April 2010

Japan External Trade Organization

WTO and Regional Trade Agreements Monthly Report

IN THIS ISSUE

Table of Contents

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Summary of Reports

United States

FCC Unveils Policy Recommendations and Suggested US Goals under National Broadband Plan

On March 16, 2010, the Federal Communications Commission (FCC) presented to Congress the National Broadband Plan, a set of policy recommendations and suggested national goals to achieve universal broadband connectivity in the United States by 2020. We review below several of the major features of the Plan.

USTR Releases 2010 NTE Report on Foreign Trade Barriers

On March 31, 2010, the United States Trade Representative (USTR) published its 2010 National Trade Estimate (NTE) Report on Foreign Trade Barriers. We highlight below the NTE Report's analysis of the trade practices of several major US trading partners.

USTR Releases 2010 Report on Technical Trade Barriers

On March 31, 2010, the Office of the United States Trade Representative (USTR) released its first annual report on technical barriers to trade (TBT).[1] The 2010 Report on TBTs ("TBT Report") is a new, specialized report "focused on significant foreign trade barriers in the form of product standards, technical regulations and testing, certification, and other procedures involved in determining whether products conform to standards and technical regulations (conformity assessment procedures)." The report is intended to describe and advance US efforts to identify and eliminate TBTs, and also identifies and describes significant standards-related trade barriers currently facing US producers, along with US government initiatives to eliminate or reduce the impact of these barriers.

[1] The complete report can be found at: http://www.ustr.gov/sites/default/files/REPORT%20ON%20TECHNICAL%20BARRIERS%20TO%20TRADE%20FINALTO%20PRINTER%2025Mar09.pdf.

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USTR Releases 2010 Report on Sanitary and Phytosanitary Measures

On March 31, 2010, the United States Trade Representative (USTR) published its new 2010 Report on Sanitary and Phytosanitary Measures[2] ("SPS Report") detailing barriers to US food and farm exports. The SPS Report discusses issues previously addressed in the USTR's annual National Trade Estimate on Foreign Trade Barriers (NTE). This year, USTR has released the SPS Report and a separate report addressing technical barriers to US exports.

USTR Releases Results of 2010 Section 1377 Review of Telecommunications Trade Agreements

On April 6, 2010, the Office of the United States Trade Representative (USTR) released its annual Section 1377 Review of Telecommunications Trade Agreements ("2010 Report").[3] 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, China, Germany, India, Mexico, and Singapore; (iii) issues affecting the telecommunications equipment trade in Brazil, China, European Union, India, Indonesia, Korea, Malaysia, Mexico, and Thailand; and (iv) other issues including frequency allocation in Costa Rica and transparency in China. We review below USTR's findings.

United States Highlights

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

- Mexico and the United States Sign Procedural Agreement on Food Safety
- DOC Submits Redetermined Duties to CIT in GPX Tire Case
- Senate Confirms New Treasury Under Secretary for International Affairs
- NAFTA Panel Rules "Zeroing" Methodology is Illegal
- Senators Send Letter to President Demanding Border Adjustment Measures in Final Climate Change Bill
- European Commission Imposes Additional Customs Duties on US Imports in Light of Continued Implementation of "Byrd Amendment"

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[2] The complete report can be found at: http://www.ustr.gov/sites/default/files/SPS%20Report%20Final(2).pdf.

[3] The full report is available at: http://www.ustr.gov/trade-topics/services-investment/telecom-e-commerce/section-1377-review.

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- Treasury Delays Currency Report as Administration Explores Other Venues to Discuss Concerns with China

Free Trade Agreements

Free Trade Agreements Highlights

We would like to alert you to the following Free Trade Agreements highlights:

- ACTA Negotiators Release Draft Text of Agreement Amid Calls for Increased Transparency

Multilateral

Multilateral Highlights

WTO Appellate Body Releases 2009 Annual Report

- Indonesia Requests WTO Consultations with US over Sales Ban of Flavored Cigarettes
- South Korea and Vietnam Request Separate Panels to Address US Zeroing
- US Makes Second Request for WTO Panel on Philippines' Taxes on Distilled Spirits
- WTO Report Highlights Decrease in Trade Restrictive Measures by G-20 Members
- Brazil Temporarily Postpones Application of Retaliatory Measures against United States in Cotton Dispute

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Reports in Detail

United States

FCC Unveils Policy Recommendations and Suggested US Goals under National Broadband Plan

Summary

On March 16, 2010, the Federal Communications Commission (FCC) presented to Congress the National Broadband Plan, a set of policy recommendations and suggested national goals to achieve universal broadband connectivity in the United States by 2020. We review below several of the major features of the Plan.

Analysis

On March 16, 2010, the FCC presented to Congress the National Broadband Plan ("the Plan"), a set of policy recommendations and suggested national goals to achieve universal broadband connectivity in the United States by 2020.

I. Background

In 2009, Congress directed the FCC to develop a "National Broadband Plan" to ensure every American has "access to broadband capability." Congress also required that the Plan include a detailed strategy for achieving affordability and maximizing use of broadband to advance "consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes." The FCC started the process of creating the Plan in April 2009. Through public workshops, public notices and requests for comments, other filings, and public hearings, the FCC explored and clarified the issues addressed in the Plan. The FCC also consulted with other government agencies and Congress on the Plan. The Plan has also assumed increased significance in light of the relatively poor showing made by the US in terms of broadband penetration, as measured by various Organization for Economic Cooperation and Development (OECD) indicators.

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According to the FCC's report detailing the Plan ("Connecting America: The National Broadband Plan"), "broadband is a foundation for economic growth, job creation, global competitiveness and a better way of life [and] is enabling entire new industries and unlocking vast new possibilities for existing ones." The report notes that the US broadband ecosystem has "evolved rapidly" although approximately 100 million Americans do not have broadband connection at home. The Plan seeks to address the lack of universal broadband coverage in the United States.

II. Main Elements of the National Broadband Plan

According to the Plan, "the US Government can influence the broadband ecosystem" through the following four ways:

A. Design policies to ensure robust competition and maximize consumer welfare, innovation and investment.

B. Ensure efficient allocation and management of assets government controls or influences.

C. Reform current universal service mechanisms to support deployment of broadband and voice in high-cost areas and ensure that low-income Americans can afford broadband in addition to supporting efforts to boost adoption and utilization.

D. Reform laws, policies, standards and incentives to maximize the benefits of broadband in sectors government influences significantly.

In its report detailing the Plan, the FCC included specific policy recommendations designed to achieve each of these "main elements." The details of those policy recommendations are set forth in Appendix A to this Report.

III. Long-Term Goals of the Plan

In addition to the specific policy recommendations, the Plan recommends that the United States adopt and track the following six long-term goals:

- Ensure that at least 100 million US homes have affordable access to actual download speeds of at least 100 megabits per second and actual upload speeds of at least 50 megabits per second.
- Lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation.
- Provide and ensure affordable access to robust broadband service.
- Provide and ensure affordable access to at least 1 gigabit per second broadband service to anchor institutions such as schools, hospitals and government buildings.

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- Provide and ensure that every first responder should have access to a nationwide, wireless, interoperable broadband public safety network.
- Enable citizens to use broadband to track and manage their energy consumption.

Outlook

According to several reports, initial industry reaction to the Plan was generally positive. CTIA, The Wireless Association lauded the Plan and its recommendation to free up 500 MHz of spectrum for the wireless industry. AT&T representatives opined that the Plan is broad-reaching and addresses many critical issues. Google Inc. also lauded the FCC's Plan, especially the policy recommendations of the Plan that would improve sectors such as public transportation, public education and public health. The National Telecommunications Cooperative Association (NTCA) commended the FCC's Plan but cautioned that some aspects of the Plan may not necessarily incent broadband deployment to rural areas. Mobile satellite companies, such as Iridium and Globalstar, noted that the Plan recognizes the value of mobile satellite services. According to reports, private sector companies are currently reviewing the Plan in detail and are tracking legislators' examination of the Plan.

The US Congress is also examining the Plan in detail. The Senate Commerce, Science and Transportation Committee held a hearing on the Plan on March 23, 2010, and the House Energy and Commerce Committee held its hearing on the Plan on March 25, 2010. At both hearings, FCC Commissioners testified on and responded to questions on the Plan and its policy recommendations. Initial Congressional reaction to the Plan has been positive thus far. Chairman of the Senate Commerce Subcommittee John Kerry (D-MA) noted that the Plan was a positive step but that it serves as a "roadmap" and that much work is still necessary in the year ahead. Chairman of the House Energy and Commerce Subcommittee Rick Boucher (D-VA) opined that Congress should take the lead on the Universal Service Fund whereas the FCC should be responsible for intercarrier compensation. Speaker of the House Nancy Pelosi (D-CA) opined that the Plan will help create new jobs for Americans. Rep. Edward Markey (D-MA) labeled the Plan "visionary [and] far-reaching."

The FCC is also expected to initiate approximately 40 proceedings in the next 12-18 months to carry out the recommendations included in the Plan. According to FCC officials, more than half of those proceedings will relate to competition issues in the broadband marketplace, and a quarter of the proceedings will relate to the Universal Service Fund. The remainder of the proceedings will relate to public safety interoperability. Some observers have questioned if any of the proceedings will also address the costs of the Plan. To date, the FCC has not yet announced the Plan's total cost, and FCC

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officials have only stated that the Plan "will set in motion dozens of notices of proposed rulemakings at the Commissions" and that the FCC will need to wait for authority from Congress to implement several of the recommendations. According to some initial projections, the Plan could cost between USD 12 billion and more than USD 25 billion, depending on Congressional spending allocations.

At this stage, the Plan has witnessed a positive reception, although the implementation of the policy recommendations is at an early stage, and it is too soon to tell how smoothly implementation of the Plan will be. Observers note that the Plan is an outline of that the FCC aims to do with broadband over the next several years, and that details of implementation will emerge only after the FCC and Congress address each of the elements of the Plan.

As the United States moves into the implementation phase of the Plan, the directives and policy initiatives should have a positive impact for US trade partners with capabilities to support high-technology products and services. Given the large number of specific proceedings likely to be conducted by the FCC over the next several months, there will be ample opportunities for foreign input into those proceedings as well. At the same time, the United States will certainly increase its scrutiny of the openness of its trading partners to broadband development in their respective home markets and the imposition of either market access or content restrictions would be likely to draw increased scrutiny. This trend was foreshadowed by the recent speech given by Secretary of State Hillary Clinton on the importance of an open and free Internet. The current controversy between Google and the People's Republic of China represents a further example of how such concerns could materialize.

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APPENDIX A

SUMMARY OF KEY POLICY RECOMMENDATIONS

For each of the four main elements of the National Broadband Plan, the following policy recommendations were made.

A. Policies to Ensure Robust Competition

The Plan outlines the "broad set of tools to protect and encourage competition in the markets that make up the broadband ecosystem," including policy tools that:

- Collect, analyze, benchmark and publish detailed, market-by-market information on broadband pricing and competition;
- Develop disclosure requirements for broadband service providers to ensure consumers have the pricing and performance information they need to choose the best broadband offers in the market;
- Undertake a comprehensive review of wholesale competition rules to help ensure competition in fixed and mobile broadband services;
- Free up and allocate additional spectrum for unlicensed use;
- Update rules for wireless backhaul spectrum to increase capacity in urban areas and range in rural areas;
- Expedite action on data roaming to achieve wide, seamless and competitive coverage, encourage mobile broadband providers to construct and build networks, and promote entry and competition;
- Change rules to ensure a competitive and innovative video set-top box market, to be consistent with Section 629 of the Telecommunications Act;
- Clarify the Congressional mandate allowing state and local entities to provide broadband in their communities; and
- Clarify the relationship between users and their online profiles to enable continued innovation and competition in applications and ensure consumer privacy, including the obligations of firms collecting personal information to allow consumers to know what information is being collected, consent to such collection, correct it if necessary, and control disclosure of such personal information to third parties.

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B. Policies to Ensure Efficient Allocation and Use of Government-owned and -influenced Assets

The Plan contains recommendations that would strengthen the development of policies for the use of spectrum and overseas access to poles, conduits, rooftops and rights-of-way, which are used in the deployment of broadband networks. The Plan's spectrum-related recommendations are meant to ensure more efficient allocation and assignment of spectrum – a major input for providers of broadband service – that will reduce deployment costs, drive investment and benefit consumers through better performance and lower prices. The Plan recommends the following:

- Make 500 megahertz of spectrum newly available for broadband within 10 years, of which 300 megahertz should be made available for mobile use within five years.
- Enable incentives and mechanisms to repurpose spectrum to more flexible uses. Mechanisms include **incentive auctions**, which allow auction proceeds to be shared in an equitable manner with current licensees as market demands change.
- Ensure greater transparency of spectrum allocation, assignment and use through an FCC-created spectrum dashboard to foster an efficient secondary market.
- Create new avenues for opportunistic and unlicensed use of spectrum and increase research into new spectrum technologies.

The Plan also contains policies meant to ensure that service providers can access infrastructure (such as poles, conduits, rooftops and rights-of-way) efficiently and at fair prices under the following suggested recommendations:

- Establish low and more uniform rental rates for access to poles, and simplify and expedite the process for service providers to attach facilities to poles.
- Improve rights-of-way management for cost and time savings, promote use of federal facilities for broadband, expedite resolution of disputes and identify and establish "best practices" guidelines for rights-of-way policies and fee practices that are consistent with broadband deployment.
- Facilitate efficient new infrastructure construction, including through "dig-once" policies that would make federal financing of highway, road and bridge projects contingent on states and localities allowing joint deployment of broadband infrastructure.

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- Provide ultra-high-speed broadband connectivity to select Department of Defense installations to enable the development of next-generation broadband applications for military personnel and their families living on base.

C. Policies to Promote Universal Availability and Adoption of Broadband

The Plan contains recommendations to promote universal broadband deployment and adoption. In order to ensure universal access to broadband network services, the Plan recommends:

- Creating the Connect America Fund (CAF) to support the provision of affordable broadband and voice with at least 4 Mbps actual download speeds and shift up to $15.5 billion over the next decade from the existing Universal Service Fund (USF) program to support broadband.
- Creating a Mobility Fund to provide targeted funding to ensure no states are lagging significantly behind the national average for 3G wireless coverage.
- Transitioning the "legacy" High-Cost component of the USF over the next 10 years and shifting all resources to the new funds.
- Reforming intercarrier compensation, which provides implicit subsidies to telephone companies by eliminating per-minute charges over the next 10 years and enabling adequate cost recovery through the CAF.
- Designing the new Connect America Fund and Mobility Fund in a tax-efficient manner to minimize the size of the broadband availability gap and thereby reduce contributions borne by consumers.
- Broadening the USF contribution base to ensure USF remains sustainable over time.
- Create mechanisms to ensure affordability to low-income Americans.

In addition, the Plan recommends expanding the Lifeline and Link-Up programs by allowing subsidies provided to low-income Americans to be used for broadband, and considering licensing a block of spectrum with a condition to offer free or low-cost service that would create affordable alternatives for consumers, reducing the burden on USF. The Plan also includes a goal of ensuring that "every American has the opportunity to become digitally literate," and recommends launching a National Digital Literacy Corps to organize and train youth and adults to teach digital literacy skills and enable private sector programs addressed at breaking adoption barriers.

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D. Policies to Strengthen and Support National Priorities in Various Sectors

The Plan contains recommendations "designed to unleash increased use, private sector investment and innovation in several areas. In order to improve the quality and lower the cost of **health care**, the Plan recommends policies that will:

- Help ensure health care providers have access to affordable broadband by transforming the FCC's Rural Health Care Program.
- Create incentives for adoption by expanding reimbursement for e-care.
- Remove barriers to e-care by modernizing regulations like device approval, credentialing, privileging and licensing.
- Drive innovative applications and advanced analytics by ensuring patients have control over their health data and ensuring interoperability of data.

In order to enable improvements in **public education**, the Plan recommends policies that will:

- Improve the connectivity to schools and libraries by upgrading the FCC's E-Rate program to increase flexibility, improve program efficiency and foster innovation by promoting the most promising solutions and funding wireless connectivity to learning devices that go home with students.
- Accelerate online learning by enabling the creation of digital content and learning systems, removing regulatory barriers and promoting digital literacy.
- Personalize learning and improve decision–making by fostering adoption of electronic educational records and improving financial data transparency in education.

In order to transition to a **clean energy** economy, the Plan recommends policies that will:

- Modernize the electric grid with broadband, making it more reliable and efficient.
- Make energy data readily accessible to consumers.
- Improve the energy efficiency and environmental impact of the ICT sector.

In order to expand access to **jobs and training**, support entrepreneurship and small business growth and strengthen community development efforts, the Plan recommends policies that will:

- Support broadband choice and small businesses' use of broadband services and applications to drive job creation, growth and productivity gains.
- Expand opportunities for job training and placement through an online platform.

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- Integrate broadband assessment and planning into economic development efforts.

In order to ensure greater efficiency and effectiveness in **government service** delivery and internal operations, the Plan recommends policies that will:

- Allow state and local governments to purchase broadband from federal contracts.
- Improve government performance and operations through cloud computing, cybersecurity, secure authentication and online service delivery.

In order to improve **public safety and homeland security**, the Plan recommends policies that will:

- Support deployment of a nationwide, interoperable public safety mobile broadband network, with funding of up to USD 6.5 billion in capital expenditures over 10 years, which could be reduced through cost efficiency measures and other programs. Additional funding will be required for operating expenses.
- Promote innovation in the development and deployment of next-generation 911 and emergency alert systems.
- Promote cybersecurity and critical infrastructure survivability to increase user confidence, trust and adoption of broadband communications.

USTR Releases 2010 NTE Report on Foreign Trade Barriers

Summary

On March 31, 2010, the United States Trade Representative (USTR) published its 2010 National Trade Estimate (NTE) Report on Foreign Trade Barriers. We highlight below the NTE Report's analysis of the trade practices of several major US trading partners.

Analysis

I. Background

The annual NTE 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 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. The 2010 NTE report classifies foreign trade barriers into the following categories:

- Import policies;

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

The report examines "the largest export markets for the United States, including: 58 nations, the European Union, Taiwan, Hong Kong, and one regional body."

II. Country Assessments

European Union

With regard to the EU, the 2010 Report reiterates the general conclusion of the 2009 NTE report that in spite of the "generally positive" character of the EU-US trade and investment relationship, exporters and investors from the United States continue to face a number of "chronic barriers" to entering, maintaining, or expanding their presence in the EU market. We summarize several of these barriers below.

I. Market Access for Goods

On trade in industrial products, the report states that the United States continues to have "serious concerns" about the compliance with the World Trade Organization (WTO) Information Technology Agreement (ITA) of EU tariffs on imports of LCD computer monitors, set top boxes with a communication function, and certain multifunction digital machines. The United States, Chinese Taipei, and Japan filed a complaint with the WTO regarding this issue in August 2008, and the report notes that USTR expects the WTO dispute settlement panel that was subsequently established to issue a decision on the matter "in the course of 2010." It is here worth adding that the European Commission has indicated in its latest general

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overview of active WTO dispute settlement cases that involve the EU that the panel will likely issue an interim report by the end of April 2010.[4]

Similar to the 2009 NTE report, the 2010 Report also mentions US concerns over EU restrictions to market access in the following areas:

- ***Pharmaceutical products.*** The report notes the procedural non-transparency and lack of stakeholder access to pricing and reimbursement processes. In addition, the report reiterates US concerns over market access, government pricing, and reimbursement systems in individual EU Member States such as the Czech Republic, Finland, France, Hungary, Italy, and Poland. Unlike the 2009 NTE report, the 2010 Report adds the Netherlands, Spain, and the United Kingdom to this list of countries, but no longer includes Germany, Slovenia, and Sweden. In addition, the 2010 NTE also specifically mentions US concerns over trade barriers resulting from IPR protection in these various countries.
- ***Uranium imports***. The report highlights that the United States has questioned the justification and non-transparent nature of the 1994 Corfu Declaration of the European Council and the European Commission, which imposes explicit quotas on imports of enriched uranium. In addition, the report notes that the United States will continue to monitor whether agreements that the EU is negotiating with Russia in the nuclear area alter the EU's application of the Corfu Declaration and comply with WTO rules on import quotas and transparency.
- Different from the 2009 NTE report however, the 2010 Report no longer refers to US concerns over non-EU stakeholder input in the development and implementation of EU regulations and standards for electrical and electronic equipment, chemicals, energy-using products, cosmetics, and lawnmowers.

II. IPR Protection

The report indicates that the United States remains concerned over high patent filing and maintenance fees in the EU and its Member States, as well as on the WTO-consistency of the EU system for the protection of Geographical Indications (GIs). Unlike the previous report however, the 2010 Report no longer mentions US concerns over the protection of data that were submitted for marketing approval of pharmaceuticals. As for the individual EU Member States, the report notes continuing problems with IPR

[4] The full general overview is available at: http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf

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protection and enforcement in Bulgaria, the Czech Republic, Greece, Hungary, Italy, Poland, Romania, Spain, and Sweden, while it also adds Finland to this list.

III. Services Barriers

Similar to the 2009 NTE report, the 2010 Report highlights that US concerns remain with regards to the following services sectors:

- ***Telecommunications.*** The report states that the Member State application of commitments under the WTO and under EU Directive 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services remains uneven, and that problems continue with regard to provisioning and pricing of unbundled local loops, line-sharing, co-location, and provisioning of leased lines. The report also reiterates that enforcement procedures for existing telecommunications legislation are cumbersome in Austria, France, and Italy, while there continues to be a slow development of competition in Austria, Finland, Germany, Greece, Ireland, Italy, Spain, and Sweden.
- ***EU enlargement.*** The report again notes that 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 recent enlargements 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.
- ***Energy services.*** The report reiterates 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.
- In addition, the 2010 Report follows the report of the previous year by also mentioning barriers in the: (i) accounting and auditing, (ii) financial, (iii) legal, (iv) postal and other delivery, and (v) television broadcasting and audiovisual services sectors. However, the report no longer refers to barriers in the architectural and healthcare sectors.

IV. Investment

In general, the section on investment in the 2010 Report is less extensive than the investment section in the previous report, and states that the EU is currently "one of the most hospitable climates for US investment in the world." The report does highlight certain specific concerns over measures in Bulgaria, Cyprus, France, Germany, Greece, Lithuania, and Romania, but no longer mentions Austria and Italy in

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this list or focus specifically on ownership restrictions and reciprocity provisions for foreign investments as creating barriers in sectors such as maritime transport and financial services. The report also notes while the policies and practices of the individual EU Member States have thus far had a more significant impact on US investment than EU-level policies, the recent entry into force of the Lisbon Treaty for the first time made FDI an exclusive EU competence. The report adds however that as FDI is currently not defined in the Treaty the exact practical implications for EU external investment policy still need to be clarified.

V. Government Procurement

As a general comment, the report notes that while US suppliers do participate in EU government procurement tenders, it is difficult to make an accurate assessment of the precise level of this US participation. In addition, the report reiterates the concern that EU Directive 2004/17/EC Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors ("the Utilities Directive") discriminates against bids with less than 50 percent EU content that are not covered by an international or reciprocal bilateral agreement. Similar to the 2009 NTE report, the 2010 Report also mentions national government procurement practices that are of particular concern to the United States in Austria, the Czech Republic, France, Greece, Ireland, Italy, Lithuania, Portugal, Romania, Slovenia, Spain, and the United Kingdom, while it adds Hungary to this list.

VI. Subsidies

As was the case in the 2009 NTE report, the 2010 Report highlights that the governments of France, Germany, Spain, and the United Kingdom have "over many years" provided subsidies that significantly benefit Airbus in comparison with its US competitors. In addition, the report again lists US concerns over specific measures by the governments of Belgium, France, Spain and the United Kingdom to support Airbus suppliers, as well as about measures by the governments of France and the United Kingdom to support producers of aircraft engines.

VII. Customs Administration

Similar to the 2009 NTE report, the 2010 Report notes that 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 does acknowledge 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.

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VIII. Electronic Commerce

The report reiterates that EU Directive 95/46/EC ("the Data Protection Directive") includes the requirement that outside of programs that 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 adequately protect the transferred data. In addition, the report again notes that 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 general, the 2010 Report is very similar to the previous edition in that it mainly highlights the same barriers and does not list any major new irritants to the EU-US trade and investment relationship. This confirms that the parties continue to share a robust partnership that has held up well in view of the global crisis and the resulting risk of an increase in protectionist tendencies. At present, the EU and the United States remain each other's main trading partners in a highly interdependent relationship that accounts for more than 50 percent of the global GDP. In 2009, US goods exports to and imports from the 27 EU Member States (EU27) decreased, respectively, by 18.8 percent to USD 220.8 billion and by 23.5 percent to USD 281.3 billion, and continued to consist to a large extent of manufactured goods such as machinery and vehicles or chemicals. In 2008, US exports to and imports from the EU25[5] of private commercial services increased to, respectively, USD 195.8 billion and 139.4 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 EU27 increased to USD 1.6 trillion and continued to concentrate to a large extent on non-bank holding companies, finance and insurance, and manufacturing sectors.

The release of the 2010 Report comes shortly after EU Trade Commissioner Karel De Gucht and USTR Ron Kirk met for the first time on March 26, 2010 in Brussels, Belgium. On this occasion, the two officials briefly discussed the full range of issues that are of common interest such as the multilateral trade negotiations under the WTO Doha Round, current bilateral issues, and cooperation on regulatory issues within the framework of the Transatlantic Economic Council (TEC). After the meeting, both officials emphasized the importance of strengthening the EU-US trade and investment relationship as a means to ensure economic recovery from the global crisis and achieve renewed growth. In addition, they

[5] EU25 refers to the EU without the most recent Member States Bulgaria and Romania.

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highlighted their commitment to a successful outcome of the Doha Round and underlined the key role that the EU-US partnership can play in achieving that objective. However, the officials did not mention the barriers that EU and US exporters continue to encounter in each other's markets, and it is at present not entirely clear how the parties intend to address these remaining obstacles. It seems most likely however that, instead of resorting to WTO action, both the EU and the United States will continue to emphasize dialogue and regulatory cooperation through vehicles such as the TEC to resolve any irritants to trade and investment.

Asia

China

The 2010 Report highlights certain progress that China made to remove barriers and implement its obligations under the World Trade Organization (WTO), and identifies new concerns caused by various measures, such as the stimulus plans that China issued in response to the global economic downturn. The 2010 Report also notes China's implementation of WTO rulings in several disputes as well as Chinese adherence to commitments made during bilateral dialogues such as the US-China Joint Commission on Commerce and Trade (JCCT) and the US-China Strategic and Economic Dialogue (S&ED). Specifically, the 2010 Report on China covers import barriers, discriminatory internal policies, export regulation, intellectual property rights (IPR) protection, services sector barriers, investment barriers, government procurement, electronic commerce, anti-competitive practices, and barriers in other fields, such as transparency and legal framework.

Specific concerns that US businesses raised in the 2010 Report include:

- Import barriers such as a problematic trading rights registration process; a problematic tariff-rate quota system; ***import substitution policies*** that favor domestic products and technologies in the steel, semiconductors, fertilizer, and telecommunication equipment sectors; ***high tariffs*** on products that compete with sensitive domestic products such as large motorcycles, video, digital video and audio recorders, and certain agricultural products; a lack unified tariff classification; ***inconsistent customs valuation and clearance*** procedures; ***lack of transparency*** and procedural fairness in China's trade remedy investigations and related legislation; ***burdensome inspection***-related requirements on agricultural products and foreign scrap; and an ***import ban*** on certain medical devices.
- ***Discriminatory internal policies*** on taxation and establishment of trade unions. The 2010 Report points out US concerns with the uneven value-added tax (VAT) application, delayed or reduced

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payment of VAT rebates, and discriminatory methods in calculating consumption tax for domestic and imported goods. The 2010 Report also notes that the amendments to business tax regulations make any foreign services supplied to China subject to a Chinese business tax.

- Trade distorting ***export duties, licensing requirements and quotas*** on a wide range of products and raw materials to help guide the development of China's downstream industries.
- ***Export subsidies*** that are often granted by the government in a disguised manner and that result in undercutting prices of Chinese exports in the global market. The 2010 Report included a description of the US WTO dispute against China's "Famous Brands" program and noted China's confirmation that it removed all benefits provided to exports under this program.
- ***Weak IPR prorection*** and IPR-related concerns that US companies have repeatedly raised, including: (i) concerns over counterfeiting, book and journal piracy, business software piracy, and internet piracy, among others; (ii) the lack of deterrent effects on would-be violators at the criminal, civil and administrative levels; and (iii) complaints on China's restrictions on the import and distribution of copyright intensive products. The 2010 Report also raises new concerns on counterfeiting and China's approval system in the pharmaceutical sector and highlights a new trend of indigenous innovation that may affect foreign innovation and technologies.
- ***Services sector barriers*** that prevent or discourage foreign providers from gaining or expanding market access. Specific barriers cited in the report include China's refusal to grant new licenses, an opaque and slow-moving renewal process for existing licenses, foreign equity limitations, higher minimum capital requirements for foreign suppliers, and overly burdensome regulatory regimes and other restrictions. The 2010 Report also identifies sector-specific barriers and progress China made to remove those barriers for 18 services categories.[6]
- ***Investment barriers*** that discriminate against foreign investment, including national security reviews for foreign investment, restrictions on foreign acquisition of state-owned assets, and difficulties in capital inflows for business expansion in China. Ongoing investment concerns under the 2010

[6] These include: (i) insurance services; (ii) private pensions-enterprise annuities; (iii) banking services; (iv) securities services; (v) financial information services; (vi) electronic payment 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) online services; (xv) audiovisual and related services; (xvi) travel and tourism services; (xvii) education and training services; (xviii) legal services.

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Report include non-transparency, inconsistently-enforced laws and regulations, corruption, and a poorly functioning legal system that is unable to enforce contracts and judgments.

- Concerns in the area of ***government procurement***, specifically on: (i) preferences for domestic products or indigenous innovation products during government procurement; (ii) ambiguous language used in government procurement-related laws and regulations; and (iii) China's delayed submission of its revised offer to join the WTO Agreement on Government Procurement (GPA).
- The 2010 Report reiterates concerns on ***anticompetitive practices***. US companies remain concerned with the role of state-owned enterprises and their administrative practices.

India

Many India-related issues cited in the 2009 NTE report were repeated in the 2010 Report. Issues of continued concern to US industries include:

- ***High average applied tariffs on industrial goods*** including tariffs on automobiles, motorcycles, textiles and apparel, fish and natural rubber.
- High bound tariff rates on agricultural products that are among the highest in the world.
- ***Additional duties or extra additional duties*** charged on imports to offset internal taxes. These duties sometimes result in higher amounts being charged on imports as compared to like domestic products. Further, refund procedures for extra additional duties where imports are sold in India and subjected to state – level value added taxes are onerous and time consuming.
- ***Non – tariff regulation on a "negative list" of imports.*** The "negative list" is split into three categories: banned or prohibited items, restricted items requiring an import license and "canalized" items that can only be imported by government trading monopolies subject to cabinet approval.
- ***Cumbersome licensing requirements for import of remanufactured goods***. Import licenses are required for all imports of remanufactured goods and obtaining licenses is often tedious, involving provision of excessive details and long delays.
- ***Lack of transparency*** in customs valuation methodologies.
- ***Government procurement*** practices and procedures that lack transparency; preference is often afforded to Indian state–owned enterprises when awarding government contracts.

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- ***Continued export subsidies*** in the form of tax holidays for export-oriented enterprises and exporters in Special Economic Zones and several duty drawback programs. In addition, pre-shipment and post-shipment export financing are available to exporters at a preferential rate.
- ***Lack of implementation and enforcement of IPR*** along with large-scale copyright piracy, especially in the software, optical media and publishing industries.
- ***Services trade restrictions*** in sectors such as insurance, banking, telecommunications and retail trade. Overly-burdensome requirements also exist in the audiovisual and communications services, accounting and education sectors. The Indian government also prohibits foreign investment in legal services.
- ***Foreign Direct Investment*** that is either completely prohibited or severely restricted in sectors including agriculture, multi-brand retailing, railways and real estate. Further, regulations and procedures are not transparent and can be tedious.

In addition, the 2010 Report includes newer developments in India that are of concern to US businesses, including:

- ***Increased export duties*** on iron ore lumps and iron ore fines. Export duties already exist on iron ore and ferrous scrap along with restrictions on the export of certain high – grade iron ore.
- India's introduction of **mandatory certification for certain steel products.**
- ***Strict licensing and participation norms*** for foreign companies wishing to participate in the auction of wireless spectrum for providing third generation services.

Thailand

USTR states in the 2010 Report that the United States and Thailand will consult closely on ways to strengthen their economic relations. The 2010 Report cites a number of areas of specific concern which were also noted in the 2009 NTE 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 and significant discretionary authority exercised by Customs officials that increases arbitrarily the customs value of certain imported products. In August

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2009, Thai Customs announced proposed reforms to its Customs Act. However, the final draft is still subject to legal scrubbing by Council of State before the Thai Cabinet can forward it to Parliament for consideration and approval.

- ***Government procurement practices*** that grant favorable treatment to domestic suppliers and create alleged irregularities in the tender process.
- ***Lack of sustained and coordinated enforcement of IPR*** that has led to an increase in the manufacture and export of counterfeit and pirated products. The 2010 Report notes that Thailand remained on the Special 301 Priority Watch List in 2009. Areas of specific copyright concern include optical media piracy, signal theft, book piracy, and other end user software piracy. The US pharmaceutical industry remains concerned with compulsory licenses and potential unfair commercial use of undisclosed test and other data related to new products. USTR is also concerned with Thailand's protection of confidential information and the inability of the patent office to process patent applications in a timely manner.
- ***Services barriers*** that include branch limitations and minimum capital requirements for foreign banks, restrictions on foreign accountants' business practices, foreign ownership limits in land transportation, and non-transparent regulations in the healthcare services sector. USTR notes "substantial progress" in Thailand's improvement of its telecommunications regulatory regime; however, the 2010 Report cites a number of other unresolved issues and barriers that remain in place.

Singapore

The NTE report reflects the high levels of trade and investment liberalization between Singapore and the United States and cites renewed trade cooperation, particularly with the United States' participation in the Trans-Pacific Partnership (TPP) regional FTA negotiations. However, the 2010 Report cites a number of ongoing concerns that were also noted in the 2009 NTE report. These include:

- ***Taxes and operational restrictions*** on motorcycles based on a motorcycle's engine displacement and engine size; USTR alleges that the taxes and restrictions put US exports of large motorcycles at a competitive disadvantage. Singapore also levies ***high excise taxes*** on distilled spirits and wine, tobacco and motor vehicles.
- Concerns over Singapore's efforts to effectively **enforce IPR** although the report notes that Singapore has developed strong IPR initiatives. Concerns remain largely due to the continued transshipment of goods through Singapore of products that infringe IPR rights and insufficient deterrent penalties for end-user and internet piracy.

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- ***Services sector barriers*** in the telecommunications, audiovisual and media, legal, education, banking and energy services sectors. These barriers include: a lack of transparency in telecommunications 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.

Indonesia

The 2010 Report covers many of the same issues addressed in the 2009 report. The 2010 Report, however, adds a number of new developments in Indonesia of concern to US businesses, including:

- ***Increased applied tariffs*** on certain products including chemical and milk products.
- A ***non-automatic import licensing requirement*** on certain products including electronics, household goods, textiles, footwear, toys, and food and beverage products. Under the new measure (that Indonesia implemented in 2009 and known as "Decree 56"), imports of these products are subject to pre-shipment verification at the importer's expense and are restricted to five designated ports and airports. The Indonesian government granted exemptions for registered importers from the application of Decree 56. However, the 2010 Report cited that the approval process to qualify as a registered importer is vague, ill-defined, and discriminatory.
- ***Rejected or delayed applications of drug registration*** by foreign wholesalers and distributors following the introduction of a new pharmaceutical decree in 2008. The decree prohibits foreign pharmaceutical companies from registering drugs if they do not manufacture locally.
- ***IPR-related concerns*** on widespread optical disc piracy and counterfeiting consumer goods.
- ***Concerns over a new law on express delivery and logistics services.*** In September 2009, Indonesia implemented a new law on postal services requiring services providers to be majority-owned by Indonesians. These services include courier, express delivery, and other logistic services. Foreign operators can only provide these services in provincial capitals with international airports and seaports.
- ***Concerns over energy sector regulations.*** In 2009, the Indonesian Industry Ministry enforced a regulation which requires foreign bidders for energy services projects to maintain at least 35 percent domestic content in their operations. Foreign operators viewed that such law seriously undermined their ability to enter biddings on these projects.

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- ***Film quotas*** permitting no more than 60 percent of screen time for foreign films. In December 2009, the Minister of Culture and Tourism re-imposed a regulation requiring all local and imported movies, in terms of theatrical prints and home video copies, to be duplicated domestically. Penalties are imposed on operators who fail to do so.

- ***Concerns over a new decree on telecommunication.*** In October 2009, Indonesia implemented a new decree requiring all telecommunications operators to spend at least 40 percent of their total capital expenditure on network development from locally sourced components or services. In July 2009, the Indonesian government also issued a decree requiring at least 50 percent local content requirement on capital expenditure for operating in the wireless broadband sector.

Malaysia

Areas of concern cited by the 2010 NTE Report are similar to those cited in the 2009 NTE report and include:

- Concerns with several programs that appear to provide ***export subsidies***. These include tax and investment incentives provided for exporters through the Pioneer Status and Investment Tax Allowance schemes. Another example is the revised NAP policy which increased the income tax exemption for high value-added exports of motor vehicle and parts. The United States has submitted questions under the WTO to Malaysia requesting for more information on these programs but received no responses from Malaysia as of end-2009.

- ***IPR-related concerns*** with regards to pirated optical media.

Positive developments cited in the 2010 Report include:

- The dismantling of Malaysian ***import restrictions for automobiles*** in accordance with Malaysia's commitments under the WTO and the ASEAN Free Trade Area (AFTA). In October 2009, the Malaysian government announced the revised National Automotive Policy (NAP) review, which is aimed at liberalizing the automotive sector. The revised NAP reduced the intra-ASEAN duty rate from five percent to zero percent effective January 1, 2010. It also suspended the freeze on manufacturing licenses for luxury vehicles, pick-up trucks, commercial vehicles, and hybrid electric vehicles. In a bid to promote green technology, the Malaysian government also granted a duty exemption and a 50 percent excise tax reduction for the production of hybrid electric cars.

- Malaysia's May 2009 announcement of ***a set of liberalization measures covering 27 services sub-sectors.*** Among other measures, the liberalization removed the 30 percent *bumiputra* equity

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requirement, with immediate effect in the health and social services, tourism services, transport services, business services, and computer and related services sectors, among others. Following the liberalization of 27 services sub-sectors, the Malaysian government announced ***a liberalization package for the conventional and Islamic financial sectors***. Under the package, foreign equity limits were raised to 70 percent from 49 percent for domestic Islamic banks, investment banks, insurance companies, and Islamic insurance operators. For insurance companies, foreign equity beyond 70 percent is subject to an approval if such investment facilitates the consolidation and rationalization of the insurance industry. Foreign equity of 100 percent is allowed for fund management companies providing wholesale services.

South Korea

Although the US and South Korean governments signed the US-Korea FTA ("KORUS FTA") on June 30, 2007, neither country's legislature has approved implementing legislation that would enact the agreement's trade and investment liberalization provisions. In addition, both countries have not yet resolveed a number of outstanding issues, particularly related to automotives, beef and non-tariff measures. According to the 2010 Report, the Obama Administration views the KORUS FTA as an opportunity to resolve these ongoing concerns and bring significant economic and strategic benefits to the United States. The United States is currently working closely with Congress and US stakeholders to identify effective ways to resolve these concerns.

Issues of concern raised in the 2010 Report are similar to those raised in the 2009 NTE report, and include:

- ***High tariffs, taxes, or tariff rate quotas (TRQs)*** with prohibitive over-quota tariff rates on a number of agriculture and fishery products. Korea also uses adjustment tariffs and compounded taxes on some agricultural, fishery and plywood products, which increase the applied tariff rates.
- The maintenance of a ***relatively high government procurement threshold*** that, according to the 2010 Report, is three times the threshold applied by the United States.
- Concerns regarding Korea's ***Industrial Subsidy Policy***, which allows the Korea Development Bank (KDB) as a government-owned entity (not bound by the same constraints as commercial institutions) to provide policy-directed loans to favored industries.
- Ongoing concerns over ***elevated levels of online piracy, corporate end-user software piracy, book piracy, counterfeiting*** and a lack of coordination between Korean health and IPR authorities.

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The 2010 Report notes, however, that Korea's progress in IPR protection and enforcement led to its removal from the Special 301 Watch List in 2009.

- ***Services barriers*** including domestic film screen and broadcast quotas, restrictions on voiceovers and local advertisements, foreign content quotas for television and radio broadcasting, regulatory and market access issues for financial services, and certain restrictions on foreign satellite and other telecommunications services. The report notes that the Korean National Assembly passed the Foreign Legal Consultant Act (FLCA) on February 27, 2009, partially opening domestic legal services. The new law allows foreign lawyers to provide legal consulting services in their areas of expertise. The Korean government will continue to open up the Korean legal services market in several stages.

- ***Investment barriers*** including restrictions on foreign ownership of cable television-related system operators, network operators, program providers, prohibition of foreign investment in rice and barley farming, foreign equity limitation on meat wholesaling, limitations on foreign investment in electric power generation, distribution, sales, news agency services, publishing, printing and a lack of transparency in investment-related regulatory decisions.

- ***Automobile import tariffs, domestic taxes, and non-tariff barriers*** that 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.

- ***Non-transparent pricing and reimbursement procedures*** for distilled liquors, pharmaceuticals and medical devices.

The Philippines

The Philippines' IPR regime remains a key area of concern for USTR and US businesses. The 2010 Report notes that the Philippines remains on the Special 301 Priority Watch List, but highlights areas in which the Philippines has made limited improvement in its IPR regime. Other issues of concern cited by the 2010 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.

- ***Customs barriers*** that include irregularities in customs processing, undue and costly delays, continued private sector involvement in the valuation process, the use of reference prices rather than declared transactional values.

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- ***Government procurement*** practices that favor purchases from Philippine and Philippine-controlled enterprises.
- ***Continued IPR violations*** due to weak enforcement of existing laws. IPR violations include the spread of camcording, peer-to-peer piracy, the growth of illegal mobile downloads and the general sale of counterfeit merchandise.
- ***Services barriers*** such as foreign ownership restrictions in the banking sector and restrictions on foreign financial institutions' presence and operation. The report also highlights concerns regarding the Philippines' classification of the telecommunications sector, which is defined outside of utility definition. Other restrictions apply to nursing, accountancy, engineering, customs brokerage, civil aviation, advertising, public utilities, shipping, and express delivery services.
- ***Investment restrictions*** based on two negative lists that restrict or limit foreign investment in a number of sectors.

Taiwan

Areas of concern cited in the 2010 NTE report are similar to those cited in the 2009 NTE report and include:

- ***Tariff and non-tariff barriers*** such as high tariffs and taxes on large motorcycles, wine, canned soups, cookies, vegetables and fruit.
- ***IPR-related concerns*** over the availability of counterfeit pharmaceuticals, online copyright infringement, illegal textbook copying, and inadequate protection for the packaging, configuration and outward appearance of products.
- ***Services barriers*** in the banking, telecommunication, pay television, and chiropractic services sectors that continue to prohibit or restrict the provision of services by US and other foreign suppliers.
- ***Investment barriers*** in agricultural production, chemical manufacturing, bus transportation, public utilities, single-axe truck leasing and postal services that remain a concern for US investors.

Vietnam

The 2010 Report's assesment of Vietnam is similar to that of the previous year's report. The US and Vietnamese governments signed a Trade and Investment Framework Agreement (TIFA) in June 2007,

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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, including:

- ***High tariffs*** for certain agricultural products and beverages.
- ***Non-tariff barriers*** such as import prohibitions and quantitative restrictions on certain products, including restrictions on firecrackers and second hand vehicles.
- The Vietnam government's ***procurement regime*** which is a concern for certain US software companies due to the government's promotion of open source software by government agencies.
- ***Weak IPR enforcement***. The report states that although Vietnam revised its IPR laws in 2009 to provide criminal penalties for IPR infringement, the government has not been able to efficiently enforce these laws.
- ***Services barriers*** such as foreign ownership limitations in a number of sectors including delivery services, distribution, telecommunication, banking and securities. USTR does note, however, that 100 percent foreign ownership in express delivery services will be permitted by 2012. However, the report cites concerns regarding the government's plans to establish a government controlled agency as the sole entity responsible for the purchase and distribution of pay television programming.
- ***Investment barriers*** including long delays in the approval of investment licenses for investments in conditional sectors and other sensitive projects, which are often subject to extensive and additional reviews.
- ***Corruption in all phases of business operations***, which remains a significant problem for US companies that operate in Vietnam.

Outlook

Similar to last year's NTE report, the 2010 NTE report exhibits little substantive change from previous reports in its analysis of individual countries' barriers to US exports and investment. Nonetheless, the 2010 Report did include more examples of positive developments than the 2009 Report (*see* Singapore, Malaysia and Korea). USTR continues to devote a large portion of the report to China; this is unlikely to change in future reports, and USTR is likely to use the JCCT, S&ED and other high-level bilateral and multilateral fora to address US concerns with China's trade regime included in the 2010 Report. Other

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Asian trading partners that had lengthy assessments in the 2010 NTE Report include India, Indonesia and the Philippines. IPR enforcement remains a predominant concern for US businesses operating in the region, and the IPR-related concerns included in the 2010 Report will likely be detailed further in USTR's annual Special 301 report on IPR (to be released shortly). Other concerns included in the 2010 Report and that appeared in the 2008 and 2009 NTE reports include high tariffs and import bans, onerous customs procedures, and services and investment barriers.

Middle East

Bahrain

As in the 2008 and 2009 NTE reports, Bahrain received a favorable review in the 2010 NTE report. The report notes that upon the August 2006 implementation of the US – Bahrain Free Trade Agreement (FTA), 100 percent of bilateral trade in consumer and industrial products became duty-free immediately. The report also positively noted that Bahrain has passed and implemented of several IPR-related laws meant to improve protection and enforcement in the areas of copyrights, trademarks, and patents. In addition, the NTE report notes that as a member of the Gulf Cooperation Council (GCC), Bahrain and other GCC members are preparing a common trademark law and a common unfair competition law to protect from unfair commercial use undisclosed information submitted for marketing approval of pharmaceutical products. The United States is engaged in a dialogue with GCC technical experts to ensure that the laws will facilitate GCC member states' implementation of international and bilateral obligations.

Egypt

The NTE report notes that the Egyptian Government in recent years has gradually liberalized its trade regime and economic policies. 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, although USTR urges Egypt to quickly implement these changes. Nonetheless, the NTE report lists a number of concerns that US companies have raised with regards to Egypt, including:

- ***High tariffs*** on certain goods, including a 300 percent duty on alcoholic beverages for use in the tourism sector, including hotels, plus a 40 percent sales tax, and a general tariff for alcoholic beverages that ranges from 1200 percent on beer to 1800 percent on wine to 3000 percent on sparkling wine and spirits;
- Abrupt ***import regime changes*** without notification or opportunity for comment;

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- ***Import bans*** on certain goods, including natural products, vitamins, and food supplements, and ***onerous import procedures*** for automobiles (passenger vehicles may only be imported into Egypt by their original owners, and the owner must have purchased the car within the first 12 months of its production for it to be eligible for importation);
- ***Lack of transparency*** in government procurement practices;
- ***High levels of piracy***, including pirated movies, sound recordings, books and other printed matter, and computer software, although "significant improvements have been made particularly with respect to improving protection of computer software and ensuring that civilian government departments and schools use legitimate 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, special authorization for private courier and express delivery service suppliers seeking to operate in Egypt, 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

The 2010 NTE report continues to provide a positive assessment of Jordan, similar to past assessments in the 2008 and 2009 NTE reports. 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 completed the final phase of tariff reductions on January 1, 2010, which resulted in the complete elimination of duties on nearly all products, except for alcoholic beverages and mature subject materials. The report does note some issues of concern, however. ***Import licenses, or advance approval to import goods***, are required for specific food and agricultural goods, and Jordan also requires that importers of commercial goods be registered traders or commercial entities. ***Video and software piracy*** continue to be problematic, although the Jordanian government continues to examine means to provide more comprehensive protection of IPR, including through more stringent enforcement of existing laws, introduction of new regulations based on existing laws, and the creation of an independent IP body. In addition, ***investment barriers*** exist; foreign investors may not have whole or partial ownership of investigation and security

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services, sports clubs (except for health clubs), stone quarrying for construction purposes, customs clearance services, and land transportation of passengers and cargo using trucks, buses and taxis.

Kuwait

The 2010 NTE report provides a generally positive assessment of Kuwait. Nonetheless, 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. Other problems include an ***onerous import clearing process*** that "has historically been time consuming, requiring large quantities of paperwork, and numerous redundancies." In addition, the report notes several ***IPR-related concerns*** that US companies have raised, including "Kuwait's failure for many years to draft and implement revised IPR legislation to implement the WTO TRIPs Agreement in areas such as copyrights, patents, trademarks, geographical indications, customs, and the protection of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products [and] a lack of deterrent criminal penalties, high rates of piracy and counterfeiting, and the use of unauthorized computer software in private enterprises." Other barriers include ***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 direct investment*** including "limitations on foreign entities participating in the petroleum and real estate sectors, long bureaucratic delays in starting new enterprises, and a local business culture based on family relationships that often preclude foreign participation," and the ***application of discriminatory taxation policies***.

Morocco

The 2010 NTE report's overall assessment of Morocco is positive. According to the report, the US – Morocco FTA entered into force on January 1, 2006 and under the FTA, close to 95 percent of bilateral trade in consumer and industrial products has become duty-free. US companies have reported issues with ***government procurement***, noting that "the 90 day timeframe given to foreign companies to answer government tenders is often too short, and channels for distributing information are limited to local newspapers and circulars sent to foreign embassies; [because] the Moroccan government does not have an official website for government tenders, foreign companies often find it difficult to identify and bid on tenders." The report also notes that the ***discriminatory policies and practices of Morocco's insurance regulatory body*** have effectively prevented US insurance companies from introducing competing products. In addition, the report notes that despite new legislation meant to address ***IPR theft***, "the Moroccan Copyright Office has identified weaknesses in the ability of the country's enforcement

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mechanisms to adequately detect and address internet-based IPR violations." The Moroccan government has requested further technical assistance from the United States and other partners in order to bring its capacity to address copyright infringement up to international standards. 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 2010 NTE report's overall assessment of Oman is positive. 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 nine years. The report states that companies that import goods in Oman must be ***registered with the Ministry of Commerce and Industry,*** and that Oman requires a ***special license*** for the importation of certain goods, such as alcohol, livestock, poultry, firearms, narcotics, and explosives. In addition, Oman has in place certain ***onerous documentation requirements*** that state that only Omani nationals and companies of WTO Members that are registered as importers are permitted to submit documents to clear shipments through customs. Regarding government procurement, the report states that US industry opines that ***bidders' costs can sometimes increase dramatically*** when award decisions "are delayed . . . or the bidding is reopened with modified specifications and, typically, short deadlines." In addition, Oman ***does not permit representative offices or offshore banking*** and concerns remain regarding the ability of US businesses to acquire office space.

Qatar

The 2010 NTE report's overall assessment of Qatar is positive, similar to the 2008 and 2009 NTE assessments. 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. Nonetheless, the report notes that Qatar requires ***import licenses*** for most products, and only issues import licenses to Qatari nationals. In addition, ***only authorized local agents are allowed to import goods*** produced by the foreign firms they represent in the local market. Qatar also has an ***import ban*** on pork and pork derivatives. Certain ***services barriers*** exist, including regulations that stipulate that only Qatari nationals are allowed to serve as local agents, distributors, or sponsors (although exceptions granted for 100 percent foreign-owned firms in the agriculture, industry, tourism, education

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and health sectors, and some Qatari ministries waive the local agent requirement for foreign companies that have contracts directly with the government of Qatar). The report also notes that ***investment barriers*** exist: Qatar allows foreign investors to own up to 100 percent of projects in the agriculture, tourism, education, industry, health, insurance, banking, and energy sectors with prior government approval, although in all other sectors, foreign equity is limited to 49 percent.

Saudi Arabia

The 2010 NTE assessment of Saudi Arabia is more positive than USTR's 2009 assessment, and the report specifically commends Saudi Arabia for improvements in its IPR regime. In February 2010, the United States announced that Saudi Arabia would be removed from the Special 301 Watch List of IP violators in recognition of significant progress that Saudi Arabia had made in the protection and enforcement of IPR, including addressing concerns identified in the 2009 Special 301 Report. USTR noted that Saudi Arabia had made improvements in certain areas, including on deterrent level penalties for violations of Saudi copyright law; action to reduce the use of unauthorized copies of software within the Saudi government; and adequate protection for patented pharmaceutical products.

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, and ***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;
- ***Services barriers***, including limits on foreign ownership in commercial banks to 40 percent of any individual bank operation (although the report notes that Saudi Arabia has taken steps to open up investment banking by granting operating licenses to foreign banks); and
- ***Investment barriers***, including bureaucratic delays in investment licensing approval, and limits to foreign participation in certain investment activities (foreign investment is currently prohibited in manufacturing and service sectors and subsectors, including oil exploration, drilling and production, and manufacturing and services related to military activity).

United Arab Emirates

Similar to the 2008 and 2009 NTE reports, the 2010 NTE assessment of the United Arab Emirates (UAE) is positive. USTR commends the UAE for improvements it has made to its IPR regime, including a reduction in software piracy. The report notes, however, certain concerns that US companies have raised. The report notes that the UAE requires ***import licenses***: only firms with an appropriate trade license can engage in importation, and only UAE registered companies, which must have at least 51 percent ownership by a UAE national, can obtain such a license (the licensing provision does not apply to goods imported into free zones). The report also notes that there exist ***barriers to foreign participation in the insurance and banking sectors***. In ***telecommunications services***, US companies complain that the UAE's Telecommunications Regulatory Authority (TRA) continues to ban the use of Voice-over-Internet-Protocol (VoIP) services, on the basis that VoIP services violate the UAE's Etisalat's monopoly on fixed telephony services. The report also notes ***investment barriers****,* stating that "except for companies located in one of the UAE's free trade zones, at least 51 percent of a company established in the UAE must be owned by a UAE national [and] a company engaged in importing and distributing a product must be either a 100 percent UAE-owned agency/distributorship or a 51 percent UAE-owned limited liability company." Similar to the 2009 NTE report, the 2010 NTE report does not include 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). The 2010 NTE report, similar to last year's report, does not forecast if and when FTA negotiations may be picked up again.

Outlook

Similar to the 2009 NTE report, the 2010 NTE assessments of Middle East economies highlighted achievements that these trading partners have accomplished with regard to the removal of trade barriers. The 2010 report does not contain mention of the proposed creation of a US – Middle East Free Trade Area (USMEFTA), an initiative announced under the Bush Administration that would build on trade agreements with Middle East countries "to increase trade and investment with the United States and others in the world economy." The countries included in the 2010 NTE report were all major components of the Bush Administration's USMEFTA initiative. The Obama Administration has been silent on the proposed USMEFTA, and, as noted, the 2010 NTE report does not contain mention of the initiative. Indeed, the 2010 assessment, like 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. At this stage, it is unlikely that the Obama Administration will shift its focus to the USMEFTA initiative in the short-term.

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Other aspects of the 2010 and 2009 NTE reports remain similar. The 2010 individual reports for the Middle East trading partners with which the United States has FTAs – Bahrain, Jordan, Morocco, and Oman – contained positive descriptions that were practically identical to the individual assessments included in the 2009 NTE report. Similar to the 2009 report, the 2010 NTE report also focused on efforts by trading partners to address IPR-related concerns. USTR's report on Egypt focused on counterfeiting and piracy problems, and USTR's report on Saudi Arabia commended the Kingdom's moves to strengthen its IPR regime and its removal from the Special 301 Watch List in 2010. Other topics that warranted repeated mention among the NTE's individual assessments included import bans and import licenses, concerns with government procurement and services and investment barriers, although US companies raised similar concerns in the 2008 and 2009 NTE reports.

Latin America

Argentina

The NTE Report notes that since 2007, Argentina has increased the number of tariff and non-tariff barriers that prevent the entry of US goods into Argentina. Moreover, Argentina's customs procedures have become more burdensome resulting in delays and additional costs for US exporters. Argentina has also imposed new export taxes to sensitive agricultural goods.

The 2010 NTE report includes the following concerns that US businesses have raised:

- **Import Tariffs.** The report notes that in December 2009, Argentina, along with other Mercosur members, increased import duties up to bound levels for a number of products, including dairy, textiles, bags and backpacks. In November 2009, Argentina and Brazil agreed to reduce the exceptions to Mercosur's Common External Tariff (CET) for Argentina. Argentina can maintain existing exceptions to the CET (800 exceptions for a number of capital goods) until December 31, 2011.
- **Antidumping Measures.** Since 2008, Argentina initiated a number of antidumping investigations imposing antidumping duties on several products, mainly originating from Brazil and China. Although these investigations did not involve direct US exports, several US-owned companies exporting from China to Argentina have expressed concerns regarding the loss of market share and unprofitable margins on products due to antidumping duties. Since 2007, Argentina imposed a safeguard on imports of recordable compact discs that is scheduled to phase out by May 2010. Although Argentina levies the majority of import tariffs on an ad valorem basis, Argentina also charges compound rates consisting of ad valorem duties plus specific levies known as "minimum specific import duties"

(DIEMs) on products such as textiles, apparel, footwear and toys. DIEMs do not apply to goods from Mercosur trading partners and cannot exceed an ad valorem equivalent of 35 percent. DIEMs are scheduled to expire on December 31, 2010.

- **Import Licenses and Customs Procedures.** Since 2008, Argentina has enacted new import licensing and customs procedures that combined with other import measures implemented in mid-2007 make the importation of US products from third-country affiliates of US companies more burdensome. These measures include an increased use of reference prices, automatic and non-automatic import licenses, and requirements for importers to have invoices notarized by the nearest Argentine diplomatic mission when imported goods are below reference prices. US exporters have expressed serious concerns regarding the above referenced measures highlighting increased costs, constant delays and burdensome requirements to import goods into Argentina. Argentina argues that these measures are consistent with WTO rules and are non-discriminatory. During 2008-2009, Argentina has also enacted additional restrictive import measures to combat fraud and prevent under-invoicing that restrict the entry of products that are deemed as sensitive for Argentina, such as electronics, apparel, footwear and leather. Among these measures, include: (i) new automatic import licensing requirements; (ii) increased use of non-automatic import licenses; and (iii) limitations on ports-of-entry for numerous goods. As of November 2009, Argentina also imposed export taxes on key agricultural commodities, such as soybeans, wheat and corn.
- **Other Barriers.** With regards to other sectors, the NTE Report notes serious concerns regarding Argentina's intellectual property (IP) regime and several other barriers in the services, audiovisual and government procurement sectors.

Brazil

According to the NTE Report, in 2009, US exporters continue to face uncertainty in the Brazilian market due to existing tariff barriers, burdensome regulation and taxation measures. The NTE Report, however, does not note an increase in non-tariff barriers.

The 2010 NTE report includes the following concerns that US businesses have raised:

- **Import Tariffs.** The NTE Report states that during August-September 2009, Brazil increased tariffs by as much as 14 percentage points on several industrial products, including electric appliances and valves for oleo hydraulic or pneumatic transmissions. In December 2009, Brazil, along with other Mercosur members, increased import tariffs –sometimes up to bound levels—for a number of goods in the CET, mainly dairy and textile goods.

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- **Antidumping Measures.** In recent years, Brazil has become an active user of safeguard and antidumping measures, some of these involving US exports (an investigation of polypropylene film and reviews of the antidumping measures on ethylene glycol [EBMEG] and polyvinyl chloride in suspension [PVC-S]). Brazil maintains antidumping duties on eight products in the chemical sector originating from the United States. In October 2009, Brazil terminated its safeguard investigation on recordable CDs and DVDs.
- **Other Barriers.** With regards to other sectors, the NTE Report notes some concerns regarding Brazil's intellectual property (IP) regime—in particular concerning patent protection for pharmaceuticals and medical devices—and several other barriers in the government procurement, audiovisual sectors and express delivery services companies.

Chile

The NTE Report praises Chile's import regime as one of the most open in the world. The 2010 NTE report includes the following concerns that US businesses have raised:

- **Import Tariffs.** Chile applies a uniform applied tariff rate for all goods with which it does not have a Free Trade Agreement (FTA) of 6 percent. Importers also must pay a 19 percent value added tax (VAT) calculated on the customs value plus import tariff. In the case of duty-free imports, the VAT is calculated on the customs value alone. Under the US-Chile FTA, the parties eliminated import duties for 87 percent of bilateral trade and will phase-out tariffs for remaining products by 2016. Chile maintains a price band system for wheat, wheat flour, and sugar that, under the FTA, will be eliminated for imports from the United States by 2016.

  Chile does not apply restrictions on the types or amounts of goods that can be imported into the country or specific requirements to use the official foreign exchange market. However, Chilean customs authorities must approve and issue a report for all imports valued at more than USD 3,000. After customs authorities issue the report, the goods to be imported must generally be shipped within 30 days.

  The report notes that Chile does not allow the importation of used vehicles, used motorcycles, and used retreaded tires (with the exception of wheel-mounted tires). Although Chile maintains a simplified duty drawback program for nontraditional exports, Chile will gradually eliminate the use of duty drawback and duty deferral for imports that are incorporated into any goods exported to the United States until reaches zero in 2016.

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- **Other Barriers.** Despite Chile's efforts to improve its IP regime, the NTE Report notes that work remains to be done in this area to guarantee an adequate enforcement against copyright piracy and trademark counterfeiting.

Mexico

The 2010 Report provides a generally negative assessment of Mexico. The NTE Report criticizes existing tariff and non-tariff barriers that continue to hamper the entry of US goods and services to the Mexican market. The report is also critical of the country's IPR regime despite Mexico's efforts to improve enforcement and combat piracy.

- **Antidumping Measures.** The NTE Report states that Mexico continues to apply antidumping duties against US meat exports, reducing the number of US suppliers to the Mexican market and altering product trading patterns. As an example, the NTE Report notes Mexico's Ministry of Economy's (SE) delay in issuing a final determination on a changed-circumstance review initiated on April 21, 2009 that affects a major US beef producer. The report notes that to this date, SE has not yet issued a determination in the review and US beef and beef by-products continue to face antidumping duties.
- **Customs Procedures.** The report notes that US exporters remain concerned with Mexico's customs' administrative procedures, including: insufficient prior notification of procedural changes; inconsistent interpretation of regulatory requirements at different border posts; alleged under-invoicing of agricultural products; and uneven enforcement of Mexican standards and labeling rules. Agricultural exporters complain that Mexican inspection and clearance procedures for some agricultural goods "are long, burdensome, nontransparent, and unreliable."
- **Other Barriers.** Despite Mexico's efforts to improve its IP regime, the NTE Report notes that work remains to be done in this area to guarantee adequate enforcement against copyright piracy, trademark counterfeiting and unfair commercial use of undisclosed test or other data generated to obtain marketing approval for pharmaceutical products. Regarding barriers in the services sector, the report criticizes Mexico's monopolist practices in the telecommunications sector despite the country's efforts to increase competition in this sector.

Outlook

The tone of the 2010 NTE Report's assessments of Latin American trading partners reflects the Obama Administration's focus on enforcement and monitoring, and signals the Administration's clear intent to keep a close eye on its Latin American trading partners' compliance with trade agreements and multilateral rules. The NTE Report appears to be very critical of Argentina's and Mexico's import and

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customs regimes and existing barriers in other sectors, such as IP and telecommunications. In comparison, the NTE Report is less critical of Brazil and Chile, which, in recent years, have made concrete steps towards eliminating tariff barriers and non-tariff barriers to US exporters and services providers. It is noteworthy that Argentina and Mexico were strongly hit by the global economic recession in comparison to Brazil and Chile, which experienced a milder recession. Although Mexico has not implemented specific policies deemed as "protectionist" by the United States, Argentina has taken a more "protectionist" approach and consequently has faced stronger criticism by the United States and other trading partners. Analysts opine that in the foreseeable future, Latin American countries should expect continued enforcement and monitoring from the Obama Administration.

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USTR Releases 2010 Report on Technical Trade Barriers

Summary

On March 31, 2010, the Office of the United States Trade Representative (USTR) released its first annual report on technical barriers to trade (TBT).[7] The 2010 Report on TBTs ("TBT Report") is a new, specialized report "focused on significant foreign trade barriers in the form of product standards, technical regulations and testing, certification, and other procedures involved in determining whether products conform to standards and technical regulations (conformity assessment procedures)." The report is intended to describe and advance US efforts to identify and eliminate TBTs, and also identifies and describes significant standards-related trade barriers currently facing US producers, along with US government initiatives to eliminate or reduce the impact of these barriers.

The report identifies TBT measures in 20 countries or groups of countries. We highlight here the country-specific barriers identified by the TBT Report for the following countries:

Analysis

I. Background

Pursuant to Section 181 of the Trade Act of 1974, as amended, USTR must annually report on significant foreign trade barriers that relate to standards-related measures. These issues are no longer addressed in the National Trade Estimate Report on Foreign Trade Barriers ("NTE Report") as they were in the past,

[7] The complete report can be found at:
http://www.ustr.gov/sites/default/files/REPORT%20ON%20TECHNICAL%20BARRIERS%20TO%20TRADE%20FINALTO%20PRINTER%2025Mar09.pdf.

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and are now addresses in the TBT Report which is “focused on significant foreign trade barriers in the form of product standards, technical regulations and testing, certification, and other procedures involved in determining whether products confirm to standards and technical regulations (conformity assessment procedures).” The aim of the report is to “describe and advance US efforts to identify and eliminate [TBTs].”

The TBT Report provides an overview of technical barriers to trade and mechanisms for addressing them. The report provides an introduction to standards-related measures and discusses how those measures are governed under the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (“TBT Agreement”) and US free trade agreements (FTAs). The TBT Report also discusses the US legal framework under which standards-related measures are implemented. Other sections of the report include the role of international standards, conformity assessment procedures, and the process by which the US government identifies technical barriers to trade. In addition, the TBT Report discusses US engagement on standards-related measures in international, regional, and bilateral fora. The penultimate section of the report identifies trends concerning standards-related measures. The remainder of the TBT Report is dedicated to a discussion of technical barriers to trade facing US producers in various countries throughout the world.

II. Country-Specific Barriers

Argentina

Since 2008, the United States has been engaged in discussions concerning a resolution that Argentina’s Ministry of Health (MoH) issued on June 4, 2008, which limited the amount of phthalates that toys and other children’s products may contain. Initially, Resolution 583/2008 mandated that only imported products would be subject to compliance tests and that technical reports accompanying imported products must have been issued by the Center of Investigation and Technological Development for the Plastics Industry (INTI). The United States expressed its strong support for Argentina’s efforts to prevent dangerous substances from appearing in toys and children’s products. However, the United States expressed concerns over the new resolution’s requirements, noting that the new requirement would significantly delay the placement of US products on the Argentine market. The United States also inquired into whether similar testing requirements were in place for domestic toys and other children’s products. While Argentina indicated that testing requirements apply to both domestic and imported products, it cited no law confirming this assertion. In October 2009, Argentina revised Resolution 583/2008 to permit the sale of toys and children’s products in Argentina if the producer “(1) certified that

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the products meet Argentine product safety requirements; and (2) indicated that the producer had requested a test report from INTI prior to September 23, 2009."

Argentina issued Resolution 1078/2009 in December 2009 to allow producers to export toys and children's products to Argentina without a report from INTI "if the products are accompanied by written proof that samples of the products have been presented to, and are being analyzed by, INTI." The United States considers this to be a positive development because the new resolution will minimize delays as a result of the Resolution 583 requirements while Argentina considers whether and how to allow testing in laboratories outside of Argentina.

Brazil

The TBT Report discusses several areas in which the United States and Brazil have held discussions over the past two years, including:

- **Distilled Spirits.** In 2008, Brazil announced proposed changes to technical requirements for distilled spirits. In 2009, the United States, Mexico, and the EU noted their concerns with the proposed Brazilian requirements because they could effectively bar exports of certain distilled spirits to Brazil. In response, Brazil issued a clarification to the proposed requirements stating that "beverages that are produced abroad and do not comply with Brazilian requirements can continue to be imported, provided that a certificate is presented attesting that: (i) the beverage is a typical product from its country of origin; (ii) the beverage was produced in accordance with that country's laws and regulations; and (iii) the beverage is regularly consumed in that country." According to the TBT Report, there have been no disruptions of distilled spirits to Brazil reported by US industry. In October 2009, Brazil announced amendments to its technical regulations concerning the labeling of beverages and products of acetic fermentations. The United States expressed concern that these new requirements could bar certain US products from being placed on the market in Brazil. The TBT Report notes, however, that there have been no reported disruptions of distilled spirits shipments to Brazil from the United States.
- **Medical Devices.** On May 18, 2009, Brazil notified the WTO of the passage of Resolution 25, which requires Brazil's medical device inspection agency, ANVISA, to inspect by May 22, 2010 those facilities that produce "high risk" medical devices to be sold in Brazil. The United States did not dispute Brazil's right to inspect facilities, but expressed concern that ANVISA would not have enough resources to meet the May 22, 2010 deadline. The TBT Report notes that increased dialogue between the two countries on medical device inspection requirements is a positive development and

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will hopefully lead to increased dialogue on other matters. In response to US concerns, Brazil exempted certain classes of medical devices from the inspection requirement and is also hiring additional inspectors. The United States also expressed concern over Resolution 185 from 2001, which establishes registration requirements for medical devices. In response, Brazil published a resolution that clarifies the requirements set forth in Resolution 185. According to the TBT Report, US and industry officials are reviewing Resolution 185 to determine whether it adequately addresses US concerns.

- **Telecommunications.** The United States and Brazil are engaged in continuing negotiations regarding the policy of Brazil's National Telecommunications Regulatory Agency (ANATEL) not to accept test data from outside Brazil. As a consequence of this policy, US exporters must submit their information technology and telecommunications equipment for testing twice, once in the United States and a second time in a Brazilian laboratory. The United States continues to encourage Brazil to implement the Inter-American Telecommunication Commission (CITEL) Mutual Recognition Agreement (MRA), pointing out that implementing the agreement would also benefit Brazilian producers who could then submit test results from Brazilian laboratories to fulfill Federal Communications Commission (FCC) requirements in the United States.
- **Toys and Children's Articles.** The United States expressed concern over a Brazilian measure that would have subjected imported toys to two rounds of testing (one in the country of manufacture and one in Brazil) and would not have required domestic companies to undergo two rounds of testing. In September 2009, Brazil's National Institute of Metrology, Standardization, and Industrial Quality (INMETRO) announced that it would change the requirements on toys and children's articles addressing the US concerns. In September 2009, INMETRO announced changes to the testing measure, which included the elimination of the requirement that imports be tested twice. The United States commended Brazil on the revised measure, but US officials are following up with Brazilian officials on this matter.
- **Wine.** In 2008, Brazil announced to the WTO proposed changes to technical requirements regarding the importation of wine. One new provision would require double registration by foreign wineries. The proposed changes would also limit wine alcohol content to 14 percent by volume, which could bar US products from the market. In December 2009, Brazil notified the WTO of a new measure that dispenses with the winery registration requirement.

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China

The TBT Report considers there to be several technical barriers to trade for US companies seeking to export their products to China. In addition to the barriers detailed below, the TBT Report also discusses TBTs pertaining to mobile phones, notification issues, and patents used in Chinese national standards.

- **Conformity Assessment Procedures.** In August 2003, China began requiring companies to apply the China Compulsory Certification (CCC) mark to products - both domestic and foreign - in over 159 categories. US companies have expressed concern that it is unclear exactly which products are subject to the CCC mark requirement. Moreover, it is especially difficult for small- and medium-sized US businesses without a presence in China to comply with CCC requirements because they are required to submit their applications in the Beijing offices of China's Certification Accreditation Administration. In addition, companies that export their product to China often times must submit their products for testing twice - once in the country of manufacture and a second time in a Chinese laboratory. This can be costly and can also delay the time it takes for the product to be placed on the Chinese market. To date, China has allowed only one US-based conformity body to enter into a Memorandum of Understanding (MOU) with China allowing the body "to conduct follow-up factory inspections (but not primary inspections) of manufacturing facilities that make products for export to China requiring the CCC mark." The report notes that China has stated that is permitting only one MOU per country, though it has given no justification for this policy.
- **Cotton Supplier Registration Requirements.** The United States and China are engaged in ongoing dialogue regarding China's registration requirements for foreign cotton suppliers. According to the TBT Report, while China claims registration is voluntary, "[f]oreign suppliers that do not register under this system are automatically subject to a lower 'quality credit assessment grade' and are required to include a pre-shipment inspection clause in their contracts." Furthermore, many US cotton producers felt pressured to register because Chinese cotton mills would not do business with them otherwise. China's General Administration of Quality Supervision, Inspection and Quarantine has indicated it is willing to consider revisions to certain provisions of the registration requirements based on feedback it has received from interested foreign governments and companies.
- **"Excessive Packaging" Requirements.** In November 2007, China proposed restrictions on "excessive packaging" for certain products. The United States expressed its support for China's efforts to promote environmentally-friendly packaging, but expressed concerns over "the efficacy of restricting total packaging cost in relation to product cost" in addition to other concerns. According to the TBT Report, China addressed many of the concerns the United States expressed with regard to

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foreign companies' ability to comply with the proposed requirements, although China's regulatory approach remains fundamentally unchanged.

- **Information Technology (IT) Products.** In August 2007, China notified the WTO of its proposed measures to maintain information security. The thirteen proposed measures would require IT products to comply with Chinese national standards for information security that may differ from international standards in some areas. Following objections from the United States and other WTO mMembers, China agreed to delay issuance of the final regulations until Chinese and foreign experts had an opportunity to discuss how best to ensure information security in China. In September 2009, China announced that the compulsory certification requirement would only apply when products are sold to government agencies.
- **Internet Filtering Software.** In May 2009, China's Ministry of Industry and Information Technology (MIIT) proposed a measure requiring all computers sold in China to package or pre-installed with Internet filtering software called "Green Dam - Escort of the Youth Flowers." The proposed measure was met with a great deal of criticism by government officials and industry leaders in the United States and in other countries. Opponents cited the fact that China did not notify the WTO of its proposed measure and it did not provide sufficient time for compliance. In June 2009, China announced its decision to suspend the proposed measure indefinitely.
- **Medical Devices.** The United States has, on more than one occasion, expressed concern over Chinese regulations that could lead to redundancy in conformity assessment procedures and requirements. In response to some of these concerns, in October 2009 China indicated that medical devices would not be required to be registered in the country of export or in the country of the manufacturer's legal residence.

Colombia

In November 2008 and May 2009, Colombia proposed amendments to its laws regarding alcohol labeling requirements. The aim of the proposed amendments was to prevent the sale of contraband products. The United States noted its support for Colombia's right to attempt to reduce the sale of contraband products, but expressed concern over certain proposed labeling requirements. In response, Colombia modified its proposal so that producers will not be required to use quotation marks with their brand names or translate their brand names into Spanish.

In March 2009, the United States submitted comments to Colombia on its proposal to adopt quality and identify requirements for distilled spirits. Colombia made several changes to its proposed measure in

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response to these comments. The United States expressed further concerns regarding "Colombia's proposal to use analytical parameters to govern the sale of spirits in Colombia, particularly the prospect of imposing limits on total congeners included in gin, vodka, and rum, and the possibility of imposing minimum and maximum alcohol content limits that could bar some US spirits from the Colombian market." In addition, "Colombia has failed thus far to implement a ban on the sale of spirits in Colombia of products produced outside of the United States that are labeled as Kentucky Bourbon or Tennessee." Colombia has stated that is delaying implementation of the ban until the US Congress approves the pending US Colombia Trade Promotion Agreement, which contains a provision that recognizes Tennessee Whiskey and Kentucky Bourbon as products distinctive of the United States.

European Union

In addition to providing an update on TBTs in the areas of borates and nickel compounds, chemicals, and ride-on lawnmowers, the TBT Report provides updates on the following trade barriers that US companies have encountered in the EU:

- **Accreditation Rules.** The EU's new accreditation regulation took effect on January 1, 2010. Under this regulation, each Member State is required to appoint one national accreditation body. In addition, competition among Member States' national accreditation bodies is not permitted. The United States expressed concerns about this regulation, specifically with respect to whether Member States will continue to recognize non-EU accreditation bodies that have been accredited under other previously recognized standards. The United States is also seeking further information with regard to the EU's justification for implementing this new accreditation framework.
- **Hazardous Substance Restrictions.** The EU's Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS) prohibits the placement of certain types of electronic and electrical equipment on the market that contains hazardous substances, such as lead, mercury, or cadmium. The United States expressed its support for the EU's objective of implementing regulations that protect the environment, but it expressed concern over what it perceives to be a lack of transparency and predictability in considering requests from companies seeking exemption from the regulations. The EU is in the process of revising the RoHS directive.
- **Wine.** Under the United States-EU wine agreement in 2006, the EU granted a three-year derogation for the use of terms such as "tawny, ruby, reserve, classic, and chateau" on labels for US wines that were sold in the EU. When the derogation expired in March 2009, the EU decided not to renew it and

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published a new regulation (EC No 607-2009) which set forth the implementation rules for a 2008 regulation concerning labeling requirements for wine products. According to the TBT Report, the United States takes the position that the new rules "severely restrict the ability of non-EU wine producers to use common or descriptive and commercially valuable terms to describe their products, on the grounds that those terms are traditionally associated with European wines."

Gulf Cooperation Council

Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (UAE) comprise the Gulf Cooperation Council (GCC). The Gulf Standards Organization (GSO) is the GCC's standards body. According to the TBT Report, the GSO is in the process of developing a conformity assessment scheme, which could be adopted by each of the GCC Member States. The scheme would be implemented in phases, starting with toys in 2010. The United States is working with GCC technical experts to develop a conformity assessment scheme that is transparent and in accordance with WTO rules.

In 2006, the Saudi Ministry of Commerce established the Certificate of Conformity (CoC) Program requiring that all products to be sold in Saudi Arabia must be shipped with a conformity certificate certifying that the product confirms to Saudi Arabian technical regulations. Upon its succession to the WTO, Saudi Arabia agreed to provide guidance in English on how to comply with the requirements of the CoC Program. According to the report, to date, however, Saudi Arabia has provided no such guidance. The United States continues to raise this issue with Saudi Arabia and "Saudi and US officials are attempting to resolve this issue on a technical level."

India

The TBT Report highlights three technical barriers to trade concerning India:

- **Cosmetics.** In 2007, India proposed an amendment to its Drug and Cosmetic Rules, 1945 regarding registration requirements. US industry has argued that "the amendment would create an unreasonably costly and burdensome registration system for cosmetic products that would also result in unnecessary delays for cosmetic products being brought to market." The United States noted that India did not notify the WTO of this measure and, therefore, India should delay enforcement until WTO Members have had an opportunity to comment on, and suppliers have had an opportunity to comply with, the new requirements. According to the TBT Report, India ultimately did notify the WTO and Members States were afforded an opportunity to submit comments on the measure. India's Ministry of Health (MoH) revised the proposed measure to address some of the concerns raised by

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the United States. The TBT Report notes, however, that the United States still has concerns that all cosmetics, regardless of whether they are low-risk or high-risk, will be treated the same under the new requirements.

- **Food and Distilled Spirits.** There continue to be concerns by the United States regarding changes to MoH's nutritional labeling requirements. While MoH addressed some of the United States' concerns there remain several outstanding issues. For instance, the United States is still concerned that India's new measure may require suppliers of distilled spirits to provide the date of production. The TBT listed additional concerns of the United States that have not yet been addressed by India, including "the labeling of proprietary foods; the declaration and calculation of certain nutrient values, especially trans fats; the criteria for labeling a product as 'trans fat free;' the allowance of stickering on products; and the rules for front of pack flavoring declarations using the statement 'CONTAINS ADDED FLAVOUR.'" The United States is in continuous talks with India to resolve these issues. The TBT Report further notes that a recent proposal from the Food Safety and Standards Authority of India may resolve some of the outstanding issues.

- **Tires.** The United States is concerned about a proposed Bureau of Indian Standards (BIS) measure that establishes conformity assessment procedures for tires. Under the new measure, tire suppliers seeking to export their products to India would be required to first obtain approval for each of their tire plants. As part of the approval process, tire suppliers would be required to submit sample tires from each tire family for testing at the Central Institute for Road Transport (CIRT). The United States expressed concern that having only one laboratory conduct this compliance testing could lead to significant delays and would disrupt tire trade in India. According to the TBT Report, BIS recently signaled that it may permit foreign laboratories to perform compliance testing, provided the laboratories meet Indian standards and are accredited by the Indian accreditation agency.

Japan

The TBT Report highlights several TBT areas regarding Japan in which there have been positive developments. These include the areas of pharmaceuticals, nutritional supplements, and cosmetics. According to the report, Japan is also taking steps to reform its public comment procedures.

The TBT Report also discusses the TBTs concerning US organic exports to Japan. The report notes that Japan's ban on alkali extracted humic acid, a substance permitted by the US Department of Agriculture (USDA) for use on US organic crops, limits US exports to Japan. In addition, the TBT Report discusses the problems with Japan's zero tolerance policy for herbicide and pesticide residues on organic products,

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noting that zero percent residue is “impossible because pesticides and herbicides are found in the natural environment, even if they are not used on organic crops.”

According to the report, Japan is also in the process of revising its requirements for organic plants, processed foods, livestock products, and feeds. The Japanese Ministry of Agriculture, Forestry and Fisheries (MAFF) expects to complete the revision process by 2011. Until then, MAFF will seek input from stakeholders on how best to ensure that organic foods are free from pesticide and herbicide residues.

Mexico

The TBT Report addresses a number of trade barriers facing US exporters seeking to sell their products in Mexico. In addition to addressing issues relating to medical devices, nutritional supplements, and telecommunications equipment, the TBT Report discusses the following issues:

- **Food Products.** In 2009, Mexico notified the WTO that it was proposing to amend its nutrition labeling rules. The United States submitted comments on the proposed amendments. In particular, the United States sought clarification from Mexico on definitions and regulatory objectives. The United States also asked Mexico to clarify other information, such as how Mexico calculated its Recommended Daily Allowance values and how it made its energy calculations. According to the TBT Report, the United States hopes to facilitate discussions in 2010 between US and Mexican regulators on these issues.

Russia

The TBT Report discusses two TBT areas related to Russia: alcoholic beverages and encryption technology. Currently, Russia requires importers of alcoholic beverages to report individual sequentially-numbered stamps when it complies with its United Federal Automated Information System by printing Universal Product Code data on paper stamps attached to each bottle of alcohol. In contrast, domestic manufacturers of alcoholic beverages are permitted to report stamps in batches. In addition to challenging this disparate treatment between domestic manufacturers and importers, the United States argues that the requirement is burdensome and costly. Russia has signaled that it intends to apply the requirements to both importers and domestic producers, although no action has been taken thus far.

Thailand

The TBT Report addresses two types of TBTs facing US exporters to Thailand:

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- **Alcoholic Beverages.** In January 2010, Thailand notified the WTO of proposed modifications to its warning label requirements for alcoholic beverages. The new measure would require alcoholic beverage manufacturers to include images about the dangerous effects of drinking alcohol on its warning labels. Although the United States, along with Thailand and thirteen other countries, requires warning statements on alcoholic beverages, the United States objects to the graphic nature and the size of the warnings required by Thailand.
- **Snack Food.** In October 2006, Thailand announced its proposal to adopt a "traffic light" labeling requirement. Under this system, five categories of food - potato chips, corn chips, extruded snack foods, biscuits/crackers, and assorted wafers - would be assigned a color based on the Thai government's assessment of the health benefits or detriments of a particular type of food. The United States expressed its support for Thailand's commitment to reducing childhood obesity, but objected to the proposal because "it deviated from the prevailing scientific and technical information on health and nutrition . . . and had the potential to tarnish in the minds of Thai consumers the reputation of all products within certain food groups. . . ." In August 2007, the Thai Ministry of Public Health withdrew its proposal and replaced it with a new proposal that would require snack food suppliers to include a label stating the following: "Should consume small amounts, and exercise for a better health." The United Stated expressed concerns with this proposal similar to the concerns it had with Thailand's initial proposal on snack food labeling.

Vietnam

According to the TBT Report, Vietnam is currently "developing a legal and regulatory framework for foods derived from agricultural biotechnology." While the United States has been pleased with Vietnam's progress overall, it remains concerned that Vietnam is considering mandatory biotechnology labeling provisions.

With regard to telecommunications, US companies asked the Vietnamese Ministry of Communications (MIC) to provide greater flexibility for them to submit reports showing their products comply with Vietnam's electromagnetic compatibility requirements. The companies also asked MIC to accept test reports from foreign laboratories. MIC has since indicated that it will allow one test report to cover all importers of the same product from a given foreign manufacturer. MIC has also started to accept test reports from foreign laboratories.

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Outlook

Similar to the NTE Report and the SPS Report, the decision to issue a separate report concerning TBTs is likely an indication of the Obama Administration's continued intent to bolster exports in part by reducing non-tariff barriers to US goods and by ensuring that US trading partners comply with bilateral and multilateral trade obligations. By devoting substantial energy to monitoring and analyzing TBTs in various countries throughout the world, officials in the Obama Administration may see the United States as being in a better position to ensure that US trading partners are in compliance with their multilateral and bilateral obligations. It thus appears that USTR and other US officials will be closely monitoring trading partners' reactions to the TBT report and the actions that they undertake in addressing specific US TBT concerns. As this is USTR's first TBT Report, it contains a great deal of background on TBTs and TBT-related obligations, in addition to country analysis. The report also provides country analysis dating farther back than the past year. It remains to be seen whether next year's report will be as comprehensive, although the 2011 TBT Report should provide a better understanding as to what the Obama Administration intends to do with the information presented in the annual report.

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USTR Releases 2010 Report on Sanitary and Phytosanitary Measures

Summary

On March 31, 2010, the United States Trade Representative (USTR) published its new 2010 Report on Sanitary and Phytosanitary Measures[8] ("SPS Report") detailing barriers to US food and farm exports. The SPS Report discusses issues previously addressed in the USTR's annual National Trade Estimate on Foreign Trade Barriers (NTE). This year, USTR has released the SPS Report and a separate report addressing technical barriers to US exports.

We highlight here the cross-cutting issues and country-specific barriers identified by the SPS Report, focusing on the following countries:

Analysis

I. Background and Cross-Cutting SPS Issues

The 2010 SPS Report is a "new, specialized report dedicated to describing significant and unwarranted SPS foreign barriers." Many of these measures were previously addressed in the NTE Report. The new SPS Report meets the requirements under Section 181 of the Trade Act of 1974, as amended, to report on significant foreign trade barriers with respect to SPS measures. Accordingly, the 2010 NTE Report itself does not contain information on these SPS measures.

The SPS Report identifies six cross-cutting issues that affect US food and farm exports in multiple markets, including:

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[8] The complete report can be found at: http://www.ustr.gov/sites/default/files/SPS%20Report%20Final(2).pdf.

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- **H1N1 Influenza Virus.** In the wake of the April 2009 outbreak of a new human strain of H1N1 (swine flu), more than 30 countries imposed bans on imports of US swine, pork, and pork products, including Bahrain, China, Indonesia, Russia, and South Korea. Although the United States has been successful in reversing some of these bans, the SPS Report notes that continued work on eliminating all barriers to US swine, pork and pork products remains a priority.

- **Biotechnology.** US exports of planted crops developed through biotechnology face bans in many countries owing to concerns over potential heath issues. The SPS Report notes that the number of countries exporting biotechnologically developed crops has expanded to 25 and that over 80 percent of corn, soy, and cotton exports planted in the United States is derived from biotechnology. The United States continues to work through international standards setting bodies (*i.e.* Codex) to overcome barriers to US exports.

- **Bovine Spongiform Encephalopathy (BSE).** In December 2003, the United States detected its first case of BSE. As a result, at least 100 countries imposed bans on US beef and beef products, resulting in a 79 percent decline in US exports. The United States is seeking to re-open markets for beef, emphasizing a finding of the World Organization for Animal Health (OIE), an intergovernmental organization responsible for improving animal health, that BSE in the United States has been brought under control.

- **Avian Influenza (A1).** A number of countries continue to ban US pork exports owing to concerns over A1. China has banned poultry from six US states based on A1 concerns, whereas India has used A1 as a basis to ban almost all US swine and poultry exports. Working through the OIE, the United States has secured the withdrawal of 36 A1-related bans. However, removal of China and India's bans are high priorities for USTR.

- **Ractopamine.** Ractopamine is a drug used to promote lean meat growth in pigs, cattle and turkeys, and is used in a number of countries, including Australia, Brazil, Canada, and the United States. China, the European Union (EU), and Thailand have banned US exports of meat products containing ractopamine. The United States is working through the Joint Food and Agriculture Organization (FAO)/World Health Oranization (WHO) Expert Committee on Food Additives for the adoption of a maximum residue level of ractopamine in animal feed.

- **Maximum Residue Levels for Pesticides.** Maximum residue levels (MRLs) are the maximum concentration of residues permitted in or on food and animal feedstuffs. While the US has developed a domestic regulatory framework that specifies MRLs for all agricultural products produced for human

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consumptions, international standards on MRLs are not yet as well-developed. US exporters have faced barriers owing to disparate MRLs. Developing MRLs through Codex remains a high priority. The SPS Report identifies the EU and Japan as imposing a number of MRL-related barriers to US exports.

II. Country-Specific Barriers

Argentina

The SPS Report identifies the Argentine ban on US exports of beef and beef product as a concern. Additionally, Argentina's block on US exports of apples and pears (due to concerns over the bacteria that causes fire blight) is noted as an issue of concern.

Brazil

The SPS Report identifies Brazil's ban on US exports of beef and beef product as a concern, though the report notes that Brazil is in the midst of a regulatory process to set sanitary standards on beef imports. The United States has provided comments to Brazil on the proposed regulations. In addition, the report notes that Brazil requires plant-by-plant inspections of pork processing facilities before allowing pork imports. The SPS Report describes this requirement as "burdensome", and notes that the United States continues to seek a solution with Brazil.

China

The SPS Report identifies systemic and product-specific barriers imposed by China on US food and farm exports as outlined below:

- **2009 Food Safety Law.** Although China's implementation of its new food safety law has been responsive to US concerns, a number of supplemental regulations have produced confusion and delays in the introduction of US products into China.
- **H1N1 Restrictions.** China maintains a ban on US pork products owing to concerns over H1N1. However, the US-China Joint Commission on Trade and Commerce (JCCT) has produced a resolution to this matter that is awaiting implementation. The SPS Report note that exports of US pork will commence upon completion of necessary export documentation.
- **Ractopamine.** China maintains a ban on all pork containing any residue of ractopamine. The United States has requested that China adopt an MRL pending development of an MRL by Codex. China has rejected this request.

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- **Salmonella.** China has imposed a ban on any meat or poultry product containing E.coli and listeria. China has claimed that it is working on developing appropriate standards.
- **BSE.** The report notes that China's regulations effectively ban US beef and beef product exports.
- **Avian Flu.** China has banned poultry exports from or transshipped through Arkansas, Idaho, Kentucky, Pennsylvania and Texas owing to detected cases of Avian Influenza.
- **Animal Feed.** US exporters of animal feed (including pet food) are required to be certified by US health authorities before being allowed to export to China. However, China is also requiring facilities that wish to export to register with Chinese authorities, which has limited the ability of US exporters to access the Chinese market.
- **Restrictions on Certain Plants.** China currently maintains bans on certain US exports of apples, pears, potatoes, and strawberries owing to concerns over the spread of various pests. The United States continues to work with Chinese authorities by providing data to assuage concerns over the potential spread of pests.
- **Biotechnology.** China's regulatory system requires that all biotechnologically derived products be approved first in the country where they were developed before an application for approval can be made in China. As a result, this has resulted in delays for biotech products entering the Chinese market.

Colombia

The SPS Report identifies Colombia's zero-tolerance policy on Salmonella for imported poultry as a barrier to US exports. Additionally, Colombia continues to ban imports of US live cattle.

European Union

The SPS Report identifies a number of issues both at the EU and individual Member State level. The SPS Report identifies the following issues of concern:

- **Biotechnology.** Despite the World Trade Organization's (WTO) ruling in favor of the United States in a recent US-EU dispute on biotech products (*EC — Approval and Marketing of Biotech Products*), the EU continues to restrict the marketing of a number of US biotech food exports. In addition, despite the establishment of an EU approvals process for biotech products, a number of EU Member States (Austria, France, Germany, Greece, Hungary, and Luxembourg) retain national bans.

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- **Food Additives.** The EU has mandated that food and cosmetic products containing certain color additives include warning labels about the additives. The EU claims the warning requirement is necessary because the additives present a risk of hyperactivity. The United States disputes the science underlying the EU's claim.

- **Beef and Beef Products.** The United States and EU have reached an interim settlement concerning their dispute over the US use of hormones in beef and beef products. The interim settlement, which was concluded in May 2009, will allow for greater access for so-called "high quality" US beef exports (*i.e.* beef that has not been raised using hormones). In exchange, the United States will refrain from imposing any additional retaliatory measures, and will phase out existing retaliatory tariffs within four years.

- **Poultry.** The EU maintains a ban on the use of certain chemical treatments used to prevent contamination of poultry products. After nearly a decade of consultation, the United States has launched a WTO proceeding concerning the EU's failure to approve the use of certain chemical treatments on poultry.

- **Ractopamine.** The EU maintains a ban on pork produced with ractopamine. In addition, US exports of pork to the EU must be tested in Canada to verify the absence of ractopamine.

- **Animal By-Products.** The SPS Report notes that the EU maintains a regulation concerning the safety of animal by-products not intended for human consumption (*i.e.* soap, candles, and industrial lubricants). This regulation has curtailed US exports of a number of products, such as dry pet food.

- **Almonds.** US shipments of almonds to the EU are subject to testing requirements due to concerns over aflatoxins. Exporters who comply with the voluntary sampling program are subject to far fewer tests than those who do not participate in the program. The United States is working to increase confidence in the sampling program.

Gulf Cooperation Council

The SPS Report notes that the Gulf Cooperation Council (GCC) is contemplating the harmonization of food safety requirements among the Council's members. Draft regulations issued by the GCC have raised US concerns. The United States is continuing to engage with GCC technical experts to address these concerns.

India

The SPS Report notes the following areas of concern:

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- **Dairy Products.** India's dairy market remains largely closed to US exporters because of Indian concerns about the use of certain hormones and enzymes in the production of US milk and cheese. The United States argues that these hormones and enzymes have been approved for use by Codex, and is pressing for removal of the Indian restrictions.
- **Pork.** India's import certificate system for pork requires attestation that the product does not exceed certain MRLs. However, the report notes that the certificates fail to adequately specify which compounds are subject to MRLs. Additionally, Indian feeding and slaughtering requirements for swine pose obstacles to US exports.
- **Avian Influenza.** India has banned the import of US poultry and swine owing to concerns over Avian Influenza. The United States claims these bans are not in accordance with OIE guidelines.
- **Wheat and Barley.** According to the report, Indian pest restrictions have effectively blocked US wheat and barley exports.

Japan

The SPS Report notes the following areas of concern with respect to Japan:

- **Beef and Beef Products.** The report notes that Japan continues to effectively ban US exports of beef and beef products. The US believes the ban is unjustified in light of OIE guidelines and continues to press Japan, which in 2003 was the largest consumer of US beef.
- **Food Additives.** In 2002, Japan identified 46 food additives for expedited review by regulatory authorities. However, the report notes that 25 of these additives have still not been reviewed by Japanese authorities.
- **Post-Harvest Fungicide.** Japan classifies the use of post-harvest fungicide as a food additive thus triggering a requirement for multiple risk assessments that can take up to six years to complete, which has deterred exports of a number of US products. In addition, Japan requires that food labels warn about the use of post-harvest fungicide.
- **MRLs.** According to the report, some of Japan's requirements concerning MRLs exceed US and Codex requirements. Japan and the United States have reached agreement on how to manage instances where a US exporter is found to be in breach of a more stringent Japanese MRL. This agreement allows Japan to penalize the individual violator rather than the entire sector. The United States continues to press Japan to adopt Codex MRLs.

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- **Rice.** The report notes that Japan's testing requirements for rice render US exports uncompetitive in Japan's market. According to the SPS Report, in addition to the number of tests, virtually all US exports of rice to Japan must be tested. The United States is seeking to have these testing requirements reduced and streamlined.
- **Poultry.** The report notes that Japan continues to limit US exports of poultry and poultry products (including eggs) owing to concerns over Avian Influenza.
- **Cherries.** Japan requires that each new variety of fresh cherry undergo fumigation trials before granting import approval. The United States claims that this requirement lacks a scientific basis.

Mexico

The SPS Report measures notes that while Mexico has eased restrictions, US beef products from animals over 30-months old, and ground beef remain banned. In addition, Mexican testing requirements in respect of processed pork have seriously affected US exports. The United States continues to press Mexico to develop a risk-based testing system.

A number of US plant exports also face restrictions in Mexico. US exporters of stonefruits (*i.e.* peaches, nectarines, and apricots) have encountered difficulties in selling in Mexico owing to concerns over oriental fruit moths, although the report notes that oriental fruit moths have never been detected in US shipments to Mexico. Additionally, Mexico continues to limit the shipment of fresh US potatoes to a 26-kilometer zone south of the US-Mexico border. This restriction aims to combat the spread of certain pests.

Russia

The SPS Report raises broad systemic concerns regarding Russia's administration of SPS measures. Russian requirements for certification of compliance with Russian safety standards by the exporting country have proven particularly burdensome for US exporters as many of the products that Russia requires be certified are not usually certified by US authorities. While Russia has directed its authorities to apply international SPS standards, these directives are not always implemented, with little justification provided as why international standards are being disregarded. Despite the fact that Russia and the United States have signed a number of bilateral agreements concerning pork and beef exports, implementation of these agreements has proven inconsistent. The approval of biotechnology products by Russian authorities has also proven cumbersome.

In terms of specific product areas, the SPS Report notes the following:

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- **Beef and Beef Products.** Russia continues to maintain its ban on US beef and beef products derived from cattle over 30-months in age.
- **Poultry.** On January 1, 2010, Russia banned the importation of chlorine-treated chicken, which has effectively halted US exports. In addition, Russia places limits on the water content of frozen chicken, and the amount of time chicken may be frozen before it is further processed.
- **Dairy.** Russia has requested that the United States certify those dairy producers who comply with Russian restrictions on certain chemical and microbiological residues. Russian officials have threatened to ban US dairy exports to Russia if such certification is not provided.
- **Pork.** Russia maintains MRLs for certain chemicals, such as tetracycline, that are more stringent than Codex requirements. The effect of these Russian MRLs has been to severely limit US pork exports to Russia.
- **Grains and Oilseeds.** Russian requirements for veterinary certificates for grains and oilseeds has effectively curtailed US exports because US authorities believe such certifications are not necessary, and therefore do not provide them.

South Korea

The SPS Report notes that the United States and South Korea have made significant progress in resolving concerns over proposed regulations governing food additives, and South Korean restrictions on US beef exports. The United States continues to press for the easing of fumigation requirements on US cherry exports. Also, the United States is monitoring South Korean proposals that would eliminate MRLs for pesticides not certified for used in South Korea. Finally, the SPS Report expresses concerns about South Korea's regulatory framework for the approval of biotechnology products, which the United States claims is becoming increasingly disruptive to US exports.

Thailand

The SPS Report notes that while Thailand has withdrawn restrictions on US pork exports arising from concerns over Avian Influenza, unprocessed US pork remains excluded from Thailand due to burdensome questionnaires and inspection requirements. In addition, the report notes that Thailand's regulation concerning ractopamine acts as a barrier to US pork exports. Thailand also maintains a ban on certain US beef and beef products.

Vietnam

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The SPS Report notes that Vietnam maintains a ban on US beef and beef products derived from cattle over 30-months in age.

Outlook

The decision to issue a separate report concerning SPS measures is likely an indication of the Obama Administration's continued intent to bolster exports in part by reducing non-tariff barriers to US goods and by ensuring that US trading partners comply with bilateral and multilateral trade obligations. As the SPS Report notes, enhanced monitoring of non-tariff barriers will provide a central focus for "engagement by US agencies in resolving trade concerns." Certainly, the SPS Report contains more details on contentious SPS issues than has previously been included in annual NTE reports, a move that for some observers shows the Administration's focus on removal of barriers to trade in US agricultural products. There has been little initial reaction to the Obama Administration's decision to issue an SPS report separate from the NTE. Chairman of the Senate Agriculture Committee Saxby Chambliss (D-GA) praised the SPS Report upon its release, as did House Ways and Means Committee Chairman Sander Levin (D-MI) and Ways and Means Trade Subcommittee Chairman John Tanner (D-TN). It remains to be seen what effect, if any, the issuing of a separate report on SPS issues will have as compared to past years when all barriers to US exports were itemized in a single NTE report, although some observers opine that the Administration will be monitoring trading partners' SPS practices and regulations in an effort to bolster US agricultural exports and in order to ensure proper compliance by trading partners to bilateral and multilateral obligations.

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USTR Releases Results of 2010 Section 1377 Review of Telecommunications Trade Agreements

Summary

On April 6, 2010, the Office of the United States Trade Representative (USTR) released its annual Section 1377 Review of Telecommunications Trade Agreements ("2010 Report").[9] 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, China, Germany, India, Mexico, and Singapore; (iii) issues affecting the telecommunications equipment trade in Brazil, China, European Union, India, Indonesia, Korea, Malaysia, Mexico, and Thailand; and (iv) other issues including frequency allocation in Costa Rica and transparency in China. We review below USTR's findings.

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, 2010. The 2010 Report is based on public comments filed by interested parties and on information developed through ongoing contacts with industry and private sector representatives in various countries. The review focused on four general areas (citing country-specific examples): (i) fixed and mobile call termination rates; (ii) problems with major suppliers; (iii) issues affecting the telecommunications equipment trade; and (iv) other issues.

I. Fixed and Mobile Call Termination Rates

Carrying forward concerns expressed in the 2009 Report, the 2010 Report notes the "troubling trend whereby some foreign governments implemented measures that led to increased termination-rates." The 2010 Report highlights general issues related to increased termination rates and lists several countries that are employing diverse methods to increase termination rates:

[9] The full report is available at: http://www.ustr.gov/trade-topics/services-investment/telecom-e-commerce/section-1377-review.

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A. General Issues

The 2010 Report reiterates fundamental concerns about the International Telecommunication Union (ITU) *Recommendation D.156*, adopted in October 2008, 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 Most-Favored Nation (MFN) treatment to foreign services suppliers.

B. Country-Specific Issues

- **El Salvador.** The 2010 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 MFN obligations under the GATS and its adherence to its commitment in the GATS Annex on Telecommunications (GATS Annex) and the Dominican Republic – Central America Free Trade Agreement (CAFTA-DR) to ensure reasonable access to and use of its public telecommunications network.

- **Jamaica.** The 2010 Report notes that Jamaica continues to levy a surcharge on incoming international calls to fund a universal service program called the "Universal Access Fund." USTR raised this same issue in 2008 and 2009 and continues to encourage 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 2010 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.

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- **Japan.** The 2010 Report notes a positive development in Japan and states that Japan's regulator is continuing its policy review on whether and how to directly regulate mobile termination rates in Japan. Although this review is not yet complete, the report notes that Japan's mobile major supplier - NTT DoComo - has implemented a substantial reduction in its mobile termination rates over the past two years, and that in 2010, NTT DoComo will reduce mobile termination rates by a minimum of 13.3 percent to a maximum of 15.5 percent, depending on place of interconnection. USTR is of the opinion that "this year's reduction will bring Japan's mobile termination market more in line with the more competitive mobile termination markets in other OECD countries."

- **Peru.** In its 2009 Report, USTR noted that OSIPTEL had initiated a process to establish new mobile termination rates to replace the rates it had established in 2004. However, concerns have been raised that the process for establishing the new rates has been delayed and that OSIPTEL has not yet established new rates due to extensions that OSIPTEL granted Peru's large operators to submit their cost information. USTR urges OSIPTEL take steps to ensure that the process to establish new rates not be unnecessarily delayed.

- **Tonga.** The 2010 Report notes a slight improvement with regards to 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 2010 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. According to USTR, "repeated attempts by USTR to obtain additional information since last year's Review had been unsuccessful until very recently, when an official from the Ministry of Communications informed USTR that Tonga has decided to repeal the USD 0.30/minute rate and allow international termination rates to be set by the market." USTR urges Tonga to follow through with this decision by formally repealing the USD .30/minute rate as soon as possible.

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II. Issues with Major Suppliers

The 2010 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:

- **China, India and Mexico.** Commenting parties noted problems regarding US operators' ability to offer satellite capacity to customers in China and India. China and India both require that foreign satellite capacity be sold through an intermediary. In addition, commenters questioned the local presence requirement that Mexico imposes on foreign satellite service suppliers, noting that Mexico's GATS commitments do not include such a requirement for cross-border telecommunications services. Finally, with respect to both India and Mexico, commenters expressed concern that these countries require mobile satellite operators to install a gateway in India or Mexico, respectively, as a condition for providing satellite services into their territories; commenters consider these requirements burdensome and unnecessary from a technical standpoint to address the security concerns these countries have raised.
- **Australia.** According to the 2010 Report, US companies continue to report difficulties obtaining reasonable and timely access to certain wholesale services and related facilities from Australia's major supplier Telstra, particularly in the broadband sector. In addition to controlling the country's copper network and regional backhaul system, Telstra also owns much of Australia's cable television infrastructure and therefore does not face the broad-based competition from independent cable providers that is seen in many other countries. In 2009, the Australian government announced that it wanted Telstra to separate its retail and wholesale arms, either voluntarily or, if necessary, through a legislative mandate, and legislation giving the government the authority to mandate such separation is currently before the Australian parliament. USTR believes that separation of Telstra's retail and wholesale arms could help avoid conflicts of interest that inevitably arise when a supplier provides a service both at the retail level to end-users and at the wholesale level to its competitors. It is currently unclear if Telstra will agree to voluntarily complete the separation or if the government will need to compel Telstra to do it. In addition, the 2010 Report notes that USTR will monitor development and deployment of Australia's open-access National Broadband Network (NBN), particularly with respect to whether (with or without Telstra structural separation) competitors are able to obtain reasonable access to wholesale services and facilities to provide services that compete with Telstra's current retail offerings.
- **Germany.** The 2010 Report states that competitive carriers continue to claim that there are market access barriers in Germany because of restrictions on access to incumbent operator Deutsche

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Telekom AG (DTAG)'s network, specifically problems with access to two wholesale products: IP-Bitstream and ATM-Bitstream. USTR encourages Germany to continue to ensure that DTAG makes wholesale access to these products available. In addition, US companies have encountered problems in obtaining a form of leased lines called Private Partial Circuits (PPC). USTR believes Germany should consider studying whether competitors should have direct, regulated access to this product, "rather than having to piece it together using other regulated offerings." US companies also claim that they require access to wholesale service optimized for video distribution (IP-Multicast), which would enable them to provide Internet Protocol television (IPTV) to compete with DTAG's IPTV service. USTR will continue to engage with the German government to address concerns that US companies have raised with respect to access to DTAG's wholesale products.

- **India.** Previous 1377 Reviews noted that India began mandating non - discriminatory and reasonable access to the country's cable landing stations. Commenters have continued to note that the regulations mandating access do not adequately ensure the transparent and timely provision of services. 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 2010 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 despite preliminary findings of dominance by Mexico's Federal Competition Commission. The 2010 Report highlights one particular problem that directly affects US consumers and operators: the inability of Mexico's regulators to consolidate regional calling areas. USTR urges Mexico to ensure that its regulator develop appropriate rules that could help in addressing difficulties that consumers and operators face in Mexico.

- **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, although commenters have noted that SingTel has become more responsive to service requests from competitive carriers. The 2010 Report also notes that the government of Singapore is planning to complete construction of a new open access broadband network in 2011, which should provide an alternative to SingTel's network and alleviate some of the problems faced by competitive carriers. USTR will monitor progress in Singapore's deployment of this new network.

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III. Issues Affecting Trade in Telecommunications Equipment

The 2010 Report notes several difficulties that 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 2010 Report notes that Mexico, Israel, Chile, Brazil and China have indicated a willingness to consider mutual recognition agreements (MRAs) for ICT and other telecommunications equipment. The 2010 Report further notes that MRAs could help address restrictions these countries maintain on equipment testing outside their territories, and eventually could lead to these countries permitting equipment sold in their markets to be certified in the United States. USTR will continue to seek timely implementation of these MRAs.

B. Country-Specific Issues

- **China.** The assessment of China in the 2010 Report was somewhat more positive than the 2009 assessment. The 2010 Report notes that in August 2007, China notified to the WTO Technical Barriers to Trade (TBT) Committee 13 proposed technical regulations relating to information technology (IT) 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 generated concerns from US and other foreign governments and industry, and in April 2009, CNCA and the Ministry of Finance announced that China would delay implementation of compulsory certification for the information security products until May 2010, and would only apply the requirements to products that are sold to the government. According to USTR, "this represented a significant reduction in the scope of the requirements as compared to the regulations China originally proposed." In October 2009, China also agreed to a dialogue with the United States regarding global best practices for trade in information security products. US companies also remain concerned with China's existing

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prohibition on marketing mobile phones with wireless local area network (WLAN) capability. USTR contends that this current prohibition has no legitimate policy justification. Although the government of China has stated that it is looking into the issue, in March 2010, officials announced that pending ongoing tests, WLAN capability functionality would continue to be prohibited in handsets. USTR will continue to urge China to ensure that it permits mobile phones with WLAN capability to be marketed in China.

- **European Union (EU).** In 2006, the EU standardizing body CENELEC adopted a revised standard that some commenters believe will create a significant barrier to US exports to the EU of certain "Broadband over Powerline" (BPL) equipment if implemented. The 2010 Report notes that although the CENELEC standard is technically "voluntary", under the EU's so-called "new approach" to standards, products that comply with the CENELEC standard enjoy a "presumption of compliance" with the "essential requirements" of the mandatory EU directive on EMC. The USTR contends that compliance with these "voluntary" standards can be effectively mandatory, given the cost and uncertainty of demonstrating that other standards meet "essential requirements." USTR will press the EU on this issue, in particular to ensure the BPL equipment that does not present a risk of harmful interference can continue to be sold in Europe.

- **India.** According to the 2010 Report, India is currently exploring how it will implement the 2008 Amendments to the Information Act of 2000; US companies, however, are concerned that India will develop policies to implement the 2008 Amendments that will impose stringent and burdensome encryption requirements, including for equipment sold for solely commercial use, or even ban the use of certain encryption technologies. USTR urges India to seek ways to ensure US telecommunication companies can effectively protect information, while also respecting security concerns of the Indian government.

- **Indonesia.** According to the 2010 Report, Indonesia has been working on implementing domestic content requirements for licensed telecommunications service suppliers since at least 2006. In January 2009, Indonesia introduced a regulation specific to the deployment of wireless broadband services that states that telecommunications providers applying for spectrum to supply wireless broadband services must adhere to local content requirements of 30-50 percent. In October 2009, the Ministry of Communications and Informatics issued a decree requiring all telecommunications operators to expend a minimum percentage of their total capital expenditures for network development on locally sourced components or services. USTR notes that these requirements seriously disadvantage US equipment and service suppliers who depend on globally-sourced

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manufacturing to meet their needs. In addition, according to USTR, "since Indonesia does not have the manufacturing capacity for many types of sophisticated telecommunications equipment, this also puts the entire sector at a disadvantage in introducing innovative products and services, hurting Indonesian consumers and commercial users of information and telecommunications services." The United States and other WTO Members have raised questions about the consistency of such measures with the WTO Agreement Trade Related Investment Measures ("TRIMs Agreement").

- **Korea.** USTR noted 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 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. In May 2009, the Korean government announced that it would limit mandatory use of ARIA to ten Korean government agencies responsible for foreign and national security affairs and would allow other public entities to use other encryption algorithms. US equipment suppliers, however, continue to face difficulties in selling VoIP equipment to Korean public sector entities, due in part to a continued widespread perception among procuring offices that ARIA is required. In addition, commenters have expressed concerns about a July 2009 regulation stipulating that encrypted network equipment procured by public sector agencies must be submitted to Korea's National Intelligence Service (NIS) for "Security Eligibility Testing." Several US companies have alleged that they have been unable to sell virtual private network and firewall systems to public sector entities in Korea due to the Korean regulation.

IV. Other Issues

- **China.** The 2010 Report notes that lack of transparency is a serious concern in China's telecommunications regulatory regime, affecting US suppliers of both services and equipment. According to the 2010 Report, Chinese authorities have often introduced new regulations or requirements with little or no notice, and without providing interested parties an opportunity to comment on the proposals. Examples of actions raising concerns include a measure adopted in 2009 requiring manufacturers to install an unproven Internet filtering program on all computers sold in or exported to China with less than two months notice; commenters noted that this action caused significant worldwide concern before China suspended the measure indefinitely. Commenters also

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noted that Chinese regulatory authorities failed to apply a reasonable notice and comment process for criteria that were announced in late 2009 for determining whether products qualify as “indigenous innovation products” and thus eligible for certain preferences. USTR has and will continue to press China to improve the transparency of its regulatory regime for both goods and services and has recommended that China include mandatory notice and comment procedures in its pending telecommunications law that ensures that all market participants have an opportunity to participate in the development of new requirements affecting the telecommunications sector.

- **Costa Rica.** Under the CAFTA-DR, Costa Rica agreed to allocate sufficient, commercially relevant mobile telephony frequencies to introduce competition into its mobile telephony market. USTR notes that, while Costa Rica has made “great strides” in establishing auction procedures to allocate such frequencies to new entrants, Costa Rica has delayed commencement of the auction process, which was scheduled to begin on February 5, 2010. In justifying the delay, the government of Costa Rica cited a potential conflict of interest raised by some Costa Rican legislators (that has since been resolved) and explained that to utilize the new mobile telephony frequencies successful bidders will require access to microwave frequencies to connect their base stations to cell towers thorough the country and that Costa Rica must implement a regime to ensure that operators share access to their microwave frequencies with the companies that Costa Rica awards the new mobile telephony frequencies. USTR urges Costa Rica to resolve the microwave frequency issue and complete the mobile telephony frequency auction so that it can fulfill its CAFTA-DR commitment to introduce competition into the mobile telephony market.

Outlook

In releasing the 2010 Report, US Trade Representative Ron Kirk stated that “US service and equipment suppliers excel in the [telecommunications] sector, and they need global access in order to ensure their competitiveness, both domestically and abroad,” adding that USTR is “vigilant in identifying barriers, market by market, and focused on working with our trading partners to remove them.” Given the Obama Administration’s enhanced focus on strengthened enforcement of trade agreements and the removal of trade barriers for US goods and services in foreign markets, USTR will likely use the 2010 Report, and those practices identified therein that it deems to interfere with the ability of US telecommunications operators to work in foreign markets, as the basis for continuing its pursuit of targeted measures seeking to modify or eliminate those barriers over the next year.

As in the 2008 and 2009 Reports, the issues highlighted in the 2010 Report are still narrow in scope, although the number of countries singled out for specific attention has diminished. Although the 2010

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report does not contain a section on “positive developments” as the 2009 report did, several of the individual country examples indicated that USTR was encouraged by developments in these countries that appear to have improved the telecommunications trade environment and that appear to have addressed concerns raised by USTR and (more importantly) US companies (*see* developments in Japan on termination-rates and developments in China on technical regulations relating to IT security). Nonetheless, commenters noted that certain areas of concern remain persistent, including excessive regulatory requirements and licensing fees, burdensome testing and certification requirements, and lack of transparency.

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United States Highlights

Mexico and the United States Sign Procedural Agreement on Food Safety

On April 27, 2010, Mexico's National Service of Health, Food Safety and Agro-Alimentary Quality (SENASICA) and the US Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS) signed a Procedural Agreement ("Terms of Reference for the Operational Relationship of the Mexican National Service of Health, Food Safety, and Agro-Alimentary Quality and the United States Food Safety and Inspection Service in the Trade in Meat, Poultry and Egg Products between Mexico and the United States") to improve collaboration on food safety issues concerning meat, poultry, and egg products traded between Mexico and the United States. Under the Agreement, the parties agreed to undertake the following actions:

- Work on specific areas of equivalency and audit protocols. In the area of audit protocols, the agreement calls for enhanced and structure between agencies and countries.
- Carry out annual audits with a specific process that will review the countries' control programs and operations, establishments and laboratories.
- Listing and delisting of eligible establishments for export to the two respective countries.
- Implement equivalency protocols that will include stipulations concerning communication, decision making and data compilation in conformity with domestic and international legal obligations.
- Create a Technical Working Group that will deal with other technical issues of interest to the parties, including improved training and know-how.
- Establish more effective channels and means of communication in public health areas.

The US-Mexico Procedural Agreement on food safety seeks to improve the functioning of bilateral established procedures on food safety and public health. This effort is expected to ensure that borders remain open and that safe products continue to flow freely between the countries. The agencies will also collaborate on other specific projects to achieve common understanding on sensitive issues of mutual concern.

Mexico is the United States second largest agricultural trading partner with bilateral trade totaling USD 20 billion. Mexico is the top destination for US exports of beef, rice, soybean meal, sugars and sweeteners,

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apples and dry edible beans. Mexico is also the second export market for horticultural goods and the third export market for US poultry, pork and eggs.

The full text of the agreement is available at:
http://www.fsis.usda.gov/PDF/Terms_of_Reference_Mexico_US.pdf.

DOC Submits Redetermined Duties to CIT in GPX Tire Case

On April 26, 2010, the Department of Commerce (DOC) submitted to the US Court of International Trade (CIT) the final results of its redetermination of duties for GPX International Tire Corp. under *GPX International Tire Corp. v. United States* (Commerce Dept.Consol. Court No. 08-00285, 4/26/10). In its final remand results, DOC announced that it was complying with the CIT's order under protest in issuing amended AD and CVD final determinations that would continue to impose countervailing duties (CVD) on imports of pneumatic off-the-road (OTR) tires from China although DOC would offset the CVDs against GPX's calculated antidumping duty deposit rate.

DOC's final results of its redetermination were in response to the CIT's order in *GPX International Tire Corp. v. United States*, where the CIT found that concurrent imposition of CVDs on products from China and DOC's antidumping (AD) non-market economy (NME) methodology had a "high potential" for and could "very well" result in double counting. In 2007, DOC initiated AD and CVD investigations OTR tires from China for the period October 1, 2006-March 31, 2007. DOC selected three Chinese producers/exporters of pneumatic OTR tires as mandatory respondents for both the AD and CVD investigations: Starbright, TUTRIC, and Guizhou Tyre Co., Ltd. (GTC). GPX is a domestic importer of OTR tires and wholly owns Chinese producer Starbright. Using NME methodologies, DOC calculated an AD margin of 29.93 percent for Starbright, 8.44 percent for TUTRIC, and 5.25 percent for Guizhou. DOC also calculated a CVD margin of 14 percent for Starbright, 6.85 percent for TUTRIC, and 2.45 percent for Guizhou. The International Trade Commission (ITC) published its affirmative injury determination on September 5, 2008.

On September 9, 2008, GPX filed three complaints with the CIT, contesting the CVD determination, the AD determination, and the ITC's injury determination, arguing that the application of both the CVD and AD law using the NME methodology resulted in a double-counting of duties. On September 18, 2009, CIT Chief Judge Jane Restani sided with GPX and found that DOC must account for the possibility of such double counting against the same imports. In her decision, she noted that "if Commerce is to apply CVD remedies where it also utilizes NME AD methodology, Commerce must adopt additional policies and procedures for its NME AD and CVD methodologies to account for the imposition of the CVD law to

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products from an NME country and avoid to the extent possible double counting of duties. Further, she concluded that DOC should refrain from using NME AD and CVDs concurrently if there is even a threat of that double counting of subsidies will occur, stating that "if there is substantial potential for double counting, and it is too difficult for Commerce to determine whether, and to what degree double counting is occurring, Commerce should refrain from imposing CVDs on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools." In her decision, Judge Restani remanded the case to DOC to reconsider its methods, directing DOC to either forgo the imposition of CVDs or adopt additional policies and procedures to adapt its NME AD and CVD methodologies to account for the imposition of CVDs on goods from China.

On remand, DOC stated that it respectfully disagreed with the court's findings leading to the remand order, noting that "in particular, we disagree that there is a high potential for double remedies from the concurrent application of the NME AD methodology and our CVD methodology in this case, such that additional policies or procedures are necessary to 'adapt' the two methodologies." DOC noted that it was complying with the court's order under protest. Specifically, in response to Judge Restani's conclusions that there is a high potential for double remedies under the current system and that additional procedures are needed to adapt the system, DOC noted that "its hands were tied by the law" regarding application of both CVD and NME AD duties to Chinese companies and that halting either policy was neither viable nor reasonable. According to the DOC, the law states unambiguously that if a country provides a countervailable subsidy on a product, a CVD "shall" be imposed on the merchandise, with no exceptions if the country is subject to higher nonmarket economy anti-dumping duties. DOC argued that under such language, it has no choice but to apply CVD law to China. In addition, DOC argued that it had determined that China was not a market economy under AD law, and that the GPX case had not provided any evidence to change that assessment. DOC argued that it is thus required by law to apply NME AD methodology to China. DOC noted that it had decided to offset GPX's CVD rate against its AD duty rate, although it noted it was doing so only because it was the "least objectionable approach" and that "an offset is neither necessary to prevent a double remedy nor required by the statutes [but is] the only option available to the department under the court's remand order that is not plainly inconsistent with explicit language in the statute."

DOC continued to find that Starbright should be denied market-oriented enterprise (MOE) treatment, finding that the factors cited in Starbright's MOE request were insufficient to justify granting it MOE status.

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DOC also abandoned its use of December 11, 2001 (the date China became a World Trade Organization Member) as a cut-off date for potentially countervailable subsidies. DOC would now consider potential subsidies that were provided before December 11, 2001.

DOC in its remand determination calculated revised AD and CVD rates in which GPX/Starbright's AD cash deposit rate was adjusted to include an offset for the calculated CVD duties. GPX/Starbright's AD rate was reduced from 29.93 percent to 15.93 percent. DOC did not adjust the AD margin for TUTRIC because TUTRIC did not raise this issue as a cause of action in its appeal. GTC's subsidy rate increased from 2.45 percent to 3.35 percent.

Under CIT rules, parties cannot appeal the case until after DOC completes its remand and after the CIT reviews DOC's remand determination. Once the CIT rules that DOC complied with the CIT's decision, an appeal may be filed.

Senate Confirms New Treasury Under Secretary for International Affairs

On April 20, 2010, the Senate confirmed Lael Brainard to serve as the US Department of the Treasury's Under Secretary for International Affairs. Brainard most recently served as Vice President and Founding Director of the Global Economy and Development Program at the Brookings Institution, where she held the Bernard L. Schwartz Chair in International Economics and directed the Brookings Initiative on Competitiveness. Prior to that, she served as Deputy National Economic Adviser and Deputy Assistant to the President on International Economics during the Clinton Administration, Associate Professor of Applied Economics at The Massachusetts Institute of Technology (MIT) Sloan School of Management and worked at McKinsey & Co. and separately on microfinance in West Africa. She received masters and doctoral degrees in Economics from Harvard University.

NAFTA Panel Rules "Zeroing" Methodology is Illegal

On April 14, 2010, a North American Free Trade Agreement (NAFTA) panel ruled 3-2 that the United States' use of the "zeroing" methodology in an administrative review of the dumping order on stainless steel sheet and strip in coils from Mexico is illegal under US law. As a result, the panel remanded the case to the US Department of Commerce (DOC) for a duty calculation of steel products imported from Mexico without zeroing. The case is *In the Matter of Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of 2004/2005 Antidumping Review*, case number USA-MEX-2007-1904-01, in the North American Free Trade Agreement panel.

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In 2007, two respondents in a 2006 DOC administrative review on stainless steel sheet and strip in coils from Mexico - ThyssenKrupp Mexinox S.A. de C.V. and Mexinox USA Inc. - requested a NAFTA binational panel hearing to challenge their calculated dumping margins. Under NAFTA Article 1904.2, a binational panel must determine whether a DOC final antidumping determination is consistent with the antidumping laws of the United States. Mexinox argued that DOC's application of zeroing when calculating the dumping margins in its administrative review is not in accordance with US law.

Zeroing refers to the practice whereby an investigating authority discounts the so-called "negative dumping margins" to zero. Where the export price of a product is lower than the price in the exporting country, the difference between the two is a positive dumping margin. However, when the export price of the product is higher than the price in the exporting country and zeroing is used, investigating authorities do not give any credit for what would otherwise be a negative dumping margin. The investigating authority does not average positive and negative dumping margins together – instead, it considers all negative dumping margins to be zero. This has the effect of inflating the overall average dumping margin, and can lead to higher antidumping duties.

Mexinox argued that the "Charming Betsy" doctrine (6 U.S. 64 (1804)) compels an interpretation of the antidumping statute which is consistent with international obligations where it is possible to do so. Under "Charming Betsy," an act of Congress ought never be construed to violate the law of nations if any other possible construction remains. In this case, the World Trade Organization's (WTO) Appellate Body has consistently ruled that zeroing violates the WTO Anti-dumping Agreement whether used in the original dumping investigation, in periodic reviews, in new shipper reviews, or in sunset reviews. In addition, the Appellate Body has ruled that zeroing is illegal whether the DOC uses average-to-average or transaction-to-transaction comparisons of export and home market prices for the dumped good.

The NAFTA Panel rejected DOC's use of zeroing and noted that "a plain reading of the statute requires that all sales be analyzed in the dumping analysis as dumping refers to an aggregate concept . . . in directing the DOC to analyze aggregate amounts and compare average sales, the statute does not countenance a methodology which permits the DOC to select some sales over others in the calculation of dumping margins." The panel also said it was "not persuaded" that the Charming Betsy doctrine is inapplicable to the circumstances of this case and it "rejects, as too narrow a reading of established jurisprudence, the arguments attempting to distinguish or limit Charming Betsy, in the context of trade cases, non-self executing treaties or in cases where the United States is a party to the litigation."

Two panelists, Cynthia Lichtenstein and Joseph Liebman who chaired the panel, filed a dissenting opinion in which they stated that "because Commerce is the representative of the political bodies who

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have discretion to carry out the international obligations of the United States as understood by the Congress, this Panel must accept Commerce's interpretation unless it is patently forbidden by the relevant United States domestic statute, which it is not."

The NAFTA panel's decision is the latest in a series of adverse rulings on zeroing with which the United States must contend. As noted above, the EU, Japan, Canada, Brazil, Mexico, Ecuador, and Thailand have already secured WTO rulings condemning zeroing in US proceedings targeting their imports, and the WTO has issued more than 20 dispute settlement rulings on the zeroing issue, nearly all of them involving the Department of Commerce's use of the methodology. According to reports, South Korea and Vietnam will also make separate requests shortly for the establishment of WTO dispute settlement panels in order to address the US "zeroing" methodology.

There are now two options that DOC could pursue: (i) DOC could convene an extraordinary challenge committee (although it should be noted that an extraordinary challenge committee does not function as an ordinary appeal and will only vacate or remand a decision if the decision involves a significant and material error that threatens the integrity of the NAFTA dispute settlement system); or (ii) DOC could issue a remand decision within 45 days of the opinion as ordered to by the panel.

Senators Send Letter to President Demanding Border Adjustment Measures in Final Climate Change Bill

In an April 15, 2010 letter to Sens. John Kerry (D-MA), Joseph Lieberman (I-CT), and Lindsey Graham (R-SC), a group of Democratic Senators called for the addition of provisions that "address manufacturing competitiveness" to an upcoming climate change bill. Senators Kerry, Lieberman and Graham have stated that they will unveil a new climate change bill in late April that addresses clean energy and greenhouse gas emissions. The signatories of the April 15, 2010 letter – Sens. Sherrod Brown (D-OH), Debbie Stabenow (D-MI), Carl Levin (D-MI), Robert Casey Jr. (D-PA), Arlen Specter (D-PA), Mark Warner (D-VA), Claire McCaskill (D-MO), Evan Bayh (D-IN), and Kay Hagan (D-NC) – state that any climate change legislation must contain "essential provisions necessary for clean energy legislation that strengthens American manufacturing competiveness, creates new opportunities for clean energy jobs, and creates a level playing field for domestic manufacturers."

Specifically, the Senators call for a "multi-pronged strategy to maintain and strengthen [the US] industrial base and the millions of manufacturing jobs critical for [US] economic recovery," and they caution that the United States must "not undertake a self-defeating effort that simply displaces greenhouse gas emissions rather than reducing them worldwide, while at the same time putting significant American jobs at risk." In

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addition, the Senators warn that the United States cannot become dependent on foreign clean energy industries or "squander the opportunity" to compete successfully in the global clean energy marketplace.

The Senators note that any clean energy legislation must include, among others:

- A "WTO-consistent border adjustment measure" that would apply to imports from countries that do not have in place comparable greenhouse gas emissions reduction requirements to those adopted by the United States; and
- Allowance rebates for energy-intensive, trade-exposed (EITE) industries that "would protect against carbon leakage and maintain competitiveness for all manufacturers by reducing costs for downstream users of basic materials and helping ensure that America's new energy technologies are built here."

Regarding the inclusion of a border measure in the final bill, the Senators note that "a border adjustment measure is critical to ensuring that climate change legislation will be trade neutral and environmentally effective." In addition, the Senators state in their letter that "a WTO-consistent border adjustment measure" is something that the WTO "has recognized as a usable tool in combating climate change." Some observers note that this language may not be accurate. Sallie James at The Cato Institute, for example, states that recognition of a border adjustment measure as "a useable tool in combating climate change" "is disingenuous and possibly misleading rhetoric from the Senators, because the WTO has done no such thing [and] there has been no formal ruling on this issue from any WTO judicial body, because no such cases have come before it."

Nonetheless, it appears that the climate change debate will continue in the short-term, even if the Senators (as some observers have put it) have made inaccurate claims on border adjustment measures. Several reports note that the upcoming Senate climate change bill is likely to contain provisions on the application of border adjustment measures on carbon-intensive imports into the United States. According to one report, "the legislation tries to protect industries from foreign competition by levying a 'carbon tariff' on imports of goods from countries, such as China and India, that do not regulate emissions . . . the proposal was drafted by manufacturing-state Democrats, who refused to support the legislation unless it protected trade-sensitive industries from foreign competition."

Recent efforts by the White House indicate that President Obama will devote attention to the 2010 passage of climate change legislation, thereby increasing the chances that any such bill (which would include carbon tariffs on imported goods) will become law. One clear example of the Administration's intentions with respect to climate change legislation is the President's March 31, 2010, announcement that he will open several expanses of American coastlines to oil and natural gas exploration. The

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President's plan would allow drilling along the Atlantic coastline, the eastern Gulf of Mexico and the north coast of Alaska. President Obama stated that the move was necessary in order to produce more domestic energy and rely less on foreign energy sources. Congressional sources believe, however, that the President's public announcement is meant to help win bipartisan political support for the new Senate climate change legislation, and they note that President Obama and his allies in the Senate have already made significant concessions on coal and nuclear power to try to win votes from Republicans and moderate Democrats on climate change legislation, and that the announced drilling plan is meant to garner additional support from the oil industry and oil-friendly Senators. The April 15, 2010 letter from the Senators indicates that the attention on the climate change bill and its provisions (including any on border adjustment measures) has not died, and that certain legislators, such as those that sent the letter to the President, will continue to push for the inclusion of border adjustment measures in the final bill.

European Commission Imposes Additional Customs Duties on US Imports in Light of Continued Implementation of "Byrd Amendment"

On April 15, 2010, the Official Journal of the European Union published Commission Regulation (EU) No. 305/2010 amending Council Regulation (EC) No. 673/2005 establishing additional *ad valorem* customs duties of 15 percent on imports of certain products originating in the United States. The EU first imposed these duties in April 2005 pursuant to the World Trade Organization (WTO) ruling that the US government's distribution of revenues from anti-dumping (AD) and countervailing (CV) duties to US firms under the Continued Dumping and Subsidy Offset Act (CDSOA, also known as the "Byrd Amendment") is incompatible with the United States' WTO obligations. To provide compensation for the increased level of nullification or impairment that the continued implementation of the CDSOA caused to the EU in Fiscal Year 2009 (October 1, 2008 – September 30, 2009), the European Commission decided to impose the additional *ad valorem* customs duties on another 19 products. The Regulation entered into force on the same day as its publication, and will apply as of May 1, 2010.

Treasury Delays Currency Report as Administration Explores Other Venues to Discuss Concerns with China

On April 3, 2010, Secretary of Treasury Timothy Geithner announced that the Department of Treasury will delay publication of its semiannual report to Congress on the international economic and exchange rate policies of US major trading partners. The latest report was originally due on April 15, 2010 but Secretary Geithner announced that there will be "a series of very important high-level meetings over the next three

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months that will be critical to bringing about policies that will help create a stronger, more sustainable, and more balanced global economy." Those meetings include a G-20 Finance Ministers and Central Bank Governors meeting in Washington in April, the US-China Strategic and Economic Dialogue (S&ED) in May, and the G-20 Finance Ministers and Leaders meetings in June. In making the announcement, Secretary Geithner opined that "these meetings are the best avenue for advancing US interests at this time" in place of the currency report to Congress.

Secretary Geithner also touched upon China's currency policy in his announcement, stating that "China's inflexible exchange rate has made it difficult for other emerging market economies to let their currencies appreciate [and] a move by China to a more market-oriented exchange rate will make an essential contribution to global rebalancing." He noted that the US objective with regards to China's currency "is to use the opportunity presented by the G-20 and S&ED meetings with China to make material progress in the coming months." Observers also note that Chinese President Hu Jingtao will attend a nuclear security summit in Washington April 12-13, and they opine that his presence in Washington may have also driven Treasury to delay the report, adding that President Hu "was unlikely to have agreed to come to the summit without assurances that the report would be delayed until after his visit."

It is unclear when Treasury will issue its delayed report. A Treasury Department spokeswoman stated that Treasury had not yet set a fixed date for releasing the delayed report beyond the series of meeting over the next three months. She added, however, that the delay in the April 15 report would not push back the date for the foreign exchange report due October 15, 2010.

Secretary Geithner's announcement received mixed reaction. Within Congress, Senate Finance Committee Chairman Max Baucus (D-MT) criticized Treasury's decision to delay the report and called on Treasury to closely evaluate whether China should be considered a currency manipulator, opining that "for years, Treasury has given China's currency practices a free pass, but it's time to reevaluate." Senate Finance Committee Ranking Member Charles Grassley (R-IA) echoed Sen. Baucus' views and stated that he was disappointed with the decision to delay the report because "the past few years has shown that denying the problem failed to solve the problem." According to Sen. Grassley, "everyone knows China is manipulating the value of its currency to gain an unfair advantage in international trade [and] if we want the Chinese to take us seriously, we need to be willing to say it in public." Sen. Grassley believes that Treasury should cite China as a currency manipulator, and that the Obama Administration should prepare a World Trade Organization (WTO) dispute against China for its currency manipulation under Article XV of the General Agreement on Tariffs and Trade (GATT). Members of the House Populist Caucus, led by Rep. Bruce Braley (D-IA), also criticized Treasury's delay decision, stating that the delay

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was "completely unacceptable and needs immediate corrective action." House Ways and Means Committee Chairman Sander Levin (D-MI), meanwhile, noted that Treasury's delay of the report was for a definite period and for a defined purpose, and that the purpose of the delay was to gauge whether other US trading partners would address the causes of the major global imbalances, including China's substantial undervaluing of its currency. He added, however, that "if the multilateral effort does not result in China's making significant changes, the Administration and Congress will have no choice but to take appropriate action."

Treasury's move to delay the report could mean that the Administration is looking to other venues to address China's currency. On April 8, 2010, Secretary Geithner made a surprise trip to China (a detour on his return trip from India). Some observers speculate that the surprise visit, coupled with the delayed currency report, shows that the Obama Administration may be pursuing a "quiet diplomacy" approach with regards to China's currency. The delay in the currency report could provide US and Chinese officials with more time to discuss US concerns with China's currency in a private setting. Some observers note that more public threats of US action on China's currency have done little thus far to affect China's official position that its currency is not undervalued. Consequently, the delayed report and the continued dialogue with China could serve as another approach that the Administration has decided to explore with regards to China's currency.

Nonetheless, for some observers, it is uncertain if Treasury's delay and its dialogue with China will address concerns over China's currency that Members of Congress have raised. Certainly, Secretary Geithner's visit may indicate that China is considering revaluing its currency. Whether this "revaluation" (if it occurs) is enough for legislators, however, is another story. With November 2010 elections approaching and with the other currency report due in October, Treasury's move to delay the April report in light of rumors of China's possible revaluation could simply serve to further delay complaints from Members of Congress that China has not done enough to address currency issues. Members of Congress, such as Sen. Charles Schumer (D-NY), could simply decide that China's has not revalued its currency enough (should China make that move) and could increase pressure on the Administration to address currency and repeat their calls for more direct US action on China later in 2010, especially closer to election season. Consequently, with the delay in the Treasury report, the Administration may now find itself in the difficult position of balancing its continued dialogue with China with regards to a possible revaluation in the short-term and increased pressure from legislators closer to election season to address China's currency.

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Free Trade Agreements

Free Trade Agreements Highlights

ACTA Negotiators Release Draft Text of Agreement Amid Calls for Increased Transparency

On April 21, 2010, the governments of the countries negotiating the Anti-Counterfeiting Trade Agreement (ACTA) released a consolidated draft text of the documents from the eighth round of negotiations held in Wellington, New Zealand from April 12-16, 2010. ACTA negotiators had been under increasing pressure from the private sector and from non-governmental groups to increase the transparency of the negotiations and release details of the draft text.

The bracketed text shows that the ACTA negotiating countries disagree on several major issues related to intellectual property rights (IPR) and piracy and counterfeiting. Among other things, negotiators are still unable to agree on:

- The scope of civil enforcement;
- The establishment of statutory damages for IPR violations;
- Whether customs officers should be granted the ability to detain violating goods without prior rights-holder complaints; and
- Whether parties must coordinate on enforcement and share information on enforcement actions.

The released text also proposes that internet service providers (ISPs) should be exempt from lawsuits and other liabilities if they take appropriate measures by blocking access to pirated content and websites and by adopting and implementing policies to address unauthorized transmission of materials protected by copyright. The draft text provides options for ISPs to avoid liability if they take action to curb and limit intellectual property infringement: (i) adopt and reasonably implement "a policy[ ] to address the unauthorized storage or transmission of materials protected by copyright or related rights" as well as expeditiously remove or disable "access to material[s] or activit[ies], upon receipt of legally sufficient notice [of alleged infringement];" or (ii) remove access to infringing material or activity "upon obtaining actual knowledge of the infringement." The draft text notes that "the [ACTA] Parties shall not impose a general monitoring requirement on providers when acting in accordance with this paragraph." The draft ACTA text also requires participating countries to provide "for adequate legal protection and effective

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legal remedies, in the form of civil remedies or criminal penalties in appropriate cases of willful conduct, against the circumvention of effective technological measures that are used by authors, performers or producers or phonograms in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonogram." In addition, the draft text includes language modeled on the Digital Millennium Copyright Act's "anti-circumvention" section, which makes it illegal to copy digital media.

The ACTA negotiations have undergone eight rounds of negotiations and the ninth round of ACTA talks is scheduled to take place in Geneva, Switzerland in June 2010. Current ACTA participants include Australia, Canada, the EU, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the United States.

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Multilateral

Multilateral Highlights

Indonesia Requests WTO Consultations with US over Sales Ban of Flavored Cigarettes

According to an April 7, 2010 communication to the World Trade Organization (WTO), Indonesia has requested WTO dispute consultations with the United States to challenge a new US law banning the sale of flavored cigarettes that went into effect on September 22, 2009. According to Indonesia, the law illegally discriminates against imported cigarettes. Specifically, the new US law requires the Food and Drug Administration (FDA) to increase efforts to stop the sale and spread of candy and fruit-flavored cigarettes. According to the FDA, US border agents have been directed to block imports of flavored cigarettes. Indonesia argues that the US law discriminates against imports because the ban is not being applied to menthol cigarettes, which are produced mainly in the United States. If Indonesia and the United States are unable to resolve their dispute in consultations within 60 days, Indonesia can request the establishment of a WTO dispute panel to rule on its claims.

South Korea and Vietnam Request Separate Panels to Address US Zeroing

On April 20, 2010, South Korea and Vietnam made separate requests for the establishment of World Trade Organization (WTO) dispute settlement panels in order to address the US "zeroing" methodology. South Korea is challenging three US Department of Commerce investigations that led to the imposition of duties on imports of Korean stainless steel plate in coils, stainless steel sheet, and strip in coils, and diamond saw blades and parts thereof. Specifically, Korea is challenging the Department of Commerce's use of average-to-average zeroing which, it claims, resulted in a finding of dumping where none would otherwise have been found, or inflated the actual margins of dumping. Vietnam is challenging a US antidumping duty order on imports of Vietnamese frozen shrimp and is specifically challenging the Department of Commerce's use of the average-to-transaction zeroing methodology in administrative reviews and new shipper reviews of the 2004 shrimp dumping order.

The United States blocked these panel requests at the April 20 meeting of the WTO Dispute Settlement Body (DSB), although any second requests from South Korea and Vietnam for dispute settlement panels will automatically be accepted by the DSB.

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South Korea and Vietnam's panel requests to address zeroing are the latest in a long list of WTO Members that have brought the United States to the WTO to address the controversial practice. The EU, Japan, Canada, Brazil, Mexico, Ecuador, and Thailand have already secured WTO rulings condemning zeroing in US proceedings targeting their imports, and the WTO has issued more than 20 rulings on the zeroing issue, nearly all of them involving the Department of Commerce's use of the methodology. The WTO Appellate Body has consistently ruled that zeroing is illegal whether used in the original dumping investigation, in periodic reviews, in new shipper reviews, or in sunset reviews. In addition, the Appellate Body has ruled that zeroing is illegal whether the Department of Commerce uses average-to-average or transaction-to-transaction comparisons of export and home market prices for the dumped good.

For its part, the United States recently indicated that it is "working intensely on changes [to antidumping procedures] that would allow us to be in conformity with the [WTO] Appellate Body findings" on zeroing, although US officials did not provide any details as to how the United States would ensure this compliance.

US Makes Second Request for WTO Panel on Philippines' Taxes on Distilled Spirits

On April 20, 2010, the United States made its second request for the formation of a World Trade Organization (WTO) dispute settlement panel to rule on US complaints regarding the Philippines' taxes applied to distilled spirits. The Philippines had blocked the United States' first panel request on April 8, 2010. Under WTO rules, the WTO Dispute Settlement Body (DSB) automatically accepted the second US request to form a panel.

The dispute centers on the Philippines' taxes applied to distilled spirits. On January 14, 2010, the United States had requested WTO dispute settlement consultations with the Philippines regarding the excise taxes on imported distilled spirits. The two sides were unable to reach a settlement on the matter, consequently leading the United States to request the formation of the dispute settlement panel. On March 26, 2010, the United States requested the formation of a WTO dispute settlement panel to rule on US complaints regarding the Philippines' taxes applied to distilled spirits. According to USTR, "the Philippines taxes imported distilled spirits at significantly higher rates than domestic distilled spirits." A USTR press release noted that the Philippines applies tax rates to distilled spirits that differ depending on the product from which the spirit is distilled. The Philippines taxes distilled spirits made from certain materials that are typically produced in the Philippines, such as sugar and palm, at a low rate, whereas the Philippines taxes imported distilled spirits "at significantly higher rates (from approximately ten to forty times higher) than the low rate applied to domestic products."

The WTO established a separate dispute settlement panel in January 2010 to examine an identical claim filed by the EU against the Philippines tax rules. The two panel proceedings will now be combined, with a single three-member panel reviewing the two complaints.

This is not the first time that the United States has broached the issue of taxes on distilled spirits. According to USTR, the United States has raised concerns over this issue with the Philippines over the past several years and participated in consultations between the EU and the Philippines in October 2009 on the same issue.

Brazil Temporarily Postpones Application of Retaliatory Measures against United States in Cotton Dispute

US and Brazilian officials have announced that the two sides are making progress in resolving the contentious cotton dispute. On April 5, 2010, the Brazilian Foreign Trade Chamber (CAMEX) published in the Official Gazette Resolution no. 19, delaying until April 22, 2010 the entry into force of punitive tariffs that would be imposed against imports originating from the United States authorized under the *US – Subsidies on Upland Cotton* (DS267) World Trade Organization (WTO) dispute. On March 8, 2010, CAMEX published in the Official Gazette Resolution n. 15, which provided for a list of 102 products that could potentially face higher import tariffs when imported into Brazil from the United States. The increase in import tariffs was supposed to enter into effect on April 7, 2010.

CAMEX, however, agreed to postpone the application of the increased import duties after Brazil received a proposal for a negotiated settlement from the United States at a bilateral meeting held on April 1, 2010 between Deputy United States Trade Representative (USTR) Miriam Sapiro, US Department of Agriculture (USDA) Undersecretary for Farm and Foreign Agricultural Services Jim Miller and Secretary General of the Brazilian Ministry of Foreign Affairs (MFA) Antonio Patriota. According to MFA and USTR, Brazil and the United States are discussing the following items included in the negotiated settlement proposed by the United States:

1. Establishment of an assistance fund to finance projects established by Brazilian cotton producers. This fund would receive USD 147.3 million per year from the United States – a value that the WTO Dispute Settlement Body (DSB) estimated as the approximate annual damage to Brazilian cotton producers as resulting from US cotton subsidies. The establishment of this assistance fund

meets the requests of the Brazilian Association of Cotton Producers (ABRAPA), who would likely be in charge of managing the fund. This fund would remain in place until the passage of the next US Farm Bill or until the parties agree to a mutually agreed-upon solution to the cotton dispute.

2. Bilateral negotiations of near term modifications in the Export Credit Guarantee Program for US cotton exports (GSM-102). Reportedly, the United States has agreed to temporarily “freeze” the disbursement of credit guarantees for cotton exports. The 2010 budget under this program amounts to USD 5.5 billion, from which USD 2.7 billion has already been disbursed. The United States has also agreed to engage with Brazil in technical discussions regarding further operation of the program.

3. The establishment of cooperative measures in animal health trade requirements, which would increase Brazilian beef and pork exports to the US market. The United States would publish a proposed rule by April 16, 2010, to recognize the Brazilian state of Santa Catarina free of foot-and-mouth disease, rinderpest, classical swine fever, African swine fever and swine vesicular disease.

In a press statement, the Brazilian Ministry of Development, Industry and Foreign Trade (MDIFT) outlined that it could delay the application of retaliatory measures against the United States for an additional 60 days after April 22 should Brazil and the United States reach an agreement regarding the three measures identified above. The parties would also use this new timeframe to come to terms regarding the full implementation of the WTO DSB. The Brazilian government noted, however, that Brazil will continue to seek the full implementation of the WTO ruling, and a negotiated settlement that includes full or partial compensation for Brazilian cotton producers will only be a temporary solution given that Brazil wants the United States to end government support to cotton producers. The Brazilian government welcomed the US offer for a negotiated settlement and hopes the parties continue to make progress to avoid the implementation of retaliatory measures against the United States.

Reaction on the US side was also positive. USTR Ron Kirk welcomed the substantial progress towards a negotiated settlement to dissuade Brazil from imposing punitive tariffs against US imports and holders of intellectual property rights (IPR). Secretary of Agriculture Tom Vilsack opined that the US proposal to Brazil “respects our farm bill process and the role of Congress in shaping our commodity programs.” Senate Agriculture Committee Chairwoman Blanche Lincoln (D-AR) and Ranking Member Saxby Chambliss (R-GA) noted that they were “encouraged that both sides have agreed upon a framework for dialogue and a process to further discussion.” The Obama Administration faced strong pressure from the US pharmaceutical and biotechnology industry to reach a negotiated settlement with Brazil. Analysts

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opine that the Obama Administration has taken firm steps towards resolving the cotton dispute with Brazil but it remains unclear whether the parties will be able to agree to a satisfactory settlement for Brazil.

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