

COUNCIL HIGHLIGHTS

NATIONAL FOREIGN TRADE COUNCIL

ADVANCING GLOBAL COMMERCE



Council Highlights is a bi-monthly summary of news and events of the National Foreign Trade Council exclusively for its members.

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A Word From the President

I have not said anything publicly about the Administration's rules on contact with lobbyists for two reasons. First, they affect me personally, and I did not want to get involved in a way that would sound like sour grapes. Second, and more important, our members are primarily large global companies that are well-staffed in Washington and elsewhere. While the rules may pose problems for particular individuals, our members will not likely have much difficulty finding non-lobbyist employees to represent them when necessary. If I'm right about that, it's hard to argue that the rules are going to seriously handicap NFTC members' ability to communicate with the government.

That is not to say no one is hurt. The real losers of this policy will be small businesses who do not have Washington offices and who have usually worked through their sectoral associations to make sure their industry's views are heard. These companies are not in a position to frequently fly senior executives into town for meetings that their association representatives are no longer allowed to attend, and appointing one of their competitors to an advisory committee on the theory he or she will represent the entire industry, is not going to reassure them. That is an important and legitimate problem, but it is not really the NFTC's problem.

I also don't think it's going to handicap the government's ability to get the information it wants, at least after an initial adjustment period. Companies are generally happy to provide information (unless it's part of a criminal investigation, in which case lawyers come into play and all bets are off) and will do so through whatever format exists.

The new rules may, however, make it more difficult for the government to get information it does not necessarily want but needs to hear anyway. A lot happens in Washington through informal contacts – lunch, dinner, receptions, at conferences, etc.

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Taking the Lead on Green Trade

If President Obama is to deliver on his ambitious goal of doubling U.S. exports in five years, it will be essential for the United States to pursue an aggressive strategy to help American businesses access international markets. The National Foreign Trade Council thinks that one promising place to begin is at the intersection of trade and the environment.

The Obama Administration sent new signals this month in its annual trade policy agenda that it will use some government muscle to advance a series of environmentally-friendly trade policies. USTR set out an ambitious plan to open foreign markets for U.S. exports, which includes significant mention of policies designed to open and regulate trade for environmental purposes.

One of those efforts is to lower or eliminate barriers to environmentally friendly goods and services. The Obama administration indicated that it would seek "to fast-track the elimination of tariffs on goods directly relevant to addressing climate change, such as solar panels and stoves, and wind and hydraulic turbines," breathing life into an effort that has been languishing in Geneva as part

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© 2010 National Foreign Trade Council, Inc.
1625 K Street, NW, Suite 200
Washington DC, 20006-1604

Phone: (202) 887-0278 | Fax: (202) 452-8160

If you have suggestions for articles or comments, please e-mail us at nftcinformation@nftc.org

News for Our Members

A Word From the President

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This is no different in the business world. Humans are social animals, and we thrive on contact. If Administration officials are largely precluded from those contacts, which usually revolve around a meal or a drink, they will miss opportunities to network and learn what's going on – opportunities that cannot be replaced by advisory committee meetings operating under the Federal Advisory Committees Act. Our members suffer from that, but Administration officials suffer more, so again, it's not a crisis for the NFTC. Our members know how to make their views known.

For the same reasons, the new rules will make life more difficult for the Administration because they limit opportunities to persuade and co-opt lobbyists to their point of view. While the rules have not stopped Administration officials from calling and asking for help when they need it (and us providing it), real dialogue has been restricted, not to mention the fact that we have been made second class citizens inevitably makes one wonder whether our help is worth it.

And that suggests why I am bothering to get into this issue now, at a relatively late date. For me, at least, there's a principle involved. This is discrimination, pure and simple. It's not up there with discrimination by race or religion by any means, but it reflects the same shortcoming. The Administration is judging individuals by their membership in a group rather than as individuals, and it is turning us into second class citizens by virtue of our occupation. This is a long way from judging people by "the content of their character."

While the consequences are not particularly severe -- lobbyists still seem to be functioning, if not thriving – the precedent is disquieting. Perhaps in the future other occupations or affiliations will be similarly singled out for unfavorable treatment, and perhaps the next time it won't be benign. I am reminded of what then-Senator Pat Moynihan said in 1999 when he accepted a Heinz Award:

"It would be just 222 years ago that what we came to call the Constitutional Convention finished its work in Philadelphia. Benjamin Franklin emerged from what we now call Independence Hall, and a lady asked him, "what have you wrought." And he said, "a Republic, if you can keep it." And how wise he was. There were in 1787 two nations on earth which both existed at that time and had not had their form of government changed by violence since that time. There are eight nations in the world which both existed in 1914 and that have not had their form of government changed except by violence since that time....Not always approved, sometimes very much disparaged, the art of politics and government is the highest calling of a democracy. And the achievement we have in the stability of this society is so easily underestimated. It is normal for us -- it is the rarest conceivable thing for most of mankind....it will not be sustained and continued if we don't know in fact how fragile it is and how much it needs the very best of men and women to continue it with the knowledge and the courage to do so."

His point was not that lobbying is a high calling – far from it -- but rather that democracy is a fragile flower that takes a lot of work to maintain. It should not be taken for granted. At present, our democracy is stressed, as the health care debate has shown so clearly. Adding to that stress through government-sanctioned discrimination is not only fundamentally unfair to the individuals affected but also another blow to the glue that has held our democracy together for more than two centuries.

News for Our Members

Taking the Lead on Green Trade

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of the long-stalled Doha Round of global trade negotiations. USTR's indication that it would work with "like-minded and ambitious WTO members" suggests they may move forward on a green trade agreement even without the rest of the Doha Round, a move NFTC supports.

The Administration has also focused on promoting American ideas and protecting the intellectual property behind U.S. clean technologies. Making sure U.S. trading partners enforce IP rules overseas helps spur investment and jobs in the United States and creates the conditions which can facilitate research and sharing of technologies with other countries.

One potential deliverable in this area this year is the establishment of a technology cooperation mechanism, which was written into the Copenhagen climate accord. As negotiators seek to flesh out the idea, U.S. trade policymakers will be called on to propose new forums and financing mechanisms to build trust and spur collaboration between U.S. companies and researchers and counterparts in developing countries. Devising a mechanism which relies on the current system of intellectual property rules, and which uses financing to make up funding gaps and strengthen legal protections abroad, would benefit U.S. exporters and our partners in the developing world.

Environmentally-friendly trade policies should be a high priority for the Administration this year. Securing access to international markets would help create clean energy jobs in the United States and reduce the cost of environmental technologies globally. Promoting global enforcement of intellectual property rules - and developing new structures that support research collaboration based on compliance with those rules - could benefit U.S. innovators and facilitate better commercial relations between the United States and partners around the world.

This is not to say that fulfilling such an agenda will be easy. Negotiations for a green trade agreement will present a host of complicated questions for the Obama administration, including whether to negotiate lower barriers to sensitive imports like ethanol and automobiles. Collaborating on clean technology development and deployment may require new sources of financing and delicate negotiations with partners in the developing world. Defending U.S. interests internationally will also be a challenge, given the importance countries like China have placed on developing local industries through a mixture of tariffs, subsidies and standards.

But as the United States seeks to rely less on the U.S. consumer to drive economic growth, the Administration will need new mechanisms to help U.S. businesses export more of what they produce. Environmentally-friendly trade policies offer fresh opportunities to deliver benefits for American businesses and workers, provided that the administration is willing to spend some serious time and energy to see them through.

For more information please contact Jake Colvin, at jcolvin@nftc.org.

Versions of this article appeared in The Hill and the Huffington Post.

The National Foreign Trade Council is a leading business organization advocating an open, rules-based global trading system. Founded in 1914 by a broad-based group of American companies, the NFTC now serves hundreds of member companies through its offices in Washington and New York.

News for Our Members

First Round of Negotiations for Trans Pacific Partnership Takes Place in Melbourne

The U.S., Australia, Chile, Brunei, New Zealand, Peru, Singapore and Vietnam met for five days during the week of March 22 in Melbourne Australia for the first full round of TPP negotiations. In what was planned largely as an organizing and introductory round for negotiators, discussions reportedly centered on how to design the agreement so that it promotes regional integration, regulatory coherence, competitiveness, transparency and development, as well as ways to encourage the participation of small- and medium-sized businesses in trade and advance other key issues, such as labor and the environment.

U.S. negotiators and their TPP counterparts agreed on detailed work plans in each negotiating group in preparation for the next round to be held in June in the United States. Prior to that, negotiators will each draft papers on a variety of issues, including papers on specific issues that emerged during this week's discussions, new areas that the TPP members may be able to incorporate in the agreement, and how methods of incorporating issues that cut across the agreement. They also discussed the goal of expanding the agreement to countries throughout the Asia Pacific and agreed to exchange a wide range of information, including on their respective legal and regulatory systems as well as other matters.

Consultations with a broad range of stakeholders is taking place in all partner countries, and USTR has conducted dozens of briefings in Congress, not only with the committees of jurisdiction, but also with the House Trade Working Group and other interested parties, and continues its listening tour throughout the United States. The TPP partners will also brief APEC members on the initiative at the APEC ministerial meeting in June.

NFTC has joined with other trade associations and companies in the creation of a U.S. Business Coalition for TPP, to provide a business-wide venue for briefings by the Administration and the foreign governments involved in the negotiations. It will also work to provide advice to the U.S. Administration and Congress on the architecture of the agreement, priorities and negotiating objectives, as well as key cross-cutting issues identified by the Administration as important to this negotiation. Coalition corporate co-chairs include Cargill, Citi, General Electric, IBM, Pfizer, and Wal-Mart. If you would like to join the coalition, email mfricchione@ecatrade.com or Chuck Dittrich cdittrich@nftc.org at NFTC.

Barbara Weisel, Assistant USTR for Southeast Asia and the Pacific, will discuss the recently held Melbourne Round of TPP negotiations with members of the U.S. Business Coalition for TPP at 2:00 p.m. on Thursday, April 15th, in the 12th floor conference room of IBM, located at 1301 K Street, N.W. (West Tower). To attend, RSVP to Marc Fricchione (mfricchione@ecatrade.com), as building-security procedures require a list of attendees to be submitted in advance of the meeting.

Increased Exports = More U.S. Jobs

The Trade and American Competitiveness Coalition is made up of U.S. business enterprises that support policies and legislation that will enhance U.S. competitiveness in the international economy to promote growth and prosperity for America's businesses, workers and consumers. Originally started in 2008 to provide broad based business support for a bipartisan effort to expand and extend Trade Adjustment Assistance, the coalition is not working in concert to create and disseminate a simple positive weekly message to Members of Congress and the public on the critical value of and linkages among exports, competitiveness and job creation, giving a greater voice to exporters and highlighting that exports are also driven by outward investment flows.

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News for Our Members

Increased Exports = More U.S. Jobs

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The NFTC kicked off the weekly message this month, and association and company members of the TAAC coalition will each take a turn sending out these critical facts each week. Some of the messages that have gone out so far may be found at:

- <http://www.nftc.org/default/Trade%20Policy/Exports%20Equals%20Jobs/TAAC%20Coalition%20Message%204.pdf>
- <http://www.nftc.org/default/Trade%20Policy/Exports%20Equals%20Jobs/TAAC%20Coalition%20Message%203.pdf>
- <http://www.nftc.org/default/Trade%20Policy/Exports%20Equals%20Jobs/TAAC%20Coalition%20Message%202.pdf>
- <http://www.nftc.org/default/Trade%20Policy/Exports%20Equals%20Jobs/Trade%20message%20for%20March%2011.pdf>

To join the TAAC coalition, sign up to create a weekly message (NFTC will disseminate it) or to learn more about the coalition and its work, contact Chuck Dittrich at cdittrich@nftc.org.

Background on South Africa Alien Tort Lawsuit

The alien tort lawsuit over aiding and abetting apartheid, now known as *Balintulo, et al. v. Daimler, et al.*, is now before the Second Circuit Court of Appeals. The lawsuit originally named 88 corporate defendants as having aided and abetted the apartheid regime in violating international common law. The complaint accused them of complicity in extra-judicial killings, torture, and war crimes, asking \$200 billion in compensatory damages. The suit was dismissed by Federal District Court in 2004 and appealed by the plaintiffs to the Second Circuit. In November, 2007 the appellate court remanded the case back to the District Court

In June, 2002, New Jersey attorney Edward Fagan filed suit in Federal District Court in New York against Credit Suisse, UBS and Citigroup for \$50 billion for aiding and abetting apartheid in violation of international law. The case was brought under the 1789 alien tort statute which has been used to litigate private party complicity in human rights abuses by foreign governments.

In November of 2002 Washington attorney Michael Hausfeld filed a similar suit on behalf of the Khulumani Support Group for \$400 billion for 87 South African plaintiffs against 23 U.S. and EU corporations. The cases were consolidated the following year. In November, 2004 Judge Sprizzo of the New York Federal District Court dismissed the case, which the plaintiffs then appealed to the Second Circuit Court of Appeals. They heard the case in January, 2006. Their ruling to send the case back to District Court more than a year and a half later in October, 2007, was a surprise to many who thought for a variety of reasons, including the Supreme Court's 2004 decision in *Sosa v. Alvarez Machain*, which cited Judge Sprizzo's ruling, that his decision would be upheld.

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News for Our Members

Background on South Africa Alien Tort Lawsuit

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The defendants, therefore, decided to ask the Supreme Court to take the case immediately rather than to wait for the District Court to rehear it and then appeal it again. This decision was based not only on the merits of the case and the South African government's strong and repeatedly stated opposition to the case, but also on the significantly broader implications for the conduct of international business if the Sprizzo ruling were not upheld. This is because of uncertainty about corporate liability to charges of aiding and abetting actions of governments over which companies have no control. A petition for *certiorari* was filed with the Supreme Court in January, 2008, asking the Court to hear the case. Amicus briefs in favor of the petition were filed by the U.S. Department of Justice, as well as a coalition of U.S. business organizations. The Supreme Court denied *certiorari* on May 12, 2008.

The May 12 decision to let the Second Circuit ruling stand *does not* mean that the Court ruled in favor of the plaintiffs. It *does* mean that the process went back to square one where it began in 2002. Judge Sprizzo, having died in 2008, was succeeded on the case by Judge Shia Scheindlin, who heard the case *de novo* in February, 2009. One issue will be questions raised by the Second Circuit as to whether the South African government's position is really their position. Since the case will probably be litigated for at least another two to three years, the Supreme Court's decision not to grant *certiorari* means an extended period of uncertainty about corporate liability for aiding and abetting under U.S. law. It also means an extended period of controversy about the liability of foreign multinationals for the policy of apartheid in South Africa.

Judge Scheindlin ruled on April 8, 2009 that the case could go forward to trial, but she dismissed all of the defendants except Daimler, IBM, General Motors, Ford, and Rheimetall, all of whom she found had a nexus with torture, extrajudicial killing, and arbitrary denationalization. In December, 2009, the defendants appealed her decision to the Second Circuit Court of Appeals, which heard oral argument in January, 2010. The Court will rule on the narrow issue of whether the "interlocutory appeal," i.e., the appeal of a case before a judgment has been rendered, is valid. If the Second Circuit denies the defendants' appeal, the case will go to trial. The defense has argued throughout that discovery would be nearly impossible, making a trial exceedingly difficult.

The Second Circuit re-solicited the views of the U.S., German and South African governments. The German government submitted a strong letter opposing litigation of the case. However, the positions of the new U.S. and the South African governments changed those of their predecessors. The U.S. Justice and State Departments had previously strongly opposed the litigation, as had the South African government. Indeed, former Justice Minister Maduna's "Declaration" to Judge Sprizzo in July, 2003, urging that the case be dismissed was even cited by Justice Breyer in his opinion in the 2004 *Sosa* case. This time the United States submitted a brief which urged the Second Circuit to deny the defendants' appeal on jurisdictional grounds without addressing the substance of the case, thereby supporting the position of the plaintiffs.. The South African government insisted that its position has not changed, despite the letter Justice Minister Radebe wrote to Judge Scheindlin in the summer of 2009 in which he argued that New York is the proper place to hear the case, thereby seemingly reversing the position taken by Maduna. In response to the Court's request for a statement of interest, on November 25, 2009, the South African government wrote the Court, "as of this date the Republic of South Africa has not determined whether it intends to make a further submission to the Court." They went on to say that if they decided to respond later, they would let the Court know.

Consequently, there has been a major change in the positions of the U.S. and South African governments. It is not clear whether the change in the two governments' positions will affect the Second Circuit's judgment on the issue of the interlocutory appeal since they are not germane to that narrow issue.

If you have questions or reaction to this article, please feel free to contact Dan O'Flaherty at doflaherty@nftc.org.

Iran Sanctions Update

The progress through Congress of Iran sanctions legislation defies the normal calculus of policy, pragmatism and politics. With American boots very much on the ground in the Middle East, the Administration's Iran policy – marshal a multilateral consensus to deal with the Iran nuclear issue; declare the relevance of the state of play between Israel and the Palestinians to diplomacy over the issue, and keep domestic politics from deforming geopolitical tactics -- is all but ignored by Congress. The impartiality of shutting off Iran's gasoline imports, short of a naval blockade (an act of war), not to mention the demonstrable gift that the Congressionally legislated attempt thereto would confer upon Iran's ruling regime are similarly ignored. Politically, the only overwhelmingly "bipartisan" legislation pending in Congress is...Iran sanctions legislation.

One searches for a useful illuminating analogy: both a hall of mirrors and the "matryoshka," Russian wooden nesting dolls, come to mind. That is, the Congressional imperative to pass another round of unilateral economic sanctions on Iran is a mixture of posture and disingenuousness; posture on the part of many in Congress who simply feel they must go on record and substance be damned, and disingenuousness on the part of some who would enact sanctions as a "check the box" on a fore-ordained path to force of arms.

Lost in the process until recently, however, are the substantial, counterproductive effects that the specifics of the sanctions legislation would impose upon U.S. businesses that have no involvement with Iran; on foreign direct investment in the United States, and on the ability of U.S. energy companies to develop energy supplies outside of the Middle East. USA*ENGAGE and the National Foreign Trade Council, working with the National Association of Manufacturers and the U.S. Chamber of Commerce has made the Administration and the key Members of Congress aware of these effects (a copy of the letter is at: http://www.nftc.org/default/USA_Engage/Package_Sanctions_Study.pdf). Whether these efforts will result in changes to the legislation to redress these effects is an open question, at best.

Final legislation that can be advertised as "crippling sanctions" is all but assured -- barring extraordinary Administration success at the multilateral level. As to timing, it is noteworthy that House Foreign Affairs Committee Chairman Howard Berman (D-CA) has set an April deadline publicly; that the President will host a global meeting on nuclear proliferation in mid April, and that disinformation about the involvement in Iran's economy of U.S. companies and subsidiaries of foreign companies that provide major employment in the U.S. continues to be published in the mainstream press.

Tax Policy

NFTC Tax Lunch is Standing Room Only to Hear Treasury International Tax Counsel

The NFTC Tax Committee luncheon on February 23, 2010 had a standing room only crowd to hear Manal Corwin, International Tax Counsel, U.S. Department of Treasury, and former NFTC Board members, discuss the international tax provisions included in the latest Obama budget, and the latest tax treaty negotiations.

Ms. Corwin explained that the international tax provisions included in the budget were not intended to be a framework for international tax reform. The Administration intends to pursue these provisions in 2010 to close loopholes and stop abusive situations.

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NFTC Tax Lunch is Standing Room Only to Hear Treasury International Tax Counsel

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Ms. Corwin outlined the provisions included in the budget. She explained that the Administration chose to drop the check-the-box provision included in the 2009 budget proposals because of opposition from the business community. The Administration is concerned about the competitiveness of U.S. multinational corporations, but is also concerned about the competitiveness of purely domestic companies as well. The Administration will not seek to change the check-the-box rules through regulatory changes, but could look for administrative ways to stem abuses.

The deferral provision included in the budget is narrower in scope than the previous year's provision, and only applies to interest allocation. Headquarter expense cut-backs have not been included in the new provision. Ms. Corwin said that there are irrationalities in the current system that must be cleaned up, no matter what kind of tax reform is considered in the future. The foreign tax credit provision was not changed from the previous budget proposal. When asked if this provision would apply only to foreign tax credits accrued in the future, Ms. Corwin responded that it is not clear how it will apply to accumulated credits, and how specifically the effective date would work. The Administration has taken a conceptual approach to the international tax provisions, and understands that there are many technical issues that will have to be worked out before the provisions become law.

The newest provision added to the budget would add a new category under Subpart F for the tax treatment of intangibles. Ms. Corwin said that this provision does not deal with transfer pricing, but looks at mobile income, and where the incidence of risk and profit are related. The new provision will treat as Subpart F income, "excessive returns" on income from intangibles shifted out of the United States to related CFC's subject to a low effective tax rate. The Administration assumed a 30% rate of return would be considered excessive and assumed an effective tax rate of 10%. Ms. Corwin said that the numbers were used for revenue estimating purposes only, and that Treasury is open to a discussion on where the lines should be drawn.

According to Ms. Corwin, the Administration is open to looking at international tax reform and is not opposed, in general, to a territorial-type of approach. A territorial approach would likely include a "haircut" approach to deductions of expenses, but everything is on the table. The biggest problem with tax reform is the tax rate on domestic income, not on foreign income. Any tax reform package would also have to be deficit neutral, so it would have to be paid for within the corporate tax system. The Administration's international tax proposals are intended to "stop the leakage" in the current system, before any discussion of tax reform even begins.

Ms. Corwin then outlined the current status of tax treaty negotiations. The tax treaties with Malta and New Zealand are still awaiting markup in the Senate Foreign Relations Committee. Treaties have been signed with Switzerland, Luxembourg, Hungary and Chile. These treaties have not yet been sent to the Senate Foreign Relations Committee, but Treasury is working toward that goal. Treaty negotiations will begin with Spain in the summer of 2010. Negotiations with Poland are almost completed and should be finished in 2010. Negotiations with Israel, Norway and Korea are stalled. Treasury is trying to determine if they should open negotiations with Singapore, Malaysia or Vietnam. Ms. Corwin asked the business community to provide any evidence of double-taxation with Singapore. Absent any evidence of double-taxation, Treasury is unlikely to want to negotiate with Singapore, even though this treaty is a high-priority for the business community.

For more information, please contact Catherine Schultz, Vice President for Tax Policy, cschultz@nftc.org.

NFTC 2010 Tax Treaty Survey Results

Thank you to everyone who responded to the 2010 NFTC Tax Treaty Survey. The survey continues to be an important tool for NFTC members to communicate their tax treaty wish list and issues to the U.S. Treasury and the IRS. An overview of the survey responses follows.

Country Priorities

While there was some change in the ranking of the most significant countries to NFTC member companies who responded to the survey (“respondents”), two countries emerged as the top priorities for the most number of respondents, and the countries in the top tier shifted. As has happened in the past, the countries that rank in the top two tiers (those that were selected by the most respondents) were clustered in groups of four or five; thereafter, a significant drop in votes per country occurs.

- The country that was once again identified as the most important to respondents with 80% of the vote (up from 72% last year) was Brazil--permanent establishment, and residence were the greatest concerns, followed very closely by interest, royalty and dividend withholding.
- The country that received the second highest number with 76% of the vote was Singapore, which moved up significantly from 2009 on the priority list. Permanent establishment, business profits, interest, dividends and royalty withholding were uniformly important. There was also a great deal of concern about the MAP process.

The countries that were identified as the next most significant to respondents with 40-68% of the votes (these countries were also most frequently listed as the first or second most important country by respondents) are: India, China, Canada, Argentina and Mexico. Canada has risen in importance this year due to treaty implementation concerns. India has fallen a bit this year (68%) and China continues to be of great concern to a significant number of respondents. Both Mexico and Argentina have moved up in significance to respondents. The negotiation items that were listed as most significant in each country are:

- India: permanent establishment was by far the biggest concern, followed by business profits, gains, interest, royalties and the MAP process;
- China: permanent establishment, business profits and reducing withholding rates on interest, royalties, and dividends were uniformly important;
- Canada: residence, permanent establishment, dividends and the MAP process were all of concern;
- Argentina: reducing withholding rates on interest and dividends were all significant, followed closely by permanent establishment;
- Mexico: gains, residence, interest withholding and royalties were important, followed by permanent establishment.

The countries that were included in the second tier (with 20-36% of the votes) were S. Korea, Columbia, Taiwan, Switzerland, Japan, Angola, Russia, Saudi Arabia and Vietnam. The priority of the countries in the second tier shifted, as Canada has become more of a priority for treaty implementation issues and moved up on the overall priority list. The items that were selected as most important for these countries are:

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NFTC 2010 Tax Treaty Survey Results

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South Korea: permanent establishment, business profits and royalties were the most important, closely followed by interest and dividends;

- Columbia: interest, royalty and dividend withholding and the MAP process;
- Taiwan: permanent establishment, gains, business profits, royalties and dividends were uniformly important;
- Switzerland: dividends and the MAP process were important;
- Japan: Residence, interest, and the MAP process were important;
- Angola: permanent establishment, interest, business profits and gains and the MAP process were all important;
- Russia: business profits, permanent establishment, royalties and dividends and the MAP process;
- Saudi Arabia: Saudi Arabia: permanent establishment, interest and royalties, and the MAP process;
- Vietnam: permanent establishment, business profits, interest, royalties and the MAP process were important.

The countries that comprise the third tier garnered significantly fewer votes. Receiving between 12-16% of the votes were: Malaysia, Thailand, Australia, Israel, Turkey and Venezuela. The items that were selected as the most important for these countries are:

- Malaysia: residence, business profits, permanent establishment, interest royalties and the MAP process;
- Thailand: residence, permanent establishment, interest, dividends, and the MAP process were all uniformly important;
- Australia: permanent establishment followed by withholding on interest and dividends;
- Israel: residence, permanent establishment, business profits, royalties and the MAP process;
- Turkey: permanent establishment, business profits, royalty, dividends and the mutual agreement process;
- Venezuela: permanent establishment.

The remaining countries received only one to three two votes each.

Question Responses

Question #1 asked respondents to expand upon any tax treaty negotiation issues that were noted in the selection of countries and items.

- The most frequently cited problem was the permanent establishment interpretations in India. India is taking very aggressive positions on P.E. Respondents requested that the tax treaty with India be renegotiated to clarify what constitutes a permanent establishment.

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NFTC 2010 Tax Treaty Survey Results

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- Respondents requested the enhancement of the U.S. tax treaty network to countries in which multinational corporations have significant business activities: Singapore, Brazil, and China were mentioned most frequently. Respondents cited business profits, royalties and dividends as priority areas with Singapore. Transfer pricing was cited as a problem in Brazil. The Chinese withholding rate was seen as placing an additional burden on companies operating in China.
- Respondents also reiterated the importance of eliminating withholding taxes on interest, royalties and dividends. Specific countries were cited as having high withholding rates, including Mexico and Turkey. The current U.S. Turkey treaty reduced dividend withholding to only 15%, which is the same as the Turkish domestic law rate, so the current treaty provides no benefit. Turkey has recently signed treaties where they have agreed to lower withholding rates (5%) . Respondents would like to see the dividend lowered in the U.S.-Turkey treaty. Mexico expanded its definition of other income subject to withholding to include a variety of payments previously treated as business profits. Mexico also changed its characterization of payments for software to expand the types of payments subject to withholding tax.
- Problems were encountered in permanent establishment interpretations in China, Kuwait, Mexico, Malaysia and Angola. Kuwait is taking particularly aggressive positions on permanent establishment.
- The Middle East and sub-Saharan Africa also were cited as areas where tax treaties could reduce the potential for permanent establishment abuse. Respondents also recommended doing regional treaties, based on a new regional “model” tax treaty, with some of these areas. After a regional treaty was in place, the U.S. could adopt a more robust treaty with specific countries.
- Respondents also recommended updating some of the oldest U.S. treaties, e.g. Philippines and Egypt, as part of this process.
- Binding arbitration and more efficient mutual agreement procedures were also referred to in several responses (to this question and question #2); respondents noted that significant delays were encountered in resolving examinations and that settlements were often held hostage unless taxpayers waived access to mutual agreement procedures. Many respondents would like to see binding arbitration provisions added to all future treaties. A mandatory arbitration provision with the U.K. was requested.
- Respondents requested a zero withholding rate with Japan. Respondents also had issues with the residence clause of the current treaty, specifically in substantiating the tax treatment of pass-through entities that are eligible for treaty benefits. Respondents requested that the L.O.B provision for withholding tax be changed to permit a taxpayer to satisfy the treaty conditions in one year, instead of the three preceding tax years included in the treaty.

Question #2 focused on tax treaty implementation issues, asking respondents to provide details about examinations, settlement problems, and procedural issues encountered in obtaining tax treaty benefits.

- Onerous procedures encountered to receive reduced tax treaty withholding rates were cited, particularly in Italy, Singapore, Portugal, China and the U.K.

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Tax Policy

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- The expansion by certain countries of what constitutes a permanent establishment and the attribution of profits to that permanent establishment (sometime attributable to misinterpretation by tax authorities) is another issue of significant concern to respondents.
- Respondents requested that countries, such as Russia, be encouraged to adhere to their tax treaty clauses on the arms-length standard and permanent establishments, and that these countries do not use indirect taxes or other measures to override the treaty content.
- Respondents requested that the U.S. view be promoted that tax treaties are not purely for the avoidance of double taxation, but have a wider and more important goal, e.g. the bilateral agreement to the allocation of taxing rights, establish minimum thresholds before taxation rights accrue, facilitate cross border flows with minimal withholding taxes and establish procedures to resolve cross border disputes.
- The inability of the MAP and Competent Authority to resolve issues of double taxation was cited frequently with reference to India, Mexico, and Japan. Respondents cited numerous problems with India, both in its expansive view of what constitutes a permanent establishment, and how the MAP cases are processed. There is also concern that the proposed new Direct Tax Code could possibly override the tax treaty.
- The slowness of the MAP process with Canada has been problematic for many respondents. The process for obtaining an APA has also been very slow.

Thank you again to those that took the time to respond to the *2010 NFTC Tax Treaty Survey*, your responses provided valuable information. The cleansed information has been provided to the U.S. Treasury and the Internal Revenue Service officials with responsibilities in the tax treaty area. For more information, please contact Catherine Schultz, Vice President for Tax Policy, cschultz@nftc.org.

Next NFTC Tax Lunch Forum

The next NFTC Tax Luncheon Forum to discuss current international tax issues will be held on Wednesday, April 14 at 12:00 p.m. ET, at the NFTC offices, 1625 K Street, NW, Suite 200, Washington, DC. Amy O'Donnell, Chief of Staff and Tax Counsel to Congressman John Larson has agreed to speak to us on the current legislative schedule and the tax agenda for the rest of 2010. Rep. Larson is a member of the House Ways and Means Committee and is the House Democratic Caucus Chairman. Please join us for this informative discussion and come prepared for a lively dialogue. Please register by Friday, April 9th. Register at: <http://www.nftc.org/default/tax/Lunch%20Tax%20Forum%20Registration%20Sheet.pdf>. For more information, please contact Catherine Schultz, Vice President for Tax Policy, cschultz@nftc.org.

100 Best Corporate Citizens

We are very proud, but certainly not surprised, that 38 NFTC member companies (15 of them are on our Board) made [Corporate Responsibility Magazine's](#) top 100 "Best Corporate Citizens" in 2010. Kudos to each of you! NFTC members also ranked in 8 of the top 10 corporate citizen companies. For the complete list of the Top 100 Corporate Citizens, click on:

<http://www.thecro.com/files/CR100Best.pdf>

International Human Resources

Looking Forward: Risks and Strategies for Global Mobility Programs

Cartus has recently completed our 2010 Global Mobility Policy & Practices Survey, co-sponsored by the NFTC. This is the fourth survey in a continuing series that probes for emerging and continuing trends in global mobility, challenges in those programs, and what solutions practitioners around the world are putting in place to meet those challenges.

Over the three years since Cartus last performed its Policy & Practices Survey, the world of global mobility has changed. Multinational companies have responded to a challenging global economy with dramatic shifts in activity, demographics, and expectations. These challenges have prompted companies to seek new solutions, such as exploring opportunities in emerging markets, continuing to shift towards short-term and temporary assignments, and utilizing localization or permanent transfers as less expensive options.

The survey findings illuminate how companies are finding the best ways to adhere to the organization's strategic objectives while balancing the need to control or cut costs. Following are summaries of The full survey report will be released in early April and information on how to obtain a copy will be posted to the NFTC and Cartus websites.

Annual International Human Resources Forum – March 10-11, 2010

The NFTC's ninth annual International Human Resource Management Forum in Houston was held on March 10-11, 2010. The turnout this year was the largest to date, a tribute to the presenters, content and improvement of the global economy. The forum agenda included a range of international business and related IHR topics. The highest rated segments were on:

- Talent Management In These Trying Times, given by Tracey Marsh, Director-Offshore Talent Management, Transocean Deepwater
- The Foreign Corrupt Practices Act-Business and IHR Implications, given by Michael B. Schwartz, Principal, KPMG LLP
- Hot Topics in Global Mobility Management, given by Mary Beth Magallanes, Global Mobility HR Specialist, GE Energy and Achim Mossmann, Managing Director-Global Mobility Advisory Services, KPMG LLP
- Reductions in Force Across Borders, given by E. Johan Lubbe, Partner, Jackson Lewis LLP; Pamela Pfeiffer, Manager-HR Policy & Compliance USA, Shell Oil Company and Laurie M. Robson, Partner, Borden Ladner & Gervais LLP
- Mobility Management: Avoiding Long-Term Problems Due To Short-Term Issues, a panel discussion that included Brad Clippinger, International Assignment Manager, Bechtel; Lance Foreman, Director-International Compensation & Benefits, ConocoPhillips; Mary Beth Magallanes, Global Mobility HR Specialist, GE Energy; Michael Hirsch, International Human Resources, Marathon Oil; and Ray Pascuzzi, Partner, KPMG LLP
- Social Media and Global Employers: Benefits and Risks, Kimberly Blasingame, Senior Human Resources Generalist, American Bureau of Shipping; Michael Cadden, Managing Director-Operations, Living Abroad LLC, Joseph Crumly, Director-International Employee Relations, American Bureau of Shipping and E. Johan Lubbe, Partner, Jackson Lewis LLP



*Panel on Corporate Social Responsibility:
Britt Cotter, Marathon Oil; Sunita Singh
McLaren, WorldWise; Amy Mifflin,
Marathon Oil*

(Continued on page 14)

International Human Resources

Annual International Human Resources Forum – March 10-11, 2010

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In addition there were sessions led by other colleagues from: Aetna Global Benefits, AIRINC, Chevron, CH2M Hill, the Education for Employment Foundation, FMC Technologies, Harvest International, Intel, International SOS, Jackson Lewis LLP, Lenovo, PPG, WorldWide and Worley Parsons. The audience valued the practical experiences and “lesson learned” that were shared by the presenters.

The NFTC will host its 15th annual International Human Resources Forum in New York City on July 14-15, 2010. Many of the topics covered in the Houston forum will be included in the July agenda. Details on the agenda and registration will be posted in April on the NFTC website- www.nftc.org or contact Sandra Rodriguez at srodriguez@nftc.org.



Cross-Border Reductions in Force Panel: Pamela Pfeiffer, Shell Oil; Johan Lubbe, Jackson Lewis LLP, Laurie M. Robson,



Harry Gram, AIRINC, Kristin Hamrick, Lenovo; Frank Bodengraven-AIRINC



Lance Foreman-ConocoPhillips; Mary Beth Magallanes-GE Energy, Michael Hirsch-Marathon Oil; Brad Clippinger-Bechtel; Ray Pascuzzi-KPMG

News for our Members

Save the Date: 2010 World Trade Dinner Set for September 29, 2010

National Foreign Trade Council Foundation’s Annual World Trade Dinner and Award Ceremony is scheduled for Wednesday, September 29, 2010, once again being held in Washington, D.C., this year at the Organization of American States, 17th Street & Constitution Avenue, NW, Washington, DC. We hope you will plan to be there. The NFTC’s World Trade Dinner is a popular event for senior corporate and public officials and foreign dignitaries; a night featuring a formal address by our keynote speaker, presentation of our annual world trade award, and, of course, much socializing. Past speakers have included such respected figures as Peter Seilgmann, CEO Conservation International, U.S. House of Representatives member Gregory Meeks and Majority Leader Steny Hoyer; United States Trade Representative, Ambassador Susan Schwab; Secretary General of the United Nations, Kofi Annan; then UN-Ambassador John Negroponte, as well as several Heads of State.



Keynote Speaker 2009 World Trade Dinner, Peter Seligmann, Co-founder, Chairman of the Board and CEO of Conservation International

For company support opportunities or individual reservations contact Bill Kelly at 202-887-0278 or wkelly@nftc.org.

Calendar of Events

Date	Event	Location
April 6-8, 2010	Expatriate Management Committee	New York City
April 8, 2010	Trade Committee Meeting with Hiddo Houben, EU Commission	Washington, DC
April 13, 2010	Trade Committee Meeting with International Labor Organization (ILO) Nancy Donaldson, Director of the Washington office	Washington, DC
April 14, 2010	Tax Lunch Forum - Speaker: TBA	Washington, DC
April 15, 2010	U.S. Business Coalition for TPP - debrief by USTR on First Negotiating Round	Washington, DC
April 16, 2010	Going Global to Support North Carolina Innovation: <i>The Role of Innovation Policy in Growing Exports, Creating Jobs, and Solving Global Challenges</i>	Research Triangle Park, NC
April 16, 2010	USA*Engage Committee Meeting with Ken Katzman , Congressional Research and Dick Nelson, Atlantic Council	Washington, DC
April 20-22, 2010	International Assignment Management Committee*	Richmond, VA
May 12, 2010	Tax Lunch Forum - Speaker: TBA	Washington, DC
June 9, 2010	Tax Lunch Forum - Speaker: TBA	Washington, DC
June 9, 2010	International Benefits Committee	New York City
July 14, 2010	Tax Lunch Forum - Speaker: TBA	Washington, DC
July 14-15, 2010	Annual International Human Resources Forum	New York City
September 21-23, 2010	International Assignment Management Committee*	San Francisco, CA
September 28-30, 2010	Expatriate Management Committee*	Boston, MA
September 29, 2010	Board of Directors Meeting	Washington, DC
September 29, 2010	Annual World Trade Dinner and Award Ceremony - Organization of American States	Washington, DC
September 29, 2010	NFTC Annual Meeting	Washington, DC
September 30 - October 1, 2010	Fall Tax Committee Meeting	TBD
October 6, 2010	International Benefits Committee	New York City
December 8, 2010	Tax Lunch Forum - Speaker: TBA	Washington, DC
<p>* Note: The WTO Committee Meetings, Expatriate Management, Global Compensation, International Assignment Management, and International Benefits Committees are by invitation only. For information about them please contact NFTC at (202) 887-0278 or e-mail nftcinformation@nftc.org.</p>		

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National Foreign Trade Council
E-mail: nftcinformation@nftc.org
www.nftc.org

Washington DC Office
1625 K Street, NW, Suite 200
Washington, DC 20006
Phone: 202-887-0278
Fax: 202-452-8160

New York Office
600 Lexington Avenue, 29th Floor
New York, NY 10022
Phone: 212-399-7128
Fax: 212-399-7144

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*For membership opportunities, please contact us at
nftcinformation@nftc.org or 202-887-0278.*