"US AUTOMOTIVE INDUSTRY BAILOUT PROGRAMS: AVOIDING WTO POTHOLES ON THE ROAD TO ECONOMIC RECOVERY"

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Undoubtedly, the toughest of the many challenges inherited by the Obama administration is devising a strategy to "fix" the ailing economy. Any such strategy requires balancing powerful and entrenched domestic interests with important policy goals such as securing jobs, "greening" our industrial base, reducing dependence on foreign oil, and reviving the consumer demand side of the economy. In the wake of global recession, governments worldwide face increasing pressures to provide assistance to ailing domestic industries, especially those companies deemed "too big to fail". Although the bailout and stimulus programs have targeted a variety of industries, one of the most vexing issues for the new administration has been whether and how to best assist the US automotive industry. The auto sector provides an excellent case in point to illustrate the pitfalls inherent in attempting to provide state aid to ailing domestic producers, without breaching multilateral trade commitments governed by World Trade Organization and regional trade agreement disciplines.

This paper addresses whether the following key programs and legislation targeting the automotive sector 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;

(2) 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 2008 Emergency Economic Stabilization Act ("EESA) of 2008;

(3) 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"), 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 ("EESA) of 2008; and

(4) A so-called "cash for clunkers" program that has been proposed but not yet enacted in the US (as of this writing), which would be intended to accelerate new car purchases and improve fleet environmental performance.

The sections that follow address key provisions of the above programs and their potential WTO implications. Part I of the paper provides a more detailed summary of key measures implemented or proposed under each of the above four categories of programs. Part II of the paper then specifically analyzes the degree to which the above bailout and assistance programs may be inconsistent with key provisions of various World Trade Organization agreements, including: 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"). This paper focuses primarily on the automotive sector, although aspects of the WTO analysis can be extrapolated to other sectors as well.

I. Description of Key Government Assistance Programs Provided to US Domestic Automotive Manufacturers and Suppliers Since 2007

A. $25 Billion in Automotive Related Grant and Loan Assistance Under The Energy Independence and Security Act("EISA") of 2007, Utilizing Funding Appropriated in September 2008

In December 2007, 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.[1] In essence, the legislation is intended to provide economic assistance to automakers in helping them comply with increased Corporate Average Fuel Economy (CAFE) standards and implement fleet modernization plans.

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.[2] 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 facilities, and payments can be stretched out over the projected life of the eligible project up to 25 years.[3]

From a WTO standpoint, the most significant aspect of the EISA is Section 136(g):[4]

> 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 embodies this requirement under two separate sections of the implementing regulations:

> **§ 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.

B. 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. These funds sought were in addition to the EISA federal funding discussed above, and not explicitly contingent on funding facilities for 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.[5]

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.[6] 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").[7]

Pursuant to AIFP requirements, Chrysler and GM signed onto comprehensive loan agreements under AIFP, requiring each company to submit restructuring plans to Treasury by February 17, 2009, in which they were expected to outline specific plans for repaying government assistance, meeting higher CAFE standards, becoming competitive, and achieving sustainable long-term financial viability.[8] 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.[9] 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.[10]

As it turns out, both companies have since entered into Chapter 11 bankruptcy reorganization proceedings, Chrysler on April 30, 2009 and GM on June 1, 2009.[11] As of this writing, both companies are currently in the process of negotiating additional US government assistance as part of the restructuring process.[12] For example, proposals as of June 1, 2009 would have the US government take up to a 60% equity ownership stake in the reorganized company in exchange for providing additional government assistance to satisfy certain creditors. The US government has initially agreed in principle to provide GM with a further $30 billion in aid (in addition to the $20 billion already loaned under the programs described above), to assist with restructuring and smooth exit from bankruptcy protection.[13] 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% equity stake in GM.[14]

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 dicussed 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 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.

C. Additional Assistance to Domestic Automotive Financing Services Companies Under the Capital Purchase Program 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**.[15]

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>. (emphasis added)**

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.[16] At that time, Treasury provided GMAC with initial CPP loan funding of $5 billion.[17] 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.[18] 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").

D. Proposed US "Cash for Clunkers" Legislation to Subsidize New Car Purchases and Improve Overall Fleet Fuel Efficiency

As of this writing, there are at least four different legislative proposals circulating in the US House and the Senate, all of which are variations on so-called "cash for clunkers" programs that would provide direct incentives for consumers to purchase newer and/or more fuel efficient vehicles. One House proposal, which seems to have the largest number of cosponsors was introduced March 17, 2009 by Rep. Betty Sutton of Ohio and has gathered 34 cosponsors as of May 18, 2009.[19] This proposed bill, entitled the Consumer Assistance to Recycle and Save ("CARS") Act of 2009, would provide vouchers of up to $5000.00 for the purchase (but not necessarily the lease) of eligible new automobiles.[20] The proposed CARS legislation specifies 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."[21]

A similar House bill, H.R. 520 was proposed by Rep. Steve Israel of New York and has gained 11 cosponsors as of May 2009. Entitled the Accelerated Retirement of Inefficient Vehicles Act of 2009, this version offers similar vouchers, but does not contain any explicit language requiring that vehicles must be assembled in the United States to qualify for the voucher credits. A similar version of the bill with the same title was introduced in the Senate by Sen. Dianne Feinstein (D-Calif.) as S. 247.

Although 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, are co-sponsoring an alternate Senate bill known as the "Drive America Forward Act" (S. 1135), which would incentivize sales of new cars and trucks even if they do not quite meet the average fuel efficiency standards.[22] Thus far, the text of the proposed Drive America Forward Act does not mandate that new vehicles must be assembled in the United States to qualify for the incentives.

II. Viability of Potential WTO Challenges to US Domestic Automotive Industry Assistance Programs Described Above

A. 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 arguably 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:

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.

In addition, the SCM Agreement classifies as "prohibited subsidies" any "export subsidies" and subsidies that are "contingent upon the use of domestic over imported goods." Such "prohibited subsidies may be challenged in a WTO dispute settlement action without proof of the above "adverse effects." 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.

Under the first option, major auto producing countries outside the US (e.g., Germany, Japan, Korea) experiencing "adverse effects" from the US automotive subsidies ultimately may seek CVD measures against the United States, but would have two practical hurdles: (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. Their US-based assembly and financing operations will be forced to compete within the US market with the subsidized and reorganized "Big 3" producers, but they will be foreclosed from participating in the automotive assistance programs described above utilizing EISA and EESA/TARP funding.

The second option listed above for pursuing a WTO dispute settlement mechanism may provide a more strategically viable means for the governments of foreign-affiliated auto producers to pressure the US to either discontinue the subsidies, or at least make some effort implement such programs on a non-discriminatory basis.

As discussed below, 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 and EESA/TARP funding. Such state aid arguably would qualify as "actionable subsidies" under the SCM Agreement that could be challenged in such a WTO dispute settlement action based on the following provisions and definitions outlined in the SCM Agreement.

1) *Financial Contribution and Benefit*

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.[23]

2) *Specificity*

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 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.[24]

The US government may assert 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. 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 specific purpose of allowing "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. 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".

3) *Adverse Effects Analysis*

(i) Loan 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. Although the subsidies are conferred to producers of automotive components as well as finished automobiles, the subsidies do not appear to be contingent on the auto producers purchasing more domestic automotive components. The 2007 EISA does provide some subsidies for "engineering integration" services performed in the United States, however the SCM Agreement addresses 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, they arguably qualify as "actionable subsidies" as discussed below.

(ii) 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.[25]

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 TARP funded 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 under discussion 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.

However, the SCM Agreement also specifically provides for actions 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 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. (emphasis added).[26]

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 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:[27]

- 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**.

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).[28]

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. See *US – Cotton Subsidies* at 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.

B. Potential WTO Challenge Under the General Agreement on Trade in Services (GATS) for Assistance Provided to US Automotive Financing Companies Under the Automotive Industry Financing Program ("AIFP") and Capital Purchase Program 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 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).[29] 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.[30]

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 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.[31]

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.

C. Proposed "Cash for Clunkers" Incentives for Scrapping Old Cars and the WTO Agreement on Technical Barriers to Trade

Incentives, vouchers, or other types of subsidies for scrapping old cars made available directly to consumers would probably not be deemed to fall under the SCM Agreement, because they are general in nature and not extended directly to 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 arguably the programs do not confer a benefit directly on industry and are not sufficiently specific. Thus, they may not be deemed actionable or prohibited subsidies under the SCM Agreement.

"Cash for clunkers" programs, by themselves, would not appear to cause trade impacts in the market for new cars, as long as they do not influence the consumer's free choice in respect of replacement cars. However, there is greater potential for WTO challenge if such incentives are explicitly linked to replacement car purchasing decisions, for example:[32]

- 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;
- 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, 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 the do not explicitly require purchase of a domestically manufactured vehicle.

In addition, such incentives may also be challenged under the TBT Agreement. Phasing out old cars through regulation would likely raise trade barriers issues, 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 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.

(i) *Definition of Technical Regulation Under the TBT Agreement*

Technical requirements such as those relating to emission control technology may well be regarded as regulations on "product characteristics or their related processes and production methods," since such characteristics include product design and/or performance, and compliance with such requirements 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 is a "mandatory" requirement.

(ii) *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, a specific assessment will have to be made in due course. 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. .

(iii) *Legitimate Objective*

The various versions of proposed "Cash for Clunkers" legislation being circulated in Congress indicate that the proposed measures are justified to support the objectives of reducing CO_2 emissions, conserving fuel, and modernizing fleets. 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 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.

(iv) *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.

Any requirements in US "cash for clunkers" legislation or regulations that impose certain technology, or prohibits the use of other technology, would be a design, rather than performance-based, requirement, and may de deemed to be more trade-restrictive than necessary, and thus violate this clause. 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 the same 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.

D. 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 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…[33]

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, WTO issues relating to any final version of proposed "cash for clunkers" legislation that may ultimately become law will hinge upon whether such programs mandate that newly purchased or leased autos must be "assembled in the United States" in order to qualify for the vouchers or other direct incentives. If final legislation incorporates such a requirement, similar to the EISA analysis above, it may be difficult for the United States to demonstrate 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.

III. Conclusions

As outlined above, there appear to be viable legal theories that automotive producing countries could use to seek WTO consultations with the United States and/or mount a formal WTO challenge of the various bailout, government assistance, and incentive programs provided to prop up the US domestic automotive producers over the past year. If they can demonstrate actual or threatened "adverse effects" to their interests, US trading partners could potentially undertake a direct WTO subsidies challenge based on the theory that US auto industry grant and loan programs qualify as "actionable subsidies," which pose a threat of serious prejudice to the interests of foreign-affiliated auto producers.

Moreover, based on the initial 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.

Finally, the proposed "cash for clunkers" legislation currently being considered by Congress may be subject to challenge if not carefully crafted to avoid running afoul of national treatment obligations and requirements of the WTO Agreement on Technical Barriers to Trade.

FOOTNOTES

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[1] See Energy Independence and Security Act of 2007 ("EISA"), H.R. 6 (2007) at Sec. 136 (setting forth provisions of the "advanced technology vehicles manufacturing incentive program").

[2] *See* CRS Report for Congress on Federal Loans to the Auto Industry Under the Energy Independence and Security Act (November 13, 2008) at 14-15.

[3] *Id*.

[4] *See* EISA at Sec. 136(g).

[5] David Sheperdson, *Rescue collapses as Senate rejects aid for auto industry*, Detroit News (December 12, 2008), available at http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20081212/AUTO01/812120370.

[6] *See* White House Press Release at http://georgewbush-whitehouse.archives.gov/infocus/economy/ (see also news reports at: http://www.edmunds.com/insideline/do/News/articleId=138226 and http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20081212/AUTO01/812120370

[7] The Emergency Economic Stabilization Act of 2008 (EESA) authorized the Troubled Asset Relief Program ("TARP"), Pub. L. No. 110-343, 122 Stat. 3765 (2008), 12 U.S.C.§ 5201. Under TARP, Treasury has the authority to purchase or guarantee up to $700 billion in troubled assets through its Office of Financial Stability.

[8] *See* GAO Report, Summary of Government Efforts and Automakers' Restructuring to Date (April 2009). Copies of the detailed AIFP contracts executed by each company with the US Treasury Department are also available at: http://www.financialstability.gov/roadtostability/autoprogram.html .

[9] *Id.* at 1 – 2.

[10] *Id.* at 1 – 2.

[11] Chrysler LLC submitted Chapter 11 bankruptcy filings on April 30, 2009, see: http://download.gannett.edgesuite.net/detnews/2009/pdf/ChryslerDocs.pdf; General Motors submitted Chapter 11 bankruptcy filings on June 1, 2009, see http://online.wsj.com/public/resources/documents/gmpetition60012009.pdf . GM's initial bankruptcy filing lists approximately $82 billion in assets and $172 billion in liabilities.

[12] For further details on proposed terms of GM bankruptcy reorganization, see White House Fact Sheet at http://online.wsj.com/public/resources/documents/GMwhitehousefactsheet05312009.pdf.

[13] *See e.g.*, http://online.wsj.com/article/SB124385428627671889.html .

[14] For details on proposed terms of GM bankruptcy reorganization, see White House Fact Sheet, Obama Administration Auto Restructuring Initiative (May 31, 2009), http://online.wsj.com/public/resources/documents/GMwhitehousefactsheet05312009.pdf

[15] *See* Emergency Economic Stabilization Act, H.R. 1424-2 at Sec. 3(5) and Sec. 101 (emphasis added).

[16] *See* Federal Reserve Order at http://www.federalreserve.gov/newsevents/press/orders/orders20081224a1.pdf.

[17] US Department of the Treasury Press Release, Treasury Announces TARP Investment in GMAC (December 29, 2009), available at http://www.ustreas.gov/press/releases/hp1335.htm ..

[18] *See* US Department of the Treasury Press Release, Treasury Announces TARP Investments in Chrysler Financial (January 16, 2009) at http://www.ustreas.gov/press/releases/hp1362.htm.

[19] *See* Bill Status and Summary Report for H.R. 1550 at http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01550:@@@L&summ2=m& .

[2020] See proposed H.R. 1550 at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1550ih.txt.pdf .

[21] *Id.* at Section 3(b)(1)(A) and (B).

[22] *See* S. 1135 accessible at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s1135is.txt.pdf

[23] *See* CRS Report for Congress on Federal Loans to the Auto Industry Under the Energy Independence and Security Act (November 13, 2008) at 14-15.

[24] *See* SCM Agreement at Art. 2.1.

[25] It would be difficult to demonstrate present material injury, or threat of material injury, to the domestic automobile industry in the home market of foreign-affiliated automotive producers based on competition from imports of subsidized US cars, because most of the injury factors identified in the SCM Agreement relate to increasing volume of imports in the domestic industry's market and imports driving down prices within the domestic market. Because the U.S.-affiliated companies eligible for the EISA and TARP bailout funding do not export significant quantities of automobiles, and are not likely to do so even if the loans are granted, it likely will be difficult to show injury in the manner required for a domestic CVD investigation.

[26] *See United States – Subsidies on Upland Cotton*, Report of the Panel, September 8, 2004 (WT/DS267/R) at 7.1497 ("*US – Cotton Subsidies"*).

[27] *See* SCM Agreement at Art. 6.1 (emphasis added).

[28] *See* Expanding the Prohibited "Red Light" Subsidy Category, Draft Text Proposal from the United States to the WTO Negotiating Group on Rules, TN/RL/GEN/146 (5 June 2007).

[29] *See* United States of America, Schedule of Specific Commitments, GATS/SC/90 (15 April 1994); United States of America, Final List of Article II (MFN) Exemptions, GATS/EL/90 (15 April 1994); and States of America, Final List of Article II (MFN) Exemptions, Supplement 1, GATS/EL/90/Suppl.1 (28 July 1995).

[30] *See* United States - Trade Policy Review, Report of the Secretariat, WT/TPR/S/200/Rev.1 (12 August 2008) at para. 127.

[31] *See* General Agreement on Trade in Services at Art. II.

[32] If structured to mandate purchase of domestic over imported cars, we note that this could implicate Art. 3.1(b) of the SCM Agreement, depending on whether the other elements of a subsidy are present as discussed above.

[33] *See* GATT 1994 at Art. XX, available at: http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf