local pharmaceutical companies are clearly favored in the public tender processes, which are automatically awarded to them.

Damage Estimate

PhRMA members estimate that the 2005 IP damages in Tunisia are equal to \$60 million which represent 18% of the total market share.

WESTERN HEMISPHERE

ARGENTINA

Argentina does not provide a legal environment with an adequate intellectual property (IP) framework for research based pharmaceutical products. Inadequate data protection and linkage, and an ineffective preliminary injunction system has resulted in continued erosion of market share for the research-based pharmaceutical companies. Market access barriers, including restrictions on trademarks, lack of bio-equivalence and bioavailability requirements, and differential import duties, are also of concern. However, elementary steps have been taken to reduce the current patent application backlog. In addition, the Argentine Congress passed legislation introducing changes to the customs code in order to comply with procedures related to border measures (TRIPS Section 4). The regulation of the application of this reform is still pending. Although there has been limited progress on the patent backlogs, PhRMA recommends that Argentina remain on the "Special 301" Priority Watch List in 2006 because of the significant adverse impact of shortcomings in Argentina's data exclusivity and linkage mechanisms.

Intellectual Property Protection

Data Exclusivity

Despite the improvements brought on by the settlement between the United States and Argentina in the World Trade Organization (WTO) in 2002, progress on effective protection for confidential and proprietary data developed by the research-based pharmaceutical industry of new medicines has not materialized.

Specifically, the Health Regulatory Authority in Argentina (ANMAT) continues to rely on the originators' data to approve unauthorized copies of medicines at any time after originator approval.

The regulation of disclosure and protection of test data provided by Argentine law 24.766 allows any competitor to begin marketing the innovator's product shortly after a request to market a copy product is filed, without having to undertake the expense of proving that the product is safe and effective, thus clearly violating Article 39.3 of TRIPS. Also, the Health Agency interprets the public disclosure of part of a data set as an indicator that all of the data should be regarded as being in the public domain. PhRMA members request the U.S. Government to use bilateral or multilateral action to ensure that Argentina adopt and implement effective protection for clinical dossiers.

Companies did seek legal remedies to circumvent the lack of effective protection for proprietary test data. One R&D company has reported its concern about the lack of compliance by the health authority (ANMAT) with a preliminary injunction granted in connection with the application of TRIPS Article 39.3,

particularly with public comments by the Minister of Health in relation to the case and IP rights in general.

Patent Backlog

Since the mid-1990s, PhRMA member companies have been faced with an inefficient patent granting system in Argentina. Every year since 1996, INPI has consistently granted far fewer patents in comparison to the surplus of applications it has received each year. The official patent backlog in 2004 reached an astounding 18,000 applications. The average time from filing to grant was 7 years, a delay that materially undermined the innovator's interests.

However, the patent backlog situation in Argentina is slowly improving. At the end of 2003, the INPI announced fast track proceedings that included 4 resolutions affecting the patent process. Resolution #372 filters through the applicant pool and requests all application holders to confirm their continued interest in the process. This measure has reduced the number of pending patent applications by 18%, from 18,000 to 15,315 applications.

During 2004, INPI conducted an evaluation of its productivity and concluded that a significant amount of resources were required to improve the patent backlog along with more effective administration of resources. INPI secured more funding to create 30 positions for patent examiners and 11 administrative officials. 2003 also marked the first year in which INPI's applications output was higher than the input, a trend that has continued into 2005.

In September of 2005, INPI reported that 441 patent applications were granted. The local R&D Association CAEME established that out of 441 patents, 59 belonged to its member companies. This is welcome progress.

Other legislation announced by INPI established a patent prioritization process. This includes Resolutions 263 and 264, and Article 27, described in further detail below:

- Resolution 263 – Allows companies to modify positions in their applications within each sub-class based on their priorities. 102 patent applications complied with the criteria established by the Resolution.
- Resolution 264 – Allows fast track treatment to applicants with claims equal to the reference patent office (United States, Europe, others) with a prerequisite of acceptance under Argentine Law. It establishes priorities and significantly reduces the timing of the overall process.
- Article 27 – Speeds up the overall publication process and provides an option for immediate publication as opposed to an 18-month waiting list.

Because few patents have been approved under this system so far, the effectiveness of the process remains unproven. PhRMA members are nevertheless hopeful that the prioritization process will facilitate earlier arrival of key drugs in the Argentine market.

Patent Law Amendment of 2002 (Injunctive Relief)

The environment for PhRMA member companies to seek injunctive relief in Argentina has become less certain compared to the time when patent holders were entitled to file for injunctions under TRIPS Article 50 and section 232 of the Argentine Code of Civil procedure. The Argentine preliminary injunction process was amended following the settlement of the U.S./Argentina WTO dispute in 2002. As a result, the Argentine Congress revised the process to comply with the Settlement and added more requirements to the regulatory postponement of the approval process, creating additional hurdles to obtain injunctive relief.

Today, there is a mandatory requirement to first hear the defendant (this wasn't the case prior to the Amendment), a requirement to evaluate the validity of the innovator's patent (which is opposed to the legally established presumption of validity of all Administrative acts), and the requirement that the court determine which party will be more harmed if an injunction is granted. Besides, proceedings now require an expert to issue an opinion on the infringement.

Below is a summary of the requirements:

- Likelihood of validity, if the patent were challenged by the defendant;
- Balance of hardships (which party will suffer more damages if the injunction is granted or not);
- Appointment of an Official Expert to analyze the likelihood of validity and the likelihood of infringement;
- Irreparable harm to the title holder;
- Likelihood of infringement; and
- Posting of a Bond (a bond should be posted or can be replaced by an insurance bond).

The new law introduced the first three requirements. Subsequently, defendants can be summoned to appear at the injunction proceedings before the injunction is granted. Prior to the amendment, injunctions were always granted on an ex parte basis.

So far there are few cases to report on, but companies that have filed for preliminary injunction report significant commercial damage as the process of obtaining a preliminary injunction has become very slow. In one particular case,

the infringers sold a copy product for several months before the preliminary injunction was granted to the R&D company.

As the current preliminary injunction system in Argentina has the potential to become less effective as a result of the WTO Settlement modifications, PhRMA members request that USTR initiate a dialogue with the Argentine government to seek improvements to the system so as to provide patent owners with fast and effective injunctive relief.

Linkage

The lack of linkage between patents and the Health Agency (ANMAT) approval process represents another important unresolved issue, which will become even more urgent since INPI began to grant pharmaceutical patents. ANMAT grants copy companies the authorization to sell products that infringe on the rights of patented products. As there is no communication between ANMAT and the Patent Office (INPI), one government agency grants a right which is violated by the other. Since INPI publishes all applications and patents granted, it should be mandatory for this agency to either communicate such information to ANMAT or for ANMAT to be required to obtain a “green light” from the INPI before it grants a sanitary registration.

Other IP Issues

The following are other important deficiencies in Argentina’s intellectual property regime:

- INPI, alleging that second uses do not comply with INPI’s novelty requirement, has issued a directive (Circular A.N.P. N° 008/02) prohibiting the grant of patents for second uses of known compounds. This has adversely affected R&D companies.
- The Argentine Supreme Court rejected the conversion of pending process patent applications into product patents (in violation of TRIPS Article 70.7), as well as the revalidation of foreign patents.
- PhRMA members contend that it would be highly consistent with recent efforts to improve the regulatory environment in Argentina if the government would aggressively pursue membership as a signatory to the Patent Cooperation Treaty (PCT).

Market Access Barriers

Bioequivalence and bioavailability tests are not required for the approval of products that are either “similar” or allegedly equal to the original product. As

a consequence, local companies have the ability to launch copies of innovative products that lack those quality and safety assurances.

Additionally, the Government of Argentina provides no clear guidelines (or regulations) about promotional brochures or product inserts. Therefore, local companies that sell copies of innovative products usually use the information developed and published by the research based companies as a basis to create their own promotional brochures. This leads to a situation where “local brochures” may provide misleading information, such as suggesting that tests performed by the inventor of the innovative product can be applied to the copied product.

Import Policies

The Government of Argentina continues to impose differential import duties on pharmaceutical products that are not manufactured within Mercosur (Argentina, Brazil, Uruguay and Paraguay). Overall customs procedure requires supporting documentation and additional payment of fees. Free samples and products for clinical trials are also subject to import duties in Argentina. In addition, there continues to be significant delays in customs due to bureaucratic red tape.

Local Manufacturing

The industry is also concerned by reports that some government officials are considering developing a minimum local manufacturing requirement to increase local production. Options include substituting imports (in case a company decides to terminate production in Argentina) for third party manufacturing. Should this initiative be actually put into place, R&D pharmaceutical companies would be discriminated against, as most have global operations. R&D companies that do not have a local manufacturing facility would have to hire a third party for partial local manufacturing of their product lines.

New Coverage Guidelines

In April 2004, the Government of Argentina issued Resolution 310, establishing a “Therapeutic List”, which basically consists of a list of drugs for chronic diseases that are covered by the social security system. These drugs will benefit from a 70% discount at the counter.

The resolution sets a “reference price” for drugs included in the list by calculating the average market price between the lowest and highest price. The 70% discount is applied to the average price. Therefore, the discount for higher priced drugs is smaller, disproportionately affecting higher cost drugs from R&D companies that must recoup investments in research and development. The measure was decided without taking into considerations comments provided by

the R&D pharmaceutical companies, which are disproportionately affected by the measure.

Standards, Testing, Labeling, and Certification

Argentina's National Medications Institute (INAME) does not accept the results of quality control testing performed in the U.S. or the European Union. New and redundant quality control tests must be performed locally.

Damage Estimate

PhRMA members estimate that the 2005 damages in Argentina are equal to 14.3% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Argentina	214397	67791	282188	1971043	14.3%

BRAZIL

The government of Brazil continues to undermine the pharmaceutical industry's intellectual-property rights. This past year, Brazil again threatened to break a patent of an innovative drug, in a situation that hardly could be considered a national emergency. Brazil's health agency ANVISA continues to interfere with the patent approval process for pharmaceuticals. Under Article 229-C of a 1999 amendment to the patent law, ANVISA must provide its prior consent before a pharmaceutical patent is issued. This procedure not only violates TRIPS Articles 27 and 62.2, but also is discriminatory, as patents approved by the Brazilian PTO for no other industry are subject to a review by another agency. There are a series of bills in the Brazilian Congress that threaten IP rights on pharmaceutical products, such as a Bill that would deny patentability to HIV/AIDS drugs. In violation of TRIPS Article 39.3, copies of medicines continue to receive sanitary registrations based on undisclosed tests and other data, although these have not been launched on the marketplace. Although the Brazilian PTO seems to be committed to improving the patent office's output, no concrete progress has been made so far to reduce the large patent backlog.

The Brazilian Government imposes a discriminatory price freeze on pharmaceutical products and government price controls affect all drugs except OTCs. During the past five years, the discriminatory price freeze has inflicted serious harm on the industry, allowing for limited price increases for medicines that do not fully account for devaluations, inflation, and the cost of doing business in Brazil. The price restrictions are completely contrary to the free-market principles to which the country has committed itself in recent years.

Further, a decree that gives unfettered discretion to the Minister of Health to grant compulsory licenses to manufacture medicines erodes the value of pharmaceutical patents and creates uncertainty in the market place. The Brazilian Government has repeatedly declared its willingness to invoke this decree if it cannot coerce lower prices from research-based pharmaceutical companies, particularly threatening the makers of HIV/AIDS medicines. For these reasons, PhRMA recommends that Brazil remain on the Priority Watch List for 2006.

Intellectual Property Protection

Data Exclusivity

The Brazilian Government does not provide appropriate protection to an originator's significant investment in the data it develops, failing to measure up to internationally accepted standards. Copies of pharmaceutical products receive

sanitary registrations based on an originator's undisclosed tests and other data, in violation of TRIPS Article 39.3. As a result, companies are forced to serve legal notices to keep inappropriate copies off the market.

Linkage

The lack of linkage between ANVISA, the Brazilian health agency, and the patent status of pharmaceutical products continues to present a problem. ANVISA has been granting sanitary registrations to copy products whether or not an innovative product has a patent or a pending request for a patent. However, so far, no copies of products still under patent have been launched in the marketplace.

Patentability Standards

One of the most serious problems facing the pharmaceutical industry today in Brazil was created by Article 229-C, the 1999 amendment to the patent law that authorizes ANVISA to review all patent applications claiming pharmaceutical products and/or processes.

The industry has long advocated a formal link between the Brazilian PTO (INPI) and ANVISA to ensure that sanitary registrations are not provided to second applicants when the innovator product is patent protected. However, the 1999 amendment is inconsistent with TRIPS, and is a factor in delaying the approval of pharmaceutical patents.

The measure is inconsistent with the anti-discrimination clause of TRIPS Article 27.1 because products made by other industries are not subjected to a similar review for patent approval by an agency other than INPI. Any review by ANVISA for patentability is beyond the expertise of ANVISA, and any review by that agency for any other purpose would be inconsistent with TRIPS Article 27.1.

In practical terms, 31 applications have been refused by ANVISA since Article 229-C was introduced in the Brazilian legal system, according to ANVISA's website. For most cases, lack of novelty was alleged. These 31 applications represent 4% of the total amount of pharmaceutical applications examined by Brazilian Patent Office (INPI) between June 2001 and May 2005.

By refusing approval to these 31 applications, ANVISA contradicted a previous decision by the Brazilian Patent office (INPI), providing a basis for legal action. The first decision arising from a lawsuit filed against ANVISA, calls for the patent to be granted. This case was submitted to a higher court.

After June 2005, INPI and ANVISA started to operate under a common process of examination in order to avoid public divergences about the patentability of a new product and/or process. Applicants now receive a

common, one-time decision by INPI and ANVISA about the patentability of a new product and/or process, further blurring the lines of the patent approval process.

Compulsory Licensing

PhRMA continues to support the WTO August 30, 2003 Decision (Menon/Motta), but the industry remains concerned about a Presidential Decree (4370/03) regulating the implementation of Article 71 of the patent law. The decree allows the granting of compulsory licenses in broadly and poorly defined situations of national emergency and national interest, with no definitions or limitations provided. Further, the decree gives broad discretionary powers to officials below the presidential level. The definition-related problem clearly allowed the Brazilian Government to threaten Abbott, the makers of Kaletra®, with a compulsory license. As largely announced in both the national and international media, Abbott and the Brazilian Government settled an agreement for the supply of Kaletra® into the Brazilian market.

We welcome the recent statement by the Minister of Health declaring the HIV/AIDS situation in Brazil as not being one of “national emergency,” and that it is not in the “public interest” to compulsory license HIV/AIDS drugs. Nevertheless, the Brazilian government must implement the necessary changes to its Decree in order to avoid the same critical situation in the future.

The pharmaceutical industry believes that the long-term sustainability of Brazil’s HIV/AIDS program does not lay in forcing price reductions through threats to compulsory license. Individual companies have been working with governments to help ensure that drugs reach patients.

Bill 22/2003

If enacted, the amendments required by Brazilian Bill of Law No. 22 on the patentability of drugs for treating HIV/AIDS would be inconsistent with the commitments made by Brazil in acceding to the TRIPS Agreement.

Current Article 18 of the Brazilian Law on Industrial Property excludes three categories of inventions from patentable subject matter. Bill of Law No. 22 would add a fourth category to exclude “drugs, and the respective process for obtaining them, used for prevention and treatment of the Acquired Immune Deficiency Syndrome – AIDS” from patentable subject matter.

Enactment would be inconsistent with the obligations of Brazil under the TRIPS Agreement. Specifically, the relevant portion of TRIPS Article 27.1 (Patentable Subject Matter) provides that “[s]ubject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.” [Footnote

omitted.] As drugs for treating AIDS and the processes to make these drugs are “inventions”, Brazil is obligated to make patents available for these drugs and processes that meet the listed criteria, unless these drugs and processes fall within the exceptions set forth in paragraphs 2 and 3 of TRIPS Article 27.

In addition, we believe the Bill’s constitutionality is questionable. First, the Bill may violate Article 5, XXIX of the Brazilian Constitution, which provides that Brazilian law must ensure temporary protection for authors of industrial inventions. By excluding from patent protection drugs used in the prevention or treatment of AIDS, the Bill may violate that constitutional requirement. Second, by excluding from patent protection only some drugs (used in the prevention and treatment of AIDS) while allowing other drugs to enjoy such benefit, the Bill may also violate the equal protection principle under the Constitution.

PhRMA members are also concerned with Bill 230/03, that would allow state run laboratories to manufacture patented drugs without previous authorization and/or compensation to the patent holder and Bill 139/99 that would allow parallel importation into Brazil.

Market Access Barriers

The research-based pharmaceutical industry continues to be harmed by a government-imposed discriminatory price freeze and price controls that conflict with Brazil’s proclaimed commitment to free-market principles. The price restrictions have caused damage to the pharmaceutical industry and undercut the industry’s incentive and ability to continue to finance research to discover new and better medicines.

Government Price Freeze and Controls

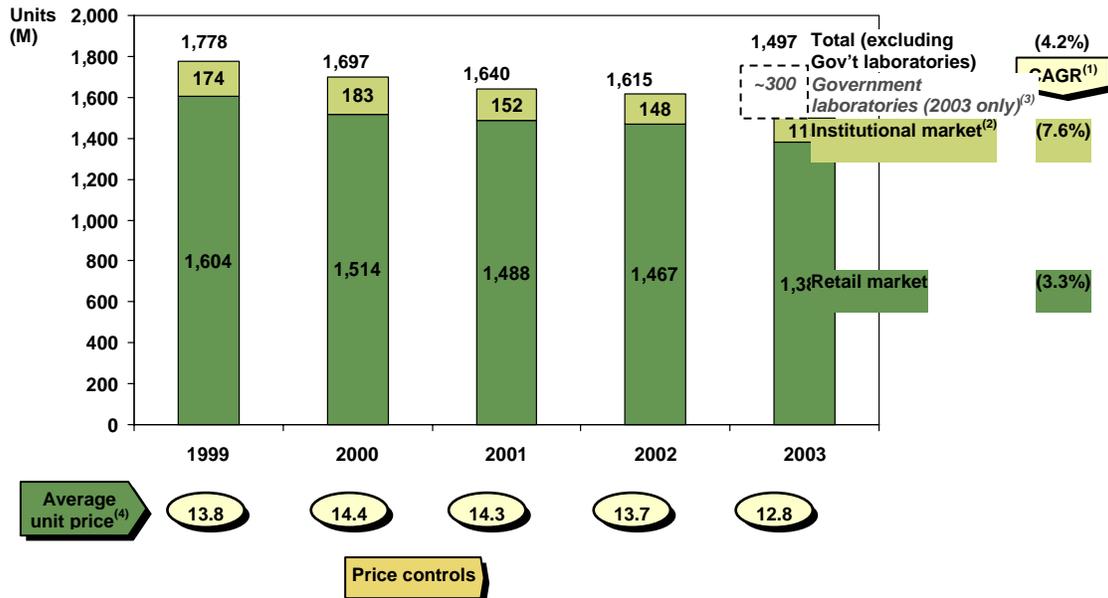
A price freeze – in effect since July 2000, is a major trade barrier to the pharmaceutical industry. The price adjustments allowed by the government have been clearly inadequate in the context of Brazil’s economic crisis and the devaluation of the Real. In 2002, the government allowed pharmaceutical companies to raise prices twice: 4.4 percent in January and 8.63 percent in November. In 2003, price increases were 8.63 percent in March and 2 percent in August. In 2004, the allowed increase was 5.62 percent in March. According to the Brazilian government’s statistics institute IBGE, inflation figures for 2002, 2003, and 2004 were, respectively, 11.99%, 9.86%, and 7.54%.

The arbitrary pricing restrictions were imposed with minimal input from the pharmaceutical industry. They take no account of increases in manufacturers’ costs, including government-mandated salary increases, and the usual increases in the cost of doing business. The restrictions fly in the face of the free-market principles espoused by Brazil and discourage international investment.

In March 2005, a price increase between 5.89 % and 7.39% was allowed, depending on the percentage of generics in a certain therapeutic class. Despite the controls, the government's goal to improve access via price controls did not succeed. Income being a major determining factor to access to medicines, did not substantially improve in the less favored social classes. Since the price freeze was introduced, the number of units sold (the total pharmaceutical market) has remained stable (1.29 billion in 2000, 1.25 billion in 2001, 1.29 billion in 2003, according to IMS in 2003), indicating that no new consumers (i.e., lower-income patients) entered the market and that the price freeze had no impact on expanding the pharmaceutical market in Brazil. Considering the last 12 months ending September 2005, total units sold increased by only 1.4%. Volume sales increases benefited mostly local generic manufacturers that, due to lower prices, substituted branded products.

The graph below clearly shows that government price controls and a price freeze had no impact on access to medicines.

FIGURE 1 – EVOLUTION OF THE BRAZILIAN PHARMACEUTICAL MARKET IN VOLUME
Access Hasn't Improved with Government Price Controls



(1) CAGR = Compounded Annual Growth Rate
(2) Institutional market includes government purchases (from laboratories established in Brazil) and hospital consumption
(3) For years prior to 2003, government laboratories production is difficult to estimate; because of recent investments in official laboratories, the number of units produced in previous years was most probably lower than in 2003
(4) Constant 2003 R\$ deflated by IGPM
Source: GRUPEMEF; CPI dos Medicamentos; MoH/SCTIE/DAF; Folha de S. Paulo; Target; Banco Central; BCG analysis

During 2005, the Medicine Pricing Review Board (CMED) insisted in developing further the price control formula, including the use of an econometric model based on labor productivity. This methodology does not reflect the characteristics of the pharmaceutical sector and the arbitrary nature of the

government's pricing restriction has further undermined the incentives for investment in Brazil.

Damage Estimate

Brazil is the second largest market for medicines in Latin America, but the pharmaceutical market declined sharply in value during 1998-2003, reflecting the lingering effects of the country's economic crisis and the price controls and freeze imposed by the government.

PhRMA members estimate that 50 percent of the economic damage inflicted on pharmaceutical companies by the Brazilian Government's policies limiting IP protection relate to the extensive delays and refusals in patent approvals caused by the dual-approval system described above. Reliance on an originator's exclusive data as mentioned above is estimated to cause another 20 percent of the damage. Most of the economic damages stem from copy products introduced before the 1996 patent law was adopted. Limitations to patentability account for an additional 20 percent of the damages sustained by pharmaceutical companies, with another 10 percent attributed to lack of linkage.

PhRMA members estimate that the 2005 damages in Brazil are equal to 14.5% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Brazil	580706	341971	922677	6368823	14.5%

Chile

We are deeply concerned that the Government of Chile has failed to adequately implement some of its obligations under the United States-Chile Free Trade Agreement (the FTA) and the TRIPS Agreement. Specifically, we are concerned that Chile has failed to adequately implement TRIPS Article 39.3 and FTA Article 17.10.1 related to the protection of certain test data, as well as two parts of FTA Article 17.10.2 often referred to as “linkage” requirements. Its failure is evident from the implementing documents, as well as from cases where Chile has acted inconsistently with its FTA obligations. Therefore, we request that USTR place Chile on the Priority Watch List.

Intellectual Property Protections

Data Protection

The Government of Chile has failed to adequately implement TRIPS Article 39.3 and FTA Article 17.10.1 related to data protection. First, it has failed to provide implementing legislation that is consistent with its obligations. Second, the Chilean Institute of Public Health has approved copies on the basis of test and other data submitted by third parties in a manner that is inconsistent with Chile’s obligations under the FTA and does not satisfactorily identify any legitimate authority for such approvals.

Implementing Legislation

TRIPS Article 39.3 requires WTO Members to protect certain test and other data from unfair commercial use and from disclosure. Members are not permitted to impose procedures and formalities on the protection of test and other data as they are for other types of intellectual property under TRIPS Article 62.1. FTA Article 17.10.1 clarifies the obligations in the TRIPS Article as follows:

1. If a Party requires the submission of undisclosed information concerning the safety and efficacy of a pharmaceutical or agricultural chemical product which utilizes a new chemical entity, which product has not been previously approved, to grant a marketing approval or sanitary permit for such product, the Party shall not permit third parties not having the consent of the person providing the information to market a product based on this new chemical entity, on the basis of the approval granted to the party submitting such information. A Party shall maintain this prohibition for a period of at least five years from the date of approval for a pharmaceutical product and ten years from the date of approval for an agricultural chemical product. Each Party shall protect such information against disclosure except where necessary to protect the public.

This FTA Article does not contain any provisions that permit Parties to impose procedures or formalities to obtain or maintain rights. (Note: Footnote 26 of the FTA IP Chapter 17) permits Parties to impose some procedural formalities for enforcing, not obtaining, rights.) This Article also confers an obligation on the Government of Chile to refrain from approving products based on prior approvals to others. The only right it confers on a private party is the right to authorize use of the prior approval.

FTA Article 17.1.13 provides:

Nothing in this Chapter prevents a Party from adopting measures necessary to prevent anti-competitive practices that may result from the abuse of the intellectual property rights set forth in this Chapter.
[Emphasis added.]

This provision would allow a Party to adopt a measure to prevent the abuse of the rights conferred by the FTA such as the right of the submitter of information to authorize use of that information.

However, Law Article 91(a) and Decree Article 9(A) provide that the protection for test and other data “will not proceed” when “the owner of the test data referred to in article 89 has incurred in conducts or practices declared contrary to free competition in direct relation to the utilization or exploitation of this information, according to a final decision of the Court of Defense of Free Competition.” Presumably, the term “will not proceed” means that the protection will not be granted or will be revoked. In this way, the Article gives broader authority to Chilean officials than permitted by FTA Article 17.1.13.

Articles 89 through 91 of Law 19,036 relate to the protection of certain test data.¹⁰ The last paragraph of Law Article 89 imposes a requirement to certify that test and other data provided to Chilean officials are “undisclosed”. This requirement is a formality upon which protection is apparently conditioned. Thus, it is not permitted under the TRIPS Agreement or the FTA. Articles 5 through 7 of Decree No. 153 establish additional and extensive formalities that are not consistent with the obligations in the TRIPS Agreement and the FTA.¹¹

These formalities erect substantial barriers to obtaining protection for those products entitled to protection by the TRIPS Agreement and the FTA. They create complicated provisions that are difficult to fulfill. For example, literal (b) of Article 6 requires that those entitled to protection must certify in a declaration that the data for which protection is sought are “not generally known”.

¹⁰ Articles 89 through 91 were added as “Paragraph 2” of Title VII of Law 19, 039 by Law 19, 996.

¹¹ Decree No. 153 entitled “Mechanisms are Established for the Protection of Undisclosed Data by the Institute of Public Health” was promulgated in November 2005 by the Under Secretary for Public Health (Ministry of Health).

In short, this certification requirement essentially requires those entitled to protection to prove a negative. This, of course, is impossible.

These Articles of Decree No. 153, also create additional ambiguities, rather than clarify the provisions of the Law. For example, health authorities are authorized under the second paragraph of Article 7 to refuse to protect data if they deem that the “information” submitted to them is “generally known or easily accessible.” There is no guidance in the Decree as to what constitutes “generally known or easily accessible”. Consequently, health authorities could easily claim that the available general information on a product is tantamount to the availability of test data and deny protection that is not publicly available.

Paragraphs (b) through (e) of Law Article 91 and Decree Article 9 provide four grounds for revoking protection for products approved on the basis of certain test and other data. These are:

- (1) “reasons of public health, national security, non-commercial public use, national emergency or other circumstances of extreme urgency declared by the competent authority....”,
- (2) “The pharmaceutical or chemical-agricultural product is subjected to a compulsory license, in conformity with that established in this law,”
- (3) “Failure to commercialize the product within twelve months from the date of grant of the sanitary registration,” and
- (4) “Protection in another country for longer than twelve months.”

Neither the TRIPS Agreement nor the FTA authorizes any grounds for revocation of protection except for the lapse of the period of protection. Moreover, it would appear that less extreme measures than revocation would be available to resolve legitimate concerns, if any, about the availability of products. These inconsistencies related to revocation are also present in Decree 153.

Failure to Protect Data

PhRMA members report that the practices of the Chilean Institute of Public Health are not consistent with the obligations of Chile under the FTA. That Institute approved or tentatively approved at least seven copies of four major innovative products based on test and other data submitted to the Government of Chile in connection with the approval of those major products. Moreover, the Institute has not satisfactorily identified its authority for approving these copies under the FTA or the current legislation.

Linkage

Refusal to Grant Marketing Approval

With respect to a pharmaceutical product claimed in a Chilean patent, FTA Article 17.10.2(c) provides that the Government of Chile “shall ... not grant marketing approval to any third party prior to the expiration of the patent term, unless by consent or acquiescence of the patent owner.” [Emphasis added.] Given its ordinary meaning within the context of the Article, the term “marketing approval” means to confirm or sanction the “action, business, or process of promoting and selling a product, etc., including market research, choice of product, advertising, and distribution.”¹²

The first paragraph of Article 11 of Supreme Decree 1876 (Decree Article 11) provides that any product imported into Chile or made in Chile must be the subject of a “sanitary registration” before it may be commercialized or distributed in Chile. The second paragraph provides that the grant of a sanitary registration “does not excuse the right holder or the user of any sanitary registration right of the obligation to fulfill other legal dispositions or regulations that regulate the commercialization of said products as well as the observance of the established legal rights of third parties.”

If there are no other legal dispositions or regulations, the sanitary registration would be the only confirmation or sanction that would give rise to a marketing approval, *i.e.*, the sanitary registration is the marketing approval. Then, Chilean officials would be required to withhold the sanitary registration of a “third party” who requested a registration for a product covered by patents owned by another. There is no requirement or authority within Supreme Decree 1876 to withhold sanitary registrations for products claimed in patents owned by another. Indeed, the Decree was amended in 2004 to eliminate the requirement to cite patent information. Without the requirement to cite patent information, it would be difficult, if not impossible, to fulfill the FTA requirement to withhold approval of such sanitary registrations.

If there are other legal dispositions or regulations, the sanitary registration of a pharmaceutical product and any confirmations or sanctions arising from these dispositions or regulations would, taken together, constitute “marketing approval” of the product within the meaning of the FTA Article. At least one of these approvals would have to be withheld to comply with obligations in FTA Article 17.10.2(c). As mentioned, there is no authority in the Supreme Decree to withhold sanitary registrations. We are not aware of any other dispositions or regulations that require Chilean officials to confirm or sanction the commercialization of pharmaceutical products, much less any provisions that require or authorize officials to withhold grant.

Consequently, we believe that the grant of sanitary registration is tantamount to the grant of marketing approval in Chile. As such, there is no

¹² *The New Shorter Oxford English Dictionary*, pp. 103 and 1700.

basis in Chilean law and regulations that would compel officials to fulfill the obligations with respect to the requirement in FTA Article 17.10.2(c) to withhold registration for products covered by the patents of others.

Notification to Patentee

With respect to a pharmaceutical product claimed in a Chilean patent, FTA Article 17.10.2(b) provides that the Government of Chile “shall ... make available to the patent owner the identity of any third party requesting marketing approval [of that product] effective during the term of the patent” Given its ordinary meaning within the context of the Article, the term “marketing approval” means to confirm or sanction the “action, business, or process of promoting and selling a product, etc., including market research, choice of product, advertising, and distribution.”¹³ [Emphasis added.] It would appear that the Government of Chile could fulfill this requirement by either (1) notifying individual patent owners of requests to market a pharmaceutical product incorporating the patented invention, or (2) publishing all requests to market pharmaceutical products as they are submitted.

The first paragraph of Article 11 of Supreme Decree 1876¹⁴ (Decree Article 11) provides that any product imported into Chile or made in Chile must be the subject of a “sanitary registration” before it may be commercialized or distributed in Chile. The second paragraph provides that the grant of a sanitary registration does not excuse compliance with other laws and regulations.

Under that Decree Article, any enterprise that requests a sanitary registration for a particular pharmaceutical product requests a confirmation or sanction to commercialize (sell) and distribute the product identified in the request. Therefore, that enterprise is requesting “marketing approval” of that product, albeit that enterprise may have to comply with other laws and regulations before it is permitted under law to market the product. The FTA obligation to notify patent owners is triggered upon the request for approval. Consequently, the Government of Chile is required under FTA Article 17.10.2(b) to notify patent owners of requests for sanitary registrations even though the requestor may have to comply with other laws and regulations to market the product legally in Chile.

We are not aware of any provisions in Supreme Decree 1876 or any other Chilean law or regulation that would require Chilean officials to notify the patent owner of requests for sanitary registrations. In fact, an amendment in 2004 removed the letter “l” of Decree Article 39 that required those requesting a sanitary registration to indicate Chilean patents associated with the product. Besides, Circular 14 of November 28, 2001, which required the ISP to notify the patent owner directly of any new applications received in the Institute for a

¹³ See footnote 12.

¹⁴ References to Supreme Decree 1876 refer to the Decree as amended in 2004 unless otherwise specified.

compound claimed in the patent, was revoked by Resolution 5572 of July 14, 2004. Thus, it is now difficult – if not impossible – for Chilean officials to notify patent owners individually of requests for sanitary registrations.

On July 15, 2004, the ISP (Institute of Public Health) issued resolution 5572 that obligates the ISP to post on its web site applications for sanitary registration. Article 1 of that Resolution states that the posting should include the name of the applicant, the name of the product identified by its generic name, and whether it is for a new or similar product, among other information. The Resolution requires updates to the web site on the 1st and 15th of every month. We understand that some information about pending applications has been made available on the web site of the Chilean Institute of Public Health. Unfortunately, this new notification system created by the Resolution has not been properly implemented. The Notices are often incomplete, late, or inaccurate. In fact, as of December 1, 2005, the web site of the Institute only contained notices covering sanitary registration applications filed before September 30, 2005, a two-month delay in posting notices.

Thus, there does not appear to be any basis in Chilean law and regulations (except for the FTA *per se*) that would compel officials to fulfill the obligations with respect to the notification requirement in FTA Article 17.10.2(b), nor does there appear to be evidence that Chilean officials are fulfilling these obligations in most cases.

Market Access Barriers

The Chilean health registration regulation (Supreme Decree 1876) sets a higher standard for innovative products than for copy products seeking registration in Chile. For instance, the health registration agency provides sanitary registrations to similar products without requiring bioequivalence studies/testing. This process discriminates against innovative products developed by the research-based pharmaceutical industry, allowing the swift introduction of copies in the Chilean market.

Standards, Testing, Labelling, and Certification

There are 53 drug manufacturing plants in Chile. Of these, only 16 have been certified by the Public Health Institute. According to a May 1, 2002 regulation, all pharmaceutical plants should be complying with the WHO 92 Good Manufacturing Practices. The Public Health Institute has extended compliance due date to national laboratories until December 2007, constituting clear discrimination against PhRMA members. This means that approximately 55% of units sold in the Chilean pharmaceutical market do not comply with the minimum quality standards established by the WHO.

Damage Estimate

PhRMA members estimate that the 2005 damages in Chile are equal to 19.1% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Chile	120159	35660	155819	816276	19.1%

DOMINICAN REPUBLIC

The pharmaceutical R&D industry has long recognized that the Dominican Republic has one of the worst industrial property law systems in the Americas. The Dominican Republic's industrial property law, adopted in 2000 and subsequently amended, has the clear effect of expropriating or seizing ownership of the rights to patented pharmaceutical products. Drafts of amendments to the industrial property law fail to bring the Dominican Republic into compliance with the DR-CAFTA and lack of government commitment continues to delay effective implementation of the TRIPs agreement. PhRMA recommends that the Dominican Republic be placed on the Priority Watch List due to its well-documented, persistent failure to protect intellectual property rights. We ask that the U.S. Government address these issues in the context of the future implementation of the DR-CAFTA by the Dominican Republic.

Intellectual Property Protection

PhRMA members operating in the Dominican Republic face a difficult commercial climate due to the Government's failure to provide adequate IP protection. We are particularly concerned that the Dominican Republic continues to exclude test data protection; fails to provide linkage between patents and health and patent authorities, and does not contemplate the restoration of the term of a patent when there is a delay in the issuance of the patents by the patent authorities or sanitary registration by the regulatory agency.

Data Exclusivity

Clinical dossiers are improperly relied upon by local laboratories and the Dominican Regulatory agency to support their registration of copy products. PhRMA member companies in the Dominican Republic continue to face unfair competition by copies of products in the market before the expiration of data protection, as established by TRIPS Article 39.3 and more recently the DR-CAFTA.

The failure by the Dominican Government to protect test data from unfair commercial use was reaffirmed with the promulgation of Presidential Decree Number 366-04, on April 28, 2004. The Decree orders the national sanitary authority, in order to grant the approval for the commercialization of new pharmaceutical products, not to request the presentation of information considered not to be divulged, secret or confidential. In Article 1, the Decree states that no legal or regulatory stipulation shall be interpreted as requiring the presentation of undisclosed, secret or confidential information as a condition to

obtain the sanitary registration of a new pharmaceutical product or medicine. Such a provision had the clear intent to circumvent data exclusivity provisions being negotiated in the DR-CAFTA.

Decree Number 366-04 does not comply with DR-CAFTA Article 15.10. Compliance with DR-CAFTA Article 15.10 will ensure that third parties will not have access to or be able to rely on undisclosed data concerning safety and efficacy data of a new pharmaceutical product for at least five years. During that time, Member States to the DR-CAFTA shall not permit third parties, without the express consent of the person who provided the information, to market a product on the basis of the information or the approval granted to the person who submitted the information.

At the same time, drafts of amendment to the Industrial Property Act do not include the protection of data, as it is required by TRIPS Article 39.3 and Article 15.10 of DR-CAFTA. At the present time, the Industrial Property Act does not adequately contemplate the Dominican Republic's obligations under TRIPS Article 39.3. Therefore, there is a need to adequately implement Article 15.10 of DR-CAFTA.

Linkage

Patent linkage refers to the obligation not to approve marketing applications for second applicants until after the expiration of patents identified as covering the product. Communication is required between the Patent Office and the Ministry of Health to ensure that the health regulatory authority does not provide market authorization (sanitary registration) for unauthorized copies of products subject to patent protection. The Government of the Dominican Republic is bound by the TRIPS Agreement and the DR-CAFTA and it is the responsibility of all relevant Government agencies to ensure the compliance with TRIPS and DR-CAFTA obligations.

In spite of its international obligations regarding patent protection, the Dominican Republic Department of Health's sanitary authority continues to approve the import, export, manufacture, marketing and/or sale of pharmaceutical products which are infringing copies of patented products registered in the Dominican Republic. The Dominican Republic should establish regulations that do not permit marketing approvals (sanitary registration) to be granted to copy products during the term of the patent. At the present moment, the Dominican Republic authorities do not seem to be committed to the creation of rules which would harmonize its internal regulations with the requirements established by TRIPS and DR-CAFTA. Drafts of the amendment to the Industrial Property Act does not include patent linkage provisions required by in DR-CAFTA Article 15.10.2.

Patent Term Restoration

Article 15.9.6.a of the DR-CAFTA requires a restoration to the term of a patent to compensate for unreasonable delays that occur in granting the patent, as well as for administrative delays when granting a sanitary registration.

DR-CAFTA defines the term “unreasonable delay” as a delay in the issuance of a patent by the Patent Office of more than five years from the date of filing of the application in the territory of the Dominican Republic, or three years after a request for examination of the application has been made, whichever is later, provided that periods attributable to actions of the patent applicant need not be included in the determination of such delays. In the case of pharmaceutical products covered by patents, the Dominican Republic shall make available a restoration of the patent term to compensate the patent owner for unreasonable curtailment of the effective patent term resulting from the marketing approval process related to the first commercial marketing of the product in the Dominican Republic.

Drafts of amendment to the Industrial Property Act did not include patent term restoration. This is particularly disturbing, considering the Office of Industrial Property (ONAPI) has not issued a single patent in accordance with Law 20-00 during the past five years and no merit examination has been conducted to the thousands of applications during the same period of time.

GUATEMALA

PhRMA requests that Guatemala be raised to Priority Watch List because of that country's consistent failure to meet its minimum commitments to provide intellectual property protection. After signing DR-CAFTA, Guatemala's government repealed Decree 9-2003, which had provided protection to test and other data. In its place, the government approved Decree 34-2004 and Law 30-2005. Both lack the clarity of Decree 9-2003. In addition, Law 30-2005 establishes a series of limitations to data protection not allowed either under the TRIPS Agreement or DR-CAFTA. It also includes numerous ambiguities that are inconsistent with Guatemala's DR-CAFTA obligations.

Intellectual Property Rights

Data Exclusivity

Articles 177 and 177*bis* of the Guatemalan Intellectual Property Law of 2002 implemented the obligations in TRIPS Article 39.3 by protecting certain undisclosed test and other data (1) against unfair commercial use by expressly prohibiting Guatemalan officials from relying on these data unless authorized by the submitter and (2) against disclosure of such data. On December 24, 2004, Decree No. 34-2004 amended these Articles to reduce the level of protection for test data by incorporating provisions that were inconsistent with Guatemala's international obligations or that resulted in implementation in a manner inconsistent with Guatemala's international obligations. Specific problems include but are not limited to the following:

- Guatemalan authorities were not expressly required to protect test data. That is, the Law merely stated that protection would be provided without specifying who would provide it.¹⁵
- Guatemalan authorities were not expressly required to prohibit reliance on the test data of others.¹⁶
- No term of protection from unfair commercial use was specified.¹⁷
- Disclosure of undisclosed test data was permitted to ensure adequate supply of products and to prevent anti-competitive practices.¹⁸
- The terms "test data" and "new product" were defined to limit protection to products first approved in Guatemala.¹⁹

¹⁵ Article 1 of Decree No. 34-2004 codified as Article 177 of the Industrial Property Law.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Article 2 of Decree No. 34-2004, uncodified.

Decree No. 30-2005, approved by the Congress on March 9, 2005, removed some problems with Decree No. 34-2004, but created other ones. On the positive side, Guatemalan authorities are now required to protect test data from unfair commercial use by prohibiting reliance on test data (submitted in Guatemala or elsewhere) without the permission of the submitter of the data for a period of five years counted from the date of approval of a pharmaceutical product in Guatemala.²⁰

Decree No. 30-2005 also eliminates certain exceptions that would allow disclosure of test data including disclosure to ensure the adequate supply of products and to prevent anti-competitive practices.²¹ Unfortunately, it also eliminated the requirement of preventing disclosure of undisclosed test data. Consequently, it is unclear whether and to what extent undisclosed test data are protected from disclosure.

The Decree also requires the submitter to request marketing approval within five years from the approval in another country as a condition to obtaining protection.²² If this requirement were interpreted to apply to requests for marketing approval that include test data (as opposed to referencing approvals in other countries) it would be inconsistent with DR-CAFTA Article 15.10.1(b). Similarly, there is a requirement that appears to limit protection to test data that are still protected in other countries – a requirement that is inconsistent with the DR-CAFTA Article as well as TRIPS.²³

The new Decree permits Guatemalan officials to deny protection when it is determined that “the owner of the test data or undisclosed information engaged in anti-competitive practices.” There is no express authorization in DR-CAFTA Article 15.10 to deny protection on the grounds of anti-competitive acts. Moreover, DR-CAFTA Article 15.1.15 only permits Guatemala to adopt measures that are consistent with Chapter 15.24. As Chapter 15 does not permit exceptions to data protection, any denial would be inconsistent with Chapter 15. Moreover, DR-CAFTA Article 15.1.15 only applies to “preventative” measures, not measures related to adjudicated violations of the unfair competition laws that are the subject of Decree 30-2005.

¹⁹ Article 3 of Decree No. 34-2004, codified as Article 177*bis* of the Industrial Property Law.

²⁰ Article 1 of Decree No. XX-2005, codified as Article 177 of the Industrial Property Law.

²¹ Article 2 of Decree No. XX-2004, codified as Article 177*bis* of the Industrial Property Law. The general requirement to protect test data against disclosure was eliminated from codified Article 177 by an amendment to Article 1 of Decree No. XX-2005.

²² *Ibid.*, at the second full paragraph.

²³ Article 3 of Decree No. XX-2005, codified as Article 177*ter*(a) of the Industrial Property Law.

²⁴ 15. Nothing in this Chapter shall be construed to prevent a Party from adopting measures necessary to prevent anti-competitive practices that may result from the abuse of the intellectual property rights set out in this Chapter, provided that such measures are consistent with this Chapter.

Among other limitations, the decree opens the door for a period of less than 5-years of protection when an R&D affiliate that operates locally or authorized distributor file for market approval in Guatemala. If the right holder authorizes a third party, such as a distributor, to submit its data to Guatemalan authorities, literal (b) of Codified Article 177*ter* provides that the period of marketing “approval” for the product marketed by the third party in Guatemala is for the remainder of the period of the “first” approval. This “Exception to the protection for test data” could be interpreted to curtail the term of data protection from five years to the remainder of the term of protection in the country of first approval, even if the third party submitted test and other data with authorization of the right holder. This would be inconsistent with Guatemala’s obligations under the DR-CAFTA.

Linkage

With the approval of the DR-CAFTA, Guatemala must implement an effective linkage system to ensure that sanitary registrations and/or marketing approvals are granted to second applicants for products that could infringe a valid patent. Literal (a) of Article 177*quinquies* of Decree 30-2005 requires Guatemalan authorities to “verify” that a product associated with test data is not claimed in a Guatemalan patent. This requirement could be interpreted to require “verification” that a pharmaceutical product, for which marketing approval is being requested, is not the subject matter of a patent owned by someone other than the person requesting marketing approval. The term “verify”, however, does not necessarily mean that the Guatemalan officials are authorized to take any actions stemming from a determination. This would create a situation where a Guatemalan official would investigate “patent status” of a product but would not act on any problems identified in their investigation.

Patent Backlog and Second Use Patents

The patent backlog at the Guatemalan PTO is growing. According to the Guatemalan PTO the total backlog for chemical patents is 369 and for other art 58. Delays in the processing of pharmaceutical patent applications have been growing over the last few years to 5 years, on average. Overall average time for a patent to be granted is 4 years.

In addition, the Guatemalan Patent Office refuses to issue patents for “second usage”, regardless of the fact that second uses are not excluded from patentability in the Guatemalan Patent Law.

Lack of Due Process

PhRMA members are also concerned with the Government of Guatemala’s complete disregard for legal due process. In a recent case, the Minister of Economy requested the local PTO to provide an official opinion on

whether a certain copy product infringed or not a valid patent in the country. The PTO concluded that, based on information provided by the copy-company, there was no infringement. Both the PTO and the Ministry of Economy did not consult with the patent right holder and did not allow for an Administrative process under which the right holder could have evaluated the information submitted by the competitor that is producing/importing the copy product.

With a document provided by the Minister of Economy stating that it doesn't infringe any intellectual property rights in the country, the copy company has participated in government tenders. Such a conclusion (on whether there is or not a patent infringement) by the Minister of Economy, taken without complete information raises serious concerns, since determination of whether a patent has or not been infringed is a matter to be decided by the Courts. In addition, such an action generates legal uncertainty to all patent holders in Guatemala and raises questions about the commitment by the government of Guatemala to legal due process.

Market Access and Tax Discrimination

Decree 16-2003 discriminates against R&D pharmaceutical products. It establishes import tariff and value added tax exemptions for "generic" and "natural" medicines and to "salts" used in the manufacture of such products. This clearly and unfairly limits fair competition in the Guatemalan pharmaceutical products market and creates an artificial competitive advantage to "generic and natural products". Decree 16-2003 also provides advantages to "generic" and "natural" products in Government tenders.

Damage Estimate

At the time of reporting PhRMA is not able to provide a specific estimate of the damages incurred in 2005 attributable to trade barriers related to intellectual property protection and market access.

PARAGUAY

The government of Paraguay continues to fall short of providing effective protection for patented products. Actions such as the 2002 adoption of legislation to cancel pharmaceutical patent protection until 2005, the continued non-compliance with TRIPS obligations, and most recently, the issuance of Resolution 577 that renders invalid pharmaceutical patents already issued, harm PhRMA members doing business in Paraguay. In addition, a bill is currently being debated in the Congress that would further weaken the patent law. Counterfeiting is also a serious problem in Paraguay. In summary, the intellectual property situation in Paraguay is becoming worse, despite the Memorandum of Understanding (MOU) which was signed between Paraguay and the United States in December 2003 (which addresses intellectual property rights as well). Therefore, PhRMA requests that Paraguay be listed as a Priority Watch List country in the 2006 "Special 301" report.

Intellectual Property Protection

Data Exclusivity

Paraguay has not yet adopted adequate data exclusivity protections in accordance with their obligations under TRIPS Article 39.3. This provision requires the Government of Paraguay to protect data against "unfair commercial use;" and to protect data against disclosure, unless it is necessary to protect the public or unless steps are taken to protect against unfair commercial use. The protection of test data ensures that companies producing copies do not unfairly rely upon innovative company data to register their products. The ability to recoup significant R&D costs is dramatically reduced as companies are forced to compete with copy products that otherwise would not exist if Paraguay were in compliance with its TRIPS obligations.

Patents

On December 29, 2002, Paraguay adopted Law 2047, which modified Article 90 of the patent law (Law 1630/00), postponing from January 1, 2003, to January 1, 2005, the effective date when pharmaceutical patents were to be granted. The Directorate of Industrial Property implemented the transition period in accordance with provisions of Article 65 of TRIPS and Law No. 1630/00 for "new" requests for patents on pharmaceutical products, but not for the revalidation of patents on pharmaceutical products, that were being granted without discrimination since legislation prior to Law No.1630/00.

The revalidation patents granted during the transition period gave rise to complaints by local laboratories. On December 27, 2004 the Director of the Industrial Property Office approved Resolution 577/04. The resolution states, without providing any specifications, that patents for pharmaceutical products

granted up to that date by the Paraguayan PTO lack validity and do not produce the corresponding legal effects.

The Directorate of Industrial Property does not have the legal jurisdiction to annul a patent, nor to declare any patent invalid. Under the Paraguayan legal code, only a court has the legal jurisdiction to declare a patent invalid. Further violating the Paraguayan patent law and TRIPS obligations, the affected parties did not receive personal notifications of the act. Without proper notification, the introduction of this resolution by the Director of the Industrial Property Office violates the Constitutional right of patent holders to exercise defense.

On June 17th, 2005, the Administration promulgated law 2593/2005 that amends several articles of Paraguay's Patent Law.

The following three articles are of greatest concern:

- Article 25: Gives the Ministry of Public Health and Social Welfare the authority to conduct patent examinations. However, the Ministry of Public Health lacks the technical capacity required to conduct technical examinations of patents. This measure is inconsistent with the anti-discrimination clause of TRIPS Article 27.1 because products made by other industries are not subjected to similar review for patent approval by an agency other than the patent office. Any review by the Health Ministry for patentability is beyond the expertise of the Ministry, and any review by that agency for any other purpose would be inconsistent with TRIPS Article 27.1.
- Article 48: This article establishes that when an applicant holds a valid sanitary registration and has traded the product or taken steps to enter the market, the administrative authority shall grant the applicant a mandatory license. If the applicant is a copy product company, it obtains legal rights in the Paraguayan market equal to a defacto compulsory license.
- Article 81: Establishes certain conditions to file for a preliminary injunction.

A preliminary injunction shall only be ordered once the interested party has proved to be in its right to act, as well as the existence of the infringed right, by submitting the title of the patent of invention or utility model, as well as proof of infringement or its imminence. The judge may request the applicant to grant a security or guarantee prior to ordering the measure.

To begin the process, the party that wishes to file for a preliminary injunction must obtain a previous expert opinion in regards to the

validity of the patent, which usurps the functions or attributions of the judge who according to the Patent Law is the only one authorized to decide whether or not the patent is valid in case of been object of a nullity action.

For pharmaceutical products, besides the above-mentioned conditions, the following must be also fulfilled: Reasonable probability that the patent be declared valid, if it were challenged with a nullity action by the defendant; reasonable probability of patent infringement; that the damage caused by the applicant exceeds the damage caused by the granting of the patent, shall the preliminary measure be rejected; that an expert designated ex-officio submit his/her report on the validity of the patent within a term of 15 working days; and that the Ministry of Public Health and Social Welfare submits a report on item damages within a term of five days.

The June 2005 amendment puts obstacles in the way of obtaining preliminary injunctions by creating additional requirements to the Patent law.

The amendment creates obstacles to filing for a preliminary injunction, threatening the availability of legal remedies to enforce rights of the patent owner.

Other IP issues

Finally, when Paraguay updated its patent law, which came into effect on January 29, 2001, it did not comply with TRIPS in several aspects. Compulsory licensing is very broadly defined and equitable remuneration is not provided for patent owners. The transition period for pharmaceutical products provides protection only from the date of granting the patent, rather than from the date of application. Exclusive marketing rights are jeopardized by language allowing unauthorized third parties to block those rights via the local health regulatory authorities. In addition, appeals are to be resolved by the same official (Director of the Patent Office) making the original decision regarding the granting of a patent.

Counterfeit Medicines

Due to weak government enforcement, counterfeiting is a significant problem in Paraguay, particularly in the area of analgesics.

VENEZUELA

PhRMA recommends that Venezuela remain a Priority Watch List Country due to a serious reversal in policies to protect intellectual property rights and ongoing efforts to weaken intellectual property protection standards. Venezuela has stopped providing data exclusivity and issuing pharmaceutical patents, in clear violation of obligations under TRIPS.

On Intellectual Property, Venezuela has not granted pharmaceutical patents since 2004, regardless of the fact that pharmaceutical companies have filed more than one thousand requests. Venezuela also stopped providing data protection. In a departure from past practice, Venezuela now violates data protection commitments, violating TRIPS Article 39.3, as well as the Group of Three (Colombia, Mexico and Venezuela) Treaty Article 18-22.

On market access, Venezuela took important steps to reduce government intervention, limiting price controls to a list of essential medicines, as defined by the WHO. PhRMA believes that this is a step forward in establishing a free market in Venezuela. Although Venezuela made limited progress on reducing price controls and foreign currency limitations, additional steps are required. In addition, PhRMA members have serious concerns with preferences provided to local manufacturers.

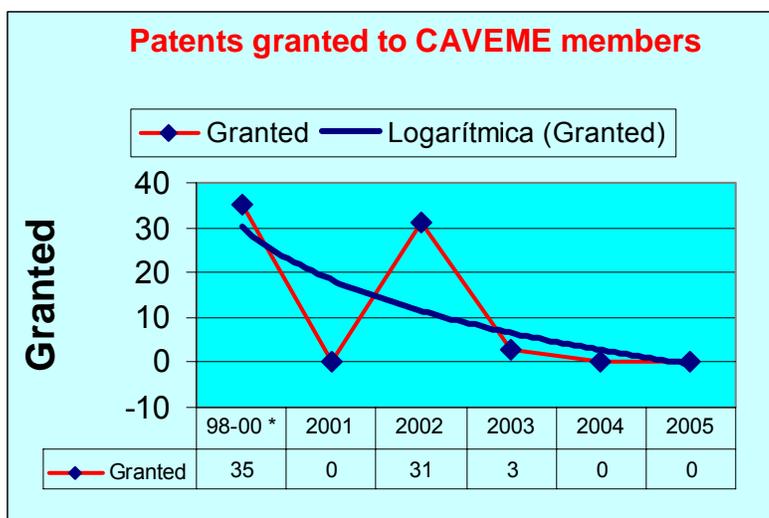
Intellectual Property Protection

Patent Slow Down

Since 2002, the number of pharmaceutical patents granted by the Venezuelan Intellectual Property Agency (Servicio Autónomo de la Propiedad Intelectual, SAPI) has been dramatically reduced, coming to a *de facto* standstill in 2004, in a clear act of discrimination against pharmaceuticals compared to other economic sectors.

In 2001-2005 the average number of patents requested by local R&D association (CAVEME) members was 270 per year. However, beginning 2004, the number of patents granted by SAPI dropped to 0 as well as in 2005.

2003	3
2004	0
2005	0
Total	69
* Average x year	



Source: SAPI; data compiled by CAVEME

Data exclusivity

Since February 2002, Venezuela has been violating data protection by granting second sanitary authorizations to copy products and relying on the original data provided by the innovator companies. This is a departure from past practice (1998-2001) when 5 years of data protection was enforced. These actions are not consistent with TRIPS Article 39.3 and the Free Trade Agreement between Venezuela, Colombia and Mexico.

Since 2002, over 20 copy products of innovator products that were under the 5 year data protection regime, obtained registration from the sanitary authority (Instituto Nacional de Higiene), forcing the research based industry to challenge the government in the courts, with no results. Many companies acted directly against the infringers by filing unfair competition claims with the Venezuelan Antitrust Agency (Procompetencia), which dismissed all claims. Claims were also brought by pharmaceutical companies to the Administrative Courts and then to the Supreme Court of Justice, but both venues denied preliminary remedies and are processing claims with no decision in sight.

Copies of these products reached the market in 2003 and 2004, causing commercial harm and significant legal costs to the companies involved. Because of the different nature of the products involved and the different administrative and legal procedures initiated by each company, it is not yet possible to assess aggregate losses.

In June 6, 2005, CAVEME sued the Venezuelan National Institute of Health for not granting the data protection stipulated by TRIPS Article 39.3 and other treaties mentioned above. As of the end of 2005, the claim had not been accepted by the Court.

IP legal framework

Since 2001, the government of Venezuela has promoted an Industrial Property bill that would lower protection below thresholds set by TRIPS and other international agreements of which Venezuela is a signatory: the intellectual property bill would reduce owner rights, create national exhaustion of rights, facilitate compulsory licensing in ways not permitted by TRIPS, and eliminate data protection.

Both the Industrial Property and Copyright bills reflect the Venezuelan government's low respect for intellectual property and, if passed, will not only represent a step back from present legislation in violation of TRIPS Article 70-2, but also a break from the Andean legislation that regulates these subjects, potentially creating a major conflict between Venezuela and the Andean Community.

Venezuela is one of the few countries in the region that has not acceded to the WIPO Patent Cooperation Treaty, the WIPO Patent Treaty, and the WIPO Trademark Treaty. The Venezuelan Intellectual Property Agency (SAPI) does not support the entry of Venezuela into the PCT or the subscription of the other mentioned treaties.

Market Access Barriers

Government Price controls

Government price controls for medicines were established in Venezuela in 2003 for Essential Medicines following WHO criteria, which represents close to one third of the number of medicines marketed. This price control policy was maintained throughout 2004 and 2005 (with minor adjustments of prices made in September 2005) and is expected to continue in 2006. Prices of Essential Medicines have not been revised to take into account the 2003-2005 accumulated inflation (70%) and devaluation (33%), adversely impacting companies and distorting the market.

Foreign currency access policy

Access control to foreign currency was established in 2003 for all economic sectors, generating uncertainty over the government's potential inadequate use of this policy at any time to develop a selective import policy; to control imports (as in the past); to force changing import suppliers; or to audit import prices.

Counterfeit medicines and other illicit activities

Venezuela is experiencing increasing numbers of counterfeit medicines (more than 10% of the market) and other illicit activities related to pharmaceuticals, such as smuggling, robbery and adulteration. This is a result of the government's lack of awareness of the problem; administrative inefficiency; poor laws, with ineffective or no enforcement; low penalties; and an ineffective judicial system.

Government Procurement

Two Decrees from 2002 provide preferential treatment to local companies over foreign companies in government bids for the purchase of medicines, by granting a 15% bidding preference to national manufacturers participating in a public bidding process, thus violating obligations contained in national laws as well as in international treaties signed by Venezuela.

Also of concern is the government's practice to purchase medicines through direct awards and not through bids as stated by law. In most cases, these awards are directed to local companies, generic manufacturers or imports, mainly from Cuba, India and China.

Damage Estimate

PhRMA members estimate that the 2005 damages in Venezuela are equal to 11.6% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Venezuela	130563	79717	210280	1811103	11.6%

WATCH LIST COUNTRIES

ASIA-PACIFIC

MALAYSIA

Although the market in Malaysia is relatively small, \$430 million, the environment, characterized by unregulated pricing and government willingness to fund innovative pharmaceutical products, is favorable. Nevertheless, while PhRMA member companies have been carrying out clinical research in Malaysia for many years, thus enhancing the capabilities of local medical researchers, they historically have not made significant manufacturing and/or research and development investments. In order to create an environment that encourages foreign direct investment, the Government of Malaysia should require bioequivalence data and manufacturing process information for all generic applicants, adopt patent linkage requirements and aggressively prosecute producers and distributors of counterfeit goods and implement data exclusivity. Given these concerns, we recommend that Malaysia be placed on the 2006 “Special 301” Watch List.

Intellectual Property Protection

Data Exclusivity

Malaysia has not enacted any data exclusivity law, as required under TRIPS Article 39.3. Malaysia remains out of compliance with its TRIPS obligations in this respect. We believe this issue should be elevated in bilateral economic discussions.

Patent Linkage

Malaysia does not currently have a patent linkage system. As a result, PhRMA member companies have encountered instances of generic products being registered and brought to market while patents are still in force. This reflects an apparent lack of support for the principle of patent linkage on the part of the Malaysian Government. Patent Linkage describes the “linkage” between patents in a country and the new drug approval process. This mechanism prevents the registration of a generic form of a patented pharmaceutical while a patent is still in force, thereby preventing unnecessary litigation and confusion. It also avoids confusion in the marketplace caused by the removal of an infringing product.

In addition to the prevention of unnecessary and costly litigation, a system of patent linkage has a number of advantages that enhance pharmaceutical development by: (1) providing transparency and predictability of the process for both the pioneer and the generic company; (2) helping both sides make better and more efficient investment decisions; and (3) ensuring timely redress of genuine disputes. Better and more efficient investment decisions mean faster development for life saving inventions and better healthcare.

By establishing and ensuring adequate “linkage,” the Malaysian Government could contribute significantly to an environment that attracts investment in research and development and encourages growth in the life sciences sector.

Counterfeits and Parallel Trade

PhRMA remains concerned that the government’s hologram policy will not adequately protect patients against the dangers of counterfeiting. Public health is further jeopardized by wholesalers who refuse to take full responsibility for product management due to policies implemented to encourage parallel trade in pharmaceutical products. Studies have shown that the financial gains from parallel importation are not passed on to the patient or healthcare facility, but are absorbed by middlemen distributors. In addition, PhRMA member companies are unable to track, recall or otherwise ensure the safety of products once they leave legitimate supply chain control.

Stronger criminal penalties and improved enforcement efforts are the most effective means for deterring counterfeits. PhRMA supports close coordination between the U.S. and Malaysian Governments on anti-counterfeit initiatives, including training for regulatory and security officials.

Market Access Barriers

Applications for Government Medicines Purchases List

Products to be used in the Ministry of Health hospitals and medical centers must be approved by a supervisory body and placed on the government’s approved drug list, commonly called the “Blue Book”. Over the last few years, the supervisory body is meeting less frequently, thereby holding up introduction of new therapies to the healthcare system.

Standards, Testing, Labeling, and Certification

New product registration in Malaysia usually takes 24 months from the time of submission. While the process is thorough and rigorous, local companies often obtain registration at a faster rate than imported products. Although a requirement for bioequivalence studies for generic products was recently put in place, the list of therapeutic areas for which data is required is limited at this time.

Damage Estimate

PhRMA members estimate that the 2005 damages in Malaysia are equal to 8.4% of the total market share. The damage is calculated using a

methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class for Priority Foreign Countries and Priority Watch List countries. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Malaysia	6197	22980	29177	346100	8.4%

TAIWAN

PhRMA member companies commend Taiwan for enacting data exclusivity legislation to implement TRIPS Article 39.3. The legislation and corresponding implementing rules signal that Taiwan values innovative medicine and wants to promote quality healthcare. Despite this development, however, the research-based pharmaceutical industry continues to face systemic market access barriers that discourage U.S. trade and investment in Taiwan. Market access barriers include Taiwan's reluctance to address the anticompetitive practices embodied in the pharmaceutical price gap (known as the "Black Hole"), as well as a discriminatory environment in which new product registration is onerous and costly, drug pricing favors local generic manufacturers, and where medicine selection and formulary access is increasingly dictated by prescriber profit. Given these concerns, we recommend that Taiwan be placed on the 2006 "Special 301" Watch List.

Intellectual Property Protection

In January 2005, Taiwan passed data exclusivity legislation to implement TRIPS Article 39.3. TRIPS Article 39.3 requires governments to prevent reliance, without the originator's consent, by regulatory authorities or third parties on the data submitted in the registration process for the manufacturing and marketing of a generic version of a drug during a pre-determined period of exclusivity. Related to the data exclusivity legislation are newly proposed regulations regarding abbreviated NDAs (gNDA) which stipulate that data protection is only applicable to new chemical entities that are registered in Taiwan within three years of receiving marketing approval in one of ten advanced reference countries. The Government will, however, disclose certain data to the public including: a product's active ingredient and package insert, information on drug safety and a summary of the clinical trial protocol. If you do not apply for approval in Taiwan within three years of receiving marketing approval in one of ten advanced reference countries, then you will not receive data protection in Taiwan. This cap is not consistent with effective IP protection.

Another stipulation in these proposed regulations applies to generic applications. A generic company can use a gNDA to apply for approval in Taiwan. The gNDA is a minimal application which only requires bioequivalence data not the full package of data that is required for the NDA that originators must use to apply for approval. If a generic company files a gNDA they must include an affidavit that stipulates that they are not in violation of the originator's patent. Unlike the U.S. system, there is no notification process in Taiwan. We encourage Taiwan to adopt procedures whereby the originator is notified either by the Government of Taiwan or by the generic manufacturer of the application, has a reasonable period in which to reply, and in the case of a dispute an automatic hold be put on the review of the gNDA.

We appreciate the Government's willingness to consult with industry on the technical aspects of this legislation and implementing procedures.

Market Access Barriers

Violation of National Treatment

Article 49 of the National Health Insurance law mandates reimbursement of healthcare providers at actual transaction cost. This is not enforced. Producers of generic drugs with little or no research and development to recoup, offer significant discounts to cash-strapped healthcare providers. Industry supports strong enforcement of Article 49 by the Government, so that product bonuses, discounts and other forms of promotion are accurately captured. At present, periodic price-volume surveys are conducted with the intent of clawing back these monies "provided" by manufacturers. These surveys lead to reductions in reimbursement prices, provide an immediate savings to government, but fail to resolve the underlying financing shortfall. Worse still, by the Government's own admission, the surveys are non-transparent and plagued by flawed or disguised data. Local manufacturers easily circumvent the reach of the Government's efforts through a variety of methods including third party transactions, donations, etc., and as such, the resulting price reductions disproportionately fall upon the research-based (primarily foreign) industry.

PhRMA is disappointed that the Government has failed to provide a clear and strong interpretation of Article 49 that prohibits these under-the-table transactions. In fact, recent legislation initially proposed abandoning Article 49 – thereby legitimizing the illicit hospital and clinic profit margins on prescribed drugs (referred to as the "black hole"). As the exclusive benefit provider in the country, the Government wields considerable leverage over private and public institutions reliant upon reimbursement income as the primary source of revenue. In this context, PhRMA is equally troubled by the complete absence of any effort to introduce transparency, via audits or truth-in-disclosure conditions within annual contracts that would mandate reimbursement at the transaction price. At present, due to a price volume survey mechanism that allows deception by local companies, companies that accurately report transaction prices find themselves in an accelerating downward pricing spiral.

This "Black Hole" distorts the nature and magnitude of payments by Government, influences unusual and unethical prescribing patterns, and puts patient welfare at a frighteningly-low priority. Resolution of the "Black Hole" in Taiwan, requiring transparent funding of healthcare expenses, implementation of actual transaction pricing and, most importantly, a real separation of prescribing and dispensing of pharmaceuticals lies at the core of substantive reform. Price-volume surveys aimed at clawing back margins from industry are rife with inaccurate data and do little to address the root of the problem, but rather

engender an environment that rewards local generic manufacturers, stifles innovation, and places patients at risk.

In the past, the Department of Health (DOH) and the Bureau of National Health Insurance (BNHI) have been reluctant to initiate substantive reform in the healthcare arena. A cumbersome regulatory system that imposes costs and conditions discriminatory to foreign companies, high generic pricing (up to 90% of the innovative drug prices), innovative drug pricing below international median levels, and a non-transparent system in which high-price and high-margin generics provide an optimal solution to healthcare providers benefits a local generic industry that has sights set upon a government-aided biotech future. PhRMA believes these practices are in violation of WTO national treatment principles.

Separation of Prescribing and Dispensing

The separation of prescribing and dispensing in Taiwan is an official requirement but one which is not enforced, in part due to a lack of political will and to a powerful hospital lobbying force. Separating prescribing and dispensing functions would effectively remove the profit incentive from the selection of appropriate treatments or therapies. As long as hospital revenue and physician remuneration is dependent on margins provided by the drug manufacturer, patient welfare is compromised by this conflict of interest, i.e. profits over people. In addition to suboptimal patient outcomes, a by-product of the dispensing-for-profit phenomena is a tendency to over prescribe: an average prescription in Taiwan typically contains four medicines.

While Taiwan has attempted to argue that local law does, in fact, require a separation of the two functions, the reality is anything but segregation. Outpatient pharmacies continue operating within all hospitals; clinics meet the separation criteria by “hiring” a pharmacist license and continue dispensing medicine in the same office. A recent governmental effort aimed at forcing hospital pharmacies to release prescriptions of chronic care medicines, e.g. hypertension, asthma, etc. has been touted as a step toward a segregation of duties, but the driving force in this initiative is cost reduction: release of the 2nd and 3rd month of prescriptions to community drugstores saves the Government from reimbursing hospitals for doctor consultant and/or registration fees of patients simply refilling prescriptions. In reality, this “repeated 3 months chronic disease prescription” policy still keeps patients coming back to the hospital for refills instead of providing a real separation of prescribing and dispensing.

The separation of prescribing and dispensing is good medical and financial practice. Implementation of a separation of these two activities requires the establishment of a timeline, sustained political determination, and the introduction of transparency in all pricing-related transactions. The first step in this direction requires a commitment to move toward actual transaction pricing,

requiring accurate transactional disclosure, utilizing independent auditors and the suspension of public funding if necessary. Closure of the Black Hole by means of an effective enforcement of actual transaction pricing, i.e. legitimate enforcement of Article 49 resulting in substantial financial consequences for non-compliance, affords the government the ability to “transfer” this hidden subsidy to reimbursement of legitimate and currently under-funded healthcare expenses. A collapse of the Black Hole does not cost the government money, but rather allows for a transparent allocation of healthcare expenses.

Global Budgeting

The introduction of global budgeting in 2002 has served to exacerbate market access barriers and expand the magnitude of the Black Hole. Under a global budget system, total healthcare expenditure growth is capped at a percentage increase over the previous year’s actual expenses.

On average, patients in Taiwan visit hospitals 15 times per year. This excessive and expensive visitation pattern is the result of patient preference (best physicians, modern infrastructure, and low co-payments) and hospital economics. Outpatient services are an effective means of covering overhead costs as physicians may see upwards of 30-40 patients/hour, and allow hospitals to capture large margins from the sale of medicines. Drug-related expenses can represent as much as 75% of outpatient-related expenses.

Given this background, it comes as little surprise that the BNHI implemented a number of measures aimed at reducing or limiting outpatient visits to hospitals starting in 2004, with the overall intent of moving patients with chronic, non life-threatening, illness to less expensive clinics and pharmacies. What is surprising, however, is the one-sided approach that was taken in establishing outpatient and inpatient targets (ratios), effectively penalizing hospitals upon their failure to achieve those targets, but do nothing to influence patient behavior change. The implementation of a global budget cap, the imposition of self management programs aimed at reducing outpatient numbers, and an aging population (9.5% over age 65) contributed to a budgetary crisis that pinned the pharmaceutical industry between government and hospitals.

Under the self management schemes, government utilizes a floating point system to calculate reimbursement rates for inpatient and outpatient expenses. If the relevant budget, e.g. hospital, regional, national, remains in the black then the point value would be 100%. If expenses exceed budget, the floating point value is correspondingly reduced. By the end of the Q1 2004, outpatient point values had dropped to NT\$0.8/per point– outpatient expense submissions were reimbursed at 80 cents on the dollar. In general, point values in 2005 improved versus 2004 due to the BNHI significant rejection of service claim, and the data shown only the combined outpatient and inpatient point value which improve the point value of outpatient services by inpatient services and

was recently reported in around 0.86/per point. But the drug expenditure growth in 2Q/05 was reported in -1% growth. This explains the uncontrolled rapid growth in the area of medical services under this very small growth cap of global budget system drive foundational growth of expenditure.

The response to the budgetary squeeze was predictable: hospitals immediately turned to drug margins as a means to cover the budget shortfall. Among the methods utilized: bidding, margin-dependent formulary criteria, generic or class substitution, and requests for donations. IRPMA, the local industry association, estimates that global budgeting and self management has cost member companies more than \$100M in sales, mainly due to formulary delisting, generic substitution, and an expanding Black Hole. Inasmuch as hospital expense growth is capped at less than 4 percent, the research-based industry in Taiwan faces daunting future. Currently, there is a new policy proposed by the DOH to implement individual hospital based global budgeting nationwide in 2006. We believe this will put an even tighter budgetary squeeze on certain hospitals and therefore exacerbate the Black Hole.

BNHI Legislation

Earlier this year BNHI proposed legislation to reform the National Health Insurance drug pricing system in a way that targets innovative medicines for punitive price cuts and puts inappropriate restrictions on the reimbursement of these medicines. The legislation proposes to: legalize the Black Hole by amending Article 49 to delete the requirement that medicines be reimbursed at their actual transaction cost; institute therapeutic reference pricing with “balanced billing” co-payments on only new drugs; mandate global budget targets and reduce reimbursements through across-the-board price adjustments when such budgets are exceeded; adopt pharmacoeconomics by applying cost-effectiveness methodologies to pharmaceutical reimbursements; and authorize BNHI to restrict reimbursements for products whose efficacy or cost-effectiveness has not been established. These policies are inconsistent with the government’s stated desire to promote an innovative life sciences sector in Taiwan.

BNHI issued proposed regulations on December 23, 2005. These regulations were discussed with industry at several meetings over the course of the last year; however the scope and specificity of the regulations goes well beyond the conversations that took place between BNHI and industry. These regulations are a separate proposal from the NHI legislation. The proposed regulations can be implemented upon approval by DOH. The regulations will have a profound negative impact on the pricing scheme for innovative pharmaceuticals in Taiwan. The regulations call for the creation of a Pharmaceutical Affairs Committee that will approve new listings and set drug prices. There will be a highly formulaic approach to pricing new medicines including A-10 pricing, therapeutic grouping for pricing and benefits for generics.

BNHI has requested industry comments on the proposed regulations. PhRMA member companies will provide input and will continue to monitor the development of these regulations.

Damage Estimate

PhRMA members estimate that the 2005 damages in Taiwan are equal to 4.4% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class for Priority Foreign Countries and Priority Watch List countries. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Taiwan	72438	60052	132490	2999270	4.4%

VIETNAM

On behalf of America's global research-based pharmaceutical companies, PhRMA welcomes Vietnam's application to join WTO. We urge that Vietnam's WTO accession protocol should enhance market access for U.S. firms and bring Vietnam's intellectual property rights regime into full conformity with WTO rules and obligations.

Though we acknowledge that some progress has been achieved through new laws and regulations passed in anticipation of WTO accession, PhRMA member companies continue to face a number of serious market access barriers to conducting business in Vietnam, including obstacles related to intellectual property protection. These issues are described in full below. Given these concerns, we recommend that Vietnam be placed on the 2006 "Special 301" Watch List.

Intellectual Property Protection

Data Exclusivity

PhRMA welcomes the passage of Vietnam's new intellectual property legislation that includes a provision for five years of data exclusivity. We will continue to monitor the implementation of this law to ensure that it is applied in a TRIPS consistent manner.

Parallel Importation

On May 28, 2004, the Ministry of Health (MOH) issued Decision 1906/2004/QD-BYT, authorizing the parallel importation of medicines for the prevention and treatment of human disease. In the case of patented pharmaceutical products, importation by entities without approval from the patent holder violates the rights of the patent holder and is therefore unsustainable. This and other issues should be addressed in Vietnam's accession package.

Patent Protection

In principle, Vietnam provides 20 years of patent protection. However, there is no single forum which covers the issuance and enforcement of patents. Responsibility for patent grant and enforcement is fragmented between the National Office of Intellectual Property (NOIP), the Ministry of Finance, and the Ministry of Planning and Investments. As a result, enforcement of patents is sometimes weak and haphazard. While the Vietnamese Parliament is considering measures to consolidate the different patent-related laws and procedures, this could take 12 – 18 months or more, and the outcome of such legislative efforts remains uncertain. Accordingly, Vietnam's WTO accession should include a clear commitment to establish effective patent procedures and

enforcement mechanisms.

Enforcement

The system for enforcing intellectual property rights (patents, trademarks, copyrights) remains weak. Such rights are enforced by a range of different government authorities and procedures. The problem is exacerbated by the fact that many of these authorities have discretion as to whether to take action and can avoid doing so by referring complaints to another agency. The Vietnamese courts have little or no experience in interpreting or enforcing intellectual property rights. In any event, it is difficult for courts to enforce their own judgments, because the responsibility for such enforcement rests with agencies external to the courts. In general, the intellectual property laws in Vietnam lack specific regulations to guide their interpretation, application, and enforcement. This is a significant hurdle to applying the law because government authorities tend to require an express legislative authorization for actions on behalf of intellectual property rights holders against infringers. Vietnam needs to engage in a comprehensive strengthening of its intellectual property rights enforcement regime.

Infringement of Registered Pharmaceutical Trademarks

Although the new Civil Code and associated implementing legislation provide a clear legal basis for protecting registered intellectual property rights in Vietnam, infringement of registered trademarks is systematic and widespread, causing substantial financial losses to PhRMA member companies. State-owned pharmaceutical companies under the jurisdiction of MOH, and manufacturers and distributors from foreign countries figure prominently in infringement of the registered trademarks of PhRMA member companies.

The only legal recourse is to petition NOIP for a decision of infringement. While the NOIP has issued decisions of infringement in a responsible and timely manner, it is often difficult to enforce NOIP decisions due to the lack of cooperation between NOIP and MOH, and a general disregard for NOIP's authority by the local generic industry.

Trade Dress

Vietnam has discriminatory loopholes in the current legal framework for protection of "trade dress". This loophole allows companies to mimic or copy the product packaging of other companies, thereby trading unfairly on the hard-earned goodwill associated with the product's "trade dress". Vietnam should amend its intellectual property rights legislation to provide protection for both foreign and local companies from this type of unfair competition.

Counterfeiting

In Vietnam a high percentage of branded goods available on the market are believed to be counterfeited, placing the public at risk of consuming medicines of substandard quality that may contain only inert ingredients or even toxins. While the incidence of counterfeited consumer goods available on the market is understood to be very high, the percentage of counterfeited pharmaceuticals in distribution in Vietnam is not clear at this point. However, increasing vigilance and improved enforcement efforts regarding this important aspect of public health are required. This requires the adoption of additional enforcement measures and the allocation of additional resources to intellectual property rights enforcement in order to prevent widespread counterfeiting.

Local Working Requirement

To render the Vietnamese law consistent with obligations of Articles 27 and 31 of TRIPS (which are incorporated in the U.S.-Vietnam Bilateral Trade Agreement (U.S.-Vietnam BTA)), Vietnam needs to adopt measures that specify that importation of a patented product will be legally equivalent to manufacturing the product in Vietnam, and as a consequence, be sufficient to block the grant of a compulsory license based on non-use or inadequate use. In addition, the patent law should be amended to require “compulsory licensees” to pay a level of compensation commensurate with the patent’s market value as provided in TRIPS and the U.S.-Vietnam BTA.

Market Access Barriers

Product Registration

PhRMA believes that Vietnam’s product registration regime, which is inconsistent with international standards and practices, should be reviewed in respect of the following issues:

- a) *Discriminatory Enforcement of Product Registration Requirements:* At the same time that MOH is issuing more stringent product registration requirements, state-owned importers of pharmaceutical products under the jurisdiction of MOH continue to import and/or distribute products from companies that have not registered their products. Many of the unregistered pharmaceutical products infringe the registered trademark rights of others or violate applicable quotas.
- b) *Certificate of Pharmaceutical Product:* A Certificate of Pharmaceutical Product (CPP) from the country of manufacturing or packaging is mandatory as part of the marketing authorization process for all imported pharmaceutical products. The CPP document is issued by each government to confirm that a product has been licensed for sale within their country. As the pharmaceutical industry often

manufactures a certain product in a very limited range of locations, it can arise that the country of manufacturing/packaging is not a country where the product is marketed. We would argue that a CPP from any country should be acceptable to comply with the regulation.

The objective of product registration, in PhRMA's view, should be to record necessary information about pharmaceutical products being sold in Vietnam and ensure product quality. Currently there are no clear guidelines or objectives to provide consistency in the registration process.

Requirement that Clinical Trials of Vaccines Be Conducted in Vietnam

Foreign manufacturers of vaccines are required to conduct clinical trials in Vietnam before being permitted to register their vaccines for sale. This is unnecessary, as most international pharmaceutical companies that develop and manufacture vaccines will have already carried out safety and efficacy trials in accordance with the very stringent rules and rigorous protocols required by the U.S. Food and Drug Administration and/or other internationally-recognized regulatory bodies, such as the International Conference on Harmonization (ICH), before introducing their vaccines to Vietnam. Foreign research-based vaccine manufacturers that conduct clinical trials outside of Vietnam in accordance with FDA or other ICH standards should be exempt from the requirement that local vaccine trials be conducted in Vietnam.

Import Quotas

All state companies wishing to import foreign pharmaceutical products are required to apply for annual quotas. Under the U.S.-Vietnam BTA, such import quotas are to be phased out.

Requirement That Pharmaceutical Raw Materials Be Imported Within Six Months of Manufacture

Official Dispatch No. 5410 requires that all pharmaceutical raw materials be imported into Vietnam within six (6) months of the date of manufacture of an end product. This requirement lacks scientific justification and is discriminatory against manufacturers who must i) produce buffer stocks of such raw materials at least five months in advance of delivery in order to meet fluctuating demand and ii) produce in large quantities in order to keep unit costs down. This also results in inefficiencies in the production and delivery of pharmaceuticals that in turn could raise the cost of producing such products. Vietnam should extend the period within which pharmaceutical raw materials must be imported into Vietnam after their manufacture to up to 12 months or no later than six (6) months before the date of expiration of their shelf-life.

Trade Restrictions

Tariffs/Zero-for-Zero: Import duties on pharmaceutical products range as high as 15% ad valorem. The tariff rate is often not known until the products are imported and can vary by point of entry. Such import duties should be eliminated.

Trading and Distribution Rights: PhRMA member companies are not permitted to freely import and distribute their products in Vietnam. Foreign pharmaceutical companies should be permitted to import and distribute their products freely in cooperation with a Vietnamese company of their choice or by themselves through branch offices. Additionally, the branch office provisions of the new Commercial Law should be applied to allow foreign pharmaceutical companies to establish branches in Vietnam, subject to fair and internationally accepted levels of taxation, licensing requirements and regulations governing the scope of their activities.

Damage Estimate

At the time of reporting PhRMA is not able to provide a specific estimate of the damages incurred in 2005 attributable to trade barriers related to intellectual property protection and market access.

EUROPE

BULGARIA

PhRMA members attempting to do business in Bulgaria continue to suffer from market access barriers, including a lack of transparency in Government pricing and reimbursement procedures. While Bulgaria is taking steps to bring its intellectual property laws in line with TRIPS, including the addition of a data exclusivity provision which came into force on January 1, 2003, PhRMA members continue to suffer from ineffective intellectual property rights enforcement in Bulgaria. PhRMA therefore requests that Bulgaria be placed on the “Special 301” Watch List for 2006.

Intellectual Property Protection

As of June 1, 1993, Bulgarian Patent Law made product patent protection available. In addition, a Bulgarian/U.S. bilateral treaty provides for a reasonable pipeline protection for those products with a qualifying patent in the U.S. (a US issued patent applied at the Bulgarian Patent Office). However, in several respects, the level of Bulgarian intellectual property protection falls short.

Data Exclusivity

PhRMA welcomes the provision that came into force on January 1, 2003 which provides for a six-year data exclusivity period for pharmaceutical products.

However, the provision requires a valid patent as a prerequisite for data exclusivity, which raises TRIPS considerations.

Furthermore, as a candidate for membership in the European Union (EU), Bulgaria was obligated to implement the new EU medicines legislation that requires a harmonized “8+2+1” year protection law by November 2005. However, even 13 months from EU accession, there is still no legislative initiative to implement the new term of protection.

Other Shortcomings of the Bulgarian Patent Law

Bulgarian legislation currently does not have rules on Supplementary Protection Certificates (SPCs) in line with the EU SPC Regulation. However, the Treaty of Accession of Bulgaria and Romania to the EU establishes January 1, 2000, as the cut-off date for products eligible for SPC: under it, any medicinal product that obtained its first marketing authorization after January 1, 2000, may be granted an SPC. Bulgaria does not appear to be taking steps toward implementation of the SPC regulation prior to the date of its accession to the EU, and practical problems are expected in operating the system upon accession.

Contributory infringement: The Bulgarian patent law does not explicitly provide for relief against contributory infringements such as supplying third parties, domestic or foreign, with intermediary products used in the synthesis of a protected substance.

Protection against threatened infringement: Bulgarian Patent Law does not specify that preliminary injunctions are available against threatened infringements, as required by TRIPS Article 41.1, and as available in the Bulgarian Copyright Law.

Enforcement

Effective action, expeditious remedies to prevent infringement, and remedies that constitute a deterrent to further infringements are not available. Corrective action should include, for the short term, effective application of procedures already available under Bulgarian law, and, for the medium term, upgrading of these procedures to EU and U.S. levels, which would include the addition of articles on preliminary injunction in the Patent Law and in the Civil Code.

The track record of enforcement does not inspire confidence in the capacity and independence of Bulgaria courts to effectively protect intellectual property of pharmaceutical companies.

Market Access Barriers

Government Pricing and Reimbursement

The procedures for drug pricing and reimbursement of pharmaceutical products are cumbersome, not transparent and not based on objective and verifiable criteria. New advanced drugs which may be more effective with fewer side effects are often arbitrarily classified, thereby limiting the companies' incentive to introduce innovative products.

Government price controls on both reimbursed and non-reimbursed medicines are tied to a basket of countries with the price control equaling the lowest price of all comparator countries.

Bulgaria is the only European country with a reimbursement procedure going through two phases causing disproportionate delays and market access hurdles. The first phase is the Positive Drug List (PDL) and determines the mere eligibility of products for reimbursement, but does not guarantee reimbursement status. To include products in the PDL, companies must apply first with the Positive Drug List Committee. A product not included in the PDL may not apply for reimbursement, which is the second phase of the procedure. The PDL is

updated only once a year, which leads to a period of 4 to 16 months from the date of application to the date of decision for inclusion, or exclusion from, in the PDL alone. Upon the issuance of the PDL, the National Health Insurance Fund negotiates with the applicants once a year the reimbursement prices for only a selected part of the drugs listed on the PDL. The timelines exceed significantly the maximum timelines set by the Directive 89/105/EEC. The reimbursement system in Bulgaria and particularly the institute of the PDL constitutes a major barrier to access the market for research-based pharmaceutical companies and to access modern therapies for patients: in Bulgaria delays for reimbursement may be anywhere from 275 to more than 800 days, one of the longest delays in Europe.

Part of reasons for the delays is the overly bureaucratic reimbursement process that requires multiple approvals, lacks individualized decisions, lacks objective criteria for inclusion in the PDL and the reimbursement list, and does not provide an appeal process for negative decisions.

The methodology of determining reimbursement levels leads to much higher co-payment for innovative patented products than for the generics. These co-payments are unaffordable for the majority of the patients.

Under a Bulgarian decree that overrides the Health Insurance Law, the National Health Insurance Fund (NHIF) engages in a practice to force - as a prerequisite for reimbursement negotiations - a "contract" on innovative manufacturers, including companies imposing liability on the supplier companies for failure of the distributors to meet drug supply obligations (incorrect or late deliveries) under the law. Instead of holding distributors accountable for correct distribution, the government holds pharmaceutical manufacturers liable for the distributors' performance over which manufacturers have no control.

Marketing Authorization

Bulgaria has only partially implemented the rules and procedures relating to Marketing Authorization that are set out in the Human Use Directive. For example, the absence of any time limits for reviewing and approving an application of marketing authorizations results in undue registration delays. The new Drug Law that will be in force 2Q 2006 will include all the rules related to MA that are in the Human Use Directive. There are time limits for reviewing and approving an application of marketing authorizations but there are cases of delay of 1, 2 or 3 months.

HUNGARY

Although the accession of Hungary to the European Union in May 2004 should have had a positive impact over the long run on the availability and enforceability of intellectual property rights in Hungary, the Government of Hungary does not yet provide effective protection for pharmaceutical products or processes or for protected data. The Government of Hungary also imposes a number of market access barriers on imported pharmaceutical products, including those resulting in reimbursement delisting based on price comparison and reference pricing. As indicated below, these market access barriers raise serious questions under Hungary's international commitments, particularly those under the WTO Agreement on Technical Barriers to Trade. PhRMA therefore requests that Hungary be placed on the "Special 301" Watch List for 2006.

Intellectual Property Protection

Certain aspects of Hungary's patent protection regime are inconsistent with its TRIPS obligations, which came into force on January 1, 2000, if not earlier, to the extent that Hungary did not invoke the transition period for developing countries found in Article 65.3 of TRIPS.

Data Exclusivity

The data exclusivity term in Hungary begins on the date of the first marketing authorization in the European Union. Since Hungarian marketing authorizations are typically issued later than authorizations in the EU, with its central and mutual recognition approval procedures, the Hungarian reference to a third country can considerably shorten the data exclusivity period. Furthermore, reference to third country marketing approval dates is not provided for, nor is it in the spirit of, TRIPS Article 39.3. Moreover, after receiving formal marketing authorization, a pharmaceutical company seeking reimbursement for its product must wait to market the product until the price of the product is approved by the Government and is published in the Official Gazette. This requirement typically takes one year, although recently it has been delayed up to two years, thereby reducing what would otherwise be a six-year period correspondingly.

To comply with the EU "Future Medicine Legislation" rules Hungary was obliged to amend its data exclusivity regulation increasing the protection period to "eight plus two plus one" years by November 1, 2005. While the relevant draft decree has been circulated to and discussed with industry associations, the new legislation has failed to be published by the deadline mandatory to all Member States.

Patent Linkage

The absence of any direct linkage between patents on pharmaceuticals and the Hungarian Regulatory Agency and patented pharmaceuticals is another area of concern. The regulatory authority, while assuming responsibility for safety and efficacy review, apparently has abdicated any responsibility for ensuring that competitors do not market products covered by patents through linkage. Thus, instead of taking the opportunity to prevent infringement during the marketing approval process, Hungary forces patent owners to resort to the court system after infringement has occurred. This results in significant adverse commercial impact because the originator loses market share during this process, which may never be recovered. Hungary has not yet committed to implement a linkage system.

Enforcement

TRIPS Article 41 requires that WTO Members ensure that their enforcement procedures permit “effective action” against intellectual property infringement acts and include “expeditious remedies to prevent infringements and remedies, which constitute a deterrent to further infringements.” As such, it is not enough for a WTO Member to merely make available in their statutes the remedies that are enumerated in TRIPS, such as preliminary injunctions and damages, but it must also ensure that these remedies are effectively and expeditiously applied by their judiciary in relevant cases.

Among the obstacles that U.S. patent holders, especially those holding pharmaceutical patents, are facing with respect to the enforcement in the Hungarian courts of their intellectual property rights, is the relative difficulty of obtaining preliminary injunctions against infringements of their process patents. This problem is especially exacerbated by the apparent unwillingness of the Hungarian judiciary to reverse the burden of proof in process patent infringement cases involving new products, as addressed by TRIPS Article 34. The unwillingness to order the defendant to demonstrate the actual process used in producing an identical product in a process patent infringement case involving a new product makes it very difficult, if not impossible, to enforce a process patent in the Hungarian courts. This is particularly true given the difficulty that process patent holders have in determining, through reasonable efforts, the process that was actually used by the defendant.

In addition, lax civil procedure practices by Hungarian courts unfairly allow a defendant to introduce new defenses at advanced stages of infringement cases – sometimes even during appeals that are pending in the second instance – resulting in protracted litigation which benefits the alleged infringer.

Finally, current damages for intellectual property rights violations are not adequate to compensate for the injury the right holder has suffered because of

an infringement of its intellectual property right. It is also rare that the infringer is ordered to pay the right holder's expenses associated with the defense of its intellectual property right, or to recover profits. Hungary should take steps to ensure compliance with TRIPS Article 45.

Taken together, these current practices provide less-than-expeditious enforcement of intellectual property rights. As a result, the enforcement of patent rights that is envisaged by TRIPS is rendered ineffective in Hungary.

Local Working Requirement

Current Hungarian patent law does not explicitly recognize the importation of a patented product as meeting the "patent working" requirements contained in the law. As such, Hungarian law should be amended to guard against the granting of a compulsory license when patented products have been imported. Local manufacture should not be necessary to satisfy the working requirement.

Failure to Comply with U.S.-Hungary Bilateral Trade Agreement

By improperly defining the filing date of certain "pipeline" patent applications, Hungary has failed to implement the Agreement. Hungarian patent law and its interpretation have established invalidating criteria for transitional "pipeline" patents that fail to comply with the scope of "pipeline" protection accorded by the Agreement.

Market Access Barriers

The Government of Hungary and pharmaceutical companies entered into an agreement in June 2004 covering the period through the end of 2006. The Government was forced to negotiate this agreement following the ruling by the Constitutional Court in May 2004 that the Government decree freezing prices at 15 percent below previous levels effective April 1, 2004, was unconstitutional. The agreement reinstated ex-company prices before the price-cut and contained specific stipulations concerning the pricing and financial settlement (e.g. company contributions) to remedy the situation. Modification of the relevant decrees stipulating Hungary's transparency regulation (Governmental Decree 91/2004 and Ministerial Decree 32/2004) took effect January 1, 2005. A positive development has been that companies and the government are to sign an amendment to the above agreement detailing the total contribution amount, while the government undertakes not to implement changes to the reimbursement legislation other than those complying with EU directives.

Nevertheless, PhRMA companies remain concerned about the implications of modifications that the Parliament issued to the Price Act enabling

the Government to impose drug price freezes in the future if the drug market becomes “unstable” for nine months.

All drugs are subject to registration and marketing authorization for safety and efficacy, but market access for non-reimbursed pharmaceuticals is much easier than for drugs subject to reimbursement from the state-regulated National Health Insurance Fund (NHIF) – the vast majority of the products that PhRMA companies seek to offer to the marketplace. To gain access to the market for a non-reimbursed drug, the holder of marketing authorization simply communicates to the Chamber of Pharmacists the product characteristics and intended price (which the holder of marketing authorization is free to set). This information is then published in the Gazette of the Ministry of Health (MOH) (which is issued quarterly), and upon publication, the non-reimbursed drug may be sold in Hungary.

In contrast, holders of marketing authorization for drugs seeking to have them included on reimbursement lists must follow a complicated and lengthy process that begins with the submission of a dossier with the National Health Insurance Fund (NHIF). There are two types of procedures for the evaluation of the dossier: a simple procedure, where no technology assessment is needed, which must be completed within 90 days; and a normal procedure, where technology assessment is needed, which must be completed within 180 days. The dossiers are first checked formally by the Transparency Secretariat of the NHIF and then passed on to the newly established Health Technology Assessment (HTA) Institute. The final decision whether a drug may be subject to reimbursement is made within the NHIF and the TEB – an inter-governmental body including representatives of the Ministries of Health and Finance and the NHIF.

PhRMA companies are concerned about several elements of the reimbursement listing system in Hungary.

In the listing process, Hungarian regulations apply different treatment to pharmaceuticals that fall into different categories. New chemical entities – consisting largely of the innovative drugs produced by PhRMA companies -- may not be listed and sold unless the holder of marketing authorization concludes a price-volume ceiling agreement with the Government.

Since 2003, the NHIF has determined the reimbursement level for a drug according to a reference price system using one of two reference calculations. Type I reference groups can be created on the basis of the chemical substance of the pharmaceuticals. The products in this group are reimbursed at a fixed amount based on the price of the least expensive product included in the group. These fixed reimbursement prices have been introduced for all significant product groups. Type II reference groups are created on the basis of the same 5-digit Anatomical Therapeutic Chemical (ATC) group. Under either the substance-

based on therapeutic approach, the reference price system discriminates against PhRMA companies' innovative products.

As applications started to be filed under the new transparency system in 2005, loopholes of the new regulations have come to light. Especially problematic for innovative companies is that many of the important therapeutic groups that receive some sort of reimbursement have to be listed in MOH's Gazette together with the indication(s) and the definition of the pool of physicians/patients eligible to prescribe/receive the products (often NHIF reimburses only a subset of the registered indications of a drug). This list covers about 20 major therapeutic fields and a number of indications within these. In case a new product filing for reimbursement in a yet undefined therapeutic field, or indication within the field, the evaluation procedure is suspended till MOH includes the new therapeutic indication in question into the list, which involves the modification of the decree containing the list every time.

No official procedure exists to initiate the missing step at MOH. Nor can the National Healthcare Fund - otherwise in charge of the reimbursement decision process - take official steps in order to start the updating of the list. As a result, approx. 8-12 reimbursement applications have been trapped in this situation and the number is increasing. This situation occurs in every case when new indications are applied for by definition - not having been on the list before. Therefore, innovative companies are the worst hit.

Reimbursement lists are documents that set forth product characteristics to which compliance is mandatory for drugs to receive compensation, and therefore, these lists fall under the definition of "technical regulations" in the WTO Agreement on Technical Barriers to Trade (TBT Agreement). Accordingly, PhRMA companies note that the Government of Hungary does not appear to be meeting its obligations under the TBT Agreement with respect to these lists. In particular, the regulation of products through reimbursement lists using Hungary's reference price system is significantly more trade-restrictive than necessary to fulfill any legitimate objective, pursuant to paragraph 2 of Article 2 of the TBT Agreement. The trade impact of Hungary's technical regulation is clear – the innovative products of PhRMA companies are (with the exception of some vaccines) available only by export to Hungary. The system, therefore, effectively narrows the range of therapeutic options available to physicians and patients.

PhRMA companies urge the United States Government to raise these concerns under Hungary's international commitments with the Government of Hungary so that PhRMA companies can enjoy the benefits of the protections afforded by the TBT Agreement in Hungary.

On a positive note, appeals from reimbursement decisions were taken by the head of the NHIF. A new decree which finally regulates opportunity for

companies to bring scientific or medical issues to the attention of an independent appellate body came into effect as of November 1, 2005.

Damage Estimate

PhRMA members estimate that the 2005 damages in Hungary are equal to 12.7% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Hungary	222950	58319	281269	2220113	12.7%

LATVIA

PhRMA members attempting to do business in Latvia continue to suffer from inadequate and ineffective intellectual property protection and from market access barriers, including a lack of full transparency in Government pricing and reimbursement procedures. Recently, the Government introduced regulations requiring companies to report and justify price increases for non-reimbursed products. PhRMA therefore requests that Latvia be placed on the “Special 301” Watch List for 2006.

Intellectual Property Protection

The Latvian Patent Law took effect on February 28, 1992, providing product patent protection for pharmaceuticals for all patent applications filed on or after that date. In addition, under a 1994 Bilateral Agreement between the U.S. and Latvia in effect since 1995, Latvia provides product patent protection for products with a U.S. patent, provided that the patent is based on an application filed with the U.S. Patent and Trademark Office between February 28, 1984 and February 28, 1991, and the product was not marketed or manufactured prior to February 28, 1992. Many companies have taken advantage of this pipeline protection.

Enforcement

Legal customs in Latvia are weak due to a lack of experience and specialization of courts. In addition, preliminary injunctions are rarely granted and judges fail to reverse the burden of proof in process patent cases. However change is coming with the introduction of an Administrative Court in 2004 that practices a significantly speedier process for intellectual property cases.

While the grant of pipeline patents by the Latvian patent office is commendable, attempts to enforce product patents under the 1994 Bilateral Agreement have failed so far. Instead of taking the pipeline provisions under the Agreement into account, the judges have permitted nullity counterclaims to proceed, and allowed an assessment of the validity of patents under national law only.

Data Exclusivity

PhRMA Members welcome the fact that Latvia has enacted six years' data exclusivity generally (ten years for high technology products). The Latvian data exclusivity provision largely meets the requirements of the Directive 65/65/EEC. However, it provides that the data exclusivity period runs from the first marketing authorization (registration) in the EU (or in Latvia) rather than from the issuance of the Latvian marketing authorization alone. This significantly shortens the

effective protection of the originator's data in Latvia, since the grant of marketing authorizations in Latvia tends to lag behind the EU.

Latvia was obligated by November 1, 2005 to implement the new harmonized regulatory data protection contained in the New Medicines Legislation (so-called “8+2+1” protection) that was enacted on May 1, 2004. Latvia has openly declared that it will not implement the new rules. Under “8+2+1”, a subsequent applicant that seeks to rely on the originator’s data may not file an application during the eight years following marketing approval of the originator’s product. If the applicant files after eight years, it may not market its product for ten years following marketing approval of the originator’s product. Thus, an application for marketing approval of a subsequent product based on the same active ingredient may not rely on the originator’s data during the first eight years of the exclusivity. The legislation also provides for one additional year of exclusivity for all indications, if the originator conducts additional clinical research to develop a new indication of significant clinical benefit over what is available and receives marketing approval for the new indication during the first eight years of marketing authorization. “8/2/1” protection will significantly improve the level of data protection in Latvia, and we encourage U.S. Government engagement on this issue.

Market Access Barriers

Reimbursement

Under the reimbursement system in place since July 2005, the manufacturer can apply for reimbursement of a product if the disease is included in the reimbursement list. INNs are submitted for reimbursement together with specific products (previously only professional associations and in specific cases pricing agency could submit INN for reimbursement). Depending on the disease, the reimbursement level is 50%, 75%, 90% or 100%. It is often limited to specific patient groups only. An applicant must submit certain documentation (including the price of the product) as well as pay a fee for the review of application and an annual fee when reimbursement is granted. The process of inclusion of the molecule in the reimbursement list, as well as the government pricing system, lacks transparency.

As an EU member state, Latvia should adjust its law to comply with the European Transparency Directive 89/105 that requires procedural and substantive guarantees for governmental decision-making on pricing and reimbursement of pharmaceutical products. Latvian law does not yet contain criteria that are objective and verifiable for making pricing and reimbursement decisions. The Law requires pharmacoeconomic evaluation to be submitted but does not state the conditions (evaluation outcome) at which a drug will be reimbursed.

Reference pricing was introduced in the reimbursement law in place since July 2005. In July 2005 a molecular (ATC7 level) reference was begun. From July 2006, therapeutic group reference or clustering (ATC4 level) is to be introduced. If introduced, clustering may create conditions in which it is difficult for innovative medicines to access the Latvian market. Currently there are no publicly accessible criteria for either selection of therapeutic classes to be clustered, or principles of product assessment within such system. There has been no economic assessment of the impact of clustering on Latvian healthcare or the reimbursement system.

Enforcement

As soon as reimbursement for a product is granted, Sick Funds are obliged to reimburse it. However, Sick Funds have introduced different limitations for prescribing reimbursed pharmaceuticals, including so-called “physician budgets”, which are stated in writing in the Agreement between the Sick Fund and the GP practice. Physicians may not prescribe a product that must be reimbursed under the law if the “physician budget” is exceeded. Although limitations set by Sick Funds contradict reimbursement regulations issued by the Cabinet of Ministers, limitations are still in place and prevent manufacturers from employing rights granted under the law. The interventions practiced by these Sick Funds operate as hurdles for patients to access drugs, and for companies to access the Latvian market. The formal justification for such limitations is that the State Budget Law is a dominant document in juridical hierarchy compared to reimbursement regulation.

NORWAY

Norway does not fully provide the patent protections that most developed countries provide the pharmaceutical industry. Norway needs to make changes to either their patent law or to their regulations to ensure that drugs with current basic patents – including analogous process patents – cannot be listed on the Norwegian Medicines Agency’s list of interchangeable drugs. Therefore, PhRMA members recommend that Norway be placed on the Watch List in the course of the 2006 “Special 301” review process.

Intellectual Property

Patents

In Norway, two different patent types exist, where the novelty or patentability of the drug substance constitutes the basis of the patent:

1. Product patent, which provides direct patent protection of the active ingredient.
2. Analogous process patent, which only provides patent protection of the manufacturing process for the active ingredient.

Until 1992, it was not possible to acquire a product patent for a drug. Instead, an analogous process patent was granted for the manufacturing process even though it was the invention of the drug substance that provided one of the bases of the patent. Norway was one of the last countries in the Western World finally to introduce product patents for drugs in 1992.

Other countries facing similar circumstances have provided remedial measures against circumvention of analogous process patent protection. Such measures require removing or barring from the list of interchangeable drugs, products on which valid analogous patents are still applicable. The U.S. government should urge Norway to adopt similar measures and bring their patent protection to the level of other developed nations.

An analogous process patent in Norway without remedial measures describe above provides poorer patent protection than a product patent. If a generics manufacturer succeeds in finding a process that is not covered by the patent, the introduction of the generic product on the market will not constitute a patent infringement. Products entering Norway pre-1992, which constitute approximately 85% of branded product sales today, may therefore be exposed to generic competition before the expiry of the original patent.

The Norwegian government has implemented further measures in 2005 aimed at stimulating generic competition, yet has not acted to address the weaker patent protection afforded by analogous process patents on the majority of products. Consequently, generic manufacturers are more active in their efforts to enter the market.

Damage Estimate

PhRMA members estimate that 85% of all sales derived from Branded pharmaceuticals today are at risk due to this inadequate patent protection. That equates to approximately 8 billion Norwegian Kroner (\$1.25 billion USD) per year. With a sharp increase in attempted entries by generic manufacturers in 2005, driven by the governmental incentives to foster generic growth, the threat of losses in revenue is of a very significant magnitude.

ROMANIA

PhRMA member companies continue to face insufficient intellectual property protection and significant market access barriers in Romania. These include weak data exclusivity provisions, discriminatory and non-transparent government pricing practices and other market access restrictions including dispensing and prescribing restrictions. PhRMA therefore requests that Romania be placed on the “Special 301” Watch List for 2006.

Intellectual Property Protection

Data Exclusivity

Basic Elements

PhRMA members appreciate Romania’s effort to meet its WTO TRIPS obligation to provide effective protection for commercially valuable clinical data submitted by PhRMA members to health regulatory authorities as a condition of gaining marketing approval for new drugs.

Important steps were taken as Romania has implemented data exclusivity legislation starting in April 2004, through law no. 123/2004. According to the law, original medicinal products registered after November 2004 are granted in Romania six years of data exclusivity generally (ten years for high-tech products) starting from the date of first authorization in the EU or country of origin. Newly proposed legislation to implement Consolidated EU Directive 83/2001 EC would delete the reference to “country of origin” and provide “8+2+1” years of data exclusivity for products launched in Romania as of January 1, 1995. This new legislation, if passed, would ensure the same level of protection as in the EU.

Market Access Barriers

Government Pricing of Pharmaceuticals

The Government of Romania is also denying equitable market access to companies relying on intellectual property through the setting of maximum prices by the Ministry of Health (MOH) under Health Minister Order 612, which entered into force in September 2002. According to this regulation, prices are set by cross border reference to the minimum price of three countries (Bulgaria, Czech Republic, and Hungary) and the country of origin but in reality the cross border reference pricing process is made by taking into account an additional 9 countries (Austria, Belgium, Denmark, Germany, Lithuania, Italy, Poland, Slovak Republic, UK).

Reimbursement System – Transparency Commissions and NHIH levels

In Romania, there is little transparency in the listing and delisting of products that are put on various reimbursement lists. Listing criteria are extremely ambiguous, while procedures for appeal for manufacturers in case of delisting do not exist. No formal answer is given by the authorities to requests for explanations for the listing or delisting of a product.

In April 2005, in order to contain costs, a new reimbursement list was issued. It consists of 3 sub-lists: A) 90% of the minimum reference price reimbursement for patent expired molecules and generics; B) 50% reimbursement for innovative, branded molecules; C) 100% reimbursement (drugs for chronic diseases). In May 2005 the minimum reference price was introduced for 100% reimbursement list as well as a new cost-containment measure. There is also a social reimbursement list for pensioners with low income (under \$100/month) that contain mostly local produced drugs that are reimbursed 100%.

More recently, the Government of Romania proposed a new “claw-back” mechanism or rebate from pharmaceutical manufacturers for what the government determines is excess growth in the reimbursement system. Although few details are concrete, the government has proposed that the “claw-back” only applies to patented products. If enacted, this system could have a discriminatory impact on imported products.

Prescribing and Dispensing Restrictions

Romanian patients’ access to medication is further restricted by the ceilings per prescription (US\$100 USD retail price for drugs on list B containing patented products) and monthly-reimbursed drug prescription budgets per pharmacy that are arbitrarily set by MOH and Sick Fund.

These cost containment measures generate inequity in access to reimbursed innovative patented products, stimulate informal payments, and oblige general practitioners to refer patients to hospitals for treatment when the patient cannot afford to cover the co-payment. This mechanism may lead to savings in the outpatient care drug bill, but also leads to increased total costs for the health care system, worsens disease outcomes – especially for chronic patients – and increases dissatisfaction in the health care system and the population.

PhRMA members have proposed various policy solutions for cost-containment that would result in better savings to the system and improved access to all categories of drugs for the population.

We do not currently have a damage estimate for Romania.

SLOVAK REPUBLIC

PhRMA member companies continue to suffer ineffective intellectual property protection and face substantial market access barriers for patented products. PhRMA therefore requests that the Slovak Republic be placed on the "Special 301" Watch List for 2006.

Intellectual Property Protection

The Slovak Republic has made significant steps forward towards compliance of its intellectual property regime with TRIPS. The Patent Law follows the international standards and allows Supplementary Protection Certificates. However, the substandard level of data exclusivity and lack of enforcement of intellectual property rights remain significant unresolved issues.

The latest negotiation with the Slovak Government conducted with the support of the U.S. Embassy shows possibilities for improvement in two areas. The Slovak Government has agreed to improve the standard of storage facilities where the confidential toxicological and clinical data filed for product registration are being archived. Final decision on the new storage facility has not been made yet. There is a promise of the Slovak Ministry of Health that the selection process, the facility adjustment and the moving of registration data to the new storage facility could be finalized within the next 3-4 months.

The other area relates to drug registration processes in which the proposed linkage system implemented between State Institute for Drug Control (SIDC) and the Slovak Intellectual Property Office could prevent granting marketing authorization for products before expiration of patent protection of the active substance. The amendment to the Medicine Act establishing the linkage could be passed by the Slovak Parliament by June 2006. As a temporary solution the Ministry of Health has published a Decree with provisions requiring SIDC to already act as stated in the proposed Medicine Act amendment.

Data Exclusivity

PhRMA member companies believe that data exclusivity protection measures in the Slovak Republic, including storage of the test data, need to be improved to the standard level required in EU in 2005 and beyond.

As a Member of the European Union (EU), the Slovak Republic was obligated by November 2005 to implement the new harmonized regulatory data protection contained in the Future of Medicines Legislation (so-called "8/2/1" protection) that was enacted on May 1, 2004. Under "8/2/1," a subsequent applicant that seeks to rely on the originator's data may not file an application during the eight years following marketing approval of the originator's product. If

the applicant files after eight years, it may not market its product until ten years following marketing approval of the originator's product. Thus, an application for marketing approval of a subsequent product based on the same active ingredient may not rely on the originator's data during the first eight years of the exclusivity. The legislation also provides for one additional year of exclusivity for all indications, if the originator conducts additional clinical research to develop a new indication of significant clinical benefit over what is available and receives marketing approval for the new indication during the first eight years of marketing authorization. "8/2/1" protection will significantly improve the level of data protection in the Slovak Republic. We do not expect the Slovak Republic to implement this legislation before July 2006.

The current Slovak Medicine Act includes a provision of 6 years of data exclusivity. The amendment of the Medicine Act passed by the end of 2003 has retroactively reduced data exclusivity already granted for marketed products. This creates a non-predictable, unreliable and unbalanced environment.

As a result, the Slovak system still exposes highly sensitive and costly registration data to unfair commercial use by copy producers, although the Slovak Republic should have implemented a system that safeguards against the unfair commercial use of such data as required by TRIPS Article 39 by the compliance deadline of January 1, 2000.

Market Access Barriers

Procedures for Inclusion on Reimbursement Lists, and Setting of Reimbursement Levels

The provisions regarding the government's drug pricing and reimbursement in Law No. 577/2004 Coll. and in the Ministry of Health Decree 723/2004 reduce the level of transparency achieved since 2002. The wording of the provisions has made the transparency measures related to reimbursement (right to a procedure, right to be heard, right to a justified decision within a time deadline based on objective and verifiable criteria and right to appeal) ineffective. It also fails to comply with the EU Transparency Directive.

A manufacturer seeking medicinal product reimbursement is obliged to submit product prices from eight different countries plus the manufacturer's country of origin. The criteria used to evaluate a medicinal product create a significant space for arbitrary decisions and do not contribute to transparency of the system. The applicant is not part of the administrative procedure. Reimbursement decisions are not made based on objective and verifiable criteria, and an applicant receiving a negative decision is not allowed to appeal.

Additional controls are used to set limits even after reimbursement listing on product usage and physicians' prescription budgets.

Any regulation at a lower legislative level (Ministry of Health Decree) that would implement additional measures into the pricing and reimbursement processes will provide a significantly weaker base for the full enforcement of transparency than a law being in line with the Transparency Directive.

Procedures on price approvals, inclusion into reimbursement list and setting of reimbursement levels create a system of market access barriers that make the business environment unstable and highly unpredictable.

PhRMA member companies are willing to co-operate with the state authorities in order to improve transparency in the decision making processes on government price approvals and on inclusion into reimbursement lists, which are the cause of the most significant market access barriers.

Damage Estimate

PhRMA members estimate that the 2005 damages in the Slovak Republic are equal to 12.1% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Slovak	64074	16958	81032	670833	12.1%

WESTERN HEMISPHERE

COLOMBIA

PhRMA recommends that Colombia remain on the 2006 “Special 301” Watch List due to continuing threats to its data protection regulation (the December 2005 Andean Court of Justice (ACJ) ruling is a case in point) and PTO’s increasing number of denials to patent applications for innovative products. A recent decision by the National Commission for Drug Prices that establishes new government price control regulations for pharmaceuticals is also of great concern to the R&D pharmaceutical industry.

In 2002, Colombia took an important step by passing Decree 2085 to remedy a major TRIPS deficiency - lack of enforcement of TRIPS Article 39.3. We welcome Decree 2085 as an important step toward Colombia’s commitment to implementing its TRIPS obligations. Decree 2085, nevertheless, needs to be protected from attacks by local copier companies at Congressional, Judicial and Andean Community levels.

The PTO’s continued intransigence against approval of second use patent applications and its refusal to grant patents to innovative products have had significant commercial impact on PhRMA members, and are increasingly damaging the IP environment in Colombia.

Finally, trademark rights have been seriously eroded by Colombia’s Regulatory Authority, INVIMA, which has allowed copy companies to use registered trademarks of a U.S. pharmaceutical company without authorization. This has tarnished the image of the trademark and allowed the copy company to take unfair commercial advantage of the trademark’s reputation.

Intellectual Property Protection

Data Exclusivity

Decree 2085 provides the domestic legal basis for proper implementation of Andean Decision 486 that protects confidential test data from “unfair commercial use”, an overdue obligation under TRIPS Article 39.3. Decree 2085 establishes a five-year data exclusivity period during which no third party may obtain a health registration for a pharmaceutical product relying on safety and efficacy studies filed by the innovator. Thirty innovative products (new chemical entities, NCEs) were protected under Decree 2085²⁵.

On December 15, 2005, the Andean Court of Justice ruled in a non-compliance action brought by the Colombian Generic Industry Association (ASINFAR) against the Colombian Government, that the 5-year exclusivity term

²⁵ Source: INVIMA

granted to undisclosed data through Colombian Decree 2085, is contrary to Andean Law as it exceeds the authority given by Andean Intellectual Property Law to member countries to address the protection of data.

For the Court, although article 266 of the Andean Law specifies that "...The member countries may take (the) measures to guarantee the protection established in this provision²⁶" said article "...is not establishing an express term of protection, much less of exclusivity, and consequently the data protection granted by the Government of Colombia through article 3 of Decree No 2085 is excessive...."²⁷.

The Andean Court also ruled that with Decree 2085 Colombia is acting against the principle of the "indispensable complement" according to which it is not possible to issue internal regulations related to a matter that has been regulated by Andean Law, unless it is absolutely necessary for the correct application of the Andean provisions. In other words, in order to have legal value, the internal provision must deal only with matters not regulated at all within the Andean community provisions. In the case of data protection, the issue is regulated within Decision 486 and therefore the Andean member governments cannot protect said data in a different way, especially by including an exclusivity term that is not contemplated in Decision 486²⁸.

The Colombian Ministry of Foreign Trade has issued a press release stating that Decree 2085 was issued due to the fact that although the Andean IP law establishes the obligation to protect undisclosed data, it does not contemplate the way in which said protection must be applied in order to make it effective, but does authorize member countries to adopt measures for the protection of the data. The press release adds that the Colombian Government will be requesting the Andean Court to clarify its decision within the following weeks. However, in the meantime, Decree 2085 will remain fully applicable in Colombia.

The press release also indicates that, a proposal before The Andean Community will be presented by Colombia in order to clarify Andean IP Law (Andean decision No 486) so that Data Confidentiality may be protected under

²⁶ Article 266 of decision 486 establishes: Member Countries, when requiring, as a condition for approving the marketing of pharmaceutical or of agricultural chemical products containing new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Member Countries shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data is protected against unfair commercial use.

Member Countries may take steps to guarantee the protection provided for under this article.

²⁷ Case No 114-AI-2004. Andean Court Decision on the Complaint filed by ASINFAR for non compliance by Colombia of Andean Law.(p.69)

²⁸ (p 81)

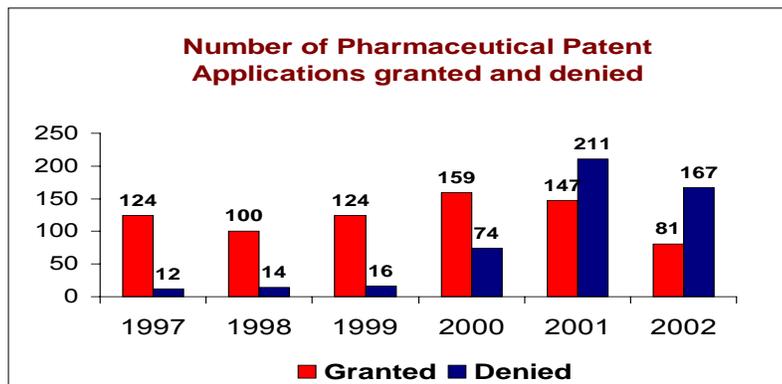
the Andean Decision 486 in the same manner as it is presently established in Decree 2085²⁹.

The Andean Court of Justice decision 144 cannot be appealed despite the fact that the legal reasoning is questionable and that the intent of the member countries when drafting Article 266 was misrepresented. We request that USTR work with the Colombian government so that action is taken to clarify the original intent of member countries and allow Colombia and other Andean Community countries to provide protection to test and other data via a 5-year term of exclusivity.

Patents

The number of pharmaceutical patent applications granted by Colombia's Patent and Trademark Office has decreased and more applications have been denied for innovative products. The number of denied patent applications shot up significantly from 1999 to 2002 (see figure 1) and the trend has continued into 2005.

Figure 1.



Source: SIC- Superintendencia de Industria y comercio Colombia

Patents for Second Uses

The Andean Court of Justice (ACJ) issued several legal opinions (89-AI-2000, 01-AI-2001 and 34-AI-2001) forcing Andean Community members to refuse recognition of patents for second uses, in violation of TRIPS Article 27.1, and contrary to long-standing precedents. Andean member countries have either been compelled by the ACJ not to grant second use patents or chosen to honor Andean treaty obligations, while ignoring their TRIPS obligations. The failure to provide patents for second uses particularly affects the pharmaceutical

²⁹ December 15. Ministerio de Comercio Exterior de Colombia-Comunicado de prensa

industry, which dedicates many of its research dollars to evaluating additional therapeutic benefits of known molecules (second uses) in order to provide effective solutions for unsatisfied medical needs. The ACJ position is dispositive on the issue and no further domestic appeals/remedies are possible.

Patents for Improvements of Known Molecules (e.g.: polymorphs, isomers, processes)

PhRMA is very concerned over a trend suggesting that the Colombian Patent Office is applying unreasonable standards for inventive level. An increasing number of decisions have applied prohibitive standards, making it extremely difficult to obtain patents for improvements, which are otherwise patentable in the rest of the world. The most troublesome aspect of this situation is that these standards discriminate against the chemical arts, which evidently singles out the pharmaceutical R&D industry. These standards also constitute a technical sector-specific protectionist barrier, as they clearly benefit the local copy industry, which can gratuitously exploit the improvement in Colombia by not having a patent. This is a clear violation of Article 27 of the TRIPS agreement, which prevents signatories from discriminating against inventions as to their field of technology.

Patents for Biotechnology

Article 15 of Andean Community Decision 486 excludes a great part of all biotech innovation, by considering that "all or part of living beings as they are found in nature ... existing biological material or that which can be isolated" is not considered an invention. This exclusion is in clear violation of TRIPS Article 27 as it is not one of the acceptable patentability exceptions.

Trademarks

Colombia's Regulatory Authority, INVIMA, issued an authorization allowing a copier to use the registered trademark of a U.S. pharmaceutical company without the trademark owner's authorization. Specifically, the copier was permitted to use the U.S. company's trademark on its product's label in order to show it was the same (a "knock-off") and without having to use any disclaimer. This has tarnished the image of the registered trademark and has opened the door for copiers to freely take advantage of the innovator's trademark's reputation. This unprecedented decision by INVIMA violates Andean Community Trademark Law and Colombia's internal law.

Government Price Control

The Government of Colombia has modified its price control scheme for pharmaceutical products, in a way that will unfairly discriminate against products enjoying patent and/or data exclusivity protection.

Article 245 of Law 100 of 1993 created the National Commission for Pharmaceutical Prices – (“the Commission”) giving it the power to regulate pharmaceutical price policy, leaving in the hands of the Ministry of Commerce the monitoring and control of pharmaceutical prices, pursuant to the policies set by the Commission.

In March 2003, the Commission issued Circular 01/2003 which provides that direct price controls will apply to products that have less than three offerors in the marketplace. More recently, Circular 02/2005 further clarifies the direct price control criteria previously set by circular 01/2003 by eliminating any ambiguity for the application of direct price control. Under the new circular, price controls take effect when there are less than three offerors for the same active ingredient contrary to previous interpretation that considered therapeutic alternatives.

The Commission makes a strict literal interpretation of this provision, arguing that “supplier” refers to a supplier of the same molecule. Thus, the Commission considers that government price controls should apply even where therapeutic alternatives for the molecule exist in the marketplace. Notwithstanding two economic studies contracted by the government indicating the contrary, and an understanding reached between the Ministries of Trade and Health that direct government price control would not apply under conditions where true competition exists, the Commission steadfastly maintains its position.

Circular 02/05, issued in December 2005 by the National Commission for Pharmaceutical Prices (“Commission”), sets maximum prices for certain pharmaceutical products. This price control –when applied according to the terms of Circular 02/2005- unfairly discriminate against products enjoying patent and/or data exclusivity protection. In addition it discriminates against imported products, disproportionately affecting innovative products not manufactured locally, which raises significant national treatment concerns under WTO rules.

Circular 02/05 establishes that the test for applying direct price control is the existence of less than three offerors for the same active ingredient in the market, eliminating the prior applicable test that required therapeutic exclusivity (i.e. therapeutic alternatives were considered part of the relevant market). Therefore, any product whose active ingredient has less than three offerors in the market is now subject to direct price control and accordingly, must now report its maximum price to the public unduly affecting imported products covered by patents or a DE term. The products subject to direct price control must have their prices reported to the Commission during the first five days of each trimester and

may only increase their prices in the percentage annually authorized by the Commission.

The enforcement of Circular 02/05 results in a violation of constitutional principles of economic freedom and free market competition. The regime does not take into consideration the real conditions of the pharmaceutical market, where competition exists not only where more than one offeror for the same molecule exists, but also where offerors within the same therapeutic class exist. In this latter case, the cardinal economic rules of demand and supply will naturally regulate prices, thereby making market regulation unnecessary and illegal under the Colombian Constitution.

Damage Estimate

PhRMA member companies have lost market share to dozens of infringing copies of their most important innovative products on the market in Colombia.

PhRMA members estimate that the 2005 damages in Colombia are equal to 16.1% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Colombia	137788	59500	197288	1227466	16.1%

COSTA RICA

Costa Rica does not provide adequate data exclusivity as required by TRIPS Article 39.3. It also needs to make significant changes to its patent law in order to comply with other matters addressed by the TRIPS agreement and the Paris Convention, such as an effective 20-year patent term and procedures to revoke a patent for failure to “work” the patent locally. Furthermore, Costa Rica’s PTO lacks resources to administer its own patent examinations and relies instead on outside examiners, creating an environment that potentially may lead to conflicts of interests. Due to the above, PhRMA members recommend that Costa Rica be placed on the Watch List of the “Special 301” 2006 report.

Intellectual Property Protection

Data Exclusivity

Data protection provisions are limited and non-effective; furthermore, such provisions contain exceptions and limitations that are not consistent with the TRIPS agreement and the DR-CAFTA to which Costa Rica is a signatory. For instance, Costa Rica allows for disclosure of clinical test data under situations and/or conditions which are not consistent with those agreements. Since no implementing bylaws have been put into force and the law fails to establish a term of protection, government authorities argue that data protection cannot be applied and therefore any protection to clinical test data has been denied.

Linkage

Costa Rica does not provide a linkage system to ensure that the health agency does not approve a sanitary registration to a second applicant for a product that is patent protected. PhRMA members look forward to Costa Rica ratifying and implementing the DR-CAFTA to provide meaningful and effective patent protection.

Patents

Costa Rica’s current patent law doesn’t comply with a 20-year patent term as established by TRIPS. The term is counted as from the date of filing in the country where the first patent was filed and not from the filing date in Costa Rica. There are cases of R&D pharmaceutical companies that filed for pharmaceutical product patents and that have obtained less than 20 years of patent protection.

The patent law also calls for local working requirements for all patents granted in Costa Rica. Failure to work the patent will lead to patent cancellation under the Law. The Costa Rican provisions for revoking patents under the circumstances described above are not consistent with the Paris Convention,

and the TRIPS Agreement, failing to exhaust prescribed procedures prior to revoking a patent for failure to “work” it locally.

Inadequate IP Infrastructure

Due to lack of resources, the Costa Rican PTO uses external examiners for patent examinations. Such procedures may result in serious conflict of interest and risks the objective nature of the examination process. The PTO has not improved its capabilities regarding patent procedures.

Market Access Barriers

The sanitary registration process in Costa Rica is one of the slowest and most bureaucratic among the Central American countries. This causes substantive delays in the launch of new products and the renewal of existing ones.

Damage Estimate

At the time of reporting PhRMA is not able to provide a specific estimate of the damages incurred in 2005 attributable to trade barriers related to intellectual property protection and market access.

ECUADOR

PhRMA member companies face several intellectual property violations and market access barriers in Ecuador. Current violations to local IP Law and other IP related agreements, such as TRIPS Art. 39.3 and Andean Community Decision 486 on data exclusivity, as well as lack of patent linkage, are of greatest concern. An FTA with the U.S. with a strong intellectual property chapter would provide necessary clarity and a strong framework for IP enforcement. PhRMA recommends that Ecuador remain a Watch List country due to the frequent IP violations, lack of DE and linkage, and expanding patent backlog.

Intellectual Property Protection

Lack of enforcement

There is not adequate IP rights protection for pharmaceutical R&D products in Ecuador. While the Ecuadorian PTO – Ecuadorian Institute of Intellectual Property (IEPI) created in 1999 – grants trademark registration, commercial names, patents and other IP rights, it is also in charge of enforcement. One of the key problems faced by the R&D pharmaceutical industry is that IEPI does not adequately enforce the application of either local or international IP Laws.

In 2005, Pfizer's request for enforcement of its current patent on "Lipitor" (Atorvastatina) was denied by IEPI, without due process. Such rulings provide room for copycat drug copies to enter the market without having to respect patents.

An ineffective administrative system at IEPI has forced companies to seek legal remedies through injunctions. Although companies face unnecessary legal and other costs, court rulings have been mostly favorable.

Patent Slow Down

According to IEPI, since 1998 the backlog for patents has grown to over 1,200 patent applications. Although IEPI has autonomy and charges for its services, legal constraints such as the Executive Decree for Public Expenses Rationalization (2005) limits IEPI's ability to invest these revenues. In order to process the entire backlog, IEPI has requested authorization for more autonomy and independence. If granted, the PTO plans to hire more staff and purchase equipment to accelerate the patent application process. Nevertheless, in the short term, PhRMA members face a growing patent backlog which considerably affects the business environment in Ecuador.

Regarding trademark registration, the process is carried out within reasonable time frames, but not for patents, which on average take over 7 years to be granted, which is excessive.

In addition, oppositions to patent filings with the PTO have increased dramatically, further reducing the numbers of patents granted in Ecuador. Most oppositions lack technical and/or legal basis and are filed with the sole purpose of delaying the granting of a patent. Unfortunately, current Ecuadorian Law on the matter does not set minimum standards for filing an opposition, which results in abusive filing. Besides, there are no court remedies available in Ecuador to challenge oppositions or administrative actions related to oppositions.

Data Exclusivity and Linkage

According to the Ecuadorian IP Law (Art. 191), Ecuador provides data exclusivity and the legal framework to initiate legal actions in cases of unfair competition. As in TRIPS Art 39.3 and Andean Decision 486, no term for data exclusivity is specified. The practical outcome is that copy products have been routinely approved for commercialization in Ecuador at any time after an innovator product has obtained approval.

The local sanitary authority grants sanitary registrations in average in three months to those copies of innovative products seeking authorization to enter the market. These copy products rely on data from the original drug. Of over 3,200 pharmaceutical products in the Ecuadorian market, 1,500 are copies.

Companies are taking palliative legal measures to protect their data by filing “unfair competition” cases in the courts. So far, out of the 4 cases brought to the courts in Ecuador, 4 injunctions were granted. Ecuadorian law should provide data exclusivity instead of requiring companies to go to court.

The absence of a linkage process, which is not contemplated in local law, aggravates the problem of copy products. The health authority routinely provides sanitary registrations to copy products of patented drugs. Out of the 8 patented pharmaceutical products in the Ecuadorian market, 5 had their patents infringed, and over 40 copies made it to the market.

Patents for Second Uses

The Andean Court of Justice (ACJ) has issued several legal opinions (89-AI-2000, 01-AI-2001 and 34-AI-2001) forcing Andean Community members such as Ecuador not to recognize patents for second uses, in violation of TRIPS Art. 27.1. Andean member countries have either been compelled by the ACJ not to grant second use patents or have chosen to honor Andean treaty commitments, while ignoring their TRIPS obligations. The failure to provide patents for second uses particularly affects the pharmaceutical industry, which dedicates many of its

research dollars to evaluating additional therapeutic benefits of known molecules (second uses) in order to provide effective solutions for unsatisfied medical needs.

Patents for Biotechnology

Article 15 of Andean Community Decision 486 excludes a great part of all biotech innovation, by considering that "all or part of living beings as they are found in nature ... existing biological material or that which can be isolated" is not considered an invention. This exclusion is in clear violation of TRIPS Article 27 as it is not one of the acceptable patentability exceptions.

Market Access Barriers

Government Price Control

In 1992, Ecuadorian Government created a rigid government price control system (Law 152). Price controls were made more rigid through Law 2000-12, broadening the scope to all product presentations. This law, which does discriminate among drugs, setting a maximum 25% profits for generic copy drugs and 20% for innovators), limits price fixation for commercialization. Drug prices haven't been revised for 2 years, with no price adjustments allowed even though accumulated inflation over the period, based on the official INEC index exceeds 10%.

New Health Code

The Ecuadorian Congress is considering a new Health Code Bill. The first of two debates took place June 25th 2005. A review by the local R&D association indicates that the current draft of the Bill would create an even more rigid and complex government price control system and allow for even more lax quality requirements for copy products.

Damage Estimate

At the time of reporting PhRMA is not able to provide a specific estimate of the damages incurred in 2005 attributable to trade barriers related to intellectual property protection and market access.

MEXICO

Mexico has played a leading role in the region to improve IP protection and the 2003 decree linking patents of pharmaceuticals and health registrations represented significant progress. However, PhRMA members note the following concerns: (1) the Linkage Decree has not been properly implemented due to ambiguous guidelines, lack of government action, and erroneous interpretations; (2) data protection provisions have not been fully implemented, as established by NAFTA, and (3) amendments to the Law of Public Tenders discriminate against innovative drugs. Due to these concerns, PhRMA members recommend that Mexico remain on the "Special 301" Watch List in 2006.

Intellectual Property Rights

Linkage

The application of the Linkage Decree remains a concern for patent holders as the Health Regulatory Agency (COFEPRIS) continues to grant registrations to copy products and because COFEPRIS and the Mexican Institute of Industrial Property (IMPI) fail to provide linkage to the full range of patents that protect pharmaceutical products. The regulation enacted in the 2003 Linkage Decree has been incorrectly interpreted to limit the linking of patents relating to patents on an active ingredient per se, and not to the full range of patents that protect pharmaceutical products.

The only patents that arguably could be excluded from the linkage process according to the Linkage Decree are those that claim manufacturing and formulation processes. In the second-to-last paragraph of Article 47 bis of the Industrial Property Law Regulations, the word "processes" equally affects the action of "manufacturing" and "formulation" of drug products. Thus, based on the above, we believe that the list of products described in Article 47 bis ought to include any patent granted to a drug that is not referred to as a process patent, i.e., it should include patents that claim pharmaceutical formulations and the use of a specific pharmaceutical product or formulation.

Both of Mexico's NAFTA partners allow linkage in connection with product, formulation, and use patents, and it would therefore be anomalous if Mexico were to restrict its linkage regulation to only product patents. Furthermore, it is in the spirit of the linkage system to prevent the granting of marketing approvals to pharmaceuticals whenever there is a patent right related to a specific product.

As mentioned above, similar linkage regulations in Canada and the U.S. allow for second use and process patents to prevent the premature regulatory approval of second applicants.

For example, Title 21 of the United States Code, which governs the conditions relating to the approval of Food and Drugs in the United States, in Section 355(b)(1) states that linkage is available when:

"The applicant shall file with the application the patent number and the expiration date of any patent which claims the drug for which the applicant submitted the application or which claims a method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug."

Similarly, in Canada, the 1993 Patented Medicines (Notice of Compliance) Regulations of Section 4(2)(b) also allow linkage for use patents.

This situation is of serious concern to PhRMA member companies. Without adequate implementation of the linkage system the patent holder's rights are under serious threat due to the lack of an effective enforcement system to quickly stop attempts to infringe patents. The weak enforcement of the Linkage Decree represents potentially devastating commercial losses for PhRMA member companies, not only derived from direct erosion of market share, but also from resources wasted on costly and lengthy legal actions.

Based on assessments by the local group of PhRMA members, to date, COFEPRIS has erroneously granted or admitted the following health registrations in violation of the Linkage Decree:

Docket #	Generic Manufacturer	Filing	Grant	Patented product
167M2004	LABORATORIOS HEXAL, S.A. DE C.V.	?	2004	Atorvastatina
092M2004	REPRESENTACIONE S E INVESTIGACIONES MEDICAS, S.A. DE C.V.	?	2004	Azitromicina
090M2004	LABORATORIOS KENDRICK, S.A.	?	2004	Azitromicina
304M2004	LOEFFLER, S.A. DE C.V.	?	2004	Azitromicina
372M2004	EUROMEX S.A.DE C.V.	2004	2004	Raloxifeno (tabletas)
167M2004	LABORATORIOS HEXAL S.A. DE C.V.	2004	2004	Atorvastatina
533002050 0103	LEMERY, S.A. DE C.V.	?	NA	Azitromicina
533006010	ANTIBIOTICOS DE	?	NA	Azitromicina

0942	MEXICO, S.A. DE C.V.			
533006010 0978	LABORATORIOS ZERBONI, S.A.	?	NA	Serrtralina
533006010 0955	LOEFFLER, S.A. DE C.V.	?	NA	Amlodipino
034M2005	INVESTIGACIONES FARMACÉUTICAS S.A. DE C.V.	?	2005	Raductil
Risedronat o		2004	2005	Actonel

PhRMA members request that the U.S. government initiate a dialogue with Mexico to ensure that (1) IMPI incorporates the full range of patents that protect pharmaceutical products into the existing linkage system, preferably, through a law (as compared to regulations), to avoid patent owners to resort to costly litigation proceedings before the Mexican Courts to secure the rights stemming from their patents and (2) COFEPRIS abides by the Linkage system spirit and that it reverses all the health registrations granted in violation of the Linkage Decree.

Data Protection

The absence of meaningful data protection is another issue of concern to PhRMA member companies. Although required by NAFTA Article 1711.6, Mexican law does not appropriately contemplate DE and a term of exclusivity of at least five years.

Despite the obligations contained in TRIPS (Article 39.3) and particularly NAFTA Article 1711, paragraphs 5 and 6, progress on effective protection for data developed by the research-based pharmaceutical industry has not materialized. There is no clear regulatory mechanism to grant innovators of a new compound a reasonable period of not less than five years to market the product in Mexico, during which no person other than the originator of the data can rely on such data in support of an application for product approval, without the latter's permission. Such a situation results in the continued erosion of market share of the research-based pharmaceutical companies, undermining the incentives for conducting pharmaceutical research.

The relevant NAFTA provisions establish the following:

5. If a Party requires, as a condition for approving the marketing of pharmaceutical or agricultural chemical products that utilize new chemical entities, the submission of undisclosed test or other data necessary to determine whether the use of such products is safe and effective, the Party shall protect against disclosure of the data of persons making such

submissions, where the origination of such data involves considerable effort, except where the disclosure is necessary to protect the public or unless steps are taken to ensure that the data is protected against unfair commercial use.

6. Each Party shall provide that for data subject to paragraph 5 that are submitted to the Party after the date of entry into force of this Agreement, no person other than the person that submitted them may, without the latter's permission, rely on such data in support of an application for product approval during a reasonable period of time after their submission. For this purpose, a reasonable period shall normally mean not less than five years from the date on which the Party granted approval to the person that produced the data for approval to market its product, taking account of the nature of the data and the person's efforts and expenditures in producing them. Subject to this provision, there shall be no limitation on any Party to implement abbreviated approval procedures for such products on the basis of bioequivalence and bioavailability studies.

In summary, under NAFTA, the Agreement signatories agreed (1) not to disclose proprietary data, (2) not to rely on the originator's data for a certain period of time (at least 5 years) for the granting of a subsequent approval of a drug, and (3) if the data are disclosed, to take steps to ensure that the data are protected against unfair commercial use in all cases where the disclosure is not necessary to protect the public.

The U.S. and Canada have both implemented a data exclusivity regime. Mexico, however, has not taken the necessary legal steps to duly implement the NAFTA DE requirements.

Mexico took some initial steps to address DE. In 1994, Article 86 Bis was added to the Mexican Intellectual Property Law (LPI). Article 86 Bis calls for safety and efficacy information of a pharmaceutical product that uses a new chemical entity to be protected under the terms of international agreements to which Mexico is a party.

In 2003, Article 167 Bis (Linkage Decree) amended the Mexican Health Regulation (RIS). The last paragraph of Article 167 Bis states that information that has the character of confidential, in conformity with that established in international treaties to which Mexico is a party, will be protected against all disclosure to other private parties.

- The Articles state that data will be protected under the terms of international agreements, presumably TRIPS and NAFTA. Nevertheless, they don't say how Mexico will implement these obligations.
- The Articles don't guarantee protection against direct or indirect reliance of the data.

- The Articles don't provide a term of protection of at least 5 years.
- If Mexico allows for the disclosure of data under certain circumstances, there is no explanation about how they would protect the data from unfair commercial use.
- The Articles don't provide evidence of the implementation of Data Protection in Mexico in accord with NAFTA or as implemented in the U.S. and Canada.

Required Language:

- Protection period of at least 5 years
- Protection against reliance (both direct and indirect)
- Language detailing how Mexico would protect data from unfair commercial use, if disclosed

Moreover, although NAFTA guarantees at least five years of protection of clinical trial data, some of the products infringed have been on the market less than five years. Thus, there have been two concurrent violations of the innovators' intellectual property: failure to respect a patent duly issued by the Mexican government, and failure to protect undisclosed test and other data.

Mexico is the largest pharmaceutical market in Latin America. If copy products gain a foothold, the innovators inevitably will lose a relevant share of this market.

Market Access

Law of Public Acquisitions (LPA)

Recent amendments to the Law of Public Tenders implemented through a July 7, 2005 Decree have had a negative impact on PhRMA members, specifically Articles 41 and 31, paragraphs 1 and 35, respectively, of the Law, which provide incentives to substitute products and limit the rights of patent holders.

Multiple cost containment actions have been implemented by the two largest health care service providers of the Mexican government: IMSS and ISSSTE. Nevertheless, the efforts to reduce costs have gone too far.

New Article 41 requires the government purchasing agents to grant preference to alternative or substitute products, which in the pharmaceutical field means granting preference to generics over patented products, which by nature are unique and therefore hardly replaceable. This situation derives from an incorrect interpretation of article 1016, paragraph 2 (b) of NAFTA. The NAFTA provision provides:

“Article 1016: Limited Tendering

.....
2. An entity may use limited tendering in the following circumstances and subject to the following conditions, as applicable:

.....
(b) when, for works of art or for reasons connected with the protection of patents, copyrights or other exclusive rights, proprietary information, confidential consulting services or, when there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

Before it was amended, Section I of Article 41 granted the titleholder of a patent the prerogative of being awarded directly with the public contract. Now, the amendments have removed that prerogative and conditioned the direct award on their being no technically reasonable “alternative” or “substitute” product. The amended Section I of Article 41 of the LPA, however, states as follows:

Article 41.- The authorities and entities, under its responsibility, may contract purchases, renting, and services, without a public tender procedure, through the proceedings of an invitation to at least three persons or to direct awarding, when:

I. As for art work, or goods and services for which there are no technically reasonable alternatives or substitutes, the contract can only be celebrated with one determined person because, the party owns or is a licensee of patents, or owns the author's rights or other exclusive rights.

Article 41 Paragraph 1 of the LPA therefore provides for limit tendering tied to the existence or not of “alternative” or “substitute” products. NAFTA paragraph b), Section 1 of Article 1016, on the contrary, allows limited tendering for reasons connected with the protection of patents.

In light of the foregoing, the amendment violates the Mexican Constitution because the provision disregards the rights already granted to the patent holder prior to the amendments. In addition, the titleholders have the prerogative of a non-conditioned direct award. The Health Law and the Industrial Property Law are silent about “technically reasonable alternative or substitute” products to patented products. Therefore, the amendments to

the Public Tenders Law lack support in the related statutory laws. In this regard, there are no “technically reasonable alternative or substitute” for patented products as an innovative or patented pharmaceutical product is unique and the Health Law only recognizes generics when the patent expires, and when the product shows to be bioequivalent and bioavailable. The existence of “alternative” or “substitute” products cannot condition the direct award for the patented product.

Article 31 protects the government agencies involved in the procurement of products such as pharmaceuticals from patent infringement suits by placing the entire liability on the supplier.

Prior to the Decree, patentees were able to seek injunctive relief against both the supplier and the purchaser of an infringing product. Under the current Law, the purchaser (a government agency) may argue immunity in light of the mechanism implemented through this reform. Such an approach is inconsistent with the essential rights conferred to patentees in the Mexican Industrial Property Law and related International Treaties, under which patentees always have the choice to sue all transgressors within the chain of a patent transgression, from the manufacturer/importer to the seller and illegal final user. For instance, under this new provision, the possibility to enforce patent rights, through a preliminary injunction to seize infringing merchandise stored at the warehouse of a purchasing government agency has been eliminated.

Moreover, article 28 of Mexican Constitution from which the patent law derives and the Industrial Property Law (IPL) itself, do not provide an exception for patent infringement liability committed by the government authority in public tenders. The exceptions to patent infringement are described and limited to the provisions in Article 22 of the IPL and it does not exempt government agencies only because they acquired the products through a public tender.

PhRMA members are highly concerned with the changes to the law governing public tenders and the considerable negative impact it will have on PhRMA’s members business in Mexico. PhRMA requests to engage the Mexican government to ensure that the current situation is reversed through amendments to the Public Tenders Law or its regulations.

Damage Estimate

PhRMA members estimate that the 2005 damages in Mexico are equal to 13.7% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account

for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Mexico	702443	312885	1015328	7405502	13.7%

PERU

PhRMA recommends that Peru remain a Watch List country due to continued ineffective patent enforcement, the lack of second-use patents, data exclusivity (DE) and linkage, and the failure to lift discriminatory measures that unfairly protect local copiers. The U.S.-Peru Trade Promotion Agreement (PTPA) shall provide, if appropriately implemented, effective DE and linkage and a stronger intellectual property framework. PhRMA will closely monitor implementation of that Agreement and assess improvements in the IP environment over the year.

Intellectual Property Protection

Ineffective patent enforcement

Effective patent enforcement has become more difficult because of a weakened patent enforcement policy by competent Government agencies. For example, the Institute for Defense of Competition and Intellectual Property (INDECOPI), which is in charge of deciding administrative infringement actions, has raised the evidentiary threshold for granting preliminary injunctions against patent infringers to an unreasonable standard, making it almost impossible to obtain these measures before significant market damage has occurred to the commercial interests of the patent owner.

The Peruvian system for litigating patents calls for a two-step process: (1), an administrative process within the INDECOPI that takes on average 2 years; and (2) only after the administrative process is exhausted can one take legal action in the civil court to seek the recovery of damages. In general, such legal action takes on average 4 years which discourages affected parties to seek legal remedies in the courts.

INDECOPI has repeatedly refused to comply with the TRIPS obligation to reverse the burden of proof in cases of process patent infringements. Moreover, in the few cases where preliminary injunctions have been granted, INDECOPI has lifted the injunctions when the infringer (1) challenged the validity of the patent by filing a nullification action, or (2) after a 120-days period elapsed, counted from the date of the filing of the legal action, whichever happens first.

Finally, when such a nullification action is filed, INDECOPI automatically suspends the enforceability of the patent until the nullification action is decided, which in practice results in an expropriation of patent rights without due process, or a de facto mandatory license and a flagrant violation of the statutory presumption of validity of the administrative resolution.

Second Use Patents

The Andean Court of Justice (ACJ) has issued several legal opinions (89-AI-2000, 01-AI-2001 and 34-AI-2001) forcing Andean Community members such as Peru not to recognize patents for second uses, in violation of TRIPS Art. 27.1. Andean member countries have either been compelled by the ACJ not to grant second use patents or have chosen to honor Andean treaty commitments, while ignoring their TRIPS obligations. The failure to provide patents for second uses particularly affects the pharmaceutical industry, which dedicates many of its research dollars to evaluating additional therapeutic benefits of known molecules (second uses) in order to provide effective solutions for unsatisfied medical needs. As a consequence of the ACJ rulings, Peru ceased issuing second use patents and has failed to take the necessary steps to amend Andean or local law to ensure such kind of patents may be granted.

Data Exclusivity and Linkage

The Government of Peru continues to provide sanitary registrations to copies of innovative pharmaceutical products in violation of TRIPS Article 39.3, which requires governments to prohibit the “unfair commercial use” of test data. With the signing of the Agreement with the U.S., the Government of Peru could remedy these ongoing violations by refraining from granting sanitary registrations to copies of innovative pharmaceutical products for a term of at least 5 years, unless the applicants for such copies provide their own test data. Peru’s Health Law for sanitary registrations is extremely lax, only requiring a foreign sales certificate (no need for test data), which is granted to any product that is published in the USP or other major country Pharmacopodia, for a product to go to the market. This enables copiers to launch products during the DE period. This problem is exacerbated by the lack of linkage between patent protection and the health authority, which results in grants of sanitary registrations to copies of products still under patent.

As a result of these ineffective regulations and disregard for Intellectual Property Rights protection, PhRMA members have reported that 8 patented products were copied, for which 294 sanitary registrations have been granted. Seven of these products face competition in the Peruvian market from over 76 copies.

The Government of Peru’s ongoing TRIPS violations also represent a breach of the Andean Trade Promotion and Drug Eradication Act (ATPDEA) eligibility requirements. Because Peruvian companies are the direct beneficiaries of these intellectual property violations, the act amounts to an expropriation of U.S. intellectual property and therefore should constitute “ineligibility” under multiple U.S. trade agreements and foreign assistance laws.

Market Access Barriers

The Government of Peru discriminates against foreign manufacturers by granting a 20% bonus or bidding preference to national manufacturers participating in a public “competitive” bidding process. This benefit, granted to goods manufactured in the Peruvian territory, constitutes discriminatory treatment against foreign manufactures and also violates the Andean Trade Preference Act eligibility requirement concerning the “application of transparent and non-discriminating policies in government procurement”. The Peruvian Constitutional Court has resolved that this 20% bonus is non-discriminatory due to the fact that foreign companies can obtain the bonus by manufacturing goods in Peru.

In addition, the requirement that a parallel importer comply with the same sanitary regulations as the titleholder of the sanitary registration of the innovative pharmaceutical product, is not enforced. This practice is both dangerous to public health and discriminates against the manufacturers of innovative pharmaceutical products.

Damage Estimate

PhRMA members estimate that the 2005 damages in Peru are equal to 24.7% of the total market share. The damage is calculated using a methodology developed by Rx4S to integrate expert opinions in each region and estimate minimum damages due to IP issues based on IMS data and pharmaceutical sales by drug and therapeutic class. The tool does not account for damages due to market access barriers, or for IP damages due to inability to launch products and certain other IP barriers. A detailed description of the damage estimate methodology is provided in Appendix A.

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Peru	66546	17466	84012	339624	24.7%

Appendix A

Intellectual Property (IP) damages calculation for the PhRMA 2006 “Special 301” Submission

Introduction and Overview

IP damages calculations relate to two broad forms of IP infringement – data exclusivity and patent protection.

Data exclusivity protection confers on developers of new pharmaceutical products a period during which the originator shall be the sole entity marketing the approved product. This data exclusivity time-period prevents market entry by parties wishing to sell the same product without having produced their own data in support of product approval.

Patent protection confers on developers of new pharmaceutical products a period during which the innovator shall be the sole entity marketing the approved product because they hold current patents on the product.

Methodology

This calculation methodology covers only those damages that occur as a result of IP infringement and does not include any damages relating to other issues. As an example, market access barriers are not included in this calculation and their impact would be additive to total damages.

The calculation is based on the use of data from IMS Health (IMS) as a quantitative input of cash sales for the total country, molecule and product markets being examined. A ‘molecule’, refers to the chemical composition of the active ingredient in a pharmaceutical, and ‘product’ refers to the version of that molecule supplied by individual manufacturers.

A proprietary Rx for Strategy -designed model has been constructed that calculates IP damages using a combination of formulae (defined below). IMS data are chosen because:

- IMS is the only source of sales data at the molecule level for nearly all countries with a market for prescription pharmaceutical products;
- IMS data have been collected using consistent methodologies that allow for comparison; and
- in most countries IMS collect the launch data of every product launched.

Calculation of Damages

The premise behind the damages calculations is that when sales of products exist within a molecule, their sales should be restricted solely to the originator (as a result of IP protection). When rights are not being upheld, all sales that are not from the innovator/originator represent an infringement of rights and are therefore damages.

Data Protection

In the case of Data Protection a period of five years protection is used as the measure of potential damages.

The calculation logic for data protection is as follows:

- If there is only one company marketing a product(s) within a given molecule then there are no damages;
- If there is more than one company marketing products within a given molecule, but the launch of the innovator molecule was more than five years ago, then there are no damages;
- If there is more than one company marketing products within a given molecule and the launch of the innovator product was less than five years ago, then the sales of all products within that molecule (excluding the innovator product) are considered to be data protection damages.

Patent Protection

In the case of patent protection a period of ten years protection is used.

Similar logic is used for the calculation of patent protection damages except that the period of coverage is ten years (and not five).

The methodology that has been constructed, allows for the calculation of data protection and patent protection damages as separate items.

This calculation is repeated for all molecules in each country, and the result is a total damages figure.

The table of final damages for each country calculated using this method is as follows:

Country	Total Patent Protection Damages	Total Data Protection Damages	Total Damages	Total Sales	Damages % of Sales
Argentina	214397	67791	282188	1971043	14.3%
Australia	231489	199828	431317	6311851	6.8%
Brazil	580706	341971	922677	6368823	14.5%
Canada	492950	109661	602611	13349390	4.5%
Chile	120159	35660	155819	816276	19.1%
China	2396652	695546	3092198	9047642	34.2%
Colombia	137788	59500	197288	1227466	16.1%
Egypt	128557	73825	202382	851221	23.8%
Hungary	222950	58319	281269	2220113	12.7%
Israel	26414	9673	36087	332103	10.9%
India	2477479	1003933	3481412	4439092	78.4%
Malaysia	6197	22980	29177	346100	8.4%
Mexico	702443	312885	1015328	7405502	13.7%
New Zealand	20879	8123	29002	718026	4.0%
Pakistan	82233	30770	113003	1080822	10.5%
Peru	66546	17466	84012	339624	24.7%
Poland	831046	159471	990517	4279078	23.1%
Slovakia	64074	16958	81032	670833	12.1%
Slovenia	35948	20117	56065	513365	10.9%
Taiwan	72438	60052	132490	2999270	4.4%
Thailand	95356	61085	156441	1258451	12.4%
Turkey	1159926	205216	1365142	6258556	21.8%
Venezuela	130563	79717	210280	1811103	11.6%
* In the \$1,000s					

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