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**BEFORE THE UNITED STATES  
TRADE REPRESENTATIVE  
Docket Numbers USTR-2009-0031, USTR-2009-0032, USTR-2009-0033**

**COMMENTS CONCERNING THE NATIONAL TRADE ESTIMATE REPORT ON  
FOREIGN TRADE BARRIERS AND REPORTS ON THE SANITARY AND  
PHYTOSANITARY AND STANDARDS-RELATED TRADE BARRIERS**

**FILED BY  
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The Office of the U.S. Trade Representative (USTR) has requested private sector input with respect to which foreign policies and practices identified in the 2009 National Trade Estimate Report on Foreign Trade Barriers (NTE) should be prioritized for action. Various business interests will undoubtedly identify policies that affect their commercial interests and request that USTR prioritize their elimination. Public Citizen believes it is critical for USTR to consider such industry requests in the context of the broader public interest all Americans have in protecting public health and safety and the environment.

**Namely, among the listed “trade barriers” in the NTE are an array of other countries’ food safety, standards-related and other consumer protection policies.** In the NTE, these measures are listed along with traditional trade barriers, such as subsidies, tariffs, and customs procedures. But there is a fundamental difference between measures that are intended to impede trade and those that are legitimate safety, health and environmental measures that apply to domestic and foreign goods but that may result in certain prospective imports being excluded from a market. For instance, the United States bans sale here of foods, whether domestically or foreign produced, that are contaminated with certain toxic pesticide residues. Obviously this policy results in some prospective food imports being excluded from our markets. However, with respect to our own laws, we do not consider such a non-discriminatory measure, while impeding trade, to be an illegal trade barrier. The NTE fails to make this critical distinction with respect to other countries’ policies.

The globalization of the production of food and consumer products has resulted in significant consumer safety challenges. Scares over unsafe imports of toys, pet food, seafood, and dry wall have created a major outcry among the public and lawmakers. In recent years, Congress has acted to try to address these concerns – as have legislatures and regulators around the world.

If the Obama administration were to take trade enforcement actions against some of the policies identified in the NTE, it would invite boomerang attacks of existing U.S. consumer health and safety measures and those promoted for future development by the administration. Indeed, the United States currently maintains some policies that are quite similar to those USTR includes in the NTE list of objectionable trade barriers. Moreover, by merely labeling other countries’ consumer regulatory policies as “illegal trade barriers” in the NTE, USTR is undermining the global push for reregulation. We have four primary concerns:

First, the current formulation of the “trade barriers” report functions as an obstruction to needed global reregulation. The National *Trade* Estimate report aims at much more than traditional trade barriers, such as subsidies, tariffs, and customs procedures. Rather, the NTE simultaneously targets dozens of non-discriminatory, state-of-the-art health and safety rules abroad that may also have indirect and often unintended trade effects. One purpose of the report is to pressure countries to eliminate the policies listed in the NTE – backed up with the threat of U.S. action if countries do not do so. Moreover, the announcement earlier this year by USTR of a campaign to target other countries’ food and other regulatory standards is extremely troubling.<sup>1</sup> Why would it be in the American public interest to *prioritize* attacking other countries’ consumer standards and food safety regimes, especially in light of the import safety scandals dominating the news over the past years which have revealed the need for other countries to improve such policies? Why would an attack on

regulation take precedence over remedying the numerous serious barriers to U.S. exports, such as currency manipulation, on which the administration has not taken action?

In the appendix below, we list policies related to consumer protection included in the 2009 NTE that are simply inappropriate for USTR to target. Some of the policy areas and specific measures listed in the NTE have been tracked by Public Citizen for decades, and represent examples of where the United States should be emulating foreign countries' practices, not attacking them in the NTE. Other policies in the appendix represent policies that Public Citizen has not investigated thoroughly, but given their consumer protection orientation should benefit from USTR applying a strong presumption against using U.S. taxpayer dollars to seek their elimination or otherwise target them. That is to say that USTR's enforcement priorities should be formulated from the perspective of promoting the American public interest, not on what foreign health, safety or environmental policy irritates a specific U.S. company or commercial sector.

Second, the NTE is a relic from a past era. The original mandate for the report – which was intended to identify priority areas for trade negotiations – dates back to President Nixon's Fast Track bill from 1973. At that time, the Nixon administration assured Congress and the public that it would use the Fast Track authority to pursue very limited non-tariff issues closely related to trade.<sup>2</sup> Instead, over the last 36 years, the scope and content of “trade” agreements have been quietly but dramatically transformed. Fast Tracked trade deals like the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) are wide-ranging international commercial pacts containing hundreds of pages of deregulatory provisions that set non-trade policy in many areas traditionally reserved for Congress and state legislatures.<sup>3</sup> The NTE's scope has expanded in parallel, thus it now represents an over 500-page “hit list” conflating non-trade regulatory policies and actual trade barriers. The overreach of “trade” agreements into an array of sensitive non-trade policy matters has become as unpopular with the American public and Congress as it is counterproductive. Perhaps the most poignant description of this problem was offered by the late Rep. Robert Matsui (D-Calif.), one of the House's leading Democratic advocates of NAFTA and WTO. He urged his colleagues to oppose Fast Track in 2001, saying:

“I stand here before you today as a free trader... But this vote is about much more than that. It's about the fact that the very nature of international trade has changed radically. Trade is no longer primarily about tariffs and quotas. It's about changing domestic laws. The constitutional authority to make law is at the heart of our role as a Congress and of our sovereignty as a nation. When international trade negotiators sit down to hammer out agreements, they are talking about harmonizing ‘non-tariff barriers to trade’ that may include everything from antitrust laws to food safety... Think about what may be bargained away at the negotiating table: our own domestic environmental protections...food safety laws...competition policies. That's the air we breathe, the food our children eat, and the way Americans do business...”<sup>4</sup>

One important way in which USTR could further its stated goal of rebuilding public and congressional support for trade expansion would be to address these concerns about trade agreements undermining non-trade regulatory policies. Instead, the NTE and even more so the announced campaign to target other countries' food and other regulatory standards only exacerbates the problem.

Further, USTR's approach conflicts with President Obama's campaign trade reform commitments that focused on ensuring that future agreements harvest the benefits of trade while safeguarding environmental and health protections. President Obama specifically identified as an area of needed reform ensuring that trade agreements and policies are not used to attack health, safety and environmental regulatory policies while also repeatedly stating his support for U.S. policies, such as Country of Origin food labeling, that are being attacked as illegal trade barriers in the same manner USTR now lists other countries' policies for attack.<sup>5</sup> Indeed, over the course of the 2006 and 2008 election cycles, 72 successful congressional candidates ran on platforms advocating for changing the overreaching NAFTA-WTO trade agreement model, replacing incumbent supporters of the status quo.<sup>6</sup> In the past decade, the National Conference of State Legislatures has shifted its policy positions from support of numerous trade agreements to demands that the inappropriate encroachment on domestic regulatory space be reversed.<sup>7</sup> Rather than reflecting the perspective now shared by many and specifically articulated by President Obama, the 2009 NTE reads like a document from 1999.

Third, it is worrying that USTR has not considered the potential for the NTE to lead to "boomerang" trade challenges of U.S. public interest policies. As you know, other countries can enforce the deregulatory mandates of deals like NAFTA and the WTO through binding international dispute settlement mechanisms; trade sanctions can be authorized for failure to comply. When the NTE singles out for elimination as trade barriers other countries' common-sense policies on behalf of specific U.S. commercial interests, it encourages other countries to similarly target our policies. This is a real threat. Since its establishment in 1995, WTO panels have ruled over 90 percent of the time that environmental, health, or safety policies brought before it in challenges constitute WTO-illegal measures that must be changed, removed or otherwise targeted for trade sanctions.<sup>8</sup>

Fourth, the USTR "trade enforcement" effort and the NTE consider as trade barriers public interest measures abroad, even though similar safeguards enjoy widespread support here at home. Public Citizen's main concern in this respect, as noted above, is that U.S. listing of other countries' domestic regulatory policies as trade barriers fosters the conditions that encourage other countries to attack U.S. regulatory policies using trade claims. Especially given USTR has the responsibility to defend U.S. policies when they are challenged as trade barriers, it is worth considering trying to avoid the prospect of USTR's own NTE listings ending up as evidence in another country's attack on similar U.S. policies.

And, the NTE has a separate section in its report on each country that targets U.S. trading partners' government procurement policies and local content requirements. Yet at home, the U.S. public and Congress overwhelmingly support such preferences, and have for nearly 80 years. The Buy American Act was passed by U.S. Congress in 1933, and has been reaffirmed since in subsequent legislation applying its terms to various areas of procurement, as well as to the American Recovery and Reinvestment Act of 2009. According to a recent poll, an overwhelming 86 percent of Americans support the Buy America provisions in the Stimulus package.<sup>9</sup>

Moving forward, U.S. trade enforcement, trade agreements and the U.S. NTE must take care not to target countries' domestic regulatory policies. The U.S. public interest is not served through the NTE's implication that globalization or the expansion of mutually beneficial trade requires a restriction of policy space on environmental, health and consumer matters. Unfortunately, the NTE

and the announced USTR campaign targeting other countries' food and other regulatory standards reflects the past, failed and discredited view of trade policy being used as a means to force deregulation.

## **APPENDIX:**

### **I. POLICIES THAT SHOULD NOT BE INCLUDED IN THE NTE**

#### **Responses to Mad Cow Disease and Avian Flu**

The NTE places special focus on targeting policies in these areas. If the NTE were more widely distributed, its attacks on other countries' basic food safety practices would likely shock U.S. public opinion – not least because of the support such measures have here at home.

For instance, in May 2003, a case of indigenous Bovine Spongiform Encephalopathy (BSE - known as "mad cow disease") was found in Canada. Nine days later, the U.S. Department of Agriculture (USDA), acting in accordance with U.S. animal disease control policy and legally required administrative law procedures, issued an emergency rule closing the U.S.-Canadian border to imports of Canadian beef and cattle.<sup>10</sup> Since 1989, the United States has not accepted any cattle or beef from nations with even one indigenous case of the disease. Previously, the United States had closed the border to imports from Austria, Finland, Greece and Israel after the discovery of a single case of BSE in each nation.

Yet the NTE targets restrictions in Argentina, Australia, Bolivia, Brazil, Chile, China, Colombia, Dominican Republic, Ecuador, El Salvador, Hong Kong, Japan, Jordan, Mexico, New Zealand, Peru, South Africa, Switzerland, Sri Lanka, Taiwan, Ukraine and Venezuela on beef imports in the wake of the mad cow crisis. The NTE also targets restrictions in Argentina, China, India, Japan and Sri Lanka on poultry and other imports in the wake of the Avian Flu crisis.

#### **Genetically Modified Organism (GMO) Policy**

GMO regulation is another area singled out in the NTE for exhaustive attacks. For instance, GMO labeling requirements in Australia, Botswana, China, Ecuador, European Union (EU), Indonesia, Japan, Korea, New Zealand, Norway, Russia, Sri Lanka, Switzerland, and Taiwan are attacked. Bans – both alleged and actual – on select GMO products in Angola, Ecuador, certain European countries, Korea, Morocco, and Saudi Arabia are attacked in the NTE.

Much of the world's population lives in countries that require pre-market approval of GMOs. Even in the United States, where agribusiness has secured a deregulated market for GMOs and is effectively conducting a GMO open field test on the U.S. environment and U.S. consumers, there have been subfederal efforts to ban GMO crops. Similar efforts are underway in developing nations. It is true that respecting other countries' and consumers' views about GMOs means that GMO products cannot enter certain markets. However, as the Obama administration works to reshape U.S.

food policies – starting with the White House garden and moving out to federal policy - the U.S. government should not be in the business of protecting U.S. agribusiness from its own bad business decision to pursue the GMO strategy. If a country decides that it does not want GMO products, and it bans both domestic production and imports, then there is no trade issue. There is no discrimination. There is no protectionism. Such policies merely reflect democracy in action – the majority making the decisions that affect their lives. Moreover, forcing unwanted GMOs on unwilling nations is a violation of international law. The Biosafety Protocol protects the right of nations to regulate these products in the public interest.

Meanwhile, scientific evidence of environmental harms caused by genetically engineered crops and the threat to human health posed by pharmaceuticals grown in food crops will not dissipate. Trying to use the WTO to reverse this trend will only likely boomerang against the already shaky status of the WTO in world public opinion.

USTR takes aim at specific anti-GMO measures in the NTE, including by:

- **Targeting rigorous labeling requirements:** This includes targeting the European policy requiring that “All food and feed produced from genetic engineering, including products that no longer contain detectable traces of agricultural products derived from biotechnology, must be labeled.” (EU, page 367)
- **Targeting the private anti-GMO choices of businesses and citizens:** Even though meats from animals that ate GMOs are not required to be labeled, “The main retailers in Switzerland have taken a strong anti-biotechnology stance, stocking only non-biotechnology products and requiring meat to have been produced without biotechnology feed... starting in November 2005, a five year moratorium on approvals for the planting of biotechnology crops or production of genetically modified animals was put into place. The moratorium was the result of a grass-roots movement put to a vote under the Swiss political system, which allows voters to seek changes to the Constitution by referendum as long as at least 100,000 voters sign a petition requesting it.” (Switzerland, page 472) “Although Japan is the largest *per capita* importer of bioengineered crops, no consumer-ready foods with recognizable bioengineered ingredients are sold in Japan. One factor that keeps bioengineered foods out of the supermarket is Japan’s labeling requirement. As of yet, no Japanese food manufacturer or retailer has been willing to test the market for a consumer-ready food that is labeled with ingredients derived from modern biotechnology.” (Japan, page 278)
- **Targeting “race-to-the-top” policies:** “In response to ... burdensome directives, some U.S. food producers have reformulated their products to eliminate the use of biotechnology products.” (EU, page 183)
- **Targeting popular local measures that establish or consider alternatives to GMO production:** “The government has declared a ‘GMO-free’ area under the Natura 2000 project (corresponding to 11.5 percent of the land area of the island). Local environmentalists and others have persistently pressured the government of Cyprus to declare all of Cyprus ‘GMO-free.’ Largely as a result of this pressure, the government in October 2008 issued a tender for a study aimed at establishing that co-existence between bioengineered and conventional crops is impossible in Cyprus. Application requirements for new biotechnology crops are also stricter in Cyprus than in other EU countries, while permits for such crops must be renewed every five years. Biotechnology products already licensed in the EU may circulate in Cyprus freely, but

biotechnology organisms must be separately approved in Cyprus, even if they are already licensed in other EU countries. In January 2008, the European Commission asked Cyprus to repeal 2007 legislation banning the importation and sale of biofuel products made from biotechnology plants. So far, Cyprus has failed to comply, risking EU sanctions of around 10 million euros annually.” (Cyprus, page 192)

- **Targeting measures to allow GMO production subject to certain non-discriminatory restraints:** “In February 2008, the German government passed an amendment to the biotechnology law of March 2006 that essentially keeps Germany’s burdensome biotechnology requirements in place. These requirements include 100 percent accessibility to field registrations; 100 percent farmer liability; plant distance requirements of 150 meters between conventional and bioengineered crops, and 300 meters between bioengineered crops and organic fields; and giving German Laender (states) the option of implementing even more burdensome measures, including distance rules for ‘nature protection’ purposes. The current biotechnology regulations limit the number of bioengineered plantings.” (Germany, page 184)
- **Targeting measures to provide for consumer redress for GMO practices:** “Malaysia’s Parliament passed the Biosafety Bill in 2007, that included potentially trade restrictive language for biotechnology-derived commodities and processed products, including mandatory labeling and a strict liability and redress enforcement regime. The implementing regulations for this law are currently being drafted.” (Malaysia, page 337)
- **Targeting requirements for proof that GMOs are socially and environmentally beneficial:** “Although not a member of the EU, as an EEA [European Economic Area] member Norway is required to implement EU legislation with regard to food, feed and seed produced from genetic engineering. However, the Norwegian Gene Technology Act of 1993 is more restrictive than EU legislation, as it requires proof that agricultural biotechnology products were developed with an ethical justification, provide a societal benefit, and accord with sustainable development goals. This difference in the assessment of products of bioengineering for licensing has led to Norway’s rejection of several biotechnology products approved in the EU. Only four biotechnology products have actually received approval for marketing in Norway—one line of tobacco and three lines of carnations.” (Norway, page 375)
- **Targeting requirements for proof that imported GMOs are safely consumed in the home country:** “Some products, most notably agricultural biotechnology products, need a certificate from the country of origin attesting to the product’s fitness for human consumption and its wide sales in the country of origin. Saudi Arabia requires that this certificate be authenticated by the local chamber of commerce in the country of origin. All nonfood consumer products must have a certificate of conformity issued under the guidelines of Saudi Arabia’s Conformity Certificate Program (COCP) before entering the country.” (Saudi Arabia, page 440)
- **Targeting requirements to fully inform consumers because of concerns of collateral commercial impact:** “In January 2007, the Ministry of Health established a regulation for the import, sale and mandatory labeling of GE [Genetically Engineered] food products. This regulation is moving towards full implementation. Sri Lankan importers have raised several concerns about the regulation, including that conformity with a 1 percent GE content labeling threshold would be costly. Additionally, importers fear bureaucratic procedures and delays in granting approvals may obstruct and limit future imports of GE products. They also fear that mandatory labeling could needlessly raise consumer concerns with biotechnology. As a result, some businesses have stopped importing GE products altogether.” (Sri Lanka, page 474)

- **Targeting a zero tolerance policy for biotechnology ingredients in products labeled organic:** (Korea, page 309)

## **NTE Targets Policies to Ensure Safety of Chemicals**

European and U.S. consumers face the same dilemma concerning the number of harmful chemicals they are exposed to at home, in the garden and at the office. Laws on both sides of the Atlantic have focused on ensuring the safety of *new* chemicals before they are placed on the market, rather than regulating the tens of thousands of *older* chemicals that have been on the market for decades. Little data is publicly available about the potential hazards posed by these older chemicals, which constitute the vast majority of those in the stream of commerce.

In response to this frightening lack of information, the EU proposed a cutting-edge chemical safety policy called REACH (Registration, Evaluation, Authorisation and Restrictions of Chemicals). The goal of REACH is to test and regulate 30,000 chemicals, old and new, produced in excess of one metric ton (a portion of the estimated 100,000 chemicals on the U.S. and European markets). This will be accomplished through construction of a candidate list. Consumer, environmental and public health groups on both sides of the Atlantic have applauded REACH as a long-overdue chemical safety measure.

Unfortunately, USTR's response to the policy has been to aggressively attack it as a "barrier to trade." On pages 178-179 of the NTE, USTR highlights its concerns, including that regulators will actually nominate substances of concern to the list, that firms and consumers might alter their purchasing policies in response, and that businesses in turn may start using safer chemicals. In other words, USTR is concerned that regulations like REACH might actually work.

As USTR writes, "the candidate list identifies substances that are to be considered for authorization and related restrictions. Substances are nominated by Member States, Competent Authorities or ECHA [European Chemicals Agency]. Nomination may be made whether or not the substance poses a risk in particular concentrations or for particular end uses and channels of exposure, and without considering information on the risks to consumers of using an alternative substance or not using an alternative if one does not exist. Many companies believe the candidate list will be used as a "black list," causing companies to discontinue use of substances on the list. If purchasers demand products free of candidate list substances, suppliers may be obliged to undertake costly reformulations despite the lack of risk or exposure. Moreover, such a change could result in the use of substances for new uses where information may not yet be available or risks understood." (EU, page 179)

USTR notes that firms may relocate from the U.S. to Europe to take advantage of producing under this new system and identifies a "potential chilling effect on commerce of having a substance placed" on the chemicals list. That is to say that USTR identifies as the possible fallout from this measure having firms respond to consumer market demands for safer products. How is the U.S. public interest served by attacking this EU innovation to protect consumer health and safety, rather than the United States importing REACH-like policies to our own shores to update our woefully inadequate chemical regulatory regime?

## Medicine and Health Policies Targeted by NTE

USTR's advocacy on behalf of "Big Pharma" in the NTE is particularly noteworthy, given that most pharmaceutical companies' goal in trade agreements is to restrict trade through monopoly patent protection, rather than enabling trade through generic competition.

In the NTE, USTR takes aim at specific health and medicines policies by:

- **Targeting consultation with access to medicine groups:** A Bolivian policy that allows the government to consult with health and other groups to ensure that issuance of patents do not "interfere with the right to health and access to medicines." (Bolivia, page 36)
- **Targeting efforts to make health care affordable:** Pharmaceutical reimbursement policies and price controls. (Egypt, page 166; EU, page 181; Korea, pages 317-318; Taiwan, page 482; and Turkey, page 505) At a time when the U.S. Congress is trying to figure out how to control health costs, it is unthinkable that USTR would be targeting other countries' pharmaceutical cost containment plans for criticism.
- **Targeting Taiwan's safety standards on medical device imports from China:** "In the medical device sector, a growing area of concern has been Taiwan's ban on imports from China of about 30 medical products. Due to global manufacturing operations, many U.S.-designed medical devices are now produced in China, and the foreign medical device industry has suggested that Taiwan lift import bans for these products. In response, the Ministry of Economic Affairs recently announced that it would conditionally allow limited imports of blood glucose meters made in China. Improvements have occurred in the registration and approval process for the least risky medical devices in recent years. However, registration and approval procedures for higher risk medical device imports are complex and time consuming..." (Taiwan, page 483)
- **Targeting lack of additional or "sufficient" monopoly protection for "test data" for medicines.** (Argentina, page 30; Brazil, page 44; Ecuador, page 163; India, pages 241-242; Pakistan, page 387; Paraguay, page 400; and Venezuela, page 536)
- **Targeting lack of patent protection for medicinal and other patents:** (Venezuela, page 528)
- **Targeting blood supply adequacy:** Japan's target for self-sufficiency in blood supply (Japan, page 268)
- **Targeting in-country clinical testing requirements for pharmaceutical products:** (Brazil, page 40)
- **Targeting requirements that healthcare providers seeking to offer services to the public healthcare system obtain an agreement with the health regulatory authorities:** (Ireland, page 196)
- **Targeting the ability of doctors to both prescribe and dispense pharmaceutical products:** (Taiwan, page 482)

## Other Standards, Testing, Labeling and Certification Policies Targeted by the NTE

Among other notable items in the NTE:

- **Not enough limbs have been severed to justify a French lawnmower safety policy:** NTE targets a French requirement that lawnmowers be equipped with a skirt “to protect bystanders from inadvertently inserting their limbs into the moving parts of the mower’s transmission.” (France, page 181) The NTE questions the documented severed limb count noting that “the accident data cited by the Ministry does not support the need for the requirement.”
- **Attacks on other countries’ country-of-origin labeling (COOL) while the U.S. labeling program supported by President Obama<sup>11</sup> is currently being challenged at WTO:** USTR complains about Argentina’s COOL regime for footwear (Argentina, page 21), Kenya’s COOL regime for products (Kenya, page 299), Korea’s COOL regime for medical devices (Korea, 317), and Cameroon’s COOL requirement for all products (which additionally requires that the name and address of the manufacturer be included on the label - Cameroon, page 54).
- **Assertions that *Halal*-meat requirements in Muslim countries pose barriers:** (Brunei, page 47; Egypt, page 161; Indonesia, page 251; Malaysia, page 328; Qatar, page 405; and the United Arab Emirates, page 519)
- **Pressuring countries to adopt less-stringent standards just because others are doing so:** The NTE targets Japanese prohibitions on food additives “that are in wide use in the United States and throughout the world.” (Japan, page 277)
- **Admitting that the U.S. has weaker organic standards than Japan, but then complaining about Japan’s higher level of scrutiny of imports labeled “organic”:** The NTE targets Japan’s zero tolerance policy for pesticides on organic products. USTR notes that this policy “appears to be more thoroughly enforced for imported organic products” but also concedes that Japan’s regulation of organic foods is more stringent than the U.S. system. (Japan, page 277)
- **Praising watered down policies:** Meanwhile, NTE praises as “progress” Korea’s decision to bow to U.S. pressure by allowing foreign cosmetic companies to self-certify their products as meeting Korean standards. That “importers are no longer required to specify the actual quantities for each ingredient when submitting ingredient lists for functional cosmetics” for certification is also praised. (Korea, page 307)

Other standards-related policies targeted in the NTE include:

#### FOOD SAFETY AND LABELING POLICIES

- Non-discriminatory labeling requirements for vitamins and other food additives: (Canada, page 59)
- Requiring that, in items like “snack packs” that contain smaller packages of food products, that nutritional labels be included on the smaller packages as well: (Korea, pages 307-309)
- Batches of products labeled “organic” must have traceable serial numbers: (Taiwan, page 479)
- Zero tolerance for salmonella and other pathogens in meat products: (China, page 95; Colombia, page 131; Singapore, page 440; and Vietnam, page 532) USTR reports that, in the case of China, the government “apparently does not apply this same standard to domestic raw poultry and meat, raising potential national treatment concerns.” USTR does not raise this concern in the other instances.
- Plant-by-plant inspection of foreign facilities exporting into the domestic market: (Argentina, page 21)
- Tough microbial standards for frozen food: (Japan, page 276)

- Requiring that, if a formula for a food product is changed, a separate approval be obtained: (Korea, pages 307-309)
- Requiring that domestic non-profit entities conduct food safety testing: (Korea, pages 307-309)

#### NON-FOOD LABELING AND/OR CERTIFICATION REQUIREMENTS

- Enforcement of a law requiring labels to be written in the national language: (Angola, page 8)
- Licensing for importation or sale conditioned on registration and other documentation requirements that disclose information about the product and associated manufacturing processes: (Brazil, page 40; and China, page 83)
- Mandatory certification of toys and other products: (Kazakhstan, page 29)
- Requiring that nutrition labels be sturdier than removable stickers: (Korea, pages 307-309)
- Product testing and certification required for product approval: (Russia, page 416)
- Importers must post a bond to help pay for inspection: (Kenya, page 299)

#### ENVIRONMENTAL REGULATIONS

- A requirement that producers recycle electronic and other production waste, in order to incentivize firms to design greener products: (EU, page 180; Korea, page 310)
- A requirement that the design stage of energy-using products must be energy efficient: (EU, page 181)

#### THE REGULATORY PROCESS

- Requirements limiting corporations in their ability to influence the development of regulation: (EU, page 178)
- Use of the “precautionary principle” in designing regulation: (EU, page 178)

### **Policies Regulating Investment and the Service Sector Targeted by the NTE**

The NTE targets an array of other countries policies’ relating to financial stability, consumer-related regulation of services and pro-development investment policies. Some of the policies attacked are those that Democrats strongly support domestically.

In the NTE, USTR takes aim at numerous investment and service sector measures, including by:

- **Targeting reversal of social security privatization:** “The Argentine parliament approved a bill to nationalize Argentina’s private pension system and transfer pensioner assets to the government social security agency in November 2008.” (Argentina, page 24) Given U.S. Democrats’ longstanding opposition to social security privatization, it is outrageous that the NTE would target efforts to reverse such privatization abroad.
- **Targeting insufficient deregulation of pensions and other financial sectors:** “Chile made WTO financial services commitments in banking services and in most securities and other financial services. However, Chile’s WTO Commitment Schedule in the securities sector did not include asset fund management (mutual funds, investment funds, foreign capital investment funds, and pension funds).” (Chile, page 71) That USTR is attacking Chile for not submitting these financial services to the WTO’s deregulation requirements is perverse, given as the United

States begins to reregulate its financial service sector it faces conflicts with the WTO rules exactly because the United States made such expansive commitments, including asset management.

- **Targeting anti-tax haven initiatives:** USTR attacks Argentina's measures to repatriate offshore income. (Argentina, page 24) It is unclear exactly how USTR sees this policy as a barrier, but targeting any such policy obviously conflicts with Obama administration efforts to reduce offshore tax evasion by U.S. firms and individuals.
- **Lamenting U.S. companies' inability to sell weapons and other combat materials in conflict-torn regions:** "Foreign investors may buy shares of any Nigerian firm except those firms on an exemption list, which includes, for example, companies that manufacture firearms, ammunition, and military and paramilitary apparel." (Nigeria, 362) "Foreign investors are generally free to establish and own business enterprises in Pakistan, with the exception of five restricted areas: arms and munitions, high explosives, currency/mint operations, radioactive substances, and new non-industrial alcohol plants." (Pakistan, page 381) Bulgarian licensing requirements in the armaments industry are also targeted in the NTE. (Bulgaria, page 200)
- **Targeting investment 'speed bump' measures used to combat capital flight:** (Argentina, page 24) Policies that require investors to hold certain investments for a minimum period of time can be useful tools to counter speculation and capital flight. No country knows better than Argentina the perils of rapid outflows of footloose capital.
- **Targeting non-discriminatory accountancy regulations:** "U.S. access to the Greek accounting market remains limited. A 1997 presidential decree established a method for fixing minimum fees for audits and established restrictions on the use of different types of personnel in audits. The decree also prohibited auditing firms from doing multiple tasks for a client, thus raising the cost of audit work. While the restrictions in the 1997 Decree apply equally to Greek and foreign accountants, the restrictions are especially burdensome to U.S. and other foreign accounting firms because they make it difficult for those firms to take full advantage of the capabilities of their staffs and the diversity of their practice area." (Greece, page 197) This attack on a non-discriminatory accountancy regulation in the wake of the Arthur Anderson-Enron-WorldCom accounting scandals would be perverse enough, but in addition the Obama administration has joined the call, most recently in the context of the G-20 Communiqués, to tighten accounting regulation globally and domestically.
- **Targeting data protection laws that help consumers and create jobs:** "Korea's strict data privacy rules require financial services providers to locate their servers physically in Korea, thus hampering foreign providers' ability to take advantage of economies of scale in the region to perform data processing in their daily business activity." (Korea, page 314) Similar policies are also targeted in the EU. (EU, pages 209-210) Instead of targeting other countries' consumer privacy protections, such as the EU safe harbors policy, the United States should update the various laws covering banking, medical other privacy rights given current law provides an enormous loophole when work connected to such information is offshored.
- **Targeting pro-development requirements:** "All foreign investors wishing to invest in Botswana are required to transfer technology to Botswana in certain circumstances; transfer skills to citizens of Botswana by promoting their involvement and participation in positions in the supervisory, middle, and senior management levels of companies; and ultimately replace expatriate employees with Botswana citizens within an agreed period." (Botswana, page 435) The NTE should not target policies in developing countries that can help them harness the benefits of foreign investment.

- **Lamenting the foreign investor treatment of ... Canadian companies?:** The NTE notes an investor-state claim against El Salvador by a Canadian corporation (Pacific Rim, identified as “a North American mining company with U.S. ownership interests”) over mining policies under the U.S.-Central America Free Trade Agreement (CAFTA). (El Salvador, page 171) Beyond the oddity of the U.S. NTE listing as a U.S. problem the mishaps of a Canadian firm, this listing is quite ironic given some of the mining policies in question are not dissimilar to those in California against which the U.S. faced a NAFTA challenge by the Glamis Gold corporation.
- **Targeting consumer protection measures for call center transactions:** “Brazil enacted a law in December 2008 (Decree 6523 – SAC) that implements numerous new requirements for customer support and call centers operating in Brazil. The provisions of the law are perceived as onerous, expensive, and adverse to private business. Among the many provisions are a requirement for companies to operate customer service call centers 24 hours a day, year-round, an obligation to preserve recorded call records for a minimum of 90 days and written records for 2 years in a central, easily accessible database, and a requirement to provide requested information to customers immediately and to resolve the complaint within 5 business days. Others provisions include the right of the consumer to cancel contracts over the phone without dispute or penalty should the issue involve unsolicited service or incorrect billing, The [sic] enforcement of the decree and sanctions given noncompliance are covered under article 56 of Law 8078, adopted in 1990.” (Brazil, page 46) These pro-consumer policies should be adopted in the United States, not targeted abroad.
- **Targeting policies that guarantee access to essential services:** “U.S. investors in the electricity sector face problems of chronic underpayment, due in part to government regulated prices and the inability to cut off consumers that do not pay their bills; government subsidies only partially offset these losses and are not available to all firms. A 2006 electricity reform law attempts to address some of the problems affecting the sector, but the problem of underpayment has not been resolved.” (Ecuador, page 157)
- **Lamenting that 99 – or even 999 – year land leases are inadequate:** USTR complains that in Ethiopia there is no private land ownership, but rather 99- year leases. (Ethiopia, page 175) Similarly targeted is Kenya’s policy that foreigners can only be granted leasehold titles – for terms of 99-999 years. (Kenya, page 302)
- **Targeting investment screening “good character” policies despite admitting they have no commercial impact:** “New Zealand maintains investment screening requirements, but has not blocked any foreign investment approvals for business investment since 1984... investors still are required to satisfy an "investor test," including that they are of good character, are not excluded from entering New Zealand under the Immigration Act, and can display both financial commitment and business acumen. The United States will continue to raise concerns about the continued use of this screening mechanism.” (New Zealand, page 350) It is unclear why U.S. government resources should be used to oppose measures that have not resulted in any impediments to U.S. investors. Furthermore, it is unclear why the U.S. government should support U.S. investors that would be unable to pass a good character and business acumen test.
- **Targeting incentives for consumption of locally produced goods:** “Among other provisions, department stores, supermarkets, and hypermarkets must reserve at least 30 percent of shelf space in their premises for goods and products manufactured by *bumiputera*-owned small and medium size industries. The guidelines also require that at least 30 percent of a store’s sales consist of *bumiputera* products.” (Malaysia, page 331) Local content requirements are strongly supported in the United States, both for their job and environmental benefits. Candidate

Obama's campaign materials, for instance, promised he would "emphasize the need for Americans to Buy Fresh and Buy Local, and... implement USDA policies that promote local and regional food systems."<sup>12</sup> Not only do Malaysia's policies promote local development, but the pro-*bumiputera* policies have been used to develop the historically economically marginalized ethnic Malay community, helping to build a social compact that has helped cool ethnic tensions.

## ENDNOTES

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<sup>1</sup> Erik Wasson, "Kirk Unveils New TBT, SPS Initiatives in Broad Enforcement Speech," *Inside U.S. Trade*, July 17, 2009.

<sup>2</sup> Ways & Means Committee, Hearing on H.R. 6767, May 9-June 15, 1973, at 212 and 263.

<sup>3</sup> Todd Tucker and Lori Wallach, *The Rise and Fall of Fast Track Trade Authority*, (Washington, D.C.: Public Citizen, 2009).

<sup>4</sup> Rep. Robert Matsui (D-Calif.), *Congressional Record*, 147, Dec. 6, 2001, at H9025.

<sup>5</sup> See e.g. Response to a Pennsylvania Fair Trade Coalition questionnaire, April 2, 2008 and Response to a Texas Fair Trade Coalition questionnaire, March 3, 2008. Available at <http://www.citizenstrade.org/hope.php>

<sup>6</sup> Todd Tucker, "Election 2008: Fair Trade Gets an Upgrade," Public Citizen Report, November 2008.

<sup>7</sup> National Association of State Legislatures, "Free Trade and Federalism," August 2007. Available at: <http://www.ncsl.org/?TabId=16751>, accessed Nov. 9, 2009.

<sup>8</sup> See Public Citizen's dispute settlement tally at:

<http://www.citizen.org/documents/WTODisputesSummaryOnePagerwtables.pdf>.

<sup>9</sup> Harris Interactive Survey, Jan. 29 – Feb. 1, 2009. Available at: [http://www.americanmanufacturing.org/wordpress/wp-content/uploads/2009/02/buy-american-steel-survey\\_final-tables.pdf](http://www.americanmanufacturing.org/wordpress/wp-content/uploads/2009/02/buy-american-steel-survey_final-tables.pdf), accessed Oct. 26, 2009.

<sup>10</sup> 68 Fed. Reg. 31939 (May 29, 2003).

<sup>11</sup> In response to a Texas Fair Trade Coalition questionnaire on March 3, 2008, Candidate Obama wrote: "I also support immediate implementation of the Country of Origin Labeling law, which will require meat products and specialty crops including fruits and vegetables to indicate their country of origin. I believe that American producers should be able to distinguish their products from imported ones and that consumers deserve the right to know where their food comes from."

<sup>12</sup> "Barack Obama and Joe Biden: Promoting a Healthy Environment," Available at: [www.barackobama.com/pdf/issues/EnvironmentFactSheet.pdf](http://www.barackobama.com/pdf/issues/EnvironmentFactSheet.pdf), accessed Oct. 31, 2009.