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US Auto Industry Bailouts: Will Protectionist Potholes Put a Dent in Trade and Competitiveness?

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EXECUTIVE SUMMARY

In the wake of global recession, governments worldwide face increasing pressures to assist ailing domestic industries, especially companies deemed "too big to fail." The auto sector provides an excellent illustration of pitfalls inherent in attempting to rescue ailing domestic producers without breaching multilateral trade commitments. This paper analyzes how specific aspects of recent auto bailout programs may violate key provisions of the WTO Agreements, and concludes that protectionist elements of such programs may distort markets, encourage proliferation of similar measures by key trading partners, lead to WTO consultation or dispute settlement, and actually inhibit the global competitiveness of domestic automakers.

Key Words: Global competition, WTO, Trade, Automotive industry, Bailouts, Financial crisis, Subsidies

INTRODUCTION

> *"The consequences of our actions are so complicated, so diverse, that predicting the future is a very difficult business indeed."*
> ~ J. K. Rowling, British fantasy author (spoken by Headmaster Dumbledore in *Harry Potter and the Prisoner of Azkaban*)

> *"If patriotism is, as Dr. Johnson used to remark, the last refuge of the scoundrel, wrapping outdated industry in the mantle of national interest is the last refuge of the economically dispossessed. In economic terms, pleading national interest is the declining cottage industry of those who have been bypassed by the global economy."*
> ~ Kenichi Ohmae, Global Strategy Expert

The current financial crisis has plunged us into an era of profound paradox. Many concepts that once seemed diametrically opposed— socialism/capitalism; liberalism/conservatism; mercantilist/globalist; free trade/protectionist— now bleed together like a watercolor painting left in the rain. The captains of Wall Street and titans of industry are being bailed out by a government that now holds substantial ownership stakes in some of our largest banks and Fortune 500 companies. The public grows wary of being told that the economic sky is falling, and companies deemed "too big to fail" continue to receive massive government aid while the average US taxpayer asks, "where is my bailout"?

In the current climate, national governments worldwide face mounting pressures to provide direct aid to their ailing local industries at a time when demand has slowed and there is worldwide overcapacity in most sectors. The temptation to implement protectionist measures is stronger than ever, and easy to rationalize to an angry and fearful electorate. National economies have become highly integrated through complex webs of intertwined commercial relationships facilitated by overlapping multilateral and regional trade agreements. In this context, one of the greatest legislative risks in trying to stabilize a national economy is the fundamental "law of unintended consequences." As Harry Potter's Headmaster Dumbledore wisely observes, "the consequences of our actions are so complicated, so diverse, that predicting the future is difficult business indeed" (Rowling). Our crystal ball is even cloudier today than it was at the time of the last global depression, given the much more complex set of intertwining variables involved in trying to

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unravel the potential cumulative impacts of bailout programs on the many stakeholder interests involved in international trading relationships and supply chains.

Policies seeking to shelter particular domestic companies, industries, or interest groups in the short run usually have unintended longer term impacts in distorting trade flows, supply chains, conditions of competition, and impacting downstream users and consumers both domestically and worldwide. As a result, the real long term "costs" and "benefits" of stimulus and bailout programs likely cannot be calculated for many years to come, but nevertheless we are compelled to debate our options and perform economic "triage" in an effort to alleviate the immediate crisis. Perhaps this is why Dr. Laurence Peter once observed that "an economist is an expert who will know tomorrow why the things he predicted yesterday didn't happen today" (As cited in, *The Economist*, 2005, p. 1).

This paper focuses on the automotive sector as a microcosm for addressing larger questions regarding whether we can pursue legislative efforts to stem job losses and prop up ailing domestic industries while still complying with our WTO trade commitments. The paper analyzes specific aspects of recent auto bailout programs that arguably violate key provisions of the WTO Agreements, and concludes that the protectionist elements in such programs may cumulatively distort markets, encourage proliferation of similar measures by key trading partners, lead to WTO consultation or dispute settlement, and ultimately inhibit the global competitiveness of US automakers in the longer term.

Recent Government Assistance Programs Targeting the US Automotive Sector

In particular, this paper first addresses whether the following recent assistance programs and legislation targeting the US domestic automotive sector include provisions that may be inconsistent with US obligations under various WTO international trade disciplines:

(1) Section 136 of the Energy Independence and Security Act of 2007 (the "EISA"), which authorized up to $25 billion in US government loans for the purpose of developing "advanced technology vehicles" with lower emissions and improved fuel economy (EISA, 2007, §136);

(2) Certain subsidies and "Buy American" provisions supporting domestic development and production of electric cars and automotive batteries in the version of the "American Clean Energy and Security Act" ("ACESA") climate change legislation passed by a vote of 219 to 212 in the US House of Representatives on June 26, 2009, and pending consideration by the US Senate (ACESA, H.R. 2454, 2009, §123);

(3) Direct government assistance to US domestic automotive manufacturers provided by the US Treasury Department ("Treasury") under the Automotive Industry Financing Program ("AIFP") using funds from the Troubled Asset Relief Program ("TARP"), which in turn was established to implement $700 billion in emergency funding appropriated by Congress under the Emergency Economic Stabilization Act of 2008 (EESA, 2008, 12 USCS §5201 et seq.);

(4) Additional direct assistance provided by the US Treasury Department to automotive financing companies closely affiliated with domestic automotive manufacturers under the Capital Purchase Program ("CPP"), (Jackson, 2007) using funding from the Troubled Assets Relief Program ("TARP"), which in turn was established to implement $700 billion in emergency funding appropriated by Congress under the Emergency Economic Stabilization Act of 2008 (EESA, 2008, §5211-12);

(5) Direct assistance and government equity infusions into Chrysler and General Motors to facilitate restructuring in their recent Chapter 11 bankruptcy proceedings (White House, June 1, 2009);

(6) Potential US safeguards in the form of higher tariffs and/or quotas to limit imports of passenger and light truck tires from China (US International Trade Commission, July 2009); and

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(7) Consumer Assistance to Recycle and Save (CARS) legislation and regulations implementing an automotive scrapping incentive program, intended to accelerate new car purchases and improve fleet fuel efficiency (US Department of Transportation, NHTSA, July 2, 2009, p. 31812).

The sections that follow address the potential WTO implications of key provisions of the above programs, and their likely impact on competitiveness in the US automotive market. The paper first provides a summary of relevant government assistance programs targeting the US automotive sector. It then analyzes more specifically the extent to which each such program may be inconsistent with key provisions of various World Trade Organization agreements, including in particular: the WTO Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"), the General Agreement on Trade in Services (the "GATS") and the Agreement on Technical Barriers to Trade ("TBT Agreement"). Finally, the paper concludes that, on a cumulative basis, these government assistance programs may distort markets, encourage proliferation of similar measures by key trading partners, lead to WTO consultation or dispute settlement, and actually inhibit the long term global competitiveness of domestic automakers.

Description of Key Government Assistance Programs Provided to US Domestic Automotive Manufacturers and Suppliers

$25 Billion in Automotive Related Grant and Loan Assistance under The Energy Independence and Security Act ("EISA") of 2007

In December 2007, Section 136 of the Energy Independence and Security Act of 2007 (the "EISA") authorized up to $25 billion in grants and low interest loans to auto manufacturers and component suppliers to subsidize the costs of reequipping, expanding, or establishing a manufacturing facility in the United States to produce certain "qualifying advanced technology vehicles" or "qualifying components", and for engineering integration performed in the United States of qualifying vehicles and qualifying components (EISA, 2007, § 136). In essence, the legislation is intended to provide economic assistance to US automakers in helping them comply with increased Corporate Average Fuel Economy (CAFE) standards and implement fleet modernization plans. Section 136 provides for "Advanced Manufacturing Facility" funding from the US government as follows:

> (b) ADVANCED VEHICLES MANUFACTURING FACILITY.—The Secretary shall provide facility funding awards under this section to automobile manufacturers and component suppliers to pay not more than 30 percent of the cost of—
>
> (1) reequipping, expanding, or establishing a manufacturing facility in the United States to produce—
>
> (A) qualifying advanced technology vehicles; or
>
> (B) qualifying components; and
>
> (2) engineering integration performed in the United States of qualifying vehicles and qualifying components.

Although the EISA authorization dates back to December 2007, funds were not actually appropriated for the automotive grant and loan programs until September 30, 2008, when the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act (P.L. 110-329) appropriated $7.5 billion to cover the subsidy cost of up to $25 billion total in EISA loans, as well as $10 million for program implementation (CRS Report, 2008, p. 14-15).

The direct loan programs under the EISA provide substantially more favorable terms than can be obtained in the open marketplace for financing of such facilities. The program offers below-market interest rates ("equal to the cost of funds to the Department of the Treasury for obligations of comparable maturity"), initial repayment of the loan can be deferred for up to five years after the start of operations of the new

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facilities, and payments can be stretched out over the projected life of the eligible project up to 25 years (CRS Report, p. 15). From a WTO standpoint, one of the most significant aspects of the EISA is the manner in which it favors the traditional "Big 3" US producers over the "transplant" foreign-owned factories located in the United States. Section 136(g) of the EISA states:

> PRIORITY.—The Secretary shall, in making awards or loans to those manufacturers that have existing facilities, give priority to those facilities that are oldest or have been in existence for at least 20 years. Such facilities can currently be sitting idle.

The DOE's Interim Final Rule published on November 12, 2008 implements this requirement under two separate sections of the implementing regulations (US DOE, 2008, p. 66734):

> **§ 611.103 Application Evaluation**. (b)(iv)(4) In making loans to manufacturers that have existing facilities, priority will be given to those facilities that are oldest or have been in existence for at least 20 years even if such facilities are idle at the time of application.
>
> **§ 611.206 Existing facilities.** The Secretary shall, in making awards to those manufacturers that have existing facilities, give priority to those facilities that are oldest or have been in existence for at least 20 years. Such facilities can currently be sitting idle.

The above provisions give a preference based on the age of factories, rather than an absolute limitation or prohibition against awarding grants or loans for facilities newer than 20 years old.

Section 131(d) of the EISA further instructs the Secretary of Energy to establish a federal government grant program to support the development and sale of electric vehicle technologies. Although it does not include a strict "Buy American" requirement, this section mandates that priority be given in to awarding funding to projects that "are likely to make a significant contribution to the advancement of the production of the vehicles in the United States" (emphasis added) (EISA, 2007, §131).

Section 135 of the 2007 EISA law also provided for support to the industry that produces batteries for these vehicles. The language of this section specifically provides for the establishment of a "program to provide guarantees of loans by private institutions for the construction of facilities for the manufacture of advanced vehicle batteries and battery systems that are **developed and produced in the United States**, including advanced lithium ion batteries and hybrid electrical system and component manufacturers and software designers" (emphasis added) (EISA, 2007, §135).

Subsidies and "Buy American" Provisions of Pending Climate Change Legislation Promoting Domestic Development and Production of Electric Cars and Automotive Batteries

The US House recently passed by a narrow margin of 219 to 212 votes a bill intended to address climate change concerns known as the "American Clean Energy and Security Act" (ACESA, designated as HR 2454). The bill encompasses a wide range of provisions intended to reduce greenhouse gas emissions, lower fuel and energy consumption, and promote development of alternative "green" energy sources and technologies. Section 123 of the bill builds upon the automotive related programs in the Energy Independence and Security Act (EISA) of 2007 discussed above. For example, Section 123(a) the House bill directs the Secretary of Energy as follows:

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> The Secretary of Energy shall establish a program to provide financial assistance to automobile manufacturers to facilitate the manufacture of plug-in electric drive vehicles, as defined in section 131(a)(5) of the Energy Independence and Security Act of 2007, that are developed and produced in the United States. (ACESA, H.R. 2454, 2009, §123) (emphasis added)

Section 123(b) uses parallel language in describing the nature of the government financial assistance:

> The Secretary of Energy may provide financial assistance to an automobile manufacturer under the program … for the reconstruction or retooling of facilities for the manufacture of plug-in electric drive vehicles or batteries for such vehicles that are developed and produced in the United States. (ACESA, H.R. 2454, 2009, §123) (emphasis added)

Thus, it appears that the federal financial assistance is explicitly contingent on both the research and development efforts and the actual production of the vehicles occurring in the United States.

In addition, Section 124(d)(1)(A) uses language similar to that found in Section 136(b) of the 2007 EISA discussed above in providing for new direct government grant payments, both to automobile assembly manufacturers and suppliers of parts and components, to cover up to 30 percent of the cost of any of the following:

> (A) reequipping, expanding, or establishing a manufacturing facility in the United States to produce —
>
> (i) qualifying advanced technology vehicles; or
>
> (ii) qualifying components; and
>
> (B) engineering integration performed in the United States of qualifying vehicles and qualifying components. (ACESA, H.R. 2454, 2009, §124(d))

As in the EISA discussed above, the financial assistance under the House version of the Climate bill specifies that development and manufacturing of the vehicles must occur "in the United States."

Direct US Government Assistance to Domestic Auto Manufacturers under the Automotive Industry Financing Program ("AIFP") as Part of the Troubled Asset Relief Program ("TARP")

During November and December of 2008, executives of General Motors Corp. ("GM"), Ford Motor Co. ("Ford"), and Chrysler LLC ("Chrysler") appeared before Congress seeking allocation of more than $25 billion in additional federal financial assistance to support their ongoing operations (Hughes & Green, 2008). The new funds sought were in addition to the prior EISA federal funding discussed above, and not explicitly contingent on expanding production of higher fuel economy cars. Multiple proposed bills were introduced, and ultimately an aid package of $14 billion was approved by the US House of Representatives in early December, before failing after rejection by the Senate (Shepardson, 2008).

Ultimately, on December 19, 2008, the Bush administration approved a $17.4 billion bailout package for Chrysler and General Motors, with $13.4 billion slated to be paid out in December 2008 and January 2009, and the remaining $4 billion payable to firms considered "financially viable" as of March 31, 2009 upon meeting certain enumerated conditions (White House, December 19, 2008). This automotive assistance program became known as the Automotive Industry Financing Program ("AIFP"), and was established by the US Treasury Department using funds allocated under the Troubled Asset Relief Program ("TARP") (EESA, 2008, §5201).

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Pursuant to AIFP requirements, Chrysler and GM signed onto comprehensive loan agreements requiring each company to submit restructuring plans to Treasury by February 17, 2009 (Chrysler LLC, 2008; General Motors, 2008). They were instructed to outline specific plans for repaying government assistance, meeting higher CAFE standards, becoming competitive, and achieving sustainable long-term financial viability (US GAO Report, April 2009). On March 30, 2009, after reviewing the restructuring plans submitted by Chrysler and GM in February, the Obama administration announced that neither plan established a credible path to viability and thus there was not sufficient justification for substantial new infusion of taxpayer dollars. Rather, the President outlined a series of actions that each company must undertake within a specified time frame (30 days for Chrysler and 60 days for GM), and Treasury agreed to provide additional working capital to fund the companies' ongoing operations during this time. As of March 2009, the Obama administration contemplated that once these time periods expire, and depending on the adequacy of the actions taken by Chrysler and GM, further federal assistance might be provided and/or the companies could enter into Chapter 11 bankruptcy reorganization proceedings (CRS Report at 14-15).

As addressed below, it turns out that both companies have since entered into Chapter 11 bankruptcy reorganization proceedings, Chrysler on April 30, 2009 and GM on June 1, 2009 (Chrysler LLC, 2008; General Motors, 2008). Each company has negotiated additional direct US government assistance as part of the bankruptcy restructuring process (White House Fact Sheet, June 1, 2009).

In addition to direct loans provided to GM and Chrysler under the AIFP, each company also has received other direct benefits under programs implemented by the US Treasury Department within the AIFP, including the Supplier Support Program and Warranty Commitment Program. GMAC Financial Services LLC and Chrysler Financial Company, the automotive financing entities affiliated with GM and Chrysler, also have received separate government assistance under TARP programs (which are discussed further below). Table 1 below summarizes the total US government assistance that Chrysler and GM and their affiliates have received to date through AIFP and TARP programs administered by US Treasury.

TABLE 1

Components and Funding Levels under the Automotive Industry Financing Program

Component	**Description**	**Funding level Through April 2009**
Direct Automaker loans Under AIFP	These are direct AIFP loans to Chrysler and GM to fund their operations while they take steps to restructure their companies	$22.9 billion[a]
Assistance related to auto finance companies	This is TARP funding provided to Chrysler Financial and GMAC financing companies	$7.4 billion[b]
Supplier Support Program	The program provides funding to guarantee suppliers are paid for the products they ship to participating automakers.	$5.0 billion[c]
Warranty Commitment Program	The program sets aside funds to guarantee warranties for vehicles Chrysler and GM sell during restructuring.	$1.1 billion[c]
Total		**$36.4 billion**

Source: GAO analysis of Treasury information.

NOTES:
(a) This includes the $17.4 billion in loans agreed to in December 2008, which have been fully disbursed, and the up to $500 million and up to $5 billion that Treasury is providing to Chrysler and GM during their additional 30- and 60-day restructuring

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periods. Treasury may provide more assistance based on the outcome of the restructuring efforts.

(b) This amount includes an $884 million loan to GM to allow the company to participate in GMAC's new rights offering related to its reorganization as a bank holding company; a $5 billion purchase of preferred stock investment plus warrants from GMAC; and a loan of $1.5 billion to a special purpose entity created by Chrysler Financial to finance the extension of new consumer automotive loans. A separate subsidiary of the Chrysler Holdings, Chrysler Financial Company provides financing to automotive dealers and consumers. Chrysler and Chrysler Financial operate independently from each other under separate managements. In April 2009, Treasury offered additional financial assistance to Chrysler Financial, but the company declined the assistance.

(c) These amounts are Treasury's estimated costs of the programs.

As reflected in the above table, US domestic automotive producers have received substantial "bailout" assistance using TARP funds under the Automotive Industry Financing Program. Section II below addresses in detail whether such direct AIFP funding qualifies as a "subsidy" under WTO disciplines, and whether US trading partners may have viable arguments mounting a WTO challenge to such automotive bailout measures.

Additional Assistance to Domestic Automotive Financing Services Companies under the Capital Purchase Program ("CPP") Using Funding from the Troubled Assets Relief Program

As mentioned above, the Trouble Assets Relief Program (TARP) was established under the Emergency Economic Stabilization Act of 2008 ("EESA"), signed into law on October 3, 2008. The legislation indicates that the original intention of the TARP was to purchase and insure illiquid and overvalued assets held by financial institutions in the United States in order to help stabilize the economy and thaw frozen credit markets. The EESA legislation itself broadly defines which "Financial Institutions" would be eligible for relief as follows:

> FINANCIAL INSTITUTION.—The term ''financial institution'' means any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State, territory, or possession . . . and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government. (EESA, 2008, §101)

On October 14, 2008, however, President Bush and the Secretary of the Treasury announced significant revisions to the program, under which the bulk of the funds actually would be used to purchase government equity stakes in financial institutions themselves, instead of purchasing their illiquid assets. To accomplish this, a new Capital Purchase Program ("CPP") was established under TARP to provide for the purchase of senior preferred stock and warrants from "Qualifying Financial Institutions" ("QFIs"). Under new guidelines issued by the Department of the Treasury, the scope of eligible financial institutions was narrowed as follows:

> The CPP is available to bank holding companies, financial holding companies, insured depository institutions and savings and loan holding companies that engage solely or predominately in activities that are permissible for financial holding companies under relevant law. To qualify, the applicant must be established and operating in the United States and <u>may not be controlled by a foreign bank or company</u>. (US Treasury Department, 2009, Factsheet and Guidelines) (emphasis added)

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Based on the above Treasury guidelines excluding institutions that are "controlled by a foreign bank or company," the definition of qualified financial institutions has been narrowed so that foreign affiliated financing companies in the United States likely would be prevented from participating in CPP.

On December 24, 2008, the Federal Reserve formally approved the bid of GMAC Financial Services LLC to become a bank holding company, clearing the way for them to qualify as a "Financial Institution" eligible for TARP funding under the Capital Purchase Program (US Federal Reserve, December 24, 2008). At that time, Treasury provided GMAC with initial CPP loan funding of $5 billion (US Treasury Press Release GMAC, December 29, 2008). On May 21, 2009, GMAC received an additional $7.5 billion in funding via the AIFP program discussed above, also utilizing TARP funding. Separately, on January 16, 2009, the US Treasury Department announced an infusion of $1.5 billion into a special purpose entity created by Chrysler Financial to serve as a conduit to receive TARP funding under the AIFP (US Treasury, Press Release Chrysler Financial, January 16, 2009). Thus, domestic automotive financing entities have received substantial direct government assistance via two separate programs implemented by Treasury utilizing TARP funding.

Both of these programs, the CPP and the AIFP, contain specific language to limit availability of such assistance to domestic entities only, and thus exclude US entities with foreign affiliation from eligibility for funding. Even financing entities that are fully licensed, organized, and operating in the US and were established to directly serve the automotive loan financing needs of US customers driving cars within the US market apparently would be excluded based solely on their affiliation with a foreign bank or company. Based on program guidelines and legislative language in the EESA, financing companies affiliated with "transplant" automotive producers that are in turn affiliated with auto companies based in Germany, Japan, South Korea, or elsewhere would not qualify for TARP funding assistance. As discussed below, by applying such measures on such an arguably discriminatory basis, the United States may be in violation of its national treatment, most favored nation, and/or certain market access commitments under the WTO General Agreement on Trade in Services ("GATS").

Direct US Government Support and Equity Infusions through Bankruptcy Restructuring of General Motors and Chrysler

Chrysler entered into formal Chapter 11 bankruptcy reorganization proceedings on April 30, 2009 and GM on June 1, 2009. Each company has received substantial direct US government support as part of this restructuring process, over and above the federal assistance provided to each company prior to the bankruptcy filings.

The Obama administration announced details of the Chrysler bankruptcy terms and government role, including the following pledges of US and Canadian government support to Chrysler (White House, Remarks by President, June 1, 2009):

- Pledge to provide approximately $3.3 billion of government funds for "working capital" in the form of "debtor in possession financing to support Chrysler through an expedited chapter 11 proceeding."

- Pledge to "loan approximately $4.7 billion to New Chrysler, in the form of a term loan with $2.1 billion due in 30 months and the balance 50 percent due on the 7th anniversary and 50 percent due on the 8th anniversary of the loan. The interest will be an appropriate combination of cash and payment-in-kind. There is also an additional note of $288 million which is a fee for making these loans. The loans will be secured by a first priority lien on all of Chrysler's assets."

- Providing GMAC with additional "liquidity and capitalization" needed to transition Chrysler financing to GMAC.

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- US Treasury funding of $280 million for Warranty Support Program to ensure "orderly payment of [Chrysler] warranties for cars sold during this restructuring period."

- The governments of Canada and Ontario also will participate alongside the US Treasury in lending money to Chrysler and New Chrysler based on a 3:1 formula using Canadian currency, and will have the right to select one initial director.

In exchange for the above assistance, the US government is taking a substantial equity ownership interest in Chrysler and reserved the right to select directors, as follows:

> The US Treasury will receive 8 percent of the equity of the new Chrysler. US Treasury also has the right to select the initial group of four independent directors, but thereafter will not play a role in the governance or management of the Company.

Government participation in the GM bankruptcy is similar to the Chrysler restructuring but on a much larger scale. Prior to GM's initial filing for bankruptcy, the administration described the substantial US and Canadian Government assistance to the company for restructuring as follows (White House, Remarks by President, June 1, 2009):

- The US Treasury is prepared to provide approximately $30.1 billion of additional financing to support GM through an expedited chapter 11 proceeding and transition the new GM through its restructuring plan. The US Treasury does not anticipate providing any additional assistance to GM beyond this commitment.

- In exchange for funds already committed by the US Treasury and the new injection of $30.1 billion, the US government will receive approximately $8.8 billion in debt and preferred stock in the new GM and approximately 60 percent of the equity of the new GM.

- The Governments of Canada and Ontario will participate alongside the US Treasury by lending $9.5 billion to GM and New GM. The Canadian and Ontario governments will receive approximately $1.7 billion in debt and preferred stock, and approximately 12 percent of the equity of the new GM. Based on its substantial financial contribution, the Canadian government will also have the right to select one initial director.

Thus, the US government is expected to take a 60 percent equity ownership stake in the reorganized company in exchange for providing a total of more than $50 billion in government assistance to satisfy certain creditors (i.e., $30 billion in new restructuring aid in addition to the $20 billion already loaned under the programs described above) (King & Terlep, June 2, 009). The Canadian national government and Ontario provincial government also have agreed thus far to provide $9.5 billion in funding in exchange for a 12.5 percent equity stake in GM (White House Fact Sheet, June 1, 2009). Thus, the US government is making unprecedented direct infusions of equity into the ailing automotive giants. As discussed below, there also are growing concerns that the government ownership stake in GM and Chrysler may create significant conflicts of interest, and that despite assertions to the contrary, the federal government may attempt to micromanage aspects of the companies ongoing operations in a manner that would impede competitiveness of the firms and further distort international trade.

Potential US Safeguard Restrictions against Passenger and Light Truck Tires Imported from China

On April 20, 2009, the United Steelworkers Union filed a petition with the US International Trade Commission requesting a safeguards investigation under section 421(b) of the Trade Act of 1974 and seeking for relief from market disruption caused by increasing imports of consumer tires from China. The action was brought under a special safeguard statute that applies exclusively to imports from China, which was included in the "U.S.-China Relations Act" (H.R.4444) of 2000 as a condition of extending permanent

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normal trade relations ("PNTR" or unconditional most-favored-nation treatment) to China. This law helped clear the way for China's accession to the WTO, and amended the Trade Act of 1974 by adding a new section 421, allowing special safeguard proceedings against China as follows:

> If a product of the People's Republic of China is being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product, the President shall, in accordance with the provisions of this section, proclaim increased duties or other import restrictions with respect to such product, to the extent and for such period as the President considers necessary to prevent or remedy the market disruption.

The new law sets forth definitions of "market disruption" and other terms, which have the effect of creating different legal standards than the injury and causation standards otherwise applied in global safeguard actions, consistent with the WTO Agreement on Safeguards.

In its filings to the USITC, the USW states that it represents about 15,000 tire workers at 13 plants in nine states. They have argued that "market disruption" is has occurred because Chinese market share for passenger and light tuck/SUV tires in the US increased from less than five percent to more than 17 percent domestic, while at the same time production of consumer tires declined by over 25 percent during 2004-2008. As a remedy, the USW is seeking safeguard measures that would limit Chinese imports to an annual import quota of 21 million consumer passenger tires for a three-year period, roughly equivalent to the level of tire imports from China in 2005 (Tire Industry Assoc., April 2009).

Four of the six commissioners found that market disruption had occurred under Section 421 (USITC Announces Determination, June 18, 2009). On June 29, 2009, these commissioners issued public statements outlining the specific proposed safeguard measures (USITC Announces Remedy). Specifically, four of the commissioners recommended imposing additional duties against Chinese tire imports of 55 percent ad valorem in the first year, 45 percent ad valorem in the second year, and 35 percent ad valorem in the third year. They also recommended providing expedited consideration of Trade Adjustment Assistance ("TAA") for firms and/or workers that are adversely affected by the Chinese imports. Interestingly, two of the commissioners found that market disruption did not exist, and they urged that no trade restricting actions be taken, but recommended offering trade adjustment assistance to displaced tire workers.

An official report to the President detailing the ITC analysis is due after July 30, 2009 and, by September 17, 2009, President Obama must make the ultimate decision regarding whether to impose quotas or other restrictions against imports of passenger and light truck tires from China. Interestingly, the Tire Industry Association (TIA) has opposed the USW's efforts to impose safeguards against Chinese imports. On June 17, 2009, the TIA issued a position statement urging the ITC to "reject the USW's effort to impose a protectionist policy," and declaring that "a reduction of this magnitude in the quantity of Chinese tires imported would itself create a market disruption, and cause very real harm to our member companies and the US consumer" (Tire Industry Assoc., April 2009).

In the past, the Bush Administration declined in four separate cases to implement Chinese special safeguards recommended by the ITC under Section 421, but there is increasing pressure on the Obama administration to impose sanctions against China under the law. Some members of Congress have been vocal in supporting the tire safeguards, including Chairman Charles Rangel (Democrat-New York) of Ways and Means Committee and Trade Subcommittee Chairman Sander Levin (Democrat-Michigan). On June 19, 2009, Levin stated: "I believe that, unlike the Bush Administration, President Obama will decide the safeguard case on the merits, not on an ideological rejection of import relief." Imposition of such safeguards against Chinese tire imports would be the first use of the 421 law, and Levin and other members of Congress are also pushing separate legislation that would allow Congress to override the President's decision to deny remedial action under Section 421 (China Eyes, June 30, 2009).

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US Legislation Providing Incentives for Scrapping Old Cars Under the Consumer Assistance to Recycle and Save ("CARS") Act of 2009 (a/k/a "Cash for Clunkers")

Last but not least, recent legislation impacting the automotive sector has included efforts to provide direct consumer incentives to purchase newer and/or more fuel efficient vehicles. At least four different legislative proposals were circulated in the US House and Senate this year, and the version that ultimately won out was the Consumer Assistance to Recycle and Save ("CARS") Act of 2009, signed into law by President Obama on June 24, 2009. First introduced March 17, 2009 by Rep. Betty Sutton of Ohio, the legislation gathered 34 cosponsors in the House as of May 18, 2009, and ultimately won approval in both houses following various revisions. (Library of Congress, THOMAS, 2009). The bill created a program that the National Highway Traffic Safety Administration (NHTSA) is now calling the Car Allowance Rebate System (CARS), which provides consumers with vouchers of $3,500 to $4,500.00 for the purchase (or long term lease) of "eligible new automobiles." The CARS program has been widely touted by auto dealers, and has proved to be so popular with consumers that it was in danger of running out of funding within the first week of implementation.

Although the so-called "cash-for-clunkers" proposals originated as largely environmental initiatives aimed at getting less fuel efficient cars off the road, Sen. Debbie Stabenow, D-Mich., along with Sen. Sam Brownback, R-Kansas, had co-sponsored an alternate Senate bill known as the "Drive America Forward Act", which would have incentivized sales of new cars and trucks even if they do not quite meet the average fuel efficiency standards. (Drive America Forward Act, S. 1135, 2009). Importantly, the original CARS draft legislation had specified that, to receive voucher credit, "eligible" vehicles must be "assembled in the United States", with the exception of certain non-passenger automobiles that may be "assembled in North America." (Drive America Forward Act, S. 1135, 2009, §3(b) (1) (A) and (B). This provision raised serious WTO national treatment and MFN concerns because consumers would be incentivized to select domestic goods over imports, even where imported models offer better fuel efficiency.

A similar House bill, H.R. 520 was proposed by Rep. Steve Israel of New York and gained 11 cosponsors as of May 2009. Entitled the Accelerated Retirement of Inefficient Vehicles Act of 2009, this version offered similar vouchers, but did not contain any explicit language requiring that vehicles must be assembled in the United States to qualify for the voucher credits. Similarly, the text of the proposed Drive America Forward Act did not mandate that new vehicles must be assembled in the United States to qualify for the incentives, nor did the Senate version of the CARS bill that was introduced by Sen. Dianne Feinstein (D-Calif.) as S. 247. Ultimately the explicit domestic assembly language was dropped from the CARS legislation, and did not make it into the final version of the bill signed by President Obama (CARS Act, 2009). Thus, the bill as passed appears to be neutral on its face, by providing consumer incentives that are based on fuel efficiency and factors other than whether the goods are produced domestically or imported.

Potential WTO Violations and Creeping Trade Protectionism from the Cumulative Impact of the US Domestic Automotive Industry Assistance Programs Described Above

Potential Violations of WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)

The automotive grant and loan programs under the EISA and EESA discussed above, as well as the massive direct government assistance and equity infusions into Chrysler and GM in the bankruptcy restructuring process, likely would meet the basic definition of "subsidies" under the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The SCM Agreement provides that member governments may take WTO action against subsidies if the following conditions are present:

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1) there is a "financial contribution" by a government or other public body (which specifically includes "direct transfers of funds" such as "grants, loans, and equity infusions," as well as "loan guarantees") (SCM Agreement Art. 1.1(a));
2) a "benefit" is conferred by the financial contribution (SCM Agreement Art. 1.1(b));
3) the subsidy is "specific" (SCM Agreement Art. 2); and
4) the subsidy causes at least one of the following types of "adverse effects" (SCM Agreement Art. 5):
    - (a) material injury (or threat of material injury) to the domestic industry of another member country;
    - (b) nullification or impairment of benefits to another member country; or
    - (c) serious prejudice to the interests of another member country.

The SCM Agreement distinguishes between "prohibited" subsidies and "actionable" subsidies, and classifies as "prohibited subsidies" any "export subsidies" and subsidies that are "contingent upon the use of domestic over imported goods." As Such "prohibited subsidies may be challenged in a WTO dispute settlement action without proof of "adverse effects," whereas a showing of "adverse effects" is required in a challenge of actionable subsidies. See SCM Agreement Art. 3.1 and 4.

The SCM Agreement permits a member country that is adversely affected by subsidies as described above to seek either of two different non-exclusive remedies:

(1) application of countervailing duties ("CVD"); and/or

(2) use of WTO dispute settlement mechanisms.

As a practical matter, the second remedy is likely to be more relevant in the context of global automotive competition. Under the first option, even if major auto producing countries outside the US (e.g., Germany, Japan, Korea) experience "adverse effects" from the US automotive subsidies would have two practical hurdles in seeking to impose CVD measures against the United States: (a) it may be difficult to prove "material injury" to the domestic automotive industry in their home country market as a result of competition from imports of subsidized US-made vehicles; and (b) the only available relief would be imposition of countervailing duties in their own home market, which would do little to improve their competitive position within the important US market. Thus, the first option above may not be attractive to so-called "transplant" automotive producers, who have invested in building and operating substantial manufacturing facilities and financing companies within the US market. Rather, the US-based assembly and financing operations of foreign affiliated producers will be forced to compete within the US market with the subsidized and reorganized "Big 3" producers, and although they may have substantial US facilities, they will be foreclosed from participating in the automotive assistance programs described above utilizing EISA and TARP funding or restructuring assistance.

Thus, the second option listed above of pursuing a WTO dispute settlement mechanism could provide a strategically viable option for the governments of foreign-affiliated auto producers to pressure the US to either discontinue the subsidies, or at least make some effort minimize the discriminatory and market-distorting impact of such measures. There are several legal arguments that could be used to challenge US government grant and loan programs awarding billions of dollars in government assistance to the US "Big 3" producers using EISA, EESA/TARP, and bankruptcy reorganization funding. As explained below, these forms of state aid arguably qualify as "actionable subsidies" under the SCM Agreement, thus could be challenged in such a WTO dispute settlement action based on the following provisions and definitions outlined in the SCM Agreement.

Requirement of "Financial Contribution" and "Benefit" Under the WTO SCM Agreement

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The basic definition of a subsidy under the SCM rules is a governmental financial contribution that confers a benefit. The SCM Agreement itself says that a direct transfer of funds, including loans, constitutes a "financial contribution." Numerous prior WTO panel and Appellate Body precedents have held that a government loan made to a company at below-market rates is considered to be a "financial contribution" and "confers a benefit." Thus, US trading partners would appear to have a r\ reasonable argument that grants and loans under the EISA, and the more recent bailout funds provided under the CPP and AIFP, would meet the "financial contribution" and "benefit" requirements of the SCM Agreement. Such funding is being provided on terms that are substantially more favorable than any terms otherwise available in the marketplace, for example the EISA program provides below market interest rates, deferral of payments for up to five years after the start of operations of the new facilities, and stretching out payments for up to 25 years (Congressional Research Service Report, November 13, 2008).

WTO panel precedent reflects that the massive government equity infusions provided as part of the Chrysler and GM bankruptcy restructuring also meet the definition of a financial contribution that confers a benefit on these companies. In "Korea - Measures Affecting Trade in Commercial Vessels," the panel explicitly ruled that both equity infusions and debt-for-equity swaps constitute "financial contributions," consistent with Article 1.1(a)(1)(i) of the SCM Agreement, because "a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)" (Korea – Measures, April 11, 2005, 7.419 – 7.425). The panel's findings are instructive in relation to the GM and Chrysler bankruptcy funding:

> 7.420 [A] debt/equity swap comprises an element of equity infusion. Accordingly, we consider that the references to equity infusions in Articles 1.1(a) (1) (i) and 14(a) of the SCM Agreement provide a strong contextual basis for rejecting Korea's argument that there is no financial contribution because one cannot make a financial contribution to oneself.
>
> 7.422 Furthermore, Korea's argument would mean that a cash grant by a government to a government-owned company would not constitute a financial contribution (and therefore could never be a subsidy). Such an outcome would be absurd. . . .
>
> 7.423 In light of the above, we reject Korea's argument that the owners of a company are unable, in law, to make a financial contribution to that company. . .
>
> 7.425 We are unable to accept Korea's argument, since entities participating in a financial contribution must assume responsibility for that participation. Thus, to the extent that a public body participates in a loan agreed by a creditors' council, that part of the loan attributable to the public body may be treated as an individual financial contribution by that public body falling within the scope of Article 1.1(a) of the SCM Agreement. Otherwise the disciplines of the SCM Agreement could be easily circumvented by groups of public bodies deciding collectively, or under court approval, to provide financial contributions.

Based on similar reasoning, the government's equity position and debt-for-equity exchanges facilitated by government intervention in the GM and Chrysler bankruptcy reorganization process should be treated as financial contributions that confer a substantial benefit on each of these firms post-bankruptcy.

Requirement of "Specificity" Under the WTO SCM Agreement

Under the SCM Agreement, to be actionable, a subsidy also must be "specific." Art. 2.1 states that a "subsidy is specific to an enterprise or industry or group of enterprises or industries" if the granting authority or authorizing law explicitly limits access to a subsidy to certain enterprises. On the other hand, the SCM Agreement states that a subsidy is not "specific" if the authorizing law or the agency granting the

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subsidy establishes "objective criteria or conditions" governing eligibility for the subsidy. But even where a law or regulation conferring a subsidy may appear to be non-specific "in fact", it may nevertheless be considered specific "as applied" if other factors are present, including actual use of a subsidy program by a limited number of certain enterprises, predominant use by certain enterprises, and the manner in which discretion is exercised in granting the subsidy. Finally, the SCM Agreement states that a subsidy limited to certain enterprises located within a particular geographical region are considered to be specific (WTO SCM Agreement at Art. 2.1).

The US government theoretically could argue that the EISA and TARP funding programs are non-specific, because they are based on "objective" criteria serving broad policy goals of stabilizing the economy during a time of crisis. Such an argument is difficult to apply to the Automotive Industry Financing Program ("AIFP"), which was created by the Bush administration on December 19, 2008 for the explicit purpose of targeting $17.4 billion in TARP funding directly to the domestic automotive industry. As applied, the AIFP measures have been used to assist specific domestic producers within a single industry, namely GM and Chrysler. Thus, measures taken to assist domestic automotive producers under the AIFP likely would be deemed "specific" for purposes of the SCM Agreement. Similarly, the Federal Reserve and the US Treasury Department suspended certain bank holding company rules and other requirements under the CPP and AIFP programs for the express purpose of allowing only the "Big 3" affiliated automotive financing companies, such as GMAC and Chrysler Financing, to qualify for a total of $12.5 billion in direct TARP funding assistance (to date).

The EISA funding allocates $25 billion in funding specifically for the automotive sector, while giving special priority to manufacturing facilities within that particular industry that have been in existence for at least 20 years. This latter requirement effectively screens out so-called "transplant" automotive producers whose US facilities are operated by companies headquartered overseas. On this basis, the EISA grants and loans to the automotive industry likely would be considered "specific" to the automotive sector under the SCM Agreement. Unlike the numerous other detailed requirements in the EISA and implementing regulations, the limitation to facilities at least 20 years old also does not appear to be supported by objective policy rationale. Rather, the 20 year preference appears to be explicitly designed to exclude facilities of foreign-affiliated producers, and to limit benefits only to certain longstanding domestic manufacturers within a particular industry, namely the "Big 3."

The government financial contributions provided to GM and Chrysler through the bankruptcy restructuring process also would likely qualify as "specific" subsidies, since they have been limited to "certain enterprises" as contemplated by Article 2.1(a) of the SCM Agreement. In "Japan - DRAMS CVDs," the Panel concluded that the October 2001 and December 2002 restructurings facilitated by the Korean government were tailored for, and therefore specific to a particular firm (Hynix), thus the subsidies provided under these restructuring programs were specific under Article 2.1(a).\ (Japan - Countervailing Duties, December 17, 2007, paras. 7.362-7.375).

"Adverse Effects" Analysis of Actionable Subsidies under the WTO SCM Agreement

Automotive Assistance Programs Likely Not "Prohibited" Subsidies

In order for the 2007 EISA or proposed bailout subsidies to be actionable under WTO rules, a member government would need to further demonstrate that either the subsidy is a "prohibited" subsidy, or that it is an "actionable" subsidy that causes "adverse effects" to their interests. As noted above, "prohibited" subsidies are either export subsidies, or subsidies that are conditioned on the use of domestically-produced goods over imported goods (commonly referred to as "import substitution subsidies").

The 2007 EISA and proposed bailout loan subsidies do not appear to qualify as "export subsidies" under the SCM Agreement, because the programs are not contingent on producers exporting more automobiles from the United States. The 2007 EISA also does not appear to be an import-substitution subsidy. While the subsidies are also available to domestic producers of automotive components as well as finished

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automobiles, they are not explicitly contingent on the auto assembly companies purchasing more domestic automotive components. Thus, the new programs do not appear to include so-called "local content" requirements that would operate as prohibited subsidies. The 2007 EISA also provides some subsidies for "engineering integration" services performed in the United States, however, the SCM Agreement focuses on subsidies to goods, not services. The WTO Agreement does include a General Agreement on Trade in Services ("GATS"), which refers to the need for negotiations to develop mechanisms to address the trade-distorting effects of subsidies on services. Nevertheless, the WTO has not yet developed either a CVD mechanism or a dispute settlement mechanism for addressing subsidized services.

Although the US measures at issue likely are not "prohibited subsidies" under the SCM Agreement, these programs arguably would qualify as "actionable subsidies" as discussed below.

Adverse Effects Analysis for "Actionable" Subsidies

As noted above, for subsidies that are not "prohibited" but are merely "actionable", a remedy is available only if the subsidy causes one or more of the following "adverse effects" (See SCM Agreement at Art. 5):

- material injury (or threat) to the domestic industry of another WTO member country;
- nullification or impairment of benefits; or
- "serious prejudice" to the interests of a member country.

In this case, the above reference to the "domestic industry" would be to the industry producing automobiles (and components) in the foreign market. Thus, any injury occurring within the US market to foreign-affiliated companies producing automobiles in the United States would not count in such an injury test. Rather, the first "adverse effect" listed above would be relevant only if another WTO member country takes a CVD action against US-origin cars imported into their domestic market in the future.

The more relevant "adverse effect" for supporting any potential WTO claim in the nearer term would be whether the 2007 EISA or the AIFP and other direct auto industry subsidies may cause "serious prejudice" to the interests of the major non-US automotive producing WTO member countries (e.g., Germany, Japan, South Korea). Because such funding has only become available in the past year, and recipients of the funds are currently undergoing major corporate restructuring, it would be very difficult at present to prove US automotive subsidy programs are causing any current "serious prejudice" to the interests of such foreign producers. The EISA implementing regulations were only just published on November 12, 2008, and the bulk of TARP funding under the AIFP and CPP was provided since December 2008. Additional government funding of up to $30 billion is still pending disbursement as part of the proposed GM bankruptcy reorganization process. Thus, it would likely take substantial additional time before any US trading partners may be able to demonstrate any "adverse effects" as a result of subsidies awarded to domestic auto producers.

WTO Director-General Pascal Lamy has expressed serious concerns that global trade is continuing to shrink dramatically and is expected to drop by more than 9 percent in 2009, the worst decline in more than 60 years (WTO Lamy Confirms, June 12, 2009). Although he characterized automotive subsidies as widespread in the current economic climate, he nevertheless suggests that such subsidies are not yet severely impacting global markets. "Everyone has subsidized their auto sector. From our point of view, which is to make sure that global trade isn't hampered, no state has acquired for itself an unfair advantage because of these subsidies," Lamy stated on June 12, 2009. But even if massive US subsidies have not yet caused current market distortion and disruption, the SCM Agreement also specifically provides for WTO challenges of such measures based on the "threat" of serious prejudice as a viable legal theory in demonstrating the adverse effects of actionable subsidies. Footnote 13 of the SCM Agreement specifically states:

> The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article

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> XVI of GATT 1994, and includes threat of serious prejudice. (emphasis added)

Article XVI: 1 of the GATT 1994 also explicitly refers to the situation where ". . . serious prejudice to the interests of any other Member *is caused or threatened by* any such subsidization" (emphasis added). In addition, a WTO Panel has specifically concluded based on these provisions:

> The text of the cited legal provisions leads us to conclude that either serious prejudice, or threat of serious prejudice, or both in combination, may trigger the remedies available in Article 7 of the SCM Agreement. The existence of either one, or the other, is both a necessary and sufficient condition, in and of itself, to achieve this. (United States – Subsidies on Upland Cotton, September 8, 2004) para. 7.1497) (emphasis added).

A threat-based legal theory may permit other WTO member governments to take WTO action soon after the 2008 EISA loans and proposed auto industry bailout loans are implemented, even before actual present serious prejudice can be definitively proven. To be successful in a claim based on the "threat" of serious prejudice, however, a foreign auto producing countries would need to be able to gather at least some early evidence tending to show that one or more of following serious prejudice factors is beginning to materialize or will become imminent/foreseeable as a result of the US auto subsidies programs:

i. *The effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member.* (SCM Agreement Art. 6.3(a)). Governments of foreign auto producing countries could argue that the effect of the subsidized loans will be to displace imports of their automobiles into the US market, because such imports otherwise would be greater in the absence of such loan subsidies.

ii. *The effect of the subsidy is to displace or impede the exports of the like product of another Member to a third country market.* (SCM Agreement Art. 6.3(b)). To the extent that the US-affiliated auto companies export in significant quantities to any third-country markets in which other foreign-origin automobiles compete (including Canada and Mexico), this could provide an argument for threat of serious prejudice.

iii. *The effect of the subsidy is a significant price undercutting or price suppression by the subsidized product or significant price suppression, price depression or lost sales in the same market.* (SCM Agreement Art. 6.3(c)). Foreign producers may be able to argue that such price effects are foreseeable as a result of the subsidies based on market surveys or early market trends immediately after implementing the loan and bailout programs.

iv. *The effect of the subsidy is an increase in the world market share of the subsidizing member.* (SCM Agreement Art. 6.3(d)). If there are any initial increases in sales or market share of the US producers immediately after the subsidies are implemented, this would support an early argument based on "threat" of serious prejudice.

The above factors would be difficult to prove in the **present** tense until the full impact of the various grant and loan programs can be established and results can be monitored to show clear competitive trends (which likely could take 6 months to a year). Nevertheless an argument based on "threat" of serious prejudice could be advanced if foreign producers and their governments could demonstrate that the adverse effects described above are foreseeable or likely to occur in the near future, as the EISA grants and AIFP programs begin to take effect, both within the US market and in third-countries.

Another potential legal theory on which foreign auto producing WTO member countries could support a "threat of serious prejudice" claim would be to argue that certain so-called "dark amber" subsidies originally listed under Art. 6.1 of the SCM Agreement pose a "per se" threat of serious prejudice due to their extremely distorted nature. When the WTO Agreements were originally signed in 1994, Art. 6.1 had

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a 5-year period of provisional application (which expired on Jan. 1, 2000), during which time the following "dark amber" subsidies were automatically "deemed" to cause serious prejudice:

- the total ad valorem subsidization 14 of a product exceeding 5 per cent;
- subsidies to cover operating losses sustained by an industry;
- subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time;
- direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.

(WTO SCM Agreement at Art. 6.1) (emphasis added). Although such programs are no longer automatically presumed to cause serious prejudice, there is a long textual and negotiating history in the WTO reflecting that most members, especially the United States, view these subsidies as extremely trade distorting and prejudicial. Indeed, in June 2007, the US tabled a formal proposal to the WTO negotiating group on Rules, including proposed draft SCM text that would classify all but the first of the above subsidies as "Red Light" prohibited subsidies under Art. 3 of the SCM Agreement (meaning no proof of adverse effects would be required for a WTO challenge) (WTO Negotiating Group on Rules, June 5, 2007).

Based on this history, and similar to an argument made by Brazil in US – Cotton Subsidies, US trading partners could allege that such "dark amber" subsidies are so prejudicial that they pose a "per se" threat of serious prejudice and necessarily create an imminent or foreseeable risk of future serious prejudice to the WTO interests of other member countries (US – Cotton Subsidies, September 8, 2004, para. 7.1507).

Arguably, direct assistance provided to US automotive producers under the AIFP and EISA appear to function as "subsidies to cover operating losses" and/or may function as debt forgiveness. For example, in most cases the government has received warrants in return for new bailout funding, and thus such funds would appear to serve as exactly the kind of equity infusions to cover operating losses specifically contemplated in the original Art. 6.1 of the SCM Agreement. Ironically, these are the very types of programs about which the United States has complained so vocally in the current Doha Round rules negotiations.

Potential Inconsistencies with the General Agreement on Trade in Services (GATS) for Aid to US Automotive Financing Companies Utilizing TARP Funding

As discussed further below, the WTO General Agreement on Trade in Services (GATS) requires non-discrimination in the services sectors listed in the corresponding GATS schedules of commitment for each WTO member country. GATS includes relevant provisions on national treatment, most favored nation treatment, and market access. Importantly, the United States included the financial services sector and related sub-sectors in its schedule of GATS commitments, thus these non-discrimination principles under GATS are relevant to the direct assistance provided to GMAC and other automotive finance institutions under the Capital Purchase Program (CPP) and Automotive Industry Financing Program ("AIFP") using funds from the Troubled Assets Relief Program ("TARP").

1) National Treatment Obligations under GATS

The GATS implements the principle of non-discrimination in services by including both national treatment and most favored nation provisions. The national treatment requirements of GATS Art. XVII are as follows:

> In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting

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> the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.

In Section 7.B of its Schedule of GATS Commitments, the United States specifically affirms its commitments in financial services, and incorporates by reference the terms of the separate Understanding on Commitments in Financial Services (UCFS) (WTO GATS, United States Schedules, 1995). In turn, Section C (1) of the UCFS contains additional national treatment language, stating:

> Under terms and conditions that accord national treatment, each Member shall grant to financial service suppliers of any other Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the Member's lender of last resort facilities.

In its very recent (August 2008) WTO Trade Policy Review of the United States, the WTO specifically confirms these US commitments to national treatment in all financial services sub sectors, stating:

> The United States maintains a general policy of national treatment towards the US branches, agencies, securities affiliates, and other operations of foreign banks. Bound commitments have been made by the United States in market access and national treatment for all sub sectors included in the Annex on Financial Services in the GATS, and in line with the Understanding on Commitments in Financial Services. (WTO Secretariat, United States – Trade Policy Review, 2008)

Based on the above GATS provisions and commitments, there appears to be a reasonable argument that denying access to TARP programs for foreign owned financial institutions fully licensed and doing business in the US would be "less favorable treatment" and thus violate the GATS Art. XVII. The US arguably would violate the national treatment obligations outlined above if it implements rules allowing "domestic" entities such as GMAC to take advantage of TARP asset purchase, funding, or refinancing programs, and yet prohibits foreign-affiliated financing companies that are licensed in the US and provide the same range of automotive financing services from also gaining access to such programs.

Of course, the US may have certain defenses to such a national treatment argument. Namely, the US may argue that the Understanding on Commitments in Financial Services limits national treatment to official funding and refinancing facilities available in the "normal course of ordinary business," whereas the TARP/CPP programs are extraordinary, one-time programs to stabilize domestic financial markets on an "emergency" basis. Similarly, the US could point to the following exception contained in the GATS Annex on Financial Services Art. 2(a):

> 2. Domestic Regulation: (a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

The US may argue that the purpose of the CPP and AIFP programs in utilizing TARP funding is to unfreeze credit markets, improve liquidity of major financial institutions, and provide greater access to credit for both businesses and consumers. If US auto finance companies with foreign affiliation can demonstrate they meet the same criteria and offer the same types of financial services as GMAC to a large number of US consumers and/or business credit clients, then these policy goals of protecting US debtors, investors, and policy holders and stabilizing financial markets should apply equally to the financing

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entities regardless of their foreign ownership ties. For example, if an automotive financing entity is organized under US laws, operates domestically within the US market, and provides financing to US-based customers for the purchase or lease of automobiles driven within the US market, it is difficult to envision how the "prudential" reasons outlined above are served by drawing an arbitrary distinction against companies that happen to have some affiliation with an automotive company based outside of the United States.

2) Most Favored Nation and Market Access under GATS

Art. II of GATS also applies "most favored nation" treatment to trade in services, by stating:

> With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country. (WTO General Agreement on Trade in Services, 1995, Art. II.)

Based on the above language, if the US ultimately extends access to TARP/CPP to any financial institutions with some degree of foreign ownership or affiliation, then arguably such programs must be extended to all foreign affiliated financial institutions on an MFN basis.

Finally, Article XVI of the GATS also references certain specific "market access" commitments, for example, prohibiting measures that contain strict numerical limits or quotas on service providers, or measures that limit market access based on levels of foreign shareholding or type of legal entity required. Such provisions arguably may apply to the TARP/CPP programs, which limit eligibility to only certain legal forms of institutions (e.g., financial holding companies) and restrict the level of foreign ownership/control.

Based on the above principles, US trading partners may be able to challenge the billions in TARP funding received to date by GMAC and Chrysler Financing as inconsistent with US obligations under the General Agreement on Trade in Services.

The WTO Agreement on Technical Barriers to Trade ("TBT") and Incentives for Scrapping Old Cars under the Consumer Assistance to Recycle and Save ("CARS") Act of 2009

Incentives, vouchers, or other types of subsidies for scrapping old cars made available directly to consumers arguably would not fall under the SCM Agreement if they are general in nature and focused on incentivizing the end consumers rather than the automotive producing enterprises. Such enterprises may benefit indirectly from such incentives (e.g. through increased opportunities for new sales to the consumers who take advantage of such tax benefits by scrapping their older cars), but they may not be sufficiently "specific" if they not confer benefits directly on a particular industry. Thus, they may not be deemed actionable or prohibited subsidies under the SCM Agreement.

Incentives for scrapping older cars by themselves would not appear to cause trade impacts in the market for new cars, as long as they are implemented in a way that does not unduly restrict the consumers' freedom of choice in selecting replacement cars. However, there is potential for WTO challenge if such incentives are implemented in a manner that explicitly influences replacement car purchasing decisions, for example:

- If the incentive is made explicitly contingent on the consumer purchasing a new car that is made or assembled in the United States;

- If the incentive is conditioned on the purchase of a car employing certain technology, which could be technology exclusively or predominantly used by US domestic automakers;

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- The incentive is limited to replacement cars that are transported from the place of manufacture to the place of sale over a relatively short distance, so as to exclude application to essentially all imports.; or

- The incentive is limited based on some other criteria that, as applied, incentivizes purchase of only domestically produced cars to the exclusion of foreign-made models.

These kinds of incentives, which skew consumer purchasing decisions in favor of domestic goods may be challenged under GATT Article III (4) as a violation of the "national treatment" provision. This provision requires that [imported products] "shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sales." WTO and GATT Panels have held that incentives influencing consumer purchasing decisions may constitute a "requirement affecting sale," thus measures such as the last three on the list above may be challenged even if they do not explicitly require purchase of a domestically manufactured vehicle.

In addition, such incentives also might be challenged under the TBT Agreement. Phasing out old cars through regulation may raise trade barriers issues for new imports, but the most direct effect would be on the market for second-hand cars. It is conceivable, however, that a regulatory phase-out may impose technical requirements relating to the replacement car, such as that the replacement vehicle must be equipped with certain new technology, or may not employ certain disfavored technology. Any such requirements would affect the sale of new cars and possibly, depending on the choice of the favored or disfavored technologies, the sale of imported cars. This is also the case where conditions attached to incentive programs for scrapping old cars are so strong that they tend to drive consumer purchasing decisions.

1) Definition of Technical Regulation under the TBT Agreement

If the legislation or implementing rules for the CARS program include technical requirements such as those relating to emission control technology, these could be regarded as regulations on "product characteristics or their related processes and production methods." This would be especially relevant if such characteristics include product design and/or performance requirements for which compliance is "mandatory." Also where a requirement to qualify for an old vehicle scrapping incentive is set at such a high level that compliance with the requirement de facto causes many consumers to comply, there is a good argument to be made that the requirement concerned effectively operates as a "mandatory" requirement.

2) No Less Favorable Treatment

If the specific requirement concerned discriminates, de jure or de facto, against automobiles manufactured by foreign-affiliated producers, or against imported automobiles in general, this requirement would likely be deemed to violate the "no less favorable treatment" clause. This is so because it would favor "like products of national origin." To determine whether a requirement has any such effect, one would need to analyze future implementing rules, program guidelines, and actual practice under the program. Even a requirement, although not explicitly discriminatory, that de facto provides an advantage to domestically produced cars to the detriment of imported cars, e.g. by requiring certain emission control technologies that, in practice, are only used by US-based vehicle manufacturers, may well violate the "no less favorable treatment" rule.

3) Legitimate Objective

The Consumer Assistance to Recycle and Save ("CARS") Act of 2009 is intended, at least in part, to support certain policy objectives for increasing fuel efficiency and spurring new car sales. Legislation or regulations supporting environmental or health protection objectives have been recognized as legitimate under the TBT Agreement and WTO law generally (e.g., see the discussion below of environmental policy exceptions under Art. XX of GATT 1994). Thus, if the legislation in its final form articulates credible

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environmental goals, and does not merely incentivize the purchase of new vehicles that do not meet improved emissions standards, then the US may have a strong basis for defending such programs as consistent with the TBT Agreement. However, as discussed below, such measures must be no more restrictive than necessary to achieve the stated policy objective, and the US may need to demonstrate the any distinctions between domestic and foreign-made vehicles further such environmental objectives.

4) Not More Restrictive than Necessary

A technical regulation is not permitted under the TBT Agreement if the objective pursued can be achieved through alternative measures that have less trade-restricting effects, taking into account the risks non-fulfillment of the objective would create. Furthermore, technical regulations must, where appropriate, be based on product performance rather than design or descriptive characteristics. Article 2.2 of the TBT Agreement states:

> 2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.

In the event that implementation of the CARS legislation results in any requirements or regulations that would impose certain technology, or prohibit the use of alternative technologies, would be a design, rather than performance-based, requirement, and may violate this clause if deemed to be more trade-restrictive than necessary. For instance, if the US rules favor some technologies over others (hybrid, dual-fuel, biofuel, electric, hydrogen fuel cell, etc.) in selecting which models of energy-efficient vehicles will be eligible for the greatest incentive awards, this could be challenged if it can be demonstrated that the favored technologies are not those utilized by foreign manufacturers and yet the technology used on foreign models offers largely similar environmental benefits. In essence, if the US cannot demonstrate a rational connection between the technologies favored under any "cash for clunkers" style program and the environmental goals of the program, such measures are more likely to be challenged under the TBT Agreement, especially if they have a disproportionate impact on discouraging consumers from purchasing imported vehicles.

Importantly, the final text of the CARS legislation dropped the explicit requirement that a new car must be "assembled in the US" to qualify for consumer incentives. Thus, the statute no longer discriminates "as such" or on its face against imported vehicles or components. However, the implementing rules and guidelines for the program are still being developed, and much will depend upon how the involved agencies and authorities actually administer the program in practice. Thus, an analysis of whether the program may implicate national treatment or other WTO obligations under the TBT Agreement "as applied" will depend largely on the forthcoming guidelines and regulations and how the program is actually implemented in practice.

Potential Defenses of US Automotive Subsidy Programs Based on Protection of Environment and Conservation of Natural Resources under GATT Article XX

In the event of a WTO challenge of US automotive industry grant and loan programs under the EISA and AIFP, the United States may be able to defend such programs if it can demonstrate they are directly tied to non-discriminatory environmental policy objectives, such as the development of fuel-efficient automobiles that result in oil conservation and reduced emissions. Article XX of the GATT 1994, as incorporated into the final WTO Agreements, provides in part:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or

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> a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> . . . (b) necessary to protect human, animal or plant life or health;
>
> . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption…

(Uruguay Round Agreements, Final Act, GATT 1994, Art. XX). Based on the above provisions of Article XX, it appears unlikely that the US can demonstrate that discriminatory treatment of foreign-affiliated entities in the automotive sector helped to further the above policy objectives of protecting health or conserving natural resources. In relation to the EISA, including foreign-affiliated facilities within the EISA grant and loan programs, as opposed to giving preference to facilities more than 20 years old, would further incentivize and expand production and availability of more efficient automobiles in the US, thereby enhancing the environmental goals of the program. Thus, the discriminatory nature of the preference for older producers does not seem to further environmental or conservation objectives. With respect to the direct funding of GM and Chrysler under AIFP using TARP funding, neither the EESA authorizing legislation nor the AIFP guidelines issued by the US Treasury Department focus on environmental goals as a central component of such funding.

Finally, the US has avoided blatant WTO issues relating to the Consumer Assistance to Recycle and Save (CARS) legislation by removing the explicit requirement that newly purchased or leased autos must be "assembled in the United States" in order to qualify for the vouchers or other direct incentives. However, if final implementing guidelines or rules incorporate any similar requirement, the United States would have difficulty demonstrating how discriminating between domestic and foreign-made vehicles furthers the environmental objectives of the program. Arguably, the program would result in greater fuel efficiency, lower emissions, and faster improvement of overall fuel economy if it is applied equally to all new vehicles regardless of whether or not they are assembled in the United States.

On balance, in light of the above, it does not appear that the United States could mount a strong defense to any WTO challenge of domestic automotive industry bailout and assistance programs based on GATT Article XX.

POTENTIAL IMPACT OF ABOVE AUTO INDUSTRY BAILOUT PROGRAMS ON TRADE AND INDUSTRY COMPETITIVENESS

In recent G8 and G20 meetings, leaders of developed nations have expressed grave concerns about avoiding protectionist measures in order to prevent further contraction of world trade and the deepening of the current global recession. In a March 26, 2009 report to the WTO Trade Policy Review Body ("TPRB") on the effects of the economic crisis, WTO Director-General Pascal Lamy expressed similar concerns, and predicted further sharp contractions in the volume and productivity of world trade along with the following observation (World Trade Organization Report, April 20, 2009, para. 2):

> There is no indication of an imminent descent into high intensity protectionism, involving widespread resort to trade restriction and retaliation. The multilateral trade rules built over the past 60 years continue to provide a strong defence against that happening. *The danger today is of an incremental build-up of restrictions that could slowly strangle international trade and undercut the effectiveness of policies to boost aggregate demand and restore sustained growth globally.* (emphasis added)

Although none of the individual automotive aid measures discussed above seems likely to cause "high intensity" distortion of automotive markets in and of itself, nevertheless the cumulative distorting impact of

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all of these subsidies and protective measures has the potential to become quite significant over the coming years. There is growing indication that the US effort to aid our domestic auto industry is leading to a proliferation of similar measures in auto-producing countries worldwide. For example, in his more recent report on the economic crises released on July 15, 2009, Lamy notes that trade in "motor vehicles and parts" already has become one of the sectors most heavily impacted by new subsidies and trade protection in 2009 (World Trade Organization Report, July 15, 2009, para. 8.75). One focus of the report is explaining how the severe contraction in international trade volumes and output over the nine months from October 2008 to July 2009 has disproportionately impacted the economies of developed countries, especially in relation to autos (para. 27):

> One explanation for the severity of the decline in trade of developed economies is that their exports are concentrated in those goods most affected by the financial crisis. Germany's exports, for example, were 8 per cent lower in April than in March and 40 per cent lower year-on-year, reflecting how strongly trade in automotive products has been affected with worldwide demand for cars and light trucks cut currently by about half.

With respect to measures protecting or subsidizing the US automotive sector as described above, this trend suggests that there may be a higher likelihood of spiraling retaliatory action, proliferation of similar measures in other countries, and/or pursuit of WTO dispute settlement challenges, given that such measures are likely to further distort global auto markets and worsen the already severe impact of the global recession on the economies of key US trading partners. The WTO report expresses particular concerns about "buy/invest/lend/hire local requirements that have officially or unofficially been attached to some recent programs," stating that "[b]ecause of their evident nationalistic appeal in current circumstances, there is a particular danger that these programmes could become targets for retaliation and proliferate" (para. 9).

Direct state aid, subsidies, and "bailout" programs targeted at specific industries or companies also may have a highly distorting impact on competition within those industries over time, as the cumulative effect of such measures becomes manifest. For example, as the current subsidies are absorbed by the target companies and if similar subsidies proliferate in other auto-producing countries worldwide, there is a real danger of distortive impacts on pricing and supply chain sourcing patterns over time. Historical experience in sectors such as agriculture, textiles, and steel demonstrates that the more distorted markets become due to subsidies, tariff, and non-tariff barriers, the more difficult it is to unwind these programs and return the industry to market-based conditions of competition in which problems such as overcapacity, inefficiency, and economies of scale can more readily be identified and addressed. As explained in the most recent WTO report on trade impacts of the economic crisis:

> The longer the subsidies remain in place, the more they will distort market-based production and investment decisions globally, the greater will become the threat of chronic trade distortions developing, and the more difficult it will become to correct those distortions. The case of distortions to international trade in agricultural products today provides a historical lesson in that respect. (para. 10)

There also is a high risk that such trade distorting programs will further the "law of unintended consequences". Programs seeking to shield particular domestic companies, industries, or interest groups in the short run have unintended longer term impacts on trade flows, supply chains, conditions of competition, and downstream users and consumers both domestically and worldwide. This is likely to be especially true in the automotive sector, given the sheer number of raw materials, parts, and components that must be sourced through complex cross-border supply chains, as well as an interlocking network of distribution to the ultimate consumers through dealerships that often represent multiple brands of vehicles, including both traditional and "transplant" brands.

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From a policy standpoint, experiments with trade restrictive programs reflect that measures protecting certain stakeholders often come at the expense of larger groups of stakeholders and the economy as a whole. One instructive recent example is the steel safeguard measures approved by the George W. Bush administration in 2001. Various economic studies conducted following imposition of the increased tariffs reflected that the costs of such measure far outweigh the benefits. For example, for each steel job supported by the tariffs, 5 to 8 jobs were lost in downstream and related industries, as metal consuming industries were forced to downsize or move operations out of the US in order to avoid the steeply higher costs of steel and other materials used in their operations, and steel prices remained artificially high long after the tariffs were repealed (Francois and Baughman, 2003). Given the substantial investments of traditionally "foreign" automotive companies in building assembly and component supplier facilities across the United States, does it really further US "national" interests to protect GM and Chrysler jobs not only at the expense of Toyota, Honda, BMW and Hyundai jobs employing American workers, but at the expense of lower profits for downstream dealers, fleet buyers, and US consumers.

Moreover, can the costs of these wider macroeconomic impacts be justified in the name of rescuing the specific firms being supported by bailout subsidies and other trade distortive measures discussed above? The goal is to prevent the ripple effect of hemorrhaging job losses at GM affiliates and suppliers. It is not at all clear that the traditional US automotive producers will emerge from the present crisis better equipped to compete in the future. Such measures are intended to encourage innovation and spur development of new "green" cars, and yet the bailout programs seem to have strings attached that may in fact limit the companies' flexibility and increase their cost structures, thus inhibiting their ability to commercialize production of newly developed products.

The unprecedented direct assistance to GM and Chrysler prior to and as part of their bankruptcy workouts is a case in point. Although President Obama has stated emphatically that the government has no intention of influencing GM or Chrysler through any direct pressure or participation in management decision-making, early reports suggest that fundamental conflicts of interest may arise between the interests of the government and taxpayers versus the interests of the company. In announcing the GM Bankruptcy filing on June 1, 2009, the President emphasized as follows:

> [W]e are acting as reluctant shareholders -- because that is the only way to help GM succeed. What we are not doing -- what I have no interest in doing -- is running GM. GM will be run by a private board of directors and management team with a track record in American manufacturing that reflects a commitment to innovation and quality. They -- and not the government -- will call the shots and make the decisions about how to turn this company around. The federal government will refrain from exercising its rights as a shareholder in all but the most fundamental corporate decisions. When a difficult decision has to be made on matters like where to open a new plant or what type of new car to make, the new GM, not the United States government, will make that decision. In short, our goal is to get GM back on its feet, take a hands-off approach, and get out quickly. (White House, Remarks By the President, June 1, 2009)

But many argue that the US government is already stepping outside these boundaries by playing an active role in imposing trade restrictive conditions on the new GM. For example, the *Washington Post* reported that, after the GM reorganization was well underway, the Treasury Department inserted trade-restrictive terms into a deal under which GM will sell off Opel (GM's Germany based European arm):

> The Treasury has imposed a condition on the Opel deal that flies in the face of free markets, but is designed to shield existing US jobs; Opel must be barred from selling cars or setting up manufacturing plants in the United States. And the Treasury insisted that, at least for a time, Opel stay out of China, where GM is strong. (Mufson, May 31, 2009)

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Some sources further report that the Administration also insisted on concessions to the UAW as part of the GM restructuring process, which will restrict the company's ability to import the smaller, more fuel-efficient cars that it already makes overseas. UAW President Ron Gettelfinger boasted in an interview on PBS's "NewsHour" that "we, quite frankly, put pressure on the White House, the [auto] task force, the corporation" to bar small-car imports from overseas (UAW's Gettelfinger, May 28, 2009). A *Wall Street Journal* OpEd characterized these criticized these developments as a dangerous form of "raw trade protectionism":

> This is raw trade protectionism. It is also textbook cartel behavior and would be an antitrust violation if practiced by a business. But the benefits for GM are illusory because the import limits mean the company will have to spend even more to retool its domestic plants to make the little green cars that President Obama and Congress are demanding. No one knows if Americans will buy such cars, even if GM can make them competitively in the US The Administration promises to wield a light ownership hand, but it's only a matter of time before Congress starts to micromanage GM's business judgments. Every decision to close a plant will be second-guessed, much like a military base-closing. . . .
>
> The larger corruption will be when government tries to vindicate its ownership by favoring GM over Ford and the other auto makers that aren't wards of the state. The TARP legislation contained one blatant example in the form of a $7,500 tax credit for consumers who buy GM's new electric car, the Chevy Volt. Expect more such favoritism, including huge new subsidies for green cars if consumers prove resistant to their charms. ("The Obama Motor Company," June 2, 2009)

By attaching strings to state aid programs and seeking to influence key management decisions of the company, the US government risks making GM and Chrysler even less competitive in the long run.

At recent G20 and G8 meetings, leaders of the world's major economies have repeatedly rejected protectionism, proclaiming that "World trade growth has underpinned rising prosperity for half a century. We will not repeat the historic mistakes of protectionism of previous eras." At the July 2009 G8 meeting, leaders specifically agreed to constantly monitor the quarterly reports of the WTO itemizing trade restrictive measures enacted in the wake of the economic crisis in an effort to reduce such measures. But emerging data seem to tell a different story about trade inhibiting measures implemented by the G20 and les developed nations as well. Multiple recent reports by the World Bank, WTO, and Center for Economic Policy Research cataloguing trade restrictive programs reflect that protectionism has been on the rise in 17 of the G20 countries, with the United States leading the pack. For instance, a March 2009 trade note by the World Bank indicated protectionist measures were increasing worldwide, particularly in the area of subsidies and non-tariff trade barriers (Gamberoni, E. & Newfarmer, R., March 2, 2009).

A July 8, 2009 report of the Center for Economic Policy Research and its partners determined that 21 trade inhibiting measures had been the United States since the start of the global economic crisis, with the next closest countries being 6 measures each reported for Indonesia and the Russian Federation. (Cattaneo, O., Evenett, S., and Hoekman, B., July 2009). Countries throughout the world take special note when the largest economy in the world is also the country implementing the greatest number of protectionist measures during the global economic crisis. The authors of the CEPR report indicate that subsidies in the automotive sector by G8 countries already distorting world trade, and may have a ripple effect in other sectors of the global economy:

> A significant increase in the use of trade-distorting policy by a major jurisdiction could set off unwelcome domino effects, not unlike that witnessed for auto subsidies, diary export subsidies, and procurement nationalism in the last few months. (Cattaneo, O., Evenett, S., & Hoekman, B., July 2009, p. 84)

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The fact that the US seems to lead the pack in protectionist measures is particularly ironic, given that many countries believe the root cause of the crisis is financial mismanagement by the United States. At present, a "creeping protectionism" trend seems to be accelerating, and the G20 will need to put their money where their mouth is in order to avoid a snowball effect that may not only stifle competitiveness in the automotive sector but lead to more widespread distortions in the global economy. Analysts should continue to closely monitor evidence of protectionism worldwide. This may be reflected in anecdotal reports, but also can be compared to aggregate data that might provide further basis for empirical analysis and comparisons. For example, increased use of trade distorting measures may begin to be reflected by changes in country scores under the "Trade Freedom" component within the Index of Economic Freedom, and historical data from the index can be used as a basis for comparison (Holmes, K. & Miller, T., Index of Economic Freedom, 2009).

CONCLUSION

As outlined above, there are viable legal theories that could provide a basis for US trade partners to seek WTO consultations and/or mount a dispute settlement challenges of the various bailout, government assistance, restructuring, and incentive programs provided to prop up US domestic automotive producers over the course of the past year. If the programs discussed above qualify as "actionable subsidies," and US trading partners can demonstrate actual or threatened "adverse effects" to their interests, then US trading partners could seek to challenge the measures through WTO proceedings.

Moreover, based on the formal Capital Purchase Program and Automotive Industry Financing Program guidelines issued by the US Treasury Department in providing billions of dollars in assistance to domestic auto financing entities such as GMAC and Chrysler Financial, WTO trading partners may also have viable claims that such programs violate national treatment, MFN, and/or market access commitments under the WTO General Agreement on Trade in Services. The US may have some available defenses to such GATS claims, based on the argument that TARP is a one-time extraordinary program to provide emergency relief and stabilize troubled markets. In turn, US trading partners may be able counter such defenses by demonstrating that arbitrary discrimination provisions, which are based on foreign ownership or control, are not relevant or narrowly tailored to accomplish the stated policy objectives of the programs.

Other more limited measures discussed above may have a trade distorting impact on the automotive sector, depending on how they ultimately are implemented. For instance, the US International Trade Commission has recommended substantial new tariffs against imports of passenger car and light truck tires from China, but it remains to be seen whether President Obama will actually implement such restrictions. The recently enacted Consumer Assistance to Recycle and Save (CARS) legislation avoided blatant WTO inconsistencies by eliminating proposed language that would have required eligible new cars to be "assembled in the United States," but implementation of the program should be closely monitored to ensure it does not in fact discriminate against cars assembled by foreign or foreign-affiliated producers, and to ensure the program does not impose technical barriers that are more restrictive than necessary to achieve stated policy goals.

Collectively, the auto industry programs discussed above have the potential to lead to retaliatory trade actions, proliferation of similar subsidies, and/or dispute settlement actions through the WTO. While no single measure is highly trade distortive, the cumulative impact of all of the above measures implemented in the automotive sector has the potential to distort competition, inflate prices, and inhibit flexibility and innovation of US auto producers.

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