WHITE & CASE

April 2009

Japan External Trade Organization

WTO and Regional Trade Agreements Monthly Report

IN THIS ISSUE

Due to the general nature of its contents, this newsletter is not and should not be regarded as legal advice.

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United States Highlights

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

- United Steel Workers Files Section 421 Petition on Chinese Tire Imports
- Treasury Department Does Not Cite China as a Currency Manipulator in Semi-Annual Report
- President Obama Nominates Deputy USTR, DOC Under Secretary for International Trade
- USTR Kirk Addresses Climate Change, "Border Measures" in Letters to Legislators
- United States Imposes Tariffs on Softwood Lumber from Canada Over Failure to Comply with the Softwood Lumber Agreement

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- Office of Management and Budget Issues Implementing Guidance for American Recovery and Reinvestment Act of 2009
- USTR Releases Summary on State of ACTA Negotiations
- USTR Ron Kirk Announces New Staff

Free Trade Agreements

USTR 2009 NTE on Foreign Trade Barriers: Middle Eastern Economies

On March 31, 2009, the United States Trade Representative (USTR) published its 2009 National Trade Estimate (NTE) Report on Foreign Trade Barriers. The annual report is an inventory of the most significant foreign barriers to: (i) US exports of goods and services; (ii) foreign direct investment by US persons; and (iii) protection of intellectual property rights (IPR). The report provides, where feasible, quantitative estimates of the foreign practices' impact on the value of US exports.

USTR 2009 NTE on Foreign Trade Barriers: Latin American Economies

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USTR 2009 NTE on Foreign Trade Barriers: European Union

On March 31, 2009, the United States Trade Representative (USTR) published its 2009 National Trade Estimate (NTE) Report on Foreign Trade Barriers, which examines the trade practices of 58 nations, the European Union, Taiwan, Hong Kong, the Southern African Customs Union, and one regional body that represent the largest export markets for the US. With regard to the EU the report notes in general that in spite of the "generally positive" character of its trade and investment relationship with the US, exporters and investors continue to face a number of "chronic barriers" to entering or expanding their presence. We summarize below the most relevant of these barriers.

USTR 2009 NTE on Foreign Trade Barriers: Asian Economies

On March 31, 2009, the Office of the United States Trade Representative (USTR) published the National Trade Estimate (NTE) Report on Foreign Trade Barriers, which surveys significant trade barriers to US

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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.

Free Trade Agreements Highlights

- USTR Launches Review of US-Colombia FTA
- Pending US-Panama FTA Sees Some Forward Movement
- Legislators Urge Obama Administration to Keep Pending KORUS FTA On Radar
- US-Rwanda TIFA Council Examines Strengthened Trade, Investment Linkages

Multilateral

Article 21.5 Compliance Panel Releases Decision in United States – Measures Relating to Zeroing and Sunset Reviews (DS322)

Decision: A WTO Compliance Panel has ruled that the United States failed to implement the 2007 rulings of the Dispute Settlement Body (DSB) on "zeroing."

Multilateral Highlights

- EU to Reduce "Byrd" Retaliatory Duties on US Imports
- United States Announces Compliance with Panel Decision on "Customs Bonding"
- WTO Establishes Panel on US Dolphin-Safe Labelling Requirements for Tuna
- China Initiates Dispute Settlement Proceedings With United States Over Poultry Ban
- New Doha Agriculture Negotiations Chair Named

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Reports in Detail

United States

House Ways and Means Committee Holds Hearings on Climate Change Legislation

Summary

On March 24 and March 26, 2009, the House Ways and Means Committee held two separate hearings on climate change legislation in the 111th Congress. The Ways and Means Subcommittee on Trade held the March 24th hearing which focused specifically on climate change legislation's impact on trade. The full Ways and Means Committee held the March 26th hearing which focused on price volatility in climate change legislation. We review below both hearings.

The full text of witnesses' statements from both hearings is available at:
http://waysandmeans.house.gov/hearings.asp?congress=19&order=eventdate&dir=asc;
http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=667; and
http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=668.

Analysis

On March 24, 2009 and March 26, 2009, the House Ways and Means Committee held two separate hearings on climate change legislation and its effects on trade and price volatility. The hearings included **on-the-record** oral testimony from academic leaders, economists and business representatives on climate change legislation and its impact.

I. March 24 Ways and Means Trade Subcommittee Hearing

At the Trade Subcommittee's March 24, 2009 hearing on climate change legislation's impact on trade, the two main discussion items were the establishment of a "cap-and-trade" system and the implementation of a carbon tax. Under a cap-and-trade system, the US government would implement a "cap" on the amount of greenhouse gases that can be emitted and would allow companies to "trade" among each other their permits to emit such greenhouse gases. The system of carbon taxing would place a tax on carbon dioxide and greenhouse gas emissions. While the hearing included arguments for both cap-and-trade and carbon-tax systems, there was consensus that no matter which system was implemented,

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trading partners would have to either comply with US standards and regulations, or agree to international large-scale climate change agreements.

Ways and Means Trade Subcommittee Chairman Sander Levin (D-MI) noted that legislative "passivity" would not solve the potential negative trade issues surrounding climate change legislation, and he and other legislators present at the hearing stressed that climate change legislation could not occur without specific focus on its impact on trade. If trade is not taken into account when passing such legislation, the Subcommittee stressed, "USs could see their jobs move to a country where no such regulations exist, thereby making these products cheaper to produce, cheaper for consumers and therefore more profitable for US foreign competitors." According to Chairman Levin, USs could also face higher taxes as a result of domestic producers trying to offset any new expenses incurred as a result of climate change legislation. Although Chairman Levin admitted that there currently was no solution to these prospective problems, he specifically pointed out that any climate change initiative had to be implemented in a way that does not hurt US jobs.

CEO and Chairman of the Board of Directors of Pridgeon & Clay, Inc. Robert Clay echoed the concern of potential climate change legislation hurting US jobs and stated in his testimony that he "appreciate[s] the need to address pressing environmental problems, but believe[s] that the cap and trade and tariff options currently being discussed put at risk what remains of the US manufacturing sector."

International President of the United Steel Workers Leo Gerard noted that, in addition to climate change legislation hurting US jobs, there are some industries that do not have the technology to completely remove the creation of pollutants. For example, Gerard explained that the steel and cement industries do not have the technology to produce their materials without also producing carbon emissions. In discussing the potential problems that might arise internationally if the United States "goes first" in instituting climate change legislation, Gerard pointed out that there would be no incentive for foreign producers to comply new standards given that they already have access to US markets. Since foreign producers are already free to trade with the United States, Gerard argued that if the United States enacts climate change legislation domestically, this would leave foreign producers unaffected relative to domestic products.

Director of Global Warming and Energy Programs at the Sierra Club David Hamilton suggested, in response to the concerns of Clay and Gerard, that disincentives be created if foreign producers do not comply with new regulations. Such disincentives could alleviate the concerns of being the only nation to enact such changes by forcing foreign countries to also comply with US climate change standards and regulations.

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II. March 26 Ways and Means Committee Hearing

In announcing the March 26 hearing on addressing price volatility stemming from climate change legislation, **Ways and Means Committee Chairman Charles Rangel (D-NY)** stated that "as we develop climate change legislation, we must ensure that the program is structured to achieve specific environmental goals at the lowest possible cost to the economy and consumers." At the hearing, he noted that there were many different ways to implement mechanisms to ensure price stability with the implementation of such legislation. Chairman Rangel and other Committee members noted that any new mechanisms could be potentially costly and expressed their support for protecting US consumers and ensuring they see as little fiscal increase as possible as a result of the implementation of any climate change measures.

Senior Fellow of Resources for the Future Dallas Burtraw highlighted the specific difficulties facing potential climate change legislation with respect to its cost on both producers and consumers. He explained that "the issue of how to set climate policy in the presence of uncertainty about the cost of emissions reductions has two features; one addresses how expected costs may change over a long time horizon, which gives rise to proposals for cost containment [whereas] a second aspect is how prices may vary in the short run." Burtraw stressed the importance of carefully choosing the type of legislation because the way specific climate change legislation is designed "can have a significant impact on price volatility."

Professor of Economics at Tufts University Gilbert Metcalf acknowledged the two leading approaches (cap-and-trade and carbon tax) and argued in favor of a version of the latter entitled "Responsive Emissions Autonomous Carbon Tax" (REACT). REACT includes an initial tax on emissions followed by benchmarks that would be set as targets to be met either annually, every five years, or any other interval of time. Under Metcalf's plan, if "cumulative emissions exceed the target in the given years, the growth rate of the tax would increase from its standard growth rate to a higher catch-up rate until cumulative emissions fall below the target again." According to Metcalf, this proposal "can minimize price volatility while ensuring that long-run emission reductions are achieved."

Hybrid approaches entailing both cap-and-trade and carbon tax policies were also mentioned at the hearing. **Director of Policy Research for the Center for Clean Air Policy (CCAP) William Whitesell** explained to the Committee the idea CCAP created entitled "Safe Markets Development Approach." CCAP's approach is primarily a cap-and-trade program that also incorporates some of the beneficial features of a carbon tax. According to Whitesell, such an approach "combines the greater price predictability of a carbon tax with the emissions certainty of a cap-and-trade program."

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As was the case at the March 24 hearing, Committee Members and those testifying expressed concern with the United States being the first nation to implement climate change strategies, given that other countries may not follow suit. **Senior Vice President and Chief Economist for the US Council for Capital Formation Margo Thorning** indicated in her testimony that “US climate change policies will have virtually no environmental benefits unless developing countries… also participate.” Thorning also noted that “global concentrations of CO2 in 2100 will be almost unaffected by US emission reductions.”

Similar to the way the March 24 hearing on trade aspects of climate change concluded, this hearing did not end with a clear view of which mechanism the Committee would choose in its efforts to reduce or eliminate price volatility pertaining to climate change legislation.

Outlook

It is evident that the House Ways and Means Committee is interested in pursuing climate change legislation, and is aware of the way such legislation could impact trade and price volatility. At both hearings, in fact, Committee Members expressed great concern in climate change legislation’s potential to “increase taxes and reduce jobs.” Committee Members also expressed doubt over the merits of being the first country to enact such legislation, an observation not only made clear at the hearings but also by other Congressional Committees. In a March 26 letter from the House Committee on Energy and Commerce to the Ways and Means Committee, legislators highlighted the recent comments made by Energy Secretary Steven Chu at a March 17 hearing wherein he addressed China’s “long-standing position [to] not reduce emissions.” The letter stated that Secretary Chu’s response to this concern was that the United States was “considering adjusting trade duties to protect domestic manufacturers if China did not change its position.” In light of Secretary Chu’s remarks and acknowledging the potential for China to retaliate, the letter stressed the importance of well-thought-out policies by indicating that “poor decisions can lead to destructive trade wars that could put tens of thousands of US workers out of a job, and severely harm our economy.”

While there was no overwhelming consensus at either hearing favoring one way to implement regulations over another, it was generally agreed upon by all present at the hearing on trade that an international agreement would be the best way address climate change issues. The United States and its trading partners will have an opportunity to discuss the issues surrounding a global approach to climate change initiatives in early April when the United Nations Climate Change Secretariat will hold a summit in Bonn. This is the first of several meetings that will be held on the issue of climate change, and one main goal of the Bonn summit will be to draft a successor to the Kyoto Protocol. Despite the fact that neither hearing ended with a clear outlook on which type of policies will be adopted in the future, it is of note that each

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session was one of a series of hearings addressing the issue of climate change legislation. The Ways and Means Committee will likely continue to call upon experts in various fields to continue this discussion.

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USTR Releases Results of 2009 Section 1377 Review of Telecommunications Trade Agreements

Summary

On April 6, 2009, the Office of the United States Trade Representative (USTR) released its annual Section 1377 Review of Telecommunications Trade Agreements. The review focused on: (i) fixed and mobile call termination rates in El Salvador, Jamaica, Japan, Peru, and Tonga; (ii) problems with major suppliers in Australia, Colombia, Germany, India, Mexico, Singapore, and Sweden; (iii) transparency and regulatory independence in China, Egypt, Germany, India, Israel, Mexico, and South Africa; (iv) failure to update World Trade Organization (WTO) commitments in Thailand; and (v) issues affecting the telecommunications equipment trade in Brazil, China, India, Korea, Malaysia, Mexico, and Thailand. The 2009 Section 1377 report also highlighted progress made in Oman. 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_file659_15550.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 6, 2009. 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 five general areas (citing country-specific examples): (i) fixed and mobile call termination rates; (ii) problems with major suppliers; (iii) transparency and regulatory independence; (iv) failure to update WTO commitments; and (v) issues affecting the telecommunications equipment trade.

I. Fixed and Mobile Call Termination Rates

According to the 2009 report, USTR has noted "the emergence of a troubling trend whereby some foreign operators are increasing termination rates due to measures implemented by their governments that are adversely affecting the ability of US telecommunications operators to provide low‐cost, quality services to US consumers and in ways that may raise questions in connection with those governments' international trade obligations." The 2009 1377 Report highlights general issues related to increased termination rates and lists several countries that are employing diverse methods to increase termination rates:

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A. General Issues

- **Network Externalities.** According to the report, in October 2008, the International Telecommunication Union (ITU) adopted ***Recommendation D.156***, which recommends that developing countries consider the imposition of a "network externality" fee on telephone traffic originating in developed countries and terminating on developing country networks, as a means to fund the extension of developing countries' telecommunications networks. The United States and other ITU members have expressed a reservation against this recommendation because it is based on the idea that a network externality fee would be used to compensate operators in developing countries for building out networks and providing developed countries with greater calling opportunities. USTR argues that the ITU recommendation could encourage potentially WTO‑inconsistent action and could run counter to obligations set out in the WTO General Agreement on Trade in Services (GATS) and various US Free Trade Agreements (FTAs) to afford MFN treatment to foreign services suppliers.

B. Country-Specific Issues

- **El Salvador.** The report states that in July 2008, El Salvador promulgated a law imposing a USD .04/minute tax on incoming international telephone calls; Salvadoran carriers have passed on the cost to foreign carriers in the form of higher termination rates. USTR states that the imposition of this tax has resulted in a 100 percent increase in call termination rates for calls from the United States to El Salvador. USTR contends that the tax raises concerns about whether El Salvador is abiding by its Most‑Favored Nation (MFN) obligations under the GATS and its adherence to its commitment in the GATS Annex on Telecommunications (GATS Annex).

- **Jamaica.** The 2009 report notes that Jamaica has levied a surcharge on incoming international calls to fund a universal service program called the "Universal Access Fund." USTR raised this same issue in the 2008 1377 Review and encouraged Jamaica to cease collection of the surcharge until it more fully defined its universal service program and utilized the money collected thus far to build out infrastructure. The report notes that Jamaica has taken neither action, but continues to collect the fee. USTR argues that levying a surcharge solely on international calls places an unfair burden on foreign operators and consumers, and similarly argues that US operators and consumers bear the bulk of the expense, given that 80 percent of Jamaica's incoming calls originate in the United States.

- **Japan.** The report states that in Japan, the regulator does not set mobile termination rates, although "a proceeding is under way to reconsider that policy, given persistently high rates." USTR will monitor

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this proceeding and will continue to urge Japan's regulator to put in place a transparent system for better evaluating whether rates imposed by operators are truly reasonable.

- **Peru.** The report states that in 2004, Peru's telecommunications regulator OSIPTEL established a five-year plan under which mobile termination rates would decrease on a yearly basis. However, concerns have been raised that the speed at which the rates are decreasing is not fast enough, and that the plan was established using 2004 costs that observers opine are overstated. USTR raised this same issue in the 2008 1377 Review, and urged Peru to accelerate the rate reduction and take into account more recent pricing information. USTR continues to urge OSIPTEL to ensure that the rate reduction plan is in place as soon as possible, taking into account the public comment and review procedures established in Peruvian law.

- **Tonga.** According to the report, Tonga issued rules mandating a USD 0.30/minute rate for terminating international long distance calls in the country in August 2008. US carriers were previously paying a termination rate of approximately USD 0.13/minute and were in the process of renewing their interconnection agreements with the country's major supplier, Tonga Communications Corporation (TCC). The report notes, however, that when US carriers refused to pay the new government-mandated rate, TCC cut off the circuits used to deliver their traffic. USTR argues that Tonga's GATS commitments on basic telecommunications include the WTO Reference Paper, which contains a commitment to ensure cost-based interconnection with major suppliers; USTR does not believe that Tonga's assertions that its costs are higher than those in other countries because it lacks economies of scale and because it does not have access to submarine cable capacity justify the higher termination rates. USTR urges Tonga to demonstrate that the rates are cost-oriented and in compliance with its WTO obligations, and if it cannot do so, to rescind the rate increase and ensure that operators provide cost-based interconnection for foreign telecommunications suppliers.

II. Issues with Major Suppliers

The report notes that the availability of wholesale network access products for services offered by incumbents has increasingly become problematic, and cites some specific country examples:

- **Australia.** According to the 2009 1377 Review, "competitive suppliers in Australia are at an important juncture: while still dependent on Telstra for key inputs in the near term for many services they offer, competitors are increasingly focusing on deployment of a government-subsidized network ("National Broadband Network", or NBN)." USTR states that although the proposed NBN could decrease competitors' dependence on Telstra for key inputs, competitors will still need access to Telstra's facilities until such a network is built. USTR remains concerned with obtaining timely, reasonably priced access to Telstra's facilities and services while the NBN is considered and implemented.

- **Colombia.** USTR is investigating allegations of discriminatory conditions imposed on a US operator with respect to access to the submarine cable landing station facilities of Colombia Telecommunications (COTEL), which may implicate Colombia's GATS commitments. USTR will monitor this issue closely and will urge Colombia to remedy any discriminatory conditions imposed on US carriers, if necessary.

- **Germany.** The report states that German regulator, BNetzA, requires the incumbent, Deutsche Telekom, to provide a wholesale service called "bitstream access." However, the report notes that although BNetzA has approved Reference Interconnection Offers (RIOs) for two specific wholesale products, IP Bitstream (targeting consumers) and ATM Bitstream (targeting business users), there is still no formal obligation for Deutsche Telekom to offer IP Bitstream to competitors at prices that have been previously reviewed and approved by the regulator. USTR urges BNetzA to ensure that competitive carriers have legal certainty of access through an approved RIO, and ensure that procedures are in place to guarantee that Deutsche Telecom can adequately respond to large-scale demand for such services. Separately, the report states that telecom operators that are dependent on European Community-mandated unbundled local loops (ULL) offered by Deutsche Telekom to supply their service have raised concerns about Deutsche Telekom's recent proposal to raise rates for ULL by over 20 percent. USTR urges careful evaluation of this proposal.

- **India.** Previous 1377 Reviews noted that India began mandating non-discriminatory and reasonable access to the country's cable landing stations. 2009 Section 1377 commenters, however, note that the regulations mandating access do not adequately ensure the transparent and timely provision of services, and they point out that in order to obtain access to the cable landing stations, competitive carriers must negotiate new agreements with the incumbent. USTR urges India to implement a public consultation process that will allow competitive carriers to formally voice these concerns, and that will allow the Telecommunications Regulatory Authority of India to make necessary changes to its rules.

- **Mexico.** The report notes that Mexico continues to have difficulty preventing anti-competitive practices by its major suppliers Telmex and Telcel, and has not yet issued dominant carrier rules

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despite preliminary findings of dominance by Mexico's Federal Competition Commission. USTR urges Mexico to ensure that its regulator acts on these findings by developing appropriate rules.

- **Singapore.** USTR continues to be concerned by the refusal of Singapore's major supplier, Singtel, to offer competitors access to leased lines at efficient aggregation points. USTR argues that Singapore is obligated under its WTO and FTA commitments to provide for interconnection at any technically feasible point, and notes that Singapore has also committed to allow reasonable access to its network, including with respect to leased lines. USTR will continue to engage with Singapore to determine how best to address this issue. USTR also urges Singapore's Infocomm Development Authority (iDA) to identify competitive alternatives for inter-exchange transport that have developed in the market since the time that iDA determined there was no compelling reason to mandate that Singtel provide leased capacity at aggregation points. If insufficient alternatives have developed during the past six years, USTR asks iDA to consider reviewing this policy, or indicate why it still expects that competitive alternatives will eventually develop.

- **Sweden.** The report states that although the European Commission and the Swedish Post and Telecom Agency (PTS) have required Sweden's dominant carrier TeliaSonera to offer competitors wholesale bitstream access, TeliaSonera has yet to adopt PTS-approved access terms and conditions. USTR contends that lack of access to this wholesale service has impaired competitive opportunities in the market, and USTR urges the Swedish regulator to resolve this issue expeditiously.

III. Transparency and Regulatory Independence

USTR notes that "transparency in rulemaking, licensing and adjudication of disputes is essential to demonstrating and safeguarding impartiality." However, USTR notes in the 2009 report the following examples of actual or apparent bias and insufficient transparency:

- **China.** USTR notes that China's effort to license 3G wireless networks has been characterized by a lack of transparency and heavily favors domestic technology. For example, USTR cites China's initial delay in licensing due to a desire first to see a domestic technology (TD-SCDMA) mature and then be deployed in conjunction with a restructuring plan for the government-owned operators that dominate the industry. The report states that other areas in which a lack of transparency has seriously hampered foreign suppliers include the unwritten prohibition on offering 802.11 technologies ("WiFi") on mobile handsets and lack of clarity on the scope of services foreign-affiliated value-added service suppliers are permitted to offer.

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- **Egypt.** USTR argues that Egypt does not fully disclose its regulations regarding access to foreign satellites, and that publicly available information for satellite service suppliers is limited to general guidelines which indicate that satellite capacity must be "approved" by the National Telecommunications Regulatory Authority (NTRA). USTR points out, however, that no information about this approval process is available. USTR urges Egypt to make public the criteria for approving satellite capacity and also to remove any economic needs analysis affecting the number of service providers that can be licensed in the market.
- **Germany.** USTR states that BnetzA redacts large portions of its decisions prior to releasing them publicly and that while it does so to protect confidential information, "heavy redaction results in a lack of transparency." USTR urges BnetzA to ensure greater transparency in such information and to include data that may form the basis on which a decision is made.
- **India.** The 2009 1377 Review states that there is a lack of transparency in India's process for modifying foreign direct investment (FDI) requirements for Internet Service Providers (ISP) in India. USTR urges India to afford greater regulatory certainty to companies already operating in India, and to comply with its GATS commitments to make such measures publicly available.
- **Israel.** Israel makes public its standards for obtaining national "general" licenses for telecommunications services, but USTR notes that there are no such standards for obtaining licenses for activities deemed to fall under the scope of "special" licenses. USTR recommends that Israel establish general rules for obtaining all forms of licenses and make those rules publicly available.
- **Mexico.** The report notes that Mexico lacks an effective regulator and that it has unnecessary delays in issuing and renewing telecommunications licenses and concessions. USTR contends that there are overlapping roles of the *Secretaria de Comunicaciones y Transportes* (SCT) and the independent telecommunications regulator, the *Comisión Federal de Telecomunicaciones* (COFETEL). However, because COFETEL is not empowered to issue licenses or concessions for the provision of telecommunications services, "companies often are required to wait an extraordinarily long time in order to obtain a license or renew an existing license [which] creates regulatory uncertainty for the companies and can impair their ability to continue to secure outside financing for their operations, especially in cases in which licenses expire due to inaction by the regulatory authorities." USTR encourages Mexico to review its current regulatory framework and to increase the ability of COFETEL to act independently of the SCT.

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- **South Africa.** USTR notes its concern with a pattern of interference by the Department of Communications (DOC) in efforts by the independent regulator, Independent Communications Authority of South Africa (ICASA), to implement liberalization policies stemming from the 2005 Electronic Communications Act. USTR states that due to DOC interventions, including an effort by the DOC to impose an invitation-only application process, ICASA missed a 2007 deadline for issuing new value-added network services licenses to compete with the incumbent operator, Telkom; Telkom competitors have had to rely on the courts to overrule DOC interventions and allow the processes to move forward. USTR urges South Africa to ensure that ICASA is given the resources and independence to fulfill its mandate.

IV. Failure to Update WTO Schedule of Commitments

The report states that in Thailand's April 1997 GATS commitments, Thailand agreed to revise its GATS schedule by the end of 2006 to reflect the results of subsequent legislation, including with respect to foreign equity participation, national treatment, competition safeguards, interconnection, and the separation of regulatory and operational functions. USTR notes, however, that Thailand has not submitted any such revisions. USTR urges Thailand to submit a revised schedule expeditiously.

V. Issues Affecting Trade in Telecommunications Equipment

The report notes several issues that US commenters have encountered in foreign markets with regards to equipment standards and conformity assessment requirements, including:

A. General Issues

- **Conformity Assessment Requirement.** US firms continue to identify conformity assessment procedures relating to information and communications technology (ICT) equipment as a significant barrier to trade, focusing in particular on electromagnetic compatibility (EMC) testing and certification. For example, mandatory certification requirements maintained by China, India, Mexico, and Brazil, and requirements maintained by China, Thailand, and Malaysia that equipment be tested domestically, remain problematic for some US businesses.

- **Telecom Equipment Testing Requirements.** The report notes that China and Brazil have indicated a willingness to negotiate mutual recognition agreements (MRAs) for ICT and other telecommunications equipment, which could help address restrictions on equipment testing outside the country, and eventually permit certification by foreign bodies as well. The report states, however, that Mexico continues to defer the implementation of the Inter-American Telecommunication

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Commission (CITEL) MRA for conformity assessment of telecommunications equipment vis‑à‑vis the United States. USTR will continue to press Mexico to implement the CITEL MRA vis‑à‑vis the United States.

B. Country-Specific Issues

- **China.** In August 2007, China notified to the WTO Technical Barriers to Trade (TBT) Committee 13 proposed technical regulations relating to information technology security for various IT products, including routers, smart cards, and secure databases and operating systems. In March 2008, China s Certification and Accreditation Administration (CNCA) issued an announcement indicating that the final regulations would be published on May 1, 2008, and would become mandatory on May 1, 2009. These proposed regulations have generated concerns from US and other foreign governments and industry, and following the September 2008 United States‑China Joint Commission on Commerce and Trade (JCCT) meeting, China announced that it would delay publication of final regulations while Chinese and foreign experts continue to discuss the best ways to ensure information security in China. USTR will participate in these discussions and will continue to urge China to refrain from adopting any measures that would impose requirements to test and certify security functions of commercial IT products. US companies are also concerned with China's existing prohibition on marketing mobile phones with wireless local area network (WLAN) capability. USTR contends that this current prohibition has no legitimate policy justification. USTR will continue to urge China to ensure that it permits mobile phones with WLAN capability to be marketed in China.

- **India.** The report states that India's restrictions on the use of strong encryption are "both confusing and detrimental to the security of companies operating in India." Under rules regulating the use of encryption at key strengths above 40 bits in telecommunication products, use of key strengths greater than 40 bits is allowed, but users must receive written permission from the Department of Telecommunications (DOT) and deposit the decryption key, split into two parts, with the DOT. India also prohibits the use of any encryption on a dedicated network without prior approval from the DOT. USTR urges India to find ways to ensure that telecommunication companies can protect information, while also respecting any security concerns of the Indian government.

- **Korea.** USTR notes that in December 2008, Korea announced plans to switch its government wireline telephone systems from a standard circuit‑switched system to an Internet protocol based system - Voice over Internet Protocol (VoIP). In making such an announcement, Korea also issued guidelines recommending that agencies procure and use encryption‑capable systems, and began

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considering mandating that government agencies purchase equipment that contains encryption technology based on a Korean encryption standard called "ARIA." USTR contends that Korea has failed to provide a justification for using a national standard when international standards for encryption are available and widely used. USTR has raised these concerns with the Korean government, and Korea will postpone implementation of its procurement plans while it works to address US concerns.

VI. Areas of Progress

In the 2008 1377 Review, USTR urged Oman to complete the creation of a transparent regulatory framework to ensure the licensing of operators to compete with incumbent fixed - line operator Omantel. The 2009 1377 Review states that at end-2008, Oman granted a second fixed - line license to a competitive carrier, implemented regulations that established the framework for new entry into the market, and provided the country's regulatory body, the Telecommunications Regulatory Authority, the tools it needs to effectively regulate the market. Oman also eliminated licensing fees of up to USD 65 million that would have created significant barriers to market entry, and replaced them with fees in line with other countries in the region. USTR lauds Oman's efforts to comply with its WTO commitments and its commitments under the US-Oman FTA.

Outlook

In releasing the 2009 Section 1377 Report, new USTR Ron Kirk stated that "barriers to telecommunications services and equipment make it harder for the United States to compete in the global marketplace, and harder for us to evolve efficient and innovative communications infrastructure here at home." Given the Obama Administration's enhanced focus on strengthened enforcement of trade agreements and in light of the economic and financial climate, USTR will likely use its 1377 Review and the practices identified within (that it deems interfere with US telecommunications operators' ability to work in foreign markets) to engage in activities meant to modify or eliminate these barriers over the next year.

As in the 2007 and 2008 Section 1377 Reviews, the issues highlighted in the 2009 assessment are still narrow in scope and the number of countries singled out for specific attention has not diminished. In some areas, the number of countries that USTR singled out seems to have increased. The 2009 report also contains concerns from USTR with some issues that were included in the 2008 report and that trading partners' appear to not yet have resolved. Areas of concern that remain persistent include

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excessive regulatory requirements and licensing fees, burdensome testing and certification requirements, and lack of transparency.

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United States Highlights

United Steel Workers Files Section 421 Petition on Chinese Tire Imports

On April 20, 2009, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) filed with the International Trade Commission (ITC) a Section 421 Petition that could result in the imposition of duties or other safeguards on imports of consumer tires from China. According to the USW, a surge of consumer tire imports from China has been a "major factor" in the decline of domestic tire production in the United States and the loss of thousands of US jobs in the industry. The petition alleges that consumer tire imports from China increased by 215 percent by volume between 2004 and 2008 and calls for the imposition of a 21 million unit annual quota on imports that would increase by five percent during the quota's second and third years. The USW represents more than one million active and retired workers, including some 15,000 tire workers employed in 13 plans in nine states.

The requested safeguards are authorized under Section 421 of the Trade Act of 1974 ("the Trade Act"), as amended, which permits the United States to impose import relief measures when products from China are imported in increased quantities or under other conditions that cause or threaten to cause "market disruption" to domestic producers of like or directly competitive products. The provision was added to the Trade Act by the U.S.-China Relations Act of 2000 as part of China's accession to the World Trade Organization (WTO). Before any China-specific safeguards may be imposed under Section 421, the ITC must conduct an investigation to determine whether market disruption has occurred based on a consideration of the volume of subject imports, their effect on prices in the US market, and their effect on the domestic industry. Market disruption exists whenever the subject imports are increasing rapidly, so as to cause "material injury" to the domestic industry. This standard is more lenient than the "serious injury" standard required to impose "traditional" safeguard measures under Section 201 of the Trade Act. If the ITC determines a market disruption to have occurred—as it has in four out of six Section 421 petitions filed—it will recommend remedies to the Office of the United States Trade Representative (USTR) and the President, who must make the final decision whether to provide import relief and determine its type, amount and duration. Section 421 permits the President to reject such relief if he determines that its provision is "not in the national economic interest of the United States" and would have an "adverse impact on the United States economy clearly greater than the benefits." As such, ultimate discretion to impose countermeasures rests with the President alone based on a balancing of the benefits of protection with the costs to the national economy.

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The use of China-specific safeguards under Section 421 is supported by a number of Congressional Democrats, including Sen. Sherrod Brown (D-OH), who issued a public statement in support of the petition. Brown rejected the notion that "tools like the [Section 421] safeguard measure" are not consistent with WTO rules and are protectionist. He added that the United States should expect continued job losses unless the government uses all available trade enforcement tools, including Section 421 safeguards. Brown stated that he believed President Obama would examine the petition "objectively" and decide the appropriate remedy on the petition's merits.

Should the ITC investigation determine that market disruption has occurred, President Obama's decision on the recommended safeguards is likely to prove a "litmus test" with respect to his Administration's stance on China trade and its trade policy more generally. Because the President alone retains the discretion to enact duties or other measures under Section 421, many observers—the Chinese government among them—will likely view Obama's decision to accept or reject any proposed safeguards as an early indication of what course his trade policy will take.

Imposition of safeguards under Section 421 would represent a significant break from the policy of the previous Administration: President Bush rejected the imposition of Section 421 safeguards on each of the four occasions such safeguards were recommended during his Administration. This repeated rejection appears to have convinced domestic industry that the Administration was unlikely to change its policy, and no further petitions were filed after August 2005. During the 2008 Presidential campaign, then-Senator Obama stated in an October 24, 2008 letter to the National Council of Textile Organizations (NCTO) that he would decide Section 421 cases "on their merits, not on the basis of an ideological rejection of import relief like that of the current Administration." It remains unclear whether this statement is an indication that President Obama would support safeguards in the current case. Notably, the Treasury Department recently declined to cite China as a "currency manipulator" in its semi-annual report to Congress on the currency policies of key US trading partners, despite past statements by then-Senator Obama and Treasury Secretary Timothy Geithner which indicated a belief within the Administration that China is manipulating its currency. The apparent reversal of the Administration's position on the currency issue suggests a shift to a more moderate China policy that better reflects the political and economic realities of the bilateral relationship with China. This diminishes the likelihood that President Obama would support the imposition of import relief and risk angering the Chinese government. Should President Obama agree to impose the safeguards, however, his decision is likely to trigger an increase in Section 421 Petitions by US industry, which might come to view China-specific safeguards as a cheaper and more certain alternative to traditional trade remedies such as antidumping or countervailing duties.

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Treasury Department Does Not Cite China as a Currency Manipulator in Semi-Annual Report

On April 15, 2009, the US Department of the Treasury submitted to Congress its semi-annual report on international economic and exchange rate policies. In the report, Treasury again failed to cite China as a "currency manipulator," despite the Department's view that China's currency, the renminbi, remains undervalued. Treasury is required to submit the report to Congress under the 1988 Omnibus Trade and Competitiveness Act to determine "whether countries manipulate the rate of exchange between their currency and the United States dollar for purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade." The current Treasury report found none of the United States' major trading partners to be manipulating their currency for such purposes.

The report cites four factors in support of Treasury's conclusion that China is not manipulating its currency. According to the report, the Chinese government has taken steps to "enhance" the flexibility of its exchange rate, including a January 2009 statement by the People's Bank of China which emphasized the need "strengthen exchange rate flexibility" and maintain the renminbi at "an adaptive and equilibrium level." The report also cites the renminbi's continued appreciation against the dollar, by 16.6 percent between the end of June 2008 and February 2009. A third factor cited in the report is a deceleration in the growth of China's foreign exchange reserves. China accumulates these reserves in part through its central bank's interventions in the foreign exchange market to ease upward pressure on the renminbi through purchases of foreign currencies, such as the US dollar. The report cites as a final factor the potential for China's USD 590 billion economic stimulus package (announced in November 2008) to increase domestic demand and help rebalance the Chinese economy.

Treasury's decision appears to reverse, or at lease significantly soften, the Obama Administration's position regarding China's currency policy. As a Presidential Candidate, then-Senator Obama stated in a September 2008 speech and policy paper that he pledged to "end China's manipulation of its currency" and use "all the diplomatic avenues available to seek a change in China's currency practices." Then-Senator Obama also was a co-sponsor of the Currency Exchange Rate Oversight Reform Act of 2007 (S.1607) to identify and correct "misaligned" currencies, and the Fair Currency Act of 2007 (S.796), which would have made exchange rate misalignment a countervailable subsidy under US law. Treasury Secretary Timothy Geithner supported this position during his January 2009 Senate confirmation hearing when he submitted a written response to questions stating that "President Obama - backed by the conclusions of a broad range of economists – believes that China is manipulating its currency." These

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statements caused concern among many observers that the Treasury Department under the Obama Administration might abandon the Bush Administration's precedent of not citing China as a currency manipulator in its semi-annual report to Congress.

Treasury's decision is likely to generate angry responses from many Congressional Democrats, who have long supported a tougher US stance against China's alleged currency manipulation, including the imposition of a 27.5 percent punitive tariff on Chinese imports. In a March 26, 2009 letter to President Obama, a number of these Democrats cited China's alleged currency manipulation as one of the "most persistent and significant barriers to trade" the United States currently faces and attributed the current global economic crisis in part to imbalances caused by exchange rate manipulation. The letter criticized the Bush Administration's "quiet diplomacy" on the issue and urged President Obama to adopt a new approach that incorporates stronger US leadership in the International Monetary Fund (IMF), possible dispute settlement proceedings at the World Trade Organization (WTO), multilateral negotiations with key countries, and stronger enforcement of existing US trade and exchange rate laws. Some Democratic Members could interpret the Treasury report as a decision by the Obama Administration to ignore their concerns on this issue and might seek to introduce new legislation in coming weeks that would force stronger action against China unless it takes additional steps to amend its currency policy. On the other hand, some Democratic critics in Congress might soften their tone now that a member of their own political party occupies the White House.

President Obama Nominates Deputy USTR, DOC Under Secretary for International Trade

On April 14, 2009, President Obama announced his intent to nominate several individuals for key Administration posts, including Miriam Sapiro for Deputy United States Trade Representative (DUSTR) and Francisco Sanchez for Under Secretary for International Trade at the Department of Commerce (DOC). We include below brief descriptions of both these nominees.

I. Miriam Sapiro

Sapiro currently serves as President of Summit Strategies International, a firm that advises non-profit organizations and companies on international Internet and telecommunications policy issues. Prior to this role, she served as Special Assistant to the President for Southeast European Stabilization and Reconstruction under President Clinton. In this capacity, she supervised efforts to revitalize the region, working with USTR and other agencies, as well as other governments and international financial institutions. From 1997 to 1999 she served at the National Security Council as Director for European

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Affairs, where she developed and coordinated implementation of security and economic policies. Sapiro has also served as a member of the Secretary of State's Policy Planning Staff and the Office of the Legal Adviser. She received her B.A. from Williams College and her J.D. from New York University School of Law.

II. Francisco Sanchez

Sanchez served as a Policy Advisor on Latin America to the Obama For America Campaign and as the Chairman of the National Hispanic Leadership Council for the Obama Campaign. Prior to these roles, he served as Special Assistant to the President of the United States working in the Office of the Special Envoy for the Americas under President Clinton. President Clinton later appointed Sanchez as US Assistant Secretary of Transportation where he developed aviation policy and oversaw international negotiations. Prior to his work in the federal government, Sanchez practiced corporate and administrative law at Steel, Hector and Davis in Miami, Florida. Sanchez also served in the administration of former Florida Governor (and current US Senator) Bob Graham as Director of the state's Caribbean Basin Initiative (CBI) Program. Sanchez has also worked with several consulting companies on projects involving complex transactions, labor-management negotiations, litigation settlement, negotiation strategy, alliance management, facilitation and training. Sanchez received his B.A. and his J.D. from Florida State University and holds an M.A. in public administration from the Kennedy School of Government at Harvard University.

USTR Kirk Addresses Climate Change, "Border Measures" in Letters to Legislators

In April 14, 2009 letters to legislators, United States Trade Representative (USTR) Ron Kirk addressed some of the views of the Obama Administration on climate change bills under discussion in Congress. The letters – written to Reps. Joe Barton (R-TX), Ranking Member of the Committee on Energy and Commerce; Ralph Hall (R-TX), Ranking Member of the Committee on Science and Technology; Greg Walden (R-OR), Ranking Member of the Subcommittee on Oversight and Investigations; and Paul Broun (R-GA), Ranking Member of the Subcommittee on Investigations and Oversight – specifically address "the linkage between US efforts to address climate change and [US] international trade policies and obligations."

In the letters, USTR Kirk notes that climate change is a priority for the Obama Administration, and that the Administration is focused on establishing a domestic "cap-and-trade" system meant to gradually reduce carbon emissions. USTR Kirk acknowledges, however, "some of the concerns of certain US

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manufacturers, particularly in those sectors that are energy and trade intensive, that increased costs associated with carbon reductions could lead to competitive disadvantages vis a vis producers in countries that do not take action to reduce their carbon emissions." According to the letters, the concerns over "carbon leakage" are justified because "any shifting of production to other countries could lead to the unintended effect of only limited or zero net decreases in global carbon emissions associated with that production." USTR Kirk states that the Administration believes that the best approach to address concerns with carbon leakage is to negotiate a new international climate change agreement in the United Nations.

The letters also address the "American Clean Energy and Security Act of 2009" (ACES), a draft bill that House Energy and Commerce Committee Chairman Henry Waxman (D-CA) and Subcommittee on Energy and Environment Chairman Edward Markey (D-MA) announced on March 31, 2009 (*please see our April 2, 2009 report on the ACES for further information*). Among the bill's contents are provisions that establish a cap-and-trade system for emissions allowances and provisions that provide domestic producers with rebates for their compliance with the ACES. USTR Kirk's April 14 letter lauds the draft ACES bill, but notes that the Obama Administration would like to ensure that the design and implementation of any domestic energy and climate policy are compatible with US international trade obligations and minimize incentives for US trading partners to pursue counter measures that could negatively impact US exports. The April 14 letter clearly states that "the Administration . . . does not support any specific measures [to prevent the movement of jobs and production offshore in the event the United States imposes a cap-and-trade system], including border measures, at this time." It adds that the Administration will work closely with Congress on climate change matters and will closely evaluate the various options to address carbon leakage under consideration on Capitol Hill. The letter also states that "trade and climate change policies can be mutually reinforcing" and notes that the Obama Administration will work with domestic and foreign trading partners to promote this objective.

USTR Kirk's letter on climate change adds fuel to what is already a heated debate on the implementation of a cap-and-trade system and its effects on US manufacturers and other businesses. The April 14 letter indicates that at this time, the Obama Administration does not support border measures that could be implemented to prevent the movement of jobs and production offshore if a cap-and-trade system is created, and notes that the Administration is concerned with US international obligations in light of cap-and-trade systems under discussion. Members of Congress that do support border measures will likely attack the Administration's stance once the formal debate on the ACES (and any other potential climate

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change bill) begins in Congress, and observers opine that it will be interesting at that point to see how the Administration responds to such criticism.

United States Imposes Tariffs on Softwood Lumber from Canada Over Failure to Comply with the Softwood Lumber Agreement

On April 7, 2009, United States Trade Representative (USTR) Ron Kirk announced that the United States would impose 10 percent *ad valorem* customs duties on imports of softwood lumber products from the Canadian provinces of Ontario, Quebec, Manitoba, and Saskatchewan, in response to "Canada's failure to cure a breach of the 2006 Softwood Lumber Agreement between the United States and Canada (SLA) and failure to impose the compensatory measures determined by the Tribunal." According to USTR Kirk, the duties will remain in place until such time as the United States has collected USD 54.8 million. In announcing the customs duties, USTR Kirk stated that "the United States is taking this action . . . to enforce our rights under the Softwood Lumber Agreement; current conditions – extremely weak demand and severely depressed prices for the softwood lumber industry – only make it clearer that Canada needs to fulfill its obligations under the Agreement and not continue to avoid the market consequences of its earlier breach."

On February 26, 2009, USTR announced that a London Court of International Arbitration (LCIA) tribunal decided on a remedy in arbitration in which Canada was found to have breached the SLA by failing to calculate quotas properly in the first half of 2007. The LCIA tribunal determined that Canada must provide a compensatory remedy for violating the SLA's terms within 30 days. The LCIA decided that the appropriate adjustment to compensate for the breach was for Canada to collect an additional 10 percent *ad valorem* export charge on softwood lumber shipments from Eastern Canadian provinces until USD 54.8 million has been collected. If Canada did not take any action within 30 days, the United States was authorized by the SLA to impose the additional charges itself in the form and amount suggested by the SLA panel. On March 31, Canada announced that it was curing the breach by making a payment of USD 36.66 million available to the United States, claiming that the offer fully compensated for the breach. US officials, meanwhile, characterized Canada's claim of compliance as "unfounded." Canada's offer is now the subject of separate proceedings under the LCIA.

Reaction from Canada to the US customs duties was negative. Canadian officials stated that Canada has "made a payment that [it] believe satisfies or cures the breach, in the language of the tribunal, related to the softwood lumber dispute [and] the Americans do not agree with that." They noted that Canada does not agree with the 10 percent customs duties "but it is within [the United States'] legal right to do it and this is why we hope for a speedy assessment by the tribunal so that we can get the matter behind

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us." Canadian Prime Minister Stephen Harper stated that Canada "would have preferred, obviously, that the Americans wait to get these parts of the ruling that are unclear sorted out [but] will continue to work to find some kind of resolution that's satisfactory to the Americans, to our industry, and also, of course, to the tribunal itself." In the meantime, USTR Kirk has noted that US officials "are in constant communication with Canadian counterparts" in an effort to address the customs duties.

The US-Canada SLA entered into force on October 12, 2006. Under the SLA, the United States and Canada committed not to take any action that circumvents the SLA, including actions that reduce or offset the Agreement's export measures, such as providing new subsidies to producers or exporters of Canadian softwood lumber products. The SLA also includes a surge adjustment mechanism. Under the SLA, Canada agreed to impose export measures on Canadian exports of softwood lumber products to the United States. When the prevailing monthly price of lumber, determined per the Agreement, is above USD 355 per thousand board feet (MBF), Canadian lumber exports are unrestricted. When prices are lower than USD 355 MBF, each Canadian exporting region has chosen to be subject to either an export tax with a soft volume cap or a lower export tax with a hard volume cap or "volume restraint." The measures become more stringent as the market price of lumber declines. Regions with a soft volume cap such as British Columbia and Alberta are subject to a "surge" mechanism. If a region's exports of softwood lumber products to the United States exceed the soft volume cap, known as the "trigger volume," by more than 1 percent in a particular month, Canada must retroactively collect an additional export tax, equal to 50 percent of the primary export tax, on all softwood lumber products from that region that entered the United States during the month in question. According to USTR, the SLA's adjustment mechanism ensures that the export volume caps that apply to Canadian softwood shipped to the United States are calculated properly during periods of rapidly changing market conditions. The United States contended, however, that Canada violated the SLA's terms by waiting until July 2007 to implement the adjustment mechanism, as opposed to applying the mechanism on January 1, 2007. The United States also argued that Canada violated the SLA by not applying the adjustment mechanism to the western provinces of British Columbia and Alberta. On March 4, 2008, the LCIA tribunal issued its initial decision in the dispute concerning Canada's implementation of the SLA's surge mechanism and calculation of quota volumes. The LCIA tribunal agreed with the United States that Canada violated the SLA by failing to properly adjust the quota volumes of the Eastern Canadian provinces in the first six months of 2007 to account for rapidly changing market conditions. The tribunal, however, disagreed with the US assertion that Canada violated the SLA by failing to properly adjust the quota volumes of Western Canadian provinces during the same period; the LCIA found that the same adjustment is not required for Canada's Western provinces.

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Office of Management and Budget Issues Implementing Guidance for American Recovery and Reinvestment Act of 2009

On April 7, 2009, the Office of Management and Budget (OMB) issued "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009" (ARRA) ("OMB Guidance"). We review below the information included in the OMB Guidance with regards to the "Buy American" provisions as included in the ARRA.

I. Background

The OMB Guidance follows a March 31, 2009 Federal Register (FR) notice from the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) that contained interim rules implementing Buy American provisions that were a part of the ARRA. The OMB Guidance is addressed to the "heads of Departments and Agencies" and is comprised of seven sections: General Information (Sec. I); Agency Plans and Public Reporting (Sec. 2); Governance, Risk Management, and Program Integrity (Sec. 3); Budget Execution (Sec. 4); Grants and Cooperative Agreements (Sec. 5); Contracts (Sec. 6); and Loans and Loan Guaranty (Sec. 7). Section 5 requires federal agencies to follow the interim guidance provided in new Part 176 to title 2 of the Code of Federal Regulations (CFR) in connection with assistance awards (*i.e.*, grant, cooperative agreement or loan) funded in whole or in part with ARRA funds.

The OMB Guidance also contains nine Appendices, including: Appendix 8, which contains the Interim FAR Rules that implement the Buy American requirements of ARRA funded procurements of construction material by federal government agencies or departments (*please refer to our April 2, 2009 report on these interim FAR Rules*); and Appendix 9, which sets out the "Interim Final Guidance For Federal Financial Assistance" which covers grants, cooperative agreements, and loans funded by the ARRA.

II. Appendix 9 (Interim Final Guidance For Federal Financial Assistance)

The OMB proposes to amend title 2 of the CFR by adding new Part 176. "Subpart B" of Part 176 implements the Buy American requirement under Section 1605 of the ARRA.

Subpart B of 2 CFR Part 176 of the regulations defines key terms, including:

- "Award" means "any grant, cooperative agreement or loan made with Recovery Act funds" (2 CFR § 176.30);
- "Recovery Act funds" are "funds made available through the appropriations of the [ARRA]" (2 CFR § 176.30);

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- "Manufactured good" means "a good brought to the construction site for incorporation into the building or work that has been—(1) processed into specific form and shape; or (2) combined with other raw material to create a material that has different properties than the properties of the individual raw materials" (2 CFR § 176.140);
- "Public building and "public work" are broadly defined to mean "a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; States and local governments; and multi-State, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works" (2 CFR § 176.140); and
- "Steel" is defined as "an alloy that includes a least 50 percent iron, between .02 and 2 percent carbon, and may include other elements" (2 CFR § 176.140).

III. Non-Application of Buy American Requirements to Certain Acquisitions

2 CFR § 176.90 provides that the Buy American requirement of the ARRA "shall be applied in a manner consistent with US obligations under international agreements." Section 176.90(a)(1) further specifies that ARRA Buy American requirements "shall not be applied where the iron, steel, or manufactured goods used in the project are from a Party to an international agreement [WTO GPA, US FTAs, and also countries covered by the United States-European Communities Exchange of Letters] and the recipient is required under an international agreement, described in the Appendix to this Subpart" to accord national treatment (emphasis added). The national treatment obligation applies to covered projects above the required threshold (USD 7,443,000) and for projects "that are not specifically excluded from the application of these agreements."

IV. Appendix to Subpart B of 2 CFR Part 176

The Appendix to Subpart B of 2 CFR Part 176 identifies "US States, Other Sub-Federal Entities, and Other Entities Subject to US Obligations Under International Agreements."

- The Appendix lists 40 US States along with specific State-entities that are covered by US international obligations, and the relevant international agreements – which principally include the WTO GPA and the applicable US FTAs for a given State. Please note that no US States listed in the Appendix have assumed NAFTA procurement obligations. Also noteworthy is that, although Canada

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is a WTO GPA signatory, Canada is specifically excluded from the list of WTO GPA covered countries.

- The Appendix also includes other “Sub-Federal Entities” (*e.g.*, “Port Authority of New York and New Jersey”).
- Finally, the Appendix is also subject to a broad "General Restriction" which exempts from US obligations under international agreements "the restrictions attached to Federal funds to states for mass transit and highway projects."

V. OMB Guidance is Effective on April 3, 2009

The OMB Guidance, including 2 CFR Part 176, was effective as of April 3, 2009. Comments can be submitted within 60 days of publication in the Federal Register.

USTR Releases Summary on State of ACTA Negotiations

On April 6, 2009, the Office of the United States Trade Representative (USTR) released information on the current state of the Anti-Counterfeiting Trade Agreement (ACTA) negotiations. The summary, which all of the ACTA negotiating partners drafted, sets out the specific topics under discussion in the negotiations, and is being shared with stakeholders for review and comment. In releasing the ACTA summary, USTR Ron Kirk stated that the United States is “grateful to our partners in the ACTA negotiations for working with us in a joint effort to prepare this summary.”

USTR formally announced the negotiation of the ACTA with several US trading partners on October 23, 2007, and negotiations began in June 2008. Participants in the ACTA negotiations include Australia, Canada, the EU, Japan, Jordan, South Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, the United Arab Emirates, and the United States. USTR seeks to negotiate the ACTA to strengthen international cooperation, enforcement practices, and participants' legal frameworks to address counterfeiting and piracy. ACTA negotiators were scheduled to meet in late March for the next negotiating round, but the United States requested a delay. No new date for the round has been set.

The ACTA summary sets out “key elements” under discussion among the negotiating countries, including:

- **Objectives.** According to the summary, the ACTA initiative “aims to establish international standards for enforcing intellectual property rights in order to fight more efficiently the growing problem of counterfeiting and piracy.” Specifically, the ACTA is intended to establish among the signatories agreed-to standards for the enforcement of intellectual property rights by increasing international cooperation, strengthening the framework of practices that contribute to effective enforcement of

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intellectual property rights, and strengthening relevant enforcement measures. The summary notes that the ACTA will be consistent with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs Agreement") and will respect to the Declaration on TRIPs and Public Health.

- **Civil Enforcement.** According to the summary, civil enforcement refers to providing courts or other competent authorities with the authority to order/take specific actions when it is established that a party has violated intellectual property laws, and the rules on when and how to use those powers. Main discussion points include the authority of the judicial authorities to order injunctions which require that a party desist from an infringement and remedies.

- **Border Measures.** ACTA negotiators are also discussing "border measures" which refer to actions that customs and other competent authorities would be authorized to take to prevent goods that infringe intellectual property rights from crossing borders. Discussion items include, among others, which intellectual property rights will be covered, and whether border measures should only apply to importations or should equally apply to the export and the transit of goods; a *de minimis* exception that could permit travelers to bring in goods for personal use; procedures for right holders to request customs authorities to suspend the entry of goods suspected to infringe intellectual property rights at the border; and measures to ensure that infringing goods are not released into free circulation without the right holder's permission, and possible exceptions.

- **Criminal Enforcement.** Under this section of the ACTA, negotiators are discussing the cases for which Parties to the ACTA should provide for criminal procedures and penalties. Issues being discussed under this heading include clarifying scope of criminal penalties; the authority to order searches and/or seizure of goods suspected of infringing intellectual property rights, materials and implements used in the infringement, documentary evidence, and assets derived from or obtained through the infringing activity; the authority of judicial authorities to order the forfeiture and destruction of the infringing goods; criminal procedures and penalties in cases of camcording motion pictures or other audiovisual works; and criminal procedures and penalties in cases of trafficking of counterfeit labels.

- **Enforcement in the Digital Environment.** This section of the agreement is intended to address special challenges that new technologies pose for enforcement of intellectual property rights, such as the possible role and responsibilities of internet service providers in deterring copyright and related rights piracy over the Internet.

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- **Cooperation.** According to the ACTA summary, the agreement's chapter on international cooperation will likely address recognition that international enforcement cooperation is vital to realize fully effective protection of intellectual property rights; cooperation among the competent authorities of the Parties concerned with enforcement of intellectual property rights, consistent with existing international agreements; and capacity building and technical assistance in improving enforcement, including for developing country parties to the agreement and for third countries where appropriate.
- **Enforcement.** Areas that the enforcement practices chapter may cover include collection and analysis of statistical data and other relevant information such as best practices concerning infringement of intellectual property rights; internal coordination among competent authorities concerned with enforcement of intellectual property rights, including formal or informal public/private advisory groups; measures to allow customs authorities to better identify and target shipments, which are suspected to contain counterfeit or pirated goods; publication of information on procedures regarding the enforcement of intellectual property rights, and promotion of public awareness of the detrimental effects of intellectual property rights infringement.

According to several sources, USTR released the ACTA summary after several groups – including the Electronic Frontier Foundation – complained that USTR and other ACTA negotiators were not being transparent enough with regards to the status of the negotiations. USTR notes in the ACTA summary that "it is accepted practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, particularly at earlier stages of the negotiation [because] this allows delegations to exchange views in confidence facilitating the negotiation and compromise that are necessary in order to reach agreement on complex issues." USTR also notes that ACTA delegations are still discussing various proposals that may ultimately be included in the agreement, and at this stage, a comprehensive set of proposals for the text of the agreement does not yet exist.

USTR Ron Kirk Announces New Staff

United States Trade Representative (USTR) Ron Kirk has announced new staff at the Office of the USTR. In several early April announcements, USTR Kirk announced the following incoming staff:

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Position at USTR	Name
Chief of Staff	Julianna Smoot
Senior Counselor to Ambassador Kirk	Peter Cowhey
General Counsel	Timothy Reif
Assistant USTR for Congressional Affairs	Daniel Sepulveda
Assistant USTR for Public and Media Affairs	Carol Guthrie
Assistant USTR for the Intergovernmental Affairs and Public Liaison	Lisa Garcia
Confidential Assistant to the Chief of Staff and Associate Director of Scheduling and Advance	Stacy Koo
Congressional Affairs Specialist	Charles Small
Deputy Assistant USTR for Congressional Affairs	Luis Jimenez
Deputy Assistant USTR for Public and Media Affairs	Deborah Mesloh
Deputy Assistant USTR for the Intergovernmental Affairs and Public Liaison	Myesha Ward
Director of Scheduling and Advance	Averyl Bailey
Executive Secretary	Devorah Adler
Personal Assistant to Ambassador Kirk	Brett Rosenthal
Press Assistant	Trinh Nguyen
Public Affairs Assistant	Amanda Scott
Senior Media Affairs Liaison	Nefeterius Akeli McPherson

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Free Trade Agreements

USTR 2009 NTE on Foreign Trade Barriers: Middle Eastern Economies

Summary

On March 31, 2009, the United States Trade Representative (USTR) published its 2009 National Trade Estimate (NTE) Report on Foreign Trade Barriers. The annual report is an inventory of the most significant foreign barriers to: (i) US exports of goods and services; (ii) foreign direct investment by US persons; and (iii) protection of intellectual property rights (IPR). The report provides, where feasible, quantitative estimates of the foreign practices' impact on the value of US exports.

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

Bahrain

Similar to last year, the 2009 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. 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. The report also commends Bahrain's removal of investment barriers, its implementation of 100 percent foreign ownership laws, and its streamlined business licensing and approval procedures.

Egypt

The NTE report notes that the Egyptian Government in recent years has gradually liberalized its trade regime and economic policies "although the reform process has been somewhat halting." USTR notes that although Prime Minister Ahmed Nazif and his economic team have adopted a wide range of significant reform measures, they must continue to reduce corruption, reform the cumbersome bureaucracy, and eliminate non-science based health and safety standards. The report commends Egypt for a comprehensive reform of Egypt's customs administration, and its reorganization of the Customs Authority to meet international standards, as well as its establishment of modern customs centers at major ports to test all proposed procedures.

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The NTE report lists a number of concerns, including:

- Significant ***barriers to trade for US agricultural products***, particularly for those of animal origin;
- Abrupt ***import regime changes*** without notification or opportunity for comment;
- ***Onerous and complicated standards*** and importer-reported problems that products that meet international standards and display international marks are still subjected to standards testing upon arrival at the port of entry;
- Certain ***strict import requirements*** that are not consistent with the World Organization for Animal Health (OIE) guidelines for trading with a "controlled" risk country;
- ***High levels of piracy***, including pirated movies, 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.

Jordan

As in the 2008 report, the 2009 NTE report continues to provide 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 does not some issues of concern, however. In 2006, Jordan banned the importation of beef and live bovine animals from all US states after the announcement of the discovery of a single case of Bovine Spongiform Encephalopathy (BSE) in Alabama. The report states that Jordan has not lifted the ban completely, and that although progress has been achieved, Jordan still ***selectively imposes sanitary and phytosanitary measures*** on meat and poultry, creating ***nontariff barriers on imports*** of these products. The report also notes that although Jordan's record on IPR enforcement has improved steadily, "further improvements are still needed to ***strengthen***

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Jordan's IPR enforcement regime" and its enforcement mechanisms and prosecution efforts, particularly with respect to ex officio authority to bring criminal cases. According to the NTE report, although Jordan sets limitations on foreign ownership in certain sectors, its laws also allow for the government to grant exceptions to these limitations where it deems appropriate, although this "exceptions policy is viewed as being too selective by some potential US investors."

Kuwait

The 2009 NTE report provides a generally positive assessment of Kuwait. The report, however, lists certain problems in the areas of import policies and standards. USTR notes that Kuwait ***prohibits the importation*** of 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 Kuwait also continues to prohibit imports of live cattle from the State of Alabama and beef from the State of Oklahoma. Other problems, according to USTR, include an ***import clearing process*** that "has historically been time consuming, requiring large quantities of paperwork, and numerous redundancies," and a ***lack of deterrent criminal penalties with regards to IPR***. US industry also reports that ***sales of pirated and counterfeit goods remain high*** in Kuwait, as does the use of unauthorized computer software. The NTE report also lists services barriers in Kuwait, including:

- ***Restrictions on foreign-owned banks*** that limit them to opening only one branch, only offering investment banking services, and prohibiting them from competing in the retail banking sector;
- Restrictions on foreign banks that make them subject to a maximum credit concentration equivalent to less than half the limit of the largest local bank and prohibit them from directing clients to borrow from external branches of the bank or taking any other measures or arrangements to facilitate such borrowing;
- ***Restrictions on foreign direct investment***; and
- ***Application of 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 that Morocco has improved transparency in its government rule making and

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has strengthened its anticorruption enforcement efforts. The report also notes that US firms have substantial access to Morocco's services market, subject to very few exceptions. The report notes, however, that ***issues relating to the definition of direct shipment*** and Morocco's application of ***tariff-rate quotas for wheat*** imports from the United States have arisen since the FTA's implementation. Specifically, "Morocco's narrow interpretation of permissible transshipment under the FTA's rules of origin has resulted in the denial of preferential treatment for some US originating goods" and Moroccan customs officials continue to insist that shipments of US originating goods must be preceded by an order) from a Moroccan customer before departing the United States which prevents US companies from pre-staging US originating goods in Europe or other locations before receiving an order from a Moroccan customer. The report also notes that Morocco has also ***banned agricultural biotechnology***. According to USTR, "the greatest obstacles to trade in Morocco are irregularities in government procedures, ***lack of transparent governmental and judicial bureaucracies***, ***inefficient transport systems***, and ***low-level corruption***."

Oman

The NTE review of Oman is positive, and USTR notes that the US – Oman FTA entered into force on January 1, 2009. 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, became duty-free. Oman also provided 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 notes, however, that Oman's proposed procedures meant to harmonize ***food safety import requirements*** for all Gulf Cooperation Council (GCC) Member States "do not appear to have a clear scientific basis and would substantially disrupt food exports to GCC Member States from their trading partners." Regarding government procurement, the report states that US industry opines that ***bidders' costs can sometimes increase dramatically*** when award decisions "are delayed, sometimes for years, or the bidding is reopened with modified specifications and, typically, short deadlines." The report also notes that Oman ***does not permit representative offices or offshore banking***.

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Qatar

Like last year's assessment, USTR's overall assessment of Qatar in the 2009 NTE report is positive. The report commends Qatar's Ministry of Business and Trade for creating a "one-stop shop" to handle all services and required documentation for foreign investors and importers present in Qatar. The report also notes that in 2008, Qatar adopted OIE guidelines for the importation of US beef, effectively lifting import restrictions which had been in place since 2003. According to USTR, however, Qatar has rejected several shipments of US poultry due to concerns over packaging procedures; US officials are working with Qatari food inspection officials to clarify import procedures.

Saudi Arabia

The 2009 NTE assessment of Saudi Arabia appears to be more positive than USTR's 2008 assessment, and the report commends Saudi Arabia for improvements in its IPR regime, its work on capital market regulation, and its efforts to increase government transparency. According to the NTE report, however, some barriers to trade and investment still remain in Saudi Arabia, including:

- ***Prohibitions on certain imports*** including alcohol, firearms, pork products, therapeutic medicines used in animal feed, and used clothing, with ***special approval*** needed for the importation of 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;
- ***High tariff rates*** on a number of items, including certain agricultural products, and cigarettes and other tobacco products, although the report notes that in March 2008, Saudi Arabia exempted wheat, wheat flour, and other grains from import duties and reduced duties levied on 75 other foodstuffs to five percent;
- ***Weak IPR protection and enforcement*** in copyright and trademarked products. Although the NTE commends Saudi Arabia for improvements in its IPR regime, the report states that "further improvements are still needed with respect to copyright enforcement." The 2009 NTE report highlights Saudi Arabia's efforts to increase transparency, eliminate procedural hurdles to judicial enforcement, and impose deterrent penalties, as well as its steps to combat counterfeiting of trademarked products through the launch of an awareness campaign on IPR violation;
- ***Services barriers***, including caps on foreign ownership in commercial banks; and

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- ***Investment barriers***, including bureaucratic delays in investment licensing approval, and limits to foreign participation in certain investment activities.

United Arab Emirates

Similar to the 2008 NTE report, the 2009 NTE assessment of the United Arab Emirates (UAE) states that "the UAE has pursued free market, trade liberalizing policies to diversify its economy away from a dependence on fossil fuel." The report notes, however, that in February 2007, the UAE Ministerial Council issued a decree levying ***fees on foreign slaughter plants and Halal certifiers***; the UAE is still working to establish procedures to collect the fees from US slaughter plants although the report notes that "this requirement is expected to be difficult to administer in the United States." The NTE report commends the UAE for its continued improvements in the IPR sector but encourages the UAE to strengthen its efforts to combat IPR piracy and counterfeiting. The report also notes that there exist ***barriers to foreign participation in the insurance and banking sectors***. Notably different from the 2008 NTE report is the 2009 NTE report's lack of mention of US-UAE FTA negotiations, which began in March 2005. In early 2007, the two sides announced that they would not be able to complete FTA negotiations under the then-existing timeframe for Trade Promotion Authority (TPA) although both sides have indicated their political willingness to complete FTA negotiations at some later date. The 2009 NTE report does not forecast when FTA negotiations may be picked up again.

Outlook

The 2009 NTE Report was different from USTR's 2008 report in that the 2009 assessment highlighted 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. This difference in tone can likely be explained by the inclusion in the 2008 NTE report of the Bush Administration's proposed creation of a US – Middle East Free Trade Area (USMEFTA) that would build on trade agreements Middle Eastern countries "to increase trade and investment with the United States and others in the world economy." The countries included in the 2008 and 2009 NTE reports were all major components of the Bush Administration's USMEFTA initiative. The Obama Administration, however, has been silent on the proposed USMEFTA, and the 2009 NTE report does not contain mention of the initiative. Consequently, the 2009 assessment has changed its tone to highlight efforts by Middle Eastern trading partners to remove trade barriers, as opposed to highlighting trade agreements with these economies that could build the USMEFTA and remove trade barriers. Whether the United States under

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the Obama Administration will want to achieve a completed USMEFTA by 2013 (as President Bush had planned) depends entirely on the Administration's willingness to pursue such an initiative and the amount of political capital President Obama is willing to give to USTR to continue its work in the region. Based on some preliminary signs (*e.g.*, lack of movement on other pending FTAs and the Doha Round, an increased focus on enforcement as opposed to trade initiatives), it is likely that the Obama Administration will continue to remain silent on the USMEFTA issue, at least in the short-run, and perhaps in the medium- to long-terms. FTA talks with the UAE have not resumed and although the Bush Administration was able to implement the US-Oman FTA before its departure from the White House, the Obama Administration has not indicated its interest in pursuing other FTAs with trading partners in the region, at least for the time being. Couple this lack of movement with the Administration's renewed focus on the domestic economy (relative to global trade), and observers are uncertain at this stage if the Obama Administration will even pick up the USMEFTA initiative and carry it forward.

Apart from the decreased focus on the USMEFTA, other aspects of the 2009 and 2009 NTE reports remain similar. The 2008 and 2009 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. USTR's 2009 report on Egypt, like the 2008 assessment, focuses on counterfeiting and piracy problems and certain import restrictions. The 2009 assessment of Saudi Arabia generally lists the same barriers to trade and investment that USTR included in its 2008 report. And apart from the decreased attention paid to the US-UAE FTA, the 2009 NTE assessment of the UAE listed similar observations as included in the 2008 report. Observers note that it is not surprising that the 2009 NTE report is similar to the 2008 version, given that USTR staff likely completed the report before USTR Kirk and other high-ranking trade officials began their terms of office at USTR.

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USTR 2009 NTE on Foreign Trade Barriers: Latin American Economies

Summary

On March 31, 2009, the United States Trade Representative (USTR) published its 2009 National Trade Estimate (NTE) Report on Foreign Trade Barriers. The annual report is an inventory of the most significant foreign barriers to: (i) US exports of goods and services; (ii) foreign direct investment by US persons; and (iii) protection of intellectual property rights (IPR). The report provides, where feasible, quantitative estimates of the foreign practices' impact on the value of US exports.

We highlight here the NTE report's analysis of the trade practices of major Latin American trading partners including Argentina, Brazil, Chile, and Mexico.

Analysis

Argentina

The 2009 NTE assessment of Argentina includes several barriers that USTR sees as problematic for US businesses. The report notes that Argentina is a member of the MERCOSUR common market, and that it applies MERCOSUR's common external tariff (CET). The report notes, however, that in October 2008, Argentina adopted a decision (issued by MERCOSUR in September 2007), to ***increase the CET*** to either 26 percent or 35 percent (from a prior ceiling of 20 percent) on several hundred tariff lines of textiles, footwear, and automobiles and auto parts. Other trade barriers in Argentina that the 2009 NTE report list include:

- ***High ad valorem tariffs*** that affect US exports across several sectors, including automobiles, auto parts, electronics, chemicals, plastics, textiles, and apparel;
- ***New customs and licensing procedures and requirements*** – including additional inspections, port-of-entry restrictions, expanded use of reference prices, and requirements for importers to have invoices notarized by the nearest Argentine diplomatic mission when imported goods are below reference prices – that "could make importing US products and products from third-country US affiliates more difficult;"
- ***New "automatic" license requirements*** on 1,200 different types of consumer goods, including food and drink, pet food, computer and audio equipment, cars, bicycles, cameras, mattresses, telephones, toys and watches, and ***non-automatic import licenses*** for toys;

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- ***Restrictions on the ports-of-entry*** for numerous goods, including sensitive goods such as textiles, shoes, electrical machinery, metal and certain other manufactured goods, and watches;
- Onerous import license application procedures and a backlog of license applications;
- ***Prohibited imports*** of many used capital goods;
- ***New requirements for couriers*** (now considered importers and exporters of goods, rather than transporters) to declare the tax identification codes of the sender and addressee, "both of which render the process more time consuming and costly;"
- ***High export taxes***, in general, and efforts by the Argentine government to retroactively collect export taxes on an estimated 24 million tons of grain exports;
- ***Strict labeling requirements*** for footwear and textiles that "significantly delay import processing;"
- A continued ***ban on US lamb and beef products;***
- ***Barriers to services***, including "measures governing the showing, printing and dubbing of films and the practice of charging ad valorem customs duties on US exports based on the estimated value of the potential royalty generated from the film in Argentina rather than solely on the value of the physical materials being imported;"
- ***Argentina's common automotive policy with Brazil*** that "significantly restricts bilateral trade in automobiles and automotive parts;"
- Certain ***exchange and capital controls*** that are considered restrictive; and
- ***A lack of adequate and effective IPR protection*** that has led to widespread availability of pirated and counterfeit products, ineffective civil damages, inadequate border controls, and weak IPR monitoring.

Brazil

The 2009 NTE assessment of Brazil highlights numerous trade barriers that US companies have encountered in Brazil, and although USTR commends some improvements that Brazil has made – especially in the area of IPR enforcement – the overall tone of the assessment is negative. Trade barriers in the report include:

- Brazil's import tariffs that range from 0 to 35 percent, although there are "***large disparities between bound and applied rates***" that may make it difficult for US exporters to engage the Brazilian market;

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- ***High ad valorem tariffs*** that affect US exports across several sectors including automobiles, auto parts, electronics, chemicals, plastics, textiles, and apparel;
- ***Federal and state taxes*** and ***charges to imports*** that can effectively double the actual cost of importing products into Brazil;
- A ***complex domestic tax system***, including multiple cascading taxes and tax disputes among the various states;
- ***Prohibited imports***, including foreign blood products, and all used consumer goods such as machinery, automobiles, clothing, medical equipment, and tires, in addition to restricted entry of certain types of remanufactured goods, such as earthmoving equipment, automotive parts, and medical equipment;
- ***Onerous import licensing procedures***, the usage of ***import licensing requirements*** in certain sectors and onerous and ***burdensome documentation requirements***;
- Brazil's ***standards development process*** across sectors that creates regulations that may not be in conformity with international practices and that in some instances prevent US exports to Brazil;
- Certain ***sanitary and phytosanitary measures*** that restrict US agricultural and food exports to Brazil;
- Brazil's requirement that the US Department of Agriculture's ***export certificates*** for animals and plants and their by-products be authenticated by a Brazilian consulate in the United States before shipping which results in "extra cost and unnecessary delays in exports of agriculture products to Brazil;"
- Difficulties in acquiring ***government procurement*** projects;
- Certain "***shortcomings in some areas of IPR protection and enforcement*** [that] continue to represent barriers to US exports and investment," although the report notes that Brazil has made important progress in enhancing the effectiveness of IPR enforcement, particularly with respect to pirated audiovisual goods;
- ***Problems in Brazil's patent system***, including a backlog of patent applications, Brazil's protection against unfair commercial use of test data generated in connection with obtaining marketing approval for pharmaceutical products and Brazil's Law 10196 of 2001, which includes a requirement that National Health Surveillance Agency (ANVISA) approval be obtained prior to the issuance of a pharmaceutical patent; and

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- ***Limits to foreign ownership and market participation*** in certain services sectors.

Chile

According to the NTE report, Chile has one of the most open trade and investment regimes in the world, and the tone of the Chile assessment in the report was mostly positive. The report notes that in December 2003, Chile closed its market to all US live cattle, beef and beef products, and that in July 2005, Chile agreed to partially re-open the market for US deboned beef from animals under 30 months of age. The United States will continue to work with Chile to achieve a ***full re-opening of Chile's market to live cattle, beef and beef products*** from the United States. ***Weak IPR protection and enforcement*** remains the most significant concern of the United States although the report cites other trade barriers, such as:

- A ***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; and
- Problems associated with patent and test data protection in the pharmaceutical sector and copyright piracy of movies, music, and software.

Mexico

The 2009 NTE assessment of Mexico is mostly positive. The report commends the Mexican government for several steps it took in 2008 to simplify customs procedures and make them more transparent. The report also lauds Mexico's efforts to make its government procurement regime more transparent and competitive. The 2009 NTE report also notes that under the terms of the North American Free Trade Agreement (NAFTA), on January 1, 2008, Mexico eliminated remaining tariffs and tariff-rate quotas on all US agricultural exports. The report states, however, that "a number of US exports, both agricultural and nonagricultural, are subject to ***antidumping duties that limit access to the Mexican market***," especially US meat products. Other trade barriers in the report include:

- ***Onerous and burdensome custom administrative procedures***, including insufficient prior notification of procedural changes, inconsistent interpretation of regulatory requirements at different border posts, and uneven enforcement of Mexican standards and labeling rules;
- ***Onerous import registration procedures*** that are confusing and can delay imports of US goods to Mexico;
- ***New requirements*** in May 2008 to test all chemical samples and shipments being sent to Mexico in gas, liquid, or powder form;

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- ***Sanitary and phytosanitary measures*** that have created barriers to exports of certain US agricultural goods, including grains, seed products, apples, stone fruit, pork, beef, poultry, citrus, wood and wood products, dry beans, avocados, potatoes, and eggs, and procedural requirements regarding sanitary and phytosanitary inspections at individual ports of entry that do not always reflect agreements reached between the US Department of Agriculture and the Mexican Secretariat of Agriculture, resulting in unnecessary delays at border points of entry, seaports, and airports;
- ***Inconsistent border procedures and inadequate inspection facilities*** with regards to US beef and beef products;
- ***Continued and extensive IPR violations*** in Mexico and continuing ***high levels of piracy and counterfeiting***, although the report acknowledges that Mexico has taken steps to address these IPR shortcomings;
- A ***lack of adequate regulations for the protection of undisclosed test and other data*** submitted for the marketing approval of pharmaceutical products;
- ***Problems with trademark enforcement*** and administration; and
- ***Limitations to foreign ownership and investment*** in certain sectors, such as oil and gas, which remains closed to foreign investment (with the exceptions of the liquefied natural gas sector and in the marketing of petroleum products).

Outlook

Similar to the 2008 report, the 2009 NTE report highlights progress made by Latin American trading partners in eliminating trade barriers, especially those economies that are US FTA partners. However, although the report states that 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. Like the 2008 assessment, the 2009 report raises serious concerns regarding IPR enforcement in all four countries (*i.e.,* Argentina, Brazil, Chile, and Mexico) and makes special note of onerous, burdensome and confusing customs and registration procedures in these countries. The report also raises concerns regarding existing barriers on manufactured goods in all four countries, which, according to USTR, prevent full market access for US goods and services in these economies. The NTE report recommends that Latin American countries improve and make more transparent their customs procedures, strengthen IPR protection and enforcement, and eliminate barriers to manufactured goods and services.

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Observers opine that Latin American trading partners' reaction to the 2009 NTE report will be interesting to watch, in light of recent developments in the United States that have made these trading partners more wary of US trade policy. Specifically, some observers point to the inclusion of new "Buy American" provisions in the stimulus package signed into law earlier in the year and the elimination of the US-Mexican trucking program as having dampened Latin American trading partners' hope that the Obama Administration would focus on strengthening trade relations with the region in 2009 and beyond. The release of the NTE report and USTR's country assessments – though not that different from the trade barriers included in the 2008 report – could create additional friction for US-Latin American trade relations in the short-term.

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USTR 2009 NTE on Foreign Trade Barriers: European Union

Summary

On March 31, 2009, the United States Trade Representative (USTR) published its 2009 National Trade Estimate (NTE) Report on Foreign Trade Barriers, which examines the trade practices of 58 nations, the European Union, Taiwan, Hong Kong, the Southern African Customs Union, and one regional body that represent the largest export markets for the US. With regard to the EU the report notes in general that in spite of the "generally positive" character of its trade and investment relationship with the US, exporters and investors continue to face a number of "chronic barriers" to entering or expanding their presence. We summarize below the most relevant of these barriers.

Analysis

On March 31, 2009, USTR published its 2009 NTE Report on Foreign Trade Barriers. The annual report, as required by the Omnibus Trade and Competitiveness Act of 1988, is an inventory of the most significant foreign barriers to: (i) US exports of goods and services; (ii) foreign direct investment (FDI) by US persons; and (iii) protection of intellectual property rights (IPRs). As such, it examines the trade practices of 58 nations, the EU, Taiwan, Hong Kong, the Southern African Customs Union, and one regional body that represent the largest export markets for the US. With regard to the EU the report notes in general that, in spite of the "generally positive" character of its trade and investment relationship with the US, exporters and investors continue to face a number of "chronic barriers" to entering or expanding their presence[1]. We summarize below the most relevant of these barriers.

I. Trade in Goods

With regard to trade in industrial products, the report first of all mentions US concerns about whether EU tariffs on imports of LCD computer monitors, set top boxes with a communication function, and certain multifunction digital machines comply with the World Trade Organization (WTO) Information Technology Agreement (ITA). In addition, US exporters increasingly view the lack of transparency, economic and scientific analysis, and non-EU stakeholder input in the development and implementation of EU regulations and standards as a barrier to trade. With regard to the latter, the report lists specific concerns in the following areas:

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[1] The full text of the section that relates to the EU is available at: http://www.ustr.gov/assets/Document_Library/Reports_Publications/2009/2009_National_Trade_Estimate_Report_on_Foreign_Trade_Barriers/asset_upload_file348_15473.pdf.

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- ***Electrical and electronic equipment:*** some US companies have noted significant commercial uncertainties, a lack of EU guidance on the product scope, and the lengthy and non-transparent exemption process under the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) Directive[2]. In addition, the US calls for a greater harmonization of the EU Member States' implementation and enforcement of the RoHS and the Waste Electrical and Electronic Equipment (WEEE) Directives[3].
- ***Chemicals:*** the EU Regulation on the Registration, Evaluation, Authorization and Restriction of Chemical substances (REACH) raises trade concerns over, amongst other things: (i) differential enforcement across the EU Member States; (ii) scope and applicability of the provisions that relate to articles; (iii) differential treatment for "phase-in substances"; (iv) commercial effects of placing a substance on the candidate list; and (v) costs and burdens imposed by the regulation[4].
- ***Energy-using products:*** the EU Framework Directive for the Setting of Ecodesign Requirements for Energy-Using Products (EuP Directive) and its implementing measures could increase administrative burdens, as well as have an adverse impact on design flexibility and new product development and introduction[5].
- ***Cosmetics:*** the EU Cosmetics Directive will prohibit the sale in the EU of US cosmetic products tested on animals as of 2009 or 2013 (depending on the type of test), or earlier if the EU has approved an alternative testing method[6].
- ***Lawnmowers:*** a French ban on imports of certain side-discharge ride-on lawnmowers has had a negative impact on US exports of lawnmowers to France and has not been notified to the WTO.

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[2] The full text of the RoHS Directive is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002L0095:20080524:EN:PDF.

[3] The full text of the WEEE Directive is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002L0096:20080321:EN:PDF.

[4] The full text of REACH is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1907:EN:NOT.

[5] The full text of the EuP Directive is available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=2005&nu_doc=32.

[6] The full text of the Cosmetics Directive is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1976L0768:20080424:EN:PDF.

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- ***Pharmaceutical products:*** the report mentions procedural non-transparency and a lack of stakeholder access to pricing and reimbursement processes at EU-level. In addition, the US has expressed concerns over market access, government pricing, and reimbursement systems in the Czech Republic, Finland, France, Germany, Hungary, Italy, Poland, Slovenia, and Sweden.
- ***Uranium imports:*** EU import quotas could restrict US exports of enriched uranium and possible downstream goods such as nuclear fuel, nuclear rods, and assemblies. The US will also monitor whether agreements that the EU is negotiating with Russia in the nuclear area comply with WTO rules on import quotas and transparency.

In addition, the report list US concerns over barriers to trade in the following agricultural and food sectors: (i) biotechnology; (ii) beef; (iii) poultry; (iv) wine; (v) bananas; (vi) animal by-products; (vii) mycotoxins; (viii) canned fruit; and (ix) vitamins and health food.

II. Trade in Services

The report highlights US concerns over barriers in, *inter alia*, the following services sectors:

- ***EU enlargement:*** the European Commission has to date failed to secure the approval of the EU Member States in the Council for the compensation that the EU has agreed to provide for any adverse effects of the enlargement on the US trade in services. The EU was required under the WTO General Agreement in Trade in Services (GATS) to enter into negotiations on such compensation with any other WTO Member that indicated that it was affected by the modification of the existing commitments of the new EU Member States.
- ***Telecommunications:*** implementation of commitments under the WTO and the EU Common Regulatory Framework for Electronic Communications Networks and Services has been uneven, and problems continue with regard to provisioning and pricing of unbundled local loops, line-sharing, co-location, and provisioning of leased lines[7]. The report also mentions, amongst other things, cumbersome enforcement procedures and a slow development of competition in countries such as Austria, Finland, France, Germany, Greece, Ireland, Italy, Portugal, Spain, and Sweden.

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[7] The full text of the Common Regulatory Framework is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0021:EN:NOT.

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- ***Energy services:*** the report notes that the effective control of the quasi-governmental Electricity Authority of Cyprus (EAC) over natural gas prices and power distribution could adversely affect foreign power suppliers and will act as a deterrent to new entrants in the energy market.

In addition, the report mentions barriers in the: (i) accounting and auditing; (ii) architectural; (iii) financial; (iv) healthcare; (v) legal; (vi) postal and other delivery; and (vii) television broadcasting and audiovisual services sectors.

III. Investment

Although free movement of capital is an EU responsibility under the 1993 Maastricht Treaty, investment barriers continue to exist in certain EU Member States. The NTE report here focuses in particular on remaining ownership restrictions and reciprocity provisions for foreign investments, which create barriers in a wide range of sectors such as maritime transport and financial services. In addition, the report highlights a number of specific concerns over measures in Austria, Bulgaria, Cyprus, France, Germany, Greece, Italy, Lithuania, and Romania.

IV. IPRs Protection

The US remains concerned about high patent filing and maintenance fees in the EU, the protection in some of the new Member States of data that were submitted for marketing approval of pharmaceuticals, and the WTO-consistency of the EU system for the protection of Geographical Indications (GIs). In addition, the report mentions continuing problems with IPRs protection and enforcement in Bulgaria, the Czech Republic, Greece, Hungary, Italy, Poland, Romania, Spain, and Sweden, among others.

V. Government Procurement

The EU Utilities Directive to coordinate the procurement procedures of entities operating in the water, energy, transport and postal services sectors discriminates against bids with less than 50 percent EU content that are not covered by an international or reciprocal bilateral agreement[8]. In addition, the report highlights national government procurement practices that are of particular concern to the US in Austria, the Czech Republic, France, Greece, Ireland, Italy, Lithuania, Portugal, Romania, Slovenia, Spain, and the United Kingdom.

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[8] The full text of the Utilities Directive is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0001:0113:EN:PDF.

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VI. Subsidies

Government support by France, Germany, Spain, and the United Kingdom provides significant benefits for Airbus in comparison with its US competitors. In addition, the report lists specific measures by the governments of Belgium, France, Spain and the United Kingdom to support Airbus suppliers, as well as measures by the governments of France and the United Kingdom to support producers of aircraft engines.

VII. Customs Administration

The EU lacks effective institutions or procedures to ensure the uniform administration and application of EU customs law or the prompt review and EU-wide correction of administrative actions that relate to customs matters. The report acknowledges that obtaining corrections with EU-wide effect is possible by referring matters to the European Court of Justice (ECJ), but adds that this is a cumbersome and time-consuming process.

VIII. Electronic Commerce

The EU Data Protection Directive includes the burdensome requirement that outside of the programs that explicitly enjoy an adequacy finding, US companies can only receive or transfer employee and customer information from the EU under certain exceptions or if they demonstrate that they can provide adequate protection for the transferred data[9]. In addition, a number of US companies have in recent years faced barriers to obtaining contracts with European governments and private sector customers because of public fears in the EU that personal data held by these companies may be collected by US law enforcement agencies.

Outlook

In 2008 US goods exports to and imports from the EU increased to respectively USD 274.5 and USD 367.9 billion, with a focus on manufactured goods such as machinery and vehicles or chemicals. In 2007 US exports of private commercial services amounted to USD 179.2 billion and imports were USD 133.1 billion, with financial, insurance, transportation, and royalties and license fees services as some of the key sectors. In the same year, US FDI in the EU was USD 1.4 trillion and concentrated to a large extent on non-bank holding companies, finance and insurance, and manufacturing sectors.

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[9] The full text of the Data Protection Directive is available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31995L0046&model=guichett.

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In releasing the NTE, USTR Ron Kirk noted that the report will help to inform an enforcement strategy for US trade policy, adding that USTR has begun several initiatives, including: (i) beginning a review of the implementation of existing trade agreements, including the enforcement of labor and environment provisions; (ii) initiating a process to prioritize trade barriers enumerated in the NTE report and to address the most significant; (iii) identifying new cases where market access for US goods and services "is in jeopardy because of disregard for the rule of law, costing our workers and businesses export opportunities and jobs;" and (iv) working with Congress to improve trade enforcement. In view of these initiatives, it is also worth noting that the NTE report played a key role in the preparation of the annual "Section 1377 Review" of foreign compliance with telecommunications trade agreements that USTR issued on April 6, 2009[10]. In addition, the report will similarly serve as a basis for the "Special 301" annual report on the adequacy and effectiveness of IPRs protection in trading partners that USTR will publish thirty days after issuing the NTE report.

The release of the NTE report comes shortly after EU Trade Commissioner Catherine Ashton met with USTR Ron Kirk on March 19, 2009 to discuss the challenges that the EU and the US face in view of the current global economic and financial crisis. On this occasion, the two officials in a formal statement committed to maintaining a sustained effort to refrain from raising new barriers to trade or investment and to increasing efforts to cooperate on, and where resolve, bilateral problems in the EU-US trade relationship *(Please see W&C March 2009 EU Report)*.

[10] The full text of the Section 1377 Review is available at: http://www.ustr.gov/Document_Library/Press_Releases/2009/April/Ambassador_Kirk_Announces_Results_of_Annual_1377_Review.html.

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USTR 2009 NTE on Foreign Trade Barriers: Asian Economies

Summary

On March 31, 2009, the Office of the United States Trade Representative (USTR) published the National Trade Estimate (NTE) Report 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

China

The 2009 NTE report repeats many of the concerns raised in the 2008 report, including US industry's focus on ensuring that the Chinese government adhered to commitments it made as part of China's accession to the World Trade Organization (WTO). The deadline for China to implement these commitments passed in December 2006, and concern over China's adherence to its WTO obligations is reflected in USTR's filing of five requests for dispute settlement consultations with the WTO Dispute Settlement Body (DSB) since that deadline.[11] This concern is reflected further in areas that the report cites as being of particular concern, including: (i) lack of effective intellectual property rights (IPR) enforcement; (ii) industrial policies that limit market access for non-Chinese origin goods and foreign services providers; (iii) arbitrary practices by Chinese customs and quarantine officials; (iv) overly burdensome licensing and operating requirements in some sectors, including banking, insurance, telecommunications, construction and engineering, and legal services, among others; and (v) insufficient transparency in most service and industry sectors.

Specific issues raised in the NTE report include:

- Trade distorting ***export duties, licensing requirements and quotas*** on a wide range of products and raw materials to help guide the development of downstream industries.

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[11] The five requests are: (i) Grants, Loans and Other Incentives (DS 387), filed December 19, 2008; (ii) Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (DS373), filed March 3, 2008; (iii) Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (DS363), filed April 10, 2007; (iv) Measures Affecting the Protection and Enforcement of Intellectual Property Rights (DS362), filed April 10, 2007; and (v) Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments (DS358), filed February 2, 2007.

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- Frequent ***adjustments to value added tax (VAT) rebates*** to manage the export of intermediate and downstream products but which create market disruption and uncertainty.
- ***Export subsidies*** that are often masked by a general lack of transparency. The report also expresses concern over China's "Famous Brands" program, which appears to incorporate prohibited export subsidies to promote the development and increased sales of Chinese brands in global markets.
- ***Weak enforcement of existing IPR rules*** at the criminal, civil and administrative levels, which creates little deterrent effect on would-be violators according to the report. The report also encourages the Chinese government to strengthen national and local measures to prevent Internet piracy as internet access increases in China. USTR continued to express concern over relatively high thresholds for criminal enforcement of IPR violations.
- ***Services sector barriers*** that prevent or discourage foreign providers from gaining or expanding market access. Specific barriers cited by the report include refusal to grant new licenses, an opaque and slow-moving renewal process for existing license, foreign equity limitations, higher minimum capital requirements for foreign suppliers, and overly burdensome regulatory regimes and other restrictions. The report also identifies sector-specific barriers for 18 services categories.[12]
- ***Investment barriers*** that could discriminate against foreign investment, including 2006 measures that restrict foreign participation in so-called "pillar" industries that the Chinese government deems critical to the national economy and other measures that seek to direct investment into specific geographic areas. Ongoing investment 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.
- ***Import substitution policies*** that favor domestic products and technologies in the steel, telecommunications and automobile sectors.

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[12] These include: (i) insurance services; (ii) private pensions-enterprise annuities; (iii) banking services; (iv) securities services; (v) financial information services; (vi) electronic payments processing; (vii) retailing services; (viii) sales away from a fixed location; (ix) express delivery services; (x) construction, engineering, architectural, and contracting services; (xi) logistics services; (xii) aviation and maritime services; (xiii) telecommunications; (xiv) on-line services; (xv) audiovisual and related services; (xvi) tourism and travel services; (xvii) education and training services; (xviii) legal services

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- ***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 2009 NTE report provides a favorable assessment on most of Hong Kong's trade policies and notes progress in most areas. The report welcomes Hong Kong's February 27, 2009 elimination of a 40 percent excise tax on wine and a 20 percent excise tax on beer and liquor with less than 30 percent alcohol. It also recognizes forward movement on the government's plans to introduce a proposed competition law during the 2009-2010 legislative session and notes that USTR will continue to follow this development. The report restates continued concern over a number of specific restrictions and practices including:

- Continued ***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***. The report states that Hong Kong's failure to maintain a copyright register makes it difficult for authorities to identify original copyright holders in cases of infringement. It further alleges that a lack of expertise within enforcement agencies and overlapping jurisdictions among regulatory agencies complicates the identification and combating of counterfeit pharmaceutical products. USTR recognizes the governments April 2008 proposed amendments to the Copyright Ordinance to better protect digital intellectual property rights, but notes the government's subsequent postponement of these amendments' adoption.
- A ***restriction on RMB lending*** for any bank in Hong Kong.
- Continued ***restrictions on frequencies and routes*** for US air carriers.
- 2007 and 2008 revisions to ***mandatory food and product labeling requirements*** that might create market entry barriers for foreign producers.
- ***Energy efficiency and related consumer product labeling requirements*** that differ from internationally recognized standards and which could create trade barriers for US and other foreign companies.

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- ***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 2009 NTE report covers many of the same issues addressed in the 2008 report; however, it adds a number of new developments of concern to US business, including:

- The late-2008 introduction of a ***non-automatic import licensing requirement*** on products including electronics, household goods, textiles, footwear, toys, and food and beverage products. Under the new requirement Imports of these goods must receive pre-shipment verification at the importer's expense and are restricted to five designated ports and airports.
- New ***pharmaceutical market barriers*** including a 2008 requirement that foreign pharmaceutical companies operating in Indonesia manufacture locally and subsequent rejections of new applications for drug registrations by Indonesian regulatory authorities.
- A ***new mining law*** that introduced a system of mining licensing and creates new risks and burdens for foreign investors.

Issues of continued concern to US industries include:

- ***Government procurement*** barriers including the granting of special preferences to encourage the use of domestic sourcing and local content.
- ***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 legal services, distribution, financial services, accounting, construction, and telecommunications. The Indonesian government also prohibits foreign investment in audio-visual services and recently began requiring all local and imported movies to be duplicated locally.
- ***Investment barriers*** including non-transparency, legal uncertainty and economic nationalism.
- A relatively high ***75 percent luxury tax*** on 4,000 cc sedans and 4x4 jeeps.

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Japan

The 2009 NTE report differs little from the 2008 report in its coverage of Japan, but provides an update of developments under the US-Japan Regulatory Reform and Competition Policy Initiative. In October 2008, the US government submitted to the Government of Japan a comprehensive list of reform recommendations on specific industry sectors and cross-cutting business environment issues. The two sides will consider these proposed issues during the Initiative's eighth work cycle. Key issues include:

- ***Telecommunications market access impediments*** including high interconnections rates, discriminatory dominant carrier regulations, a universal service fee that benefits Japanese carriers, relatively high mobile connection 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. The 2009 report added mention of concerns about potentially restrictive policies for health IT services and a lack of clear regulations on IT-related financial reform.
- Although the report recognizes Japan's continued progress in improving its already strong IPR regime, it identifies a number of areas in which the US government encourages improvement. These include Japan's "piecemeal" approach to patent examination and the resulting ***lengthy delays in patent grants, inadequate protection for rights holders on the internet, and continued internet piracy***. The US government continues to urge Japan to extend the term of copyright protection.
- ***Services barriers*** in the insurance and professional (educational and medical services) services sectors that restrict market access for US firms.
- ***Investment barriers*** that continue to contribute to Japan's relatively low level of inward foreign direct investment as a percentage of total economic output among developed economies.
- ***Medical device and pharmaceutical reimbursement policies*** that hinder the development and introduction of innovative products. The report also cites a continued need for improved transparency of drug and medical device reimbursement policies.
- ***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

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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 2009 NTE notes continued low sales of North American made automobiles in Japan due to nontariff barriers, non-competitive practices and non-transparent rulemaking for the automobile sector. Other sectors cited by the report include business aviation, 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 differ little from the previous year's report and 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 2009 report notes that Korea continues to maintain a ***relatively high government procurement threshold*** for construction services. The report also cites a December 2008 announcement by the Korean government regarding a change to an Internet protocol based telephone system, the adoption of which could require government agencies to purchase equipment containing a ***domestic encryption standard***.

- USTR remains concerned about Korea's inadequate or incomplete ***IPR protection and enforcement*** regimes. Specific concerns include burdensome documentation requirements required under Korean law in order for a rights holder to request a "takedown" of infringing online materials. The report also notes some improvement, however, including the August 2008 creation of a Copyright Protection Team (CPT) and strengthened enforcement and prosecution actions.

- 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.

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- 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 2009 closely resemble those cited in the 2008 report and 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. The report also cites a ***tariff-rate quota*** the government imposed on certain agricultural products in spring 2008.
- ***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 2008 to enhance enforcement of IPR violations, Malaysia remains a significant producer and exporter of ***pirated optical media***.
- Violation of ***pharmaceutical product IPR*** remains a key USTR concern. The report cites Malaysia's continued lack of adequate measures to prevent approval of pharmaceutical products already covered by a patent. Wide availability of counterfeit pharmaceutical products also continues.
- Malaysia's relatively large ***services sector remains highly protected***. Equity restrictions limit foreign participation in the telecommunications and banking sectors, and requirements to partner with

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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

IPR remains a key area of concern for USTR and US business in the 2009 NTE report. The report notes that the Philippines remains on the Special 301 Priority Watch List, but notes a few areas in which the Philippines has made limited improvement in its IPR regime. Other issues of concern cited by the 2009 report include:

- ***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. The report notes that the Philippine government is expected to release updates of these lists during the first quarter of 2009.
- ***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.

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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 concerns, also noted in the 2008 report. These include:

- ***Taxes and operational restrictions*** based on a motorcycle's engine displacement, which USTR alleges puts US imports at a competitive disadvantage.
- A 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.
- 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

Areas of concern cited by the 2009 NTE report differ little from those cited in the 2008 report and include:

- ***Tariff and non-tariff barriers*** such as high tariffs and taxes on small automobiles and large motorcycles, and a continued partial ban on US beef imports.
- ***Government procurement*** practices, such as contractual clauses that exclude US or other foreign bidders, restrict market access to Taiwan's government procurement market. The report does note, however, that Taiwan has moved a step closer to signing the Government Procurement Agreement (GPA) and that it submitted a final coverage offer in November 2008.
- The report notes that USTR removed Taiwan from the Special 301 Watch List in January 2009; however, USTR remains concerned with a number of ***IPR violations*** that continued despite this improvement***.*** These include the availability of counterfeit pharmaceuticals, online copyright

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infringement, illegal textbook copying, and inadequate protection for the packaging, configuration and outward appearance of products.

- ***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. USTR states in the 2009 NTE report that is will continue to evaluate developments in Thailand to determine the next steps in the suspended FTA negotiations. The 2009 report cites a number of areas of specific concern which were also noted in the 2008 report, including:

- ***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. 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.

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- ***Lack of sustained and coordinated enforcement of IPR*** has led to an increase in the manufacture and export of counterfeit and pirated products, and the report notes that Thailand remains on the Special 301 Priority Watch List in 2008. Areas of specific copyright concern include optical media piracy, signal theft, book piracy, camcording, and other end user software piracy. The US pharmaceutical industry remains concerned about the issue of compulsory licenses and about potential unfair commercial use of undisclosed test and other data related to new 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.
- ***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 continued recognition of "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 2009 report's coverage of Vietnam differs little from that of the previous year's report. 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:

- ***High tariffs*** on certain agricultural products such as fresh apples, cooked and raw frozen poultry, cheese, and potato products among others.
- ***Non-tariff barriers*** such as import prohibitions and quantitative restrictions on certain products.
- Although the report cites some improvement, ***weak IPR enforcement*** remains a continued concern. The report cites laws 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 100 percent foreign ownership in express delivery services will be permitted by 2012.

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- ***Corruption in all phases of business operations***, which remains a significant problem for US companies that operate in Vietnam.

Outlook

The 2009 NTE report exhibits little substantive change from the 2008 report in its analysis of individual countries' barriers to US exports and investment. This is likely due in part to the continued transition from one Administration to the next, which left certain key USTR positions unfilled during much of the time during which the NTE report was compiled. Further, the Obama Administration's relatively low prioritization of trade as a key issue combined with the Administration's efforts to respond to the ongoing financial crisis has likely left USTR without a clear direction to follow in compiling the report for 2009. At a more general level, however, the 2009 report does include new language that reflects the Obama Administration's stated intention to focus on increased enforcement of rules under US, and existing multilateral and bilateral trade agreements to which the United States is a party. The Administration considers the report, together with the February 2009 Presidential Trade Agenda as the initiation of this enhanced enforcement strategy. The report also states that the Administration will broaden the NTE's focus in coming years to include greater coverage of labor and environmental standards within US trade agreements, a long-time priority for the Democratic Party.

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Free Trade Agreements Highlights

USTR Launches Review of US-Colombia FTA

The Office of the United States Trade Representative (USTR) has announced that at the direction of President Obama, it will start a review of any outstanding issues in the US-Colombia Free Trade Agreement (FTA). In addition, USTR will engage in bilateral dialogue with Colombian officials in an effort to resolve the outstanding issues that have prevented Congressional consideration of the bilateral agreement. To date, Congressional Democrats have blocked passage of the FTA because of concerns over violence against labor unions and union leaders in Colombia. Several reports have noted that some Congressional Democrats would like to establish benchmarks that would help them assess whether Colombian President Alvaro Uribe's Administration has responded to Democratic concerns over the violence. USTR Ron Kirk hopes that the review process and the dialogue – which will be led by USTR with participation by Members of Congress – will clear up these outstanding contentious issues. He noted that USTR officials will meet with their Colombian counterparts to first "map out a strategy to identify what remaining issues" exist, although he did not give a clear timeline on how the dialogue would proceed.

USTR Kirk also stated that the US-Colombia FTA will still fall under Trade Promotion Authority (TPA) when Congress ultimately decides to consider the agreement. TPA expired in mid-2007, and although the Colombia agreement was completed before TPA's expiry, the House of Representatives voted to strip the agreement of its TPA-mandated timeline. On April 10, 2008, in an unprecedented move, the House of Representatives approved a resolution (H. Res. 1092) that eliminated the TPA-mandated timetable under which the House of Representatives had to consider the US-Colombia FTA that the Bush Administration had submitted to legislators. USTR Kirk stated that the Obama Administration is "moving forward with the presumption that . . . the Colombian free trade agreement [is] moving forward under the trade promotion authority that was given to the previous Administration."

The sudden burst of activity on the US-Colombia FTA comes after months of silence on the agreement. Colombian officials have indicated their optimism with the review and the bilateral dialogue, opining that if the two sides are able to resolve the outstanding issues as soon as possible, Congress could consider the agreement by the end of the year. At this stage, however, it is too early to tell how the review and the dialogue will proceed, and if they will be effective in pushing Congress to consider the agreement. USTR Kirk to date has not confirmed a solid timetable for the review process and for consideration of the

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agreements, and Members of Congress have thus far been relatively quiet on USTR's announcement of the review process.

Pending US-Panama FTA Sees Some Forward Movement

According to several reports, USTR Kirk has provided signals that the Obama Administration could seek Congressional approval of the pending US-Panama FTA before a new President takes office in Panama on July 1, 2009. According to USTR Kirk, US officials had several meetings with Panamanian President Martin Torrijos and his Cabinet during the mid-April Summit of the Americas and talks between US officials and a "high-level team from Panama" continued the week of April 20 in Washington, DC. According to USTR Kirk, "given the reality of the electoral map in Panama, we may have a discreet window to move more forcefully... and come up with a timeline to move [the FTA] more expeditiously."

Panama will hold elections for a new President in early May, and Panamanian officials have indicated their desire to see the agreement approved by the July 1 inauguration. USTR Kirk noted that the US-Panama FTA still falls under now-expired TPA, and under TPA rules, if the US Congress is to approve the FTA by July 1, the Obama Administration would have to submit implementing legislation for the FTA in late April or early May in order for the agreement to move through the House Ways and Means and the Senate Finance Committees before being sent to the respective Chambers of Congress for floor votes.

Observers opine that of the three pending FTAs (Colombia, Korea and Panama), the US-Panama FTA has the least amount of problems surrounding it, consequently making it the agreement that has the highest chances of Congressional passage by the end of 2009. Contentious issues that government officials and Members of Congress have highlighted include Panama's tax laws (*i.e.*, issues related to tax havens) and Panamanian labor standards, specifically the right to organize, the right to strike, and treatment of contractors. House Ways and Means Trade Subcommittee Chairman Sander Levin (D-MI) has been vocal on Panama's labor standards and has opined that until both sides explore Panama's labor standards further in detail, the agreement will face opposition in Congress. In response, USTR Kirk has noted that the United States "will be working with the Panamanians to identify and resolve all of those issues." USTR Kirk did not give a concrete timeline, however, for these activities. The high-level dialogue during the Summit of the Americas and subsequent meetings, combined with the identification of an informal timeline for approval (*i.e.*, by the July 1 inauguration of the new Panamanian President), could mean that legislators will try to vote on the agreement before Congress' annual August recess. Such consideration, of course, depends on Panama's response to legislators' concerns on tax shelters and labor standards, a response that will likely take shape shortly.

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Legislators Urge Obama Administration to Keep Pending KORUS FTA On Radar

In an April 20, 2009 letter to President Obama, Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Charles Grassley (R-IA) urged the Administration not to forget the importance of the US-Korea FTA ("KORUS FTA"). The legislators stated that North Korea's April 5 launch of a Taepo-dong 2 missile and recent statements that it will resume its nuclear program "demonstrate yet again the threat that North Korea poses in the northeast Asian region," consequently making it even more important for the United States to "maintain and expand its strong and proven partnership with the Republic of Korea." The Senators note that the two countries must resolve bilateral economic issues in order to move the stalled KORUS FTA forward, and they state that although they both support the bilateral agreement, "Korea has yet to ensure US beef exporters full access to its market in accordance with international standards." They also note that "Korea's long history of non - tariff barriers to its autos sector also raises serious concerns with some regarding the agreement." The Senators state, however, that "postponing addressing such issues will not make them easier to resolve" and they urge the Administration "to begin the hard work of winning broad approval of the [KORUS FTA] without delay."

Like the US-Colombia FTA, the KORUS FTA has seen a burst of recent activity. President Obama met with South Korean President Lee Myung-bak at the G-20 summit in London, and President Lee plans to visit Washington in June. Both leaders will likely use the June visit to measure progress in the KORUS FTA. As noted, the bilateral agreement remains stalled due to several contentious issues, including access for US beef to Korean markets and Korean barriers to US automotive imports. Congressional observers opine that it is unlikely that the two sides will resolve these contentious issues within the next several months, but some members of the trade community see the interaction between President Obama and President Lee, and the letter from key Members of Congress, as a sign that there could be some forward movement achieved on this agreement this year.

US-Rwanda TIFA Council Examines Strengthened Trade, Investment Linkages

On April 16, 2009, US and Rwandan officials met in Kigali, Rwanda to review their progress in deepening trade and investment ties under the United States-Rwanda Trade and Investment Framework Agreement (TIFA). This was the third meeting of the United State-Rwanda TIFA Council. Assistant USTR for Africa Florizelle Liser and Rwandan Trade and Industry Minister Monique Nsanzabaganwa co-chaired the meeting where officials examined the two governments' work together on implementation of the African

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Growth and Opportunity Act (AGOA), cooperation in the World Trade Organization (WTO), trade capacity building, export diversification, trade and investment promotion, and infrastructure issues.

On June 7, 2006, the United States and Rwanda signed the TIFA, which created the US-Rwandan TIFA Council that addresses trade and investment issues, including trade capacity building, intellectual property rights (IPR), labor, investment and environmental issues. Total trade between the United States and Rwanda was valued at USD 34.2 million in 2008, a 19 percent increase over 2007. During that same period, US exports to Rwanda were valued at nearly USD 20.5 million and Rwandan exports to the United States were valued at USD 13.7 million.

The TIFA is not the only bilateral agreement that the two countries envisage as a bridge to strengthened trade and investment ties. On February 19, 2008, the United States and Rwanda signed a Bilateral Investment Treaty (BIT) meant to afford US and Rwandan investors with legal protections including nondiscriminatory treatment and effective compensation in the event of an expropriation. The BIT will enter into force once the US Senate and the Rwandan legislature approve the treaty. US and Rwandan officials have stated that the TIFA and the BIT will enable both countries to strengthen trade linkages and discuss any trade-related matters in an open forum.

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Multilateral

Article 21.5 Compliance Panel Releases Decision in United States – Measures Relating to Zeroing and Sunset Reviews (DS322)

Summary

Decision: A WTO Compliance Panel has ruled that the United States failed to implement the 2007 rulings of the Dispute Settlement Body (DSB) on "zeroing."

Significance of Decision / Commentary: This decision deals with important issues related to the implementation of WTO rulings in the context of the US "retrospective" system for anti-dumping duties.

Virtually every country in the world other than the United States maintains a prospective system for collecting anti-dumping duties, *i.e.*, the duties are assessed at the time of entry of the goods. By contrast, under the US retrospective duty assessment system, definitive anti-dumping duties are not assessed upon the entry of the good. Instead, a cash deposit is required, and the definitive duties are determined during the annual administrative reviews of the order conducted by the US Department of Commerce (USDOC). In some cases, the final anti-dumping duty rate can be significantly higher than the cash deposit.

The US retrospective duty system gives rise to unique "temporal" issues when the United States implements rulings of the DSB. In the present case, certain imports entered the United States before the expiration of the compliance period, but liquidation (*i.e.*, actual collection of the duties) occurred after the compliance period. The United States took the position that it had no legal obligations with respect to such imports. It argued that the operative date was the date of importation, when it was not yet under an obligation to comply.

The Panel rejected this US position, reasoning that the relevant date was the expiry of the compliance period. It stated that "[i]f a measure found to be WTO-inconsistent is to be applied after the expiry of the RPT, that measure must have been brought 'into conformity', irrespective of the date of entry of the imports covered by that measure."

The December 2008 compliance Panel in *EC – Zeroing* (DS294) reached a different conclusion on the liquidation issue, finding that "US actions to collect anti-dumping duties after the end of the reasonable period of time pursuant to final determinations of anti-dumping liability before the end of the reasonable period of time do not constitute a failure to comply with the DSB's recommendations and rulings" [see our

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report of January 9, 2009]. The EC has appealed that ruling, and the Appellate Body decision will be released on May 14, 2009. Thus, the WTO-consistency of this US practice will be resolved shortly.

Another noteworthy aspect of the current decision was the Panel's ruling on the scope of the US "measures taken to comply." Article 21.5 of the WTO Dispute Settlement Understanding (DSU) provides a procedure to resolve disputes between WTO Members on the existence or WTO-consistency of "measures taken to comply" with the original rulings of the DSB. The United States argued that a number of the reviews cited by Japan were not "measures taken to comply" because they pre-dated the adoption of the original DSB rulings. The United States claimed that these reviews had "no connection with the DSB's recommendations and rulings, and cannot be considered measures taken to comply." The Panel rejected this position, reasoning that the reviews challenged by Japan "form part of a continuum, the purpose of which is the ongoing assessment of anti-dumping duties owed" under the original order. The Panel found "substantive continuity between the original and subsequent reviews." The Panel also admitted into its terms of reference a review that did not exist at the time the Panel was requested. Such findings seem likely to be appealed.

Ultimately, the Appellate Body will need to resolve these sensitive issues arising from the intersection of WTO compliance obligations and the US retrospective system. (*For a further explanation of the mechanics of zeroing, please see our report of August 17, 2006 on the Appellate Body decision in US – Softwood Lumber V (Article 21.5 – Canada*)

Analysis

Background: Original rulings on zeroing

In January 2007, in the original proceedings in this dispute, the Appellate Body ruled against the use of zeroing by the United States during both original investigations and reviews. Japan and the United States agreed that the "reasonable period of time" for US compliance would expire on December 24, 2007. The current compliance panel proceedings arose from a Japanese complaint that the United States had failed to bring itself into compliance by that time, as discussed below.

"Measures taken to comply": US arguments on compliance "simply not credible"

The United States brought a preliminary motion to strike Japan's claims with respect to certain reviews of the original anti-dumping order. The United States argued that these reviews could not be considered as "measures taken to comply" because they pre-dated the adoption of the original DSB rulings. The United States argued that these measures were outside the Panel's terms of reference.

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The Panel rejected this US argument. It began by reviewing prior Appellate Body jurisprudence on the terms of reference for compliance panels, and concluded that “measures taken to comply” were those that were “sufficiently closely connected” to the original dispute. The Panel found that the reviews challenged by Japan “form part of a continuum, the purpose of which is the ongoing assessment of anti-dumping duties owed” under the original order. The Panel found “substantive continuity between the original and subsequent reviews.”

The United States argued that it “came into compliance with the DSB's recommendations and rulings by withdrawing the WTO-inconsistent cash deposit rates”, and that such removal had to be considered as separate from the reviews. However, the Panel found that “since it is the subsequent administrative review that eliminates the cash deposit rates imposed by a prior review…the elimination of existing cash deposit rates may not be viewed separately from the superseding administrative review.” The Panel stated that it did “not consider that the act of removing the WTO-inconsistent cash deposit rates may be viewed as having occurred independently of the subsequent administrative review.” It therefore rejected the US position that “it is exclusively the act of removing the WTO-inconsistent cash deposit rates that constitutes the ‘measure[] taken to comply’.”

The Panel also ruled that the fact that the reviews pre-dated the adoption of the DSB rulings was “not sufficient to break the very strong substantive links between those measures and the original dispute.” It noted that the compliance proceeding concerned “a series of subsequent administrative reviews that extends, through the continued application of zeroing, the chain of assessment commenced by the administrative reviews at issue in the original proceeding.” The Panel found that it was “the subsequent administrative review as a whole, and the process of withdrawing and replacing cash deposit rates”, that constituted the “measure taken to comply.” The Panel ruled that it was “simply not credible” for the United States to assert a review had “no connection with the DSB's recommendations and rulings” merely because it pre-dated them. It added its agreement with prior jurisprudence that “Article 21.5 should not be interpreted and applied on the basis of the intent of the implementing Member.”

For these reasons, the Panel concluded that the challenged reviews were “sufficiently closely connected to the original dispute…that they should be treated as ‘measures taken to comply’ with the recommendations and rulings of the DSB.”

The Panel also included in its terms of reference a review that had been initiated at the time of the Panel request, even though no determination had been made at that point. The Panel concluded that “where the measure in issue eventually came into existence as part of a continuum that existed at the time of the

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panel request, and where the process for bringing about the measure's existence was already underway", the review fell within the Panel's terms of reference.

Duty collection: relevant date is the expiration of the compliance period

As noted above, Japan challenged the WTO-consistency of assessment rates with respect to imports that entered prior to the end of the compliance period, but for which the liquidation occurred after the expiry of the compliance period. The United States objected that DSB rulings apply only prospectively, and that Japan was seeking a "retrospective" remedy.

The United States advised the Panel that it had done "nothing" in respect of these measures. It asserted that the United States "was not required to implement in respect of the importer-specific assessment rates because they relate to import entries occurring before the expiry of the RPT."

The Panel rejected this US argument. It reasoned that the relevant date was the expiry of the compliance period. It stated that "[i]f a measure found to be WTO-inconsistent is to be applied after the expiry of the RPT, that measure must have been brought 'into conformity', irrespective of the date of entry of the imports covered by that measure." It added that "those importer-specific assessment rates continued to have legal effect after the end of the RPT, in the sense that they continued to provide the authority for the collection of anti-dumping duties in respect of the relevant (unliquidated) import entries." Therefore, the Panel concluded that "the United States failed to bring those importer-specific assessment rates 'into conformity' by [the end of the compliance period on] 24 December 2007."

US failure to remove all "manifestations" of zeroing

Japan claimed that the United States failed to eliminate the zeroing procedures "as such", and therefore remained in breach of the DSB rulings.

In December 2006, in order to implement the DSB rulings in *US – Zeroing (EC)*, the USDOC announced that it was discontinuing the use of one type of zeroing ("weighted average-to-weighted average" comparisons in original investigations). The United States argued that "the zeroing procedures no longer have universal application", which meant that "the measure at issue in the original proceeding, whose existence was based on the universal application of zeroing in all contexts, and when using all comparison methodologies, no longer exists."

The Panel rejected this argument, noting that zeroing continued to be applied in other contexts, or manifestations. The Panel ruled that "[i]n order to eliminate the zeroing procedures *per se*, the [USDOC] Notice would have had to eliminate zeroing in the context of all of the 'different manifestations'. The

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Notice fails to do this." Therefore, the United States remained in violation of its obligation to eliminate zeroing "as such."

The Panel also found that the application by the United States of zeroing in the context of certain challenged reviews was WTO-inconsistent.

Breach of tariff bindings: no "safe harbour"

Japan argued that the United States had collected anti-dumping duties on the affected products in excess of the bound rate in the US tariff schedule, in violation of US obligations under GATT Article II.

GATT Article II does not permit the application of tariffs above the scheduled rate. However, Article II also includes what the Panel called a "safe harbour": a WTO Member can impose "any anti-dumping…applied consistently with the provisions of [GATT] Article VI[.]" The Panel found that such a safe harbour was unavailable to the United States in the present case, since the US liquidation actions "had been found to be WTO-inconsistent in the original proceeding." It therefore concluded that the USDOC liquidation instructions were inconsistent with GATT Article II.

The Panel also found that the United States failed to take any action to implement the DSB rulings with respect to a "sunset review" determination.

The decision of the Article 21.5 Compliance Panel in *United States – Measures Relating to Zeroing and Sunset Reviews* (DS322) was released on April 24, 2009.

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Multilateral Highlights

EU to Reduce "Byrd" Retaliatory Duties on US Imports

On April 21, 2009, EU officials announced to the WTO Dispute Settlement Body that the EU would reduce the amount of retaliatory duties it applied to US imports with regards to the US-EU WTO dispute over the Continued Dumping and Subsidy Offset Act (CDSOA, also known as the "Byrd Amendment"). Specifically, the EU will reduce the retaliatory duties from the current annual total of USD 33.38 million to USD 16.31 million. The reduction will enter into effect on May 1, 2009. In announcing the reduced duties, EU officials stated that the EU had decided to lower the retaliation because the United States collected and distributed a lower amount of duties under the Byrd Amendment compared to the previous fiscal year.

The Byrd Amendment mandates the distribution of antidumping and countervailing duties to the US companies that petitioned for trade relief under the CDSOA. In March 2005, the WTO allowed eight Members to impose retaliatory duties on US imports based on the United States' failure to comply with a 2003 WTO Appellate Body (AB) decision that the Byrd Amendment was inconsistent with global trade rules. The complainants included, among others, the EU, Japan, Canada, Mexico, Brazil, India, South Korea, and Chile. On February 17, 2006, US officials informed the WTO's Dispute Settlement Body that the February 1, 2006 repeal of the Byrd Amendment reflected the United States' compliance with the WTO dispute ruling. Several WTO Members, however, dismissed the US claim, arguing that although the United States repealed the CDSOA, petitioner companies would continue to receive Byrd payments beyond the repeal date, and they stated that they would continue imposing retaliatory duties on US imports until the "Byrd payments" ceased operation altogether. The WTO gave the EU and several other WTO Members the option to penalize the United States at levels up to 72 percent of the annual amounts collected and dispersed via the Byrd Amendment. To date, the only other WTO Member that has imposed retaliatory duties in response to the Byrd Amendment is Japan; in August 2008, Japan announced the application of retaliatory duties in the amount of USD 16.49 million on US imports starting on September 1, 2008, a retaliatory figure lower than the USD 48.18 million in additional duties Japan imposed on US imports in the previous fiscal year.

United States Announces Compliance with Panel Decision on "Customs Bonding"

On April 20, 2009, the United States announced that it has complied with an adverse WTO Panel ruling on a US customs bond requirement for imports of agricultural and aquaculture products subject to antidumping and countervailing duties. US officials, who announced the panel compliance at the April 20

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Dispute Settlement Body meeting, stated that an April 1, 2009 Federal Register (FR) notice from US Customs and Border Protection (CBP) announced that importers of shrimp are no longer required to post bonds in the amounts established under the enhanced continuous bond requirement (EBR), and that importers may instead post bonds in amounts calculated using ordinary bond formulas. US officials noted that the notice of action applies to imports from India and Thailand and all other affected importers. India and Thailand were the two WTO Members that initiated the dispute settlement proceedings with the United States on the EBR. In announcing the compliance with the panel decision, US officials added that the Department of Commerce carried out a Section 129 determination that eliminated the use of "zeroing" in the margin of dumping on Thai shrimp imports and recalculated the applied duties. Although the United States has claimed compliance with the panel decision, India and Thailand appear to be adopting a "wait-and-see" approach and will decide on any further action as necessary after observing how the US Government implements the FR notice.

WTO Establishes Panel on US Dolphin-Safe Labeling Requirements for Tuna

On April 20, 2009, the WTO Dispute Settlement Body established a panel to rule on whether the US "dolphin-safe" labeling requirements for tuna unfairly block Mexican tuna exports to the US market. The measure is the result of a second request by Mexico, after the United States blocked a first request in March. Argentina, Australia, China, Ecuador, the European Union, Guatemala, Japan, New Zealand, South Korea, Taiwan, and Turkey have all joined as third parties in the dispute.

At issue is the 1990 US Dolphin Protection Consumer Information Act, which sets out labeling standards for tuna products that are exported from or offered for sale in the United States. The act bans the use of the "dolphin-safe" label for tuna harvested with purse-seine nets because of dolphins trapped in the nets. The adoption of the act led to an immediate drop in US imports of tuna from Mexico, where the fishing fleet uses purse-seine nets. In 1997, the legislation was amended by the International Dolphin Conservation Program Act, which allowed the importation into the United States of tuna caught using purse-seine nets if no observed mortality occurred. The modifications to this legislation took place after Mexico convinced US authorities that new fishing methods adopted by Mexican fishing fleets have substantially reduced the number of dolphins killed each year with purse-seine nets. However, in 2007, a US court ruled that "dolphin-safe" labeling requirements must be interpreted as meaning that the tuna was not harvested with purse-seine nets, and that no dolphins were killed or seriously injured when the tuna were caught.

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Mexico charges that US "dolphin-safe" labeling measures block its access to the US market and discriminate against Mexican tuna in favor of US tuna producers and other tuna competitors in violation of the national treatment and most favored nation (MFN) obligations under the General Agreement on Tariffs and Trade (GATT 1994). In addition, Mexico considers that US "dolphin-safe" labeling regulations have the effect of creating unnecessary obstacles to trade in violation of the WTO Agreement on Technical Barriers to Trade ("TBT Agreement"). The TBT Agreement provides that measures should not be more trade restrictive than necessary to fulfill a legitimate objective and not create unnecessary obstacles to trade.

China Initiates Dispute Settlement Proceedings With United States Over Poultry Ban

On April 17, 2009, China initiated World Trade Organization (WTO) dispute proceedings with the United States to challenge measures included in the recently-signed US omnibus spending bill that continues the US ban on poultry imports from China. On March 11, 2009, President Obama signed into law a USD 410 billion dollar omnibus spending bill (H.R. 1105) that would keep the federal government operating until fiscal year 2010 begins, on October 1, 2009. The legislation includes several trade-related provisions that, among other things, prohibit the use of any funds appropriated under the legislation to implement a rule allowing poultry products to be imported into the United States from the China (Section 727 of H.R. 1105).

In its consultation request to the United States, China notes that it is "concerned that Section 727, in conjunction with the overall US regime for regulating imports of poultry products, places restrictions on the import from China of poultry products that are inconsistent with the United States' WTO obligations." Specifically, China argues that the spending bill provision violates Articles I:1 and XI:1 of the WTO General Agreement on Tariffs and Trade (GATT) and Article 4.2 of the WTO's Agriculture Agreement. In addition, China disagrees with the US assertion that the poultry ban is a sanitary and phytosanitary (SPS) measure under WTO rules and instead argues that the ban is not based on a proper risk assessment and is not supported by sufficient scientific evidence as required by the WTO.

The United States imposed a ban on all imports of birds and bird products from China and several other Asian countries in February 2004 following the outbreak of avian influenza. In 2006, the United States determined that China was eligible to import certain poultry products (*i.e.*, shelf-stable, fully cooked, processed poultry) into the United States. China argues, however, that the United States has not yet implemented this decision that would allow for the importation of poultry products from China. According to Chinese officials, the provision included in the omnibus spending bill exacerbates the matter further and "now prohibits the US Department of Agriculture from taking action to establish or implement

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measures allowing for the importation into the United States of poultry products that the United States has already determined are eligible for importation."

The two sides will now have 60 days to resolve the dispute through consultations. If the United States and China cannot resolve the dispute in 60 days (*i.e.*, by mid-June), China can then request the establishment of a WTO dispute settlement panel to decide on the matter.

New Doha Agriculture Negotiations Chair Named

New Zealand's World Trade Organization (WTO) Ambassador David Walker has become the new Chairman of the Doha Round Agriculture Negotiations, replacing Ambassador Crawford Falconer who left the post in March. Ambassador Walker is the fourth chair of the Doha Agriculture negotiations since 2001, and his predecessors include Stuart Harbinson who served as Chair from 2001 to 2003; Tim Groser who served from 2004 to 2005; and Ambassador Falconer who served from 2005 to March. Ambassador Falconer left the Agriculture Chair post in order to serve as Deputy Secretary at New Zealand's Ministry of Foreign Affairs and Trade. In assuming the Chair, Ambassador Walker inherits stalled Agriculture negotiations that have seen little movement since 2008; the most contentious issue in the negotiations is the inclusion of a special safeguard mechanism (SSM) in the final Agriculture text that would allow developing countries to temporarily increase tariffs to counter surging agriculture imports.

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