WHITE & CASE

# White & Case LLP
# General Trade Report - JETRO

April 2012

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# UNITED STATES

## GENERAL TRADE POLICY

### USTR Releases 2012 TBT Report

#### Summary

On April 2, 2012 the Office of the US Trade Representative (USTR) released its third Report on Technical Barriers to Trade ("2012 TBT Report"). Started by the Obama Administration in 2010, USTR's annual TBT Report addresses significant foreign trade barriers faced by US exporters in the following forms: (i) product standards; (ii) technical regulations and testing; (iii) certification; and (iv) other procedures involved in determining whether products conform to established standards and technical regulations. According to USTR, these standards-related measures become technical barriers to trade (TBTs) if they are non-transparent, outdated, overly burdensome or discriminatory. The aim of the TBT Report is to describe and advance the US government's efforts to identify and eliminate these barriers.

The 2012 TBT Report includes the following components, *inter alia*: (i) an introduction to standards-related measures; (ii) an overview of standards-related trade obligations; (iii) a description of the US legal framework for implementing its standards-related trade obligations; (iv) a discussion of standards; (v) a discussion of conformity assessment procedures; (vi) a description of the interagency and stakeholder consultations used by the US government to identify TBTs; (vii) an overview of how the US government engages on standards-related measures through international, regional and bilateral fora; (viii) a summary of trends regarding standards-related measures in 2011; and (ix) an identification and description of TBTs on a country-by-country basis.

Progress made on the removal of TBTs and the emergence of new TBTs can be observed through a comparison of the 2012 TBT Report and the 2011 TBT Report. Although some of the 2012 TBT Report remains unchanged, significant changes can be identified in sections (viii) and (ix). Below we provide analysis on how the trends and country reports have changed from 2011 to 2012.

#### Analysis

**I. TRENDS IN 2011**

The 2012 TBT Report lists the following as major trends that appeared in 2011 across various US trading partners' markets as TBTs:

- **Regulatory Measures on Goods with Cryptographic Capabilities.** China, India and Russia, among other US trading partners, are considering, or have already adopted, measures that restrict US exports of products that protect data integrity and confidentiality through cryptographic capabilities;



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- **Mandatory Labeling of Genetically Engineered Foods.** In 2011, the US government was concerned with: (i) Colombia, Peru and Ukraine"s proposed labeling requirements for genetically engineered (GE)-food, which differ from the guidelines set forth in the "Compilation of Codex Texts Relevant to Labeling of Foods Derived from Modern Biotechnology"; and (ii) the European Union"s (EU) possible extension to honey of its practice of mandatory labeling for GE foods;

- **Alcoholic Beverage Regulations.** Labeling requirements, definitions specific to products of a specific region, unique standards for specific spirits and certification practices that impede trade are among the TBTs US exporters have experienced with respect to alcoholic beverages in countries such as Russia, Thailand and Kenya, among others;

- **Organic Product Standards.** According to the Report, significant differences in regulatory approaches to organic products have adversely affected US exporters of organic products. Although the United States has experienced some success negotiating organics equivalency agreements, significant differences remain between the United States" regulatory approach and that of Japan, Korea and China;

- **Formula Disclosure Requirements.** A growing number of countries, including Brazil, Indonesia, Japan, China and Venezuela, require food producers to disclose proprietary product information as a condition for being able to export their respective products to those countries;

- **Documentation Requirements.** Brazil, China, Russia, Switzerland, Chile, Costa Rica, the Dominican Repubic, Guatemala, Indonesia, Peru, Vietnam, China and Korea, among other countries, are cited as imposing "onerous" documentation requirements on US exports; and

- **"Voluntary" Measures as Trade Barriers.** Countries such as China, Korea and Malaysia have developed and implemented "voluntary" standards in such a manner that renders them required standards in practice.

While the trends listed in the 2012 TBT Report were also listed as trends in the 2011 TBT Report, two trends listed in the 2011 Report were not listed in the 2012 Report, namely: (i) recognition of conformity assessment bodies; and (ii) issues related to trade in halal products.

## II. COUNTRY REPORTS

The 2012 TBT Report identifies and describes signifant TBTs faced by US exporters in 19 countries and two groups of countries, including: (i) Argentina; (ii) Brazil; (iii) China; (iv) Chile; (v) Colombia; (vi) India; (vii) Indonesia; (viii) Japan; (ix) Kenya; (x) Korea; (xi) Malaysia; (xii) Mexico; (xiii) Russia; (xiv) Saudi Arabia; (xv) South Africa; (xvi) Taiwan; (xvii) Thailand; (xviii) Turkey; (xix) Vietnam; (xx) Central American Customs Union (CACU); and (xxi) the EU. The 2012 TBT Report examined the same countries and country groups examined in the 2011 TBT Report, but also addressed TBTs in two countries and one new country group, namely:

- **Chile.** The 2012 TBT Report addresses Chilean regulation DS No. 95/2005, which imposes emissions limits for new commercial diesel trucks in Chile;



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- **Kenya.** The Report takes note of Kenya"s labeling requirements for alcoholic beverages, which, *inter alia,* require a warning message that compromises at least 30 percent of the package"s total surface area; and

- **CACU.** CACU countries require all processed food products to be registered in the exporting country with a Certificate of Free Sale (CFS) before they are eligible to be imported.

For the remaining countries and country groups, the 2012 TBT Report updates the TBT issues mentioned in the 2011 TBT Report. For some countries and countries groups, the 2012 TBT Report mentions new TBTs or no longer mentions certain TBTs. Below we summarize these additional substantive revisions:

- **Argentina.** The 2012 Report addresses Argentine Resolution 453/2010, which requires all inks, lacquers and varnishes used in producing printing materials to undergo testing for lead content at a single laboratory in Argentina;

- **Brazil.** Unlike the 2011 Report, the 2012 Report does not mention concerns regarding a Brazilian proposal that would require toys and children"s articles produced by foreign manufactures to undergo compliance testing in Brazil, even if they have already been tested in their country of manufacture;

- **China.** The 2012 Report mentions the following additional TBTs: (i) an April 2011 regulation titled "Specification for Import and Export of Food Additives Inspection, Quarantine, and Supervision," which requires food product labels to list the precise percentage of each food additive; (ii) framework regulations for information security in critical infrastructure known as the Multi-Level Protection Scheme (MLPS), which categorize information systems based on the extent of damage a breach in the system could pose to social order, public interest and national security; (iii) proposed voluntary standards related to information security; (iv) China"s classification of imaging and diagnostic medical equipment as having the highest risk level; and (v) China"s "National Voluntary Certification Program for Electronic Information Products Subject to Pollution Control," which the US government believes could be made mandatory;

- **Colombia.** The 2012 Report addresses Colombia"s proposed Resolution 2604, which would specify that imported trucks must meet the Euro IV emissions standard;

- **EU.** The 2012 Report addresses the EU"s renewable energy directive (RED), which provides for biofuels and biofuels feedstocks to be counted toward fulfilling Member State biofuel use mandates or to benefit from RED tax incentives if they qualify. The 2012 Report does not mention the following TBTs: (i) the EU"s classification and labeling requirements for borates and nickel compounds; (ii) the EU"s consideration of country of origin labeling requirements for certain industrial products, which would only apply to imported goods; (iii) the EU"s Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS), which prohibits placing certain categories of electrical and electronic equipment on the EU market that contain certain chemicals; and (iv) the French Ministry of Agriculture"s "skirt" requirement for ride-on lawnmowers;

- **India.** The 2012 Report addresses (i) India"s new set of rules for managing electronic waste, which will apply to producers, dealers, refurbishers and consumers; and (ii) India"s proposed "Toys and Toy Products



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(Compulsory Registration) Order," which would give foreign manufacturers 45 days to demonstrate that their toy poducts comply with the proposed testing requirements;

- **Indonesia.** The 2012 Report notes that Indonesia is considering toy safety standards that would require "redundant and burdensome" testing, and make other toys eligible for a mark signifying that the product satisfies the safety requirements of Indonesia"s National Standardization Agency. Unlike the 2011 TBT Report, the 2012 Report does not mention TBT issues related to Indonesia"s halal certifications for meat and poultry;

- **Korea.** The 2012 Report addresses the following: (i) the Korean National Tax Service"s July 2011 announcement that it will begin requiring imported whiskey bottles to carry a radio frequency identification tag; (ii) Korea"s proposed regulation on certifying cosmetic products that satisfy Korea"s standard for Good Manufacturing Practices; (iii) Korea"s draft "Act on the Registration and Evaluation of Chemcals"; (iv) Korea"s proposed limits on the use of phthalates in PVC flooring; and (v) a 2011 amendment to Korea"s Radio Waves Act, which requires broadcasting and communication equipment to confirm compliance with Korean conformity assessment critieria. Unlike the 2011 Report, the 2012 Report does not address: (i) conformity assessment issues; (ii) proposed fuel efficiency and emissions requirements for automobiles; and (iii) Korea"s proposed expansion of its mandatory biotechnology labeling requirements for food products to include processed products;

- **Mexico.** The 2012 Report addresses: (i) draft legislation that would restrict the sale of certain caffeinated energy drinks and a separate draft standard that would impose design and sanitary requirements on non-alcoholic flavored beverages; (ii) Mexico"s requirement that manufacturers, importers, distributors and marketers of electrical equipment and appliances label those products with information regarding the product"s energy efficiency and testing compliance; and (iii) Mexico"s certification requirements for corrugated high-density polyethylene pipes. Unlike the 2011 Report, the following are not mentioned: (i) conformity assessment procedures; (ii) Mexico"s proposed nutritional labeling requirements; and (iii) Mexico"s failure to carry out its commitment under the North American Free Trade Agreement (NAFTA) to adopt provisions to accept test results from US laboratories for telecommunications equipment: USTR Ron Kirk and Mexican Secretary of Economy Bruno Ferrari signed a conformity assessment mutal recognition agreement in May 2011;

- **Russia.** The 2012 Report addresses Russia"s amendment to its alcoholic beverages law to, among other things, allow beer to be brewed from no more than 20 percent brewing malt in grain form;

- **Taiwan.** The 2012 Report does not address the reinterpretation of Taiwan"s Commodity Inspection Act and Commodity Labeling Act to require all units included in a retail multipack to be labeled;

- **Thailand.** The 2012 Report addresses Thailand"s new rules for food additives, which require food product labels to list all the additives and their percentages by weight. Unlike the 2011 Report, the 2012 Report does not address Thailand"s labeling requirement for snack foods;

- **Turkey.** Unlike the 2011 Report, the 2012 Report does not address: (i) Turkey"s conformity assessment requirements; (ii) Turkey"s regulation mandating the labeling of bio-engineered ingredients in all food and



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feed if the biotech content exceeds a certain level; and (iii) Turkey"s proposed regulation to define the characteristics necessary for a vegetable oil to be labeled “olive oil” or “olive pomace oil;” and

- **Vietnam.** The 2012 Report addresses new testing requirements for a number of imported products, including alcohol, cosmetics and mobile phones, which appears to limit entry of the covered goods and requires Vietnam"s consulate in the country of export to approve the exports. Unlike the 2011 Report, the 2012 Report does not mention Vietnam"s food safety law requiring labeling for biotech food products.

### Outlook

The annual publication of the TBT Report is seen as both a metric for measuring the Obama Administration"s success at eliminating unwarranted standards-related measures during the previous year as well as an agenda for furthering such efforts within the next year. In this regard, the 2012 TBT Report highlights several of the Administration"s accomplishments from 2011, including: (i) the the United States work to negotiate a TBT chapter in the Trans-Pacific Partnership (TPP); and (ii) United States" leadership of Asia-Pacific Economic Cooperation (APEC) in 2011, which involved the promotion of good regulatory practices and work to prevent governments from creating standards-related barriers in several emerging industries. Looking forward, analysts expect that many of the TBTs addressed in the 2012 country reports will be broached in bilateral, regional and multilateral fora, and may be used as the basis for trade dispute brought by the United States.

## USTR Releases 2012 National Trade Estimate

### Summary

On April 2, 2012 the Office of the US Trade Representative (USTR) released the twenty-seventh National Trade Estimate Report on Foreign Trade Barriers (“2012 NTE”). Pursuant to the Omnibus Trade and Competitiveness Act of 1988, the annual NTE provides a country-by-country inventory of the most important foreign barriers affecting the following: (i) US exports of goods and services; (ii) foreign direct investment by US persons; and (iii) protection of intellectual property rights (IPR). The stated goal of the NTE is to facilitate negotiations aimed at reducing or eliminating the identified trade barriers and enhance efforts to enforce US trade laws. While much of the 2012 NTE is similar to the 2011 NTE, the resolution of some trade barriers and the emergence of others, as described within each country report, reflects the Obama Administration"s success in 2011 and 2012 trade policy objectives. Below we identify the major changes among the trade barriers identified in the 2012 NTE, as compared to the 2011 NTE.

### Analysis

#### I. TRADE BARRIER CATEGORIZATION AND IDENTIFICATION

The trade barriers identified in the 2012 NTE are categorized as they were in the 2011 NTE. More specifically, trade barriers identified in the report fall into the following categories:

- Import policies;



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- Government procurement;
- Export subsidies;
- Services barriers;
- Lack of IPR protection;
- Investment barriers;
- Anticompetitive practices with trade effects tolerated by foreign governments;
- Trade restrictions affecting electronic commerce (e-commerce); and
- Other barriers.

Althought the report is based on information provided by USTR, the Department of Commerce (DOC), and other relevant US government agencies, the information is supplemented by input provided by: (i) US embassies abroad; (ii) a request for input published in the Federal Register; and (iii) private sector trade advisory committees.

## II. COUNTRY REPORTS

The 2012 NTE examines trade barriers in the largest export markets for the United States, including 58 nations, as well as the European Union (EU), Taiwan, Hong Kong and the Arab League.[1] These are the same countries and country groups examined in the 2011 NTE. The 2012 NTE provides updates based on developments from 2011 to the trade barriers identified in the 2011 NTE. In addition to these updates, certain trade barriers are no longer mentioned while others are mentioned that have not been mentioned previously. Below we summarize those newly addressed trade barriers and those no longer mentioned in the 2012 NTE:

- **Argentina.** The 2012 NTE lists trade barriers to Argentina"s insurance services industry, including: (i) Resolution 36.615/2011 prohibiting cross-border reinsurance; and (ii) Resolution 36.162/2011 requiring all investments and cash equivalents held by locally registered insurance companies be located in Argentina. The 2012 NTE also lists a bill nationalizing Argentina"s pension system as a possible impediment to US investors. The 2012 NTE no longer lists Argentina"s initiation of more than 30 antidumping investigations as a nontariff barrier;

[1] The 58 nations include: Angola, Argentina, Australia, Bahrain, Bolivia, Brazil, Brunei Darussalam, Cambodia, Canada, Chile, China, Colombia, Costa Rica, Democratic Republic of Congo (DRC), Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Ghana, Guatemala, Honduras, India, Indonesia, Israel, Japan, Jordan, Kazakhstan, Kenya, Korea, Kuwait, Laos, Malaysia, Mexico, Morocco, New Zealand, Nicaragua, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, the Philippines, Qatar, Russia, Saudi Arabia, Singapore, South Africa, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United Arab Emirates (UAE), Venezuela, and Vietnam.



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- **Australia.** The 2012 NTE expresses concerns related to Australia"s "Convergence Review Committee," which is considering possibly extending local content rules to convergent media platforms, *e.g.*, computers and smart phones, as a potential services barrier. The NTE also voices concern that the Australian government has ostensibly implied to its citizens that hosting data overseas in countries such as the United States entails greater risk than elsewhere;

- **Brazil.** Investment barriers related to foreign ownership rules for Brazilian airlines are no longer mentioned;

- **Canada.** The 2012 NTE voices concern over the effects of privacy rules in two Canadian provinces, British Colombia and Nova Scotia, which mandate that personal information in the custody of a public body be stored and accessed in Canada unless otherwise granted exemption. The report also notes that even though Canada is a signatory of several government procurement agreements, the country only gives US suppliers access to seven of Canada"s Crown Corporations;

- **Chile.** The 2012 NTE no longer discusses barriers to several of Chile"s financial services sectors, including those relating to asset fund management and foreign-based insurance companies;

- **China.** The 2012 NTE raises several issues related to the November 2011 publication of a revised draft "Guiding Catalogue of Indigenous Innovation in Key Technologies and Equipment." The 2012 report also notes that China has increased support to its agricultural industry;

- **Democratic Republic of Congo (DRC).** Although mentioned in the 2011 NTE, the 2012 NTE places greater emphasis on the DRC"s "deficient" infrastructure as a potential trade barrier;

- **EU.** The 2012 NTE alleges that the following additional issues pose as significant trade barriers: (i) practices by the Finnish Pharamcuetical Pricing Board that have resulted in delayed consumer use of certain drugs; (ii) measures included in a reform bill passed by the French Parliament to provide stricter conflict of interest and drug monitoring rules; (iii) pharmaceutical market access issues in Lithuania; (iv) subsidies for fruit distributed by the EU Common Market Organization; (v) France Telecom"s predominance in France"s telecommunication"s sector; (vi) the relative lack of participation by foreign telecommunications companies in Greece"s tenders for mobile communications licenses; (vii) Poland"s requirement that broadcasters in Poland devote at least 33 percent of their broadcasting time each quarter to programming originally produced in the Polish language; (viii) delayed consideration of energy projects involving US investments in Ireland due to vested local interests and state-owned enterprises (SOEs); (ix) the discriminatory nature of Italy"s new incentive scheme for companies producing solar cells; (x) attempts by US companies to claim compensation for losses suffered as a result of changes made to Spain"s renewable energy feed-in tariff; (xi) Bulgaria"s non-transparent public procurement process; and (xii) Germany"s exclusion of US suppliers of passenger scanning equipment from public procurement bids. Unlike the 2011 NTE, the following were not mentioned in the 2012 NTE: (i) regulatory uncertainty in Finland"s telecommunications sector; (ii) the closed nature of the EU"s postal service markets; (iii) foreigner lawyers" inability to register with the Slovak Bar Association, which is required for foreign lawyers interested in practicing law in Slovakia; (iv) Poland"s lack of a value-added tax (VAT) grouping mechanism; (v) the Electrical Authority of Cyprus" effective control over natural gas pricese and power distribution; (vi) insufficient modifications to Germany"s 1960 law privatizing Volkswagen; (vii) the



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United Kingdom"s support for Airbus through investment in the Integrated Wing Program; and (viii) online data privacy issues in Germany related to Facebook and Google;

- **Hong Kong.** Unlike the 2011 NTE Report, the 2012 NTE does not mention restrictions for foreign lawyers and law firms practicing in Hong Kong. Issues with the length of approval procedures and non-transparency of the approval process for new pharmaceuticals is also no longer mentioned;

- **Indonesia.** The 2012 NTE no longer mentions concerns regarding the reportedly closed nature of Indonesia"s market to US direct selling companies;

- **Japan.** Unlike the 2011 Report, the 2012 NTE does not express concern for regulations that limit foreign access to the Japan"s medical services market. Japan"s restrictions on imports of blood products are also no longer mentioned;

- **Kenya.** Although mentioned in the 2011 NTE Report, additional emphasis was placed on the following issues in the 2012 NTE: (i) corruption as a trade barrier; (ii) the reported inefficiency of the Kenyan judicial system;

- **Korea.** Unlike the 2011 NTE, the 2012 NTE does not express concern that preferences provided to "traditional liquors" under Korea"s Liquor Tax Law disadvantage imported liquors;

- **Malaysia.** The 2012 NTE expresses concern for the biosafety legislation passed by the Malaysian Parliament that requires mandatory labeling, as well as a strict liability and enforcement regime for biotechnology-derived commodities and processed products. While the 2011 NTE addressed Malaysia"s licensing requirements for all meat imports, the 2012 NTE focuses on the import licensing requirements for pork. Unlike the 2011 Report, the 2012 Report does not discuss the requirement that foreign content in commercials in Malaysia be limited to 20 percent;

- **Morocco.** Unlike the 2011 NTE, the 2012 NTE does not address investment restrictions on foreigner"s interested in owning agricultural land in Morocco;

- **Oman.** Unlike the 2011 NTE, the 2012 NTE does not address the requirement that only Omani nationals and companies of WTO members registered as importers be permitted to submit documents to clear shipments through customs;

- **Peru.** The 2012 NTE questions the consistency with the US-Peru Trade Promotion Agreement (TPA) of a Peruvian measure passed in 2010 requiring exporters of remanufactured automotive parts to provide documentation from the original manufacturer consenting to the remanufacture and exportation of that part;

- **Philippines.** Unlike the 2011 NTE, the 2012 NTE does not mention that the Philippines has not ratified the Fifth Protocol to the WTO General Agreement on Trade in Services (GATS), which contains commitments that the report alleges would benefit US financial services providers in the Philippines;



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- **Qatar.** The 2012 NTE discusses concerns related to the laws and provisions applied to foreign banks registered in the Qatar Financial Center (QFC);

- **Russia.** Although discussed in the 2011 NTE, the 2012 NTE further emphasizes delays and other issues related to the Russian government"s effort to privatize state assets. The 2012 NTE also discusses Russia"s investment incentive regime in the automotive sector, which maintains several domestic content requirements;

- **Singapore.** Unlike the 2011 NTE, the 2012 NTE does not mention obstacles two US-based universities interested in providing classes in Singapore have reportedly encountered;

- **Taiwan.** Unlike the 2011 NTE, the 2012 NTE does not mention the issue of counterfeit US industry-associated wood product certification stamps. The 2012 NTE also does not discuss restrictions on foreign insurance firms, which were broached in the 2011 NTE;

- **Thailand.** Unlike the 2011 NTE, the 2012 NTE does not address: (i) issues related to the 2005 Multimodal Transport Act with respect to the treatment of foreign shipping companies; and (ii) non-transparency relating to foreign ownership and management of Thai hospitals and treatment facilities;

- **Turkey.** The 2012 NTE mentions that, according to the Organization for Economic Cooperation and Development (OECD), Turkey"s overall corporate governance outlook is positive; however, the 2012 NTE notes that Turkey needs to improve in the areas of control and disclosure of related-party transactions and self-dealing, protection of minority shareholders, and the role of the board in overseeing management and controlling shareholders;

- **United Arab Emirates.** The 2012 NTE expresses the need for clarification on the scope and implementation of the Federal Act No. 9 on Land Transport and Public Roads, which authorizes the National Transport Authority (NTA) to oversee licensing of all commercial transport vehicles, including those used by couriers; and

- **Venezuela.** Unlike the 2011 NTE, the 2012 NTE does not mention Venezuela"s use of direct payments for export subsidies in the agricultural sector.

## Outlook

The 2012 NTE was released in conjunction with the release of the 2012 Report on Sanitary and Phytosanitary Measures ("2012 SPS Report") and the Report on Technicial Barriers to Trade ("2012 TBT Report") (*please see W&C Trade Reports from April 19, 2012*). Together with the 2012 Trade Policy Agenda (*please see W&C Trade Report from March 6 2012*), these four reports provide key insight into the Obama Administration"s 2012 trade policy objectives. The information provided in these reports is likely to guide and inform the Administration"s trade related negotiations and enforcement actions in the coming year.



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# USTR Releases 2012 SPS Report

## Summary

On April 2, 2012 the Office of the US Trade Representative (USTR) released the third Report on Sanitary and Phytosanitary Measures ("2012 SPS Report"). Started by the Obama Administration in 2010, the annual SPS report provides, *inter alia*: (i) an overview of SPS measures, the agencies that impose and monitor them, and the international trade agreements that govern their application; (ii) a summary of major cross-cutting SPS issues; and (iii) analysis of SPS-related trade barriers facing US exporters in a number of key countries. The aim of the Report is to describe and advance the US government's efforts in removing these barriers. While much of the 2012 SPS Report is similar to the 2011 SPS Report, the resolution of some SPS issues and the emergence of others, as described in the country reports, reflects the Obama Administration's successes in 2011 and 2012 policy objectives with respect to the removal of SPS-related trade barriers. Below we provide analysis on major cross-cutting SPS issues and how the country reports changed from 2011 to 2012.

## Analysis

### I. MAJOR CROSS-CUTTING SPS ISSUES

The 2012 SPS Report lists the following as major cross-cutting SPS issues:

- **Export Certification Requirements.** Recently, several countries have begun requiring that export certificates, *i.e.,* written certification from the producer and exporting country that sets out a variety of SPS-related assurances, include "cumbersome and often unnecessary „attestations"" that subject imports to burdensome requirements;

- **Biotechnology.** A number of major US trading partners impose "unwarranted" import bans, restrictions or labeling requirements on US goods produced through the use of modern biotechnology or genetic engineering (GE) techniques;

- **Bovine Spongiform Encephalopathy (BSE)**. US beef exporters face a number of BSE-related trade barriers, including (i) import bans on US beef and beef products; (ii) selected import bans for certain US beef and beef products; (iii) restrictions on the importation of US beef and beef products produced from animals of a certain age; and (iv) import bans on US bovine and/or ruminant commodities;

- **Avian Influenza.** Several US trading partners have imposed import bans on US poultry products based on apparent concern over avian influenza. These concerns are often related to outbreaks of Low Pathogenic Avian Influenza (LPAI), which, according to USTR, causes either no, or only minor, symptoms in infected birds; and

- **Maximum Residue Levels (MRLs) for Pesticides.** Several US trading partners have allegedly imposed trade barriers on US exporters by: (i) setting pesticide MRLs at "unreasonably" low thresholds; (ii) failing to establish an MRL for certain pesticides that have Codex or US MRLs; or (iii) backlogging reviews for newer, safer pesticides.



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## II. COUNTRY REPORTS

The 2012 SPS Report provides analysis on SPS-related trade barriers facing US exporters in almost 50 countries or groups of countries.[2] Unlike the 2011 SPS Report, the 2012 SPS Report does not address SPS issues in (i) Saudi Arabia or (ii) the United Arab Emirates (UAE). The 2012 SPS Report addresses SPS issues in several countries that were not listed in the country reports section of last year"s report, namely:

- **Italy.** The Report mentions Italy"s trade barriers against biotechnology and, more specifically, its apparent pursuit of a GE-free strategy;
- **Malaysia.** Malaysia"s Department of Veterinary Services, which requires a permit for all pork imports, only grants such permits on a case-by-case basis, and often refuses to grant the permits without providing an explanation; and
- **Kyrgyzstan.** The Report cites Kyrgyztan"s ban on US pork imports from several US states due to H1N1 concerns as "unjustified."

Although the remaining countries mentioned in this section have been listed previously, some new issues are mentioned in the 2012 SPS Report that were not mentioned in the 2011 SPS Report. Likewise, some SPS issues mentioned in the 2011 SPS Report are no longer mentioned in the 2012 SPS Report. Below we highlight major issues removed or added to the country reports section of the 2012 SPS Report:

- **Argentina.** The 2012 Report addresses Argentina"s requirement that pork produced in the United States be shipped frozen or tested for trichinosis;
- **Brazil.** The 2012 Report includes a section on Brazil"s December 2010 Normative Instruction 36, which established "burdensome and unnecessary" new pest and disease requirements for the importation of planting seeds;
- **Chile.** The United States" previous concerns regarding market access in Chile for US beef and beef products and poultry are no longer mentioned;
- **China.** Concerns regarding China"s import restrictions on US pork products related to H1N1 concerns are not addressed;
- **Colombia.** The 2012 Report notes that Colombia requires pork produced in the United States to be shipped frozen or tested for trichinosis;

[2] The countries and country groups addressed in the country reports section include: Argentina, Australia, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, European Union, Guatemala, Gulf Cooperation Council, Honduras, Hong Kong, India, Indonesia, Israel, Jamaica, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Malaysia, Mexico, Morocco, New Zealand, Nicaragua, Norway, Peru, Philippines, Singapore, South Africa, South African Development Community, Korea, Sri Lanka, Switzerland, Taiwan, Thailand, Turkey, Ukraine, Uruguay, Venezuela, and Vietnam.



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- **EU.** Trade barriers related to the importation of US cherries and milk are mentioned. More specifically, the Report states that the EU requires cherries to be free of "brown rot" and to have documentation verifying that related controls are in place. The EU also limits the number of white blood cells allowed in imports of raw milk;

- **Indonesia.** The Report notes Indonesia"s January 3, 2012 announcement that it plans to close the Port of Jakarta to fruit and vegetable imports;

- **Israel.** The Report no longer mentions trade barriers related to the importation into Israel of US-origin pet food and table grapes;

- **Japan.** The Report does not note import restrictions imposed by Japan on US frozen French fries. Nonetheless, the Report does mention Japan"s prohibition of US pear imports due to concerns about fire blight, a bacterial disease;

- **Kuwait.** Trade barriers associated with poultry are no longer included. However, concerns regarding Kuwait"s ban on beef produced in Oklahoma due to BSE concerns are mentioned;

- **New Zealand.** Issues related to New Zealand"s health standards for stone fruit are no longer mentioned;

- **Peru.** Additional concerns are mentioned with respect to Peru"s ten-year moratorium on imports and products of GE products and animals. The Report also addresses Peru"s requirement that US pork be shipped to Peru either frozen or tested due to concern over trichinae;

- **Russia.** Although mentioned briefly in the 2011 Report, additional emphasis is placed on issues related to Russia"s: (i) zero tolerance policy for Salmonella, Listeria and coliforms in all food products, including raw meat and poultry; and (ii) zero tolerance for residues of unapproved veterinary drugs, and near zero tolerances for approved veterinary drugs;

- **Singapore.** Concern is expressed regarding Singapore"s (i) prohibition on the use of all pathogen reduction treatments (PRTs) in the production of pork and pork products; and (ii) requirement that US pork be frozen or tested for trichinosis;

- **South Africa.** The 2012 Report mentions that South Africa has suspended imports of table grapes from California due to concerns over the presence of European grapevine moth and light brown apple moth;

- **Sri Lanka.** Issues related to Sri Lanka"s policy of testing imported meats for various pathogens are not included;

- **Taiwan.** The 2012 Report states that Taiwan currently limits imports of fresh potatoes from the United States to those grown in only some major exporting states;

- **Thailand.** The Report notes Thailand"s ban on the use of magnesium silicate as a filtering agent to prolong the life of frying oil, which the Report claims is "generally recognized as safe;"



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- **Turkey.** Turkey"s regulations on imports of wood products are not mentioned;
- **Ukraine.** Ukraine"s requirement that US pork be shipped frozen or tested for trichinosis is mentioned; and
- **Uruguay.** The 2012 Report mentions that Uruguay"s tolerance level for powdery scab in seed potatoes remains "unacceptably low;"

### Outlook

The annual publication of the SPS Report is seen as both a metric for measuring the Obama Administration"s success at eliminating unwarranted SPS-related trade barriers during the previous year as well as an agenda for furthering such efforts within the next year. According to the 2012 SPS Report, US government achievements from 2011 include: (i) the removal of specific SPS barriers in Japan and Korea for US cherries and citrus; (ii) the removal of barrers in South Africa and Sri Lanka for apples and seed potatoes; (iii) collaboration with Kuwaiti and Taiwanese officials toward lifting their respective restrictions on US poultry and poultry products; and (iv) the negotiation for full market access for US beef to the UAE. Within the next year, the US government is likely to draw its priority SPS issues from the 2012 SPS Report. These priority issues will undoubtedly be broached in bilateral, regional and mutlitlateral fora, and some may form the basis for trade disputes brought by the United States.

## USTR Releases Results of 2012 Section 1377 Review of Telecommunications Trade Agreements

### Summary

On April 4, 2012, the Office of the United States Trade Representative (USTR) released its annual Section 1377 Review of Telecommunications Trade Agreements ("2012 Report").[3] The review focuses on issues contemplated in US trade agreements and relating to: (i) telecommunications equipment trade; (ii) cross-border data flows and internet enabled trade in services; (iii) regulation; (iv) foreign investment; (v) access to major supplier networks; (vi) fixed and mobile call termination rates; and (vi) satellites and submarine cable systems.

### Analysis

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, USTR conducts an annual review of the operation and effectiveness of US telecommunications trade agreements. Such trade agreements include: (i) the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS); (ii) the North American Free Trade Agreement (NAFTA) with Canada and Mexico; (iii) the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic; and (iii) bilateral free trade agreements

[3] The full report is available at: http://www.ustr.gov/webfm_send/3331.



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(FTAs) with Australia, Bahrain, Chile, Israel, Jordan, Korea, Morocco, Oman, Peru and Singapore. The 2012 Report assesses the operation and effectiveness of telecommunications-related provisions under such trade agreements based on public comments filed by interested parties and on information obtained from foreign public officials and private sector representatives.

The 2012 Report notes that positive achievements since the issuance of the 2011 report include: (i) progress in resolving longstanding pricing- and access-related disputes in Mexico; and (ii) a decision by Canada to seek legislative changes to partially open its telecommunications market to fully foreign-owned suppliers. The 2012 Report notes concern, however, in regard to several countries" imposition of measures requiring suppliers to use locally-manufactured or developed equipment, particularly in the case of Brazil.

## I. TELECOMMUNICATIONS EQUIPMENT TRADE

The report notes the concern on the part of US equipment manufacturers over the growing use of local content requirements in such countries as Brazil, India and Indonesia. The report also discusses the use of equipment standards and conformity assessment procedures (including testing requirements), which act as barriers to entry for US telecommunications equipment producers. We summarize these concerns below:

- **China.** The 2012 Report states that China"s Multi-Level Protection Scheme (MLPS) establishes guidelines for the categorization of information systems according to the extent of damage a breach in the system could pose to social order, public interest and national security, and it also requires equipment buyers to observe certain information security technical regulations and encryption regulations referenced in the MLPS regulations. USTR asserts that MLPS, if broadly applied, could adversely affect sales by US information security technology providers in China;

- **India.** The 2012 Report notes that US firms have expressed concern over India"s possible forthcoming policies to implement the 2008 Amendments to the national security-related Information Act of 2000, which would impose unnecessarily stringent and burdensome encryption requirements, such as those for equipment sold solely for commercial use, and could result in the prohibition of certain encryption technologies. USTR also notes that US firms have additional concerns relating to certain Indian licensing requirements, including: (i) the requirement for telecommunications equipment vendors to test all imported information and communications technology (ICT) equipment in India-based labs; (ii) the requirement to allow the telecommunications service provider and government agencies to inspect a vendor"s manufacturing facilities and supply chain, and to perform security checks over the duration of the equipment supply contract; and (iii) the imposition of strict liability for taking “inadequate” precautionary security measures;

- **Local Content Requirements.** The 2012 Report notes that several countries have proposed or adopted policies requiring the use of local content in their telecommunication sector infrastructure, including: (i) Brazil; (ii) India; and (iii) Indonesia. USTR notes that such policies potentially raise issues under the WTO Agreement on Trade-Related Investment Measures (TRIMs), among other agreements, as they distort trade and investment flows; and

- **Conformity Assessments.** The 2012 Report notes that US firms have expressed concern over trade restrictive ICT conformity assessment requirements contemplated in measures proposed or adopted by



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several countries, including: (i) China; (ii) Costa Rica; (iii) India; and (iv) Brazil. USTR puts forth the adoption of Mutual Recognition Agreements (MRA) as an avenue through which the United States and these trade partners can address some conformity assessment issues.

## II. CROSS-BORDER DATA FLOWS AND INTERNET ENABLED TRADE IN SERVICES

The 2012 report highlights concerns over data access and transfers restrictions, particularly in regard to issues in China and Vietnam, as well as general issues with Voice over Internet Protocol ("VoIP") services generally. We summarize these concerns below:

- **China.** The 2012 Report alleges that China's implementation of a national firewall directly affects firms' ability to carry out business in China. USTR has engaged Chinese officials in a bilateral dialogue to better understand the reasons for the firewall and, where possible, improve conditions for access;

- **Vietnam.** The 2012 Report alleges that US businesses experience significant blocking of websites in Vietnam. USTR has urged Vietnamese officials to instruct local Internet Service Providers (ISPs) not to block such websites; and

- **Voice-over Internet Protocol (VoIP).** The 2012 Report notes that barriers to the provision of VoIP services encountered around the world include: (i) regulatory requirements that impose the same requirements on VoIP providers as on traditional fixed or mobile voice providers; and (ii) limitations on the ability of VoIP providers to connect with the Public Switched Telephone Network (PSTN). USTR is evaluating countries' compliance with trade agreements in this regard and, according to the 2012 Report, will engage countries where non-compliance is found.

## III. REGULATION

The 2012 Report also discusses issues relating to regulation, including:

- **Licensing in Costa Rica.** The 2012 Report alleges that US firms continue to encounter delays in obtaining a license from the Costa Rican regulatory authorities to provide internet services by satellite despite the Costa Rican telecommunication market having been liberalized under DR-CAFTA. USTR has engaged both the US firms as well as the Costa Rican government on this issue in order to achieve a mutually satisfactory solution.

## IV. FOREIGN INVESTMENT

Foreign investment limits, *e.g.*, limits on the percentage of equity a foreign-owned firm can control, in Thailand, Canada and Mexico were widely cited in the 2012 Report as a trade-distortive barrier:

- **Canada.** The 2012 Report notes that the government has proposed lifting investment limits on companies comprising less than 10 percent of the market. However, the scope of this proposal is unclear and it remains unknown why companies comprising more than 10 percent of the market are excluded;



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- **Mexico.** The 2012 Report notes that the Mexican government has proposed lifting investment limits but the Congress has yet to support the Executive Branch in this regard, which is a necessary step; and

- **Thailand.** Despite Thailand having passed in 2001 legislation to liberalize its foreign investment limits, *i.e.*, increase permissible foreign equity for facilities-based operators from 20 percent to 49 percent, the 2012 Report notes that "Thailand has failed to bind that liberalization in its GATS commitments."

## V. ACCESS TO MAJOR SUPPLIER NETWORKS

The 2012 report highlights problems that competitive telecommunications carriers have encountered in several countries when attempting to access the network of an existing operator, including:

- **Germany.** The 2012 Report notes that US firms face difficulty in accessing high-speed Ethernet services from Deutsche Telekom (DT), which "hampers" the ability of such firms to compete with DT. US firms also express concern in regard to DT"s next generation (NGN) interconnection offerings involving IP-based connectivity, noting that the slow pace and narrow scope of these offerings will ultimately result in negative consequences for competition in the market; and

- **Mexico.** The 2012 Report alleges that Mexico has prevented liberalization of the long-distance telecommunications market in "non-equal access" (NEA) rural areas of Mexico. USTR also notes US firms" concern over NEA interconnection issues.

## VI. FIXED AND MOBILE CALL TERMINATION RATES

The report highlights concerns, principally in regard to El Salvador, Ghana and Jamaica, over rates these countries charge US telecommunications carriers to connect to their respective networks for long-distance calls, *i.e.*, termination rate. We summarize these concerns below:

- **Inbound International Traffic Tax.** The 2012 Report notes that El Salvador levies a tax on incoming calls from abroad, which has likely resulted in the recent decrease in call volume between the United States and El Salvador. USTR also asserts that Tonga applies a similar tax;

- **Government Mandated Termination Rate Increase.** The 2012 report puts forth that Ghana mandated in 2009 an increase in the termination rate for incoming international calls. USTR asserts that this increase is inconsistent with Ghana"s commitments under GATS; and

- **Universal Service Surcharge.** The 2012 Report notes that Jamaica renewed in 2011 its universal service charge on the termination rate paid by international operators to effect international phone calls to Jamaica. USTR asserts that this charge is discriminatory and not transparent for which it is questionably GATS-consistent.



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### VII. SATELLITES AND SUBMARINE CABLE SYSTEMS

The report highlights problems in regard to US operators‟ ability to offer satellite-based services to customers in China and India, as well as to obtaining timely competitive access to cable landing stations (CLS) in India. We summarize these concerns below:

- **Barriers to Provision of Satellite Services.** The 2012 Report notes that only the China Direct Broadcast Satellite Company ("China DBSat") holds the license necessary to sell domestic satellite services such that foreign satellite operators must sell capacity to end-users through China DBSat. In the case of India, foreign operators are required to first sell direct-to-home (DTH) capacity to India‟s domestic satellite operator, *i.e.*, Indian Space Research Organization (ISRO), which, in turn, sells such capacity to DTH customers, thus allowing ISRO to establish and maintain an exclusive relationship with the retail end-user; and

- **Access to Submarine Cable Systems.** The 2012 Report states that US firms continue to experience problems in obtaining competitive access to cable landing stations (CLS) in India. USTR states that this might be attributable to deficiencies in the Reference Interconnection Offers (RIOs) submitted by the companies that control access to CLS.

## Outlook

Considerable progress has been made in the past year on a number of fronts to improve trade in telecommunications through the reduction in certain countries of existing impediments to more open market access and the improvement of in-country access to major supplier networks. At the same time, new and potentially more insidious barriers have started to emerge under the guise of promoting domestic manufacturing capabilities, which have the potential to significantly harm trade in telecommunications. USTR has also begun to focus more intensively on impediments to the free flow of data – specifically including the construction of restrictive firewalls that serve to block access to internet sites – which can serve to restrict the free flow of information exchanges across borders, thereby resulting in a potentially deleterious affect on a broad array of trade activities, including in the telecommunications sector itself. Experts anticipate that both of these latter concerns will continue to warrant heightened USTR scrutiny in upcoming years.

# *US General Trade Policy Highlights*

# Human Rights Legislation Considered Key to Granting Russia PNTR

On April 13, 2012, the Atlantic Council hosted the event "Economic and Trade Implications of Russia‟s World Trade Organization (WTO) Accession." US-Russia Business Council President Edward Verona and International Research and Exchange Board (IREX) Fellow Viacheslav Evseev provided commentary on the processes by which Russia will formally accede to the WTO and the US government will grant Russia permanent normal trade relations (PNTR), *i.e.*, most-favored nation (MFN) status.

WTO members formally invited Russia to join the Organization on December 16, 2011. According to Russia‟s WTO accession agreement, Russia has until July 23, 2012 to ratify its accession agreement. Russia will become



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a full WTO member 30 days after Russia notifies the WTO that it has ratified such accession agreement. In order for US firms to benefit from the tariff and non-tariff commitments Russia made as part of its WTO accession, Congress must pass and the President must enact legislation establishing PNTR with Russia. Granting Russia PNTR will require Congress to revoke the Jackson-Vanik Amendment"s (under Title IV of the Trade Act of 1974) application to Russia.

While some expect the Russian legislature, known as the Duma, to ratify Russia"s WTO accession agreement within the near term, Mr. Evseev opines that Russia will not ratify the agreement until much closer to the deadline of July 23, 2012. If Russia waits to ratify its accession agreement until July 23, Mr. Verona noted that Congress will need to grant Russia PNTR by August 22, 2012, *i.e.*, the date on which Russia would become a full WTO member if it ratifies its accession agreement and notifies the WTO accordingly on July 23, in order to ensure that US firms have similar market access opportunities in Russia as other WTO member competitors once Russia becomes a full fledged WTO member.

Lawmakers have already begun to discuss the need to revoke the application of the Jackson-Vanik amendment to Russia through hearings held in March 2012 by both the House Committee on Foreign Affairs and the Senate Committee on Finance. During these hearings, a number of lawmakers, including Rep. Ileana Ros-Lehtinen (R-FL) and Sen. Jon Kyl (R-AZ), expressed the opinion that the application of the Jackson-Vanik amendment to Russia should not be repealed without addressing certain issues within the US-Russia relationship. Although a wide range of issues, including security concerns, have been discussed, human rights and intellectual property rights (IPR) enforcement have emerged as two central issues.

In an effort to address human rights concerns in Russia, Sen. Ben Cardin (D-MD) introduced the "Sergei Magnitsky Rule of law Accountability Act of 2011" (S. 1039), which is currently co-sponsored by a bi-partisan group of 31 Senators. If passed, the Act would require the US government to, *inter alia*, freeze certain assets and deny US visas to persons named by the Department of State (DOS) as responsible for extrajudicial killings, torture or other human rights violations committed against individuals seeking to promote human rights or expose illegal activity carried out by Russian government officials.

According to Mr. Verona, S. 1039 is likely to be linked, either directly or indirectly, to the revocation of the Jackson-Vanik amendment"s application to Russia. In other words, the Act may be passed separately or as part of legislation granting Russia PNTR. Although US Ambassador to Russia Michael McFaul stated on March 12, 2012 that the Obama Administration would not accept a link between the extension of PNTR to Russia and legislation to address human rights issues in the country, members of the Obama Administration have since confirmed that they are engaged in discussions with lawmakers regarding the passage of S. 1039. According to Mr. Verona, Russian government officials have expressed opposition to the Act, noting that, if it is made into law, they will respond in a "symmetrical" manner. Other sources assert that the Obama Administration is interested in drafting an action plan to address Russia"s IPR enforcement as part of the establishment of PNTR with Russia.

Congress is expected to more closely consider granting Russia PNTR once the House Ways and Means Committee holds a hearing on the issue, as legislation on the issue statutorily must originate in the House. The Committee has not yet set a date for such a hearing.



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# Vietnam Sets Out Negotiating Priorities with the United States in the Context of the TPP

As parties to the Trans-Pacific Partnership (TPP) prepare for the 12th round of negotiations towards a final agreement, Vietnam has articulated its negotiating priorities with the United States. Reportedly, Vietnam is most concerned with market access for apparel, followed by market access for footwear, and the recognition of Vietnam as a market economy. If the United States is willing to sufficiently address Vietnam"s priority issues, Vietnam has expressed its willingness to offer concessions in areas of interest to the United States, including agricultural market access, labor rights, and intellectual property rights (IPR), among others. Details of Vietnam"s priorities are as follows:

Apparel

Discussions on market access for apparel are comprised of two main elements, namely: (i) tariff concessions, and (ii) rules of origin. With respect to tariff concessions, Vietnam claims that the United States has proposed placing approximately 72 percent of its apparel related tariff lines in an undefined category, the contents of which analysts expect are reserved for those products the United States is most interested in protecting, and thus likely to be subject to the longest tariff phase-out period (usually at least 10 years). Reports from Vietnam hold that these sensitive items cover approximately 95 percent of Vietnam"s total apparel exports to the United States.

In addition to tariff concessions, the United States continues to insist that its proposed "yarn forward" origin rule for textile and apparel products be used in the context of the TPP. The United States has stressed that this rule is essential to ensuring that non-TPP members, such as China, do not benefit from the agreement. Under the yarn forward origin rule, all products in a garment from the yarn stage forward would have to be made in one of the TPP countries. Against this proposal, Vietnam has essentially urged the United States to adopt a "cut and sew" origin rule, which would require that a product be entirely cut and sewn in one of the TPP members. Vietnam"s opposition to the yarn forward rule of origin is underscored by the reality that it sources some of its apparel inputs from non-TPP countries.

Footwear

The second major area Vietnam is focused on with respect to its negotiations with the United States in the context of the TPP is market access for footwear, especially in terms of tariff concessions. Currently, US import duties on footwear range from 12 to 20 percent. The total amount of import duties Vietnamese exporters of footwear products to the United States pay has increased substantially, from USD 82 million in 2005 to USD 248.97 million in 2011. In this regard, Vietnam has requested the United States reduce its import duties on these products by half, while indicating its willingness to accept the tougher origin rule proposed by the United States. Unlike the textile and apparel industry, Vietnam is prepared to accept a more stringent rule of origin for its footwear industry, which is vertically integrated and thus not depend as much on imports of raw materials.



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Market Economy Status

Vietnam"s third negotiating priority is for the United States to recognize Vietnam as a market economy rather than a non-market economy (NME). Currently, the Department of Commerce (DOC) considers Vietnam an NME when initiating antidumping (AD) cases against Vietnam. The NME status means that the DOC adopts cost and price data from third countries that are market economies of a comparable level of development to Vietnam when calculating AD duties. Reports from Vietnam claim that this methodology results in a higher AD margin than would have otherwise been calculated if Vietnam were considered a market economy by DOC. Under Vietnam"s accession agreement to the World Trade Organization (WTO), all WTO members must recognize Vietnam as a market economy by 2018. Despite this deadline, several WTO members, including Australia and New Zealand but not the United States, have already granted Vietnam market economy status.

Vietnam"s request for market economy status may prove difficult for the United States to grant. According to the United States Tariff Act of 1930, as amended, certain conditions related to the following must be met before such a status can be granted: (i) currency convertibility, (ii) wage rates freely determined by labor and management, (iii) degree of openness to foreign investment, and (iv) government control over the allocation of resources, among others. Experts note that it may be difficult to exempt Vietnam from the requirements laid out in US law through a deal negotiated within the context of the TPP. Nonetheless, according to sources the United States may consider Vietnam"s suggestion of setting up a work program to outline the steps Vietnam must take in order to obtain market economy status from the United States.

The level of importance attached to some of these issues by Vietnam and the United States, especially those relating to apparel, suggests that they are unlikely to be resolved until the agreement is closer to being finalized. Although the Obama Administration has urged TPP negotiators to complete the legal texts of the TPP by the end of 2012, it remains to be seen whether such a goal can be met.

Both sides are expected to continue negotiations on these major areas at the 12th round of TPP negotiations which is scheduled to be held in Dallas, Texas from May 8-18, 2012.

## ITC Votes Steel Wheels From China Do Not Injure US Industry

In a unanimous decision made on April 17, 2012, the US International Trade Commission (ITC) found that the US industry is not materially injured or threatened with material injury by imports of certain steel wheels from China. The steel wheels that were subject to the investigation are used on commercial vehicles, including trucks and tractor trailers. As a result of this vote, a press release issued by the ITC on April 17 states that no antidumping (AD) or countervailing duties (CVD) will be issued on imports of these products from China.

The April 17 vote is the conclusion of a process that began on March 30, 2011 when Accuride Corporation and Hayes-Lemmerz International, Inc. filed petitions seeking the imposition of such duties. On March 19, 2012 the Department of Commerce (DOC) announced its affirmative final determination in the AD and CVD investigations of imports of steel wheels from China. According to DOC, Chinese producers and exporters sold steel wheels in the United States with dumping margins ranging from 44.96 to 193.54 percent. DOC further determined that Chinese producers and exporters of steel wheels were subsidized at rates ranging from 25.66 to 38.32 percent.



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Despite these findings, Sections 701 and 731 of the Tariff Act of 1930 state these AD and CVD rates cannot be applied unless the ITC also determines that a US industry is injured or threatened with material injury due to imports of the product.

White & Case LLP ("W&C") represented the largest Chinese exporter, Zhejiang Jingu Co. Ltd. throughout the AD and CVD investigations. At the ITC, W&C argued that the US market for steel wheels was segmented, with the US producers having a dominant role in the Original Equipment Manufacturer (OEM) segments. In contrast, subject imports from China had a moderate presence in the much smaller aftermarket segment. The ITC's unanimous vote suggests that the ITC Commissioners agreed with W&C.

W&C lead counsel Adams Lee expressed satisfaction with the April 17 vote, noting "We are so glad that we were able to achieve such a decisive and total victory for our client." The ITC is expected to provide written views explaining its decision by the end of April 2012. The decision marks only the fourth time the ITC has found, in a CVD case, that imports from China do not injure, or threaten to injure, US industry. W&C successfully defended Chinese producers in the first CVD case against China, which involved coated free sheet paper.

## USTR Requests Establishment of WTO Panel to Address EU Compliance with WTO Airbus Ruling

On March 30, 2012 the United States requested the establishment of a panel under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to address whether the European Union (EU) has fully complied with the WTO ruling for the dispute *European Communities and Certain Member States--Measures Affecting Trade in Large Civil Aircraft* (DS316) (WT/DS316/23). The EU released the *EU Compliance Report to the WTO Dispute Settlement Body in DS316* on December 1, 2011, which listed 36 actions the EU took to come into compliance with the WTO ruling. In the United States' view, these measures are insufficient to comply with the recommendations of the Dispute Settlement Body (DSB).

The United States initiated DS316 in October 2004. The May 2010 Panel Report found, *inter alia*, that "launch aid" provided by certain EU member states to the European aircraft manufacturer Airbus is inconsistent with the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Although the EU appealed the Panel's ruling, the WTO Appellate Body affirmed the Panel's central findings in June 2011. According to Article 7.9 of the WTO SCM Agreement, a WTO member country has 6 months to withdraw, or take the appropriate steps to remove the adverse effects of a subsidy found to be inconsistent with the SCM Agreement. After the EU released its *Compliance Report* on December 1, 2012, exactly 6 months after the WTO ruling was adopted, the United States announced that it disagreed with the EU's position that the EU had fully complied with the WTO ruling.

According to Article 21.5 of the DSU, disagreement between WTO members regarding compliance with a WTO ruling should be settled through recourse to the dispute settlement procedures. In accordance with this Article, the United States and the EU held consultations on January 13, 2012, which failed to resolve the dispute. In particular, USTR maintains its claims that: (i) the measures the EU has taken have not removed the adverse effects or withdrawn the subsidies deemed WTO-inconsistent in the WTO ruling; and (ii) certain measures taken to comply with the DSB recommendations and rulings introduce new inconsistencies with the SCM Agreement.



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Pursuant to a "sequencing agreement" reached between the EU and the United States in January 2012 (WT/DS316/21), the EU cannot block the United States' request to establish an Article 21.5 panel regarding the EU's compliance efforts. As a result, the Article 21.5 panel, presumably in its original composition, will be established at the April 13 meeting. The panel report is due within 90 days of the panel's establishment.

## Congress Initiates Process to Pass MTB

On March 30, 2012 the leaders of the House Ways and Means and Senate Finance Committees announced the initiation of a process by which the Miscellaneous Tariff Bill (MTB) will be assembled.[4] The MTB provides for the temporary reduction in or suspension of tariffs on certain intermediate imported products in order to reduce costs for US manufacturers and ultimately increase US competitiveness.

According to documents released by the Committees, Senators and Representatives have until April 30, 2012 to submit bills proposing one of the following: (i) a temporary duty suspension or reduction; (ii) an extension of an existing temporary duty suspension or reduction; or (iii) a technical correction. Each bill can only propose that one product, as identified by an 8-digit US Harmonized Tariff Schedule (HTSUS) code, be subject to one of the aforementioned actions.

After the proposed bills have been submitted, they must meet several requirements before they can be included in the final MTB package that will be debated and voted on by Congress. More specifically, each bill must: (i) be non-controversial; (ii) cost under USD 500,000 a year; and (iii) be administrable. In determining whether or not each bill meets these three requirements, the bills will be reviewed by:

- **The public**. The proposed bills will be posted on the Committees' websites, where the public will be invited to post comments;
- **The US International Trade Commission (ITC)**. The ITC will investigate whether the products described in the bills are already produced domestically. If a domestic producer exists, the ITC will further determine whether it objects to the tariff suspension or reduction. The ITC will also calculate the amount of tariff revenue that would no longer be collected upon enactment of the bill in the present year and future years;
- **The Department of Commerce (DOC)**. DOC is responsible for formulating the Obama Administration's position on each bill after the ITC determines whether domestic production exists and whether any domestic producer opposes the bill;
- **Customs and Border Protection (CBP)**. CBP will determine whether the bill is administrable when goods are presented for importation into the United States; and

[4] House Ways and Means Chairman Dave Camp (R-MI) and Ranking Member Sander Levin (D-MI), as well as House Ways and Means Trade Subcommittee Chairman Kevin Brady (R-TX) and Ranking Member Jim McDermott (D-WA) announced the initiation of the process on the House side; Senate Finance Committee Chairman Max Baucus (D-MT) announced the initiation of the process on the Senate side.



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- **Congressional Budget Office (CBO)**. CBO will "score" each bill by calculating the amount it will either increase or decrease federal spending and tax revenues.

The last tranche of duty suspensions and reductions, authorized under the 2006 MTB, expired on December 31, 2009. The 112th Congress' House ban on earmarks, or guarantees of federal expenditures to particular recipients in appropriations-related documents, has delayed the resumption of the MTB process. In an effort to resolve this issue, House Ways and Means leaders declared in a press release circulated March 30, 2012, that the MTB process "is in accordance with Ways and Means Committee guidelines and House Rules."

## North American Leaders Meet to Discuss Regulatory and Border Coordination, IPR and TPP; High-Level Talks Yield Few Concrete Results

US President Obama, Mexican President Calderón and Canadian Prime Minister Harper participated in the North America Leaders' Summit in Washington, DC on April 2, 2012. The purpose of the Summit is to advance the economic well-being, safety and security of the three North American countries. To that end, the three leaders reaffirmed in the joint statement released at the conclusion of the Summit their commitment to further developing North American political and economic cooperation with a "strategic long-term vision."

The leaders held high-level discussions on such issues as: (i) energy; (ii) climate change and the ozone layer; (iii) cyber security; (iv) public health; (v) drug trafficking and organized crime; (vi) foreign aid; and (vii) nuclear energy. The leaders also discussed progress made on and next steps in regard to the following issues:

- **Regulatory Coherence.** The leaders committed to implementing harmonized regulatory measures to foster innovation and growth, reaffirming their commitment to the US-Canada and US-Mexico Regulatory Cooperation Councils. No details were offered in regard to which specific measures would be prioritized;

- **Border Administration.** The leaders reaffirmed their commitment to the May 2010 US-Mexico 21st Century Border Management Declaration and the December 2011 US-Canada Beyond the Border Action Plan, both of which aim to provide for more efficient borders and secure supply chains;

- **Intellectual Property Rights (IPR).** The leaders reaffirmed their commitment to promoting a legal framework for IPR enforcement in the areas of: (i) criminal enforcement; (ii) enforcement at the border; (iii) civil and administrative actions; and (iv) distribution of IPR infringing material on the Internet, consistent with the Anti-Counterfeiting Trade Agreement (ACTA). The United States and Canada have signed ACTA and Mexico is expected to do so in the near-term;

- **Competitiveness.** The leaders reaffirmed their commitment to advancing North American competitiveness, particularly in regard to small- and medium-sized (SME) business development and trade facilitation, although they did not provide any details on possible measures to advance this competitiveness; and

- **Trans-Pacific Partnership (TPP).** The President Obama reaffirmed that the United States continues to welcome Canada's and Mexico's interest in joining the ongoing negotiations toward concluding the TPP. This



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statement does not mean that the United States formally approves of these countries‟ inclusion in the Agreement.

The joint statement including language on TPP comes shortly after a March 30, 2012 letter, sent by 28 House lawmakers to United States Trade Representative (USTR) Ron Kirk, expressing strong support for Mexico‟s inclusion in the ongoing TPP negotiations. The letter cites the positive trade relationship the United States has built with Mexico since the implementation of the North American Free Trade Agreement (NAFTA) but does not express support for the inclusion in TPP of Canada, which is also a NAFTA member. Regardless of whether there is Congressional support for the inclusion of Mexico and Canada in TPP, experts doubt that the United States will acquiesce to these countries‟ accession prior to the November 2012 US presidential and legislative elections, to which the Obama Administration will likely turn its attention toward the last half of 2012. Nonetheless, regulatory coherence, IPR, SMEs and trade facilitation are disciplines that the United States is aggressively pushing in the context of the TPP negotiations such that it cannot be ruled out that the Obama Administration is priming Mexico and Canada for TPP accession for when such a request is politically viable in the United States after the November 2012 elections.

## DOC Questionnaires in Four China AD/CVD Cases Provide Glimpse of Possible Path Forward on Double Remedies

The Department of Commerce (DOC) issued on March 28, 2012 questionnaires in four antidumping (AD) and countervailing duty (CVD) cases involving China-origin imports, including: (i) circular welded carbon quality steel pipe (CWP); (ii) certain new pneumatic off-the-road tires (OTR); (iii) light-walled rectangular pipe and tube (LWRP); and (iv) laminated woven sacks (“sacks”). DOC issued the questionnaires in an effort to arrive at determinations in these four AD/CVD proceedings that are “not inconsistent” with the World Trade Organization (WTO) Dispute Settlement Panel (“Panel”) and Appellate Body (AB) rulings in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379). The Panel and AB rulings relate to the potential for double remedies resulting from the dual application of AD and CVD duties on goods originating in nonmarket economy (NME) countries, including China.

In addition to soliciting information to help DOC comply with the DS379 ruling, the questionnaires seek to align these forthcoming determinations with the recently modified US trade remedy statute. On March 13, 2012, President Obama enacted into law a bill “to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes” (Public Law 112-99) in response to the United States Court of Appeals for the Federal Circuit‟s (CAFC) December 19, 2011 ruling in *GPX International Tire Corp. v. United States* (“*GPX* case”), which found that DOC lacked the legal authority to impose CVDs on imports of merchandise from countries designated as NMEs under the US antidumping law. Public Law 112-99 has two principal components:

- **Section 1** invalidates the CAFC ruling by amending Section 701 of the Tariff Act of 1930 to include an additional section specifically stating that CVDs can be applied to imports from NME countries; and

- **Section 2** of the bill states that, in the event a countervailable subsidy has been ascribed to imported merchandise from an NME country for which DOC has already made an AD determination, DOC shall reduce



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the AD duty (thus mitigating the risk of double remedies) where two conditions are met: (i) the foreign exporter has demonstrated that such a countervailable subsidy has reduced the average price of its US imports of the subject merchandise; and (ii) DOC determines that it can "reasonably estimate" the extent to which the countervailable subsidy has increased the dumping margin for the merchandise.

Part (i) of Section 2 imposes on NME exporters the burden of demonstrating that any subsidies conferred have lowered the NME exporter"s US import prices. In this regard, the questions posed in the four questionnaires appear seek information from NME exporters relating to any subsidies conferred and US import prices. DOC"s questions include the following:

- **Cost-Accounting Categories.** "Please specify all cost-accounting categories into which operating costs were segregated for pricing purposes in the […] industry during the [period of investigation (POI)];"

- **Operational Costs.** "Please explain and provide support or documentation for how operational costs, in terms of the specified cost categories, were impacted by […] subsidies, in the […] industry during the POI. Please explain all relevant industry accounting principles or practices that were in effect during the POI;"

- **Pricing Practices.** "Please explain and provide support or documentation for the time period in which full cost recovery was achieved utilizing the industry standard pricing practices, for costs associated with each of the […] specified cost categories in the […] industry during the POI;"

- **Raw Materials.** "Describe the extent to which supplies of raw materials, labor, energy and other production inputs could have been increased to the […] industry during the POI;"

- **Exports.** "Describe the extent to which the […] industry exports of the subject merchandise could have been increased during the POI;"

- **Intra-Industry Competition.** "Describe the scope and extent of intra-industry competition in the export market for the subject merchandise during the POI, in terms of (i) the number of other [Chinese] companies in the […] industry and (ii) the primary basis on which companies in the […] industry competed;" and

- **Long-Term Contracts.** "Describe the extent to which it was […] industry practice during the POI to export subject merchandise under fixed-price long-term contracts."

Additionally, DOC"s questions could provide a glimpse into forthcoming regulations aimed at reconciling US AD/CVD practice with the DS379 ruling. Specifically, DOC"s questions appear to address concerns surrounding the application of double remedies in that they provide foreign exporters with the opportunity to satisfy PL 112-99, Part (i) of Section 2 (above). Experts doubt, however, that PL 112-99 and the forthcoming DOC regulations will avoid the double application of AD/CVD remedies, noting the difficulty NME exporters will face in proving a causal relationship between subsidies and US export prices.

DOC has given respondents, industry associations and third-party experts until April 11, 2012 (with the possibility of an extension) to respond to the questionnaires. In light of the short deadline and the lingering controversy surrounding PL 112-99, it remains unclear how cooperative Chinese respondents will be.



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# US and Argentine Presidents Meet to Assuage Bilateral Trade Irritants

On April 14, 2012, US President Barack Obama met with Argentine President Cristina Fernández de Kirchner on the sidelines of the VI Summit of the Americas, held in Cartagena, Colombia, from April 14-15, 2012. According to Argentine Minister of Foreign Affairs and Worship Héctor Timerman, Presidents Obama and Fernández agreed to work toward resolving trade irritants, "which in no way constitute the central aspects of the bilateral relationship."

This bilateral meeting comes at a time when several countries, led by the United States, are applying further pressure on Argentina to modify its allegedly trade-restrictive policies, as detailed below:

- **On February 10, 2012,** the US Chamber of Commerce and several trade coalitions sent a letter to United States Trade Representative (USTR) Ron Kirk and Deputy National Security Advisor for International Economic Affairs Michael Froman, expressing concern over measures adopted by Argentina that allegedly restrict the entry of US and other foreign-sourced products and services into the Argentine market. According to the letter, such measures include the introduction of new regulations that require prior approval for imports of all products, thus imposing prohibitive costs for US exporters, *i.e.*, the "Advance Sworn Import Declaration" (*Declaración Jurada Anticipada de Importación* (DJAI)). Furthermore, the letter emphasizes that the Argentine government has increased restrictions on US firms which have formally complained about such restrictions;

- **On March 26, 2012,** the United States suspended Argentina as a beneficiary country under the Generalized System of Preferences (GSP), thus depriving duty-free access to the US market for certain Argentine exports. Although US officials assert that this decision was due to Argentina"s refusal to pay several arbitral awards to US firms, the suspension of GSP benefits is largely seen as a signal that the United States is ready and willing to apply pressure in response to certain Argentine trade-restrictive policies; and

- **On March 30, 2012,** fourteen World Trade Organization (WTO) Members (led by the United States) presented a Joint Statement (JS) before the WTO Council for Trade in Goods (CTG) criticizing Argentina"s allegedly restrictive import policies and practices, including Argentina"s: (i) import licensing regime; (ii) pre-registration requirements; and (iii) trade balancing requirements. The JS points out that, if Argentina continues to maintain its import-restrictive measures and practices, Argentina should provide a detailed written explanation of how, in its view, these measures and practices are consistent with WTO rules. The JS concludes by noting that members reserve their rights to pursue this matter further, although it does no specify which avenues complainants could pursue.

Minister Timerman stressed that Presidents Obama and Fernández agreed that the trade relationship, and the efforts to assuage the corresponding trade irritants, should be handled by experts, and that, in this regard, delegations from the two countries will meet on several occasions over the near-term to reconcile disparate positions on certain key trade-related issues. Minister Timerman also noted that, despite such irritants, the bilateral relationship remains strong, a state that is attributable to common positions on such issues as combating international terrorism, scientific cooperation and environment protection.



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President Obama´s Deputy National Security Advisor for Strategic Communications and Speechwriting Ben Rhodes remarked that the United States believes that all businesses and all countries should observe the clear standards articulated by such international organizations as the WTO. In this regard, Mr. Rhodes noted that the United States and Argentina can resolve bilateral irritants through WTO mechanisms, and that the relationship between both countries is broad and able to prosper, occasional differences notwithstanding.

## USTR Concludes Review of Model Bilateral Investment Treaty

The Office of the United States Trade Representative (USTR) and the State Department (DOS) announced on April 20, 2012 the conclusion of the Obama Administration"s review of the US model bilateral investment treaty (BIT), and the release of the 2012 model BIT. The press release announcing the conclusion of the BIT review asserts that the 2012 model BIT seeks to: (i) ensure that US firms compete on a level playing field in foreign markets; (ii) put in place effective mechanisms to enforce US economic partners" international obligations; and (iii) create strong labor and environmental protections.

According to DOS, the US model BIT has conferred upon investments six principal benefits: (i) covered investments are entitled to national or most favored nation (MFN) treatment; (ii) limits on expropriation are established and fair compensation is provided for when expropriation does occur; (iii) inbound and outbound transferability of funds is ensured at market-determined exchange rates; (iv) circumstances under which performance requirements may be implemented are reduced; (v) a dispute settlement mechanism is established; and (vi) nationality requirements are suppressed in regard to top management of covered investments.

In February 2009, the DOS and USTR initiated, at the request of the Obama Administration, a revision of the 2004 model BIT. According to a USTR press release, this review was aimed at ensuring consistency of the 2012 model BIT with "the public interest and the [Obama] Administration"s overall economic agenda." Despite the Obama Administration having consulted with Congress, companies, business associations, labor groups, environmental and other non-governmental organizations and academics for a period of more than three years over the model BIT revision, large differences between the 2004 and 2012 model BITs are few. We highlight the principal differences below:

- **Performance requirements.** The 2012 model BIT includes language in Article 8, which targets the imposition of measures in connection with an investment of a party or non-party: (i) requiring a certain level of domestic content; and (ii) granting a preference for one technology over another;

- **Transparency.** The 2012 model BIT includes language in Article 11, which aims to address transparency concerns by requiring: (i) that parties maintain a single official journal in which to publish proposed regulation for public comment; and (ii) that each party develop standards, technical regulations and conformity assessment procedures in an open and transparent manner;

- **State-Owned Enterprises.** The 2012 model BIT includes language in Article 2, which aims to address concerns relating to the delegation to state-owned enterprises of government authority to "exercise regulatory, administrative or government authority" by providing in a footnote a clarifying definition of "delegated" government authority;



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- **Labor and Environment.** The 2012 model BIT includes language in Articles 12 and 13, which aims to address environment- and labor-related concerns by: (i) strengthening the requirement to comply with domestic and international environmental law; (ii) defining the scope of "environmental law" as understood by USTR; and (iii) requiring parties to reaffirm their respective obligations in regard to the International Labor Organization (ILO).

DOS and USTR assert that the provisions contemplated in the 2012 model BIT address the investment negotiating objectives of the Bipartisan Trade Promotion Authority Act of 2002 (TPA), and are substantively similar to provisions in the investment chapters of US free trade agreements concluded over the past decade. Congress need not approve the 2012 model BIT although two-thirds of the Senate will need to ratify any subsequent BIT negotiated between the United States and another country. In this regard, the Obama Administration"s 2012 Trade Policy Agenda, which USTR released in early March 2012, states that the Obama Administration will seek to re-engage in BIT negotiations with China, India and Mauritius, and will consider initiating BIT negotiations with Russia and the East African Community (EAC), among others.

A copy of the 2012 model BIT may be viewed here.

## Senate Agriculture Committee Releases Draft 2012 Farm Bill

On April 20, 2012, the Senate Agriculture Committee Chairwoman Debbie Stabenow (D-MI) and Ranking Member Pat Roberts (R-KS) released the Senate Agriculture Committee"s draft version of the 2012 Farm Bill. The Senate Agriculture Committee is expected to mark up, or amend, and vote on the legislation from April 25-26, 2012. Once amended and approved by the Senate Agriculture Committee, the bill will be submitted to the Senate floor for a vote by the Senate plenary. The Farm Bill is bundle legislation that sets national agriculture, nutrition, conservation and forestry policies for a period of five years. The last Farm Bill was passed in 2008 and will expire on September 30, 2012.

The bill includes 12 titles covering a number of issues, including, *inter alia*: (i) commodities; (ii) conservation; (iii) trade; (iv) nutrition; (v) credit; (vi) rural development; (vii) research; (viii) forestry; (ix) energy; (x) horticulture; (xi) crop insurance; and (xii) livestock. Like the farm support proposal drafted by Sen. Stabenow and House Committee on Agriculture Chairman Frank Lucas (R-OK) for the Joint Select Committee on Deficit Reduction (JSC) in October 2011, the Senate Agriculture Committee"s draft Farm Bill proposes reducing the deficit by USD 23 billion. The draft bill proposes ending direct payments and counter-cyclical payments (CCPs), while strengthening crop insurance programs. Below we summarize certain commodity support programs included in the legislation:

- **Dairy.** The draft Farm Bill proposes establishing: (i) a dairy production margin protection program, which would, *inter alia*, protect dairy producer income by paying participating producers a basic margin protection payment when dairy producer margins are less than a certain level; and (ii) a dairy market stabilization program, which would balance the supply of milk with demand when dairy producers experience low or negative operating margins, among other things. The bill also eliminates several dairy programs, including: (i) the Milk Income Loss Contract; (ii) the Dairy Price Support Program; and (iii) the Dairy Export Incentive Program;



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- **Cotton.** The draft legislation establishes a Stacked Income Protection Plan ("STAX") for producers of upland cotton. STAX is a voluntary insurance program meant to be purchased in addition to other insurance programs. STAX specifically addresses "shallow" revenue losses incurred by producers of upland cotton of 10 to 30 percent cotton. The bill also includes special marketing loan provisions for upland cotton and special competitive provisions for extra long staple cotton. Sources note that the Brazilian government has charged that the STAX proposal would increase trade-distorting subsidies and may be World Trade Organization (WTO)-inconsistent. Although Sen. Stabenow and Senate Agriculture Ranking Member Pat Roberts have responded that they will work with the Brazilian government to address their concerns, it remains unclear to what extent they will do so; and

- **Sugar.** The draft Farm Bill proposes to extend the current sugar program, which provides support to US cane and beet producers at no cost to the US government through: (i) price support mechanisms; (ii) domestic marketing allotments; and (iii) tariff-rate quotas (TRQs).

Although many farm groups have applauded the bill's support for crop insurance programs, they have also noted an interest in altering certain provisions of the bill in order to better serve their farmers' interests. For example, in an April 23, 2012 press release, the American Farm Bureau Federation called on lawmakers to include a financial safety net for "catastrophic revenue loss" based on county level loses in the Farm Bill. Likewise, the National Farmers Union released a statement on April 20, 2012 noting its concern that the bill, in its current form, does not do enough to protect against long-term price collapses.

If the draft 2012 Farm Bill is approved by a strong bipartisan vote in the Senate Agriculture Committee, it may be considered by the Senate as a whole in the near-term. A final version of the 2012 Farm Bill is still far from completion, however, as the House Agriculture Committee has not yet compiled its draft 2012 Farm Bill. The House Committee will likely draft its version after it finishes holding hearings in Washington on the different aspects of the Farm Bill. The House Committee is scheduled to hold the first of these hearing on April 25, 2012. The House and Senate versions of the 2012 Farm Bill will undoubtedly contain numerous differences, especially in light of members of the House Committee having expressed a desire for the 2012 Farm Bill to reduce the deficit by far more than USD 23 billion. Once both the Senate and the House have passed their respective versions of the 2012 Farm Bill, the differences must to be reconciled in conference committee.

Despite this progress toward the formation and passage of the 2012 Farm Bill, experts note that the remaining work ahead and the realities of an election year suggest that lawmakers will find it difficult to complete the process by September 30, 2012. In the event that they are not able pass a new Farm Bill within the next few months, lawmakers will likely opt to instead extend the 2008 farm bill to 2013 and put off passing a farm bill until such time.



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# FREE TRADE AGREEMENTS

## *Free Trade Agreements Highlights*

### Entry into Force Date Announced for US-Colombia FTA; Similar Announcement on US-Panama FTA Expected in Coming Months

At the VI Summit of the Americas, held in Colombia, President Obama announced on April 15, 2012 that the US-Colombia Free Trade Agreement (FTA) will enter into force on May 15, 2012. The Office of the United States Trade Representative (USTR) press release communicating President Obama"s announcement states that US and Colombian officials have reviewed the other party"s applicable laws and regulations related to the implementation of the FTA, and have confirmed, through the bilateral exchange of letters, that each party has completed its respective legal requirements and procedures necessary for the FTA to enter into force.

The USTR press release also addresses the April 7, 2011 Labor Action Plan, titled "Leveling the Playing Field: Labor Protections and the US-Colombia Trade Promotion Agreement," accorded between the two parties, noting that the entry into force of the FTA "is recognition that Colombia has met the milestones of, and continues to demonstrate its strong commitment to, the [Labor Action Plan]." The release further notes that the Obama Administration "will continue working with the [Colombian Government] to help it continue to meet its long-term commitments to improve its labor practices and deter violence against labor leaders." US and Colombian organized labor groups have since issued statements countering this assertion, alleging that Colombia has failed to meet several of the milestones contemplated in the April 2011 Labor Action Plan. In contrast, President Obama"s announcement has been welcomed by the US Chamber of Commerce as well as Republican and Democratic House and Senate trade-related committee leadership.

The FTA"s implementing bill, approved in Congress and enacted into law by President Obama in October 2011, authorizes the President to exchange notes with Colombia providing for the entry into force at such time as the President determines that Colombia has taken measures necessary to comply with provisions of the Agreement that are to take effect on the date of the entry into force (President Obama, upon submitting the FTA"s implementing bill to Congress in October 2011, also conditioned entry into force of the Agreement on Colombia successfully executing key elements of the Labor Action Plan). Organized labor"s continued opposition notwithstanding, President Obama"s announcement on the FTA"s May 15 entry into force allows the Obama Administration to avoid pushing discussion of this FTA closer to the November 2012 US presidential and legislative elections in which, due to still precarious economic conditions in the United States and free trade skepticism among many voters, trade liberalization will unlikely be the centerpiece of many campaigns.

In regard to the US-Panama FTA, which is the last of the three FTAs negotiated by the Bush Administration and inherited by the Obama Administration (*i.e.*, (i) US-Colombia FTA, signed in 2006; (ii) US-Panama FTA, signed in 2006; and (iii) US-Korea FTA, signed in 2007) to enter into force, US and Panamanian officials remain engaged in a comprehensive review of the other party"s applicable laws and regulations related to the implementation of



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the FTA. According to Panamanian President Ricardo Martinelli, who discussed the subject during the Summit of the Americas, the US-Panama FTA is likely to enter into force by September 2012.



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# MULTILATERAL

## *Multilateral Highlights*

### DOC Misses Deadline for Implementation of AB Ruling for DS379, Issues Supplemental Section 129 Questionnaire on "Double Remedies"

The US Department of Commerce (DOC) has missed the deadline by which it was required to implement the WTO Appellate Body's (AB) recommendations and rulings in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379). In January 2012, the United States and China agreed to extend by two months (*i.e.*, until April 25, 2012) the "reasonable period of time" permitted by the WTO for implementing the AB's decision relating to, *inter alia*, DOC's concurrent imposition of anti-dumping duties and countervailing duties on imports from "non-market economies" (NMEs) and its treatment of certain state-owned enterprises as "public bodies" under US CVD law. DOC missed the April 25 deadline without public notice, although recent questionnaires issued in the case, as well as recent public statements of US officials before the WTO's Dispute Settlement Body (DSB), indicated that DOC would miss the DS379 deadline.

DOC's failure in this regard appears related to its attempts to address the potential application of "double remedies" in concurrent AD/CVD investigations of NME imports. On April 19, 2012, DOC issued additional supplemental questionnaires on that issue in the Section 129 proceeding designed to conform the four AD/CVD determinations at issue in DS379 to the AB's ruling that they were inconsistent with WTO rules. The deadline for responses to the supplemental questionnaires was set for April 30, 2012 – five days after the "reasonable period of time" would have expired.[5] In addition to soliciting information to help DOC comply with the DS379 ruling, the supplemental questionnaires, similar to their March 28 predecessors, also appear to conform the forthcoming Section 129 determinations to Public Law 112-99, which amends Section 701 of the Tariff Act of 1930 to include an additional section affirming that DOC has the authority to apply CVDs to imports originating in NME countries (*please see W&C Trade Alert of April 11, 2012*). The new US law was strongly criticized by the Chinese government at the time of enactment.

PL 112-99 conditions DOC reducing the AD duty (to mitigate the risk of double remedies) on, *inter alia*, NME exporters demonstrating that any subsidies conferred have lowered the NME exporter's US import prices. As such, DOC's March 28 questionnaires sought such information from NME exporters through questions on: (i) accounting categories; (ii) operational costs; (iii) pricing practices; (iv) supplies of raw materials; (v) trends in

[5] The four underlying antidumping (AD) and countervailing duty (CVD) cases involving Chinese imports that were the subject of the AB ruling are (i) circular welded carbon quality steel pipe; (ii) certain new pneumatic off-the-road tires; (iii) light-walled rectangular pipe and tube; and (iv) laminated woven sacks.



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exports; (vi) intra-industry competition; and (vii) long-term contracts. On April 11, 2012, China"s Ministry of Commerce (MOFCOM) submitted responses to DOC"s March 28 questionnaires.

DOC"s April 19 supplemental questionnaires sought additional information to the responses provided in MOFCOM"s April 11 responses. In particular, DOC"s questions include the following:

- **Fixed Assets.** For each program countervailed in the DOC proceeding, DOC asks whether the program is defined as "fixed assets" pursuant to accounting regulations; and

- **Functional Category.** For each program countervailed in the DOC proceeding, DOC asks for the functional category of the program, *e.g.*, overhead, etc.

The April 19 questionnaires also asked MOFCOM to support their assertions in regard to fixed assets and functional categories with source documentation, *e.g.*, accounting regulations, policies, classification methods and/or relevant memoranda.

Due to the complexity of the DS379 AB recommendations and rulings, DOC issued in early April 2012 partial preliminary Section 129 determinations in the CVD investigations concerning (i) certain new pneumatic off-the-road tires and (ii) laminated woven sacks. While these partial preliminary determinations address issues subject to DOC action under Section 129 such as loan benchmarking, the sourcing of raw materials and land-use rights, they leave the double remedies and public body issues unaddressed. While DOC has committed to issuing further preliminary determinations to address all the AB"s recommendations and findings, DOC has not indicated how it will rule in its future preliminary determinations on the double remedies issue.

It is unclear how the Chinese government will respond to DOC"s failure to meet the April 25 deadline. Analysts note that MOFCOM"s response to the April 19 supplemental questionnaire on April 25 – five days before DOC"s April 30 deadline and on the same day that the revised determinations were to have been issued by DOC - was atypical and thus may be a symbolic gesture to the United States that China believes the AB"s ruling should have been fully implemented by the agreed upon deadline. US officials" statements before the DSB indicate that the parties have not agreed on a timeframe or a way forward, and that the Chinese government may be growing impatient with the United States on this controversial issue.



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