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UNITED STATES

GENERAL TRADE POLICY

USTR Releases Results of 2011 Section 1377 Review of Telecommunications Trade Agreements

Summary

On April 7, 2011, the Office of the United States Trade Representative (USTR) released its annual Section 1377 Review of Telecommunications Trade Agreements ("2011 Report").[1] The review focuses on issues related to fixed and mobile call termination rates, access to major supplier networks, licensing, transparency and regulatory requirements, and telecommunications equipment trade. 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 7, 2011. The 2011 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 focuses on: i) increases in fixed and mobile call termination rates in Tonga, Ghana and Jamaica; ii) problems relating to access to major supplier networks in Chile, Germany, India and Mexico; iii) issues relating to licensing, transparency and regulatory requirements in China, Costa Rica and India; and iv) issues affecting the telecommunications equipment trade in China and India.

Increases in Fixed and Mobile Call Termination Rates

As was noted in the last two 1377 Reviews, the 2011 Report states that it has been "following the emergence of a troubling trend whereby some foreign operators are increasing termination rates due to measures implemented by their governments." The Report continues by noting that such actions are "adversely affecting the ability of US telecommunications operators to provide low-cost, quality services to US consumers and may raise questions regarding those governments' international trade obligations." The 2011 Report highlights general issues related to increased termination rates and lists several countries that are employing diverse methods, including levying universal service surcharges, to increase termination rates:

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

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General Issues

- **Concerns Regarding On-net vs. Off-net Mobile Rates.** Consistent with previous reports, a commenter once again raised the issue of countries setting higher prices for retail rates for calls made to competing mobile networks ("off-net calls") relative to the lower charge for calls made within a users own network ("on-net calls"). While the 2011 Report indicates that there could be legitimate reasons for such rate settings, it notes that setting significantly higher rates for off-net calls in order to discourage such calling while also hindering the ability of customers from other networks to receive such calls "can distort the market and hinder competition." While New Zealand was the subject of comments from 2010 (and has since taken steps to address the issue), this year's Report cites comments noting such issues in Mexico and Chile. While the 2011 Report indicates that Chile's Competition Commission is investigating such matters, the Report notes that it is unclear whether authorities in Mexico will be able to address this issue as past attempts to regulate pricing of mobile services have been met with legal challenges by operators.

Country-Specific Issues

- **Tonga.** The 2011 Report refers to the issue faced in 2010 of the unexpected raise in termination rate from USD 0.17/minute to USD 0.30/minute implemented by Tonga's major supplier, the fixed-line operator Tonga Communications Corporation (TCC). This year's Report indicates that Tonga did effectively rescind the USD 0.30/minute rate on April 1, 2010, but noted that the country has "replaced that mandate with a new requirement that will ensure that the rates remain artificially above cost." According to the 2011 Report, the new requirements mandate that carriers pay the government 5.1 US cents/minute of international incoming calls as well as instructing its two major carriers, TCC and Digicel, to negotiate rates in accordance with "prevailing market conditions." USTR maintains that, at least with regard to TCC, such instruction may be inconsistent with the country's World Trade Organization (WTO) General Agreement on Trade in Services (GATS) commitments on basic telecommunications including the WTO Reference Paper which requires a commitment to ensuring cost-based interconnection with major suppliers. The 2011 Report notes that Tonga has yet to move forward in resolving these issues which has resulted in the prevention of US carriers from negotiating an interconnection agreement and has forced traffic to be sent through third countries. USTR asserts that because Tonga's actions have prevented US telecommunications operators from providing quality and low-cost services to US consumers, major concerns exist over the country's compliance with its Reference Paper obligations as well as the potential for the setting of a dangerous precedent for other countries to follow. The 2011 Report "urges the government of Tonga to ensure that its major supplier negotiates cost-based rates for the termination of international traffic."

- **Ghana.** The 2011 Report notes that in late 2009, Ghana passed Act 786 which requires that telecommunications operators charge a rate of USD 0.19/minute to terminate incoming international calls. Further, the Act mandates that 32%, or USD 0.06, of that rate be collected by the telecommunications regulatory authority and deposited into the main bank account of the government. The 2011 Report indicates that Ghana asserts that the rate increase provides for "the opportunity for increased revenues in Ghana, the stabilization of international rates to Ghana, the provision of universal access/service, and the financing of modern monitoring equipment." USTR maintains that the mandated increase is problematic because the fee appears to be unrelated to the costs associated with terminating calls and cites the WTO Reference Paper

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requirement to ensure major suppliers charge cost-based rates. Secondly, USTR notes the difficulty in verifying whether the portion of the fee given to the government of Ghana is actually put toward covering the costs of universal service. As the Reference Paper requires that obligations regarding universal services be transparently administered, USTR states that Ghana has yet to provide such transparency by noting which portion of the increased fees will be used for universal service. Lastly, USTR questions Ghana's argument that the increase in termination rate is necessary to combat illegal bypass and notes that such an assertion is not supported by the latest traffic statistics released by the Federal Communications Commission (FCC). The 2011 Report "strongly encourages" the removal of the mandated termination rate thereby allowing the establishment of cost-oriented rates which will comply with Ghana's commitments under the Reference Paper.

- **Jamaica.** This year's Report echoes the calls of previous Reports that Jamaica discontinue its practice of levying surcharges on incoming international calls in order to fund a universal service called the "Universal Access Fund." The 2011 Report notes that while the fund "seeks to provide funding for domestic operators to provide communications services to underserved areas that are not commercially viable," US concerns remain as to the lack of details pertaining to the actual use of the funds collected. USTR acknowledges that it "supports efforts to ensure universal telecommunications services," but notes that surcharges levied solely on international calls puts an unfair burden on foreign consumers and operators. The 2011 Report notes a new argument set forth by Jamaica in defense of its fund which maintains that it is improper to depict the access fund as fully funded by foreigners because "a higher rate of general sales tax is levied on Jamaican telecommunications services than on other types of services, and some of this money is also used for universal service purposes." USTR counters that it must continue to believe that US consumers and operators are primarily bearing the burden for universal service in Jamaica until concrete information is released with regard to the manner in which sales tax revenue is collected and allocated for universal service. The 2011 Report references Jamaica's obligations under the WTO Reference Paper to provide transparency in the administration of universal service obligations and notes that funds from Jamaica's Universal Access Fund are disproportionately used "for items not specifically related to expanding broadband network capacity." The surcharge, which was instituted in 2005, is scheduled to expire on May 31, 2011. The 2011 Report states that Jamaican authorities have signaled that a renewal of the surcharge is likely, at least until a new Information and Communications Technology (ICT) Policy is set in place which, USTR notes, could potentially take years.

Problems Relating to Access to Major Suppliers Networks

The 2011 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:

- **Chile.** One commenting party noted a new law under consideration by Chile's Congress which would regulate the construction of new antennae for commercial mobile operators. Although the proposed law seeks to limit the impact of new tower construction on the community by requiring incumbent operators to share infrastructure with new entrants, the 2011 Report indicates that incumbent operators are resisting any such obligation. In addition, the Report cites the "extensive rights afforded to local communities," which includes "veto power" over construction if an objecting community resident falls within a radius of 1.5 times the height of an antenna. This veto power, along with the resistance by incumbent operators to share

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infrastructure, could, as USTR notes, “seriously hinder the ability of new entrants to build out their own infrastructure,” which is an obligation under the terms of their licenses. USTR states that “it is essential that the law either include sharing obligations, or a more expedient process for addressing community concerns.” The 2011 Report indicates that Chile’s regulatory authority is aware of the problem and is working to ensure that the final law does not place any unnecessary hindrances on competitive opportunities for new entrants.

- **Germany.** The 2011 Report identifies various issues raised by competitive carriers in 2010 pertaining to market access barriers in Germany due to restrictions on access to the network of Germany’s incumbent operator Deutsche Telekom AG (DTAG). Commenters from last year’s Report indicated that competitive carriers required access to IP-Multicast, a wholesale service optimized for video distribution which would allow the carriers to provide Internet Protocol television (IPTV) and thereby allow for competition with DTAG’s IPTV service. While DTAG had claimed that it “did not have a standard multicast platform that it could offer to competitors,” commenters this year noted that DTAG now has a subscriber base upwards of one million and, as a result, DTAG should be “required to provide a standard offer for this service.” According to the 2011 Report, last fall DTAG submitted for approval a reference interconnection offer and Germany’s telecom regulator BNetzA is now reviewing the offer for adequacy. The 2011 Report notes that if BNetzA determines that “there is a sufficient commercial demand to meet the ‘reasonable request’ standard,” it would be required “to mandate that DTAG include this wholesale production in its reference interconnection offer.” Further, the 2011 Report indicates that if such a determination does not happen, the German government has stated that companies will be allowed to request a “direct access order” from the BNetzA. The German government has noted that no such requests have been made.

- **India.** Previous 1377 Reviews noted one commenter’s claims of difficulty in obtaining competitive access to India’s cable landing stations (CLS). The 2011 Report indicates that in past Reviews, it has “urged the Telecommunications Regulatory Agency of India (TRAI) to conduct a public consultation to determine if there are deficiencies in the Reference Interconnection Offers (RIOs) submitted by the companies that control access to the CLS.” According to the 2011 Report, it appears that TRAI has not taken any action in this regard. The 2011 Report also notes a new area of concern by commenters pertaining to timing of a CLS operator’s presentation of its RIO for approval to TRAI. Commenters maintain that when CLS operators seek to install new submarine cable facilities, the presentation of the RIO to TRAI should be done in advance in order for sufficient review time of the RIO which the commenters claim will ultimately ensure a “level playing field” for the CLS owner as well as the carriers which seek access to the CLS facilities. USTR indicates in the 2011 Report that it will discuss the issue with India and encourage consultation with the public in order to ensure competitive access is granted to submarine cables.

- **Mexico.** While the 2010 Report noted difficulties regarding competitive access to Mexico’s major telecommunications fixed line operators Telmex and Telcel, the 2011 Report notes that, for the first time, Telmex and Telcel’s parent company, America Móvil, participated in the 1377 process through the submission of comments as well as through meetings with USTR. America Móvil asserts that there is “robust competition among fixed-line providers,” that Telmex has “lost market share due to regulatory barriers,” and that both Telmex and Telcel are “subject to onerous requirements not imposed on other carriers, such as price caps on retail rates, universal service obligations and geographic rate averaging requirements.” The 2011 Report notes that USTR has once again received multiple filings pertaining to issues over competitive

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carrier's access to Telmex and/or Telcel networks including: "difficulty in obtaining local interconnection and long-distance termination into certain rural areas of Mexico; retaliatory actions taken by Telmex in a yet-to-be resolved dispute regarding interconnection rates; and a claim that Telcel's mobile termination rates are significantly above cost." According to the 2011 Report, by virtue of Mexico's adoption of the Reference Paper on Pro-Competitive Regulatory Principles in its GATS commitments, it is obligated to allow for US affiliated Mexican carriers to obtain cost-based, non-discriminatory access to the Telmex and Telcel networks. USTR notes that such access is particularly important due to the fact that the number one destination for calls from the United States is Mexico. The 2011 Report notes that many of the issues raised by commenters are currently under review by the Secretariat for Communications and Transportation (SCT) in Mexico. The 2011 Report also notes that "the structure of the Mexican legal system, which allows for extensive opportunities to challenge government rulings, may be an impediment to progress in these areas," particularly as they pertain to intervention in interconnection disputes by the Federal Telecommunications Commission (COFETEL) which submits sanctions recommendations to SCT. This year's 1377 Report details a number of such cases involving COFETEL intervention.

Issues Relating to Licensing, Transparency and Regulatory Requirements

The 2011 Report notes comments submitted pertaining to a number of issues surrounding Government-sponsored barriers to various markets including:

General Issues

- **Voice over Internet Protocol issues.** The 2011 Report notes one commenter's concerns over barriers faced worldwide pertaining to the provision of supplying Voice over Internet Protocol services (VoIP). Specifically, the commenter pointed to barriers including "regulatory regimes that impose the same requirements on VoIP providers as on traditional fixed or mobile voice providers; allowing incumbent operators to block that ability of companies to provide VoIP services over the incumbent's broadband network; and the inability to provide VoIP services that connect to the public switched network (PSTN)." USTR indicated that it will continue to evaluate the barriers referenced by commenters and will engage with countries as necessary to ensure each country's measures taken pertaining to such services are consistent with its telecommunications trade commitments.

Country-Specific Issues

- **China.** The assessment of China in the 2011 Report again notes commenters' concerns over China's "failure to authorize certain value-added services in its domestic licensing regime" which hinders market access as well as runs counter to commitments made by China upon its WTO accession in 2001. The 2011 Report indicates that it has repeatedly raised this issue with China's telecommunications regulator and will continue to seek the establishment of norms established by suppliers of other WTO members. Also noted as an area of concern in the 2011 Report is China's requirement that foreign companies sell satellite capacity through government-owned intermediaries. The 2011 Report indicates that only China DBSAT holds the required license to sell domestic satellite services and, as a result, all foreign satellite operators must make capacity sales to end-users through the Chinese company. Similarly, USTR indicates that Hong Kong has two companies which are permitted to directly sell capacity to end-users in China but that both companies are

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partially-owned by Chinese government entities. The 2011 Report indicates that it will continue to raise the concerns with China in hopes that it will consider changing these practices.

- **Costa Rica.** The 2011 Report sites one commenter's concern that it has been attempting for nearly two years to obtain a license to provide Internet services via satellite. The *Superintendencia de Telecomunicaciones* (SUTEL), Costa Rica's telecommunications regulator, has indicated that a number of technical issues must be resolved in order to grant an authorization to this US company and others, including "spectrum fees, international coordination of the satellite to be utilized, and changes needed to Costa Rica's table of frequency allocation." Because Costa Rica admitted that resolution of these issues may take some time, the 2011 Report indicates that the country is considering instituting a "transitory framework" which will allow companies to obtain a license and begin operations pending the finalization of the technical details. USTR notes that under Dominican Republic-Central America Free Trade Agreement (CAFTA-DR FTA) commitments, Costa Rica is committed to issuing licenses for Internet services and USTR believes Costa Rica must "act expeditiously" to grant authorization, even if occurring in the form of a temporary authorization, until all outstanding issues are resolved. The 2011 Report also refers to the issue raised in the 2010 Report pertaining to the delay in the mobile telephony frequency auction which was intended to fulfill Costa Rica's commitments under CAFTA-DR to introduce needed competition into its mobile telephony market. The 2011 Report notes that the auction finally moved forward in September 2010 and that a Spanish and a Mexican company won the spectrum to begin to compete with ICE, the incumbent operator. As indicated by the 2011 Report, the auction was able to move forward as a result of the implementation of a regime which would ensure operators could share certain microwave links needed to connect base stations to towers through Costa Rica. USTR notes that it "understands that legal challenges have been lodged against the microwave ruling but expects that Costa Rica will ensure that its CAFTA-DR commitment to liberalize its mobile telephony market is realized."

- **India.** Similar to China's requirement that the sale of satellite capacity occur through government-owned intermediaries, the 2011 Report notes that India requires foreign operators selling satellite capacity for the lucrative direct-to-home (DTH) market to first sell the DTH capacity to India's domestic satellite operator. At that point, according to the 2011 Report, the Indian operator will resell the capacity to DTH customers and then maintain ownership of the customer. The 2011 Report indicates that it will continue to raise the concerns with India in hopes that it will consider changing these practices.

Issues Affecting the Telecommunications Equipment Trade

The 2011 Report notes several difficulties that commenters have encountered in foreign markets with regards to equipment standards and conformity assessment requirements, including:

General Issues

- **General Concerns with Conformity Assessment Requirements.** As was identified by US industry in the 2010 Report, the same barriers to trade exist surrounding the conformity assessment procedures pertaining to information and communications technology (ICT) equipment. In particular, US industry identified certification requirements and certain electromagnetic compatibility (EMC) testing as areas of particular concern. Such mandatory certification requirements, according to the 2011 Report, are maintained in Brazil,

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China, Costa R bica, India and Mexico, while China requires that equipment be tested domestically. USTR notes that such policies can lead to redundant testing, especially when products are required to endure testing to the same standard in both the importing and exporting country. With regard to China, the 2011 Report indicates that the United States and China discussed such issues, including specific redundant requirements pertaining to mobile phones, at the December 2010 US-China Joint Commission on Commerce and Trade (JCCT) meeting. The 2011 Report indicates that while China made specific commitments to improve its practices in these areas, it has yet to follow through on these commitments as of early 2011. USTR also notes that Israel, Chile and China have indicated willingness to consider Mutual Recognition Agreements (MRAs) for ICT and other telecommunications equipment which “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.” As for Mexico, the 2011 Report indicates that it has been in “extensive discussions” with the United States on implementing a bilateral MRA and a deadline for the finalization of the text of an agreement is set for May 1, 2011.

Country-Specific Issues

- **China.** The 2011 Report refers to Chinese framework regulations, first issued in 2007, pertaining to information security in critical infrastructure referred to as the Multi-Level Protection Scheme (MLPS). The MLPS regulations set forth guidelines for the categorization of information systems based on the amount of damage a system breach would pose on national security, social order, and public interest. According to the 2011 Report, the regulations also “appear to require, by reference, purchasers’ compliance with certain information security technical regulations and encryption regulations that are referenced within the MLPS regulations.” USTR notes its concerns over the possibility of China issuing implementing rules for the MLPS regulations and applying such rules broadly to commercial sector networks and IT infrastructure, which could significantly impact sales in China by US information security technology providers. The 2011 Report indicates that the United States has “urged China to notify any MLPS implementing rules laying down equipment-related requirements in accordance with China’s obligations under the Technical Barriers to Trade (TBT) Agreement” and further notes that the United States will “continue to urge China to refrain from adopting any measures that mandate information security testing and certification for commercial products.”

- **India.** One concern set forth in the 2011 Report surrounding the trading of telecommunications equipment in India is the country’s restrictions on encryption. Commenters indicated concern that India’s attempt to implement recent Amendments into the Information Act of 2000 could lead to the imposition of “stringent and burdensome encryption requirements, including for equipment sold […] solely for commercial use, or even ban the use of certain encryption technologies.” USTR indicates that it has encouraged India to implement such amendments in a matter that is commonly-accepted worldwide given that India’s national security concerns may be similar to those concerns of other countries. Another concern set forth in the 2011 Report pertains to recent amendments to telecommunications service licenses which “sought to impose an inflexible and unworkable security approval process, which mandated the forced ‘transfer of technology’ to Indian companies, the escrowing of source code and other high-level and detailed designs, and assurances against malware and spyware during the entire use of the equipment.” USTR acknowledges that upon raising these concerns with the Government of India (GOI), several issues were halted while GOI works to revise the policies. The 2011 Report notes that the United States and US industry has engaged in “constructive

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dialogue" with India and that the two countries will continue to work together to ensure that US telecommunications companies have proper access to Indian markets while at the same time preserving security concerns of the Indian government.

Outlook

While the 2011 Report references many of the same issues noted in the 2010 Report, a number of differences occurred with regard to various countries cited within the report. Countries such as El Salvador and Peru were present in last year's Report but removed from the 2011 Report, while Ghana was added to this year's Report. Many of the general issues referenced with regard to each country remained similar to the 2010 Report and continued to be rather narrow in scope. Further, the 2011 Report, as was the case with the 2010 Report, did not feature a "positive developments" section. USTR did, however, list a number of areas where the United States has seen improvements, including, among others, Costa Rica's movement on its mobile telephony frequency auction.

USTR Releases 2011 NTE Report on Foreign Trade Barriers

Summary

On March 30, 2011, the United States Trade Representative (USTR) published its 2011 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 (FDI) 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 2011 NTE report classifies foreign trade barriers into the following categories:

- Import policies;
- Standards, testing, labeling, and certification;
- Government procurement;
- Export subsidies;
- Lack of IPR protection;
- Services barriers;

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- Investment barriers;
- Anticompetitive practices with trade effects tolerated by foreign governments;
- Trade restrictions affecting electronic commerce (e-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 the Arab League.

II. COUNTRY ASSESSMENTS: ASIA

China

The 2011 NTE Report notes that although China made progress to remove barriers and implement its obligations under the World Trade Organization (WTO), US businesses raised concerns about the following measures:

- **Import barriers.** Similar to the report of the previous year, the 2011 NTE Report highlights US concerns about: i) a problematic trading rights registration process and tariff-rate quota system; ii) import substitution policies that favor domestic products and technologies in the automotive, steel, semiconductors, fertilizer, and telecommunication equipment sectors; iii) high tariffs on products that compete with sensitive domestic products such as large motorcycles, video, digital video and audio recorders, and certain agricultural products; iv) a lack of unified tariff classification; v) inconsistent customs valuation and clearance procedures; vi) lack of transparency and procedural fairness in China's trade remedy investigations and related legislation; vii) significant non-tariff barriers (NTBs) to trade; and viii) tariff-rate quotas (TRQs) on agricultural products and fertilizers. Unlike the previous report however, the 2011 NTE Report also mentions that China continues to maintain market access barriers to US beef and beef product exports that are inconsistent with the standards of the World Organization for Animal Health (OIE). In addition, it not longer notes US complaints about China's burdensome inspection-related requirements on agricultural products and foreign scrap or the import ban on certain medical devices.

- **Internal policies.** The 2011 NTE Report mentions i) discriminatory internal policies in the area of wind power projects; ii) an uneven application of China's value added tax (VAT); iii) delayed or reduced payment of VAT rebates; and iv) the fact that amendments to business tax regulations make any foreign services supplied to China subject to a Chinese business tax.

- **Export regulation.** China continues to impose trade distorting export duties, licensing requirements and quotas on a wide range of products and raw materials to help guide the development of its domestic downstream industries. In addition, the 2011 NTE Report reiterates that export subsidies are often granted by the government in a disguised manner and result in undercutting prices of Chinese exports in the global market.

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- **IPR protection.** As in the report of the previous year, the 2011 NTE Report notes that US companies have raised concerns about i) 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; iii) complaints on China's restrictions on the import and distribution of copyright intensive products; and iv) a new trend of indigenous innovation that may affect foreign innovation and technologies.

- **Services barriers.** China continues to impose restrictions in a number of sectors that prevent or discourage foreign providers from gaining or expanding market access. As specific examples of such barriers, the report mentions i) China's refusal to grant new licenses; ii) an opaque and slow-moving renewal process for existing licenses; iii) foreign equity limitations, iv) high minimum capital requirements for foreign suppliers; and v) overly burdensome regulatory regimes and other restrictions. In addition, the report identifies sector-specific barriers for 17 services categories.[2]

- **Investment barriers.** US investors continue to complain of a lack of transparency, inconsistently-enforced laws and regulations, weak IPR protection, corruption, and a poorly functioning legal system that is unable to enforce contracts and judgments. In addition, the United States is concerned about the increase in Chinese measures that restrict investment, many of which appear to represent protectionist tools that aim to shield inefficient or monopolistic enterprises from competition. As specific examples of investment barriers, the 2011 NTE Report mentions, amongst other things, i) investment requirements that encourage technology transfers to China, exportation, or the use of local content; ii) restrictive administrative measures or investment guidelines such as the Catalogue Guiding Foreign Investment; and iii) other investment issues such as regulatory limitations on foreign venture capital and private equity investments, restrictions on the scope and operations of holding companies, or difficulties with regard to access to China's capital markets.

- **Government procurement.** The United States has noted that China must improve the coverage of its revised offer to join the WTO Agreement on Government Procurement (GPA) and accelerate the accession process. In addition, the United States has expressed concerns about the ambiguous language and GPA-inconsistency of government procurement-related laws and regulations such as, for example, the two draft measures to implement China's Government Procurement Law (GPL) that were circulated in 2010. Thirdly, the 2011 NTE Report mentions US concerns about China's indigenous innovation policies and the resulting government procurement preferences for domestic goods and services over foreign goods and services.

- **E-commerce.** Technical problems and the lack of an adequate legal framework inhibit the growth of e-commerce in China. In this regard, the 2011 NTE Report notes that Chinese ministries also continue to impose a range of burdensome restrictions on Internet use, such as registration requirements for web pages and arbitrary and non-transparent content controls.

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

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- **Anticompetitive practices.** The 2011 NTE Report mentions US concerns about the anti-competitive effects, and inadequate enforcement, of many of China's competition policy laws and regulations. In addition, China has adopted several measures that restrict inward investment and increased the ambiguity of China's investment policy.

- **Other barriers.** Similar to the previous edition, the 2011 NTE Report lists a number of specific US concerns about barriers resulting from a lack of transparency and various inadequate aspects of the legal framework in China.

India

With regard to **import policies**, the 2011 NTE Report states that the following issues remain of concern to US industries:

- **Tariffs and other charges on imports.** To determine the applicable applied tariff or other customs duty rate, companies importing products into India must cross-reference separate customs and excise tax schedules with any applicable customs or excise notification that may subject the product to higher or lower rates than set forth in the schedules, which is a system that lacks transparency and imposes significant burdens on importers. In addition, US exporters continue to face "tremendous uncertainty" because India has considerable flexibility to change tariffs at any time, in particular as over 30 percent of India's non-agricultural tariffs remain unbound and are thus not subject to a WTO ceiling on the rate. India also maintains very high tariff peaks on goods such as flowers, natural rubber, automobiles and motorcycles, coffee, poultry, and textiles, while its bound tariff rates on agricultural products remain amongst the highest in the world. Lastly, imports into India remain subject to additional duties or extra additional duties to offset internal taxes, and these duties sometimes result in higher amounts being charged on imports as compared to like domestic products. In this regard, importers have reported that refund procedures for extra additional duties where imports are sold in India and subjected to state–level value added taxes remain onerous and time consuming.

- **Import licensing.** India maintains a "negative list" of imported products subject to various forms of non-tariff regulation, which makes a distinction between the 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. In addition, US industry representatives have again reported that licensing requirements for imports of remanufactured goods are cumbersome.

- **Customs procedures.** US exporters continue to raise concerns about the lack of transparency and negative effects of India's application of customs valuation criteria to import transactions. In addition, India's customs officials often require extensive documentation, which inhibits the free flow of trade and leads to frequent and lengthy processing delays. Lastly, the 2011 NTE Report reiterates that motor vehicles may be imported through only three specific ports and only from the country of manufacture.

- **Government procurement.** The report notes that India applies an onerous defense "offsets" program which requires companies to invest 30 percent or more of the value of contracts above USD 67 million in Indian produced parts, equipment, or services. Also, the report repeats the assessment of the previous year that

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India's government procurement practices and procedures often lack transparency, and that preference is often afforded to Indian state–owned enterprises when awarding government contracts.

- **Export subsidies.** The 2011 NTE Report reiterates US concerns about i) Indian subsidization in the form of tax holidays for export-oriented enterprises and exporters in Special Economic Zones (SEZs); ii) other export subsidy schemes such as duty drawback (DDB) programs; and iii) the fact that India provides pre-shipment and post-shipment export financing to exporters at a preferential rate. The report also notes that India continues to offer, and has extended or expanded, export subsidies to the textiles and apparel sector, although it must phase out such subsidies over a period of two years in accordance with the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).

- **IPR.** The report again highlights that protection and enforcement in India is "weak" and urges the Indian government to provide stronger protection for copyrights, trademarks, and patents. In addition, the report calls for more effective protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agrochemical products. Lastly, the report reiterates the conclusion of the previous edition that large-scale copyright piracy, especially in the software, optical media and publishing industries, continues to be a "major problem."

- **Services.** The report mentions restrictions and overly-burdensome requirements in sectors such as insurance, banking, audiovisual and communications services, accounting, telecommunications, distribution services, postal and express delivery services, and education. In addition, the report reiterates that the Indian government still prohibits foreign investment in legal services.

- **Investment.** Similar to the 2010 NTE Report, the 2011 edition notes that India continues to prohibit or severely restrict FDI in politically sensitive sectors such as agriculture, retail trade, railways, and real estate. In addition, the report states that India's stringent and non-transparent regulations and procedures governing local shareholding inhibit inbound investment and increase the risk for new entrants.

- **Other barriers.** The report mentions, amongst other things, that US exports of certain solar power equipment are prevented as a result of new guidelines that India issued in July 2010 which require that eligible solar projects source certain materials from domestic manufacturers. In addition, the report notes that in 2010, India again increased export duties on iron ore lumps, while the Indian state of Karnataka banned the export of iron ore. Lastly, the report indicates that India has adopted similar measures to preserve the availability of affordable inputs for its textile and apparel sector.

Indonesia

With regard to **import policies**, the 2011 NTE Report states that the following issues are of concern to US businesses:

- **Tariffs.** In 2010, Indonesia increased applied tariffs on certain products including medicines, cosmetics, and energy efficient lights. In addition, Indonesian tariffs exceed 40 percent or remain unbound for products such as automobiles, iron, steel, and some chemical products. The report also notes that US exports of

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motorcycles remain particularly restricted by the combined effect of a 75 percent luxury tax, 10 percent VAT, and the prohibition of motorcycle traffic on Indonesia's highways.

- **Import licensing.** In 2010, Indonesia extended a non-automatic import licensing requirement for certain products including electronics, household goods, textiles, footwear, toys, and food and beverage products until the end of 2012. Under the measure, which is 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 has granted exemptions for registered importers from the application of the Decree, but the 2011 NTE Report notes that the approval process to qualify as such a registered importer is vague, ill-defined, and discriminatory. In addition, the NTE Report expresses concerns about the potential restrictive effect on imports of a new requirement that companies can only import goods for further distribution or goods for their own manufacturing but not both. Lastly, the report notes that the United States continues to call for the elimination of other additional non-automatic licensing requirements on textiles, clothing, and other "made-up goods" such as curtains and blankets, while Indonesia also imposes burdensome product-specific licensing and registration requirements for agricultural products.

- **Pharmaceutical market access.** The US government has repeatedly raised its objections to market access barriers resulting from a Decree requiring foreign pharmaceutical companies operating in Indonesia to manufacture locally in order to be considered domestic manufacturers and be qualified to apply for drug approvals.

- **Quantitative restrictions (QRs).** The United States has raised concerns about a requirement of an import permit for the importation of animal-based food products into Indonesia. In addition, Indonesia maintains seasonal bans and restrictive requirements for imports of salts, QRs for imports of wines and distilled spirits, and restrictions on exports of unprocessed ore.

- **Product registration.** Similar to the previous edition, the 2011 NTE Report notes that the process for registering products in Indonesia has become increasingly burdensome, opaque, and costly to US exporters.

- **Customs barriers.** US firms continue to report that Indonesia's Customs Service uses a schedule of reference prices to assess duties on some imports, instead of the actual transaction prices that it is committed to use under the WTO Customs Valuation Agreement. In addition, US companies exporting to Indonesia continue to complain about costly delays in customs processing and requests for unofficial payments to customs officers. Lastly, the United States has expressed concerns about a recent change in the procedure of Indonesia's Customs Service that increased the duties payable for, and stifled trade in, motion pictures.

- **Luxury taxes.** The 2011 NTE Report reiterates that Indonesia continues to impose significant luxury taxes on certain motor vehicles, as well as higher excise taxes on imported spirits than on domestic spirits.

- **State trading.** Similar to the 2010 NTE Report, the 2011 edition mentions that Indonesia's National Logistics Authority (BULOG) has the exclusive authority to import rice, while private firms are only allowed to import rice for special purposes and on the condition that they obtain a special importer identification number.

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- **Services.** The report lists various "significant and far-reaching trade and investment barriers" in the i) legal; ii) express delivery and logistics; iii) health; iv) distribution; v) cabotage; vi) financial; vii) energy; viii) audit and accounting; ix) film; x) construction; xi) architecture and engineering; xii) telecommunications; and xiii) education services.

- **Investment.** The report again notes that Indonesia maintains "significant and far-reaching" restrictions on FDI and that its investment climate continues to be characterized by legal uncertainty, economic nationalism, and disproportionate influence of local business interests. In this regard, the NTE Report particularly mentions specific barriers in the energy and mining and telecommunications sectors.

As for other issues, the 2011 NTE Report reiterates US concerns about Indonesia's encouragement of domestic sourcing and use of local content in **government procurement**, as well as about persisting deficiencies in Indonesia's **IPR** protection and enforcement. Lastly, the report highlights that foreign companies continue to report corruption-related difficulties as another barrier to trade and investment with Indonesia.

Malaysia

The 2011 NTE Report states that the following issues, amongst others, are of concern to US businesses:

- **Tariffs and import licensing requirements.** US companies have indicated that tariff reductions on products such as frozen French fried potatoes, other food and confectionary products, and restaurant equipment would allow them to significantly increase their exports. In addition, Malaysia charges "extremely high effective tariff rates" on roughly 80 products, imposes non-automatic import licensing requirements for a large number of tariff lines related to import-sensitive or strategic industries, and maintains performance requirements that must be met to receive a customs waiver for operations in Foreign Trade Zones (FTZs).

- **Import restrictions on motor vehicles.** Malaysia continues to maintain tariff barriers and NTBs in the automobile sector, as well as traffic restrictions and noise standards that affect the usage of large motorcycles. In addition, the Malaysian government continues to pursue policies that make a distinction between "national" cars, which are cars made by the domestic producers Proton and Perodua, and "non-national cars," which include most vehicles assembled in Malaysia by non-Malaysian owned firms.

- **Export taxes.** Similar to the previous edition, the 2011 NTE Report highlights that Malaysia taxes exports of palm oil, rubber, and timber products to protect domestic processing production. In addition, the Malaysian government waives export taxes on exports of crude palm oil to Malaysia-invested foreign vegetable oil refineries in order to give Malaysia-invested plants an advantage in foreign markets such as the United States.

- **Government procurement.** Malaysia's official policy is to use government procurement to support national public policy objectives, and the government generally favors domestic over foreign companies. In addition, the United States has raised concerns about the lack of transparency in Malaysia's government procurement process.

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- **Export subsidies.** The 2011 NTE Report reiterates that Malaysia maintains several programs that appear to provide export subsidies, which include tax and investment incentives provided to exporters through the Pioneer Status and Investment Tax Allowance schemes.

- **IPR protection.** Several areas of IPR protection and enforcement continue to represent barriers to US exports and investment, including widespread piracy and counterfeiting, declining IPR enforcement efforts, and lack of *ex officio* initiated IPR investigations by customs officials. Amongst other things, the United States has urged Malaysia to ensure effective protection against unfair commercial use and against unauthorized disclosure of undisclosed tests or other data to obtain marketing approval for pharmaceutical products, as well as to provide an effective system to address patent issues expeditiously in connection with applications to market pharmaceutical products.

- **Services barriers.** The 2011 NTE Report lists several barriers in the telecommunications, distribution services (including direct selling), legal, architectural, engineering, accounting and taxation, financial, advertising, and audio-visual and broadcasting services.

- **Investment barriers.** The Malaysian government heavily restricts foreign investments in sectors controlled by government-linked companies or in sectors deemed strategically important, including financial services, professional services, the oil and gas sector, telecommunications, automotive industries, plantations, and mining. Examples of the restrictions thus imposed are limitations on foreign equity and requirements that foreign firms enter into joint ventures with local partners. In addition, investors in sectors that are not targeted for increased investment by the Malaysian government face significant bureaucratic obstacles.

- **Other barriers.** As in the previous edition, the 2011 NTE report highlights that US companies have reported obstacles to market access that result from the lack of transparency in government decision making and procedures.

The Philippines

The 2011 NTE Report states that the following issues, amongst others, are of concern to US businesses:

- **Import tariffs.** The Philippines continues to apply high tariffs on finished automobiles and motorcycles, which are subjected to the highest rates of any non-agricultural product. In addition, the Philippines maintains a prohibition on imports of used motor vehicles, as well as a ban on heavyweight motorcycles from highways which severely limits the export potential for US-built motorcycles.

- **Customs barriers.** As in the 2010 NTE Report, the 2011 edition notes that reports of corruption and other irregularities in customs processing persist, including undue and costly delays, continued private sector involvement in the valuation process, the use of reference prices rather than declared transaction values, and customs officials seeking the payment of unrecorded facilitation fees.

- **Government procurement.** The 2011 NTE Report reiterates that government procurement laws and regulations favor Philippine-controlled companies and locally produced materials and supplies. In addition,

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US companies have expressed concern about delayed procurement decisions, delayed payment, and different interpretations of the procurement law by different Philippine government agencies.

- **IPR protection.** In 2010, the United States conducted an out-of-cycle review which led to the conclusion that several areas of Philippines' IPR protection and enforcement continue to represent barriers to US exports and investment. Key issues addressed in this review included ineffective IPR enforcement, continued widespread copyright piracy and trademark counterfeiting, and amendments to the patent law that prohibit patents on certain chemical forms unless the applicant demonstrates increased efficacy. Amongst other things, the report also notes that an anti-camcording bill has not yet been implemented.

- **Services barriers.** Similar to the previous edition, the 2011 NTE Report notes that the Philippines maintains foreign ownership restrictions in the banking sector and restrictions on foreign financial institutions' presence and operation. In addition, the report reiterates US concerns regarding the Philippines' classification of the telecommunications sector, which is defined outside of utility definition. Also, the report lists several barriers in the financial services, insurance, securities and other financial services, advertising, public utilities, professional services, express delivery services, retail trade, and civil aviation sectors.

- **Investment barriers.** The Philippines prohibits foreign investment in sectors such as mass media, practice of professions, and small-scale mining, while it imposes significant restrictions in sectors such as natural resource extraction, firearms and explosives. In addition, the business community has expressed concerns about barriers resulting from a lack of transparency in regulations and laws, as well as from weak enforcement of anti-smuggling laws and regulations. Amongst other things, the 2011 NTE Report also notes that unresolved land disputes are a particularly significant barrier to investment in the mineral exploration and processing sector.

Singapore

The 2011 NTE report reflects the high levels of trade and investment liberalization between Singapore and the United States, although it reiterates ongoing US concerns with regard to the following issues:

- **Import licenses and internal taxes.** Similar to the 2010 NTE Report, the 2011 edition mentions that a tiered motorcycle operator licensing system based on engine displacement, along with a road tax based on engine size, places US exports of large motorcycles at a competitive disadvantage. In addition, the report reiterates that Singapore levies high excise taxes on distilled spirits and wine, tobacco and motor vehicles.

- **IPR protection.** The United States continues to have concerns regarding IPR enforcement in Singapore, and in particular with regard to the continued transshipment through Singapore of products that infringe IPR, insufficient deterrent penalties for end-user piracy, and the lack of meaningful enforcement against online infringers.

- **Services barriers.** As a new issue of concern, the United States has requested that Singapore reconsider a new "cross-carriage" measure requiring pay television companies with an exclusive contract for a channel to offer that content to customers of other pay television companies. In addition, the 2011 NTE Report again lists various specific barriers in the basic telecommunications, audiovisual and media, legal, banking, and

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education services sectors. Amongst other things, 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, and restrictions on ATM access for holders of foreign bank cards.

South Korea

On December 3, 2010, the United States and South Korea reached an agreement resolving the outstanding issues under the US-Korea Free Trade Agreement ("KORUS FTA"), which both sides now need to formally approve and implement. In addition, the 2011 NTE Report notes that the following, amongst others, remain key issues of concern:

- **Tariffs and taxes.** Korea maintains particularly high tariffs on a number of high value agricultural and fishery products. In addition, Korea uses adjustment tariffs and compounded taxes on some agricultural, fishery and plywood products, which increase the applied tariff rates.

- **Government procurement.** For procurement of construction services by subcentral and government enterprises covered under the GPA, Korea maintains a threshold that is three times the one applied by the United States. In addition, the report again mentions certain specific concerns with regard to Korean regulations on encryption technology for public procurement of Voice over Internet Protocol (VoIP) equipment.

- **Industrial subsidy policy.** The 2011 NTE Report reiterates that the Korea Development Bank (KDB), as a government-owned entity that is not bound by the same constraints as commercial institutions, is allowed to provide policy-directed loans to favored industries.

- **IPR protection.** Similar to the previous report, the 2011 NTE Report notes that US concerns persist over new forms of online piracy, corporate end-user software piracy, book piracy in universities, and counterfeiting of consumer products.

- **Services barriers.** As in the 2010 edition, the 2011 NTE Report highlights US concerns about 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.

- **Investment barriers.** The 2011 NTE Report again mentions barriers such as i) restrictions on foreign ownership of cable television-related system operators, network operators, and program providers; ii) the prohibition of foreign investment in rice and barley farming; iii) the foreign equity limitation on meat wholesaling; iv) limitations on foreign investment in electric power generation, distribution, sales, news agency services, publishing, and printing; and v) and a lack of transparency in investment-related regulatory decisions.

- **Anticompetitive practices.** The Korea Fair Trade Commission (KFTC) plays an active role in enforcing Korea's competition law and in advocating for regulatory reform and corporate restructuring, and several US companies have expressed concerns that respondents in KFTC investigations have not been afforded a

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sufficient opportunity to review and respond to evidence against them. In addition, concerns have been raised that procedural rules for KFTC hearings have not been sufficiently transparent and that the KFTC lacks authority to enter into settlement agreements with respondents by mutual agreement.

- **Other barriers.** The 2011 NTE Report mentions that the lack of transparency in Korea's rulemaking and regulatory system continues to be one of the principal problems cited by US businesses. In addition, the report reiterates that automobile import tariffs, domestic taxes, and NTBs continue to restrict market access for US automakers. Also, Korea continues to impose similar tariffs and taxes on motorcycles and to limit their access to highways. Lastly, Korea still maintains its non-transparent pricing and reimbursement procedures for distilled liquors, pharmaceuticals and medical devices.

Taiwan

Similar to the 2010 NTE Report, the 2011 edition cites, amongst others, the following areas of concern for US businesses:

- **Import policies.** US industry continues to request that Taiwan lower tariffs on products such as large motorcycles, wine, canned soups, cookies, snack foods, vegetable juices, potato and potato products, and various fruits and vegetables. In addition, Taiwan still maintains import restrictions on 107 product categories, as well as import bans on more than 2000 products from China. Also, Taiwan still does not allow large motorcycles on its highways, while it continues to restrict motorcycles with engine displacement of over 550 cc.

- **IPR protection.** US companies continue to express concerns over issues such as 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.** The 2011 NTE Report lists several specific barriers in the banking, securities, insurance, healthcare, pay television, and telecommunications services sectors that continue to prohibit or restrict the provision of services by US and other foreign suppliers.

- **Investment barriers.** As in the previous edition, the 2011 NTE Report notes that Taiwan prohibits or restricts foreign investment in sectors such as agricultural production, chemical manufacturing, bus transportation, and public utilities.

Thailand

The 2011 NTE Report cites a number of areas of specific concern, including the following:

- **Import policies.** Thailand's high tariffs remain an impediment to market access in many sectors, and in particular for imports competing with locally produced goods such as automobiles and automotive parts, motorcycles, beef, pork, poultry, tea, wine and spirits, and textiles and clothing. In this regard, the 2011 NTE Report cites specific US concerns about the tariffs on imported processed food products, meats, fresh fruits and vegetables, fresh cheese,, and restaurant equipment. In addition, the report mentions several NTBs

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including Thailand's QRs and import licensing for products such as raw materials or industrial materials, a complex and non-transparent taxation system which imposes high excise taxes on certain products, the non-transparent customs administration, and the significant discretionary authority of Customs officials.

- **Government procurement.** As in the previous edition, the 2011 NTE Report notes that Thailand provides preferential treatment to domestic suppliers through an automatic 7 percent price advantage over foreign bidders in evaluations in the initial bid round. In addition, US companies continue to report allegations of irregularities in tender procedures, while they have also expressed concerns regarding a Thai government decision to no longer include arbitration clauses in concessions and government contracts.

- **IPR protection.** The 2011 NTE Report recalls that key concerns cited in the 2010 edition included continued widespread copyright piracy and trademark counterfeiting, as well as a growing challenge in the areas of Internet, cable, and signal piracy. The report adds that while the United States is encouraged by the Thai government's commitment to stronger IPR protection and enforcement, some of these concerns remain and continue to represent barriers to US exports and investment.

- **Services barriers.** The 2011 NTE Report notes that significant barriers remain in the areas of telecommunications, legal, financial, accounting, transport, postal and express delivery, and healthcare services.

- **Other barriers.** The US pharmaceutical industry has expressed serious concerns about the uncertain climate for its business in Thailand. In addition, the report again mentions issues such as the fact that the Thai government retains authority to control prices or set price ceilings for certain goods, the non-transparency of price control review mechanisms, and continuing widespread corruption.

Vietnam

The 2011 NTE Report mentions, amongst other things, the following areas of concern for US businesses:

- **Tariffs.** High tariffs remain for certain agricultural products, beverage products, and items such as selected equipment for restaurant use and large engine motorcycles.

- **NTBs.** The 2011 NTE Report notes that Vietnam continues to impose import prohibitions and QRs on products such as cultural products deemed "depraved and reactionary", firecrackers, certain children's toys, second hand consumer goods, right hand drive motor vehicles, and used spare parts for vehicles. In addition, US companies continue to raise concerns about, amongst other things, certain QRs and import licensing procedures, Vietnam's price registration and stabilization regime for a broad range of goods and services, inefficient customs clearance, and possible discriminatory treatment against foreign firms across a range of product registration requirements for imported pharmaceuticals.

- **Government procurement.** As in the 2010 NTE Report, the 2011 edition notes that the US software industry has expressed concerns about the Vietnamese government's promotion of the use of open source software by government agencies, including specific preferences for open source software in government procurement.

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- **IPR protection.** The 2011 NTE Report again notes that Vietnam's enforcement efforts have not kept pace with rising levels of IP infringement and piracy, while administrative enforcement actions and penalties have not served as a sufficient deterrent.

- **Services barriers.** The 2011 NTE Report again cites restrictions such as foreign ownership limitations in a number of sectors including audiovisual, broadcasting, express delivery, telecommunications, distribution, and banking and securities services.

- **Investment barriers.** Similar to the 2010 edition, the 2011 NTE Report notes US concerns about 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.

- **Other barriers.** US firms have identified corruption in all phases of business operations as an obstacle to their business activities, and note that the lack of transparency, accountability, and media freedom, as well as widespread official corruption and inefficient bureaucracy, remain serious problems.

III. COUNTRY ASSESSMENTS: EUROPEAN UNION

The 2011 Report reiterates the general conclusion of the 2010 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.

Market Access for Non-Agricultural Products

The 2011 NTE Report recalls that in September 2010, the WTO Dispute Settlement Body (DSB) adopted the final panel report in the case *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products* (DS 375). In this report, the panel ruled in favor of a US claim that EU tariffs on imports of LCD computer monitors, set top boxes with a communication function, and certain multifunction digital machines were inconsistent with the WTO Information Technology Agreement (ITA). In this regard, the 2011 NTE Report indicates that the United States and the EU agreed that the EU will comply with the ruling by June 30, 2011.

Similar to the 2010 NTE report, the 2011 Report also mentions US concerns over EU restrictions to market access in the following areas:

- **Pharmaceutical products.** The US pharmaceutical industry has expressed concerns about procedural non-transparency and a lack of stakeholder input into policies related to pricing and reimbursement. In addition, the 2011 NTE Report notes that the US pharmaceutical industry has raised concerns about market access, government pricing, and reimbursement systems in Austria, Belgium, the Czech Republic, Finland, France, Germany, Hungary, Lithuania, the Netherlands, Poland, Portugal, Spain, and the United Kingdom.

- **Uranium.** The US remains concerned that EU policies may unjustifiably restrict the importation of enriched uranium, and the 2011 NTE Report reiterates that the United States has questioned the justification and the non-transparent nature of the 1994 Corfu Declaration imposing explicit quotas on imports of enriched uranium.

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In addition, 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.

IPR Protection

Similar to the report of the previous year, the 2011 NTE Report notes that US industry has concerns regarding the implementation of key provisions of EU IPR directives and overall IPR protection in some EU Member States. The report specifies that the United States remains concerned about high patent filing and maintenance fees in the EU and its Member States, as well as about the WTO-consistency of the EU system for the protection of Geographical Indications (GIs). As for the individual EU Member States, the report notes continuing problems with IPR protection and enforcement in Bulgaria, the Czech Republic, Finland, Greece, Italy, Poland, Romania, Spain, and Sweden. Unlike the 2010 edition, however, the 2011 NTE Report also includes Austria, Latvia, and Portugal in this list while it no longer mentions Hungary.

Services Barriers

Similar to the 2010 NTE report, the 2011 edition highlights that US concerns persist with regard to the following services sectors:

- **Telecommunications.** 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 problems continue with regard to provisioning and pricing of unbundled local loops, line-sharing, co-location, and provisioning of leased lines. In addition, enforcement procedures for existing telecommunications legislation remain 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. The 2011 NTE Report further notes that legislative proposals resulting from the overall strategy for the European digital economy by 2020, which the EU set out in August 2010, are likely to impact US companies providing telecommunication and broadband services and online content in Europe.

- **Energy services.** The 2011 NTE report reiterates the concern of the previous edition 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.

- **EU enlargement.** Similar to the 2010 NTE Report, the 2011 edition notes that the European Commission ("the Commission") has to date failed to secure the approval of the EU Member States in the Council of the EU ("the Council") for the compensation that the EU has agreed to provide to the United States for any adverse effects on trade in services of recent EU enlargements. Under the WTO General Agreement in Trade in Services (GATS), the EU was required to negotiate 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.

In addition, the 2011 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.

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Investment Barriers

Similar to the report of 2010, the 2011 NTE Report states in general that, although EU law imposes some restrictions on US and other foreign investments, the policies and practices of the individual EU Member States have often had a more significant impact. In addition, the report recalls that because the Lisbon Treaty does not clearly define “foreign direct investment” (FDI), many practical implications remain unclear of the fact that this Treaty made FDI for the first time an exclusive EU competence.

In this regard, the report also notes that in July 2010, the Commission issued the Communication “Towards a Comprehensive European International Investment Policy” and a Proposal for a Regulation establishing transitional arrangements for bilateral investment agreements between EU Member States and third countries *(Please also see W&C July 16, 2010 EU Report)*. Both documents provide that the Bilateral Investment Treaties (BITs) of the EU Member States will remain valid under international law, but the 2011 NTE Report argues that the existence of these treaties may raise questions of compatibility with EU law and with the EU’s common commercial policy. The report also notes that the United States will monitor the impact on its BITs with individual EU Member States of the Commission’s review of the compatibility with EU law of the existing BITs.

As in the 2010 NTE Report, the 2011 edition further highlights certain specific concerns over investment barriers in Bulgaria, Cyprus, France, Germany, Greece, Lithuania, and Romania, but also adds the Czech Republic and Portugal to this list.

Government Procurement

The 2011 NTE Report reiterates the comment of the previous edition that while US suppliers do participate in EU government procurement tenders, the lack of statistics makes it difficult to make an accurate assessment of the precise level of US and non-EU participation. In addition, the report repeats the US 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 2010 NTE report, the 2011 Report also mentions national government procurement practices that are of particular concern to the United States in Austria, the Czech Republic, France, Greece, Hungary, Ireland, Italy, Lithuania, Portugal, Romania, Slovenia, Spain, and the United Kingdom.

Subsidies

As was the case in the 2010 NTE report, the 2011 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 this regard, the report notes that in June 2010, the WTO dispute settlement panel found in favor of the United States on the central claims, and that this dispute is now before the WTO Appellate Body (AB).

Also, the 2011 NTE Report again lists US concerns about specific measures by the governments of Belgium, France, Spain and the United Kingdom to support Airbus suppliers, and about measures by the governments of France and the United Kingdom to support producers of aircraft engines.

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Customs Administration

Similar to the 2010 NTE report, the 2011 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. Unlike the NTE Report of the previous year, the 2011 edition also mentions a complaint by the US Distilled Spirits Council about a specific measure by the EU Member State Romania that had a negative impact on several US exporters of distilled spirits.

Electronic Commerce

As in the 2010 edition, the 2011 NTE Report states 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.

As a new development, the 2011 NTE Report mentions that the United States is closely monitoring the Commission's current review of the EU's framework of data protection legislation to ensure that any subsequent revisions do not adversely impact transatlantic trade and investment. Moreover, the report now also highlights US concerns about recent discussions in the EU Member State Germany on the issue of online data privacy as it relates to the US companies Google and Facebook, which resulted in the drafting of data privacy legislation aimed at online services and the establishment of a voluntary data privacy codex for geo data services by a major information technology association.

IV. COUNTRY ASSESSMENTS: LATIN AMERICA

Argentina

The 2011 NTE Report mentions, amongst other things, the following areas of concern for US businesses:

- **Import tariffs.** The report notes that there are concerns that the Argentine Government is considering an extension of the so-called "minimum specific import duties" (DIEMs) on products in sectors such as textiles and apparel, footwear, and toys, which expired on December 31, 2010.

- **Non-tariff barriers (NTBs).** US companies continue to express concerns that certain customs and licensing procedures and requirements which Argentina has implemented since October 2008 have delayed imports and made imports of intermediate and final goods from US companies and their third-country affiliates more costly and difficult. The report specifies that these measures include additional inspections, port-of-entry restrictions, expanded use of reference prices, automatic and non-automatic licenses, and requirements for importers to have invoices notarized by the nearest Argentine diplomatic mission when imported goods are

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below reference prices. In addition, Argentina restricts or prohibits the importation and/or sale of used capital goods and remanufactured goods, such as used or remanufactured self-propelled agricultural machinery, tires, medical equipment, automotive parts, earthmoving equipment, and information and communications technology (ICT) products. Also, importers have since April 2010 reported delays in the approval of the so-called “certificates of free sale” that are necessary to import food products into Argentina, and this approval is reportedly conditioned on an absence of a domestic substitute of the products. Furthermore, in 2010 Argentine policymakers reportedly began requiring companies to invest domestically or commit to export and equal amount in order to import. Moreover, the report lists concerns in the following specific areas:

- **Anti-dumping (AD).** Argentina initiated over 30 AD investigations since October 2008 and applied provisional duties in several cases, mostly with regard to products from Brazil and China. On December 15, 2010, Argentina initiated an AD investigation on coated paper and paperboard from the United States.

- **Import licensing.** Since October 2008, Argentina has significantly expanded the list of products subject to both automatic and non-automatic import licensing. US industry representatives have complained that the time for ruling on non-automatic licenses often extends beyond 60 days to 100 days or more, as well as that obtaining a license is burdensome and requires multiple duplicative reviews by several different government offices. As for automatic licensing, companies have reported not being granted import licenses unless they commit to export or invest in Argentina, while they also claim that they are prevented access to parts of the Argentine market.

- **Customs procedures.** Certificates of origin have become a key element in Argentine import procedures, and companies have complained that major delays in obtaining an import license often put them over the 180-day validity period for such certificates. In addition, the import-export regulations applied to couriers were most recently modified in 2005, and these changes increased the cost of both the couriers and the users of courier services.

- **Export policies.** The Argentine Government continues to impose export taxes on all but a few exports, including significant taxes on key hydrocarbon and agricultural commodities. In addition, the Argentine Government requires export registration for major commodities before an export can be shipped, while it also imposes time restrictions on grain and oilseed exports depending on whether the export tax is paid.

Lastly, the NTE Report also notes serious concerns regarding Argentina’s IP regime and several other barriers in the areas of government procurement, audiovisual and financial services, investment, and electronic commerce (e-commerce).

Brazil

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

- **Import tariffs.** US exporters face significant uncertainty in Brazil’s market because the Brazilian government can raise applied rates to bound levels, and high *ad valorem* tariffs currently affect US exports across sectors such as automobiles, auto parts, electronics, chemicals, plastics, textiles and apparel. The report adds that

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during 2009 and 2010, Brazil increased import tariffs on products such as electrical machinery, machine tools, automotive parts, telecommunications equipment, crane lorries, textiles and leather, and toys.

- **NTBs.** The complexities of the Brazilian tax system, including multiple cascading taxes and tax disputes among the various states, pose numerous challenges to US companies. In addition, Brazil prohibits a number of imports, restricts the entry of certain types of remanufactured goods through onerous import licensing procedures, and puts US agricultural products at a competitive disadvantage to Mercosur products through a 25 percent merchant marine tax on long distance freight at Brazilian ports.

- **Import licensing.** The lack of transparency surrounding non-automatic import licensing procedures can create additional burdens for US exporters. US companies also continue to complain of onerous and burdensome documentation requirements before goods such as pharmaceuticals, medical devices, health and fitness equipment, cosmetics, and processed food products can enter Brazil even on a temporary basis.

- **Customs valuation.** US companies have complained that customs officials often apply a higher dutiable value based on a retail price rather than recognizing the company's stated transaction value.

- **Trade remedies.** In 2010, Brazil initiated AD investigations on US exports of n-butonal, toluene diisocyanate, nitrile rubber, and light weight coated paper, while it also issued affirmative determinations in the AD investigations of US exports of polypropylene resin, ethylene glycol, and polyvinyl chloride in suspension (PVC-S).

- **Export subsidies.** Brazil offers a variety of tax, tariff, and financing services to encourage production for export and the use of Brazilian-made inputs in domestic production.

- **Other Barriers.** With regards to other sectors, the NTE Report notes some concerns regarding Brazil's IP regime and several other barriers in the areas of government procurement, audiovisual services and broadcasting, express delivery services (EDS), financial services, telecommunications, and investment.

Chile

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

- **Import tariffs.** Chile applies a uniform tariff rate of 6 percent for nearly all goods, but will continue to apply higher effective tariffs for wheat, wheat flour, and sugar during the 12 year transition period under the US-Chile FTA due to the application of an import price band system. The report also reiterates that importers 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.

- **Import controls.** Chilean customs authorities must approve and issue a report for all imports valued at more than USD 3,000, after which the goods to be imported must generally be shipped within 30 days. In addition, importers and exporters must report their import and export transactions to the Central Bank. Furthermore, Chile does not allow the importation of used vehicles, used motorcycles, and used retreaded tires (with the

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exception of wheel-mounted tires), while some used items originating from a country that does not have an FTA with Chile are subject to an additional importation charge of 3 percent.

- **NTBs.** Chile maintains a complex price band system for wheat, wheat flour, and sugar that, under the US-Chile FTA, will be phased out by 2016 for imports from the United States. In addition, non-Chilean companies operating in the country are required to contract the services of a customs agent when importing or exporting goods valued at over USD 1000 Free on Board (FOB). The fact that the fees of these customs agents are not standardized is an extra cost for non-Chilean companies operating in-country.

- **Export policies.** Chile continues to maintain a simplified duty drawback (DDB) program for nontraditional exports, but will gradually eliminate the use of DDB and duty deferral for imports that are incorporated into any goods exported to the United States by 2016.

- **Other barriers.** Despite Chile's efforts to improve its IP regime, the United States continues to have concerns regarding the implementation of Chile's IPR commitments under the US-Chile FTA. In addition, the NTE-report mentions some concerns in the area of financial services.

Mexico

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

- **Import policies.** The NTE-report notes that in 2010 Mexico included several new US products in the list of goods that are subject to the tariffs that it imposed in retaliation for the US cancellation of the US-Mexico Cross Border Trucking Demonstration Project. In addition, US producers continue to complain that, while Mexico imposes a VAT on imports of US nutritional supplements, it does not collect the VAT on sales of similar domestic products. Furthermore, the NTE-report reiterates the US concerns about Mexico's AD duties on US meat exports, and about 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 in the area of customs' administrative procedures.

- **Other barriers.** The NTE-report notes that the United States remains concerned about Mexico's IPR regime, while it also calls for improvements in the areas of government procurement, telecommunications services, and investment.

V. COUNTRY ASSESSMENTS: MIDDLE EAST

Bahrain

As in the previous year, the 2011 NTE Report gives a favorable review of Bahrain's **import policies**, where it recalls that upon the August 2006 implementation of the US – Bahrain FTA, 100 percent of bilateral trade in consumer and industrial products became duty-free immediately. In addition, the report comments positively on Bahrain's policies in the areas of **government procurement** and **IPR protection**

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Egypt

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

- **Import policies,** the NTE Report notes that the gradual liberalization of Egypt's trade regime and economic policies has been "somewhat halting" and continues to face challenges such as the need to reduce corruption, reform the cumbersome bureaucracy, implement a fully transparent regulatory regime, and eliminate non-science based health, sanitary/phytosanitary (SPS), and safety standards. The report also highlights that Egypt continues to impose high tariffs on alcohol and alcoholic beverages, clothing, foreign movies, passenger cars, processed and high value food products such as poultry meat, tobacco, and vehicles. Thirdly, the report mentions that Egypt continues to impose certain restrictions on the imports of passenger vehicles, vitamins, food supplements, specialty foods, dietary foods, and medical equipment.

- **Other barriers.** The 2011 NTE Report reiterates the US concerns about the lack of transparency in government procurement practices, high levels of piracy and counterfeiting, the government-controlled and non-transparent pricing mechanism for pharmaceutical products, and restrictions in the areas of banking, telecommunications, transportation, and courier and express delivery services.

Jordan

Similar to past assessments, the 2011 NTE Report provides a positive assessment of Jordan, although it does note some issues of concern:

- **Import policies.** The report mentions that Jordan currently imposes a "Special Tax" of 17.5 percent on imported automobiles and trucks, requires licenses or advance approval to import specific food and agricultural goods, requires that importers of commercial goods be registered traders or commercial entities, and occasionally issues directives requiring import licenses for certain goods or categories of goods and products in newly emerging or protected sectors. The report particularly notes that in 2010, the government of Jordan issued directives requiring a special import license prior to the importation of telecommunications and security equipment.

- **Other barriers.** The NTE report highlights that enforcement of IPR protection remains weak in areas such as digital media. In addition, current Jordanian laws set limitations on foreign ownership in certain sectors, subject to exceptions where the government deems appropriate. Lastly, the NTE report notes that there is no composite body of regulations and tax laws covering e-commerce transactions, and in particular that there is an immediate need for regulations on electronic signatures.

Kuwait

As in the report of the previous year, the 2011 NTE Report provides a generally positive assessment of Kuwait, although it does note US concerns about the following:

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- **Import prohibitions and licensing.** Kuwait prohibits the importation of alcohol, pork products, used medical equipment, automobiles over five years old, all materials that promote political ideology, and books, periodicals or movies that insult religion and public morals.

- **Customs.** The import clearance process in Kuwait is time consuming as it requires extensive documentation and involves numerous redundancies.

- **Government procurement.** Kuwait requires the purchase of local products, where available, and prescribes a 10 percent price advantage for local firms in government tenders. In addition, any procurement made by the Kuwaiti government with a value in excess of USD 17,700 must be conducted through the Central Tenders Committee.

- **IPR protection.** The lack of deterrent criminal penalties and excessive delays in the enactment of key pieces of IPR related legislation continue to represent barriers to US exports and investment.

- **Services barriers.** Foreign-owned banks are restricted to opening only one branch and to only offering investment banking services. In addition, they are prohibited from competing in the retail banking sector, subject to a maximum credit concentration, and expressly prohibited from directing clients to borrow from external branches of their bank or taking any other measures or arrangements to facilitate such borrowing.

- **Investment barriers.** Major barriers to FDI include regulations limiting participation of foreign entities from investing in the petroleum and real estate sectors, long bureaucratic delays associated with starting new enterprises, and obstacles created by a business culture heavily influenced by clan and family relationships.

- **Corporate tax policies.** Arbitrary tax assessments are a continuing complaint of foreign companies active in Kuwait.

Morocco

The 2011 NTE Report gives a favorable review of Morocco's **import policies**, although it mentions US concerns about the Moroccan government's administration of two tariff rate quotas (TRQs) that allow preferential access for US durum and common wheat exports under the US-Morocco FTA. In addition, US companies have reported concerns about the following issues:

- **Government procurement.** The 45 and 90 day timeframes given to foreign companies to answer government tenders is often too short, guidance is often vague, and channels for distributing information are limited to local newspapers and circulars sent to foreign embassies.

- **Services barriers.** The discriminatory policies and practices of Morocco's insurance regulatory body continue to effectively prevent US insurance companies from introducing competing products.

- **IPR protection.** The 2011 NTE Report reiterates that there are weaknesses in the Moroccan mechanisms to detect and address internet-based IPR violations and that the Moroccan government has therefore requested

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further technical assistance from the United States and other partners to bring its capacity to address copyright infringement up to international standards.

- **Other barriers.** The 2011 NTE Report notes that irregularities in government procedures, lack of transparent governmental and judicial bureaucracies, inefficient transport systems, and low-level corruption continue to be the greatest obstacles to trade in Morocco.

Oman

The 2011 NTE Report provides a positive assessment of Oman's **import policies**, but notes US concerns about the following:

- **Import licensing.** Companies that import goods must be registered with the Ministry of Commerce and Industry**,** while importation of goods such as alcohol, livestock, poultry, firearms, narcotics, and explosives requires a special license. In addition, media imports are subject to review and possible censorship.

- **Documentation requirements.** Only Omani nationals and companies of WTO Members that are registered as importers are permitted to submit documents to clear shipments through customs.

- **Customs.** Some firms have reported difficulties in receiving duty-free treatment under the US-Oman FTA for goods that enter Oman via Dubai.

- **Government Procurement.** In addition, the 2011 NTE 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."

- **IPR protection.** The report notes that cases of online piracy remain common.

- **Services.** Oman does not permit representative offices or offshore banking and non-Omani attorneys are prohibited from appearing in courts of first instance.

- **Investment.** The report mentions that concerns remain about the ability of US businesses to acquire office space in Oman.

Qatar

As in the report of the previous year, the 2011 NTE Report provides a generally positive assessment of Qatar, although it does note US concerns about the following:

- **Import licensing.** Qatar requires importers to have an import license 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.

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- **Services barriers.** The 2011 NTE Report mentions US concerns about 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 and health sectors, and some Qatari ministries waive the local agent requirement for foreign companies that have contracts directly with the government of Qatar).

- **Investment barriers.** Foreign equity participation in most sectors of the Qatari economy is limited to 49 percent. In addition, foreign ownership of residential property is limited to select real estate projects.

Saudi Arabia

In an assessment that is similar to that of the previous edition NTE Report, the 2011 NTE Report reiterates that barriers remain in the following areas:

- **Import prohibitions and licensing.** Saudi Arabia prohibits the importation of alcohol, firearms, pork products, and used clothing. In addition, Saudi Arabia requires a special approval 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.** Saudi Arabia limits foreign ownership in commercial banks to 40 percent of any individual bank operation, although it has taken steps in recent years to open up investment banking by granting operating licenses to foreign banks.

- **Investment barriers.** All FDI into Saudi Arabia requires a license from the Saudi Arabian General investment Authority (SAGIA), and companies can experience delays in or after receiving such licenses as a result of bureaucratic impediments. In addition, FDI is currently prohibited in 15 manufacturing and service sectors and subsectors, including oil exploration, drilling and production, and manufacturing and services related to military activity. Also, direct foreign participation in the Saudi stock market is prohibited.

United Arab Emirates

Similar to past assessments, the 2011 NTE Report provides a positive assessment of the United Arab Emirates (UAE), although it does note some issues of concern in the following areas:

- **Import licensing.** 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.

- **Government procurement.** The UAE grants a 10 percent price preference for local firms in government procurement. In addition, companies have to register with the government before they can participate in government procurements, but are only eligible for registration if they have at least 51 percent UAE

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ownership. However, the latter requirement does not apply to major projects or defense contracts where there is no local company able to provide the goods or services required.

- **IPR Protection.** The UAE is recognized as the regional leader in fighting computer software piracy, but some industry stakeholders believe it could be doing more. As a specific example, the 2011 NTE Report mentions that the recording industry has complained about the UAE's failure to establish a royalty collecting mechanism for the use of recorded music, which means that rights holders are not being renumerated for certain uses of such works.

- **Services barriers.** The 2011 NTE Report mentions that there are several barriers to foreign participation in the insurance and banking sectors, as well as that it remains difficult to sell products in UAE markets without a local agent. In addition, one US trade association representing Voice over Internet Protocol (VoIP) providers has complained that the UAE is limiting their ability to provide these services by licensing only two companies, while other companies using this technology are subject to having their services blocked.

- **Investment barriers.** The 2011 NTE Report repeats the assessment of the previous year 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." In addition, the report mentions that resolution of investment disputes continues to be a problem in the UAE.

Outlook

Similar to last year's NTE report, the 2011 NTE report exhibits little substantive change from previous reports in its analysis of individual countries' barriers to US exports and investment. As in previous years' reports, the 2011 report focuses on nine categories of foreign trade barriers, covering government-imposed measures and policies that restrict, prevent or otherwise impede the cross-border exchange of goods and services. Within these nine categories, the 2011 report cites new foreign trade barriers as well as those covered in previous reports but that have since evolved.

For Asia, the 2011 report cites increased concern among US firms over barriers in the areas of import barriers, internal policies, export regulations, IPR, services, investment and government procurement. The lengthiest country-specific passages are those related to China, India, Indonesia, and the Philippines. In regard to China, USTR is likely to continue using the Joint Commission on Commerce and Trade (JCCT), the Strategic and Economic Dialogue (S&ED) and other high-level bilateral and multilateral fora to address US concerns with China's trade regime. The United States will likely continue to engage Japan, India, Indonesia and the Philippines at the bilateral and multilateral level as none of these countries are currently negotiating members of the Trans-Pacific Partnership.

For Europe, the 2011 report focuses on such barriers of concern to US firms as import barriers, particularly for pharmaceutical goods, IPR, services, government procurement, export subsidies, customs and e-commerce. Despite the largely positive EU-US economic and trade relationship, the United States will likely continue to engage the European Union to address these concerns through bilateral consultations and WTO dispute

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settlement proceedings as has been the pattern over the last decade. At present, the European Union 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 2010, goods exports to and imports from the European Union were USD 239.8 billion and USD 319.6 billion, respectively. US services exports (private commercial services excluding military and government) to the European Union were USD 171.8 billion in 2009 (latest data available) and US services imports were USD 121.4 billion with financial, insurance and transportation as key sectors. US foreign direct investment (FDI) in the European Union was USD 1.7 trillion in 2009 and is primarily concentrated in the nonbank holding companies, finance/insurance and manufacturing sectors.

For Latin America, the 2011 NTE Report reflects the Obama Administration's focus on enforcement and monitoring, and signal the Administration's clear intent to keep a close eye on its Latin American trading partners' compliance with trade agreements and multilateral rules. The 2011 NTE Report appears very critical of Argentina's import and customs regimes and existing barriers in other sectors, such as IPR. In contrast, the NTE Report is less critical of Brazil and Chile, which, in recent years, have made concrete steps towards eliminating tariff and non-tariff barriers to US exporters and services providers. In regard to Mexico, the 2011 report notes that the Obama and Calderon Administrations came to a preliminary agreement on US compliance with NAFTA provisions concerning cross-border trucking services such that Mexico will gradually draw down retaliatory tariffs imposed on US goods. Analysts opine that in the foreseeable future, Latin American countries should expect continued emphasis on enforcement and monitoring from the Obama Administration.

For the Middle East, similar to the 2010 NTE report, the 2011 NTE assessment highlights achievements that these trading partners have accomplished with regard to the removal of trade barriers. The 2011 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 2011 NTE report were all major components of the Bush Administration's USMEFTA initiative. The future of the proposed USMEFTA under the Obama Administration is unclear. Therefore, the 2011 assessment highlights efforts by Middle Eastern trading partners to remove trade barriers, such as the Israeli-related boycott, and limits discussion of 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. The 2011 individual reports for the Middle East (or Maghreb) 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 2010 NTE report. Similar to the 2010 report, the 2011 NTE report also focused on efforts by these trading partners to address IPR-related concerns. 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.

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US General Trade Policy Highlights

Chinese Ministry of Commerce Announces Affirmative Provisional Decision in AD and CVD Investigations of Saloon Cars and Cross-country Cars from the United States; No Provisional Duties Imposed

On April 2, 2011, China's Ministry of Commerce (MOFCOM) published Notice No. 13 [2011] announcing its affirmative provisional determination in the antidumping (AD) and countervailing duty (CVD) investigations of imports of saloon cars and cross-country cars imported from the United States.

MOFCOM initiated the investigation on November 6, 2009. The merchandise covered by the investigation is saloon cars and cross-country cars, with cylinder capacity over 2500 cc, under the following headings of the *Import and Export Tariff Code of China*: 87032361, 87032362, 87032369, 87032411, 87032412, 87032419, 87032421, 87032422, 87032429, 87033311, 87033312, 87033319, 87033321, 87033322, 87033329, 87033361, 87033362, 87033369, and 87039000. MOFCOM's AD investigation examined imports during the twelve-month period from September 1, 2008 through August 31, 2009. MOFCOM's material injury analysis examined the condition of the Chinese domestic industry during the period from January 1, 2006 through September 30, 2009.

In the affirmative provisional decision, MOFCOM announced provisional AD and CVD rates as follows:

Mandatory respondents	AD duty	CVD duty
General Motors LLC	9.9%	12.9%
Chrysler Group LLC	8.8%	6.2%
Mercedes-Benz U.S. International, Inc.	2.7%	0%
BMW Manufacturing LLC	2.0%	0%
American Honda Motor Co, Inc.	4.4%	0%

For all other exporters from the United States, MOFCOM assigned the country-wide provisional AD rate of 21.5 percent and CVD rate of 12.9 percent, respectively. However, MOFCOM decided not to impose provisional duties for importing such products; as a result, there will be no retroactive collection of duties.

If MOFCOM makes an affirmative definitive determination and establishes final duty rates for either investigation, any US imports of the subject merchandise will be dutiable based upon the outcome of the final determination. MOFCOM will issue a definitive decision in these two investigations no later than May 6, 2011. Experts note that MOFCOM initiated the case following President Obama's September 11, 2009 decision to impose additional duties for three years on all imports of passenger vehicle and light truck tires from China pursuant to the China-specific safeguard under Section 421 of the 1974 Trade Act.

The official Chinese-language notice can be viewed at:
http://gpj.mofcom.gov.cn/accessory/201104/1301729619904.doc

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Lawmakers Send Letter to USTR Kirk Urging "Rectification" of WTO Ruling on Double-Counting

On April 14, 2011, 22 Republican and Democratic Senators sent a letter to US Trade Representative (USTR) Ron Kirk, expressing concern over the World Trade Organization (WTO) Appellate Body's (AB) March 11, 2011 ruling regarding the application of US countervailing duty (CVD) law to China. In the letter, the lawmakers urge the Obama Administration, under which USTR Kirk works, to ensure that the US CVD law remains fully applicable to China in the future. The letter's signees are Sen. Sherrod Brown (D-OH), Sen. Olympia Snowe (R-ME), Sen. Tom Harkin (D-IA), Sen. Carl Levin (D-MI), Sen. Rob Portman (R-OH), Sen. Debbie Stabenow (D-MI), Sen. Ron Wyden (D-OR), Sen. Jay Rockefeller (D-WV), Sen. Kirsten Gillibrand (D-NY), Sen. Robert P. Casey, Jr. (D-PA), Sen. Ben Cardin (D-MD), Sen. Amy Klobuchar (D-MN), Sen. Al Franken (D-MN), Sen. Jeanne Shaheen (D-NH), Sen. Claire McCaskill (D-MO), Sen. Susan Collins (R-ME), Sen. Joe Manchin (D-WV), Sen. Mark Pryor (D-AR), Sen. Lindsey Graham (R-SC), Sen. Dan Coats (R-IN), Sen. Richard Blumenthal (D-CT), and Sen. Jeff Merkeley (D-OR).

The AB decision which the lawmakers call into question in the letter reverses the WTO Dispute Settlement Body (DSB) Panel's finding in DS379 (*United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*) with respect to "double remedies", *i.e.*, the US Department of Commerce's (DOC) simultaneous application of antidumping (AD) and CVD duties on imports from countries designated as NMEs. The AB reviewed the Panel Report, which assessed a complaint by China over AD and CVD duties imposed on four products from China: i) circular welded carbon quality steel pipe; ii) light-walled rectangular pipe and tube; iii) laminated woven sacks; and iv) certain new pneumatic off-the-road (OTR) tires. In each of these investigations, DOC had treated China as an NME to determine normal value and calculate dumping margins. DOC had also determined in these investigations that China received countervailable subsidies such that DOC also applied CVD duties. The AB found that DOC's practice of applying both AD and CVD rates to respondents in NME proceedings, *i.e.*, double-counting, is inconsistent with Article 19.3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The decision by the AB is consistent with a finding last year by the US Court of International Trade (USCIT) that double-counting violates US trade law.

In the letter, the lawmakers cite and express agreement with USTR Kirk's March 11, 2011 remarks, in which he stated that the AB ruling "appears to be a clear case of overreaching by the Appellate Body." The lawmakers allege that the Chinese government's industrial policies, including a reported USD 1.5 trillion, five-year investment in seven strategic manufacturing industries, makes it such that "it is more important than ever that [US] workers and industries retain the ability to use [CVD laws to] combat subsidies that violate international trade rules."

Experts note that, in light of the AB and USCIT rulings, DOC essentially has four options: i) make no modification to CVD NME methodology and, as a result, accept WTO-sanctioned retaliatory action on the part of China; ii) adopt a different CVD NME methodology that dramatically reduces or eliminates the double counting effect; iii) no longer allow for concurrent AD/CVD investigations of NME imports; or iv) deem China a market economy and thus use standard AD/CVD methodologies in all future cases. Experts further note that deeming China a market economy would administratively be the simplest path forward although DOC would likely face stiff opposition to

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doing so from certain US industries. It therefore remains unclear how DOC will proceed although it is unlikely that the lawmakers' letter will greatly inform its eventual course of action.

DOC Initiates Investigations into Bottom-Mount Refrigerators from Mexico (AD) and Korea (AD/CVD)

On April 19, 2011, the Department of Commerce (DOC) initiated investigations into imports of bottom-mount refrigerators originating in Mexico (AD) and Korea (AD/CVD) and currently falling under the Harmonized Tariff Schedule of the United States subheadings at the 8-digit level 8418.10.0010, 8418.10.0020, 8418.10.0030, 8418.10.0040, 8418.99.4000, 8418.99.8050, 8418.99.8060, 8418.21.0010, 8418.21.0020, 8418.21.0030 and 8418.21.0090.

DOC initiated these AD/CVD investigations in response to a petition filed on March 30, 2011 by Whirlpool Corporation, which provided the following information:

Country	Alleged Dumping Margin (Percent)
Korea	34.16 – 61.82
Mexico	23.10 – 183.18
Country	**Estimated Subsidy Rate (Percent)**
Korea	Above *de minimus*[3]

The US International Trade Commission (ITC) held its preliminary Staff Conference on April 20, 2011. The ITC is expected to issue its preliminary injury determinations on May 16, 2011. If the ITC determines that there is a reasonable indication that imports from Korea and Mexico are materially injuring or otherwise threatening material injury to the domestic industry, the investigations will continue. The DOC will issue its preliminary CVD and AD determinations in June and September 2011, respectively.

[3] less than 1% for developed countries, less than 2% for developing countries

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FREE TRADE AGREEMENTS

United States and Colombia Reach an Agreement on Action Plan to Move US-Colombia FTA

Summary

On April 7, 2011, President Obama and Colombian President Juan Manuel Santos met in Washington, DC where they agreed to pursue an action plan, announced by US Trade Representative (USTR) Ron Kirk on April 6, 2011, to address lingering US concerns over the labor code and violence against organized labor leaders in Colombia, and advance the US-Colombia Trade Promotion Agreement closer to congressional consideration in the United States. The action plan, titled "Leveling the Playing Field: Labor Protections and the US-Colombia Trade Promotion Agreement," details the steps Colombia will take to address US concerns and deadlines for undertaking these steps in order to clear the way for President Obama to submit the Agreement's implementing legislation to Congress. The timeline for the Obama Administration to do so remains unclear.

Analysis

I. ACTION PLAN AND DEADLINES

The action plan lists the steps Colombia will take to address US concerns over the labor code and violence against organized labor leaders in Colombia, and presents a timeline for Colombia to undertake these steps. While the action plan contains specific deadlines to be met by Colombia, it offers no timeline for the Obama Administration to draft the US-Colombia Trade Promotion Agreement's implementing legislation and submit the same to Congress.

<u>Anti-Union Violence</u>

With respect to preventing violence against organized labor leaders and prosecuting the perpetrators of violence against them, Colombia made commitments in the following areas:

- **Protection Program.** By April 22, 2011, dramatically expand the scope of its existing protection program for union leaders to provide protection for labor activists;
- **Risk Assessment.** By July 30, 2011, eliminate the backlog of risk assessments for union members who have requested protection and ensure that the Colombian police force will process all risk assessments within 30 days;
- **Teacher Relocation.** By April 22, 2011, revise the teacher relocation and protection program to address the high risks faced by teachers, and commit to working with the US government to ensure that the program is effective;

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- **Criminal Code Reform.** By June 15, 2011, enact a reform of the Criminal Code to criminalize and penalize actions or threats that could adversely affect fundamental workers' rights;

- **Prosecution.** By December 2011, in order to address the backlog of cases and speed up prosecutions, direct the Colombian police force to assign 95 full-time judicial police investigators to support prosecutors handling cases of crimes against union members ; and

- **Capacity Building.** By May 20, 2011, develop a plan to strengthen the capacity and number of prosecutors and judicial police investigators in regional offices.

Additionally, Colombia has agreed to other related efforts such as: i) improving the detection of anti-union crime; ii) re-opening investigations into past anti-union homicides; iii) cooperating with US Departments of Justice and Labor to develop training programs for police officers and prosecutors; and iv) establishing closer collaboration with Colombian organized labor unions to accelerate action on outstanding labor violence cases.

Workers' Rights

With respect to protecting workers' rights, Colombia has made commitments in the following areas:

- **Cooperative Misuse.** Move to June 2011 (from July 2013) the effective date of certain legal provisions in the Colombian labor code to prohibit the misuse of cooperatives and other employment relationships that undermine workers' rights;

- **Cooperatives Law.** By June 15, 2011, issue regulations to implement the 2010 Cooperatives Law;

- **Labor Inspection.** By the end of 2011, hire 100 new labor inspectors with an additional 380 inspectors to be hired subsequently to enforce the Colombian labor code;

- **Preventive Inspections.** By the end of 2012, commence preventive labor inspections in such priority sectors as palm oil, sugar, mines, ports and flowers;

- **Outreach.** By June 2011, establish an outreach program to inform workers of their rights under the relevant laws and the legal remedies available to them;

- **Temporary Hires.** By June 15, 2011, improve inspection and labor code enforcement to prevent the use of temporary service agencies to circumvent workers' rights; and

- **Collective Pacts.** By June 15, 2011, amend the Colombian criminal code to make it a crime to offer a collective pact to non-union workers that is superior to terms extended to unionized workers.

According to the action plan, Colombia has agreed to seek the advice and assistance of the International Labor Organization (ILO) to implement and enforce the measures on workers' rights.

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II. REACTION

USTR's April 6, 2011 announcement drew generally positive reactions from various congressional, industry and trade observers, although not all reactions from observers were supportive. Reaction can be summarized as follows:

- **Rep. Dave Camp (R-MI).** Rep. Camp, Chairman of the House Ways and Means Committee, stated that he was "very encouraged by today's announcement" and acknowledged that it was a "major step forward." In reiterating his long-held stance of moving all three pending FTAs by July 1st, Rep. Camp called for the Administration "to continue pressing ahead, such as by beginning the technical drafting work with [Congress] on the implementing bill." Rep. Camp noted the urgency of the FTA by stating that, until the trade agreement is implemented, US exporters and workers "will continue to fall behind their competitors in countries that already have trade agreements with Colombia";

- **Sen. Max Baucus (D-MT).** Sen. Baucus, Chairman of the Senate Finance Committee, "hailed" the announcement made by USTR and stressed the importance the FTA has on US exports which he estimates will increase by more than $1 billion annually. Sen. Baucus, a long-time supporter of the US-Colombia FTA who recently met with Colombian labor leaders in Bogotá, Colombia, noted that the announcement will "reverse the steady loss of market share that US agricultural products and manufactured goods have suffered while this agreement languished." In an effort to move the agreement as quickly as possible, Sen. Baucus called for the Administration to immediately begin working with Congress on drafting the implementing legislation of the agreement so that the President "can submit and Congress can approve the agreement in the coming months";

- **Rep. Kevin Brady (R-TX).** Rep. Brady, Chairman of the House Ways and Means Trade Subcomimittee, welcomed the "Administration's success in reaching this agreement with Colombia" and noted its potential for the creation of US jobs as well as the strengthening of US national security. Rep. Brady also reiterated his long-held position that all three pending FTAs be submitted to Congress for consideration by July 1, 2011;

- **Rep. John Boehner (R-OH).** Rep. Boehner, Speaker of the House, asserted that Colombia is one of the United States' "strongest allies" in South America and stated that it is a "long-overdue trade pact." Rep. Boehner also noted his desire "to implement all three pending trade agreements […] in tandem with one another as soon as possible";

- **Rep. Sander Levin (D-MI).** Rep. Levin, Ranking Member of the House Ways and Means Committee, noted that while "a number of important commitments" have been achieved by the Administration, "more work needs to be done." Two areas highlighted by Rep. Levin included the "need to more clearly spell out how regulations will be changed by June 15 to end the widespread use of so-called cooperatives" as well as the need "to be certain that the way the issue of essential services is addressed will truly remedy the defects cited in the State Department and International Labor Organization (ILO) reports." Rep. Levin noted his recent meeting with President Juan Manuel Santos in Colombia in which the President "expressed his commitment and willingness to address these long-standing outstanding issues." Rep. Levin further noted that this "active process allows us to provide oversight, to understand the changes as they are made, evaluate progress and short-comings and to highlight their importance to real workers' rights in Colombia";

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- **Sen. Orrin Hatch (R-UT).** Senator Hatch, Ranking Member of the Senate Finance Committee, stated that while "long overdue and despite unreasonable delay, [the] announcement by the Administration is welome news." In order to "preserve our role as the single greateset economy in the world," Sen. Hatch noted that the Administration and Congress must now start the necessary work to prepare all three trade agreements in tandem for Congressional consideration;

- **Rep. Eric Cantor (R-VA).** Representative Cantor, House Majority Leader, welcomed the announcement and noted that the FTA has been "long-awaited." Rep. Cantor expressed hope "that the Obama Administration acknowledges the bipartisan support in Congress and works to quickly […] finalize the pending trade agremeements." In noting that trade is "critical to our nation's economic growth," Representative Cantor stated that trade is "an essential element of House Republicans' economic growth agenda to allow businesses to expand, compete and lead at home and abroad";

- **US Chamber of Commerce.** The US Chamber of Commerce "applauded today's announcement" and noted that "Presidents Obama and Santos showed courage and pragmatism in striking this accord." The Chamber indicated that the announcement "proved the United States can still lead on trade" and committed to working closely with both the Obama Administration and Congress to "secure approval of the three pending free trade agreements in the weeks ahead";

- **National Association of Manufacturers (NAM).** The NAM noted its appreciation of the efforts of President Obama and USTR Kirk to work closely with the Colombian government to resolve outstanding issues and stated that it "stand[s] ready to work with the Administration and Congress to pass" all three pending trade agreements. The NAM also stated that it is "concerned that it has taken nearly 28 months for the Administration to move on this agreement. We cannot continue to stand on the sidelines and lose market share and our competitive advantage";

- **National Foreign Trade Council (NFTC).** The NFTC "applauded" the work done by US and Colombian negotiators to resolve outstanding issues surround the US-Colombia FTA. The NFTC noted that "Colombia has long been a vitally important strategic ally in the region" and stated that the implementation of the FTA will "further strengthen our longstanding bilateral economic ties and help to promote export growth and job creation." In noting that the announcement was a "milestone," the NFTC stated that it will "look forward to working with Congress to ratify the FTA as soon as possible";

- **US Wheat Associates.** The US Wheat Associates noted that they were "very pleased" with USTR's announcement and stated that it is a "critical step toward being able to compete on a level playing field in one of the largest wheat markets in South Ameirca. Without this FTA, US wheat farmers face a potential loss of sales currently valued at about $100 million per year." The Associates cautioned that "[t]here is more work to be done," including "several months" between the time the agreement is eventually signed and the time it is implemented;

- **Rep. Mike Michaud (D-ME).** Rep. Michaud, Chairman of the House Trade Working Group, noted that he was "appalled that the Obama Administration is putting forward this action plan as the answer to Colombia's rampant human rights and labor rights violations." Rep. Michaud continued that the plan is "simply a way for the Administration to seek political cover as they push this flawed agreement." While supporting some of its

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objectives, Rep. Michaud stated that it is "absurd to think that just passing a law or developing a plan will protect Colombians' basic human and worker rights." Rep. Michaud indicated that "without a mechanism of enforcing these benchmarks or a plan to maintain dialogue with victims in Colombia, this action plan will not be worth the paper it's printed on"; and

- **American Federation of Labor – Congress of Industrial Organization (AFL-CIO).** The AFL-CIO noted that it was "deeply disappointed" with the announcement of moving the US-Colombia FTA forward. The AFL-CIO stated that "the situation in Colombia remains unacceptably violent for trade unionists, as well as for human rights defenders and other vulnerable populations." While expressing appreciation of the Administration's efforts, the organization noted that "the Action Plan does not go nearly far enough in laying out concrete benchmarks for progress" in problematic areas. Further, the AFL-CIO stated that because the "Action Plan is a stand-alone agreement" and not connected to the FTA, the United States will "have no leverage whatsoever to enforce its terms in the event that the terms are not implemented as agreed." The AFL-CIO noted that "deeply ingrained and longstanding" problems "cannot be solved by commitments on a piece of paper" and indicated that "concrete progress on the ground" must be demonstrated over a sustained period; as a result, the AFL-CIO expressed its stance that it is "strongly opposed" to the US-Colombia FTA;

Outlook

Although congressional Republicans as well as much of the US business community laud the announcement on the action plan, the mere existence of it does not mean that the Agreement with Colombia will be submitted to Congress, approved in the same and enter into force in the near-term. Experts note that, while the action plan is a concrete list of benchmarks for Colombia to meet in order to allay US concerns over the labor code and anti-union violence, it raises questions as to what will happen if, before the Obama Administration submits the Agreement's implementing language to Congress, Colombia does not meet the corresponding benchmarks to the satisfaction of US Democratic lawmakers or US organized labor. Also, while the action plan puts forth specific dates by which Colombia will need to have taken certain measures, it contains no such specificity as to when the Obama Administration will commit to submitting the implementing language for congressional consideration. Furthermore, experts point out that USTR Kirk, in announcing the action plan, stated that the plan merely puts the Obama Administration in a position to engage in discussions with Congress but he did not say that the action plan bound the Obama Administration to any specific timeframe for moving the Agreement toward congressional approval. Nonetheless, USTR Kirk noted in his announcementthat his statement, made in testimony before the Senate Committee on Finance on March 9, 2011, that the Obama Administration is working to see the Agreement with Colombia passed in Congress before the end of 2011 remains true.

Congressional Republicans and some congressional Democrats, for their part, continue to urge President Obama to submit the implementing language for all three pending FTAs (US-Korea, US-Colombia and US-Panama FTAs) to Congress before mid-2011. However, experts remain divided as to whether the Agreement with Colombia may still be considered in Congress under Trade Promotion Authority (TPA or "Fast Track") procedural rules, whereby Congress votes up or down on the Agreement's implementing legislation on a limited timetable but may not amend the bill's language. Although the three pending FTAs were negotiated under TPA rules, a rule change in the House in 2008 stripped the Agreement with Colombia of its TPA language. Nonetheless, experts opine that Republicans, who enjoy majority-control of the House, would likely reinstate TPA for the US-

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Colombia FTA, and the Senate, although majority-controlled by Democrats, would likely do the same in light of recent remarks on the part of Senate Finance Committee Chairman Sen. Max Baucus (D-MT) and Ranking Member Sen. Orrin Hatch (R-UT), both of whom see the Agreement with Colombia as a boon for the US economy.

US Announces Proposal for Initiation of US-Mexico Cross-Border Long-Haul Trucking Pilot Program

Summary

On April 13, 2011, the Department of Transportation (DOT) released a Federal Register Notice seeking comments on its proposal for the initiation of the United States-Mexico cross-border long-haul trucking pilot program. The proposal, which permits Mexico-domiciled motor carriers ("Mexican trucks") to operate within the United States for up to three years, is an effort to fully implement the North American Free Trade Agreement (NAFTA) cross-border long-haul trucking provisions. According to the proposal, the focus of the program is to "test and demonstrate the ability of Mexico-based motor carriers to operate safely in the United States beyond the municipalities and commercial zones along the United States-Mexico border." The pilot program would also give reciprocal right to US-domiciled motor carriers ("US trucks") to operate in Mexico for the same period. The public has 30 days, or until May 13, 2011, to submit comments to DOT on the proposed pilot program.

Analysis

I. BACKGROUND

Articles 1108 and 1206 of NAFTA, as well Annex I ("Reservations for Existing Measures and Liberalization Commitments") provide for the liberalization of cargo trucking services in US and Mexican border states by December 18, 1995 with such liberalization intended to encompass the entire territories of both countries by January 1, 2000. With the exception of the period between April 27, 2007 and March 11, 2009 when the US and Mexican Governments collaborated on the implementation of a pilot cross-border trucking program that allowed a limited number of Mexican trucking companies access to US territory, the United States has not fulfilled its obligations under NAFTA pertaining to granting national and/or most favored nation (MFN) treatment to Mexican firms engaged in cross-border transport of cargo.

In response to the United States' alleged failure to fulfill its NAFTA obligations, Mexico's Secretary of Economy (SE) published on March 18, 2009 a list of 89 US goods on which Mexico would impose retaliatory import duties in accordance with Article 2019 of NAFTA, which permits the complaining party (Mexico) in a dispute (in this instance, cross-border transport of cargo) to suspend benefits (*e.g.*, market access at preferential import tariff rates) until both the United States and Mexico reach an agreement on the resolution of the dispute. To date, these retaliatory tariffs remain in effect although SE periodically changes the list of US goods on which import duties are applied.

A DOT fact sheet released with the recent pilot program proposal indicates that Mexico has agreed to suspend 50 percent of its retaliatory tariffs when a final agreement for the pilot program is signed and the remaining 50

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percent of the tariffs will be removed when DOT approves the first Mexican company for participation in the program.

II. PILOT PROGRAM SPECIFICS

The proposed pilot program features a number of procedures and regulations which DOT intends to analyze in order to determine the safety of Mexican trucks, including:

A. STAGES

- **Stage 1.** The first stage of the proposed program would commence upon the issuance of a provisional operating authority. The application process for a provisional operating authority includes, among other things, completion of a 28-page application, completion of up to 35 safety and compliance certifications and payment of appropriate fees, as applicable. Applicants must also pass a security screening conducted by the Department of Homeland Security as well as complete a Pre-Authorization Safety Audit (PASA) which reviews the carrier's safety management systems. Upon successful completion of the foregoing, DOT will approve the application for operating authority and publish a summary of the application online at DOT's website. Stage 1 requires that all Mexican trucks be inspected each time they enter the United States for a period of at least three months;

- **Stage 2.** After a minimum of three months of operations in Stage 1, DOT will perform an evaluation of the Mexican trucks' performance in that stage and, contingent upon a favorable finding for the Mexican carrier, will permit the Mexican motor carrier to proceed to Stage 2. In this stage, Mexican trucks will be inspected at a rate that is comparable to the inspection rates of other Mexican vehicles crossing the US-Mexico border. During Stage 2, DOT will also monitor the motor carrier's safety data in order to ensure the truck is operating safely. Within 18 months of the issuance of the provisional operating authority to a Mexican motor carrier, DOT will conduct a compliance review of the motor carrier. If a satisfactory safety rating is given and there is no pending enforcement or safety improvement actions and the carrier has been operating under its provisional operating authority for at least 18 months, the motor carrier's provisional operating authority will become permanent. If a less than satisfactory rating is given, DOT will take action to suspend and/or revoke the Mexican motor carrier's operating authority; and

- **Stage 3.** The final stage requires that Mexican trucks continue to operate in compliance with the Federal Motor Carrier Safety Regulations as well as with all provisions of the pilot program.

B. REQUIREMENTS

- **Inspections**. Ongoing training and guidance would be provided to Federal and State auditors, inspectors, and investigators in order to ensure complete understanding of the pilot program. Specifically, these individuals would be screening for, among other things:

    - Valid Licenses;

    - Liability Insurance;

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- Emission Control Label;
- Electronic Monitoring Device;
- Commercial Vehicle Safety Alliance (CVSA) Safety Decal; and
- Federal Motor Vehicle Safety Standard (FMVSS) Certification.

- **Monitoring.** The proposed pilot program would include electronic data collection and analysis. All information collected from inspections, field monitoring and other activities would be entered into an electronic database on DOT's website and would be made available for public review. DOT would use this information to identify potential compliance and safety issues. The website would also contain PASAs, participating carriers, vehicles approved and results of roadside inspections.

C. ACCEPTANCE OF MEXICAN LAWS

DOT has identified three areas in which it will accept Mexican regulations as being equivalent to US regulations for the proposed pilot program, including:

- **Mexican Commercial Driver's Licenses (CDL).** According to DOT, the Federal Highway Administrator has determined that Mexican CDLs were equivalent to the standards of the US regulations. In noting Mexico's "rigorous requirements for knowledge and skills testing that are similar to those in the United States," DOT cites Mexico's requirements to partake in training in advance of testing and requires further training upon each license renewal;

- **Physical Examinations and Drug Testing.** DOT indicates that the United States and Mexico have equivalent procedures for conducting physical examinations and drug testing. Specifically, DOT states that it has examined the "Mexican medical fitness for duty requirements and has found that the Mexican physical qualification regulations are more prescriptive, detailed, and stricter than those in the United States." One area of difference between Mexican and US standards, as noted by DOT, involves vision: Mexico requires vision tests for red only while the US tests for at least red, green, and yellow. When "taken as a whole," however, DOT "believes that […] Mexico's medical regulations are comparable to those in the United States, and provide a level of safety at least equivalent to the US regulations;" and

- **Controlled Substance Testing**. According to the proposed pilot program, "DOT and SCT [Mexico's Transport and Communications Ministry] have implemented a MOU [Memorandum of Understanding], under which Mexico has agreed to collect drug testing specimens using US specimen collection procedures, including chain of custody requirements, and US collection forms to ensure the integrity of the sample." While the samples are permitted to be collected in Mexico, DOT states that they would be tested at certified laboratories in the United States.

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D. PROGRAM TARGETS AND EVALUATION

DOT estimates that participating carriers will perform, on average, one long-haul border crossing per week per truck, and further estimates that each carrier will have, on average, two trucks participating in the program. Based on these estimations, DOT calculates that at least 46 carriers must participate in the program in order for the target of 4,100 inspections to be met within three years. DOT notes that it is difficult to estimate exactly how many carriers will participate in the program and cites the 2007 demonstration project as evidence, which featured 775 initial applicants with only 20 (4 percent) completing all of the required paperwork and passing the required vetting process.

Because the pilot program is aimed at evaluating the safety performance of Mexican trucks (measured in terms of violations assessed as a result of inspections), DOT indicates that it will "test the 'null hypothesis' that Mexico-domiciled carriers that may take future advantage of NAFTA's cross-border long-haul provisions will perform as well or better than the average carrier domiciled in the United States." Based on the data collected from the pilot program, DOT will either reject or not reject the null hypothesis (rejecting it would mean that the collected data indicates that Mexican trucks would perform worse that the average US trucks).

III. REACTION

The announcement of the proposed pilot program was met with mixed reactions from members of Congress, as well as industry and trade observers. Reaction can be summarized as follows:

- **Sen. Michael Bennet (D-CO).** Senator Bennet, whose constituents heavily export dairy, pork and potatoes to Mexico, noted that "[t]oday's announcement is encouraging and brings us one step closer to resolving an international trade dispute that has come at the expense of our agricultural producers." Senator Bennet continued by noting that "Mexico is Colorado's largest agricultural trading partner so resolving this issue is key for rural Colorado's economy;"

- **National Association of Manufacturers (NAM).** NAM stated that the proposed pilot program is a "very welcome development and one that is overdue." In noting the loss of market share in Mexico to manufactures in Brazil, Canada, China, Japan, and others, NAM indicated that "[t]he loss of exports to our second largest trading partner as a result of the tariff retaliation by Mexico forced manufactures in America to cut production and lay off workers;"

- **International Brotherhood of Teamsters (IBT).** IBT cited Mexico's "drug violence" and stated that "[a] government's first duty is to protect its citizens. Unfortunately, DOT is failing miserably in that responsibility." IBT concluded that "[t]his proposal threatens the jobs of thousands of American truck drivers and warehouse workers along the border;" and

- **Owner-Operator Independent Drivers Association (OOIDA).** OOIDA asserted that "[t]his is the wrong plan at the wrong time." Citing concerns over equivalency of regulatory regimes for the trucking industry and drivers, OOIDA states that the "[t]he onus in on Mexico to raise the safety, security and environmental standards for their trucking industry." OOIDA claimed that the proposal is "irresponsible and reckless. The [Obama] Administration must reconsider or Congress must step in again to force them to do the right thing."

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Outlook

With DOT's proposal of its trucking pilot program focusing on assessing the safety of Mexican trucks, many stringent requirements have been proposed for participating Mexican motor carriers. In addition to the various applications and certifications that Mexican motor carriers must obtain, the proposed program also requires Mexican trucks to be equipped with an electronic monitoring device which must be "operational" throughout the duration of the pilot program. Another stringent requirement is that participating Mexican drivers must be able to "read and speak the English language sufficiently to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records required" by DOT. The proposed pilot program indicates that in order to enforce such a requirement, DOT will conduct an English Language Proficiency assessment. As DOT noted in its proposal, the 2007 demonstration project realized only a 4 percent completion rate of those initial 775 applicants, and these strict requirements for Mexican motor carriers may further factor into whether a specific Mexican company or individual decides to join this pilot program.

Although the proposed pilot program, if initiated, would lead to the United States complying with its obligations under NAFTA, there remains, as expected, a sharp divide between those who support the proposal and those who oppose it. On one side, pro-free trade lawmakers and industry representatives support the proposed program as it would eventually lead to the elimination of the retaliatory tariffs levied on US exports to Mexico. In contrast, US organized labor is generally unsupportive of the proposal, considering it an attack on US jobs and a threat to US highway safety.

Trade observers note the significance of the timing on the release of the proposal, which was done with the 2012 US Presidential elections less than two years away and in spite of the well-known fact that the powerful and influential International Brotherhood of Teamsters (IBT) labor union would vehemently oppose a program allowing Mexican trucks into the United States. The IBT, which represents 1.4 million individuals in the United States, Canada and Puerto Rico, has long provided the narrative that Mexican trucks have subpar vehicular safety standards despite statistics computed as part of the Bush-era pilot program which showed that, to the contrary, Mexican trucks were safer than their US counterparts. With the IBT's assertion of pressure on the successive Clinton, Bush, and Obama Administrations, trade observers note that the release of the proposed pilot program under the Obama Administration could prove troublesome for President Obama's re-election campaign.

DOT has indicated that it will likely take about 30 days to review public comments and finalize and publish the description of the final program in the Federal Register. Once the final notice is published, DOT estimates that it will take about 60 days to complete the processing of a Mexican company and grant it authority for long-haul transportation in the United States, thereby beginning the pilot program and eliminating the last 50 percent of the tariffs currently imposed on US exports to Mexico.

Comments on the proposed pilot program are due by May 13, 2011.

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US Proposes Environmental Provisions on Illicitly Harvested Wildlife and Lumber and on Fishery Subsidies

From March 28-April 1, 2011, Trans-Pacific Partnership (TPP) member countries held the sixth round of negotiations in Singapore, during which the United States proposed language on environmental standards and enforcement provisions. The proposal establishes binding commitments for TPP member countries to combat trade in illicitly harvested wildlife (including fish) and lumber. The proposal also includes language requiring TPP countries to reduce fishing subsidies that, according to USTR, contribute to overfishing.

Although the United States has not tabled an entire environmental chapter, US Trade Representative (USTR) officials envision that the proposal on environmental standards and enforcement provisions will constitute a cornerstone of what the United States will eventually propose in this area. USTR officials note the following:

- **Illicit trade in wildlife.** The US proposal aims to maintain measures banning trade in wildlife obtained illegally in the country of harvest. The proposal does not require TPP countries to pass laws resembling the US Lacey Act but, rather, provides for countries to determine the best way to implement such measures;

- **Illicit logging.** The US proposal aims to increase cooperation among the TPP members with respect to information sharing and enforcement of timber-related legislation;

- **Fishery subsidies.** The US proposal aims to require that TPP members not maintain programs that contribute to overfishing, particularly in the case of overfished stocks. Given that establishing a single definition for "overfished" has been troublesome for negotiators on fishery subsidies in the World Trade Organization (WTO) Doha Development Round, the US proposal reportedly provides for TPP members to individually determine which stocks are overfished.

The Obama Administration has, on repeated occasions, signaled that any future free trade agreement (FTA) into which the United States enters must have strong provisions on environmental protection (as well as on labor standards). Critics note, however, that achieving consensus on these provisions among the TPP members, particularly in regard to the least developed, will likely prove difficult in the remaining negotiating rounds. Furthermore, according to experts, reaching consensus on environmental provisions will be far easier than reaching consensus on more difficult areas such as intellectual property rights (IPR), investment, labor, market access, technical barriers to trade (TBT) and the so-called "horizontal issues", including competitiveness, business facilitation, regulatory coherence and small and medium enterprise (SME). These experts further note that, due to slower-than-expected progress on some of the above-mentioned areas over the past few negotiating rounds, US officials have gradually modified their rhetoric in the recent months toward indicating that the TPP will not be concluded by the November 2011 Asia-Pacific Economic Cooperation (APEC) summit in Hawaii but, rather, that the TPP members now aim to achieve a "framework agreement" by that date. It remains unclear, however, what this "framework agreement" will entail.

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USTR Announces Way Forward on US-Panama FTA; Movement on Pending FTAs to Dislodge US Trade Policy

On April 18, 2011, US Trade Representative (USTR) Ron Kirk sent a letter to Senate Committee on Finance Chairman Sen. Max Baucus (D-MT) and Ranking Member Sen. Orrin Hatch (R-UT) as well as to House Committee on Ways and Means Chairman Rep. Dave Camp (R-MI) and Ranking Member Rep. Sander Levin (D-MI), announcing that Panama has fulfilled the commitments that the Obama Administration deemed necessary in order for USTR to begin technical discussions with members of Congress on the US-Panama Free Trade Agreement's (FTA) draft implementing bill and draft Statement of Administrative Action.

The Panamanian National Assembly approved a Tax Information Exchange Agreement (TIEA) on April 13, 2011, which largely addressed allegations that Panama has encouraged tax-haven activities in the past. According to Deputy USTR Miriam Sapiro, the final passage in the Panamanian legislature of the TIEA was the last remaining step that Panama needed to take in order for the Obama Administration to submit the US-Panama FTA for congressional consideration in the United States. Panamanian President Ricardo Martinelli has yet to enact the TIEA into law although experts opine that he will have done so before meeting with President Obama on April 28, 2011 in Washington, DC to discuss the next steps in regard to the US-Panama FTA.

In the first four months of the 112th Congress, US trade policy has been largely held captive to the uncertainty surrounding the three pending FTAs with Korea, Colombia and Panama. Republicans, who enjoy majority-control in the House, unofficially made clear that little would be done with US trade policy, including US preference programs (Generalized System of Preferences (GSP) and the Andean Trade Promotion and Drug Eradication Act (ATPDEA)), Trade Adjustment Assistance (TAA) and trade-related appointments, until the Obama Administration made substantive progress on moving the pending FTAs toward congressional consideration. Democrats, who still retain majority-control of the Senate, and the Obama Administration seemed unwilling to move forward on the pending FTAs without assurances from congressional Republicans that a bolstered TAA would be approved in exchange thus creating a deadlock on US trade policy.

Although a satisfactory agreement was reached on the US-Korea FTA in December 2010, the implementing legislation has yet to be drafted and submitted to Congress. In regard to the US-Colombia FTA, experts note that the prospects for its eventual submission to Congress seemed grim until the April, 7, 2011 announcement that the Obama Administration and Colombian trade officials had devised an action plan to address lingering issues related to violence against organized labor leaders, although it remains unclear whether this action plan will suffice in muting strong opposition from US organized labor to the Agreement. With the TIEA now in hand and the US-Panama FTA ready for congressional consideration in the United States, experts note that the prospects for advances with US trade policy seem brighter than they did in February or March 2011 given that passage of the pending FTAs would likely break the deadlock in Congress on the rest of the trade-related measures, *e.g.*, GSP, ATPDEA and TAA. Despite recent optimism surrounding the three FTAs and the Obama Administration's express willingness to work with Congress and submit to it the FTAs' implementing language, however, there is no guarantee that the Agreements will be approved and enter into force in the near-term. US organized labor largely remains opposed to the US-Colombia FTA and only nominally tolerant of the Agreements with Korea and Panama. In addition, the Trade Promotion Authority (TPA) procedures related to the agreements with Korea and Colombia are unclear, and there remain many unknowns surrounding the implementation of the anti-union

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violence action plan with respect to the US-Colombia FTA. Given these potential complications, it is premature to say at this time that the three FTAs have a clear path toward passage and entrance into force.

Korean Parliament Revokes KORUS Ratification Bill Over Translation Errors in Text; USTR Engages Congress in KORUS FTA Technical Discussions

On April 28, 2011, the Korean National Assembly agreed to revoke the ratification bill for the US-Korea Free Trade Agreement (KORUS FTA) due to translation errors in the Korean-language version of the FTA text.

At the beginning of March 2011, Korea's Foreign Affairs, Trade and Unification Committee at the National Assembly highlighted several errors in the EU-Korea FTA. As a result, it sought public assistance in proofreading the Korean-language version of the KORUS FTA. The public review, which took place from April 15-28, 2011, uncovered several errors in the Korean-language version of the KORUS FTA, resulting in the National Assembly's consensual decision to revoke the ratification bill. Instead, the Korean Ministry of Trade will re-submit a new bill to the National Assembly in May 2011 for it to be considered as early as June 2011 when the National Assembly reconvenes from recess. Experts opine that the withdrawal of the ratification bill will not likely suppose a problem for its eventual passage in Korea and that, if the Korean Ministry of Trade is able to address all translation issues, the KORUS FTA will likely be approved by the Korean National Assembly by July 1, 2011.

In the United States, the US Trade Representative (USTR), which operates at the behest of the Obama Administration, notified the US Congress on March 7, 2011 that it was ready to engage in technical discussions on the KORUS FTA implementing language although it remains unclear when USTR will conclude this process and the Obama Administration will formally submit this implementing language for congressional consideration. Experts note, however, that the Obama Administration is aware of that the EU-Korea FTA is expected to enter into force in July 2011 and is, therefore, aiming to submit to Congress the KORUS FTA implementing language shortly in order to ensure that it enters into force before or, at least, concurrently with the EU-Korea FTA. Notwithstanding, uncertainties remain as to how the Obama Administration will sidestep the unclear legality of submitting the KORUS FTA's implementing language under Trade Promotion Authority[4] (TPA) procedural rules in light of that the United States and Korea accorded the December 3, 2010 supplemental agreement on automobiles after TPA expired. Experts note that the Obama Administration is exploring several different ways in which to submit KORUS FTA's implementing language, incorporating the December 3, 2010 supplemental agreement, without the bill losing eligibility to be considered under TPA procedural rules, although it cannot be ruled out that the bill, once introduced, could face delays due to these TPA-related uncertainties.

[4] Trade Promotion Authority (TPA) imposes strict disciplines - including set timelines and a prohibition on amendments - on congressional consideration of a US trade agreement's implementing legislation

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MULTILATERAL

Multilateral Highlights

WTO Panel Sides with European Communities in Aircraft Dispute; Both Parties Expected to Appeal

On March 31, 2011, a World Trade Organization (WTO) Dispute Settlement Body (DSB) panel circulated to members its report (United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint (DS353)), largely siding with European Community (EC) claims that US aircraft producer Boeing received subsidies in violation of the WTO Agreement on Subsidies and Countervailing Measures (ASCM). While rejecting some of EC's claims, the panel report found that these subsidies caused European aircraft producer Airbus to suffer lost sales, price suppression and displacement from third party markets.

Estimating that the total amount of the alleged US subsidies afforded to Boeing was USD 19.1 billion between 1989 and 2006, the EC requested the establishment of a Panel on January 20, 2006. It claimed that the following ten categories of measures constituted ASCM-inconsistent subsidies to Boeing's large civil aircraft division:

- Various tax and non-tax incentives provided by the State of Washington and the city of Everett, WA in connection with the location of the 787 assembly facility;

- Property and sales tax breaks provided by the City of Wichita, KS and interest payments provided by the State of Kansas on State Development Bonds;

- Tax and non-tax incentives provided by the State of Illinois, the City of Chicago, IL and Cook County (IL) in connection with the relocation of Boeing's headquarters;

- Payments and access to government facilities, equipment and employees provided to Boeing by the National Aeronautics and Space Administration (NASA) pursuant to research and development (R&D) contracts and agreements entered into under NASA aeronautics R&D programs;

- Payments and access to government facilities, equipment and employees provided to Boeing by the US Department of Defense (DOD) pursuant to R&D contracts and agreements entered into under DOD Research, Development, Testing and Evaluation programs;

- Payments and access to government facilities, equipment and employees provided by the US Department of Commerce (DOC) to joint ventures/consortia in which Boeing participated under the Advanced Technology Program (ATP);

- Waivers and transfers of intellectual property rights (IPR) by NASA and DOD to Boeing;

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- Reimbursements given to Boeing by NASA and DOD for R&D and costs associated with bid and proposal and worker training; and

- Tax breaks related to Foreign Sales Corporations (FSC) and the Extraterritorial Income Exclusion Act (ETI).

The DSB established a panel on February 17, 2006 and, on November 22, 2006, the panel was composed with Australia, Brazil, Canada, China, Japan and Korea reserving third-party rights.

While the panel report found that all of the NASA R&D and FSC/ETI measures contravened the ASCM, the panel report found that only some of the measures implemented by the states of Washington, Kansas, Illinois and municipalities therein and only some of the DOD R&D measures violate the ASCM. The panel report also asserts that the FSC/ETI subsidies constituted prohibited export subsidies.

With the exception of the FSC/ETI subsidies, the panel report recommended that the United States "take appropriate steps to remove the adverse effects or withdraw the subsidy." The panel report made no such recommendations on the FSC/ETI measures as previous DSB rulings have done so.

Sources note that both the United States and European Commission are likely to appeal. According to these sources, the EC appeal will not reflect any discontent with the panel report's findings, but will aim to narrow the time gap between the expected US appeal of DS353 and the appeals process in DS316 (European Communities — Measures Affecting Trade in Large Civil Aircraft), in which the United States is claiming that Airbus received significant government subsidies in the form of preferential "launch loans." The EC claims that the long time gap between the two cases makes it impossible for the United States and EC to reach a negotiated settlement over the subsidies that each party alleges the other provided for the development of large civil aircraft.

WTO Director-General Lamy Warns that WTO Members Risk Failure to Achieve Necessary Breakthrough in Doha Round by Easter

On March 29, 2011, World Trade Organization (WTO) Director-General (DG) Pascal Lamy chaired an informal meeting of the WTO Trade Negotiations Committee (TNC), where he assessed the current state of play and discussed next steps in the ongoing negotiations under the WTO Doha Round. On this occasion, DG Lamy recalled that, in view of their collective objective to conclude the Round by the end of 2011, WTO members had agreed to produce by the Easter weekend (April 24-25, 2011) revised draft texts that capture progress in all areas. DG Lamy added that these texts are a "necessary and logical step" in the negotiating process as they will serve the "fundamental objectives" of:

- Providing an across-the-board picture of the gaps that will need to be addressed in the end game, which will in turn allow, for the first time in the Round, an evaluation in all areas at the same time; and

- Providing, through the mentioned across-the-board evaluation, a tool to move into a more horizontal phase in the negotiations where "key obstacles are crystallized and remaining trade-offs identified".

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However, commenting on the state of play in the negotiations, DG Lamy warned that WTO members are currently “not on target” to deliver the revised draft texts by Easter as both the bilateral and plurilateral discussions on market access have reached an impasse and substantive gaps remain outstanding. DG Lamy specified that, at present, the negotiations on sectorals for non-agricultural market access (“NAMA sectorals”)[5] are the main obstacle preventing progress on the remaining market access issues, while there are also market access-related problems with regard to agriculture and, to a larger extent, services.

As for next steps, DG Lamy noted that he would, in the two weeks following April 4, 2011, consult with a number of WTO members privately in order to better understand the size of the gaps on NAMA. Following these consultations, DG Lamy will report to the full WTO membership and decide jointly, “on the basis of an across-the board-review of progress in all areas in the negotiation”, on what should be the next steps. In this regard, DG Lamy highlighted the need for a “spirit of give and take” across all areas, and urged those WTO members “who bear the largest responsibility in the system” to reflect on the consequences of failure for the world economy, the development prospects of WTO members, and the multilateral trading system.

Despite DG Lamy’s efforts to close gaps among members, experts remain divided as to whether this current impasse effectively signals the demise of the Round. The window of opportunity to make progress in 2011 is, according to experts, running out and negotiating members have largely ruled out the possibility of making progress in 2012 due to a difficult political climate, *e.g.*, presidential elections in such countries as the United States, France and India, three countries whose positions on agriculture and NAMA are commonly characterized as irreconcilable. Experts note that, in particular, the Obama Administration may be reluctant to make concessions in an election year with an economic climate in which, due to the still poor performance of the US job market, many voters are already free trade-skeptics. Furthermore, US officials have reiterated on several occasions that the United States will not support a deal that does not deliver improved market access for industrial goods and services, particularly in China, Brazil, India and other emerging economies.

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[5] “NAMA sectorals” refers to proposals for major trading countries – including emerging economies – to allow duty-free access or lower-than normal duties for imports in particular sectors within the negotiations on market access for non-agricultural products.

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