April 2008

Japan External Trade Organization
WTO and Regional Trade Agreements Monthly Report

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USTR Releases Results of 2008 Section 1377 Review of Telecommunications Trade Agreements

On April 8, 2008, the Office of the United States Trade Representative (USTR) released its annual Section 1377 Review of Telecommunications Trade Agreements. The review focused on four areas: (i) issues related to regulatory independence and transparency; (ii) high mobile termination rates; (iii) barriers to the provision of Voice over Internet Protocol (VoIP) technology; and (iv) excessive market entry requirements. USTR discussed problems surrounding each of these issues for several US trading partners. We review below USTR's findings.

USTR Releases 2008 "Special 301" Report on IPR Enforcement: China, Russia Again Top List of IPR Infringers

On April 25, 2008, the Office of the United States Trade Representative (USTR) released its "Special 301" annual report on the adequacy and effectiveness of US trading partners' intellectual property rights (IPR) protections. The report identifies governments that "need to take stronger actions to combat piracy and counterfeiting." We review here the main aspects of the "Special 301" annual report.

ITC Issues Report on Selected Government Practices and Policies Affecting China's Economic Decision Making

The United States International Trade Commission (ITC) recently issued a report that provides an overview of specific measures that the Chinese government has taken to influence economic decision making in the manufacturing, agricultural and services sectors. The report is the first of three that Congress has requested the ITC prepare to examine specific elements of the US-China bilateral economic relationship. It describes how the Chinese government utilizes policy measures in four key areas to achieve a broad range of economic and industrial development policy goals, and discusses how these goals have developed during recent years. The report concludes that although government involvement in the economy continues through specific policy measures, the degree of this involvement varies from sector to sector and has declined over time. The ITC is expected to release the two follow-up reports—one to comprehensively catalogue and quantify government interventions and policies, and

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another to consider US trade and investment flows to China and the Asian region overall—in mid-2008 and early 2009.

United States Highlights

We would like to alert you to the following United States highlights:

- Congress Approves Two-Week Extension for 2002 Farm Bill as Negotiators Work on Addressing Congressional, Administration Concerns with Latest Deal
- Democrats Urge President Bush for Stricter Enforcement of US Rights Under Trade Agreements

Free Trade Agreements

USTR 2008 NTE on Foreign Trade Barriers: Middle Eastern Economies

On March 28, 2008, the Office of the United States Trade Representative (USTR) published the National Trade Estimate Report (NTE) on Foreign Trade Barriers, which surveys significant foreign trade barriers to US exports. The report addresses a wide array of issues and US government actions to combat foreign trade barriers. We highlight here the NTE report's analysis of the trade practices of major Middle Eastern trading partners including Bahrain, Egypt, Jordan, Kuwait, Morocco, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (UAE).

USTR 2008 NTE on Foreign Trade Barriers: Latin American Economies

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USTR 2008 NTE on Foreign Trade Barriers: Asian Economies

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Free Trade Agreements Highlights

- US, South Korea Reach Agreement on US Beef Exports; Passage of KORUS FTA Remains Uncertain
- House of Representatives Approves Pelosi Resolution Eliminating TPA Deadline for US-Colombia FTA Vote
- President Bush Delivers Implementing Legislation for US-Colombia FTA to Congress Amidst Opposition from Democratic Members
- United States and Ukraine Sign Trade and Investment Cooperation Agreement

Multilateral

WTO Panel Report: United States – Continued Suspension of Obligations in the EC-Hormones Dispute (DS320)

Decision: A WTO Panel has issued a mixed ruling in an EC challenge to the application of retaliatory trade sanctions by the United States. The US sanctions were initially imposed in 1999, after the WTO ruled that the EC ban on imports of hormone-treated beef failed to comply with the WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "SPS Agreement"). In 2003, the EC announced that although the ban would remain in place, it had conducted a "comprehensive risk assessment" that justified this import prohibition under the SPS Agreement. The United States took the position that the EC remained in breach of its WTO obligations and refused to lift the sanctions. On March 31, 2008, the Panel ruled that the United States had violated its procedural obligations under the Dispute Settlement Understanding (DSU) by not having recourse to multilateral procedures to determine whether the new EC measure was WTO-consistent. However, it also ruled that the 2003 EC measure still did not meet the requirements of the SPS Agreement, and so it rejected the EC claim that its illegal measure had been "removed."

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Reports in Detail

United States

USTR Releases Results of 2008 Section 1377 Review of Telecommunications Trade Agreements

Summary

On April 8, 2008, the Office of the United States Trade Representative (USTR) released its annual Section 1377 Review of Telecommunications Trade Agreements. The review focused on four areas: (i) issues related to regulatory independence and transparency; (ii) high mobile termination rates; (iii) barriers to the provision of Voice over Internet Protocol (VoIP) technology; and (iv) excessive market entry requirements. USTR discussed problems surrounding each of these issues for several US trading partners. We review below USTR's findings.

The full report is available at: http://www.ustr.gov/assets/Trade_Sectors/Telecom-E-commerce/Section_1377/asset_upload_file386_14697.pdf.

Analysis

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, USTR conducts an annual review of the operation and effectiveness of US telecommunications trade agreements. USTR released its latest Section 1377 Review of Telecommunications Trade Agreements on April 8, 2008. The report is based on public comments filed by interested parties and on information developed in ongoing contacts with industry and private sector representatives in various countries. The review focused on four areas: (i) issues related to regulatory independence and transparency; (ii) high mobile termination rates; (iii) barriers to the provision of VoIP technology; and (iv) excessive market entry requirements. The review also highlights country-specific issues for Australia, China, El Salvador, Germany, Guatemala, Jamaica, Mexico, Oman, and Singapore, and commends Colombia and India for improvements to their telecommunications sector.

I. General Issues

The report focuses on several general issues and trade-related barriers impeding US telecommunication provider access to certain foreign markets:

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A. **Concerns Regarding Regulatory Frameworks.** USTR reports that US providers continue to face problems in the regulatory frameworks of certain US trading partners. These problems include lack of transparency, the weakness of the telecommunications regulator and potential conflicts of interest resulting from government ownership in incumbent operators.

- **Transparency.** The report lists several concerns from US companies regarding transparency, including: (i) lack of transparency in the development, implementation and dissemination of rules in China; (ii) lack of transparency from German regulator BNetzA, which "often publishes orders that have been heavily redacted . . . [and] hinder competitive carriers' understanding of the reasoning behind the regulator's decisions;" and (iii) concerns with IDA, Singapore's telecommunications regulator, and whether IDA decisions are subject to a transparent judicial review.
- **Regulatory Bodies.** According to the report, US companies remain concerned with several foreign telecommunications regulatory bodies, including: (i) the overlapping roles between Mexico's telecommunications regulatory body COFETEL and Mexico's Secretary of Communication and Transportation, which leads to delays in obtaining licenses; and (ii) the lack of effectiveness of the Peruvian telecommunications regulator OSIPTEL (OSPITEL has been operating without a complete Board of Directors since May 2007) and the consequent delays in regulatory proceedings.
- **Conflicts of Interest.** The report states that US companies have raised issues of preferential treatment of telecommunications operators in several countries, including: (i) Oman, where the chairman of the country's telecommunications regulator TRA is also the Deputy Minister for the Ministry of National Economy, and where the Minister of National Economy also serves as the Supervisor of the Ministry of Finance, which holds a 70 percent controlling stake in the country's incumbent operator Omantel (US companies are concerned that TRA may be slow in implementing market liberalization policies due to possible harm they will cause to Omantel's revenues); and (ii) India, where the Indian Space Research Organization (ISRO) exerts influence over the licensing process and prevents companies from contracting directly with foreign satellite operators, even though the Department of Telecommunications and the Ministry of Information and Broadcast act as licensing authorities for companies interested in utilizing foreign satellite capacity (US companies are concerned that ISRO plays an unofficial policy role and acts as a competitor to the foreign satellite operators, thus presenting "a serious conflict of interest that is likely to put foreign satellite operators at a competitive disadvantage and also limit the number of choices available to Indian telecommunications and broadcast companies in need of satellite capacity").

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B. **Concerns Regarding High Mobile Termination Rates.** According to the report, US operators remain concerned with high mobile termination rates in certain countries due to a lack of effective competitive pressures on these rates. The 1377 report states that "in some instances there has been a lack of effective regulatory intervention even where the regulators concluded that the rates for such interconnection are unreasonably high." USTR focused its comments on the amount of the current rate, and the lengthy glide path to lower rates that have been established by regulators in certain US trading partners, including:

- **Mexico.** The report states that US carriers are subject to a per‑minute surcharge of approximately USD 0.14 cents for international calls to wireless phones in Mexico. The report also states that it has become difficult for the Mexican telecom regulator COFETEL to resolve disputes about specific termination rates because its decisions are typically subjected to numerous court challenges. USTR will continue to work with Mexico to ensure that mobile termination surcharges are not higher than the rates the mobile operator charges its own retail customers for an equivalent termination service.
- **Peru.** According to the 2008 report, US operators are concerned with the long glide path over which mobile termination rates are scheduled to decline and the end rate envisaged in Peru. The report states that the glide path established by the Peruvian regulator OSIPTEL ends in December 2009 with a rate between USD 0.09 – USD 0.10 cents per minute, depending on the network. US operators have stated that these figures were based on 2004 costs and are now significantly overstated, based on the rates mobile operators offer their own retail customers. USTR encourages OSIPTEL to initiate a process to ensure a long‑term structure for reasonable rates.
- **New Zealand.** US operators are also concerned with respect to the long transition period (*i.e.*, five years) to reduce rates in New Zealand. US operators believe that mobile phone operators Telecom NZ and Vodafone to charge relatively high levels to terminate calls. The report notes that New Zealand's regulator, the Commerce Commission, had recommended adopting a regulation that would have established a methodology for determining cost‑based rates, but that the Ministry of Economic Development rejected this recommendation. Similar to Peru, USTR encourages New Zealand to follow through with its regulator's recommendations and proposed cost‑based pricing mechanism.

C. **Concerns with Barriers to the Provision of VoIP services.** USTR reports that it is concerned that several US trading partners are "stifling technologies that help promote innovative services" such as VoIP. VoIP service providers allege that they encounter

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difficulties in the provision of VoIP in countries such as China, India, Oman, and the United Arab Emirates (UAE). VoIP service providers also state that they have encountered market access barriers that "have the potential to stifle full utilization of the broadband infrastructure being deployed around the world," including barriers such as restrictions on the type of VoIP permitted in a country, difficulties in obtaining basic telecommunications licenses, and telecommunications service providers that have blocked access to websites that enable VoIP.

D. **Concerns with Conformity Assessment Requirements.** According to the report, "US industry continues to identify conformity assessment procedures relating to telecommunications and information technology (IT) equipment as a significant barrier to trade, focusing in particular on electromagnetic compatibility (EMC) and electrical safety testing and certification." The report states that mandatory certification requirements maintained by China, Mexico, and Brazil (especially for EMC), and requirements maintained by China, Thailand, and Malaysia that equipment be tested domestically, remain problematic for US operators.

II. Specific Issues

The 2008 report also focuses on specific US trading partners and barriers to US telecommunication providers in those markets:

A. **Australia.** According to the report, "for competitive suppliers that are dependent on the network of Telstra (Australia's major supplier) to serve their own customers, Telstra's longstanding efforts to resist network access obligations through legal challenges to the regulator and political pressure on the government continues to create an environment of legal and financial uncertainty." The report states that competitors do not have the ability to install their equipment in individual switching centers operated by Telstra exchanges. Other challenges include pricing of leased network elements and Telstra's broad‑based constitutional challenge to the regulator's ability to impose almost any access obligation. USTR encourages transparency in Australia's telecommunications market.

B. **China.** The report states that barriers to market access remain problematic in China. According to the report, US operators remain concerned with China's capitalization requirements (which appear excessive), China's unwritten policy that only existing telecommunications licensees in China are eligible to serve as joint venture partners for

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foreign companies and rules governing the provision of satellite capacity in China (*i.e.*, foreign satellite operators are generally prohibited from signing contracts directly with Chinese telecommunications companies and must first sell the satellite capacity to a domestic satellite operator who then resells it to telecommunications or broadcast companies in China). The report states that "the fact that the Chinese government owns and controls all major basic service operators in the telecommunications sector and plays an active role in managing the industry's structure continues to raise serious questions about the ability of the regulator to act impartially."

C. **El Salvador.** The report states that a US company with a controlling interest in a Salvadoran telecommunications operator has informed USTR that El Salvador's incumbent operator CTE has prevented this operator from expanding its service by restricting the number of circuits it can lease to terminate calls on CTE's network. According to USTR, CTE's ability to block regulatory action raises questions about how El Salvador will be able to ensure that its major supplier provides interconnection to other telecommunications service suppliers in accordance with its obligations under the Telecommunications Chapter of the Dominican Republic – Central America Free Trade Agreement (CAFTA - DR).

D. **Germany.** According to the 2008 report, US operators remain concerned with delays in obtaining access to wholesale product offerings from Germany's major supplier, DTAG. Commenters for the 2008 report referenced long delays in obtaining Internet Protocol (IP) Bitstream and Asyncronous Transfer Mode (ATM) Bitstream access to DTAG's network, largely because of "time consuming negotiations either between DTAG and the German regulator BNetzA (in the case of IP Bitstream access), or DTAG and the competitive carriers (in the case of ATM Bitstream access)."

E. **Guatemala.** The report states that the incumbent operator in Guatemala, Telgua, preemptively cut off 20 percent of the interconnection capacity circuits of another Guatemalan telecommunications operator on October 7, 2006 due to a dispute between that company and Telgua. USTR encourages the Guatemalan authorities to address the issue of the circuit suspensions in a manner consistent with Guatemala's obligations under the CAFTA - DR as well as introduce measures to prevent the recurrence of such disputes, including ensuring that Telgua's interconnection agreements are predicated on cost-based rates.

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F. **Jamaica.** Similar to the 2007 report, USTR remains concerned that a surcharge levied beginning in May 2005 on incoming international calls to fund Jamaica's universal service fund is burdensome for US carriers. USTR encourages Jamaica to find a means to fund the program in a more equitable manner and eliminate the surcharge on incoming international calls.

G. **Mexico.** According to the report, USTR is concerned about Mexico's continued deferral of the implementation of the Inter‑American Telecommunications Commission (CITEL) Mutual Recognition Agreement (MRA) for conformity assessment of telecommunications equipment vis‑à‑vis the United States. The report states that Mexico requires (as of 2005) that all telecommunications equipment that connects to a public telecommunications network in Mexico be tested, and that this required testing "is shouldering unnecessary cost and delay [for US operators] by having them send equipment to Mexico for testing before they can begin to export." USTR believes that implementing the MRA would avoid such burdens.

H. **Oman.** The report states that although Oman made commitments at the World Trade Organization (WTO) to liberalize its telecommunications market by January 2004, it has not yet licensed any operators to compete with its "de facto monopoly" fixed‑line operator, Omantel. US operators are also concerned that Oman does not permit the utilization of VoIP technology, despite undertaking market access commitments at the WTO covering voice services on a technologically neutral basis.

I. **Singapore.** US operators have reported that Singapore's decision to allow its major supplier, SingTel, to deny access to leased lines at aggregation points (which competitors use to provide services to their customers) is problematic. The report also states that SingTel has announced "vague plans" to close many of its local exchanges, a move that US operators see as problematic because it places "competitors in the position of having to invest in facilities that would soon become unusable if SingTel closes the local exchange." According to the report, "the lack of clarity on the closures seriously hinders competitive carriers' ability to plan any network expansion or recover investment in facilities built out to exchanges subsequently closed." USTR encourages SingTel to provide a full list of exchanges it plans to close.

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III. Areas of Progress

The 2008 report also lists areas of progress in Colombia and India:

A. **Colombia.** According to the report, a positive development is Colombia's elimination in July 2007 of a one‐time USD 150 million fee to obtain a license to provide international long distance services. The report states that the one – time fee acted as a barrier to market entry, but that with its elimination, companies are now able to obtain a convergent license, which allows them to provide a variety of services under one license.

B. **India.** The report states that in the 2007 1377 review, USTR commented favorably on the Telecommunications Regulatory Authority of India's (TRAI) efforts to reduce its access deficit charge (ADC), which cross‐subsidizes local telecommunications service with revenue generated by long distance calls. According to the 2008 report, TRAI will completely eliminate the ADC on September 1, 2008.

Outlook

According to USTR Susan Schwab, "open and competitive telecommunications markets are an important element of US trade policy [and] barriers that impede US telecommunications operators and equipment manufacturers from effectively competing abroad ultimately hurt the global economy by slowing down innovation, deterring investment, and stifling development." With the release of the 2008 1377 Review, USTR has managed to identify those practices that it deems interfere with US telecommunications operators' ability to work in foreign markets. As such, USTR will focus on modifying or eliminating these barriers over the next year.

Similar to last year's Section 1377 Review, the breadth of issues highlighted for 2008 is still narrow in scope and the number of countries singled out for specific attention has not diminished. Areas of concern that remain persistent include excessive regulatory requirements and licensing fees and burdensome testing and certification requirements, as well as burdensome or limited licensing procedures. Also similar to last year's report is the increased attention on China and its various practices, a move that corresponds with USTR's more aggressive and direct stance against China.

Two additional considerations warrant mention. First, while there are certain countries about which USTR has had ongoing concerns over the past several years, some of the countries highlighted in the current report are countries that have traditionally been very open in terms of their market access practices – *i.e.*, Australia and New Zealand. This development is of some concern in that it shows that restrictive

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practices can be found even in the most progressive of settings. Second, the sophistication of certain of the practices is continuing to increase, signaling that trade barriers need not be blatant in order to have a potentially dampening effect on free trade.

USTR Releases 2008 "Special 301" Report on IPR Enforcement: China, Russia Again Top List of IPR Infringers

Summary

On April 25, 2008, the Office of the United States Trade Representative (USTR) released its "Special 301" annual report on the adequacy and effectiveness of US trading partners' intellectual property rights (IPR) protections. The report identifies governments that "need to take stronger actions to combat piracy and counterfeiting." We review here the main aspects of the "Special 301" annual report.

The 2008 "Special 301" annual report can be found at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2008/2008_Special_301_Report/asset_upload_file553_14869.pdf.

Analysis

On April 25, 2008, USTR released its "Special 301" annual report on the adequacy and effectiveness of US trading partners' IPR protections. The report identifies governments that "need to take stronger actions to combat piracy and counterfeiting." China and Russia's IPR enforcement and monitoring feature prominently throughout the report, as they did in the 2006 and 2007 "Special 301" reports.

I. Background

Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994) ("Special 301"), USTR must annually identify those countries that deny adequate and effective IPR protections. According to the report, "countries that have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact on the relevant US products" are designated as "Priority Foreign Countries." Priority Foreign Countries are potentially subject to an investigation under the Section 301 provisions of the Trade Act of 1974, under which the United States may impose trade sanctions against foreign countries that maintain acts, policies and practices that violate, or deny US rights or benefits under, trade agreements, or are unjustifiable, unreasonable or discriminatory and burden or restrict US commerce.

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As part of its Special 301 duties, USTR has created a "Priority Watch List" and "Watch List." Placement of a trading partner on either list indicates that particular IPR-related problems – including protection, enforcement and market access – exist in that country. Countries that have been placed on the Priority Watch List are "the focus of increased bilateral attention concerning the problem areas." Additionally, under Section 306, USTR monitors a country's compliance with bilateral intellectual property agreements that are the basis for resolving an investigation under Section 301. USTR may apply sanctions if a country fails to "satisfactorily" implement an agreement.

II. 2008 "Special 301" Report

The 2008 Special 301 annual review examines the adequacy and effectiveness of IPR protection by US trading partners. USTR listed 46 countries on the 2008 report's Priority Watch List, Watch List or Section 306 Monitoring list, an increase from the 43 countries included in the 2007 Special 301 report:

- There are nine countries on 2008's Priority Watch List: China, Russia, Argentina, Chile, India, Israel, Pakistan, Thailand, and Venezuela;
- USTR included 36 trading partners on its Watch List[1]; and
- Paraguay will continue to be subject to Section 306 monitoring under a bilateral Memorandum of Understanding (MoU) that establishes objectives and actions for addressing IPR concerns in that country.

A. Positive Progress

USTR notes that there has been "significant positive progress on IPR protection and enforcement in several countries in 2007." For example, the report states that Russia increased penalties for copyright crimes and strengthened action against unlicensed optical disc plants. China has also made progress in the form of implemented measures to reduce end-user software piracy and strengthen enforcement against company name misuse.

In the 2008 report, USTR improved the "Special 301" status of certain countries or removed them from the Priority Watch and Watch Lists because of progress on IPR issues in 2007. USTR has removed **Belize** and **Lithuania** from the Watch list due to improvements in IPR enforcement efforts. USTR has

[1] The 36 Watch List countries include: Algeria, Belarus, Bolivia, Brazil, Canada, Colombia, Costa Rica, Czech Republic, Dominican Republic, Ecuador, Egypt, Greece, Guatemala, Hungary, Indonesia, Italy, Jamaica, Kuwait, Lebanon, Malaysia, Mexico, Norway, Peru, Philippines, Poland, Republic of Korea, Romania, Saudi Arabia, Spain, Taiwan, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.

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also moved **Egypt, Lebanon, Turkey,** and **Ukraine** from the Priority Watch List to the Watch List due to improvements in IPR enforcement efforts.

B. USTR IPR Initiatives

In the 2008 report, USTR highlighted several of its IPR-related initiatives, including:

1. Free Trade Agreements (FTAs)

The report states that the United States is committed to promoting strong IPR through the negotiation of FTAs, which contain IP chapters that establish protections for copyrights, patents, and trademarks, as well as rules for enforcement. The report also notes that the United States has used an increasing number of Trade and Investment Framework Agreement (TIFA) negotiations to enhance IPR protection and enforcement.

2. Generalized System of Preferences (GSP) Reviews

According to USTR, GSP reviews serve as another mechanism for promoting strong IPR among US trading partners. The report notes that USTR will continue to review IPR practices in Russia, Lebanon, and Uzbekistan under ongoing GSP reviews.

3. Anti-Counterfeiting Trade Agreement (ACTA)

USTR also noted in the 2008 report that its ACTA initiative – announced in October 2007- will serve to “bring together countries that recognize the critical importance of strong IPR enforcement for a prosperous economy.” USTR will continue to work on the ACTA in order to raise the international standard for IPR enforcement.

4. STOP! Initiative

The report notes that USTR is “actively engaged” in implementing the Bush Administration’s Strategy Targeting Organized Piracy (STOP!) initiative. President Bush announced the initiative in October 2004 in an effort “to bring together the federal government, private sector and trade partners to take concerted action in cracking down on piracy and counterfeiting.” As part of this effort, USTR plans to introduce new initiatives to “improve the global intellectual property environment that will aid in disrupting the operations of pirates and counterfeiters,” including the US-EU Action Strategy for IPR Enforcement, initiatives under the Security and Prosperity Partnership of North America (SPP) Intellectual Property Working Group and the Anti-Counterfeiting and Piracy Initiative with the Asia Pacific Economic Cooperation (APEC).

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C. Priority Watch List Country: China

USTR states that China will remain on its Priority Watch List and remain subject to Section 306 monitoring in 2008. USTR recognizes the Chinese government's efforts to protecting IPR but notes that "in spite of these efforts, the shared goal of significantly reducing IPR infringement throughout China has not yet been achieved."

USTR notes that China has made some IP progress over the past year. According to the report, notable IPR improvements include: (i) completion of China's accession to the World Intellectual Property Organization (WIPO) Internet Treaties; (ii) China's ongoing implementation of rules that require computers to be pre-installed with licensed operating system software; (iii) enforcement efforts against counterfeit textbooks and teaching materials; (iv) joint enforcement raids conducted by US and Chinese security agencies; and (v) China's openness to discuss IPR enforcement through the US – China Strategic Economic Dialogue (SED), the Joint Commission on Commerce and Trade (JCCT) and other fora.

The report, however, still finds that piracy and counterfeiting in China remained unacceptably high in 2007. US copyright industries estimate that 85-95 percent of all of their members' copyrighted works sold in China was pirated. USTR also reports that internet piracy is increasing, as is trade in pirated optical discs. US companies have also complained of piracy of books and journals, and end-user piracy of business software.

USTR believes that inadequate IPR enforcement is the key factor that contributes to China's increased piracy and counterfeit rates. According to the report, Chinese IP enforcement efforts are weak because of poor coordination among Chinese government ministries and agencies, corruption, high thresholds for initiating investigations and prosecuting criminal cases, lack of training, and inadequate and non-transparent processes. USTR also notes that "China's chronic underutilization of deterrent criminal remedies" and administrative fines that are too low to provide a deterrent continue to prove unsuccessful in addressing IPR violations. In addition, the report states that China maintains market access barriers (*e.g.*, import restrictions and restrictions on wholesale and retail distribution) that in turn discourage and delay the introduction of a number of legitimate foreign products into China's market, thus driving consumers to seek cheaper, pirated copies of movies, video games, and books in the black market.

The 2008 report lists several cities and provinces in China where, according to USTR, the most egregious IPR violations exist. These include:

- Beijing City;

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- Fujian Province;
- Guangdong Province;
- Jiangsu Province;
- Shanghai City; and
- Zhejiang Province.

The report notes that in response to IPR problems in these cities and provinces, China has established a working group on IPR, adopted action plans and opened several IPR complaint centers. The government has also provided greater access to information regarding regional IPR protection and enforcement activities. The United States commends these initiatives and encourages more similar IPR enforcement initiatives. Nonetheless, the report notes that the persistent IPR violations in China require USTR and other US agencies to maintain a close watch on China's IPR enforcement.

D. Priority Watch List Country: Russia

Russia remains on USTR's Priority Watch List in 2008. According to the report, US business remain concerned with piracy and counterfeiting in Russia, with US copyright industries estimating a loss in excess of USD 1.4 billion in 2007 due to piracy and counterfeiting. The report also notes that optical disc production capacity in 2007 catered to both domestic consumption and export. USTR attributes these violations to Russia's weak enforcement against piracy and counterfeiting. According to USTR, "prosecutions and adjudications of IP cases remain sporadic and inadequate; there is also a lack of transparency and a failure by courts to impose deterrent penalties for IPR violators."

The report notes that Russia has committed to fight optical disc and Internet piracy, protect against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, deter piracy and counterfeiting through criminal penalties, strengthen border enforcement, and bring Russian laws into compliance with World Trade Organization (WTO) and international IPR norms. In addition, the United States will continue to work with Russia on the enforcement of IPR and Russia's compliance with its bilateral obligations through the "United States – Russia Bilateral Working Group on Intellectual Property Rights." USTR is also reviewing Russia's status as a beneficiary under the GSP Program.

E. Other Priority Watch List Countries

USTR also placed seven other countries on its 2008 Priority Watch List. We highlight USTR's assessment of several of these countries' IPR regimes below:

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- **Argentina**. The report states that although Argentina has made some positive steps to improve IPR enforcement, copyright piracy remains problematic. USTR attributes this largely to ineffective civil damages and an Argentine judiciary reluctant to impose deterrent-level penalties. The report also notes that Argentina still does not provide adequate protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products.
- **Chile.** According to USTR, "Chile's IPR performance continues to fall well below expectations for a US free trade agreement partner." The report states that inadequate protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical products, and insufficient coordination between Chile's health and patent authorities to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products are problematic for US companies. The United States also remains concerned about continued copyright piracy and trademark counterfeiting. The United States encourages the Chilean Congress to approve legislation that would implement various regulations and provisions regarding Internet service provider liability, limitations and exceptions to copyright protection, and enforcement and penalties against copyright infringement.
- **India.** USTR remains concerned about inadequate IPR protection and enforcement in India. The report states that piracy and trademark counterfeiting, including of pharmaceuticals and distilled spirits, remain problematic for US businesses. USTR continues to urge India to improve its IPR regime by providing stronger protection for copyrights, trademarks and patents. The United States also encourages India to implement the WIPO Internet Treaties and to improve its IPR enforcement system by enacting and implementing an effective optical disc licensing scheme to combat optical disc piracy.
- **Thailand.** USTR will maintain Thailand on its Priority Watch List in 2008. In its report, USTR notes piracy and counterfeiting rates in Thailand remained high in 2007. US industries have complained of optical disc piracy, large-scale organized book piracy, cable and signal theft, and entertainment and business software piracy. USTR urges Thailand to take additional actions to strengthen IPR enforcement, including continuous and sustained enforcement actions that get to the source of the infringing activity and the issuance of deterrent penalties to IPR infringers. USTR also encourages greater interagency coordination. Regarding Thailand's recent policies and actions regarding the compulsory licensing of patented medicines, the report states that these actions "have contributed to continuing concerns regarding the adequate and effective protection of IPR in Thailand."

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F. Watch List Countries

USTR placed 36 countries on its 2008 Watch List. We highlight USTR's assessment of several of these countries' IPR regimes below:

- **Brazil.** Brazil remains on the Watch List in 2008 even after USTR lowered Brazil from its Priority Watch List to its Watch List in 2007. In its report, USTR notes that Brazil has strengthened its IPR enforcement, but that book and Internet piracy remain problematic for US companies. The United States encourages Brazil to consider acceding to and implementing the WIPO Internet Treaties.

- **Canada.** According to USTR, Canada has made progress in effective IPR enforcement, especially in Canada's issuance of measures in 2007 to criminalize camcording of copyrighted films in movie theaters. The report, however, lists ongoing serious concerns, including Canada's failure to accede to and implement the WIPO Internet Treaties, and Canada's failure to address the growing volume of infringing products transshipped and transiting through Canada, in large part attributed to weak border measures.

- **Colombia.** Although the United States and Colombia have completed an FTA, Colombia will remain on the Watch List in 2008. USTR commends Colombia for its actions to combat IPR violations and for increasing sentences for copyright infringement in 2007. Nonetheless, the report states that that "further IPR improvements are needed, including efficient prosecutions of IP infringers, issuance of deterrent-level criminal sentences by courts, and stronger IPR border enforcement." The United States will continue to monitor Colombia's IPR enforcement and will work with Colombia to achieve progress on these IPR issues through the implementation of its IPR commitments under the US-Colombia FTA.

- **Indonesia.** According to the report, Indonesia will remain on the Watch List in 2008. The report states that Indonesia took some positive steps toward combating piracy and counterfeiting in 2007. However, according to USTR, "there has been little improvement in Indonesia's IPR climate, nor any signs that the government is taking significant steps to address the weaknesses in its system." For example, according to US pharmaceutical industry estimates, approximately 25 percent of drugs in Indonesia are counterfeit. The United States encourages Indonesia to improve its IPR protection and enforcement regimes vis-à-vis better interagency coordination and increased bilateral dialogue and initiatives with the United States and other trading partners.

- **Malaysia.** USTR will maintain Malaysia on its Watch List in 2008 even though Malaysia has strengthened some aspects of its IPR protection and enforcement through several initiatives, such as

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the establishment of a specialized IP court, which began to adjudicate IPR cases in 2007. The United States urges Malaysia to continue its IPR enforcement efforts, to accede to and fully implement the WIPO Internet Treaties, and to provide effective protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products.

- **Mexico.** Mexico will remain on the Watch List in 2008. According to USTR, overall IPR enforcement efforts remained weak in Mexico in 2007, even though there were some improvements. USTR believes that Mexico must "continue to build a consistent record of aggressive prosecutions and deterrent-level penalties imposed by courts" and improve domestic cooperation efforts between federal, state, and local enforcement authorities in order to address IPR violations effectively. The United States also encourages Mexico to implement fully the WIPO Internet Treaties, and provide adequate protection against unfair commercial use for test or other data generated to obtain marketing approval for pharmaceutical products, as well as improve coordination between its health and patent authorities to prevent the issuance of marketing approvals for unauthorized copies of patented pharmaceutical products.

- **Peru.** USTR will maintain Peru on its Watch List in 2008. USTR remains concerned with high piracy levels, inadequate protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products, and inadequate protection for patents, copyrights and trademarks. The United States encourages Peru to conduct more raids and seizures and ensure that arrests of IPR infringers result in convictions and the imposition of deterrent-level sentences that include imprisonment. USTR notes that the United States will work closely with Peru to ensure implementation of Peru's IPR commitments under the recently signed US-Peru FTA.

- **Saudi Arabia.** According to USTR, Saudi Arabia will remain on the Watch List in 2008. The report notes that Saudi Arabia has made some progress in IPR enforcement (*e.g.*, an increased number of IPR raids, numerous cases by the copyright enforcement Violations Review Committee), but that further IPR improvements are needed, including continuing sustained raids and inspections to combat piracy and counterfeiting, encouraging courts to impose deterrent-level sentences and improving border enforcement. Nonetheless, the United States recognizes that Saudi Arabia is increasing transparency of its copyright enforcement administrative processes and has agreed to establish a United States – Saudi Arabia IPR Working Group. USTR will work closely with Saudi Arabia to address the outstanding IPR issues through this IPR Working Group and the US-Saudi Arabia TIFA.

- **South Korea.** USTR will maintain Korea on the Watch List in 2008 even though the United States and Korea have completed the US-Korea FTA. USTR notes that Korea has strengthened its IPR

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enforcement in the areas of patents, trademarks, copyrights, and protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products. The United States urges Korea to adhere to the IPR commitments it agreed to under the US-Korea FTA.

- **Vietnam.** USTR will maintain Vietnam on its Watch List in 2008, even though USTR acknowledges that Vietnam made progress in 2007 by continuing to build its legal framework for IP protection, strengthening enforcement capacity and improving interagency coordination. USTR remains concerned with weaknesses with respect to Vietnam's criminal regime, administrative regime, and its border enforcement regime. USTR also notes that "there is a lack of enforcement against Internet piracy and optical media containing unauthorized content." USTR urges Vietnam to address weaknesses in its criminal law relating to trademark infringement and copyright piracy.

Outlook

Addressing weak IPR protection and enforcement, particularly in China and Russia, continues to be one of the Bush Administration's top priorities, as made evident in the 2008 Special 301 report. Of all the IPR regime assessments included in the 2008 Special 301 report, USTR's assessment of China's regime was the longest and the most comprehensive, similar to the China assessments in the 2006 and 2007 Special 301 reports. USTR's assessment of Russia – though not nearly as long as that of China – was also more comprehensive than the assessments of the other US trading partners on the Priority Watch and Watch Lists. Although the 2008 Special 301 Report shows positive progress in many countries in 2007, it still includes numerous counterfeiting and piracy problems that USTR believes indicate a critical need for stronger intellectual property protection in several countries, notably China and Russia. Thus, it seems likely that USTR will focus much of its attention on China and Russia's IPR efforts over the next year.

Of particular note is the increased number of IPR related initiatives USTR included in the 2008 report, including USTR's commitment to promote strong IPR through the negotiation of FTAs and TIFAs. That – combined with GSP reviews (as noted, USTR will continue to review IPR practices in Russia, Lebanon, and Uzbekistan under ongoing GSP reviews) and the ACTA initiative – show that the Bush Administration is ready to use all the tools it has at its disposal to encourage stronger IPR regimes from its trading partners.

As in the 2007 Special 301 report, this year's report places special emphasis on IPR violations related to pharmaceutical products, especially problems associated with inadequate protection against unfair commercial use of undisclosed test or other data generated to obtain marketing approval for

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pharmaceutical products. This likely shows that the US pharmaceutical lobby has not pulled back from its increased efforts to outline its concerns in the Special 301 report, similar to the pharmaceutical lobby's efforts for inclusion of its concerns in the 2006 and 2007 reports.

ITC Issues Report on Selected Government Practices and Policies Affecting China's Economic Decision Making

Summary

The United States International Trade Commission (ITC) recently issued a report that provides an overview of specific measures that the Chinese government has taken to influence economic decision making in the manufacturing, agricultural and services sectors. The report is the first of three that Congress has requested the ITC prepare to examine specific elements of the US-China bilateral economic relationship. It describes how the Chinese government utilizes policy measures in four key areas to achieve a broad range of economic and industrial development policy goals, and discusses how these goals have developed during recent years. The report concludes that although government involvement in the economy continues through specific policy measures, the degree of this involvement varies from sector to sector and has declined over time. The ITC is expected to release the two follow-up reports—one to comprehensively catalogue and quantify government interventions and policies, and another to consider US trade and investment flows to China and the Asian region overall—in mid-2008 and early 2009.

Analysis

On April 4, 2008, the ITC released *China: Description of Selected Government Practices and Policies Affecting Decision Making in the Economy* ("the Report").[2] The Report is the first of three that the ITC will issue as part of September 2006 and May 2007[3] requests by the House Ways and Means Committee to conduct three separate fact finding investigations on specific elements of the US-Chinese bilateral

[2] International Trade Commission. "China: Description of Selected Government Practices and Policies Affecting Decision-Making in the Economy." Investigation No. 332-492, USITC Publication 3978, December 2007. The full text of the report is available on the ITC website at: http://hotdocs.usitc.gov/docs/pubs/332/pub3978.pdf

[3] The Ways and Means Committee submitted its first request to the ITC on September 21, 2006 and augmented the request on May 23, 2007 by adding two additional components to the ITCs fact-finding investigations under the original request. Additional components under the second request included an identification of the causes of the US-China trade "imbalance" and an assessment as to what extent the Chinese government utilizes market intervention to promote investment, employment and exports.

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economic relationship. According to the May 2007 request, the three investigations and accompanying reports should:

(i) identify practices and policies that central, provincial, and local government bodies use to support and attempt to influence decision making in China's manufacturing, agricultural and services sectors, and by individual firms;

(ii) comprehensively catalogue and where possible, quantify such government policies and interventions; and

(iii) describe changes in US-Asia trade and investment flows and assess how global trends in production and investment contribute to the US trade balance with China.

The Committee issued its requests to the ITC under section 332(g) of the Tariff Act of 1930, which requires the ITC to make available to the President or Congress "all information at its disposal" and to make investigations or reports upon request.[4] The ITC submitted the Report to Congress on December 7, 2007, and will submit the remaining two reports in July 2008 and February 2009.

As per the Committee's request, the Report identifies Chinese government practices and policies in four areas: (i) industrial development, rationalization and private ownership; (ii) price coordination, utility rates and taxation; (iii) banking and finance, infrastructure development, research and development, and worker training and retraining; and (iv) restraints on imports and exports. The Report describes how the Chinese government utilizes policy measures in these areas to achieve a broad range of economic and industrial development policy goals. It also notes, however, that these goals and the corresponding policies have changed as China's economy has developed in recent years. Recent trends include: discouragement of environmentally unfriendly or inefficient technologies and production techniques; privatization or rationalization of state-owned enterprises (SOEs) to eliminate excess production capacity and improve efficiency; limitations on imported technology and the encouragement of domestically-developed innovation; and a more even geographic distribution of the country's overall economic development. The Report concludes that although government involvement in the economy continues through such policies, the degree of this involvement varies from sector to sector, and that the above trends suggest less overall government involvement in the economy.

We summarize below key measures in each of the four areas requested by the Committee.

I. **Industrial development, rationalization, and private ownership.** The Report describes a number of key industrial development policies that target specific industries.

[4] 19 U.S.C. 1332(g).

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These policies include the classification of industries the State Council considers to be "encouraged," "restricted," or "to be eliminated," the provision or rescission of preferential tax, tariff and other measures, research and development (R&D) policies to promote domestic innovation, and state guidance of credit and foreign investment along similar guidelines.[5] Other policies identified in the report attempt to foster development in specific geographic regions, such as Western China. The Report also describes the government's role in the privatization and rationalization (*i.e.*, eliminating inefficient or unprofitable enterprises) of the state-owned sector and the liberalization of the non-state sector. The State-Owned Asset Supervision and Administration Commission (SASAC) coordinates rationalization policies for SOEs by exercising the government's power of ownership and rights as principal investor in SOEs. SASAC encourages solvent SOEs to undertake privatization through listings on domestic stock exchanges and oversees bankruptcy and closure for insolvent SOEs. In a December 2006 directive to the State Council, SASAC also identified "strategic," "pillar," and other industries in which the government should maintain ownership of varying degrees. Strategic industries include armaments, power generation and distribution, oil and petrochemicals, telecommunication, coal, civil aviation, and shipping; the government will maintain at least 50 percent equity in all firms within these industry groups. The government will also maintain at least 50 percent equity in principal enterprises in pillar industries such as machinery, automobiles, information technology, construction, steel, base metals, and chemicals, among others.

II. **Price coordination, utility rates, and taxation.** The Report notes that the National Development and Reform Commission (NDRC) monitors and sets price controls for a number of key products and services. It describes price control policies for agricultural goods and related commodities, medical and pharmaceutical products, energy, and real estate (the cost of land-use rights). The Report also categorizes state controls on utility rates for electricity, natural gas and water on a provincial and end-user basis. It notes that although the government has begun to eliminate preferential rates for specific industries, US enterprises allege that industries such as steel, copper and brass continue

[5] "Encouraged" industries include those that generate domestic research and development, have the potential for export demand growth, are technology intensive, and meet the government's requirements for environmentally sustainable development.

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to receive electricity at artificially low rates or at no cost. Further, domestic and US industries report difficulties in securing a sufficient and uninterrupted supply of electricity, and the Report cites instances of local government officials ensuring such supplies to "favored" industries during shortages. The Report does not mention specific industries. Regarding China's tax regime, the Report details policies related to the government's application of a value added tax (VAT) on goods, a business tax on services, and the enterprise income tax (EIT) on businesses. It notes the government's use of VAT refund adjustments to discourage exports of energy-intensive, high-polluting, or low-tech goods such as construction materials, metals and minerals, chemicals, textiles and garments, and electrical and mechanical appliances. The Report also notes that the government uses VAT tax adjustments to encourage foreign invested enterprises' (FIEs) use of domestically-manufactured equipment in "encouraged" investment sectors and in other sectors such as transportation, real estate, and offshore oil contracting services. The government's enactment of a revised EIT law on January 1, 2008 will eliminate gradually a number of preferential tax policies, such as lower EIT rates for FIEs; however, it contains provisions that will continue to grant preferential rates to certain types of enterprises, such as those engaged in the development of high-technology products.

III. **Banking and finance, infrastructure development, research and development, and worker training and retraining.** The Report notes that the government maintains a "pervasive" role in the banking system through its ownership of five large commercial banks, which control 55 percent of China's total banking assets and deposits. The government also owns three state policy banks that direct lending to support government economic initiatives. According to the Report, Chinese banks also regularly direct lending to SOEs, and such loans are often made at favorable interest rates to specific industries. (The Report does not identify these industries.) The Report notes, however, that Chinese government officials deny that such indicative lending continues to occur. Regarding interest rates, the Report states that because state banks lack the ability to conduct risk-analysis on potential borrowers, their interest rates often equal the rates set by the central bank. This practice allows less-credit worthy SOEs to obtain loans at lower interest rates than would be possible under a market-based financial system in which banks would adjust rates based on a customer's creditworthiness. The government has also undertaken a number of policy measures to promote infrastructure development, with a specific focus on rural and economically underdeveloped regions. Under the "Go

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West" program, the government has granted tax incentives and other preferential treatment to foreign or domestic firms that invest in designated provinces and in specific sectors that improve the region's infrastructure development.

IV. **Restraints on imports and exports.** The Report identifies and categorizes a number of policy measures that the Chinese government has implemented to restrict imports and exports of specific products or services. Key import restrictions on goods include the imposition of tariffs and a VAT, the removal of preferential treatment for certain processing trade imports, quantitative restrictions such as import licensing and restrictions, and a number of non-tariff barriers such as non-transparent customs procedures, restrictions on imports of used equipment, and burdensome product certification requirements. The Report also notes that China's schedule of services concessions under the General Agreement on Trade in Services (GATS) excludes specific sectors and for a number of included sectors limits certain modes of operation or imposes other types of restrictions such as minimum capitalization requirements, equity ceilings, or mandatory joint-ventures. The government's key restrictions on goods exports include export taxes, quantitative restrictions such as export licensing requirements and quotas, and VAT rebate reductions or eliminations.

The Report also summarizes the views of five interested parties including representatives from US manufacturing and agricultural associations, law firms and academia.[6]

- The **American Iron and Steel Institute** (AISI) and the **Steel Manufacturers Association** (SMA) cited larger than reported government ownership in the steel industry and stated that such ownership creates difficulties in obtaining financial information on Chinese companies and in determining their profitability. The two organizations alleged that Chinese producers often are able to sell finished steel products for less than the cost of raw materials, while their financial statements show that they earned a profit. AISI and SMA also identified a number of specific policies and practices that the government uses to encourage steel production, including preferential loans and directed credit, equity infusions, free or cheap use of land, government-mandated mergers, and direct cash grants for certain projects.

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[6] Interested parties expressed these views during testimony before the ITC on September 2, 2007, or in written submissions. The five interested parties include: (i) Pieter P. Bottelier, School of Advanced International Studies, the Johns Hopkins University; (ii) the American Iron and Steel Institute (AISI) and the Steel Manufacturers Association (SMA); (iii) the Copper and Brass Fabricators Council; (iv) Dewey Ballantine; and (v) the National Electrical Manufacturers Association (NEMA).

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- The **Copper and Brass Fabricators Council** cited a 16.2 percent decline in US copper production from 2000 to 2006 and attributed this decline in part to the Chinese government's import substitution strategy for copper and brass. The Council cited a number of government policies to encourage copper and steel production including an undervalued currency, the encouragement of "pillar industries", loan forgiveness, land grants, and utilities subsides, among others.
- The **National Electrical Manufacturers Association** (NEMA) cited a number of concerns regarding Chinese product certification practices including, among others, costly, inconsistent and non-transparent procedures for obtaining a China Compulsory Certification (CCC) mark, redundant product testing requirements, and rejection of data from internationally recognized testing institutions.

The ITC will incorporate these views into its second Section 332 report detailing the effect of Chinese government policies on US trade in selected sectors. The report is scheduled for release in July 2008.

Outlook

The Report's release follows several months of waning Congressional interest in passing legislation that would target Chinese trade and economic practices that allegedly grant an unfair advantage to Chinese industry and products. A combination of factors led to what appears to have been a peak in such activity in late-2007. A softening of the US economy, due in part to the subprime mortgage crisis, and the resulting decline in the US dollar against other major currencies, including the Chinese Yuan, appears to have undercut much of the motivation behind Congressional proposals to force currency revaluation or impose tariffs on imports of Chinese goods. Progress in other areas of US economic policy towards China also undercut motivation to pass new legislation targeting Chinese trade practices. In late December 2007, the United States and China announced that they had reached an agreement to resolve a WTO complaint (DS358) that the United States filed in February 2007 on China's alleged use refunds, reductions and exemptions from taxes and other payments. In March 2007, the Office of the United States Trade Representative (USTR) filed its fifth WTO complaint against China in two years, and a WTO dispute Panel issued a final ruling that sided with the United States in a separate complaint on Chinese auto parts duties. Further, the Department of Commerce's (DOC) 2007 decision to allow the application of countervailing duties (CVDs) to non-market economies (NMEs) such as China weakened efforts to pass legislation that would codify this practice under US law. Accordingly, the number of CVD investigations that US industry has filed against Chinese products has increased substantially in recent

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months, and the ITC and DOC are in various stages of investigation on 11 Chinese products.[7] These developments have further supported the Bush Administration's assertion that it would seek WTO or domestic legal measures to address trade concerns with China where dialogue failed. Despite these developments, a number of Members of Congress appear committed to forcing the United States to take a tougher stance against China. On April 3, 2008, Sens. Jim Bunning (R-KY), Debbie Stabenow (D-MI) and Evan Bayh (D-IN) submitted the China Currency Manipulation Act of 2008 (S. 2813), which would seek to require the Secretary of the Treasury to designate China as a "currency manipulator" in the Treasury Department's Semiannual Report on International Economic and Exchange Rate Policies to Congress. On March 27, House Ways and Means Committee Chairman Charles Rangel (D-NY) and 14 of the 24 Democratic Members on the Ways and Means Committee sent a letter to President Bush to urge the Administration to adopt and implement a new strategy regarding China's alleged currency manipulation and other trade issues. The letter recommended that the Administration use international organizations such as the International Monetary Fund (IMF) and the WTO to address China's currency policy and engage other countries with a "strong interest in pressing China to end its currency manipulation." It also called for the Treasury Secretary to identify China as a currency manipulator. Although neither S. 2813 nor the proposals in the letter are likely to translate into official US policy, Congressional rhetoric against China likely will increase as the November 2008 Presidential and midterm elections approach. Indeed, both Democratic Presidential candidates have publicly criticized China's trade and currency practices on numerous occasions. Such criticisms resonate well with many American voters, whose unease about the consequences of a continued US economic slowdown has grown in recent months. Candidates in both elections are therefore likely to appeal to such unease by seeking external causes and blaming US trade and foreign economic policy for domestic economic conditions.

[7] Notably, the Report appears to identify a number of possible countervailable subsidies; however, it lacks specific details on a number of these subsidies. The ITC is likely to address such specifics in its second Section 332 report on Chinese Trade practices, which will "comprehensively catalogu[e] and where possible, quantif[y] government policies and interventions described in [the first report]." The second report will also include case studies on sectors in which US exports lack market penetration and on sectors that the ITC determines to be the main drivers of the US-China trade deficit.

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United States Highlights

Congress Approves Two-Week Extension for 2002 Farm Bill as Negotiators Work on Addressing Congressional, Administration Concerns with Latest Deal

On May 1, 2008, Congress approved a two-week extension of the 2002 Farm Bill in order to provide negotiators with additional time to finalize a Farm Bill deal between the Senate and the House of Representatives. The bill extends provisions of the 2002 Farm Bill until May 16, 2008. This is the fifth extension of the 2002 Farm Bill that Congress has passed since it began deliberating the Farm Bill in 2007. On July 27, 2007, the House of Representatives approved its Farm Bill Extension Act of 2007 (H.R. 2419) by a margin of 231 to 191. The Senate passed its Farm, Nutrition and Bioenergy Act of 2007 (H.R. 2419) on December 14, 2007 by a vote of 79 to 14. However, the majority of the 2002 Farm Bill's provisions expired on September 30, 2007, and in December 2007, Congress renewed provisions of the 2002 Farm Bill for an additional three months – until March 15, 2008 – in order to allow enough time for Senate and House negotiators to hammer out differences between the two versions of the Farm Bill. On March 12, 2008, the Senate and the House of Representatives passed a bill (S. 2745) that extended agricultural programs under the 2002 Farm Bill beyond March 15, 2008 (i.e., until April 18, 2008). Congress followed this extension with three more, the most recent (as noted) extending the 2002 Farm Bill until May 16, 2008.

The additional two-week extension comes on the heels of an April 25, 2008 agreement between lead Senate and House negotiators on a tentative final framework for the new Farm Bill. Farm Bill talks had stalled over proposed offsets that would allow additional new spending over the current 10-year USD 560 billion Farm Bill baseline. Senate and House negotiators differed over the amount of proposed offsets and the addition of some other provisions to the Farm Bill, including tax provisions supported by the Senate Finance Committee and a disaster-aid program supported by Senate Finance Committee Chairman Max Baucus (D-MT). Specifically, the Senate originally proposed spending an additional USD 12.5 billion (which includes a USD 2.5 billion package of tax credits and a USD 4 billion disaster program) over the Farm Bill's baseline. The House of Representatives originally proposed only USD 6 billion in additional spending above the baseline and objected to the inclusion of the tax credits in the final Farm Bill. Although the Farm Bill negotiators have not fully disclosed the complete details of the April 25 Farm Bill agreement (because the provisions of the deal will likely change over the next several weeks), Congressional sources report that negotiators finally agreed to additional spending totaling USD 10 billion over the Farm Bill's USD 560 billion baseline. Congressional sources note that a large portion of the USD

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10 billion in extra spending will be offset by extending customs user fees paid by importers. According to Congressional sources, conferees agreed to:

- provide USD 10.2 billion to nutrition program spending;
- provide USD 25 million for a four-year food aid pilot program that would allow the United States to buy food (used for food aid) locally in foreign countries that are aid beneficiaries;
- provide USD 150 million in extra spending to extend the Caribbean Basin Trade Partnership Act Trade (CBTPA) for two more years (CBTPA provisions expire on September 30, 2008);
- cut USD 400 million from direct payments to farmers;
- trim to USD 3.8 billion Chairman Baucus' proposed USD 4 billion disaster-aid fund; and
- trim to USD 1.4 billion the Senate's proposed USD 2.5. billion in tax credits to include in Farm Bill.

Congressional sources note that although a tentative deal has been reached, lead negotiators must still vet the agreement with members of Congress and the Administration as well as reconcile the tentative deal with any concerns from legislators and the Administration. In fact, the Bush Administration's reaction to the April 25 Farm Bill deal was negative. President Bush has opined that the tentative Farm Bill that Congressional conferees have completed is a "bloated [gift for] multimillionaire farmers" and does little to reduce consumer costs. Thus, even though conferees have reached a tentative Farm Bill agreement, negotiators must still address the Administration's concerns as well as those of legislators over the next two weeks in order to finalize a 2008 Farm Bill.

Even if members of Congress can finalize a Farm Bill by May 16, 2008, several more short-term extensions of the 2002 Farm Bill are likely required in order for conferees to formally complete negotiations, draft a final Farm Bill, present it to Congress, have legislators vote on the measure, and have the President sign the bill. Thus, the "logistical" details of a final Farm Bill will likely spur one or more short-term extensions of the 2002 Farm Bill beyond May 16, 2008. Add to this the Bush Administration's objection to the tentative Farm Bill, and the chances of final approval of the agriculture measure in the next two weeks stretches even further. Thus, even though it looks as if negotiators are finalizing a Farm Bill, the Bush Administration and others are likely to further debate provisions included in the final bill, making it even more uncertain when Congress and the President will finally complete the long-overdue Farm Bill.

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Democrats Urge President Bush for Stricter Enforcement of US Rights Under Trade Agreements

In a March 28, 2008 letter to President Bush, House Ways and Means Committee Chairman Charles Rangel (D-NY) and 13 Senior House Democrats called for stricter enforcement of US rights under trade agreements. The Members sent the letter in anticipation of the Office of the United States Trade Representative's (USTR) release of its annual National Trade Estimate (NTE) of Foreign Trade Barriers report. The letter states that the Administration should "move past merely inventorying [in the annual NTE report] the systemic, recurring trade barriers that US companies face" and that it should begin enforcing US rights more vigorously. According to the Democratic Members, stricter enforcement of trade laws would avoid further growth of the US trade deficit.

Specifically, the letter identifies existing trade barriers with several US trading partners and their impact on the US economy, including:

- **Currency manipulation.** The letter states that China's alleged currency manipulation and Japan's alleged currency intervention have exacerbated international financial instability and prevented international financial markets "from adjusting to actual underlying market-based fundamentals." On China, the Members recommend that the Administration: (i) initiate consultations under World Trade Organization (WTO) rules with China regarding its currency manipulation; (ii) label China a "currency manipulator" in the Department of Treasury's annual report; and (iii) urge the International Monetary Fund (IMF) to hold China accountable for currency manipulation. On Japan, the Members recommend that the Administration: (i) cite Japan for its currency intervention in Treasury's annual report; (ii) initiate consultations with Japan and attempt to resolve the issue of currency intervention; (iii) initiate WTO consultations with Japan if bilateral dialogue does not work; and (iv) file a WTO complaint if WTO consultations with Japan fail.
- **Barriers to US manufactured products.** According to the letter, several US trading partners have implemented barriers to US manufactured products, such as China and its manufacturing subsidies and standards regime, the EU's reclassification of several technology products so as to remove them from the US-EU Information Technology Agreement (ITA), and Japan and Korea's non-tariff barriers to US autos and auto parts, among others. The Democrats suggest that the Administration take a broad array of steps to address these different barriers, including initiating consultations with each of these trading partners to discuss barriers to market access, cataloging these market-access barriers and addressing them in bilateral and multilateral dialogues with each of these trading partners,

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seeking more market-opening agreements with these countries, and initiating WTO consultations and dispute settlement proceedings in the event that bilateral and multilateral consultations do not work.

- **Intellectual property rights.** The letter lists several US trading partners that the Democrats feel must improve their intellectual property rights (IPR) enforcement and monitoring. These countries include Canada because "its IPR laws and enforcement remain far behind most other developed countries," China because of increased piracy and counterfeiting rates, Mexico because of weak IPR protection, especially for US motion pictures and music, and Russia for its continued copyright piracy problems. The Democratic Members urge the Administration to request WTO consultations with each of these trading partners and initiate WTO dispute settlement proceedings if consultations fail, maintain or downgrade these countries' status on USTR's annual "Special 301" report on IPR regimes, and, in some cases, suspend a trading partner's eligibility for duty-free benefits under US preference programs and link restoration of benefits to an improvement of IPR enforcement.

- **Agriculture barriers.** The letter states that multiple US trading partners use WTO-inconsistent sanitary and phytosanitary (SPS) regulations to keep their markets closed to US agricultural exports. The Democratic Members call on the Administration to support "Special 301 for SPS" legislation in Congress that would "give USTR the tools to deal with a large number of discrete cases involving other countries' misuse of SPS regulations."

- **Services barriers.** On services, the Democratic Members point to China and trade barriers in services sectors, including financial services and insurance. The letter states that China has not fully implemented all its WTO accession commitments that guarantee an open services market. The Democratic Members urge the Administration to continue pressing China to meet its WTO commitments and engage it in bilateral negotiations. The letter also states that USTR should "keep all other options open and review progress" periodically.

- **Other barriers.** The letter also notes that regional trade agreements (RTAs) are increasing and "may not be in accordance with international rules." According to the Democratic Members, the number of RTAs has substantially increased over the past several years even though some of these RTAs may not be compliant with provisions of certain WTO agreements, including the General Agreement on Tariffs and Trade (GATT). The Democratic Members urge USTR to prepare a comprehensive assessment of significant RTAs and determine their compliance with WTO agreements, and work with the WTO to strengthen the notification and review system "to ensure that the relevant RTA provisions [of the GATT] will be enforced fully and effectively."

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The Democratic Members encourage the Administration to instruct USTR to "request immediate consultations" with key trading partners to resolve outstanding issues. According to the Democratic Members, "stronger enforcement of trade agreements and the preservation of US rights would help open additional foreign markets to US goods and services," and action in these areas could "help restore confidence and fight the growing perception that trade agreements are part of the problem, not the solution to expanding opportunity for American workers, farmers and businesses." The letter also noted recent action by the Administration to initiate disputes dealing with WTO violations by China and encourages similar action on remaining issues.

Like the March 27, 2008 letter to President Bush sent by Chairman Rangel and 14 Democratic Members on the Ways and Means Committee urging the Administration to adopt a new strategy regarding China's alleged currency manipulation and other trade issues, the March 28 letter on trade barriers by US trading partners may indicate a renewed interest from Democrats on US trade relations with other countries, and whether those trade linkages need to be re-examined. The letter certainly indicates that Members of Congress remain unsatisfied with the Administration's actions regarding each of the trade barrier issues raised in the letter. It seems likely that these Democrats would like to see more direct action by the Administration – vis-à-vis WTO consultations and dispute settlement proceedings – in addressing these problems.

The timing of the letter makes sense: USTR released its 2008 NTE report on March 28, and, as the letter clearly states, these Democrats are calling on the Administration to act on these issues as opposed to "cataloging" them in the NTE report. It is unclear if the letter will elicit an immediate response from the Administration, but it is unlikely that USTR will begin to address each of the trade barrier problems included in the letter through "immediate consultations" with US trading partners. Indeed, with the Bush Administration in its final year in office, it is unlikely that USTR will implement any kind of grand action plan at all to address the issues in the letter. Rather, USTR may offer assurances to Democratic Members that it is aware of the trade barrier problems included in the letter, and that it is continually working with US trading partners through bilateral and multilateral channels to address these issues. Democratic Members are unlikely to be satisfied with this kind of response in dealing with these problems if this is the approach the Bush Administration decides to take.

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Free Trade Agreements

USTR 2008 NTE on Foreign Trade Barriers: Middle Eastern Economies

Summary

On March 28, 2008, the Office of the United States Trade Representative (USTR) published the National Trade Estimate Report (NTE) on Foreign Trade Barriers, which surveys significant foreign trade barriers to US exports. The report addresses a wide array of issues and US government actions to combat foreign trade barriers.

We highlight here the NTE report's analysis of the trade practices of major Middle Eastern trading partners including Bahrain, Egypt, Jordan, Kuwait, Morocco, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (UAE).

Analysis

On March 28, 2008, USTR published the 2008 NTE Report on Foreign Trade Barriers. The report, required by the Omnibus Trade and Competitiveness Act of 1988, is an inventory of the most significant foreign barriers to US exports of goods and services, foreign direct investment (FDI) and protection of intellectual property rights (IPR).

The 2008 NTE report classifies into ten categories all government measures and policies that restrict, prevent, or impede the international exchange of goods and services, regardless of the measures' consistency with global trade rules. The categories of foreign trade barriers include:

- Import policies;
- Standards, testing, labeling, and certification;
- Government procurement;
- Export subsidies;
- Lack of intellectual property protection;
- Services barriers;
- Investment barriers;
- Anticompetitive practices with trade effects tolerated by foreign governments;
- Trade restrictions affecting electronic commerce; and

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- Other barriers (barriers that affect more than one category, e.g., bribery and corruption, or that affect a single industrial sector).

The 2008 NTE report examines the trade practices of the United States' 62 major trading partners.[8]

In May 2003, President George W. Bush proposed the creation of a US – Middle East Free Trade Area (USMEFTA) with eighteen Middle Eastern countries "to increase trade and investment with the United States and others in the world economy." The United States views USMEFTA as a step-by-step plan to increase Middle Eastern countries' integration into the global economy and to promote economic growth in the region. To join USMEFTA, the United States requires each Middle Eastern country: (i) to join the WTO; (ii) to consider participation in the Generalized System of Preferences (GSP), which provides duty-free treatment for products of eligible developing countries imported into the United States; (iii) to enter into Trade and Investment Framework Agreements (TIFAs) that create a framework for trade and investment dispute resolution; (iv) to enter into Bilateral Investment Treaties (BITs) that require governments to offer foreign investors the same legal protections as domestic investors; (v) to enter into comprehensive Free Trade Agreements (FTAs) with the United States; and (vi) to participate in trade capacity-building projects whereby the United States government provides funding to spur government-private partnerships related to international trade in the Middle East. The countries included in this report are all major components of the Bush Administration's USMEFTA initiative.

The full 2008 NTE report is available at:
http://www.ustr.gov/Document_Library/Reports_Publications/2008/2008_NTE_Report/Section_Index.html.

Bahrain

The 2008 NTE review of Bahrain is favorable. The report notes that upon the August 2006 implementation of the US – Bahrain FTA, 100 percent of bilateral trade in consumer and industrial products became duty-free immediately, and that Bahrain will phase out tariffs on the remaining agricultural product lines within ten years. USTR also commended Bahrain for its passage and implementation of several IPR-related laws meant to improve protection and enforcement in the areas of copyrights, trademarks, and patents. According to the report, Bahrain also joined the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty in December 2005. The report commends Bahrain's removal of investment barriers, its implementation of

[8] The 62 major trading partners within the 2008 NTE report are comprised of: (i) 57 individual countries; (ii) the Arab League; (iii) the European Union; (iv) Hong Kong; (v) Taiwan; and (vi) the Southern African Customs Union (SACU).

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100 percent foreign ownership laws, its streamlined business licensing and approval procedures, and Bahrain's creation of the Bahrain Investors Center (BIC) in October 2004 for both local and foreign companies seeking to register in Bahrain.

Egypt

- The NTE report notes that the Egyptian Government has gradually liberalized its trade regime and economic policies in recent years, but that in order to maintain its reform momentum, "the government needs to continue to reduce corruption, reform the cumbersome bureaucracy, and eliminate unreasonable and non-science based health and safety standards." The NTE report lists a number of concerns, including:
- ***High tariff rates*** on imports of certain agricultural products, poultry, alcohol, and foreign movies;
- ***Confusing customs procedures*** with different valuation systems depending on the type of imports;
- ***Import restrictions*** on passenger vehicles and ***import bans/onerous approval procedures*** for natural products, vitamins, food supplements, used and refurbished medical equipment, and poultry products;
- ***Inconsistent application of technical regulations or mandatory standards*** on imported goods;
- ***Lack of transparency*** in government procurement practices;
- ***Inadequate IPR protection and high levels of piracy*** in copyright industries, including sound recordings, books and other printed matter, and computer software;
- ***Restrictions in services sectors*** that prevent entry or discriminate against foreign investors in a number of areas. Such barriers include limitations on foreign investment and equity in construction and transportation services, onerous licensing procedures for foreign participation in existing local banks, restrictions on land acquisition by foreigners in certain cases, screen quotas on foreign motion pictures, and the inability for foreigners to be employed as export and import customs clearance officers, or as tourist guides; and
- ***A government controlled, non-transparent pricing mechanism for pharmaceutical products*** that does not provide a clear compensation mechanism to allow for price flexibility based on exchange rate variation, which hurts foreign firms' profitability.

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Jordan

The NTE report provides a positive assessment of Jordan. According to the report, under the terms of the US – Jordan FTA, which entered into force on December 17, 2001, the United States and Jordan agreed to phased tariff reductions culminating in the complete elimination of duties on all products by 2010. The report notes that certain non-tariff barriers impact US exports to Jordan. For example, Jordan excludes certain imports from the US-Jordan FTA's direct customs tariff relief, including poultry, dairy products and apples. The report also states that Jordan selectively imposes sanitary and phytosanitary (SPS) measures on fruits, vegetables and beef, effectively creating non-tariff barriers on imports of these products. The report notes that in 2006, Jordan banned the importation of beef and live bovine animals from the United States after the announcement of the discovery of a single case of Bovine Spongiform Encephalopathy (BSE) in Alabama. According to USTR, the subsequent partial lifting of the ban was accompanied by strict conditions that have proven difficult to meet by both US exporters and Jordanian importers, particularly for non-boneless meat. The report also states that Jordan's record on IPR enforcement has improved, but that enforcement mechanisms and legal procedures are still not fully effective and are in need of further refinement: video and software piracy remain problematic and enforcement action and prosecution of piracy cases remains inconsistent. On investment, the report notes that Jordanian law sets limitations on foreign ownership in certain sectors but also allows for the government to grant exceptions to these limitations where it deems appropriate; several US investors, however, feel that the exception policy is too selective.

Kuwait

The 2008 NTE report provides a generally positive assessment of Kuwait but lists certain problems in the areas of import policies and standards. USTR notes that Kuwait prohibits the entry of certain imports, including alcohol and pork products, used medical equipment and automobiles over five years old, books, periodicals, or movies that insult religion and public morals, and all materials that promote political ideology. Kuwait also requires a special import license for firearms. The report states that the import clearing process in Kuwait is onerous and time-consuming, but that the Customs Department is undergoing privatization and has contracted a private company to provide customs support services. According to the report, Kuwait also maintains restrictive standards that impede the marketing of certain products such as certain food products, and medical, telecommunications and computer equipment. According to the report, "although Kuwait Customs continues to make progress on copyright enforcement and pursues cases through the judicial process, the lack of deterrent criminal penalties in the copyright law limits their effectiveness." The report states that sales of pirated and counterfeit goods remain high in

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Kuwait, and the use of unauthorized computer software continues in private enterprises. The report also notes that Kuwait maintains several restrictions on FDI and applies discriminatory taxation policies.

Morocco

The NTE report's overall assessment of Morocco is positive. The US – Morocco FTA entered into force on January 1, 2006, and USTR notes that under the FTA, close to 95 percent of bilateral trade in consumer and industrial products has become duty-free and all remaining tariffs will be eliminated within nine years. The report notes, however, that Moroccan interpretation of permissible transshipment under the FTA's rules of origin has resulted in denial of preferential treatment for some originating goods. In the services sector, the NTE report states that although US insurance companies enjoy the same treatment in the insurance market as Moroccan companies, the policies and practices of Morocco's insurance regulatory body prevent US insurance companies from introducing competing products and that in practice, only applications that bring new products to the sector are likely to be approved. The NTE report states that "the greatest obstacles to trade in Morocco are irregularities in government procedures, lack of transparent governmental and judicial bureaucracies, inefficient transport systems, language and cultural barriers, and low level corruption."

Oman

The NTE review of Oman is positive, and USTR notes that the President signed the US – Oman FTA implementing legislation on September 26, 2006. The FTA will be brought into force once Oman has enacted the necessary implementing legislation and regulations. Upon entry into force of the US-Oman FTA, 100 percent of bilateral trade in industrial and consumer products, with the exception of certain textile and apparel products, will become duty-free. Oman will also provide immediate duty-free access on virtually all products in their tariff schedule and will phase out tariffs on the remaining handful of products within ten years. The report states that companies that import goods in Oman must be registered with the Ministry of Commerce and Industry, and that the importation of certain goods, such as alcohol, livestock, poultry, firearms, narcotics, and explosives, requires a special license. The report also states that media imports are subject to censorship. The NTE report states that the investment chapter of the US-Oman FTA sets out a secure, predictable legal framework for US investors operating in Oman.

Qatar

USTR's overall assessment of Qatar is positive. The report notes, however, that Qatar still imposes a ban on imports of US beef in response to the 2003 discovery of BSE in a single dairy cow in the United States. Omani officials indicate that they have agreed to lift the BSE ban in principle, but are still working

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out the details of what their requirements will be. The report also states that Qatar requires importers to have a license for most products, and only issues import licenses to Qatari nationals, *i.e.*, only authorized local agents are allowed to import goods produced by the foreign firms they represent in the local market. In services, the NTE report notes that under Qatari law, only Qatari nationals can act as local agents, distributors, or sponsors. The report states that there are exceptions granted for 100 percent foreign-owned firms in the agriculture, industry, tourism, education, and health sectors. The NTE report states that Qatar's Organization of Foreign Capital Investment Law allows foreign investors, upon receiving government approval, to own up to 100 percent of projects in the agriculture, tourism, education, industry, health, and energy sectors, although foreign equity is limited to 49 percent in other sectors.

Saudi Arabia

According to the NTE report, a number of barriers to trade and investment remain in Saudi Arabia, including:

- ***High tariff rates*** on a number of items, including certain textiles, certain agricultural products, and cigarettes and other tobacco products;
- ***Import restrictions*** on certain goods, including agriculture seeds, live animals, books, periodicals, audio or visual media, religious materials that do not adhere to the state-sanctioned version of Islam or that relate to a religion other than Islam, chemicals and harmful materials, pharmaceutical products, wireless equipment, horses, radio-controlled model airplanes, products containing alcohol, natural asphalt, and archaeological artifacts. Saudi Arabia also ***prohibits importation*** of alcohol, firearms, pork products, and used clothing;
- ***Weak IPR protection and enforcement*** in copyright and trademarked products. According to the report, copyright owners have expressed frustration with "the lack of transparency in the enforcement system, procedural hurdles to judicial enforcement, and failure to impose punishment at the higher end of deterrent penalties." The NTE report also notes that another area of concern involves the counterfeiting of US trademarked products;
- ***Services barriers*** including foreign ownership limitations in financial services and difficulties in obtaining licenses to provide distribution services; and
- ***Investment barriers***, including delays in licensing approval and investment prohibitions in certain service sectors and subsectors, including oil exploration, drilling and production, and manufacturing and services related to military activity.

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United Arab Emirates

According to the NTE report, in March 2005 the United States began FTA negotiations with the United Arab Emirates (UAE). The agreement aims to remove barriers to US goods and service providers – an ongoing concern for the United States; however, in early 2007, the two sides announced that they would not be able to complete FTA negotiations under the existing timeframe for Trade Promotion Authority (TPA) although both sides remain committed to completing FTA negotiations at some later date. The United States and the UAE have since initiated a “TIFA Plus” consultative process under the existing Trade and Investment Framework Agreement (TIFA). The report notes that there are several trade barriers in the UAE. The UAE imposes high duties on alcohol, tobacco, and some food and agricultural items, although the UAE maintains the Gulf Cooperation Council’s (GCC) five percent external tariff for most other products. According to the NTE report, only firms with an appropriate trade license can engage in importation, and only UAE-registered companies, which must have at least 51 percent ownership by a UAE national, can obtain such a license. This licensing provision, however, is not applicable to goods imported into free zones, and not all goods require an import license. There also exist barriers to new foreign entrants in the insurance and banking sectors, and ownership restrictions that prohibit foreign nationals from owning businesses or increasing foreign participation outside economic free zones.

Outlook

The 2008 NTE Report was similar to USTR’s 2007 report although the 2007 report focused more on achievements that Middle Eastern trading partners have accomplished with regard to the removal of trade barriers whereas the 2008 report seemed to focus more on the benefits of US trade agreements with trading partners and how these trade agreement can spur the removal of trade barriers. Indeed, the 2008 NTE report (and its accompanying USTR press release) states that a “priority” for the Bush Administration is building the USMEFTA. According to USTR, the United States will continue to work with partners in the Middle East (both current FTA partners and those in other stages, such as TIFA dialogues and WTO accession candidates) and encourage them “to liberalize their economies, thus creating opportunities for US and Middle Eastern businesses and integrating the region more fully into the global economy.” USTR’s involvement in this “priority” region indicates that the Administration is dedicated to achieving President Bush’s USMEFTA initiative, which focuses on the region’s geopolitical importance. Whether the United States can actually achieve a completed USMEFTA by 2013 (as President Bush has planned) depends entirely on USTR’s continued work in the region and whether the next Administration will have the same interest in creating the free-trade area.

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Apart from this increased focus on the USMEFTA, other aspects of the 2007 and 2008 reports are very similar. The 2007 and 2008 individual reports for the Middle Eastern trading partners with which the United States has FTAs – Bahrain, Jordan, Morocco, and Oman – were generally identical and were all positive, although for Morocco, USTR notes that the Moroccan government must address several problems such as irregularities in government procedures, lack of transparent governmental and judicial bureaucracies and low level corruption. On Oman, the report notes that once Oman implements the US-Oman FTA, the agreement will likely address any of the US trade concerns included in the 2008 NTE report. USTR's 2008 report on Egypt, like its 2007 report, focuses on high counterfeiting and piracy rates, and USTR continues to press Egypt for increased IPR enforcement and monitoring. Regarding Saudi Arabia, the 2008 NTE report lists the same barriers to trade and investment that USTR included in its 2007 report, including the same concerns on piracy of copyrighted and trademarked goods. And regarding the UAE, the NTE report states that although the US-UAE FTA has become more of a long-term objective, the United States and the UAE remain committed to completing a comprehensive agreement, and will continue to meet under the TIFA Plus dialogue.

USTR 2008 NTE on Foreign Trade Barriers: Latin American Economies

Summary

On March 28, 2008, the Office of the United States Trade Representative (USTR) published the National Trade Estimate Report (NTE) on Foreign Trade Barriers, which surveys significant foreign trade barriers to US exports. The report addresses a wide array of issues and US government actions to combat foreign trade barriers. We highlight the NTE report's comments on the trade practices of the United States' major Latin American trading partners: Argentina, Brazil, Chile, and Mexico.

Analysis

As noted, the 2008 NTE report examines the trade practices of the United States' 62 major trading partners.[9] We review here the NTE's assessment of four Latin American countries: Argentina, Brazil, Chile and Mexico.

[9] The 62 major trading partners within the 2008 NTE report are comprised of: (i) 57 individual countries; (ii) the Arab League; (iii) the European Union; (iv) Hong Kong; (v) Taiwan; and (vi) the Southern African Customs Union (SACU).

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Argentina

In 2007, the United States held a trade surplus in the goods sector with Argentina of USD 1.4 billion. Argentina is the 33rd largest export market for US products. In 2006, US foreign direct investment (FDI) in Argentina amounted to USD 13.1 billion, up from USD $11 billion in 2005. US FDI is largely concentrated in the manufacturing, finance, and non bank holding companies sectors.

The NTE report cites the following trade-related problems:

- In July-August 2007, Argentina imposed a new set of measures to enhance customs inspections, increase port-of-entry restrictions, and introduce new reference price measures. According to the Argentine government, these measures intend to expedite customs procedures and prevent the fraudulent under-payment of customs duties. However, US companies operating in Argentina are concerned that these measures become an obstacle to trade and make more costly imports from their third country affiliates. Customs Resolution 52 restricts the ports-f-entry for a variety of goods classified in 20 Harmonized Tariff Schedule (HTS) chapters, such as electrical machinery, shoes, textiles, and other manufactured goods. Partial limitations on ports-of-entry are applied to computers, car parts, motorcycles and parts, bicycles and parts, and other goods. The list of products limited to certain ports-of-entry is available at:

  http://www.infoleg.gov.ar/infolegInternet/anexos/130000-134999/131847/norma.htm.

  Depending on their country of origin, some of these products may also be subject to Customs External Note 58, which revised some reference prices and established new ones on over 7,000 tariff lines. Note 58 expands rigorous inspection procedures to several goods and requires importers to provide guarantees for the difference of taxes and duties if the declared price of an import is lower than its reference price. Customs External Note 57 also requires importers of any goods from certain countries, which are invoiced below the reference prices to have the invoice validated by the exporting country's customs agency and the appropriate Argentine Embassy or Consulate in that country. The list of reference prices and applicable countries (the Annex to Customs External Note 58) is available at:

  http://www.infoleg.gov.ar/infolegInternet/anexos/130000-134999/131630/notaext58-2007-sup.doc

- Since 2005, Argentina imposed a non-automatic licensing regime on shoes and toys, and an automatic license requirement for most footwear imports.

- Argentina restricts or prohibits imports of several capital goods. The importation of used capital goods is subject to a 6 percent import tariff. According to the NTE report, used machinery and self propelled agricultural machinery imports is allowed, but only after the machinery has been rebuilt or

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repaired. Argentina prohibits the importation and sale of used or retreaded tires, used medical equipment, including imaging equipment, and used automotive parts.

- The full implementation of Mercosur's common external tariff (CET) was scheduled to take place in 2006 but will be postponed until 2009. Mercosur's CET averages 13.6 percent and ranges from 0 to 20 percent ad valorem, with some exceptions. Individual Mercosur country exceptions to the CET are allowed until the end of 2008. Argentina continues to maintain exceptions on 1,899 product lines in its Harmonized Tariff Schedule (HTS), mostly on capital goods, computer and telecommunications products. In 2007, Argentina established a duty safeguard on imports of recordable compact discs, which is scheduled to be phased out by May 2010. Argentina continues to apply a variety of export taxes on major agricultural commodities, hydrocarbons and biodiesel goods.
- In 2005 Argentina modified regulations for couriers. Now, couriers are considered importers and exporters of goods, rather than transporters, and must also declare the tax identification codes of the addressee and sender, lengthening the customs clearance process threefold and increasing the cost and time for couriers.
- Testing and safety standards for a variety of products including low-voltage electrical appliances, toys, gas products, elevators, personal protection equipment, and construction steel are often inconsistent, redundant and non-transparent. Although Argentina has taken steps towards establishing a more open market for beef and other bovine products, it continues to require special sanitary certificates for beef and poultry products from the United States.
- The NTE report states that Argentina's laws provide inadequate and ineffective intellectual property rights (IPR) protection. IPR enforcement of copyrights and trademarks remains of enormous concern to the United States, which has placed Argentina on the Special 301 Priority Watch List. The report cites inadequate border controls, in particular along the border near Paraguay and Brazil, as a major cause of regional circulation of pirated goods. Widespread end-user piracy of software, movies, and books continue to generate losses for US companies.

Brazil

In 2007, the United States held a trade deficit with Brazil in the goods sector of USD 1 billion, a decrease of $6.1 billion over 2006. US exports in 2007 totaled USD 24.6 billion, up 28.1 percent over 2006, while Brazilian imports into the United States totaled USD 25.6 billion, down 2.8 percent. Brazil is the 13th largest export market for US goods. In 2006, US FDI in Brazil amounted to USD 32.6 billion, up from

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USD 29.6 billion in 2005. The NTE report notes tariffs, non-tariff barriers, and obstacles in the services sector as the main concerns of the United States.

- The full implementation of Mercosur's common external tariff (CET) has been postponed until 2009. CET's range from 0 to 35 percent ad valorem, with a number of exceptions. Brazil maintains 100 exceptions to the CET. Elevated CET's impede increased US imports of agricultural goods, distilled spirits, and computer and telecommunications equipment. Brazil also applies additional import taxes that can double the actual cost of importing goods into the country. Brazil applies a 60 percent flat import tax on most manufactured retail goods that are individually imported through the simplified tax regime (RTS).
- Non-tariff barriers such as cumbersome documentation requirements required before certain types of goods can enter Brazil (even on a temporary basis) remains an ongoing concern for many US companies. Registration under the Secretariat of Foreign Trade computerized trade documentation system (SECEX) is onerous and often times lacks transparency. Although the wait time for import-export license processing through SISCOMEX, a computerized trade documentation system, has been cut in half, SISCOMEX's registration requirements remain burdensome. Most imports into Brazil can enter the country through an "automatic import license regime." Nevertheless, some imports require previous authorization by certain Brazilian Ministries (*i.e.,* non-automatic import licensing regime). According to the NTE report, specific information related to the non-automatic import licensing regime and explanations for rejections of non-automatic import licensing applications are lacking, placing additional hurdles to US exporters.
- Although Brazil has made progress in the area of sanitary and phytosanitary (SPS) measures, barriers remain that impede the free flow of US agricultural and food products to Brazil. Brazil restricts US beef imports and prohibits the entry of poultry and poultry products imports from the United States.
- Regarding Brazil's services sector, barriers to entry in telecommunications, limitations on foreign ownership of cable and media companies, and ceilings on foreign capital and voting rights in insurance companies are all serious concerns for US service providers.
- In October 2007, Brazil issued Law 11529, reinstating tax breaks to exporters hurt by the strengthening Real. Law 11529 allows certain Brazilian industries, including agricultural machinery, automotive and auto parts, to apply tax credits under the social integration (PIS) and social security (COFINS) programs to the purchase of capital goods (both domestic and imported) for the

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manufacturing of finished goods. The Law also expands the government's program for exporting companies purchasing capital goods.

- Although USTR lowered Brazil from its Priority Watch List to its Watch List in 2007, US officials remain concerned about some areas of IPR protection and enforcement, which continue to place obstacles to trade. In its report, USTR notes that Brazil has made considerable progress in enhancing copyright enforcement, in particular with regards to pirated audio-visual good. USTR also welcomed the new system of streamlined paperless processing for trademarks established by the National Institute of Industrial Property (INPI).

Chile

The United States held a trade deficit with Chile in the goods sector of USD 692 million in 2007, a decrease of USD $2.8 billion over 2006. US exports to Chile totaled USD 8.3 billion, up 22.5 percent over 2006, while Chilean imports into the United States totaled USD 9 billion, down 5.9 percent. The United States–Chile Free Trade Agreement (FTA) entered into force on January 1, 2004, eliminating tariffs on 87 percent of bilateral trade. Chile is the 28th largest export market for the United States.

According to the NTE report, Chile has one of the most open trade and investment regimes in the world. Although some tariffs remain in place, these will be phased out by 2016. Approximately 75 percent of US agricultural exports will enter Chile duty-free within four years. The United States and Chile are considering a proposal to accelerate the elimination of tariffs under the US-Chile FTA for certain vegetables and grapes from Chile. Protection and enforcement of intellectual property rights (IPR) remains the most significant concern of the United States. The NTE report cites the following problems:

- Chile's trade regime allows for the free importation of goods, except those that are forbidden under domestic legislation. There are almost no restrictions in the types or amounts of goods that can be imported into Chile, nor any restrictions to use the official foreign exchange market. Although Chile has a relatively open services trade and investment regime, it has limited commitments under the World Trade Organization's General Agreement on Trade in Services (GATS).
- Chile maintains certain non-tariff barriers, such as the country's price band system for wheat, wheat flour, and sugar, which will be phased out under the US-Chile FTA for imports from the United States by 2016.
- In January 2007, the United States Representative (USTR) elevated Chile from its "Watch List" to its "Priority Watch List" as a result of its "Out-of-Cycle Review" (OCR) carried out in 2006. USTR noted that the decision to place Chile on its 2007 Priority Watch List was due to Chile's failure to provide

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adequate IPR enforcement. USTR's key concerns involve patent and test data protection in the pharmaceutical sector and copyright piracy of movies, music, and software. USTR will continue to work with Chile to improve IPR enforcement and ensure full compliance with the US-Chile FTA, and other international trade agreements.

- On January 1, 2007, Chile eliminated its luxury tax on automobiles. Chile will continue to apply a 15 percent tax to other imported "luxury goods," such as beer, cider, wine and champagne; gold, platinum, and white ivory articles; jewelry and natural or synthetic precious stones; fine furs; mobile home trailers; caviar conserves and their derivatives.

Mexico

In 2007, the United States held a trade deficit with Mexico in the goods sector of USD 74.3 billion, an increase of USD 10 billion over 2006. US exports to Mexico totaled USD 136 billion, up 1.9 percent over 2006, while Mexican imports into the United States totaled USD 210.8 billion, up 6.3 percent. Mexico is the second largest export market for US products. In 2005, US FDI in Mexico amounted to USD 84.7 billion and was mainly oriented to the manufacturing, banking, and finance sectors. The NTE report highlights the following issues related to Mexico's import policies and investment barriers:

- Under the North American Free Trade Agreement (NAFTA), Mexico eliminated tariffs on most industrial and agricultural goods from the United States. Trade growth in agricultural products has been balanced since NAFTA entered into force. However, this has not been the case for non-agricultural trade. On January 1, 2008, Mexico eliminated remaining tariffs and tariff-rate quotas on all US agricultural exports, including dry beans, corn, nonfat dry milk, and orange juice.
- Several US agricultural and non-agricultural exports are subject to antidumping duties that limit entry to the Mexican market. Goods subject to these duties include beef, apples, bond paper, and carbon steel pipe and tube. In 2006, Mexico terminated antidumping duties on US long-grain white rice. On December 31, 2007, Mexico terminated the safeguard measures on US chicken leg quarter imports into Mexico.
- Mexican sanitary and phytosanitary standards create barriers to certain US agricultural goods, including grains, seed products, pork, beef, poultry, apples, dry beans, and avocados.
- Mexican customs administrative procedures are inconsistent, burdensome, unevenly enforced, and often change without sufficient prior notification. In particular, US exporters have expressed concerns regarding Mexico's inspection and clearance mechanisms for agricultural goods, which are

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burdensome and non-transparent. Mexico also requires import licenses or registration for imports of sensitive products, often delaying importation or imposing additional costs to the importer.

- Since 2003, Mexico has remained in the Special 301 Watch List. According to USTR, despite a fairly extensive set of IPR laws and an increase in the number of arrests and seizures, IPR violations remain considerable.
- The NTE report welcomed Mexico's efforts to increase transparency in its government procurement regime but noted that Mexico's telecommunications market remains uncompetitive and regulatory agencies are unresponsive to complaints of market discrimination.

Outlook

The NTE report identifies progress made in recent FTAs, such as the elimination of tariffs for certain US agricultural goods under the NAFTA and the proposed accelerated elimination of tariffs for certain products under the US-Chile FTA. The report also notes a dramatic increase in US goods exports to Brazil and Chile, which led to a considerable reduction in the US trade deficit with these two countries in 2007. US goods exports to Argentina and Mexico only registered a marginal increase in 2007. The US goods trade deficit with Mexico increased by USD 10 billion and the United States held a USD 1.4 billion trade surplus with Argentina.

The NTE report states that although Latin American countries have made progress to improve or eliminate some foreign trade barriers, a number of tariff and non-tariff barriers remain that make importing US products and services to these countries more difficult. The report raises serious concerns regarding IPR enforcement in all for countries (*i.e.,* Argentina, Brazil, Chile, and Mexico), customs valuation practices and taxation regulations (except for Chile), and restrictive SPS measures in all four countries. The report also raises concerns regarding existing barriers on services and manufactured goods in Brazil and Mexico, which prevent full market access for US goods and services. The NTE report recommends Latin American countries to improve customs valuation procedures, which remain burdensome and unevenly enforced, strengthen IP protection, and eliminate barriers to competition in the provision of telecommunication and media services in several of these countries.

Latin American countries usually welcome the annual NTE report with skepticism since most of these countries also face tariff and non-tariff barriers (sometimes despite having an FTA with the United States) in the US market. Most Latin American countries argue that the United States maintains high tariffs on textiles, clothing, and footwear, and grants extensive protection to sensitive agricultural products, such as

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sugar and ethanol, which also pose challenges to exporters in Latin America and discourage Latin American countries' access to the US market.

USTR 2008 NTE on Foreign Trade Barriers: Asian Economies

Summary

On March 28, 2008, the Office of the United States Trade Representative (USTR) published the National Trade Estimate Report (NTE) on Foreign Trade Barriers, which surveys significant trade barriers to US exports. We highlight the NTE report's comments on the trade practices of the United States' major Asian trading partners—China, Hong Kong, Indonesia, Japan, Korea, Malaysia, the Philippines, Singapore, Taiwan, Thailand and Vietnam.

Analysis

As noted, the 2008 NTE report examines the trade practices of the United States' 62 major trading partners.[10] We highlight below the report's comments on the trade practices of China, Hong Kong, Indonesia, Japan, Korea, Malaysia, the Philippines, Singapore, Taiwan, Thailand, and Vietnam.

China

The 2008 NTE report echoes the 2007 report's acknowledgement of China's progress during recent years in implementing the broad set of commitments it made upon accession to the World Trade Organization (WTO). Although implementation of certain commitments remains incomplete, the report notes a shift in focus from ensuring implementation of specific commitments to ensuring adherence to those commitments already in place. This concern is reflected in USTR's filing of three new WTO cases—for alleged subsidization of manufactured goods, IPR violations, and market access restrictions for audiovisual products—against China in 2007. It is reflected further in areas that the report cites as being of particular concern, including: lack of effective IPR enforcement; industrial policies that restrict market access for foreign goods and services; arbitrary Customs practices and sanitary and phytosanitary (SPS) measures; burdensome licensing and operating requirements; and non-transparent regulatory regimes.

Specific issues raised in the NTE report include:

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[10] The 62 major trading partners within the 2008 NTE report are comprised of: (i) 57 individual countries; (ii) the Arab League; (iii) the European Union; (iv) Hong Kong; (v) Taiwan; and (vi) the Southern African Customs Union (SACU).

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- ***Continued weakness in the criminal, civil and administrative aspects of IPR enforcement***. The report cites underutilization of deterrent criminal remedies, procedural burdens, and excessive legal thresholds for criminal prosecution as particular problems weakening enforcement, and adds that China's enforcement mechanisms lack interagency coordination, training, resources, and transparency.

- ***Services barriers***, including restrictions on the activities of foreign insurance companies and foreign companies in other sectors such as financial services, financial information services, retail, franchising , express delivery, construction, logistics, telecommunications, audiovisual services, education, and legal services. The 2008 report also cites licensing restrictions on foreign enterprise annuity services as a new concern.

- ***Continued investment restrictions*** and more recent measures that USTR suggests might signal an increase in discrimination against foreign investment. Ongoing concerns cited by US businesses include non-transparency, inconsistently enforced laws and regulations, and a poorly functioning legal system that is unable to enforce contracts and judgments. Newer measures include the designation of "pillar" industries deemed critical to China's national economy, increasing use of vague language about protecting national economic security, and attempts to direct investment towards specific sectors or geographic regions while limiting or restricting it elsewhere.

- ***Import substitution policies*** that favor domestic products and technologies in the steel, telecommunications and automobile sectors.

- ***High tariffs*** on products that compete with sensitive domestic products such as large motorcycles, video, digital video and audio recorders, and certain agricultural products.

Hong Kong, Special Administrative Region

The NTE report provides a favorable assessment on most of Hong Kong's trade policies and notes progress in most areas. However, it cites a number of restrictions and practices that remain of concern to US companies and USTR:

- ***Restrictions on US beef imports*** that discourage exporters from shipping beef products to the Hong Kong market despite the World Animal Health Organization's (OIE) May 2007 classification of the United States as a "controlled risk" country for bovine spongiform encephalopathy (BSE).

- ***IPR infringement*** such as illegal internet downloads, end-use piracy, and transshipment of counterfeit goods including optical media and brand apparel products. The report cites the Hong

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Kong government's failure to keep a promise to release new digital protection laws by end-2007, and the government's ongoing refusal to establish a copyrights register.

- A restriction on RMB lending for any bank in Hong Kong.
- Revisions to ***mandatory food and product labeling requirements*** that create or would create market entry barriers for foreign manufacturers.
- ***Lengthy and non-transparent procedures for approval of new pharmaceutical products***. Such procedures shorten a product's patent life by as much as six months and delay the timely marketing of new products.
- ***Long approval procedures for new pharmaceutical products*** that reduce new pharmaceutical products' patent life by as much as six months. The US pharmaceutical industry has also expressed concern over a growth in the sales of ***counterfeit pharmaceutical products***.

Indonesia

The 2008 NTE report's coverage of Indonesia differs little from the 2007 report, and the issues of concern the report cites remain largely unchanged. However, the report does note a number of positive developments, such as the Indonesian government's reopening of its market to all US beef products from animals of all ages, and the March 2007 passage of a new Investment Law that would in principal grant equal treatment to foreign and domestic investors.

Issues of concern to U.S. industries include:

- ***Non-tariff barriers*** such as bans on imports of rice, salt and chicken parts and quantitative restrictions on animal based food products and wines and distilled spirits.
- ***Continued import restrictions and special licensing requirements for certain products*** such as alcoholic beverages, lubricants, corn, rice, soybeans, textiles, electronics, and toys.
- ***Lack of adequate protection for patents, copyrights and trademarks.*** Although the Indonesian government has in place a number of legal provisions to protect IPR, such provisions and their weak enforcement have allowed continued high rates of piracy, unfair commercial use of undisclosed pharmaceutical product data and trademark violations.
- ***Services trade barriers*** for sectors including distribution, financial services, accounting, construction, and telecommunications. The Indonesian government also prohibits foreign investment in audio-visual services.

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- ***Unclear investment regulations*** under the March 2007 Investment Law, for which the government has yet to issue implementing regulations.

Japan

Since 2001, the United States government has used the US-Japan Regulatory Reform and Competition Policy Initiative to address areas of concern in the bilateral economic relationship and to request changes to Japanese regulatory and other practices that limit market access for US goods and services. The US and Japanese governments completed the Initiative's sixth annual Report to the Leaders in June 2007, and in October the Unites States government submitted its most recent set of detailed recommendations to its Japanese counterpart. Key regulatory reform and sectoral issues of ongoing concern to the United States government include:

- ***Telecommunications market access impediments*** including high interconnection rates, dominant carrier regulations that favor Japanese providers, a universal service program fee that benefits certain regional Japanese carriers, high mobile termination rates, and complex and often non-transparent procedures for issuing new mobile wireless licenses.

- ***Regulatory barriers for information technology (IT) and e-commerce***, including non-transparent rulemaking and government procurement. The US government also expressed concern regarding the development of privacy guidelines under a recent review of Japan's Privacy Law.

- ***Tariff and non-tariff barriers to trade in agricultural products***, such as high tariffs on beef, citrus, dairy, and processed foods. Other restrictions include overly restrictive plant quarantine practices, a tariff rate quota (TRQ) on rice, safeguards on pork and beef, and quotas on certain fish and fish products. The Japanese government also maintains a partial ban on imports of US beef products despite the OIE's May 2007 designation of the Untied States as a "controlled risk" country for BSE.

- ***Government procurement practices*** such as high thresholds for government procurement projects covered under the Government Procurement Agreement (GPA), rigged bidding for public works projects, and the use of excessively narrow Japan-specific qualifications. US firms complain that such practices have limited their access to Japan's government procurement market, and USTR has identified and will monitor a number of planned and ongoing public works projects that it expects will provide important opportunities to US firms.

- The report recognizes Japan's strong IPR protection regime; however, it cites a number of areas of concern including ***lengthy delays in granting patents, inadequate protection for rights holders on the internet, and continued internet piracy***. The report also cites weaknesses in Japan's laws

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that govern copyright protection, such as the lack of a provision in Japan's Civil Procedures Act for statutory damages in cases of copyright infringement. The US government continues to urge Japan to extend the term of copyright protection.

- ***Services barriers*** that restrict market access for US firms in sectors including insurance, accounting, medical and educations services.
- ***Investment restrictions*** and negative attitudes towards foreign investment continue to complicate cross-border mergers and acquisition (M&A) and suppress Japan's rates of foreign direct investment (FDI).

The 2008 NTE also cites a number of other barriers for autos and automotive products, aerospace, business and civil aviation, and transportation and ports.

South Korea

Although the US and South Korean governments signed a bilateral FTA on June 30, 2007, neither country's legislature has approved implementing legislation that would enact the agreement's trade and investment liberalization provisions. The FTA's implementation likely would address a number of issues of ongoing concern and cited by USTR in its annual NTE reports. These issues include:

- Korea maintains ***high tariffs, taxes, or TRQs*** with prohibitive out-of-quota rates on a number of agriculture and fishery products, and textile and apparel products. The government also continues to ***restrict imports of US beef products*** despite the OIE's May 2007 categorization of the United States as a "controlled risk" country and a January 2006 agreement to partially open the market. These restrictions remain a significant obstacle to the Korea-US FTA's approval by Congress.
- The NTE report recognizes the National Intelligence Service's (NIS) lifting of certain proprietary information disclosure requirements for provision of IT security products; however, it notes that Korea maintains a ***high government procurement threshold***.
- Inadequate or incomplete ***IPR protection and enforcement***. USTR remains concerned that the revised Copyright Act and Computer Program Protection Act (CPPA) lack provisions to adequately protect certain intellectual property. According to the NTE report, the revised Copyright Act (effective June 30, 2007) does not clarify the liability of internet service providers, contains burdensome requirements for rightsholders to request "takedowns" of infringing materials, and allows broad exceptions for copying of sound recordings at the university level. USTR expressed concern that the revised CPPA (effective April 2, 2007) does not contain provisions to protect temporary copies, nor

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does it contain minimum penalties for offenses. The NTE report also cites other concerns regarding Korean government practices for data protection, book and video-DVD piracy, and the protection of patents and trade secrets.

- Korea's ***services barriers*** include domestic film screen quotas, foreign content quotas for television and radio broadcasting, limitations on services that foreign-licensed lawyers may offer, regulatory and market access issues for financial services, and certain restrictions on foreign satellite and other telecommunications services.
- A combination of ***automobile import tariffs, domestic taxes, and non-tariff barriers*** continue to restrict US automakers' access to Korea's automobile market. Korea imposes similar tariffs and taxes on motorcycles and limits their access to highways.
- USTR remains concerned about non-transparency in pricing and reimbursement procedures for pharmaceuticals and medical devices.

Malaysia

FTA negotiations with the Malaysian government have remained on hold since March 2007, following the two sides' inability to reach a compromise on difficult issues such as financial services and government procurement; however, USTR has continued informal discussions toward the agreement's eventual completion. Areas of concern that USTR cites in the 2008 NTE report include:

- ***High import duties*** on products with value-added content, a ***10 percent sales tax*** for a large number of products, and ***annually adjusted excise taxes*** that discourage the sale of imports of certain products.
- ***Import restrictions for automobiles and motorcycles*** favor ethnic Malay-owned businesses that import and distribute motor vehicles, and programs to support locally-assembled vehicles discriminate against foreign distributors and manufacturers.
- The Malaysian government maintains a non-transparent ***government procurement*** system that lacks competitive bidding and explicitly supports national policy objectives such as granting favorable treatment to ethic Malays, supporting technology transfers, managing foreign exchange outflows, and promoting Malaysian exports.
- Despite government efforts in 2007 to enhance enforcement of IPR violations, Malaysia remains a significant producer and exporter of ***pirated optical media***.

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- Violation of ***pharmaceutical product IPR*** remains a key USTR concern. Although in 2007 the government extended to five years its data protection provisions for pharmaceutical products, it lacks adequate measures to prevent approval of pharmaceutical products already covered by a patent. Wide availability of counterfeit pharmaceutical products also continues.

- Malaysia's large ***services sector remains highly protected***. Equity restrictions limit foreign participation in the telecommunications and banking sectors, and requirements to partner with domestic firms restrict the actions of foreign firms for legal, architectural and engineering services. Most affiliate agreements require government licenses, and foreign investment in the Malaysian service sector is restricted.

The Philippines

Five years after placing the Philippines on the Special 310 "Priority Watch List," in February 2006, USTR moved the country to the "Watch List," where it has remained since. However, USTR cites the Philippines' "limited progress" in improving its IPR protection regime since its removal from the Priority Watch List. Further, USTR suggests that the country's IPR climate may be worsening.

The 2008 NTE report cites issues of concern including:

- ***Auto sector restrictions*** such as high tariffs on imports of finished automobiles and motorcycles, a prohibition on the import of used vehicles, and an excise tax based on a vehicle's value.

- ***Government procurement*** practices that favor purchases from Philippine and Philippine-controlled enterprises.

- ***IPR violations*** continue due to inadequate legal protection under the 1997 Intellectual Property Code; however, the Philippine Congress has undertaken steps to amend the Code. Weak enforcement of existing laws has failed to deter widespread optical disc piracy and sales of counterfeit merchandise. Inefficient judicial processes lead to long delays in IPR-related cases and result in few successful prosecutions.

- ***Services barriers*** such as foreign ownership restrictions in the telecommunications sector, burdensome capitalization requirements for foreign-owned insurance agencies, and restrictions on foreign financial institutions' presence and operation. Other restrictions apply to advertising, public utilities, shipping, and express delivery services. The government also maintains ***investment restrictions*** based on two negative lists that restrict or limit foreign investment in a number of sectors.

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- ***Inconsistent enforcement of anti-corruption laws*** remains a key USTR concern. USTR also notes that domestic and foreign investors have expressed concern over non-transparency in judicial and regulatory decision making.

Singapore

The NTE report reflects the high levels of trade and investment liberalization that Singapore has achieved through its many FTAs with the United States and other key trade partners. However, the report cites a number of ongoing and a few new concerns:

- A new requirement under the Health Products Act that will ***require medical device manufacturers, importers and wholesalers to receive licenses*** under the Act by October 2009.
- ***Transshipment practices*** such as the failure to collect information on contents and destinations for most transshipment and transit trade restricts the ability to enforce against the illegal shipment of IPR infringing goods. Singapore's Copyright Act also does not allow easy seizure of such goods in transit.
- The Singaporean government continues to maintain a number of ***services sector barriers*** in the telecommunications, audiovisual and media, legal, banking and energy services sectors. These barriers include: a lack of transparency in telecom regulatory and rulemaking processes; foreign equity restrictions for domestic market broadcasters; distribution and importation restrictions on foreign newspapers; restrictions on ATM access for holders of foreign bank cards; and lengthy delays in application approval for bidding for access to Singapore's gas pipeline infrastructure.

Taiwan

In July 2007, the US and Taiwanese governments held the sixth joint council meeting under their 1994 trade and investment framework agreement (TIFA) and discussed a number of issues of mutual concern such as agriculture, IPR, pharmaceuticals, government procurement, and investment. The NTE report cites a number of improvements in 2007 including a slight (0.04 percentage points) fall in the average nominal tariff rate, and additional tariff cuts on small passenger cars, certain fish and fish products, and a number of agricultural goods. The Taiwanese government also lifted a travel restriction on large motorcycles, approved licenses for certain US agricultural biotechnology products and amended the Copyright law to strengthen the punishment for illegal file sharing. Despite these improvements, the report also cites areas of continued concern, including:

- ***Tariff and non-tariff barriers*** such as high tariffs and taxes on large motorcycles and a continued partial ban on US beef products.

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- ***Government procurement*** practices, such as contractual clauses that exclude US or other foreign bidders, restrict market access to Taiwan's government procurement market. Taiwan has continued to delay membership to the GPA and has no liability caps or exclusions for consequential damages in procurement contracts, which deters US suppliers from bidding because of non-transparent liability exposure.
- ***IPR violations continue*** despite the Taiwanese government's recent efforts to improve enforcement. Issues of particular concern include the wide availability of counterfeit pharmaceuticals, internet infringement, illegal textbook copying, trade dress violations, transshipment, and trademark counterfeiting. Moreover, judicial procedures often delay enforcement efforts, and inadequate penalties are ineffective at deterring violators.
- ***Services barriers*** in the financial, telecommunication, pay television, and chiropractic services sectors continue to prohibit or restrict the provision of services by US and other foreign suppliers.
- The Taiwanese government maintains ***foreign ownership limits*** on wireless and wireline telecommunications firms, cable television and satellite broadcasting services, power transmission and distribution services, and high-speed railways, among others.
- ***Restrictions on pharmaceuticals and medical devices***. Taiwan's pricing and reimbursement system for pharmaceuticals and its allowance of hospital doctors to prescribe and distribute pharmaceutical products distorts the market for pharmaceutical products. Taiwanese regulatory agencies appear to grant favorable treatment to domestic pharmaceutical and medical device companies, and the government maintains a ban on approximately 30 medical products imported from China, a major production center for US-designed medical devices.

Thailand

FTA negotiations between the United States and Thailand have remained in abeyance since September 2006 despite the election of a new Thai government in December 2007 and its inauguration in February 2008. USTR states in the NTE report that is will continue to evaluate developments in Thailand to determine the next steps in the suspended FTA negotiations.

Areas of specific concern cited in the 2008 NTE report include:

- ***High tariff rates*** on goods that compete with locally produced products including agricultural goods, automobiles and parts, motorcycles, alcoholic beverages, fabrics, paper, and restaurant equipment.

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USTR also cites Thailand's complex and non-transparent taxation system, which imposes high excise taxes on certain products.

- ***Non-transparent Customs*** administration that increases arbitrarily the customs value of certain imported products including wines and spirits and powdered tea.
- ***Government procurement practices*** that grant favorable treatment to domestic suppliers and create alleged irregularities in the tender process.
- ***Costly, lengthy and complex standards, testing and labeling requirements*** for food, pharmaceutical and medical products. USTR also cites a specific concern over a December 2007 labeling requirement for snack food.
- ***Lack of sustained and coordinated enforcement of IPR*** has led to an increase in the manufacture and export of counterfeit and pirated products. USTR remains concerned about Thailand's protection of confidential information and the inability of the patent office to process patent applications in a timely manner. Further, although USTR recognizes the Thai government's right to issue compulsory licenses (CLs) for certain patented drugs, USTR remains concerned about the lack of transparency in the government's decision making regarding CLs. The report also cites key elements lacking in Thailand's optical disc legislation, uncertainties about the application of laws governing geographic indications, and inconsistent IPR enforcement efforts.
- ***Services barriers*** include branch limitations and minimum capital requirements for foreign banks, restrictions on foreign accountants' business practices, foreign ownership limits in land transportation, and non-transparent regulations in the healthcare services sector. USTR notes "substantial progress" in Thailand's improvement of its telecommunications regulatory regime; however, the report cites a number of unresolved issues and barriers that remain in place.

Vietnam

The United States and Vietnamese governments signed a TIFA in June 2007, and USTR indicates that the United States will use the arrangement to further bilateral trade and investment and to monitor Vietnam's implementation of its WTO accession commitments. USTR notes that as a part of these commitments, the Vietnamese government continued tariff reductions for a number of key US exports in 2007. Despite these positive developments, the NTE report cites several areas of ongoing concern:

- ***Non-tariff barriers*** such as import prohibitions and quantitative restrictions on certain products.

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- ***Weak IPR enforcement*** that results in widespread patent and trademark infringement and lengthy delays in adjudication and enforcement of violations. USTR cites uneven enforcement for software, music and video CDs, and DVDs and notes piracy rates above 90 percent for certain products.
- ***Services and investment barriers*** such as foreign ownership limitations in a number of sectors such as audiovisual services, telecommunications and financial services. USTR does note, however, that the Vietnamese government issued an August 2007 timetable for the eventual removal of foreign ownership restrictions in express delivery services by 2012.
- ***Corruption in all phases of business operations***, which remains a significant problem for US companies that operate in Vietnam.

Outlook

The 2008 NTE report suggests little substantive change from the 2007 report; most of the concerns cited in the report echo those of the previous year. IPR remains a key barrier for US businesses in Asia, and the report notes that key trading partners in the region have made mixed progress in strengthening enforcement efforts. Restrictions on imports of US beef products also remain a concern in the 2008 report due to continued partial bans by China, Japan, Korea, Singapore, and Taiwan. However, since USTR issued the 2007 report, Indonesia, Malaysia, and the Philippines have reopened their markets to US beef imports. Some observers opine that an opening of Korea’s beef market is possible during President Lee Myung-bak’s April 15-19 visit to the United States, although a US government source stated recently that a breakthrough on beef was not expected.

During the past year, USTR has sought to address a number of barriers cited in the NTE report’s China section through the WTO’s dispute settlement process. USTR requested dispute settlement consultations with China three times during 2007 and once in early 2008. For one of these cases—related to China’s granting of corporate tax subsides—China agreed to eliminate these subsides under a January 1, 2008 memorandum of understanding (MOU) with the United States; on the same day, China implemented a number of related tax revisions with the implementation of a new Corporate Tax Law. The other three cases remain in various stages of the dispute settlement process. A WTO panel also recently ruled against China on a fifth WTO dispute, which USTR requested in 2006 in response to certain measures affecting the imports of automobile parts. China’s subsidy programs are likely to remain a key concern of US industry going forward; the International Trade Commission (ITC) is currently conducting ten investigations of allegedly illegal Chinese subsidies, and the Department of Commerce (DOC) has issued affirmative preliminary findings in seven of these cases. Notably, the NTE report does not cite the

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value of China's currency as a barrier to trade and investment; this appears consistent with the Administration's view that currency remains within the purview of the Treasury Department.

New governments in Korea, Taiwan, and Thailand suggest economic reform in these countries' economies going forward, and these changes could foreshadow improvements in USTR's future evaluation of these countries' trade and investment barriers. Voters in Korea and Taiwan recently elected candidates who ran on pro-growth platforms with proposed economic policies that would further liberalize or deregulate their countries' respective markets. Although both administrations face a number of economic challenges, such as rising inflation, many foreign businesses in these countries have expressed early optimism that the positive effects of the newly elected leaders' policies will create spillover effects for both domestic and foreign investors and enterprises. A newly-elected government in Thailand has also begun to implement policies aimed at stimulating economic growth and restoring investor confidence.

Free Trade Agreements Highlights

US, South Korea Reach Agreement on US Beef Exports; Passage of KORUS FTA Remains Uncertain

On April 18, 2008, the Government of South Korea announced that it had reached an agreement with the United States to reopen fully its market to imports of all US beef products. According to the Korean Agriculture Ministry, Korea will implement the reopening gradually and in mid-May will begin to import most cuts of meat, including bone-in cuts such as ribs, from cattle under 30 months of age. The Ministry indicated that Korea will expand the range of permitted imports in stages, contingent upon the United States' adoption of stronger controls to limit the inclusion in cattle feed of materials believed to increase the risk of infection with Bovine Spongiform Encephalopathy (BSE).

Korea banned imports of all US beef products in December 2003 following the discovery of a cow in the United States that tested positive for BSE. Although Korea agreed to reopen its market to US imports in January 2006, the government limited imports to boneless cuts of meat from cattle 30 months or younger. In October 2007, however, Korea suspended quarantine inspection for boneless cuts after inspectors discovered vertebral column fragments in a shipment. Subsequent talks between US and Korean negotiators failed to resolve the issue and to restart inspections. Prior to the ban, Korea had been the United States' third largest beef export market, worth USD 815 million in 2003 according to US government figures.

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Korea's implementation of the agreement to allow imports of all US beef products would remove a key obstacle to US Congressional passage of the Korea-US (KORUS) Free Trade Agreement (FTA). The United States and Korea signed the KORUS FTA on June 30, 2007, but neither country's legislature has approved the agreement. A number of influential Members of Congress, such as Senate Finance Committee Chairman Max Baucus (D-MT) and Senate Finance Committee Ranking Member Charles Grassley (R-IA), have maintained that they will not support the FTA unless and until Korea agrees to reopen fully its market to imports of US beef. Chairman Baucus reacted positively to Korea's announcement, stating that he would monitor closely the import protocol, and that he looked forward to working with Korean President Lee Myung-bak to "move [the] trade relationship forward." United States Trade Representative (USTR) Susan Schwab stated that with the agreement in place, the Administration would work "in earnest" with Congress and all sectors of the US economy to ensure the KORUS agreement's passage in Congress.

Such passage would be eased considerably by the Korean government's first approving the FTA. However, it remains unclear when or if the current session of the National Assembly—set to end on May 31, 2008—will vote on the trade agreement. Although President Lee has indicated that he and his governing Grand National Party will open a special session in May to consider the KORUS agreement, the main opposition party objects to the session. The National Assembly's approval of the agreement likely would lend further momentum to the United States' consideration of the FTA. If the National Assembly fails to pass the agreement before the end of the session, however, the Lee Administration must resubmit the FTA's ratification legislation to the next session, which then must start the approval process anew. Such an outcome would delay considerably Korea's implementation of the agreement and lend further uncertainty to the US Congress' approval of the FTA.

Timing plays an important part in the consideration of the KORUS FTA. If the Bush Administration waits until mid-May for the beef agreement to actually take effect before submitting implementing legislation of the KORUS FTA to Congress, Congress could delay a vote on the FTA until after the August recess. Such an outcome would leave Congress with less than a month to consider the agreement before the current session adjourns, likely in late September. If, however, the Bush Administration submits implementing legislation prior to mid-May, Congress still might not consider the agreement until it can verify that Korea has in good faith reopened its market to US beef exports under the terms of the beef agreement. Indeed, in April 17 remarks before the US Chamber of Commerce and President Lee, Chairman Baucus stated that "until American beef and beef products of all ages…arrive on Korean store shelves in a meaningful and sustainable fashion, [the FTA] will continue to circle."

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Despite this uncertainty, the Bush Administration is likely to adopt an aggressive approach to gain Congressional support for the agreement and will emphasize the FTA's economic and political importance to the US-Korean relationship. This would be a similar approach to the aggressive lobbying campaign the Bush Administration is undertaking with the long-delayed US-Colombia FTA. The Korean government's announcement preceded April 18-19 one-on-one meetings between President Bush and President Lee; both men have publicly expressed their desire to see the FTA approved. A positive outcome during these meetings likely would strengthen President Bush's resolve to achieve approval of the agreement.

Further complicating the FTA's outlook is continued opposition due to the FTA's provisions on automobiles. Certain members of Congress, several US automobile manufacturers and labor unions have all voiced public opposition to the KORUS FTA because they claim that it does not adequately address non-tariff barriers to Korea's automobile market. Although these interested parties have not been as vocal on the auto provisions as Chairman Baucus and others were with the beef issue, they will likely increase their lobbying efforts on the auto issue. Thus, although the announcement regarding the reopening of Korea's market to US beef imports represents a substantive move towards the FTA's ratification by both sides, its ultimate passage by either remains far from certain.

House of Representatives Approves Pelosi Resolution Eliminating TPA Deadline for US-Colombia FTA Vote

On April 10, 2008, in an unprecedented move, the House of Representatives approved a resolution (H. Res. 1092) that eliminates the Trade Promotion Authority (TPA)-mandated timetable under which the House of Representatives must consider the US-Colombia Free Trade Agreement (FTA). The House approved the resolution by a vote of 224 to 195 along mainly party lines. (Ten Democrats voted against the bill, and six Republicans approved it.) Many observers opine that House approval of the rule change effectively eliminates any chance that Congress will consider and vote on the US-Colombia FTA this year.

On April 9, 2008, Speaker of the House Nancy Pelosi (D-CA) announced and presented to the House of Representatives H. Res. 1092. The resolution suspends two provisions of the Trade Act of 1974 regarding TPA rules: sections 151(e)(1) and 151(f)(1) that address the timetable that the House of Representatives must follow in considering the US-Colombia FTA. The resolution is specific only to the US-Colombia FTA and does not apply to the other pending US FTAs with Panama and Korea that were also completed under TPA. However, most analysts agree that elimination of the Colombia FTA's timetable significantly diminishes the chances for Congressional consideration of the Korea and Panama agreements by the end of 2008.

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It is unclear when the House will begin to consider the US-Colombia FTA, or whether it now will consider the agreement at all. Although Speaker Pelosi has opined that Congress could approve her resolution and still consider the FTA by the end of 2008, most observers, including the Administration officials, believe that the resolution has indefinitely delayed a vote on the FTA and eliminates any chance of Congressional passage of the agreement by the end of the year.

The immediate response in Congress and the Administration to the vote was partisan. President Bush stated that the House of Representative's "unprecedented and unfortunate action . . is damaging to our economy, our national security, and our relations with an important ally." He also stated that the move undermines the trust required for any Administration to negotiate trade agreements in the future. United States Trade Representative (USTR) Susan Schwab echoed President Bush's statement, opining that the House had acted "recklessly." She reiterated her message that passage of the resolution erodes US trading partners' confidence and trust in the United States. Senate Minority Leader Mitch McConnell (R-KY) opined that the resolution sets a "dangerous and indefensible precedent" that affects the future of US trade agreements and US trade policy in general. Meanwhile, on the Senate side, Finance Committee Chairman Max Baucus (D-MT) opined that "with the Colombia agreement in a holding pattern, the most productive thing to do now is to focus on . . . Trade Adjustment Assistance [TAA]." Chairman Baucus stated that once Congress and the Administration hammer out a new TAA program, Congress can then consider the Colombia agreement on its merits.

Industry views on the resolution were mostly negative. National Association of Manufacturers (NAM) Executive Vice President Jay Timmons stated that removal of the 90-day timetable for action on the Colombia agreement "will not only prevent timely and fair consideration of the US-Colombia agreement, but will also fundamentally undermine the effectiveness of the [TPA] process." US Chamber of Commerce Executive Vice President for Government Affairs R. Bruce Josten noted that denying the US-Colombia FTA a vote is unacceptable and "would do nothing to advance US economic or geopolitical interests in Colombia." American Farm Bureau Federation (AFBF) President Bob Stallman criticized Congress for "having had no issue unilaterally opening the US market to Colombian products through trade preferences" while hesitating to approve the FTA itself. The Coalition of Service Industries (CSI) also criticized the resolution and called on Congress and the Administration to work out a bipartisan resolution. American Federation of Labor - Congress of Industrial Organizations (AFL-CIO) President John Sweeney, however, lauded House approval of H. Res. 1092 and stated that the AFL-CIO's opposition to the Colombia agreement would remain unchanged "until the Colombian government achieves sustained results on the ground" with regards to its record of violence.

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President Bush Delivers Implementing Legislation for US-Colombia FTA to Congress Amidst Opposition from Democratic Members

On April 8, 2008, President Bush delivered implementing legislation for the US-Colombia Free Trade Agreement (FTA) to Congress. The Administration's delivery of the agreement starts the timeline for Congress' consideration of the FTA under Trade Promotion Authority (TPA): Congress has only 90 days under TPA to consider and provide an up-or-down vote on the agreement. Under the US Constitution, the House must act first on the agreement because the FTA is a revenue measure. The House has a maximum of 60 days to vote on the agreement. After the House votes, the Senate has a maximum of 30 days to vote on the agreement. The Bush Administration wants Congress to vote on the US-Colombia FTA before Congress' adjournment on September 26, 2008. Thus, a final Senate vote on the agreement could occur between now and September, depending on how long it takes each chamber to consider the agreement.

In announcing the transmittal of the US-Colombia FTA, President Bush – joined by his entire Cabinet – stated that he delivered the agreement to Congress because he did not want to run the risk of Congress adjourning without voting on the FTA. President Bush also assured legislators that he would continue to work with them on renewal of the now-expired Trade Adjustment Assistance (TAA) program, a concession many Democrats have demanded in exchange for approval of the US-Colombia FTA. He called on members of Congress to continue their cooperation with the Administration in approving the FTA. Subsequent press releases from the Office of the United States Trade Representative (USTR) and the White House echoed President Bush's message and indicate that the Bush Administration is launching an aggressive campaign in an effort to the get the agreement passed.

President Bush's assurances, however, have failed to convince certain legislators to support the agreement. Key members of Congress, including Senate Majority Leader Harry Reid (D-NV), Senate Finance Committee Chairman Max Baucus (D-MT), Speaker of the House Nancy Pelosi (D-CA), and House Ways and Means Committee Chairman Charles Rangel (D-NY) have stated that President Bush's decision to send the FTA to Congress without having full support from key legislators will lessen the FTA's chances for passage. Senator Olympia Snowe (R-ME) – a member of the Senate Finance Committee – has also linked passage of the agreement to TAA, stating that she will not support the agreement until the Administration implements a "strong TAA program."

The fight over the US-Colombia FTA has escalated in recent weeks, with the Administration arguing that passage of the agreement assures the United States important economic and geopolitical benefits, and with members of Congress (mainly Democrats) arguing that Colombia has not improved its record of

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violence, especially against labor leaders. The Administration, in its attempts to secure support for the agreement, has carried out several delegation visits (comprised of both Administration officials and members of Congress) to Colombia to address US lawmakers' concerns regarding the FTA. However, these delegations have failed to garner support for the FTA in Congress or among US labor union associations. The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) has reiterated its vehement opposition to the Colombia FTA because it argues that the Colombian government has not done enough to stop the violence against union leaders. The US business community, on the other hand, is actively lobbying Congress to approve the agreement. According to the US Chamber of Commerce, "with US credibility in the hemisphere hanging in the balance, a vote next year [in 2009] is not an option." National Association of Manufacturers (NAM) President John Engler opined that the United States should "not permit election year political posturing about process compromise our commitment to free trade."

It is unclear whether Congress will approve such a controversial agreement. To date, no Congress – Democratic- or Republican-led – has voted down an FTA, and the Administration appears to be relying on that precedent by forcing Congressional consideration of the US-Colombia FTA. In following this strategy, however, the Administration must contend with the fact that it is sending an FTA to Congress without any assurances that legislators will support and pass the agreement. Observers have stated that the argument over the Colombia FTA has broadened from an economic focus to now include national security. According to many observers, the US-Colombia FTA is not as economically significant an agreement as other FTAs; US exports to Colombia only represent a small percentage of total US exports, and Colombian exports to the United States already enjoy duty-free and preferential treatment under the Andean Trade Promotion Act (ATPA). The Bush Administration, for its part, has argued that passage of the agreement would strengthen relations with a strong Latin American ally in a region that is critical to US national interests.

Congressional consideration of the US-Colombia agreement will also provide an indicator as to how the two other pending FTAs – with Panama and Korea – will fare in Congress once the Bush Administration submits implementing legislation for both these agreements. Analysts are uncertain if the Bush Administration has enough time (and political willpower) to submit these two agreements to Congress so that legislators consider them before they adjourn in late September. Both agreements still suffer from sensitive contentious issues: Korea has not yet lifted its ban on US beef imports, and the President of Panama's National Assembly has been accused of the murder of a US soldier. Add to these concerns the controversial debate surrounding the US-Colombia FTA, and the odds that Congress considers these

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two pending FTAs by the end of 2008 become even slimmer. On an even broader level, observers have stated that foreign governments and businesses are closely watching the Colombia FTA vote because it potentially serves as an indicator of the direction of US trade policy under the current and future Administrations.

United States and Ukraine Sign Trade and Investment Cooperation Agreement

On April 1, 2008, the United States and Ukraine signed a Trade and Investment Cooperation Agreement (TICA). United States Trade Representative (USTR) Susan Schwab and Ukrainian Minister of Economy Bohdan Danylyshyn signed the agreement that, according to USTR, "will provide a forum to address trade issues and help build trade and investment relations between the United States and Ukraine." The TICA is similar to other US Trade and Investment Framework Agreements (TIFAs) in that it will establish a forum for discussion of bilateral trade and investment relations. Under the TICA, the United States and Ukraine will create a joint US-Ukraine Council on Trade and Investment, which will address trade and investment issues including market access, intellectual property, labor, and environmental issues. The Council will also identify and work to remove impediments to trade and investment flows between the United States and Ukraine.

The US-Ukraine TICA comes at the same time that Ukraine is acceding to the World Trade Organization (WTO). In February 2008, the WTO approved the terms of Ukraine's accession. Ukraine will become a WTO Member 30 days after the Ukrainian Parliament ratifies the accession protocol, expected to occur before July 4, 2008.

As noted, the US-Ukraine TICA is similar to other US TIFAs. If this is the case, then the United States may be attempting to strengthen commercial and trade ties with Ukraine now with the possibility of negotiating a Free Trade Agreement (FTA) in the long-term. TIFAs (and the TICA, in this case) are limited trade agreements that establish joint councils of trade and economic officials to discuss trade issues. Under US trade policy, TIFAs are usually the first step towards the initiation of formal bilateral or regional FTA negotiations. The next step in the process would be for the countries to enter into a Bilateral Investment Treaty (BIT), which protects the rights of foreign subsidiaries and investors in the countries' home markets. Although USTR has not formally discussed the possibility of a US-Ukraine BIT or FTA, the completion of the TICA shows that USTR is interested in maintaining strong trade ties with Ukraine so that it may broach a more comprehensive trade agreement with Ukrainian at a later time.

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Multilateral

WTO Panel Report: United States – Continued Suspension of Obligations in the EC-Hormones Dispute (DS320)

Summary

Decision: A WTO Panel has issued a mixed ruling in an EC challenge to the application of retaliatory trade sanctions by the United States. The US sanctions were initially imposed in 1999, after the WTO ruled that the EC ban on imports of hormone-treated beef failed to comply with the WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "SPS Agreement"). In 2003, the EC announced that although the ban would remain in place, it had conducted a "comprehensive risk assessment" that justified this import prohibition under the SPS Agreement. The United States took the position that the EC remained in breach of its WTO obligations and refused to lift the sanctions. On March 31, 2008, the Panel ruled that the United States had violated its procedural obligations under the Dispute Settlement Understanding (DSU) by not having recourse to multilateral procedures to determine whether the new EC measure was WTO-consistent. However, it also ruled that the 2003 EC measure still did not meet the requirements of the SPS Agreement, and so it rejected the EC claim that its illegal measure had been "removed."

Significance of Decision / Commentary: DSU Article 23 requires Members to use the multilateral procedures of the DSU to "seek…redress" for the violation of WTO rules. The adoption of this provision was seen by many countries as a major achievement of the Uruguay Round, as they regarded it as a key tool to prevent US unilateralism, particularly the use of the US "Section 301" procedure. After protracted negotiations, the United States agreed to Article 23 in exchange for a significantly strengthened dispute settlement system.

Continuation of US retaliation breaches the DSU

While Article 23 is a key provision governing the imposition of retaliation, it is far from clear whether it can or should apply to the termination of retaliation. In the present case, the United States was found to be in breach of its obligation to use the DSU to "make a determination" that "a violation has occurred." Yet the United States had received authorization from the Dispute Settlement Body (DSB) in 1999 to retaliate against the EC because of the WTO-inconsistent EC import prohibition on hormone-treated beef. Four years later, the EC claimed to have brought itself into compliance – not by removing the ban, but by informing the WTO of a new risk assessment which the EC considered provided sufficient justification for

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it. The Panel found that by continuing its retaliation subsequent to the EC notification, the United States was in violation of its obligations under DSU Article 23.

The Panel's ruling on this issue is troubling. The United States "sought redress" for the EC's violations through the multilateral procedures of the WTO at the time of the original proceeding, and it was duly authorized by the DSB to impose sanctions. It would have been reasonable to assume that the US actions remained permissible unless the DSB revoked such authorization, or at least modified the legal basis for it, such as by adopting a panel report indicating that the EC was in compliance. Yet, according to this Panel's ruling, virtually any *post hoc* implementing measure would shift the onus to the retaliating party either to terminate the sanctions, or to engage in a new round of litigation to determine if they could be maintained. The implication of the Panel's decision is that a unilateral assertion of compliance by the defending party – not a DSB decision – is to be considered as the triggering event for the termination of sanctions or additional proceedings. There is no express textual support for such an interpretation, and it raises serious questions about the ability of the WTO dispute settlement system to ensure effective compliance with its rulings.

New EC risk assessment fails to meet the requirements of the SPS Agreement

The Panel's second major ruling was made under DSU Article 22.8, which provides in part that retaliation "shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed…." The EC made an alternative claim that the continuation of US sanctions violated Article 22.8 because the 2003 Directive met the conditions of the SPS Agreement, and therefore the WTO-inconsistency of its measure had been "removed."

This claim led the Panel to examine whether the 2003 Directive complied with the relevant provisions of the SPS Agreement, and it ruled against the EC on that point. The Panel, assisted by experts, examined the scientific evidence presented by the EC and concluded that the EC had not conducted an appropriate risk assessment within the meaning of Article 5.1 of the SPS Agreement. The Panel found that the scientific evidence evaluated did not support the conclusions in the EC's risk assessment. The EC also invoked Article 5.7 of the SPS Agreement, which provides that where "relevant scientific evidence is insufficient", a Member may "provisionally adopt" SPS measures. The Panel found that the relevant scientific evidence could not be considered "insufficient" in relation to "any of the five hormones with respect to which the European Communities applies a provisional ban." Therefore, the Panel concluded that the WTO-inconsistent EC measure had not been "removed", and the United States was not in breach of DSU Article 22.8.

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The Panel's rulings on the SPS Agreement are a significant setback for the EC efforts to provide a WTO-consistent basis for its import prohibition. The EC had initiated and funded 17 scientific studies and research projects for the purpose of conducting a risk assessment. However, after considering the "clear and consistent answers" of the experts it consulted, as well as "the plain language" of the EC studies, the Panel concluded that the EC had not met the requirements of the SPS Agreement. This decision will serve as a strong precedent that will be cited by the United States in any future proceedings that may be convened in response to the DSU procedural violations discussed above.

It seems likely that both sides will appeal this decision.

Analysis

A. Background

In 1998, the WTO Appellate Body upheld a complaint by the United States that an EC ban on the importation of hormone-treated beef violated the SPS Agreement. The Appellate Body ruled, among other things, that the EC import prohibition was not "based on" a risk assessment, in breach of Article 5.1 of the SPS Agreement. In 1999, following the expiration of the compliance period, the DSB authorized the United States to impose retaliatory trade sanctions on EC imports up to the level of USD 116.8 million per year. The US Government immediately implemented this authorization through 100% additional tariffs on certain EC imported products.

In 2003, the EC adopted a new measure (the "2003 Directive"), which it argued brought the EC into compliance with the DSB rulings. While it kept the import prohibition in place, the EC argued that the 2003 Directive was "based on a comprehensive risk assessment" that justified the ban. However, the United States did not agree that the 2003 Directive constituted compliance, and it therefore refused to remove the sanctions against EC imports.

B. EC claim under DSU Article 23 upheld: "Strengthening the Multilateral System"

(i) Violation of DSU Article 23.1: US authorization to retaliate granted for the original measure only

DSU Article 23, by its own terms, seeks the "strengthening of the multilateral system." Article 23.1 provides that when Members "seek the redress of a violation of obligations", they are required to "have recourse to, and abide by", the multilateral procedures of the DSU. Article 23.2(a) specifies that Members shall "not make a determination to the effect that a violation has occurred" except through recourse to the

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DSU. The EC argued that the United States breached these provisions by maintaining its sanctions after the EC had notified the WTO of the 2003 Directive.

The Panel upheld the EC claim on this issue. The United States argued that it had already sought and obtained redress through the multilateral dispute settlement system in 1999. However, the Panel reasoned that the authorization given to the United States to impose sanctions had been granted with respect to the original measure only, and the 2003 Directive had not been subject to adjudication under the DSU. It found that the United States, by continuing its retaliation subsequent to the EC notification, was "seeking the redress of a violation" without having recourse to the DSU, in violation of DSU Article 23.1.

(ii) Violation of DSU Article 23.2(a): US determination of EC non-compliance a "procedural error under the DSU"

The Panel similarly agreed with the EC that the United States had breached Article 23.2(a) because it had made a "determination" that a violation had occurred without having recourse to the DSU.

Applying the test from *US – Section 301 Trade Act*, the Panel first found that the United States had made a "determination" that the 2003 Directive violated the WTO obligations of the EC. The Panel pointed to statements made by the US delegation to the DSB, such as "[t]he United States failed to see how the revised EC measure could be considered to implement the DSB's recommendations and rulings in this matter." The Panel considered that these US statements "can be reasonably deemed to convey, with a high degree of firmness and immutability, a more or less final decision."

In any event, as the Panel noted, the sanctions remained in place. Therefore, it concluded that that United States had made a "determination" within the meaning of DSU Article 23.2(a). As this determination was made without recourse to the DSU, the Panel found the United States in violation of Article 23.2(a) and Article 23.1. The Panel characterized these violations as "a procedural error under the DSU…."

C. EC claims under DSU Article 22.8 rejected: WTO-inconsistent EC measure had not been removed

(i) Removal of the illegal measure "must lead, without delay, to the removal of the suspension of obligations…."

DSU Article 22.8 provides in part that "[t]he suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a

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covered agreement has been removed….” The EC argued that the United States breached Article 22.8 “because it failed to withdraw its suspension of concessions even though the European Communities removed the measure found to be inconsistent with a covered agreement.” The Panel noted that this claim was “not premised on the mere existence of an EC implementing measure, but on its *conformity* (presumed or actual) with the *SPS Agreement* [original emphasis].”

The Panel began its analysis on this issue by observing that “the terms of Article 22.8 make it clear that countermeasures may remain in place only until such time as the measure found to be inconsistent by the DSB is removed.” In other words, according to the Panel, “the removal of the illegal measure by the losing party must lead, without delay, to the removal of the suspension of obligations by the Member authorized by the DSB to suspend concessions.”

The Panel stressed that the term “measure” should “not be interpreted narrowly as applying only to the legislation at issue.” It reasoned that “what is to be achieved is not the removal of the measure but the actual compliance with the recommendations or rulings of the DSB.” Therefore, the Panel concluded that “Article 22.8 may be breached only if the European Communities has complied with the recommendations and rulings of the DSB and the United States has failed to immediately remove its suspension of concessions or other obligations.”

The EC argued that it should be “presumed to have removed in good faith” the original measure, and that this presumption could only be rebutted through recourse to a compliance panel proceeding by the United States under DSU Article 21.5. The Panel agreed with “the existence of a presumption of good faith compliance”, but stressed that “this presumption is rebuttable.” It also rejected the notion that the presumption of good faith could only be rebutted through an Article 21.5 compliance panel procedure.

The Panel next considered whether it had a mandate to address the compliance of the EC implementing measure under the SPS Agreement. It concluded that it could do so in order to rule on the EC’s claim under Article 22.8 that the “measure found to be inconsistent” in the original dispute had been removed.

(ii) EC fails to satisfy the definition of “risk assessment” under the SPS Agreement

Article 5.1 of the SPS Agreement provides that Members must ensure that their SPS measures are “based on” a risk assessment. The Panel, recalling the ruling of the Appellate Body in *Japan – Apples*, stated that “for a risk assessment to be valid the science evaluated must support the conclusions reached in the risk assessment.”

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The EC argued that the 2003 Directive was "based on" a risk assessment that "sufficiently warranted" the definitive import prohibition on meat treated with the hormone oestradiol. Therefore, the EC claimed that its measure was now consistent with the SPS Agreement, particularly Article 5.1.

The Panel considered the definition of "risk assessment" in the Annex to the SPS Agreement, which includes "the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs." Relying on prior Appellate Body decisions, the Panel stressed that the requirement to conduct a risk assessment was not satisfied "merely by a general discussion of the disease sought to be avoided" by the imposition of the SPS measure. Rather, the EC was required to "evaluate the possibility that the identified adverse effect came into being, originated, or resulted from" the presence of residues in meat "as a result of the cattle being treated with the hormone for growth promoting purposes."

After reviewing the technical evidence, the Panel concluded that the EC had "evaluated the potential for the identified adverse effects to be associated with oestrogens in general", but had not analyzed the potential for these effects to arise from consumption of meat which contained residues of this hormone as a result of the treatment of the cattle with the hormone for growth promotion purposes. The Panel therefore concluded that the EC had not satisfied the requirements of the definition of a "risk assessment" contained in Annex of the SPS Agreement.

The Panel also found that the scientific evidence evaluated did not support the conclusions about the adverse effects of hormone-treated beef. The Panel evaluated the views of the experts it had consulted, as well as the EC's scientific studies, and concluded that the evidence did not support the EC's position, such as the view that the presence of residues of oestradiol in meat as a result of the cattle being treated with the hormone leads to an increased cancer risk. The Panel referred to the "clear and consistent answers" of the experts it consulted, as well as "the plain language" of the EC studies and concluded that the EC had not satisfied the requirements of the definition of a risk assessment in the Annex to the SPS Agreement. Accordingly, the Panel ruled that the EC had not conducted a risk assessment "as appropriate to the circumstances" within the meaning of Article 5.1 of the Agreement. The Panel concluded that the EC implementing measure on oestradiol was "not compatible" with Article 5.1.

(iii) Provisional ban rejected: scientific evidence not "insufficient"

Article 5.7 of the SPS Agreement provides in part that "where relevant scientific evidence is insufficient", a Member may "provisionally adopt" SPS measures on the basis of "available pertinent information." The

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Panel assessed whether the EC's ban on meat treated with five other hormones could be justified under this provision.

The Panel noted that the parties agreed to the fact that "scientific evidence which was previously deemed sufficient could subsequently become insufficient" in light of new studies and information. Relying on the decision of the Appellate Body in *Japan – Apples*, the Panel stated that "relevant scientific evidence will be deemed insufficient within the meaning of Article 5.7 if the relevant scientific evidence does not make it possible to complete a risk assessment on which a sanitary measure can be based *in substance* [original emphasis]." It affirmed that "Article 5.7 will apply in situations where, in substance, the relevant scientific evidence does not allow the completion of an objective evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs."

The Panel cautioned that Article 5.7 operated as a qualified exemption from the obligation not to maintain SPS measures without sufficient scientific evidence, and that "an overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless." It also stressed that "the existence of scientific uncertainty does not automatically amount to a situation of insufficiency of relevant scientific evidence."

The Panel reasoned that if relevant evidence already existed, "not any degree of insufficiency will satisfy the criterion under Article 5.7 that 'relevant scientific evidence is insufficient'." Rather, it emphasized that "depending on the existing relevant evidence, there must be a *critical mass* of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient [emphasis added]."

Applying these principles to the evidence before it, the Panel found that "the experts who expressed themselves in detail on this matter have confirmed, both in general and for each of the five hormones subject to a provisional ban, that such critical mass had not been reached." Therefore, the Panel concluded that "it has not been demonstrated that relevant scientific evidence was insufficient, within the meaning of Article 5.7 of the SPS Agreement, in relation to any of the five hormones with respect to which the European Communities applies a provisional ban."

Accordingly, the Panel concluded that "it has not been established that the European Communities has removed the measure found to be inconsistent with a covered agreement" and therefore the EC "did not demonstrate a breach of Article 22.8 of the DSU by the United States."

The decision of the WTO Panel in *United States – Continued Suspension of Obligations in the EC – Hormones Dispute (DS 320)* was released on March 31, 2008.

Note: Canada was a co-complainant in this dispute, and was also authorized by the DSB in 1999 to impose retaliatory trade sanctions against the EC, albeit in a lower amount (CDN 11.3 million, or about USD 10.9 million). On March 31, the same Panel issued a parallel ruling in the Canadian case.

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