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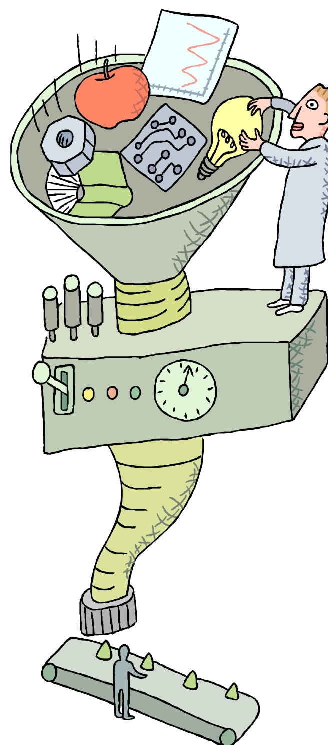
Producers and consumers live in a world where goods such as music CDs, computer software, and even medicines are duplicated and sold without permission from the holders of intellectual property rights.



Are global counterfeiting and piracy unstoppable?

Are current international efforts curbing these illegal practices? Will a new initiative to stop counterfeiting and piracy have a significant impact on a growing trade worth hundreds of billions of dollars? (See page 4)

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Can Editing be a Threat to National Security?

U.S. economic sanctions and the free flow of information

Could the practices of editing and marketing a journal or book threaten U.S. national security by providing aid and comfort to this country's enemies? Current economic sanctions and other restrictions imposed by the U.S. on particular countries – such as Iran, Cuba, and Sudan – prohibit Americans from engaging in certain publishing activities with individuals and groups from these nations.

According to a recent complaint filed by several American publishers, these restrictions not only defy the wishes of Congress to exempt such activities from economic sanctions, but also violate provisions in the U.S. Constitution. Where does this debate stand today? Could an editor or individuals from a publishing house face substantial fines and even possible jail time for printing and marketing informational materials from countries subject to American economic sanctions?

Isolating the enemy with economic sanctions

The U.S. currently maintains and enforces almost 30 economic sanctions and trade embargoes against several countries and certain groups around the world whose policies it has deemed a threat to its national security or foreign policy interests. Some policymakers argue that – by prohibiting most forms of trade and various financial and commercial transactions with American citizens – they hope to isolate these regimes and convince them to change their policies, and also to deny economic benefits which could be used to support such countries. (Many other political analysts, though, have questioned the effectiveness of using economic sanctions in furthering a country's foreign policy goals.) While these current sanctions prohibit American citizens from engaging in specified activities with people in the targeted countries, they do not apply to citizens from other nations whose governments may or may not already have similar sanctions in place.

U.S. economic sanctions are primarily governed by the Trading with the Enemy Act (TWEA) and the International Emergency Economic Powers Act (IEEPA). The TWEA was enacted in 1917 as a wartime measure and allows the Executive branch to regulate business transactions between Americans and citizens of countries at war with the U.S. In 1977, Congress enacted the IEEPA to give the Executive branch limited power to impose sanctions during *peacetime* against countries considered to be a threat to U.S. national security.

Using its authority under IEEPA, the Executive branch has – over the last several decades – issued many regulations which "set out the terms of the embargoes" for many countries and groups. Some of these regulations include the Cuban Assets Control Regulation, Burmese Sanctions Regulations, Sudanese Sanctions Regulations, Terrorism Sanctions Regulations, and the Foreign Narcotics Kingpin Designation Act. One commentator said that "laws and regulations prohibiting trade with various nations for decades have generally applied to items like oil, wheat, nuclear reactors, and, sometimes, tourism."

Under the provisions of the Iranian Transactions Regulations (ITR), in particular, "the exportation, re-exportation, sale, or supply . . . from the United States, or by a United States person, wherever located, of any goods, technology, or services to Iran or the Government of Iran is prohibited." Legislative historians say that the Executive branch had amended the ITR regulations several times since the 1980s to tighten even further the current embargo on Iran. U.S. officials have justified these sanctions by claiming that the Iranian government sponsors many terrorist groups and has a clandestine program to build weapons of mass destruction. Analysts note that the Office of Foreign Assets Control (OFAC) in the Department of Treasury "promulgates and enforces U.S. economic sanctions pursuant to TWEA and IEEPA." That office also works with other regulatory agencies, including the U.S. Department of Commerce, to ensure compliance with these sanctions.

Although these two statutes prohibit most commercial transactions between American citizens and those countries and groups judged to be a threat to U.S. interests, they do provide exemptions for such items as donations of food, clothing, and medicine to relieve human suffering, and also personal communications that "do not involve transfer of anything of value." People who wish to engage in activities which are otherwise prohibited by the TWEA and IEEPA

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Founded with funding from the Starr Foundation, the Center for International Law supports teaching and research in a broad range of areas of international law. The Center organizes events whereby students, faculty, and guests of New York Law School may interact with experts who link theory and practice. (Clipart/Photos ©2005 Microsoft Corp.)

Could the editing and publication of informational materials from countries under U.S. economic sanctions violate federal regulations and subject editors to fines and possible jail time? Advocates say that such restrictions deny economic benefits to hostile regimes. Others argue that they violate the U.S. Constitution and prevent better cross-border relations.

statutes must apply for a license to do so by submitting an application to OFAC. Analysts note that violations of OFAC regulations could lead to fines of up to $1 million per violation and even jail time for up to 10 years.

An exception for the exchange of ideas?

In 1988, Congress amended the TWEA and IEEPA statutes to provide exemptions for "informational materials." The amendment – which was sponsored by Congressman Howard Berman (D-CA) and came to be known as the Berman amendment – read as follows: "[T]he authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation . . . or the exportation . . . , whether commercial or otherwise of publications, films, posters . . . or other informational materials." Supporters and other groups said that the purpose of the amendment was to ensure that "trade sanctions not interfere with the international exchange of ideas and information."

Legislative analysts noted that while OFAC did amend its regulations so that "informational materials" would be exempt from American economic sanctions, they said that OFAC officials narrowed the definition of this term. For example, OFAC said that exemptions for informational materials would apply only to "information in tangible form," and would exclude intangible information such as wire feeds. It further stated that the following kinds of information and publishing activities would not be exempt from U.S. economic sanctions unless they were specifically authorized by a license:

(i) *Information and informational materials not fully created and in existence at the date of the transactions*, which publishers and critics said simply banned "transactions involving new books or articles and revised versions of publications." They argued that the regulations would only allow publishers to re-print books already in existence unless OFAC granted prior authorization.

(ii) *Substantive or artistic alteration or enhancement of informational materials*, which critics say would prohibit publishing houses from editing books and adding materials to them such as "notes, introductions, and illustrations" in order to clarify certain points or enhance the understanding of the materials themselves.

(iii) *The provision of marketing and business consulting services*, which critics say is – for all practical purposes – a ban on publishing books and articles from countries that are currently under American sanctions. They argued that providing marketing and advertising services were essential components in the publication of materials, and that, without such services, the public won't know about the availability of new books. One critic said: "Book publishers cannot feasibly publish books without marketing them."

Amendment supporters have argued that the text of the Berman amendment did not provide OFAC with any basis to narrow the definition of "informational materials." For example, one critic asked: "Where does OFAC's continuing insistence that it may regulate works 'not yet fully in existence' come from? It is not in the law, not in the legislative history." Civil libertarians also believed that a prohibition on providing editorial services violated the First Amendment's provision on freedom of expression.

In 1994, Congress passed the Free Trade in Ideas Amendment (FTIA) whose main purpose, supporters say, was to broaden OFAC's interpretation of the Berman amendment by allowing "the import and export of all materials [and not just narrowly-defined 'informational materials'] protected by the First Amendment," and regardless of the current format of these materials. Supporters said that the amendment should have covered all editorial activities from the early stages of development for a particular book to its final publication.

Analysts point out that while OFAC did revise its regulations to conform to some of the requirements of the FTIA amendment, it still left in place the restrictions concerning materials "not fully created," and also did not retract prohibitions on "substantive or artistic alteration or enhancement of informational materials" or even "the provision of marketing and business consulting services."

Unclogging the information pipeline from sanctions

These discrepancies in the supposed legislative intent of these amendments and the actual text of the regulations soon came into conflict beginning in September 2003 when OFAC issued a series of interpretive rulings concerning those informational materials and publishing activities exempt and not exempt from the provisions of ITR.

In one case, the Institute of Electrical and Electronic Engineers (IEEE) inquired as to whether it would need permission to engage in certain activities – such as "the reordering of paragraphs or sentences, correction of syntax, and replacement of inappropriate words by U.S. persons" – when preparing manuscripts from Iranian authors for publication in the U.S. Officials from OFAC responded that while ITR regulations did exempt "informational materials" from the American trade embargo against Iran, they stated

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Are Global Counterfeiting and Piracy Unstoppable?

A Wider Effort to Curb These Growing and Illegal Practices Draws Scrutiny and Doubt

Although growing world commerce may provide a wide variety of goods and services at competitive prices to consumers around the world, and may open markets in which businesses can sell their products, along with these opportunities has come a growing trade in counterfeit and pirated goods worth hundreds of billions of dollars. Business experts say that the growing popularity and sales of these products are depriving legitimate businesses of potential sales, and that these fake goods (which are often poorly made) even pose a threat to consumer safety. The Bush Administration recently announced plans to coordinate a more vigorous response to counterfeiting and piracy. But questions remain about whether these efforts will make a difference in the growing "trade in fakes."

The fake side of international trade: Violations of copyrights and trademarks (both of which are legal rights protecting intellectual property) have led to a lucrative trade in counterfeit and pirated goods – such as music CDs, automobile parts, cosmetics, furniture, foods, electronics, and toys – worth hundreds of billions of dollars. These goods are produced in mass quantities and then sold without the permission of the rights holder.

Counterfeiting and piracy: violations of intellectual property rights

The practices of counterfeiting and piracy revolve around the concept of intellectual property, which is often defined as the creation of a person's mind or the product of his invention. Governments around the world protect such property by giving the creator – such as the designer of a computer program, the writer of a song, or the manufacturer of a drug – the exclusive rights to use the product and control its use by others. Some of these rights include a trademark, which is defined as "a word, phrase, symbol or design that identifies and distinguishes the source of the goods of one party from those of another." Examples include computers made specifically by Apple whose trademark is a picture of an apple, and clothing manufactured by Nike with its trademark swoosh arrow.

Another legally recognized monopoly that protects intellectual property is a copyright, which "reserves to authors the exclusive control of their 'writings' [or original expressions] such as literary, musical, pictorial, and audiovisual works, including computer programs, for a fixed period of time." In order for another individual to use such a work, that person must usually obtain permission from the copyright holder, and – in many instances – pay licensing and royalty fees. For example, analysts note that the Disney Corporation, which holds the copyright for Mickey Mouse, collects billions of dollars in licensing revenue from businesses and individuals that use that character on its products.

Although the terms piracy and counterfeiting are sometimes used interchangeably, each term has a distinct legal definition. The World Trade Organization (WTO) defines pirated goods as "any goods which are copies made without the consent of the *copyright* holder . . ." Examples of pirated goods produced in mass quantities include music CDs, video movies, and computer software programs. The WTO defines counterfeit goods as "any goods bearing, without authorization, a *trademark* which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark." Examples of counterfeit goods include batteries that feature the trademark name of Energizer, but were not manufactured with the consent of the owner of the trademark.

A growing threat to global governance?

Other goods which have been affected by counterfeiting and piracy operations include cigarettes, toys, cosmetics, pharmaceuticals, home electrical appliances,

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beverages, tools, and even automobile and aircraft parts. One analyst said that "virtually everything of value that Americans [and others] make, create, or innovate is stolen somewhere around the world."

The U.S. Chamber of Commerce claims that piracy and counterfeiting have drained an estimated $287 billion in revenues (in terms of lost sales, and licensing and royalty fees) from the U.S. economy alone and have also resulted in the loss of 750,000 American jobs. Some experts have even argued that these illegal practices constitute the number one economic threat in the world. At the global level, the International Trade Commission estimated that counterfeiting and piracy have deprived businesses of $200 billion in 1996, and that this figure had increased to $450 billion in 2000. One analyst went so far as stating that "the global markets in counterfeit goods range as high as $600 billion, which represents about seven percent of world trade."

Various industries in the U.S. say that counterfeiting and piracy have taken a financial toll on their earnings. For example, American recording companies, book publishers, movie producers, and software publishers say that they lost more than $10 billion in revenues from the global sale of illegal copies of their products in 2003. Analysts estimate that the value of pirated recorded music was $4.5 billion in 2003, which equaled a record 15 percent of all legitimate music market sales. This was an increase of 11 percent from 1999.

According to the Business Software Alliance (BSA), piracy of copyrighted American computer software programs has deprived U.S. technology companies of almost $11 billion in revenues. A recently published list of countries with the highest piracy rates of computer software programs revealed that 94 percent of all programs used in Vietnam are pirated copies of the original program (placing that country at the top of the list). Vietnam was followed by China (92 percent), Indonesia (88 percent), Ukraine (87 percent), and Russia (87 percent). Piracy and counterfeiting even affect small manufacturing companies. In fact, industry analysts say that smaller companies are the most vulnerable and the least able to defend themselves.

In addition to affecting businesses, counterfeiting and piracy hurt state and local governments. According to a report released by the Office of the Comptroller of New York City in November 2004, these illegal practices have cost that city more than $1 billion in sales tax revenues during a time when it is facing a projected $2.9 billion deficit. Officials have estimated that almost 42 percent of all counterfeit CDs seized in the U.S. are made in the tri-state area, and that New York City accounts for almost 10 percent of the $287 billion in counterfeit goods sold in the U.S. every year.

Analysts also argue that piracy and counterfeiting not only affect governments and reputable companies, but that the resulting products – which are usually of a much lower quality and do not undergo any kind of safety testing – pose "significant health and safety risks to consumers." For instance, said an industry official, counterfeit car windshields that claim to be shatterproof may shatter and cause serious injury to car passengers. One legal analyst said that "counterfeit spare parts for automobiles, helicopters, and airplanes have been associated with numerous accidents, sometimes with fatal results." Last spring, a report claimed that dozens of babies in China died from acute malnutrition after consuming counterfeit milk formula containing little nutrition. In 2001, China reported that over 192,000 people died from using counterfeit medicines.

Government officials have also pointed to a more troubling trend where organized crime – which is dominating piracy and counterfeiting operations – is using the proceeds from these activities to fund other illegal enterprises such as the purchase of weapons. According to the International Criminal Police Organization, the sale of counterfeit goods provides criminal organizations with hundreds of billions of dollars a year. One expert concluded that the evolving nature of counterfeit and pirated goods now represents "real threats to global security, consumer health and safety, economic development, and good governance."

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Undermining real businesses: Many legitimate companies say that sales of counterfeit and pirated goods have cost them hundreds of millions of dollars in lost revenue. A recent survey revealed that, in some countries, most people used pirated computer software programs instead of buying authorized versions. New York City officials claim that these illegal practices – which, in many cases, are headed by criminal organizations – have also deprived that city of much-needed sales tax revenue.

A real threat to consumer safety? Consumer advocates say that fake goods – which don't undergo safety tests – pose a threat to consumer safety. For example, they note that counterfeit medicines have killed tens of thousands of people in China. Fake and faulty automobile and airplane parts have also been blamed for many fatalities.

Global counterfeiting and piracy Continued from page 5

The World Trade Organization (WTO) to the rescue? A global agreement on the Trade-Related Aspects of Intellectual Property Rights or TRIPS – which is administered by the WTO – requires member nations to implement minimum standards for protecting and enforcing intellectual property rights.

Lack of compatibility across borders? Policymakers and legal experts note that while the TRIPS Agreement calls for minimum protections of intellectual property rights, it still allows member nations to implement different standards of protection and enforcement. While some countries impose stiff penalties for, say, copyright violations, others may turn a blind eye to such practices.

An escape route for counterfeit and piracy operations?

Despite the increasing rate of counterfeiting and piracy worldwide, there is currently no single international treaty that addresses these illegal activities in a comprehensive manner. The most relevant multilateral agreement which addresses some aspects of these activities is the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which is one of the treaties administered by the World Trade Organization (WTO). The TRIPS Agreement requires member nations of the WTO to implement minimum standards of protection for and enforcement of intellectual property rights (by, for example, granting copyrights and trademarks). The TRIPS agreement does not require its members to have the same intellectual property laws or even the same levels of protection. Instead, the agreement "leaves it to Member nations to decide whether to provide for criminal procedures and penalties to be applied in . . . cases of infringements of intellectual property rights."

Some scholars have said that these particular provisions have undercut the effectiveness of the TRIPS agreement in curbing counterfeiting and piracy. While many countries have long had similar intellectual property laws, legal analysts say that standards of protection and enforcement still vary widely among different nations (which are, again, allowed under the TRIPS agreement). Those involved in making fake products, say experts, will simply move their operations to countries where enforcement is more lax.

For example, in the U.S., a repeat copyright violator may be fined up to $1 million and/or may be imprisoned for up to 10 years. But other countries, such as China (which experts say has emerged as the leading source of pirated and counterfeit goods), have much less onerous penalties and still haven't passed rigorous intellectual property laws as required by the TRIPS agreement. Analysts point out that copyright piracy in China is treated as a civil matter punished by fines "that are frequently seen [by counterfeiters] as a cost of doing business." In fact, criminal prosecutions can only take place if, say, the copyright pirate makes sales that exceed $6,000 for an individual or $24,000 for a company. Currently, government officials use the price of a pirated good (which is relatively low) in making these calculations.

Analysts note that the accelerating growth of counterfeiting and piracy has spurred policymakers and officials to try different approaches in tackling these illegal activities. For example, in 1996, Congress passed the Anti-Counterfeiting Consumer Protection Act (ACPA), which imposed heavier penalties for violations of intellectual property rights. For instance, under ACPA, "law enforcement officials may seize not only counterfeit goods, but also property, equipment, and storage facilities associated with a criminal counterfeiting operation."

The U.S. government has also taken stronger measures against countries that it claims have failed to enforce intellectual property rights. It imposed $75 million in trade sanctions against Ukraine – which are still in effect today – for failing to enforce intellectual property rights in that country. Recently, the U.S. removed $250 million in preferential trade access to Argentina for piracy reasons. Bowing to American diplomatic pressure, China announced in April 2004 that it would fully implement its obligations under the TRIPS agreement and also issue a new judicial interpretation making it easier to prosecute violations of its intellectual property laws, though American industry executives still express doubt about these commitments.

Despite these national and international efforts to curb piracy and counterfeiting, the U.S. Customs and Border Protection Agency (CBP) reported that seizures of counterfeit and pirated goods have increased by 100 percent since the year 2000. CPB officials also reported that the agency was setting a record pace in the number (5,500) and value ($90 million) of seizures just last year.

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Another futile attempt to stop the trade in fakes?

In October 2004, the U.S. launched a new initiative called the Strategy Targeting Organized Piracy (or STOP), which, officials say, is a multifaceted effort in building a coalition with the private sector and also with governments overseas to fight piracy and counterfeiting. It also envisions several legal and administrative changes to curb these activities. For example, the Justice Department says that it will announce plans to update and modernize U.S. intellectual property statutes and will also attempt to toughen criminal penalties for people convicted of piracy and counterfeiting. It will also try to update its Mutual Legal Assistance and Extradition Treaties with the European Union (EU) to apprehend certain individuals involved in these activities.

Officials at the Office of the U.S. Trade Representative said that the agency is planning to work with other countries in seizing counterfeit merchandise at sea and also in coordinating joint sting operations. They also announced plans to publicize a "name and shame" list of those foreign companies making and selling pirated and counterfeit goods. The Department of Commerce said that it will work with the private sector in developing a voluntary "no trade in fakes" program to "help companies keep their supply chains free from fakes." Other agencies announcing similar plans included the CBP and the Department of Homeland Security.

While some commentators have described the STOP initiative as another tool in the fight against piracy and counterfeiting, critics are already questioning its usefulness. They point out that similar efforts in the past have not effectively curbed these activities. Some economists believe that many countries – while publicly denouncing piracy and counterfeiting – actually turn a blind eye on these activities simply because the revenues earned from the sale of fake goods help to keep their economies afloat, and that there is no political will to do otherwise. Experts note that some countries often do not or can not provide enough resources to protect and enforce intellectual property rights. One commentator said: "Many countries face the unenviable choice of applying scarce resources to intellectual property enforcement issues or to other pressing socio-economic issues."

Legal experts point out that the levels of enforcement of intellectual property laws continue to vary from nation to nation. Even within, say, the EU, which is an economic trading bloc composed of 25 nations, every country has its own intellectual property laws. One analyst said: "For years, a confusing array of differing enforcement measures among nations has helped counterfeiters to ply their dastardly trade." One political analyst even questioned the motives of the Bush Administration in announcing its STOP initiative, noting that it was trumpeted during the heat of last year's presidential campaign.

Some legal experts are calling on countries to work much harder in passing comparable statutes, enforcement measures, and penalties against piracy and counterfeiting operations. Analysts point out that the EU recently adopted a Directive which will require its member nations to provide a stronger legal framework to curb piracy and counterfeiting. On the other hand, a spokesman for the International Trademark Association recently said that similar efforts in the Americas, Asia, the Middle East, and Africa "unfortunately do not have the central focus of Europe."

Other commentators add that even if various regions around the world harmonized their legal frameworks in protecting intellectual property rights, "coordination at the international and regional levels is doomed to failure without the political will and the commitment of resources by individual governments to fight the scourge of counterfeits." Along with these efforts, say analysts, governments and companies must also undertake more vigorous efforts to "change the public's attitude towards fakes." They argue that even with a stronger legal mechanism in place to fight piracy and counterfeiting, these activities would not be such a problem "if there was not the constant demand by a significant segment of the consuming public willing to buy fakes." One trade association executive said that "what seems to boost demand is the public's attitude that counterfeiting is a 'victimless' crime."

A final STOP to global counterfeiting and piracy? Last year, the U.S. launched a multifaceted initiative – called the Strategy Targeting Organized Piracy or STOP – involving greater coordination and cooperation among different agencies and even foreign governments in curbing these illegal practices. For example, some plans call for the publication of a "name and shame" list of counterfeiters.

Getting to the core of the problem: Critics say that unless governments around the world enact comparable laws protecting and enforcing intellectual property laws, initiatives such as STOP will fail to curb counterfeiting and piracy. Other analysts point to a deeper problem – they say that strong consumer demand for fake goods is fueling the explosive growth of this sector of international trade.

that because editorial activities such as the “reordering of paragraphs or sentences” would result in a “substantively altered or enhanced product,” the current ITR regulations would prohibit such activities unless licensed by OFAC.

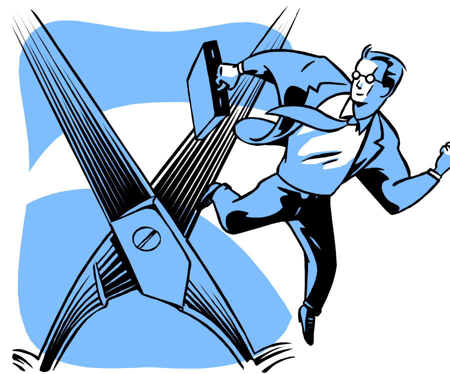
That agency also concluded that a peer review process – under which IEEE staff would review papers from Iran for their “clarity, logic, language, context, or content” – would not be exempt from economic sanctions under ITR regulations unless authorized by OFAC because such an activity would also result in a “substantively altered or enhanced product.” Although this interpretive ruling applied only to the case of Iran, legal experts say that its logic would also extend to other countries subject to American economic sanctions such as Cuba and Sudan.

But in April 2004, OFAC issued another interpretive ruling in response to further explanations submitted by IEEE regarding that group’s editorial activities. It concluded that the particular peer review and editing process as undertaken by IEEE alone for a paper submitted by an Iranian author would *not* result in “substantive alterations or enhancements of informational materials by U.S. persons prior to its final importation into the United States for publication,” and was, therefore, exempt from ITR sanctions (i.e. IEEE would not have to apply for a license authorizing such activities). Critics said that the ruling not only contradicted the previous ruling, but also failed to explain why IEEE’s publishing activities would not lead to substantive alteration of a certain journal article or book.

In another ruling issued in July 2004 in response to an inquiry from the American Society of Newspaper Editors (ASNE), OFAC concluded that a newspaper may edit a completed article from a writer in a sanctioned country by, for example, deleting superfluous text, correcting grammar, and making other substantive edits without having to obtain permission from OFAC because such activities did not lead to “substantive alterations or enhancements of informational materials.” But several publishers said that OFAC “did not explain the departure from its previous rulings [such as the ruling concerning IEEE] or how to square its ruling with ITR regulations, which bar substantive alteration.”

Describing these rulings as “contradictory,” many publishers, editors, and academics said that OFAC failed to provide clear guidelines or sufficient explanation to determine whether a certain publishing activity or informational material was exempt from ITR sanctions. One critic said: “Faced with such inconsistency in the interpretation of ‘substantive . . . alteration or enhancement,’ publishers are left to wonder which rulings to follow and which transactions remain prohibited by that phrase . . .”

Some editors have wondered whether the particular rulings issued separately to the ASNE and IEEE would apply to the other group, or whether there were now different standards for scientific journals on the one hand, and newspapers on the other. Speaking about the April 2004 IEEE decision, an OFAC official said that “the ruling does not apply to peer reviewing or editing done differently than



Editing through a minefield? Critics say that the Office of Foreign Assets Control (OFAC) – which administers and enforces American economic sanctions – has issued contradictory rulings as to when a publisher may need prior authorization from that agency when editing manuscripts and informational materials from particular countries.

the IEEE process . . . this ruling, of course, is limited to the facts that were submitted to us.” Furthermore, other editors noted that, despite these rulings, they would still be unable to market new publications and provide other services to their authors unless they received a license from OFAC.

Some publishers have claimed that the fear of violating OFAC regulations has already forced them to postpone or even abandon several book projects. Others say that such regulations could diminish scholarly activity and prevent researchers from learning about important discoveries from around the world in various scientific fields. One academic publisher claimed that it had to remove an article written by Iranian authors which described “a novel way to predict earthquakes.” The publisher said that the article needed several corrections, but that it wasn’t sure if such changes would possibly violate OFAC regulations.

A new ruling for the free flow of information?

In September 2004, several publishers and other groups – including Arcade Publishing, the Association of American University Presses, and the Association of American Publishers – filed a complaint in a federal district court. It asked the court to prevent OFAC from enforcing those particular regulations which required publishers to obtain a license before they handled certain kinds of informational materials or undertook those publishing activities not exempt from U.S. economic sanctions. The plaintiffs said that they represented 124 publishers which printed the “vast majority of materials produced and used by . . . academics.”

The complaint argued that OFAC regulations violated the TWEA and IEEPA statutes (as amended by the Berman and the FTIA amendments), which, it claimed, barred that agency from “regulating or prohibiting the import and export of all First Amendment protected materials.” It also asserted that many provisions in the OFAC regulations “openly defied that unconditional ban” by violating “the plain language of the statutes” and also the “expressed intent of Congress.”

The complaint also argued that OFAC regulations

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violated the First Amendment rights of "publishers, authors, editors, and translators to express themselves by bringing works by authors" from countries subject to American economic sanctions. One advocate said that "according to Congress and the Constitution, Americans are entitled to receive ideas and information from authors anywhere in the world." The suit also said that having to apply for licenses to engage in those publishing activities prohibited by OFAC regulations imposed an "impermissible prior restraint on First Amendment protected speech."

Others have said that economic sanctions against countries such as Iran "do nothing to penalize the governments of sanctioned countries and everything to harm the very people who are most interested in a free and open exchange of literary and scientific ideas."

Furthermore, the complaint stated that certain phrases in the OFAC provisions (such as those prohibiting editorial activities which may lead to "substantive alterations or enhancements of informational materials") were unconstitutionally vague because "they fail[ed] to provide the kind of notice that would enable ordinary people to understand what conduct is prohibited."

In another suit filed in October 2004, Shirin Ebad – an Iranian activist who was jailed in that country for her human rights work and was later awarded the 2003 Nobel Peace Prize – also challenged the legality of those provisions in OFAC regulations prohibiting the publication of her memoirs in the U.S. without a license from OFAC. Making similar arguments filed by publishers in their September 2004 complaint, Ms. Ebadi's suit contended that certain OFAC provisions violated the TWEA and IEEPA statutes, and also violated the First Amendment of the U.S. Constitution. A commentator said that an Iranian citizen writing a memoir for an American audience "would require close collaboration with an editor, and perhaps a co-writer in the U.S. – services her attorneys advise are prohibited without a government license" under OFAC regulations.

In December 2004, OFAC issued a new ruling which explicitly allowed Americans to engage in "all transactions necessary and ordinarily incident to the publishing and marketing of manuscripts, books, journals, and newspapers in paper or electronic format" with individuals in countries such as Cuba and Iran. While an OFAC official said that "this rule enables U.S. persons to freely engage in most ordinary publishing activities," he added that the agency would continue "to maintain restrictions on certain interactions with government officials and people acting on behalf of the governments of those countries." He stated that OFAC's previous rulings were not intended to discourage "the publication of dissident speech from within these oppressive regimes. This is the opposite of what we want."

The counsels for the plaintiffs in these suits said that the announcements were "clearly a step in the right direction." But they added that OFAC regulations had to reflect the changes in the rulings. They also stated that OFAC still had to clarify vague language in several of its regulations.

International Law News Round-up

Report: How to build a more effective United Nations

In the wake of the United States-led military operation toppling the dictatorship of Saddam Hussein in Iraq in 2003 – an action which occurred without formal approval from the United Nations (UN) and divided much of the world – the member nations of that global organization began to question its effectiveness in addressing new threats to international peace and security, some of which may not seem imminent but may create danger very quickly.

In September 2003, the Secretary-General of the UN convened a group of experts called the "High-level Panel on Threats, Challenges and Change" to analyze these new threats to international peace and security and to make recommendations on ways to strengthen the UN as an institution in addressing them. In December 2004, the panel released its report and recommendations, which one analyst described as offering "the most sweeping changes" in that organization's history. Will these recommendations help to produce a more effective global organization?

Through the principle of collective security, the 191 member nations of the UN try to join together as a group to address a wide variety of global problems that transcend national borders. While the UN has several purposes, its most prominent includes maintaining international peace and security, and also promoting cooperation in addressing various economic, social, and humanitarian problems.

The UN is not a world government. It describes itself as "an organization of sovereign and independent States." It does not have a standing army or an international police force to carry out its will. Instead, UN officials say that "the effectiveness of the UN depends on the political will of its member states, which decide if, when, and how the UN takes action" in dealing with a particular issue or problem. Another official adds: "[The UN] does only what member states have agreed it can do."

The UN Charter is the principle treaty that sets forth the rights and obligations of each member state, and also establishes that organization's various organs and procedures. Among the better known and contentious provisions of the Charter is Article 2.4, which restricts

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member states from threatening or using force, and Article 51, which gives member states "the inherent right of individual . . . self-defense if an armed attack occurs" without having to wait for UN approval.

In trying to maintain international peace and security, the UN Security Council tries to mediate disputes – through a combination of diplomacy and political pressure – before they become actual conflicts or, alternatively, tries to keep the peace once all sides to a conflict have agreed to cease hostilities. The blue helmets worn by UN peacekeepers in various operations around the world have become a widely recognized symbol of the UN.

Although the UN is best known for its efforts to promote international peace, officials say that the "vast majority" of its resources (up to 70 percent) are actually used to coordinate humanitarian projects around the world through various specialized UN agencies such as the UN Development Program and UNICEF. For example, the UN has helped to organize and supervise elections in emerging democracies. It has also led efforts to relieve human suffering in the wake of natural disasters by providing emergency assistance. The UN's various agencies also provide technical assistance to poor countries in eradicating disease and promoting literacy.

In its report, the members of the High-level Panel reviewed several new threats faced by the international community such as those posed by poverty, terrorism, transnational organized crime, genocide, and the proliferation of weapons of mass destruction. For example, in the case of terrorism, the report stated that "the attacks of 11 September 2001 revealed that States, as well as collective security institutions, have failed to keep pace with changes in the nature of threats." The report then provided several recommendations as to how the UN as an organization can recalibrate some of its internal decision-making processes to deal with these threats in a more effective manner. Some of these recommendations include the following:

The use of force: Many political analysts believe that the U.S.-led invasion of Iraq in March 2003 – an operation which was undertaken (without UN approval) to find and destroy weapons of mass destruction supposedly hidden throughout the country – highlighted a long-standing debate within the UN as to when and under what circumstances a member nation may use military force. The invasion, many say, provided the catalyst for the creation of the panel.

While the UN Charter (under Article 2.4) urges member states to refrain from using or threatening force against each other, it does allow exceptions in the cases of (i) self-defense under Article 51 when a country is faced with *imminent* attack and (ii) measures directly authorized by the Security Council under Article 42.

But scholars and policymakers have noted a still unresolved debate as to whether, for example, a member nation may, under provisions of the Charter, undertake *preventive* military action in self-defense when a threat – while real – is not imminent. The report acknowledged that the "potential harm from some threats [such as those posed by terrorists in possession of nuclear weapons] is so great that one simply cannot risk waiting until they become imminent." One advocate of preventive self-defense argued that waiting to strike an enemy "only after they have struck first is not self-defense, it is suicide."

But in response to those who have argued that member states have the right to take preventive military action without UN approval, the report stated that "in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action." For example, political analysts believe that some states could undertake so-called preventive military action against non-imminent threats for political rather than security reasons. Instead, the High-level Panel urged nations to continue working through the UN: "If there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to."

The report said that because some of the factors used by Security Council members in deciding whether to authorize the use of force seemed to be – in many past instances – inconsistent, unpersuasive, and subject to political rather than security considerations, it recommended that, rather than changing Article 51, the Security Council should adopt a set of guidelines to help determine not only if force "can legally be used, but whether, as a matter of good conscience and good sense, it should be." It added that "the task is not to find alternatives to the Security Council as a source of authority, but to make the Council work better than it has." Some guidelines recommended by the High-level Panel included determining: the seriousness of the threat, the primary purpose of using force, the balance of consequences of actually taking military action, and whether all other options have been exhausted.

Enlarging membership on the Security Council: In addition to recommending guidelines as to when the Security Council should allow a member nation to use force, the High-level Panel also recommended changes to the Security Council itself. Under the UN Charter, the Security Council – which is composed of 15 members (five of which are permanent members with veto powers) – is primarily responsible for maintaining international peace and security.

The report noted that the members of the Security Council had "gravely damaged" the credibility of the UN in the past by selectively addressing only certain threats to international peace. "Too often, the United Nations and its Member States have discriminated in responding to threats to international security," stated the report. In comparing the quick response of the UN to the events of September 11 to the unfolding genocide in the African nation of Rwanda, the report stated that "from April to mid-July 1994, Rwanda experienced the equivalent of three 11 September 2001 attacks every day for 100 days . . ." but that the UN did not act quickly to stop these events. Furthermore, the High-level

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A new direction for the United Nations? A recent report recommends many changes to make that global organization more responsive to new threats facing international security such as terrorism and the spread of weapons of mass destruction. But will the UN member nations follow through on these changes?

Panel concluded that the basic structure and decision-making processes of the Security Council (which have remained unchanged since the UN's founding in 1945) were now inadequate in addressing the new threats to peace and security that have emerged over the years.

In order to "enhance the capacity and willingness" of that organization to face new challenges in the future, the report concluded that "a decision on the enlargement of the Council . . . [was] now a necessity." More specifically, it recommended increasing the involvement of other countries that contribute "most to the United Nations financially, militarily, and diplomatically" and also broadening its membership to include major developing countries. Political analysts say that some of these countries could include Japan, Germany, Brazil, Nigeria, Egypt, and India.

The report presented two options (Models A and B) for increasing the membership of the Security Council. While both models increase the number of Security Council seats to 24, none involves the expansion of the veto power or the modification of the Council's existing powers. For example, Model A creates "six new permanent seats . . . and three new two-year-term non-permanent seats," which is to be distributed among different geographical regions such as Africa, Asia, and the Americas. Model B does not provide any new permanent seats, but, instead, creates "eight four-year renewable-term seats and one new two-year non-permanent (and non-renewable) seat, divided among the major regional areas."

The report also recognized that it would be politically unfeasible to modify or even withdraw the veto powers of any existing permanent members. In fact, one scholar, in commenting on the issue, said: "The retention of their veto powers is not a matter of principle; rather, it is strictly a matter of practicality." Political observers say that it is highly unlikely that a current permanent member would ever agree to give up its veto power because it would denote a perceived loss of influence and stature. Another UN expert said: "To put it crudely, much of the reform debate, at its basest level, is a struggle over political turf."

Terrorism: The report stated that UN efforts to address terrorism in a comprehensive manner has been hampered (and its credibility tarnished) by the inability of its member nations to define that particular term. Observers point out that agreeing on a definition of terrorism has been fraught with political considerations. For instance, some UN member states have resisted efforts to define terrorism in a way which would restrict the ability of people currently living under foreign occupation to take up resistance. In the case of the Israeli-Palestinian conflict, there are differing views on whether attacks against Israeli civilians should be viewed as terrorism.

In its report, the panel argued that "there is nothing in the fact of occupation that justifies the targeting and killing of civilians." It then proposed that terrorism should be defined as "any action . . . that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." But many experts believe that, given the highly politicized nature behind the issue of terrorism, it is unlikely that the UN member states will ever agree to a clear definition of that term.

Commission on Human Rights: The report also offered several recommendations to halt the "eroding credibility and professionalism" of the United Nations Commission on Human Rights, whose membership is composed of member states periodically elected to that body and is entrusted with reviewing and investigating human rights practices and violations around the world, and also with passing resolutions pointing out deficiencies in certain countries. But in the minds of many critics, the Commission has become a prime example of how political concerns can take precedence over the substantive work of the UN.

The report of the High-level Panel speculated that, in recent years, "states have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others." It further noted that the issue of the Commission's membership has taken attention away from its substantive work, and opened that body to constant criticism. Some have said that the most heated and controversial debates in the Commission concerned which countries should or have become members to that body.

During a politically-embarrassing moment in May 2001, the United States was voted off the Commission for the first time since it was created in 1947 while other countries with questionable human rights practices – such as Libya, Syria, and Sudan – were given seats on that body. This led one human rights advocate to declare that the Commission was becoming a "rogues' gallery of human rights abusers."

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In order to help that body fulfill its mandate of protecting human rights, the report recommended that “the membership of the Commission on Human Rights be expanded to universal membership.” Taking such a course of action, argued the panel, “might help to focus attention back onto substantive issues rather than who is debating and voting on them” and also pressure every UN member state to respect and protect human rights. The report also noted that trying to create membership criteria for the Commission would only politicize the issue further.

The High-level Panel also called for the creation of an advisory council composed of 15 independent experts to support the work of the Commission. It also recommended that the High Commissioner of that body issue an annual report on the state of human rights worldwide.

While political observers are still debating whether the UN member states will accept the most sweeping recommendations, they foresee an arduous process ahead. They note that changing the number of seats on the Security Council will be difficult because it requires an amendment to the UN Charter. According to one UN scholar: “The hardest reforms to achieve . . . are those entailing amendments to the UN Charter” because they not only require an affirmative vote of two-thirds of the General Assembly (which is made up of all 191 UN member states), and is then followed by a ratification process in the legislatures of every member state, but are also subject to the individual vetoes of the five permanent members of the Security Council. Since the UN’s founding in 1945, its member states have amended the Charter only three times.

Experts say that the Secretary-General will try to condense the recommendations of the High-level Panel’s report into eight or 10 broad themes and put them forward at the opening session of the UN in September 2005.

The WTO 10-year review: A world trading system in peril?

On the 10th anniversary of its inception, the World Trade Organization (WTO) released a report in January 2005 called "The Future of the WTO: Addressing institutional challenges in the new millennium" whose stated purpose was to "study and clarify the institutional challenges that the [international trading] system faced and to consider how the WTO could be reinforced and equipped to meet them."

An independent panel of experts known as the Consultative Board, which wrote the report, concluded that while the WTO has provided many benefits to its member nations and has also brought greater predictability to the realm of international trade, that organization also had to address several developments which were eroding the very foundation of the current trading system. It also recommended that the WTO continue addressing several issues which could affect its credibility and public support.

The WTO is the premier international organization which sets the rules for global trade and the settlement of trade disputes. The trade activities of its 148 member nations (most of whom are developing countries) encompass over 90 percent of global trade. In fact, almost every major developing and industrialized country is a member of that institution. Under WTO rules, member nations must hold periodic global trade talks to reduce further barriers to trade. The current round of global trade negotiations is called the Doha Round (named after the city where the talks began).

One of the main functions of the WTO is to administer three main agreements governing, respectively, trade in goods (the General Agreement on Tariffs and Trade or "GATT"), services (“GATS”), and intellectual property (“TRIPS”; see page 6 above). Agreements administered by the WTO operate under the principle of "most-favored-nation" (MFN) status, which requires that when one WTO member nation grants a trade benefit to another member, it must grant to all other members benefits that are not less favorable. One scholar said that the principle of MFN serves "as one of the pillars of the WTO trading system." Many historians and analysts have argued that, in the years before the implementation of MFN, discriminatory trade policies practiced by many countries (for example, during the 1930s) had exacerbated already-existing political tensions and were also a contributing factor in the decline of economic activity around the world.

Analysts and policymakers describe the organization's Dispute Settlement Understanding (DSU) – which is the legal text setting forth the WTO's rules and procedures for settling trade disputes – as the "backbone of the multilateral trading system." Because adherence to the WTO's rules in regulating international trade and settling disputes is legally binding on its members, some analysts and critics have described the WTO as one of the most powerful and effective global organizations ever created.

But despite this unique status of the WTO, the report of the Consultative Board pointed to several recent developments and issues which, it says, could undermine the effectiveness of that institution in the coming years, some of which include the following:

Erosion of Non-Discrimination: While the WTO calls on its member nations to treat one another on an MFN basis, the report pointed out that many members also participate in regional trade agreements (otherwise known as “preferential trade agreements” or PTAs) separate from the WTO, and whose memberships are limited to particular countries. Some of these PTAs include the North American Free Trade Agreement (whose members include only Canada, Mexico, and the United States) and the European Union, which has 25 members located in Europe.

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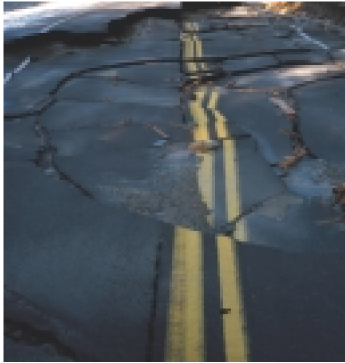

A bumpy road to a better world trading system? Despite critics who say that the World Trade Organization (WTO) has become one of the most powerful global organizations in history, a recently-commissioned report said that WTO member nations were, in part, responsible for undermining the mission of that group.

Scholars and policymakers point out that PTAs do violate the principle of MFN since trading privileges associated with particular PTAs are extended only to certain countries. Still, the WTO does allow its members to create PTAs as long as these agreements "show clear improvement of trading and development prospects of those involved in the agreements, but also does not harm the interest of those outside." But the report estimates that there will be over 300 PTAs in force by the end of 2007, and that this “spaghetti bowl of customs unions, common markets, regional and bilateral free trade areas . . . . has almost reached the point where MFN is no longer the rule; it is almost the exception.”

The report said that the “explosion” of PTAs in recent years has not only added more confusion to international trade as rules become more complex and inconsistent, but that it will increase transaction costs among trading partners. Some analysts have questioned why many WTO members would agree to join trade agreements which are outside the realm of the WTO and which seem to undermine the principle of MFN. It can be argued that the negotiation of PTAs endanger the multilateral Doha Round, although the slow pace of the current Doha trade negotiations can also be said to cause some countries to pursue PTAs.

The report urged WTO members to “take into account the damage being done to the multilateral trading system [and the principle of MFN] before they embark on new discriminatory initiatives” such as creating more PTAs. It also said that the long-term remedy for the problem of discriminatory preferences created by PTAs is to reduce high tariffs, various protectionist measures, and other barriers to global trade.

Compliance with WTO rulings: The Consultative Board said that while many analysts have called for a reform of the WTO dispute settlement process, it reported that, “on the whole, there exists much more satisfaction with its practices and performance,” and that it would approach this particular area with the principle of “do no harm.”

Under the dispute settlement process, a WTO member may initiate dispute settlement proceedings if it believes that another member’s trade policies are violating WTO rules and obligations. If initial consultations fail to end a trade dispute among member nations, the WTO creates a first level dispute settlement panel to resolve that dispute under an established timeline. A panel's ruling may be appealed to the Appellate Body whose decisions are final. If a losing party does not comply with a final ruling, the WTO can, for example, authorize the winning nation to impose penalties.

While countries losing a dispute have largely complied with WTO rulings, the Consultative Board noted that many member nations seem to believe that they have a “free choice” on whether to comply with a WTO ruling. For instance, some losing countries have provided compensation to or have simply endured retaliation from the winning country in a dispute. The report stated that “this is an erroneous belief. There is an underlying obligation . . . to require measures to bring the governmental activities complained of into consistency with the rules of the WTO.” It further argued that allowing governments to “buy out” of their obligations to comply with WTO rulings would “favor the rich and powerful countries which can afford such ‘buy outs’ while retaining measures that harm and distort trade.”

Making the WTO more transparent: While the WTO has made public its dispute settlement panel and Appellate Body rulings and also engaged in a campaign to educate the public about its work, the report noted that the organization still faced a high level of mistrust. Some have argued that opening the dispute settlement proceedings to the public could alleviate concerns that the WTO worked in secrecy against the public interest.

Under DSU rules, only member governments can participate in closed-door dispute settlement proceedings and review submissions made by parties to a dispute. Analysts have said that dispute settlement proceedings often involve the airing of confidential business information and that opening up the process to public view would discourage candid discussions between the disputing parties. But others believe that these closed-door proceedings undermine public confidence in the WTO. Many non-governmental organizations (NGOs) also argue that because the WTO adjudicates disputes which could have serious implications for public policy, outside organizations should be allowed to attend its proceedings to ensure accountability.

In its report, the Consultative Board said that “as a matter of course, the first level panel hearings and Appellate Body hearings should generally be open to the public,” and that motions to exclude the public from any party of a hearing should only be granted for “good and sufficient cause.” (One example of good cause would be to protect confidential business information.) The report stated that the perceived degree of secrecy of its proceedings “can be seen as damaging to the WTO as an institution,” and that, by opening these meetings, “observers would be favorably impressed with the [dispute settlement] process.” But

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analysts note that opening these proceedings to the public will require a change in the DSU rules, which can only be made through consensus among all WTO members.

Amicus briefs: The report also said that it "generally agrees with the procedures already developed for acceptance and consideration of amicus curiae briefs (i.e. unsolicited legal submissions by nonparties to a dispute arguing in support of a certain position) by first level dispute settlement panels and the Appellate Body. In recent years, NGOs and other groups have successfully submitted these briefs during WTO dispute settlement proceedings. The Appellate Body, for example, argued that it "has the legal authority under the DSU to accept and consider amicus curiae briefs in an appeal" which it finds pertinent and useful. But it also added that it "has no legal duty to accept or consider unsolicited amicus curiae briefs . . ." The report then recommended that the WTO "develop general criteria and procedures at both levels, to fairly and appropriately handle amicus submissions."

In the next few months, analysts say that the WTO member nations will review the report and decide whether to adopt any of its recommendations. Because the WTO operates on consensus, meaning that all of its 148 member nations must unanimously agree on taking a course of action, many believe that organization is unlikely to adopt any controversial recommendations. Others believe that because the WTO is in the midst of global trade talks, its member nations are unlikely to undertake any major overhaul.

WTO: Equal protection for Florida orange juice?

In a recent decision, the World Trade Organization (WTO) ruled that a European Union (EU) regulation which prevented non-EU companies from registering valuable geographical food names – such as Washington State apples and Florida orange juice – for legal protection against counterfeiters violated international trade rules. Analysts say that the ruling could affect current global trade talks and also create complications for an EU proposal to create a global registry to protect other geographical food names.

According to a complaint filed by the United States and Australia at the WTO in 1999, an EU regulation called the "Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs" – or simply Regulation 2081/92 – denied legal protections for well-known geographical food names filed by non-EU applicants – such as an American company trying to register the name "Idaho potatoes" – unless that applicant's home country provided equivalent protections found in the EU. This regulation prohibits the use of well-known geographical food names that does not represent the product's true place of origin. Currently, the EU protects the names of over 600 foodstuffs, including Swiss chocolate and Roquefort cheese.

Although this current debate may seem to revolve around food, its main focus centers on the concept of intellectual property. Governments around the world protect such property by giving the creator the exclusive rights to use the product and control its use by others. Some of these rights include patents, copyrights, and trademarks. Although intellectual property laws and their enforcement vary among nations, an international treaty called the Trade-Related Aspects of Intellectual Property Rights (also known as "TRIPS," which is administered by the WTO) requires WTO member nations to provide minimum standards of intellectual property protection within its own legal system. (See p. 6 above.)

The WTO is the international organization that sets the rules for international trade among its member nations, which encompass nearly every developing and industrialized country in the world. In addition to administering the TRIPS agreement, the WTO also administers other major trade agreements regulating the trade of goods and services.

The TRIPS agreement includes the principle of national treatment whereby a WTO member nation must give another member nation's goods and services the same treatment it accords to similar goods and services of domestic origin. Where this principle applies, member nations cannot discriminate against foreign products or services by, for example, imposing discriminatory taxes or creating a different set of regulations for those products. So how do these principles apply to the TRIPS agreement? Under national treatment, one WTO member nation must offer the same level of protection for intellectual property belonging to nationals from other WTO members as it would to the intellectual property of its own nationals.

In addition to covering copyrights, trademarks, and patents, the TRIPS agreement also contains guidelines for an intellectual property right called a geographical indication (popularly known by its acronym "GI"). A GI is a name that identifies the geographical origin of a product, and is protected if the product's unique quality and characteristics are directly linked to its place of creation. Some examples of GIs include Swiss chocolate and Parma ham. Experts say that the TRIPS agreement is the first major international treaty requiring its signatory nations to implement minimum intellectual property standards in their own legal systems. Under this framework, a company or individual must apply for GI protection in every individual country. (There currently is no one global registry.)

The U.S. legal system does not have a specific law concerning GIs. Instead, the U.S. Patent and Trademark Office (USPTO) provides a manufacturer with a "certificate of origin" and trademarks to protect its unique product. On the other hand, EU Regulation 2081/92 directly addresses GI

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protection and involves a much more comprehensive inspection and oversight process whereby comments and objections to a proposed GI must be sent to every EU national government before receiving final approval. For a non-EU applicant trying to register a GI in the EU, the regulation offers protection only if the applicant's home country provides GI protection equivalent to that found in the EU. (This has been termed the "reciprocity provision.") Several American companies say that they have been unable to register names such as Florida orange juice and Napa Valley wine because U.S. laws governing GIs supposedly do not provide protection equivalent to that found in the EU.

In a formal complaint filed with the WTO in 1999, the U.S. challenged the legality of the reciprocity provision, arguing that it violated the principle of national treatment under the TRIPS agreement by denying the same GI protection to non-EU states that it offered to its own nationals. (The TRIPS agreement requires every WTO member nation to provide minimum intellectual property protection and not the same protection, said the U.S.)

The U.S. also argued that Regulation 2081/92 did not provide sufficient legal protection for already-existing trademarks filed by non-EU nationals which were similar to GIs found in the EU but registered at a later date. The U.S. noted that even though a non-EU company may have registered a trademark earlier than a GI with a similar sounding name (or similar linguistic variations of that name) in the EU, Regulation 2081/92 still allowed the coexistence of both registered names. The U.S. argued that the regulation effectively denied these trademark owners an opportunity to enforce their rights against owners of GIs with similar names, and could also potentially lead to confusion among consumers trying to decide the authenticity of a particular product.

The EU responded that its reciprocity provision and its position concerning the coexistence of similar trademarks and GIs were in full compliance with the national treatment provision under the TRIPS agreement, though it did not further elaborate its defense.

In October 2003, the WTO established a dispute settlement panel to rule on the complaint. In a decision issued in November 2004, the panel ruled that the reciprocity provision of Regulation 2081/92 did, indeed, violate the principle of national treatment under the TRIPS agreement by denying the same GI protection to non-EU states that it offered to EU nationals. An EU spokesperson responded that the panel had merely found the disputed provision to be "insufficiently clear" about its discriminatory effects, and that the EU was now in a position "to clarify its legislation without difficulty."

But the panel also partly upheld the EU's claim that its regulation may allow the co-existence of GIs with names that are similar to already-registered trademarks by citing certain "fair use" exceptions found in the TRIPS agreement. But the report narrowed the scope of this exception by stating that this right of coexistence applies only to GI names "as they appear in the EU register" and not to linguistic variations and translations of GIs. Analysts say that if owners of GIs were able to create and use linguistic variations of already-registered trademarks, this could undermine the very purpose of protecting trademarks and GIs.

While the WTO's decision seems only to decide a particular case at hand, political analysts believe that the outcome could have broader ramifications. For example, some say that the EU will have less leverage to push forward its idea of creating a global registry for GIs. In its plan, the EU has suggested that its own GI regulation (2081/92) should serve as a model for such an international registry which would be overseen by a central authority in the WTO, and would involve a more comprehensive vetting process whereby potentially every WTO member and interested party would give comments on (or oppose the adoption of) a newly-proposed GI.

In pushing for its proposal, the EU says that the current system of protection for GIs under the TRIPS agreement puts an impossible burden on small groups of regional producers who are required to apply for legal protection in each individual country where they are seeking protection for their goods. Opponents, such as the U.S., Canada, Argentina, El Salvador, and the Philippines, argue that an international registry is not necessary because the TRIPS agreement already provides sufficient protection for GIs. Specifically, they point to the successful protection of products such as Roquefort cheese and Parma ham, which are European GIs protected in the U.S. after their producers filed for certificates of origin with the USPTO. They also say that many countries have simply not resorted to using provisions in the TRIPS agreement in protecting their products.

In light of the recent WTO decision, the EU may not be in a strong position to advocate the creation of a global registry based on its own GI regulation. One American official said: "From the U.S. perspective, current TRIPS Agreement obligations are sufficient [in protecting GIs], and a priority should be placed instead on Members meeting current obligations." Others note that while the EU had even threatened to delay further progress on the current round of global trade talks called the Doha Round unless the other WTO member nations agreed to create an international GI registry, the EU is unlikely to carry through with that threat.

Short breaths for global warming treaty?

After the completion of negotiations in 1997, the Kyoto Protocol – an international treaty whose aim is to cut the emissions of greenhouse gases – came into force for its 130

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signatory parties on February 16, 2005. Although many experts and policymakers say that this treaty will help to slow the effects of global warming, others are still expressing doubts as to whether it will be an effective means to address this problem.

Scientists say that emissions of industrial gases and pollutants – such as carbon dioxide – trap heat in the atmosphere and cause temperatures to rise around the world in a so-called “greenhouse effect,” which, they assert, could then lead to catastrophic natural disasters such as rising ocean levels and the expansion of deserts. Many scientists agree that carbon dioxide is the largest contributor to global warming, and experts claim that only a sustained and coordinated international effort can reduce the emissions of these gases. On the other hand, skeptics argue that the consequences of this greenhouse effect have been exaggerated by environmentalists.

State parties to the Kyoto Protocol are legally bound to cut total emissions of six greenhouse gases to five percent below 1990 levels by meeting specified targets beginning in 2008. (The treaty itself will expire in 2012.) Experts note that these targets apply mainly to industrialized nations, which will cut emissions in proportion to the amount they create every year (i.e. the more gases a country emits, the more it will have to reduce its emissions).

For example, the countries of the European Union (EU) will have to reduce their emission levels to eight percent below 1990 levels. Japan will be required to reduce its emissions by six percent. On the other hand, developing countries such as Brazil, China, and India will not have to abide by any specific targets under the Kyoto Protocol because, it is claimed, these countries have historically released lower emissions than their industrialized counterparts.

The Kyoto Protocol did not become a legally-binding treaty until after the number of industrialized countries that have ratified the treaty accounted for more than 55 percent of the emissions produced in 1990. Legal experts point out that the 120 countries that initially ratified the treaty emitted only 44 percent of emissions, and that the treaty couldn’t come into force unless the U.S. or Russia (the largest and fourth-largest producers of global emissions, respectively) ratified the agreement. Although the U.S. signed the Kyoto Protocol, it later refused to ratify the treaty, which effectively gave Russia a veto over its implementation. Russia decided to ratify the treaty in November 2004, but only after it received assurances that the EU would support that country’s membership to the World Trade Organization.

Under the treaty, every industrialized country will reduce its carbon dioxide emissions through a combination of efforts such as burning less fossil fuel, using more fuel-efficient technologies, and promoting alternative energy sources. Many countries have already drafted regulations setting certain caps on carbon dioxide emissions. Even though cuts in emissions must officially start in 2008, many nations must begin those cuts beforehand simply to meet their negotiated targets. One analyst estimates that, for example, the EU will require over 12,000 factories to cut their emissions in the years prior to 2008.

An important part of reducing carbon dioxide emissions is an approach called carbon trading where a particular government will give companies and businesses – such as large oil and gas companies, and utilities – a certain allocation of credits to emit carbon dioxide. (Each credit represents the right to emit one metric ton of carbon.) A factory that does not use all of its credits can then sell the excess credits to another company. Some critics have derisively described these credits as “pollution permits.” Private companies will also be able to earn credits by financing energy-efficient technologies and carbon-reducing projects around the world. One commentator said: “The theory is that, since global warming is global, the atmosphere doesn’t care whether emissions occur in, say, Germany or China.” In order to help nations and companies trade these credits, both the EU and the U.S. created exchanges – the European Climate Exchange based in Amsterdam and the Chicago Exchange – that specialize in carbon emissions.

Although many environmentalists, scientists, and policymakers have applauded the implementation of the Kyoto Protocol, they say that it still faces many obstacles. For example, they say that the seven years of delay in implementing the treaty will make it more difficult for its State parties to reach their targets in reducing carbon emissions. For example, in order for the EU to stay on track in cutting its emissions target by 2012, analysts say that it should have reduced its carbon emissions by 4.8 percent in 2002 (even before the Protocol came into force). Instead, the EU cut its emissions by 2.9 percent that year. Furthermore, critics note that it will be much harder to reduce the overall emission of carbon dioxide because the world’s largest producer of that gas, the U.S., and several major developing countries such as India and China, don’t have to implement the treaty’s provisions. Another critic said that even if all the State parties met their targets, “it would take more than 40 times the emissions reductions required under the treaty to prevent a doubling of the pre-industrial concentration of carbon dioxide in the atmosphere.”

The U.S. is still not a State party to the Protocol. Instead, the current administration has asked businesses voluntarily to slow the rate or “intensity” at which they produce emissions. The administration has also argued that it does not have the legal authority to limit carbon dioxide emissions in the U.S. unless Congress explicitly grants that authority.

Although many countries are still criticizing the U.S. for not ratifying the Kyoto Protocol, some business executives point out those American companies based in countries that have ratified the Protocol (such as those based in the EU), will have to comply with emission reduction rules in those countries. But even with these efforts through the Kyoto Protocol, one environmental group described the Protocol as “only the first step in a long journey towards stabilizing greenhouse gas emissions.”

Selling an EU constitution to a skeptical public

In January 2005, lawmakers across the European Union (EU) formally approved a final text for an EU constitution, a document which had been in the making for almost two years through often contentious negotiations. While supporters say that an EU constitution will streamline operations in that 25-nation alliance, others are skeptical of its potential, and, instead, fear the growth of a large bureaucracy. Political analysts say that the greatest hurdle now lies ahead as the constitution goes on the road and faces a ratification process whereby all EU members must unanimously approve that document before it comes into force.

As it stands today, the EU is a union of 25 nations bound together through a series of complex international treaties. These treaties created common institutions to manage certain political and economic areas of mutual concern such as trade and finance, environmental protection, and agricultural policy. Although referred to as a constitution, the document agreed to in January 2005 is actually a treaty. Unlike, say, the U.S. Constitution which binds a single nation, the proposed EU constitution will be an agreement among sovereign nations still retaining a large measure of control over their internal affairs.

Political and legal experts argued that, as the EU increased its membership, it had to streamline its decision-making process, and that one single, all-encompassing constitutional treaty would help reach that goal. For example, under the proposed constitution, decision-making in many areas of governance will be changed to "qualified majority voting" whereby a majority of member nations may adopt a certain piece of legislation if that majority represents at least 60 percent of the EU population. (Under the current system, certain legislation is created through a process of consensus.) Some of these areas include criminal law, immigration policies, and asylum procedures. Many analysts also say that certain proposals in the text would allow the EU to speak in a single voice in many policy areas which, in turn, could provide the union with greater legitimacy in world affairs.

Still, much of the proposed constitution is simply a combination of the various EU treaties already in existence. In practical terms, it will change little in the daily lives of Europeans.

Despite some of the benefits of enacting an EU constitution, critics still voice some misgivings. For example, there is fear among some opponents that a constitution will sharply erode the sovereignty of individual EU nations and send decision-making to EU headquarters in Brussels. Some also say that the constitution gives too much voting power to large members such as France and Germany, and that smaller EU nations will be unable to attain their own majority to push forward certain legislation.

As of January 2005, four countries – Hungary, Lithuania, Slovenia, and Spain – have ratified the proposed EU constitution in referenda, meaning that these nations have formally voted to abide by its terms. Still, political analysts see a rough process in the next 18 months ahead when over 10 other EU member nations will try to ratify the proposed constitution through a national referendum or parliamentary approval or both.

For example, they note that a majority of legislators from the United Kingdom (UK), Poland, and the Czech Republic oppose ratification of the constitution. In February 2005, after Spain approved the proposed constitution in a referendum, some supporters touted the vote as a promising start for the ratification process. But analysts pointed out that the turnout of eligible voters (42 percent) was low, and that "one of the biggest challenges faced by the pro-constitution camp is that huge numbers of Europeans simply don't know or understand what is in the charter."

What will happen if one or more nations fail to ratify the constitution? Some analysts say that the EU could negotiate a compromise in order to appease the concerns of any holdout nations. The EU could also decide to ignore the concerns of the holdout nations and simply start a new union based on the proposed constitution. But this is unlikely because some analysts note that smaller EU nations will want, for example, the UK to ratify the constitution in order to serve as a counterweight to larger nations such as France and Germany. If successfully ratified by all EU member states, the constitution will come into force on November 1, 2006.

Bittersweet ending for sugar subsidies?

The World Trade Organization (WTO) recently issued a decision which trade experts say strikes a blow against the vast subsidy system used by industrialized countries to protect their agricultural sectors. The WTO recently ruled that the European Union (EU) violated international trade rules by providing export subsidies for sugar exports beyond prescribed WTO limits. Critics of the subsidy system say that this decision will not only help to bring down sugar prices, but also represents a challenge to countries that extensively use subsidies to protect uncompetitive domestic industries.

Subsidies are financial contributions made directly or indirectly by governments for various economic and political purposes, often at the behest of various special interest groups. Many governments provide subsidies, for example, to maintain low prices for basic domestic commodities (such as cooking oil) which may otherwise be too expensive for the public at market rates. Subsidies are also used in the realm of

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international trade. Although many developing and poorer countries around the world have a cost advantage in producing, say, agricultural goods, economists and other experts claim that subsidies protect inefficient farm interests – which would otherwise cease operations – in mostly industrialized countries.

For example, under a subsidy program, a government guarantees a certain price for an agricultural good. If the market price falls below this established floor price, the government will pay the difference directly to farmers or, frequently, agri-businesses, which could add up to hundreds of billions of dollars every year. Subsidies are mostly drawn from general tax revenues.

Many economists believe that using subsidies – combined with protectionist measures such as high tariffs – forces consumers to pay high prices for agricultural goods made by inefficient growers. For example, the price of sugar in the EU is three times higher than market prices around the world. Critics also say that the use of subsidies also encourages the overproduction of many crops (which would not be grown otherwise), leading to lower market prices for these goods while hurting those developing countries which rely on a certain crop for their economic growth. According to a humanitarian organization, "the overproduction of European sugar reduces world sugar market prices by 23 percent . . . which cost farmers in Brazil $494 million in 2002." The Brazilian Foreign Ministry added that its country "is losing $400 million a year in sugar exports because of the EU subsidies."

Analysts say that the United States, the EU, and Japan provide their farm sector with hundreds of billions of dollars in subsidies every year, more than any other group of countries. In 2002, the industrialized countries of the world provided their farmers with over $318 billion in subsidies. Critics argue that the money spent on subsidies could, instead, be used for more productive uses.

While the WTO does not prohibit subsidies (in fact, it says that some subsidies can actually "play an important role in developing countries and in the transformation of centrally-planned economies to market economies"), it strictly regulates the use of these measures. For example, the WTO generally prohibits the use of export subsidies for agricultural goods – which it defines as "payments on the export of agricultural products financed by virtue of government action" – above a prescribed limit in order to prevent unfair competition (that is, to prevent a government from using subsidies to hurt the competitive position of another country in a particular sector of the economy).

In the current case, which began formal WTO dispute settlement proceedings in August 2003, three Member nations of the WTO – Australia, Brazil, and Thailand – argued that the EU indirectly provided subsidies for sugar exports beyond limits (1.28 billion metric tons per year) established by international trade rules. The EU currently has a floor price for domestic sugar producers whereby the government promises to pay the difference if the market price for sugar falls below the floor price. (The EU is the fourth largest exporter of sugar in the world.)

The complainants argued that the EU had set the floor price for domestic sugar so high that it allowed domestic producers – in an action described as "cross-subsidization" – to finance the sale of sugar made specifically for the export market at prices below production costs. (This floor price, they said, essentially constituted an export subsidy subject to WTO limits.) The complainants then argued that, when taking into account these particular sugar exports, the EU had gone beyond the 1.28 billion ton limit set by the WTO. Brazil, which is the world's largest producer of raw sugar, also argued that these export subsidies damaged its sugar manufacturers who could not compete with the artificially low prices created by the EU.

The EU argued, in turn, that it did not provide direct subsidies to its sugar exports, and that its alleged breach of WTO limits for subsidized sugar exports resulted from an "excusable and common scheduling error."

In a September 2004 ruling described by legal experts as a blow against the use of subsidies by industrialized countries, the WTO dispute settlement panel ruled largely in favor of the complainants and agreed that the EU's floor prices for sugar did constitute an export subsidy (and, therefore, subject to WTO limits) which allowed EU sugar manufacturers to export their sugar at prices well below production costs. Without this form of government support, said that panel, EU domestic sugar manufacturers would not have been able to export their sugar at such low prices.

In summarizing the decision, one expert said that the panel ruled that "a high degree of support for a given commodity through government actions, combined with the export of the product below cost of production, is enough to find that export subsidization exists." The EU later announced that it would appeal the ruling. In particular, the EU argued that it would challenge the panel's ruling that the alleged cross-subsidization of sugar exports constituted an export subsidy as defined by the WTO.

Analysts say that if the EU ultimately complies with the WTO's decision and eliminates the alleged cross-subsidization of sugar exports, it would reduce the amount of EU sugar exports by five or six million tons a year which would, in turn, open more markets for large producers such as Brazil. They also believe that sugar prices will rise. Political analysts also speculate that the EU may have

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foreseen the WTO's ruling and decided to take certain measures to prevent opponents from dictating the terms of debate surrounding its sugar subsidy program. They noted that, in the months prior to the WTO ruling, the EU had proposed reforming its sugar subsidy program by, for example, cutting back on its sugar exports and substantially reducing the floor price at which the government would intervene in protecting that particular sector of the economy.

A commentator said that, in light of the WTO decision, "critics of EU subsidies now may feel more confident about leaning on the EU, the U.S., and Japan for cuts to their most-heavily subsidized crops." For example, said one analyst, other developing countries may challenge subsidies given to American farmers for certain crops such as rice, which they say allows those farmers to export rice below production costs. In a similar ruling which analysts say was the first decision nullifying a country's use of a domestic agricultural subsidy, another WTO dispute settlement panel ruled, in June 2004, that the subsidies provided by the U.S. to its cotton growers had harmed other cotton producers around the world in violation of international trade rules.

The end of a long-running WTO tax dispute?

In the context of a dispute running over five years, the U.S. recently announced that it had passed and implemented legislation that would bring into compliance American tax laws deemed in violation of international trade rules set by the World Trade Organization (WTO). While the complaining party in the case – the European Union (EU) – said that much of the new legislation did seem to comply with WTO rules, it still held out the possibility that it would challenge certain portions of the new law.

A WTO dispute settlement panel ruled in September 1999 that the tax breaks given under the "foreign sales corporation" (FSC) provisions in the U.S. tax code – whereby American companies exported U.S.-manufactured goods through offshore subsidiaries set up in places like the Virgin Islands and Barbados – constituted an illegal export subsidy under WTO rules. EU officials argued that WTO rules generally prohibited member nations from subsidizing exports to make them more competitive, and that the FSC provisions (which they said provided these export subsidies) had given an unfair advantage to American exports.

Tax analysts say that under the FSC provisions, U.S. companies had saved over $3.5 billion in taxes every year on export sales. The EU also claimed that European companies had suffered $4 billion in damages, which experts say made the FSC case the largest dispute ever adjudicated by the WTO. The WTO Appellate Body later upheld the original panel decision in February 2000.

In order to comply with the WTO's ruling, Congress enacted the "Extraterritorial Income Exclusion" (ETI) Act in November 2000, which repealed the FSC provisions and replaced them with special income tax rates for export and non-export foreign sales. But another WTO dispute settlement panel ruled in July 2001 that the ETI Act also violated the original 1999 decision. The WTO Appellate Body upheld this ruling some time later.

Although both chambers of Congress continued to craft legislation which would revise the ETI Act and bring the U.S. into compliance with the WTO's decision, negotiators from the House of Representatives and the Senate were unable to work out compromise legislation. On March 1, 2004, the EU imposed sanctions on $4 billion worth of American products – ranging from aircraft parts to sports accessories – for the US's failure to comply with the original WTO decision.

In October 2004, the President signed into law a corporate tax bill which replaced the FSC export subsidies with hundreds of tax breaks and deductions for American companies worth almost $140 billion. The new bill, which took effect in January 2005, cuts the top tax rate for manufacturers by three percent. It also provides a one-time tax holiday for American companies with foreign profits held outside of the U.S. (estimated to be as large as $650 billion). Instead of being taxed at the usual 35 percent rate, these profits would be taxed at 5.25 percent if brought back to the U.S. Although some lawmakers tried to pass an amendment which would require these companies to use its repatriated profits to hire more workers, these efforts did not pass.

The bill also provides American companies a transition period of two years "to wean themselves off the old tax breaks" provided by the FSC provisions. Although many legal experts say that the new legislation would finally bring the FSC dispute to a close, critics point out larger costs – the majority of the tax breaks were given to companies not even affected by the FSC provisions.

In January 2005, the EU announced that while it would lift its sanctions against American products, it would ask the WTO to verify whether the new tax bill complied with the original 1999 ruling. More specifically, the EU complained that "grandfather" clauses in the new legislation would allow certain companies to continue receiving FSC benefits even after the two-year transition period. Some lawmakers defended these specific provisions, arguing that many companies had signed contracts and other business arrangements before the new law was enacted, and that canceling these agreements would be disruptive to commerce.

Although some EU member states wanted to re-impose automatically sanctions on American goods if the WTO determined that the new legislation was not in compliance, officials decided that the EU would, if necessary, try to reach a negotiated settlement with the US in order to avoid creating unnecessary political tensions.

EVENTS IN SPRING 2005

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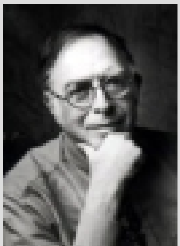
February 23, 2005: C.V. STARR LECTURE – The Making of the Interim Iraqi Constitution with His Excellency DR. FEISAL AL-ISTRABADI, Ambassador, Iraqi Mission to the United Nations. In June 2004, after a transfer of authority from the Coalition Provisional Authority in Iraq – which had taken power after the United States and other countries had toppled the dictatorship of Saddam Hussein – a sovereign Iraqi government put into effect its Interim Constitution, which guarantees broad political and civil rights such as equality before the law. In his lecture, His Excellency Dr. Feisal al-Istrabadi discussed the drafting and implementation of the Interim Constitution. He was instrumental in drafting that document. He also spoke about the process of preparing a permanent constitution for Iraq and its prospects for passage this fall in the face of continuing political strife.

March 30, 2005: C.V. STARR LECTURE – Restructuring Iraq's debt with LEE C. BUCHHEIT, Partner, Cleary Gottlieb Steen & Hamilton LLP, which represents the government of Iraq in restructuring its debt. After enduring over 10 years of sanctions, three wars since 1980, and decades of corruption and mismanagement, Iraq emerged in 2003 as a heavily indebted nation when a group of countries led by the United States toppled the regime headed by Saddam Hussein. In November 2004, Iraq and a group of creditor nations known as the Paris Club agreed to forgive 80 percent of that country's $40 billion of foreign debt. Many financial problems still confront Iraq. In his lecture, Lee C. Buchheit discussed these and other issues.



APRIL 6, 2005: C.V. STARR LECTURE – Iraq and the Shaping of a State Media Policy with MONROE E. PRICE, Director, Howard M. Squadron Program in Law, Media and Society, Cardozo Law School. Under Saddam Hussein, all media in Iraq – including news agencies, radio, and television broadcasters – were controlled by the regime and its Ministry of Information. Freedom of the press did not exist, and dissent was punished severely. After April 2003, following the invasion by the United States and its Coalition, Iraq saw the proliferation of newspapers, magazines, and new radio and television operations. The Iraqi media still face many obstacles, including the lack of experienced journalists, an unreliable communications system, and political and economic instability. In his lecture, Professor Monroe Price discussed Iraqi media governance and the shaping of state media policy.

April 20, 2005: The 2005 OTTO L. WALTER LECTURE – Rethinking the War on Terror with ANNE-MARIE SLAUGHTER, Dean, Woodrow Wilson School of Public and International Affairs at Princeton University, 4:30 pm – 6:00 pm, Wellington Conference Center. Since the terrorist attacks on September 11, 2001, and subsequent attacks around the world, national leaders and their governments have taken many approaches to combatting the threat posed by organizations such as Al Qaeda. Political leaders have primarily taken the lead in fighting terrorism by arranging high-profile meetings and carrying out initiatives at top levels of national government. But there already exists a variety of formal and informal networks of government officials ranging from prosecutors to judges to policy experts who interact, coordinate, and exchange information with one another in addressing problems that transcend national borders. In her lecture, Anne-Marie Slaughter will describe how governments around the world have been organizing themselves into formal and informal networks to deal with terrorism.