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UNITED STATES

GENERAL TRADE POLICY

Forecast 2012: An Elections-Driven Trade Agenda

Summary

The November 2012 elections are expected to affect the US trade agenda, likely limiting the scope and timing of any new or existing trade initiatives. Because Congress and the Obama Administration will direct almost all efforts toward the presidential and legislative campaigns by late summer, the US government has only the first half of the year to accomplish key trade agenda items. Key trade issues for 2012 include the following:

- **FTA Implementation.** Given the October 2011 passage of three free trade agreements (FTAs) with Korea, Colombia and Panama, the Obama Administration will work throughout 2012 to implement these agreements. Of the three, only the US-Korea FTA (KORUS) is expected to enter into force in 2012;

- **TPP Negotiations.** The Trans-Pacific Partnership (TPP) will continue to draw attention as the Obama Administration engages other TPP members on contentious portions of the agreement and considers the addition of new members to the same. Despite the attention, the agreement is not expected to be finalized, and new members are not likely to accede, before the end of 2012;

- **Russia PNTR.** The congressional vote to extend permanent normal trade relations (PNTR) to Russia will be a heavy lift but is expected to be successfully carried out around the same time Russia formally accedes to the WTO. The WTO has given Russia until mid-July 2012 to ratify its accession agreement;

- **US-China Trade.** US-China trade relations should continue to be tense in 2012 as campaigning politicians in both the United States and China leverage the often unpopular bilateral trading relationship. The US-China relationship will be tested early on as the Obama Administration and China challenge each other in several cases at the World Trade Organization (WTO) Dispute Settlement Body (DSB) and investigations under national trade remedies laws, and Congress and the Administration work together to respond to the recent US Court of Appeals for the Federal Circuit (CAFC) ruling regarding the application of US countervailing duty (CVD) law to imports from "non-market economies" (NMEs). It is also likely that China's currency practices continue to elicit criticism from the US Congress, the President and GOP presidential candidates;

- **2012 Farm Bill.** In anticipation of the October 2012 expiration of the 2008 farm bill, Congress will begin the process of drafting a new farm bill. However, the election year will likely delay congressional passage of a new farm bill until 2013 and could affect its substance; and

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- **WTO.** Even though WTO members have acknowledged that the Doha Development Agenda (DDA or "Doha round") is at an impasse, the US government is expected to continue to lean heavily on the WTO DSB to arbitrate its trade disputes.

Analysis

I. FREE TRADE AGREEMENTS

On October 12, 2011 Congress passed the implementing legislation for three free trade agreements (FTAs), namely: (i) KORUS; (ii) the US-Colombia FTA; and (iii) the US-Panama FTA. President Obama signed the three pieces of legislation into law on October 21, 2011. Although all three FTAs have been ratified, they have not yet entered into force. According to the text of the agreements, the FTAs cannot enter into force until both parties have exchanged diplomatic notes confirming that they have come into compliance with the obligations that will take effect immediately after the agreement goes into force. With these three FTAs ratified, the US government is negotiating only one FTA: the Trans-Pacific Partnership (TPP). In 2012, the Obama Administration is expected to focus on implementing the agreements with Korea, Colombia and Panama and negotiating the TPP.

FTA Implementation

After their implementing legislation was passed by Congress and signed by President Obama, the Office of the USTR began to work towards implementing KORUS, the US-Colombia FTA and the US-Panama FTA. While the obligations of Korea, Colombia and Panama with respect to implementation differ, USTR holds that the implementing legislation for each FTA contained all changes to US law required under the agreements.

USTR has further stated, however, that there are several regulatory measures the US government must enact before it is in full compliance with the agreements. President Obama will issue a presidential proclamation several days before or on the day that each agreement enters into force that will modify certain tariff lines and product-specific rules, and make additional administrative changes covering issues such as customs and procurement. Sources expect that KORUS will enter into force first, followed by the US-Colombia FTA and the US-Panama FTA. Of the three, only KORUS is expected to enter into force in 2012. We provide below a more detailed discussion of the timing associated with each agreement's implementation, as well as the steps that must be taken before they can enter into force:

- KORUS. Upcoming parliamentary elections in Korea and the fear of diminishing market access for US businesses as a result of the recently implemented European Union-Korea FTA will likely pressure US and Korean policymakers to implement KORUS sometime between February and April 2012. Both the US and Korean governments claim to have already enacted the legal changes necessary to allow KORUS to enter into force. To date, US and Korean officials have held four rounds of working-level meetings to discuss the implementation of the agreement. During the fourth and most recent round, held from January 27-28, 2012, officials continued the process of reviewing each other's laws so as to verify that the other party has complied with the obligations made under the agreement;

- US-Colombia FTA. Due to uncertainties surrounding Colombia's remaining unfulfilled commitments under the US-Colombia FTA and the Colombia Action Plan Related to Labor Rights ("Action Plan"), it is unlikely, but not

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impossible, that the agreement enters into force in 2012. By mid-2012 the Colombian Congress is expected to fufill its outstanding legal commitments under the FTA by, *inter alia*: (i) passing a law to address the liability of Internet service providers (ISPs) for IPR-infringing material posted by users, *i.e.* "secondary liability;" (ii) ratifying the International Convention for the Protection of New Varieties of Plants of 1991; and (iii) ratifying the Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite of 1974. In addition to these legal requirements, President Obama has also stipulated that Colombia must "successfully implement key elements" of the Action Plan before the agreement enters into force. If the agreement's implementation is delayed too far past mid-2012, the Obama Administration may try to further delay the implementation until 2013 due to a desire to avoid a dispute with its organized labor supporters regarding alleged labor rights violations in Colombia during the 2012 election season; and

- US-Panama FTA. According to the American Chamber of Commerce in Panama (AmCham Panama), the US-Panama FTA is likely to enter into force sometime between late 2012 and early- to mid-2013. Although the US-Panama FTA is widely considered to be the least controversial of all three FTAs, experts agree that, because the market opportunities Panama presents to US businesses are not as substantial as those offered by Korea and Colombia, USTR will likey prioritize the implementation of KORUS and the US-Colombia FTA ahead of that of the US-Panama FTA. Like Colombia, sources note that Panama must also ratify several international treaties related to IPR. Sources also contend that Panama must change the way it administers its tariff-quota system before it can be considered to be in compliance with its obligations under the US-Panama FTA.

TPP

In 2012, USTR will use what they describe as a "two-track" approach to TPP, meaning they will maintain separate, but simultaneous focus on: (i) the continued negotiation of the TPP agreement; and (ii) consultations regarding the addition of Mexico, Japan and Canda to the TPP. While much attention is expected to be paid to TPP in 2012, there is little chance that negotiators will be able to complete the negotiation of the legal texts over the next year. Regardless of the pace of new member consultations or the possible expression of interest from additional countries, new members are also not expected to formally accede to the agreement in 2012.

Several key TPP-related developments occurred at the November 2011 Asia-Pacific Economic Cooperation (APEC) Leaders Summit in Honolulu, including: (i) the announcement by current TPP members, after nine rounds of negotiations, of the "broad outlines" of the TPP agreement; (ii) the announcement, from Japan, Mexico and Canada, of their interest in seeking to join the TPP negotiations; and (iii) the statement, by President Obama, that TPP negotiators should seek to complete the legal texts of the agreement in 2012.

In an effort to assess the readiness of Japan, Mexico and Canada to join the TPP, USTR solicited stakeholder comments from December 7, 2011 to January 13, 2012 regarding the possible inclusion of each of the three countries. Overall, the comments conveyed support for the inclusion of Canada and Mexico to the agreement as a means of, *inter alia*, improving the supply chain and other "outdated" aspects of the North American FTA (NAFTA). While most stakeholders expressed cautious optimism regarding the possible inclusion of Japan in the agreement, those representing the US auto, agriculture and services industries expressed a desire for the

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Japanese government to dismantle certain non-tariff barriers before acceding to, or as part of, the TPP negotiations.

The election year will likely affect the Obama Administration's accession consultations with the three countries. In particular, USTR will likely seek to avoid being perceived as: (i) anything less than rigorous and thorough in its assessment of longstanding US-Japan trading issues; or (ii) attempting to expand NAFTA, an agreement which a large portion of the Democratic base claims ships jobs offshore, by actively pursuing the inclusion of Mexico and Canada. These political concerns, as well as substantive concerns regarding the negotiating leverage that the acceding nations could have prior to the completion of the TPP agreement, likely will delay the countries' accessions until after the November elections, if not longer. Sources note that other countries, including Colombia and Korea, have also looked into the possibility of seeking to join the agreement. No new members, however, are expected to join the TPP in 2012.

The TPP agreement also faces significant substantive hurdles that will likely delay its completion. In 2012, the agreement's members are expected to spend a considerable amount of time broaching some of the more contentious issues related to the TPP, including disciplines for state-owned enterprises (SOEs), IPR protection, and labor rights. Gridlock has most recently arisen with respect to the negotiation of the TPP's labor chapter; on December 21, 2011, the top four Republican trade committee lawmakers warned USTR Ron Kirk that expanding the scope of the TPP's labor chapter beyond that defined by the labor provisions of the "May 10 Agreement"[1] would "seriously undermine support for the TPP and jeopardize [c]ongressional approval of the agreement."

As long as the agreement's completion continues to be a distant goal, the Obama Administration is not expected to aggressively pursue Trade Promotion Authority (TPA), *i.e.*, the authority to submit the finished agreement to Congress for an up-or-down vote, this year, but key Republican lawmakers, *e.g.*, Senate Minority Leader Mitch McConnell (R-KY), are expected to continue to press the President for it.

II. PNTR

Congress is expected to successfully extend permanent normal relations (PNTR), *i.e.* Most-Favored Nation (MFN) status, to Russia around the same time Russia formally accedes to the WTO. According to Russia's WTO accession agreement, Russia has until mid-July 2012 to ratify its WTO accession agreement. The Russian government has signaled that it will likely take up the issue after their March 2012 Presidential elections.

After 18 years of negotiations, Russia was formally invited to join the WTO on December 16, 2011. Even so, Russia will not become a formal WTO member, nor will it be required to fulfill the commitments it made in its accession agreement, until the Russian legislature, known as the Duma, ratifies Russia's accession agreement. Russia will become a formal WTO member 30 days after the government notifies the WTO that it has ratified its

[1] The May 10 Agreement, a compromise deal reached by then President Bush with House Democrats to break a partisan stalemate on the US-Peru and US-Panama Free Trade Agreements (FTAs) and allow for their consideration in Congress, provided for the inclusion in pending and future FTAs of core international labor and environmental protection standards and loosened intellectual property rights (IPR) provisions

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accession agreement. As noted above, the Duma is expected to vote on the agreement sometime between March and July 2012. Although passage is expected, the precarious state of Russian politics could affect the Duma vote.

Despite concerns regarding what kind of WTO member Russia will be and other aspects of the US-Russia relationship, Congress is expected to approve PNTR with Russia before the Duma approves the accession agreement. In order for US firms to benefit from the tariff and non-tariff commitments Russia made as part of its WTO accession, the US Congress must pass and the President must enact legislation establishing PNTR with Russia. If Congress waits to extend PNTR to Russia until after they formally accede, experts note that the United States will lose key market share in Russia to other WTO members. This fact will provide significant motivation for congressional approval prior to the Duma vote.

On December 15, 2011, President Obama took a step towards granting Russia PNTR with his determination, under Section 1106(a) of the Omnibus Trade and Competitiveness Act of 1988, that provisions dealing with Russia's SOEs within the Russia's WTO terms of accession are stringent enough not to require the President to invoke the non-application provisions of the WTO Agreement.

The revocation of the Jackson-Vanik Amendment's (under Title IV of the Trade Act of 1974) application to Russia is expected to be the most difficult step in granting Russia PNTR. (The Jackson-Vanik Amendment prevents the United States from establishing PNTR with a country unless that country fulfills certain "freedom of emigration" conditions under the Amendment.) Lawmakers will likely want to address a number of issues with respect to US-Russia relations before voting on the revocation of the Jackson-Vanik Amendment's application to Russia. Such issues are likely to include, *inter alia*: (i) international security concerns, especially with respect to Iran; (ii) Russia's record on the protection of human rights; (iii) Russia's ability and willingness to protect intellectual property rights (IPR); and (iv) market access for US agricultural products. Key members of Congress, including House Ways and Means Subcommittee on Trade Chairman Kevin Brady (R-TX) and Senate Finance Chairman Max Baucus (D-MT) have signaled their intention to synchronize the extension of PNTR to Russia with Russia's formal accession. In an effort to lay the groundwork for an eventual vote on the issue, both the House Ways and Means Committee and the Senate Finance Committee are expected to hold hearings on the US-Russia trading relationship in early 2012.

III. US-CHINA RELATIONS

Trade relations with China may deteriorate in 2012 as both the United States and China prepare for political transitions. Chinese Vice President Xi Jinping is expected to replace Hu Jintao as President of China by March 2013 and, in the United States, President Obama, all the Representatives and one-third of the Senators will face elections in November 2012. Both Chinese and US politicans are expected to embolden their stance against the often unpopular US-China trading relationship in an effort to secure their respective support bases. Below we provide details on the trends and actions expected in 2012 with respect to the US-China trade relationship.

Administration Actions.

In 2012, the Obama Administration is expected to continue to bilaterally engage the Chinese government on many of the same issues it focused on in 2011, *e.g.* IPR infringement, market access for US goods, indigenous

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innovation, and investment restrictions, among other issues, via key fora, including: (i) Vice President Xi Jinping's February 2012 visit to Washington, DC; (ii) the Strategic and Economic Dialogue (S&ED), likely to be held in spring 2012; and (iii) the Joint Commission on Commerce and Trade (JCCT), likely to be held in fall 2012. In addition to engagement, the Obama Administration will likely employ a number of more confrontative means of addressing US-China trade issues in order to solicit voter support. In an early display of this type of political positioning, President Obama formally announced the launch of an "Enforcement Task Unit" during his January 24, 2012 State of the Union address. According to the White House, the Unit will employ a number of government agencies in an effort to monitor China for trade and commercial violations, although further details have yet to be provided. As election season continues, the Obama Administration is also expected to confront China regarding its WTO commitments at the WTO DSB. The Administration will undoubtedly add to the six WTO DSB cases it has already initated against China in order to secure support from key constituent groups who have been adversely affected by trade with China. According to experts, USTR is likely to consider initiating disputes on the following issues, among others: (i) China's application of trade remedy laws against US imports; and (ii) China's use of subsidies to support its renewable energy industries; and (iii) China's use of export restraints on "rare earth" elements.

Congressional Actions.

Congress is also expected to address many of the same US-China trade issues it addressed in 2011, *e.g.* Chinese investment in the United States, China's alleged currency manipulation, WTO commitments and disputes, and IPR infringement, among others. Most notably, lawmakers are likely to consider, and may vote on, legislation to counteract China's alleged currency manipulation. There is a clear precedent for this type of action: between 2004 and 2010, currency legislation was introduced in every US election year. In 2010, the House passed - but the Senate did not consider - the "Currency Reform for Fair Trade Act" (HR 2378).[2] In 2011, the Senate passed - but the House did not consider - the "Currency Exchange Rate Oversight Reform Act" (S 1619).[3]

Congress is also expected to work with the Obama Administration during the first half of 2012 to address a December 19, 2011 US Court of Appeal for the Federal Circuit (CAFC) ruling, which found that US countervailing duty (CVD) law does not apply to merchandise from nonmarket economices (NMEs) such as China and Vietnam. During the week of January 19, 2012, the Obama Administration revealed that its preliminary approach to the CAFC ruling involves a "two-track" strategy of both legislative and judicial efforts. On January 25, 2012 House

[2] If passed, HR 2378 would have, inter alia: (i) amended the Tariff Act of 1930 to include as a "countervailable subsidy" requiring action under a countervailing duty or antidumping duty proceeding the benefit conferred on merchandise imported into the United States from foreign countries with fundamentally undervalued currency; and (ii) declared that the fact that such a subsidy is also provided in circumstances not involving export shall not, for that reason alone, mean it cannot be considered export contingent and actionable under a countervailing duty and antidumping duty proceeding.

[3] S 1619 proposed: (i) requiring the Department of Commerce (DOC) to investigate whether currency undervaluation by a government provides a countervailable subsidy if a US industry requests investigation and provides the proper documentation; (ii) preventing DOC from refusing to investigate a subsidy allegation based on the single fact that a subsidy is available in circumstances in addition to export; and (iii) repealing the currency provision in current law and replace it with a new framework that requires the US Treasury Department to present a biannual report to Congress that identifies both "fundamentally misaligned currencies" and "fundamentally misaligned currencies for priority action."

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Ways and Means Chairman Dave Camp (R-MI) expressed his willingness to consider legislation that makes the appropriate amendments to US CVD law. Camp's announcement followed the CAFC's grant of a one-month extension (*i.e.*, until March 5, 2012) of the deadline for the administration to request a rehearing of the court's decision. If and when judicial redress fails, such legislation is expected to make its way through Congress. Nonetheless, sources opine that there will be significant pressure from lawmakers to add other, trade-related amendments to the legislation. Thus its passage could be slowed by an amendment to extend PNTR to Russia or even threatened by amendments that counteract China's alleged currency manipulation. (For more on the CAFC decision and its likely implications, please see our report of January 25, 2012.)

Trade Remedies.

In 2012, the United States and China are expected to continue to impose a number of trade remedies against the other's imports. Although the Chinese government's application of trade remedies against US imports is often perceived as being retaliatory in nature, WTO disciplines regarding the application of trade remedies – and the WTO dispute settlement system - are expected to continue to prevent this exchange from escalating into a "trade war." Nevertheless, 2012 promises significant domestic and multilateral litigation related to bilateral trade remedies actions.

The "tit-for-tat" use of trade remedies was demonstrated throughout 2011. For example, on December 14, 2011 the Chinese Ministry of Commerce (MOFCOM) announced that it would impose AD/CVD on US imports of certain autos just a week after USTR's December 8, 2011 announcment that it had requested the WTO DSB to establish a panel to address China's allegedly WTO-inconsistent imposition of AD/CVD on US imports of chicken "broiler" products (DS427) and less than two weeks after the International Trade Commission's (ITC) December 2, 2011 unanimous preliminary determination that dumped/subsidized Chinese solar panels were injuring the domestic industry.

The WTO DSB in 2011 also demonstrated its ability to help control bilateral tensions over trade remedies. On March 25, 2011, per the request of the United States, the WTO DSB established a panel to address whether China's application of AD/CVD on US imports of grain-oriented flat-rolled electrical steel is WTO-consistent (DS414). The above-mentioned December 8, 2011 request by the United States to establish a panel under DS427 is another example of this trend.

In 2012, bilateral trade remedies actions are expected to be influenced by several cases. First, in the absence of legal and legislative redress, the December 19, 2011 CAFC ruling could force DOC to revoke 24 existing CVD orders and to terminate seven pending CVD investigations of NME imports. The vast majority of those cases involve China. On the other hand, expected congressional legislation to "fix" the CVD/NME issue will likely elicit further legal challenges from Chinese exporters, US importers or the Chinese government. Second, assuming the pending CVD investigations are not terminated because of the CAFC ruling, the United States is expected to continue high-profile AD/CVD investigations of Chinese solar panels and wind towers. The imposition of final duties in these cases could result in Chinese "retaliation" via new AD/CVD investigations of strategic US imports. Third, the United States and China agreed that the United States would comply with the adverse ruling of DS379, which found that DOC's simultaneous application of AD and CVD in four US investigations of Chinese goods violates WTO rules, by April 25, 2012. It is likely that China will heavily scrutinize any US compliance efforts.

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IV. 2012 FARM BILL

On October 1, 2012, the "Food, Conservation, and Energy Act of 2008" ("2008 farm bill") expires. Congress is expected to work toward, but not pass, a new farm bill in 2012. Due to the November 2012 legislative and Presidential elections, lawmakers will likely extend the 2008 farm bill to 2013 and put off passing a farm bill until 2013. Although lawmakers will actively debate the issues surrounding the new farm bill in 2012, the changing composition of Congress in 2013 could affect the bill's substance. Below we discuss several key factors likely to drive this debate.

Mounting federal debt.

High levels of federal debt have resulted in across-the-board calls for fiscal constraint, with several politicians having called for cuts to agricultural spending. More specifically, the Obama Administration's Fiscal Year (FY) 2011 budget proposes a cut in agricultural commodity programs by USD 2.6 billion over the ten-year period of FY2011 to FY2020. In addition, in November 2011, Sen. Debbie Stabenow (D-MI) and Rep. Frank Lucas (R-OK) submitted to the Joint Select Committee on Deficit Reduction (JSC) a plan to cut USD 23 billion from farm programs ("Stabenow-Lucas proposal"). Although the JSC missed its November 23, 2011 deadline for agreeing to a plan to reduce the federal deficit by USD 1.5 trillion, sources note that the Stabenow-Lucas farm program proposal may still be used as a template for the 2012 farm bill.

International Obligations.

The debate over federal support for several key agricultural products in the 2012 farm bill will be influenced by relevant international obligations and pressure. These agricultural products include:

- Cotton. WTO members, including Brazil, China, and the "Cotton Four" countries (*i.e.* Benin, Burkina Faso, Mali and Chad), have threatened to bring a WTO dispute against the United States regarding its subsidization of domestic cotton. Similary, under DS267 the US government pays approximately USD 147.3 million a year to the Brazil Cotton Institute in exchange for Brazil's agreement not to impose countermeasures on US imports. This agreement is set to expire with the implementation of the 2012 farm bill, or a new, mutually agreed upon solution, whichever comes first;

- Sugar. Under the current US Sugar Program, the federal government supports domestic sugar producers by keeping the price of US sugar high through restricted imports and sales of domestic sugar. This policy has received pushback from numerous WTO members, including Brazil, but is likely not to be changed under the 2012 farm bill, because the program does not require government outlays;

- Corn. In 2007, Canada and Brazil requested a WTO DSB panel to address whether the United States' support of domestic corn is WTO-consistent (DS357 and DS365). Although the three countries agreed in April 2008 to postpone the panel's consideration of the cases, the failure of the Doha round to achieve progress of US agricultural subsidies may influence Canada and Brazil to re-open the case. Lawmakers will be pressured to restructure US support for domestic corn accordingly; and

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- Soybeans. WTO members, including Brazil and China, have threatened to challenge the United States' support of domestic soybean production in front of the WTO DSB. Although no such case has yet been initiated, pressure from these countries is expected to influence the debate over support for soybeans in the 2012 farm bill.

Domestic Politics

Domestic politics will also heavily influence the next farm bill. The Obama Administration's FY 2012 budget demonstrates support for increasing agro-technology research, conservation programs, rural development, nutritious and biofuels. The President's FY 2013 budget, which will likely be published in mid-February 2012, is expected to provide further details on which programs the President wants to bolster and those he wants to downsize.

Personnel changes resulting from the 2012 elections also could change the final farm bill's scope and substance. Although lawmakers have also begun to express their views with respect to the farm bill's content, the November 2012 congressional elections are likely to result in significant turnover in both the House and Senate. The lawmakers of the 113th Congress will bring fresh views and priorities regarding the farm bill that will more directly influence the legislation's content. This is particularly true if party control of the House or Senate were to change as a result of the elections. (Many experts note that Republicans could take control the Senate, given the number of Democrat-held seats at play.)

Likewise, key agricultural interest groups have also begun to push their 2012 farm bill agendas. In response to budgetary pressures, groups such as the American Farm Bureau Federation have expressed their willingness to trim key programs, such as direct payments. Despite this apparent concession, the same groups have revealed an unwillingness to reduce the overall farm bill budget by simultaneously pushing for increased funding in other, less contentious programs, such as crop insurance.

V. WTO ISSUES

WTO Dispute Settlement

Use of the WTO DSB is expected to increase as WTO members attempt to resolve new and contentious trading issues. The US government, in particular, is expected to be involved in many cases in 2012, including, but not limited to:

- **Trade Remedies Disputes.** As noted above, the exchange of trade remedies between China and the United States is likely to be addressed in several disputes in 2012. Several other WTO Members have also raised complaints related to the US administration of trade remedies. Theses cases include:

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- **Zeroing Cases.** Zeroing has been one of the most extensively litigated issues in the DSB.[4] There are currently six cases that challenge DOC's use of zeroing, including: DS422 (initiated by China), DS420 (initiated by Korea), DS404 (initiated by Vietnam), DS402 (initiated by Korea), DS350 (initiated by the European Union (EU)), and DS344 (initiated by Mexico). In order to come into compliance with several of these cases, DOC proposed, on December 28, 2010: (i) changing the fundamental AD calculation methodology used in AD administrative review proceedings; (ii) ending DOC's practice of disregarding negative dumping margins, or "zeroing," in the calculation of overall weighted-average dumping margins for AD administrative review proceedings; and (iii) ending the use of zeroing in AD investigations in which a transaction-to-transaction dumping margin calculation methodology is applied. To date, DOC has not provided details on the content of DOC's final rule or when this final rule will be adopted. Sources note that the EU and Japan recently extended the Unites States' deadline to comply with adverse rulings in zeroing cases they won against the United States for the third time. Nonetheless, experts note that the deadline has only been extended until early February 2012. As such, the Obama Administration is expected to announce how it will comply in the near term;

- **Chicken Broiler Products.** DS427 was intiated by the United States against China in September 2011. On October 28, 2011, WTO consultations were held between US and Chinese officials regarding AD/CVD China places on US chicken "broiler products" that the US government believes violate WTO rules. According to USTR, the parties were unable to resolve the dispute through the consultations. On January 20, 2012 the DSB established a panel to address the issue;

- **Grain-Oriented Flat-Rolled Steel (GOES).** DS414 was initiated by the United States against China in September 2010. On March 25, 2011 the DSB established a panel to determine whether China's application of AD/CVD on US imports of GOES is WTO-consistent. The panel is expected to issue its report by May 2012;

- **"Double Counting" (CVDs and NME imports).** DS379 was initiated by China against the United States in September 2008. A panel report issued in October 2010 rejected China's legal argument that US procedures resulted in the imposition of AD duties and CVDs on a variety of Chinese exports. In March 2011, the Appellate Body reversed the panel ruling with its determination that the United States violates its WTO obligations by applying both AD duties and CVDs on imports from China while not protecting against potential "double counting" of dumping/subsidization levels. In its ruling, the Appellate Body also determined that firms could not be considered "public bodies" solely because they are majority-owned by the government of a certain country. The United States and China agreed that the United States would comply with the Appellate Body ruling by April 25, 2012. The US government's attempts to address this

[4] Zeroing refers to the practice whereby an investigating authority sets to zero so-called "negative dumping margins," *i.e.*, when the export price of the product is higher than the price in the exporting country, thus potentially inflating the overall average dumping margin, and leading to the imposition or maintenance of anti-dumping duties which may not otherwise apply. Under its current standard anti-dumping (AD) review calculation methodology, DOC disregards any negative dumping margins found and does not offset an exporter's dumped transactions with non-dumped sales.

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adverse ruling will be complicated by its simultaneous efforts to address the December 2011 CAFC ruling, which found US CVD law does not apply to NMEs;

- **Raw Materials.** The United States initiated DS394 against China in June 2009. The panel ruling, which was issued in July 2011, found that China's use of export restrictions and duties on certain raw materials used for the production of steel and chemicals violates certain WTO rules. On January 30, 2012 the Appellate Body circulated its ruling, which affirmed most of the the panel ruling's key substantive findings. The Appellate Body's ruling is expected to be formally adopted on February 20, 2012, at which point China will negotiate with the United States a timeline for China to comply with the ruling. Due to some similarities between the measures at issue in DS394 and those related to the exportation of "rare earth" elements, the United States could explore the possibility of bringing a similar dispute related to rare earth export restraints. On the other hand, significant differences, such as Chinese limits on domestic rare earth production, reportedly exist among the measures at issue, and could therefore dissuade the United States from challenging China's rare earth policies based on the DS394 findings;

- **Electronic Payment Services.** DS413 was initiated by the United States against China in September 2010. A panel was established in March 2011 to address Chinese restrictions that prevent wholly foreign-owned companies from supplying credit card and electronic payment services through their own network to Chinese customers in local currency. The panel is expected to issue its report by May 2012;

- **Boeing-Airbus.** The ongoing Boeing-Airbus dispute between the United States and the EU will continue in 2012. The dispute currently centers on the following two cases: (i) DS316, which the United States brought against the EU in October 2004 for its subsidization of the European aircraft manufacturer Airbus; and (ii) DS353, which the EU brought against the United States in June 2005 for its subsidization of the US aircraft manufacturer Boeing. The Appellate Body is expected to issue by February 2012 its report on the panel ruling for DS353, which found that the US government granted USD 5 million in WTO-inconsistent subsidies to Boeing. On January 13, 2012, the United States and the EU held formal consultations to address the EU's compliance efforts with an adverse May 2011 Appellate Body ruling for DS316, which the United States has deemed incomplete. USTR is expected to request the establishment of a compliance panel to further address the issue as soon as February 2012;

- **Clove Cigarettes.** DS406 was initiated by Indonesia against the United States in April 2010. A September 2011 panel ruling found that the United States violated its WTO obligations by affording clove cigarettes less favorable treatment than that afforded to menthol cigarettes. On January 5, 2012 the United States appealed the panel ruling to the Appellate Body;

- **Tuna Labeling.** Mexico initiated DS381 against the United States in October 2008. In September 2011, a panel ruling determined that US labeling requirements that preclude Mexican tuna exports from receiving a "dolphin safe" label violate WTO obligations. On January 20, 2010, the United States announced its decision to appeal the panel ruling; and

- **Country of Origin Labeling.** Canada and Mexico initiated the disputes DS384 and DS386 against the United States in December 2008. A November 2011 panel ruling found that US country of orgin labeling requirements for beef and pork violate the United States' WTO obligation to refrain from discriminating

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against foreign products and to provide clear and accurate origin information to consumers. The DSB decided on January 5, 2012 to extend the date by which the United States must appeal the decision to March 23, 2012.

The Doha Round

WTO members are not expected to make any dedicated efforts to reinvigorate the Doha round until 2013. 2012 brings elections in a number of WTO countries, including France, Russia, Mexico, and the United States, as well as a political transition in China. In addition, the EU is expected to continue to struggle with its sovereign debt crisis. As a result of these conditions, key WTO members will not soon be in a position to make the commitments necessary to bring the Doha round to a close. Although USTR will likely use 2012 as an opportunity to explore the possibility of negotiating several plurilaterals, such negotiations are not expected to make significant headway this year.

At the WTO Eighth Ministerial Conference (MC8), held in Geneva, Switzerland from December 15-17, 2011, WTO members achieved several successes, including: (i) the completion of the terms of accession for Russia, Montenegro and Samoa; (ii) the conclusion of negotiations to revise the WTO Government Procurement Agreement (GPA); and (iii) several new initiatives that aim to boost trade and development for least developed countries (LDCs).

Despite these accomplishments, WTO members acknowledged that the Doha round is at an impasse. In response, WTO Director General (DG) Pascal Lamy announced in his MC8 opening statement that he would establish a "panel of multi-stakeholders of the WTO" to study current and future trade patterns and obstacles as well as possible ways in which the multilateral trading system can continue to transform trade into development, growth, jobs and poverty alleviation. The panel will report their findings to WTO members by the end of 2012.

In a separate effort to overcome the impasse, USTR Kirk noted that the US government is willing to "make progress wherever possible on the Doha mandate." This statement suggests the US government is interested in the negotiation of plurilateral WTO agreements, *i.e.*, agreements on issues upon which a subset of WTO members can agree, instead of continuing to negotiate the Doha round deal as a "single undertaking" under the Doha mandate, *i.e.*, an approach in which every item of the mandate is negotiated as part of an indivisible final package of deliverables.

In a first step towards the consideration of a new plurilateral, the United States met with 16 other WTO members on January 18, 2012 to discuss the possibility of negotiating a services plurilateral under Article V of the General Agreement on Trade in Services (GATS), which allows WTO member countries to pursue services trade liberalization deals among themselves on a preferential basis, provided certain criteria are met. Nonetheless, experts note that key developing countries, including China, Brazil and India, have expressed a lack of interest in the proposed services plurilateral. Such disintersest makes the agreement less appealing for the US services industries, which are interested in obtaining better market share in these expanding economies. WTO members are also expected to continue discussions on how to revise the WTO Information Technology Agreement (ITA) in 2012. Even so, a revised agreement is not likely to be completed for a few years, as sources note that ITA signatories are at odds over what issues the revised agreement should seek to address.

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VI. MISCELLANEOUS CONGRESSIONAL TRADE AGENDA ITEMS

In addition to the major issues mentioned above, Congress is also expected to consider several less-controversial pieces of trade legislation in 2012, including:

- **Customs Reauthorization.** Lawmakers are expected to consider legislation that reforms and modernizes Customs and Border Protection (CBP). Such legislation is expected to reinforce former CBP commissioner Alan Bersin's emphasis on trade facilitation and enforcement;

- **Miscellaneous Tariff Bill (MTB).** In December 2011, Rep. Brady expressed an interest in advancing a new MTB, which provides for the temporary reduction or suspension of duties on certain imports into the United States. The challenge for lawmakers will be to develop a process for assembling the bill that distinguishes it from earmarks, which Republicans have formally pledged to ban;

- **Africa Growth and Opportunity Act (AGOA) Third Country Fabric Provision.** The AGOA Third Country Fabric Provision, which is set to expire on September 30, 2012, allows AGOA beneficiary countries to use fabrics from third countries to make apparel that is eligible for duty-free access into the United States. USTR is likely to push Congress to pass legislation that extends the provision by three years to 2015; and

- **Fixes to Dominican Republic-Central America-United States FTA (CAFTA-DR).** On February 23, 2011 officials representing the countries party to CAFTA-DR agreed to make changes to the rules of origin for certain textiles covered in the agreement. These changes cannot be enacted without US congressional approval.

These bills are not expected to dominate the 2012 trade agenda. Because they have yet to be formally introduced or vetted by the responsible congressional committees, the precise content and timing of each measure remains unclear.

Outlook

As the election year continues, US politicians are expected to push trade-related policies in an attempt to secure the votes of those who blame free trade-friendly policies for the state of the US and world economies. Although much attention will likely be drawn to these proposed policies, it is important to note that few of them will actually be implemented. As mentioned above, this type of political posturing will certainly be used with respect to the US-China trading relationship, but is also likely to be employed in other areas of the US trade agenda. In addition to the "Enforcement Task Force," which is expected to monitor China's allegedly unfair trading practices, the Obama Administration has already announced two additional trade-related policies meant to draw favorable voter support, including: (i) the January 13, 2012 announcement that President Obama will seek fast-track authority from Congress in order to reorganize six US trade federal government agencies that deal with trade; and (ii) the January 11, 2012 announcement that President Obama will, in the next few weeks, put forward tax proposals that reward companies that choose to bring jobs to the United States and eliminate tax breaks for companies that move jobs overseas. Although such policies are unlikely to be implemented, experts agree that they will unnecessarily impede upon an already constricted 2012 trade agenda.

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US-EU, US-Japan Memoranda Detail Steps US Will Take to Resolve Zeroing Disputes

Summary

On February 6, 2012, the United States signed memoranda with Japan and the European Union (EU) to address the World Trade Organization's (WTO) adverse rulings on the Department of Commerce's (DOC) use of "zeroing."[5] (Please see W&C Trade Alert *"USTR Announces End to Zeroing Disputes With EU, Japan; Final Rule Forthcoming"* from February 6, 2012.) This report analyzes these memoranda, which list the steps agreed to among the United States, the EU and Japan to resolve DS322, DS294 and DS350.

Analysis

In order to come into compliance with these adverse WTO rulings, the United States agreed, under both the EU-US and the US-Japan Memoranda, to complete the procedures described in Sections 123 and 129 of the Uruguay Round Agreement Act (URAA). Section 129 of the URAA describes the process by which the US government must take the administrative action necessary to correct the specific actions found by a WTO ruling to be inconsistent with the WTO Anti-dumping Agreement or the WTO Agreement on Countervailing Measures. In particular, the following steps must be followed under Section 129:

- The US Trade Representative (USTR) must consult with the appropriate congressional committees as well as the administering authority regarding the relevant WTO ruling;
- 180 days after receiving a written request from USTR, the administering authority must issue a determination in connection with the WTO ruling that renders the administering authority's action consistent with the WTO ruling;
- Before the administering authority implements the determination, USTR must consult with the administering authority and the appropriate congressional committees; and
- After consultations, USTR must direct the administering authority to implement, in whole or in part, the determination.

In the context of the US-EU and US-Japan Memoranda, the administering authority is the DOC. In order to correct the specific actions found to be inconsistent with the WTO Anti-dumping Agreement, DOC must recalculate the anti-dumping (AD) deposits without zeroing for certain AD orders at issue in DS322, DS294 and DS350. The relevant AD orders are listed in an Annex to each Memorandum; AD orders on imports from

[5] Zeroing refers to the practice whereby an investigating authority sets to zero so-called "negative dumping margins," *i.e.*, when the export price of the product is higher than the price in the exporting country, thus potentially inflating the overall average dumping margin, and leading to the imposition or maintenance of anti-dumping (AD) duties which may not otherwise apply.

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countries other than Japan and the EU member states are not included. The Memoranda provide deadlines by which: (i) USTR must send its written requests to DOC; and (ii) DOC must issue its final determinations. As long as the deadlines are met, the Memoranda state that the EU and Japan will continue to suspend the work of the WTO arbitration panels set up to address the complainants' request for compensation based on the United States' failure to comply with the rulings of the disputes.

Section 123 of the URAA details the process by which the US government must modify a certain practice or regulation to bring it into compliance with an adverse WTO ruling. (Section 129 addresses specific agency actions ruled inconsistent with WTO rules, while Section 123 addresses WTO-inconsistent regulations or policies.) In particular, the following steps must be taken under Section 123:

- The appropriate congressional committees must be consulted;
- USTR must seek advice regarding the modification from the appropriate private sector advisory committees;
- A proposed rule to modify the practice or regulation must be published in the Federal Register (FR) for public comment;
- USTR must submit a report describing the proposed modification to the appropriate congressional committees; and
- The Final Rule must be published in the FR.

According to the Memoranda, the United States will complete the Section 123 process with the publication of a Final Rule detailing modifications to the DOC's AD calculation methodology. The Final Rule will be based on a proposed rule that DOC published in the FR on December 28, 2010 (75 FR 81533). The proposed rule suggested DOC resolve the issue of zeroing by: (i) changing the fundamental AD calculation methodology used in AD administrative review proceedings; (ii) ending DOC's practice of disregarding negative dumping margins, or (zeroing) in the calculation of overall weighted-average dumping margins for AD administrative review proceedings; and (iii) ending the use of zeroing in AD investigations in which a transaction-to-transaction dumping margin calculation methodology is applied. (Please see W&C Trade Alert "*DOC Propose to Change AD Review Calculation Methodology and End „Zeroing" Practice in AD Proceedings"* from January 4, 2011.)

I. US-EU Memorandum

The table below provides details on the specific commitments the EU and the United States made under the US-EU Memorandum, and the deadlines by which the parties agreed to fulfill the commitments.

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Deadline	US and/or EU Commitment
By the seventh day after the signing of the memorandum	The US government will complete the process outlined in Section 123 of the URAA by publishing a Final Rule, based on 75 FR 81533, to modify DOC's AD calculation methodology.
By the twelfth day after the signing of the memorandum	Acting under Section 129 of the URAA, USTR will send a written note to DOC requesting the revision of current cash deposit rates established on the basis of prior administrative review determinations for exporters covered by the relevant AD orders disputed under DS294 and DS350. These Section 129 determinations will cover the following AD orders: (i) Stainless Steel Plate in Coils from Belgium; (ii) Steel Concrete Reinforcing Bars from Latvia; (iii) Carboxymethylcellulose from Finland; (iv) Pasta from Italy; (v) Carboxymethylcellulose from the Netherlands; (vi) Stainless Steel Wire Rod from Spain; and (vii) Granular Polytetrafleuorethylene Resin from Italy.
By the fourth month after the signing of the memorandum	DOC will issue its final determinations for the exporters of the merchandise in the AD matters listed above. The Section 129 process will be considered complete seven days after DOC issues its final determinations.
By the fifteenth day after the US government completes the Section 129 proceedings	The EU will withdraw its request, under Article 22.2 of the WTO Dispute Settlement Understanding (DSU), to collect compensation in return for the US government's failure to comply with the adverse rulings of DS294 and DS350. Additionally, the United States and the EU will send a joint letter to the WTO arbitration panel informing them that the EU has withdrawn its request under Article 22.2 and that, in return, the United States has also withdrawn its request, under Article 22.6 of the WTO DSU, to dispute the request for compensation.

II. US-Japan Memorandum

The table below provides details on the specific commitments Japan and the United States made under the US-Japan Memorandum, and the deadlines by which the parties agreed to fulfill these commitments.

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Deadline	US and/or Japanese Commitment
By the seventh day after the signing of the memorandum	The US government will complete the process outlined in Section 123 of the URAA by publishing a Final Rule, based on 75 FR 81533, to modify DOC's anti-dumping (AD) calculation methodology.
By the twelfth day after the signing of the memorandum	Acting under Section 129 of the URAA, USTR will send a written note to DOC requesting the revision of current cash deposit rates established on the basis of prior administrative review determinations for exporters covered by the relevant AD orders disputed under DS322. These Section 129 determinations for Japan will cover the following AD orders: (i) Stainless Steel Sheet and Strip in Coils
By the fourth month after the signing of the memorandum	DOC will issue its final determinations for the exporters of the merchandise in the AD orders listed above. If the final determination involves a change in the current cash deposit rate, the Section 129 process will be considered complete seven days after DOC issues its final determinations. If the final determination does not result in a change in the rate, the Section 129 process will be considered complete upon issuance of the final determination.
By the fourth month after a ruling is issued in the case *NSK Corporation v. US International Trade Commission (USITC)*	If the ruling for *NSK Coporation v. USITC* does not affirm the revocation of the relevant AD orders, DOC will issue, within four months of the ruling, a final determination under Section 129 for several exporters covered by the relevant AD orders. These Section 129 determination will cover the following AD orders: (i) Antifriction Bearings from Japan If the ruling does affirm the revocation of the relevant AD orders, DOC does not need to issue the additional Section 129 determinations.
No later than six months after the signing of the memorandum	Japan will withdraw its request, under Article 22.2 of the WTO DSU, to collect compensation in return for the US government's failure to comply with the adverse ruling of DS322. Additionally, the United States and Japan will send a joint letter to the WTO arbitration panel informing them that the Japan has withdrawn its request under Article 22.2 and that, in return, the United States has also withdrawn its request, under Article 22.6 of the WTO DSU, to dispute the request for compensation

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Outlook

Both the EU Trade Commissioner Karel De Gucht and the Japanese Minister of Economy, Trade and Industry Yukio Edano have welcomed the United States' commitments under the Memoranda. In addition to resolving the WTO disputes with the EU and Japan, experts note that DOC's Final Rule could also affect: (i) other administrative reviews for AD orders on imports from countries other than the EU and Japan; and (ii) additional WTO disputes brought against the United States by countries other than the EU and Japan for DOC's use of zeroing in reviews. Until DOC's Final Rule has been published and analyzed, the extent to which the rule, as well as US-EU and US-Japan Memoranda, will affect these issues remains unclear.

US General Trade Policy Highlights

President Obama Signs Executive Order Establishing Interagency Trade Enforcement Center

President Obama signed on February 28, 2012 an Executive Order (EO) establishing the Interagency Trade Enforcement Center (ITEC or "the Center"). During a press conference held on the same day, Secretary of Commerce John Bryson, US Trade Representative (USTR) Ron Kirk, as well as other officials from both offices, provided additional details on how ITEC will use government-wide resources to challenge the allegedly unfair trading practices of US trading partners. President Obama first announced his intention to establish ITEC during his January 24, 2012 State of the Union (SOTU) address.

According to President Obama's February 28 EO, which has not yet been published in the Federal Register (FR), the Center's main responsibility will be to serve as the primary forum through which numerous US government agencies will work together to enforce domestic trade laws and US trade rights under international trade agreements, *e.g.,* World Trade Organization (WTO) rules and free trade agreements (FTAs). More specifically, ITEC will coordinate with the following agencies and offices within the US government in its trade enforcement efforts: (i) USTR; (ii) Department of State (DOS); (iii) Department of the Treasury ("Treasury"); (iv) Department of Justice (DOJ); (v) Department of Agriculture (USDA); (vi) Department of Commerce (DOC); (vii) Department of Homeland Security (DHS); (viii) the Office of the Director of National Intelligence; and (ix) the Intellectual Property Enforcement Coordinator in cases involving intellectual property rights (IPR). The EO also lists the following as additional duties of the ITEC:

- **Information Exchange.** The ITEC will coordinate the exchange of information between the agencies and offices listed above related to potential violations of international trade agreements by US trade partners; and

- **Stakeholder Outreach**. The Center will conduct outreach to US workers, businesses and other interested persons to increase their participation in the identification and reduction or elimination of foreign trade barriers and allegedly unfair foreign trade practices

In addition to detailing the mission of the ITEC, the EO, as well as the subsequently held press conference, also provided details on the following characteristics of the Center:

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- **Staff.** According to the EO, the ITEC will be established within USTR. It will have a Director, designated by Ambassador Kirk, and a Deputy Director, designated by the Secretary Bryson. The EO further states that the Center will have an Intelligence Community Liaison, who will be recommended by the Director of National Intelligence. According to Secretary Bryson, the ITEC's leadership and its core staff will be appointed within 90 days;

- **Funding.** In his Fiscal Year (FY) 2013 proposed budget, President Obama requested that USD 26 million be given to DOC's International Trade Administration (ITA) and USTR to support the work of ITEC. According to DOC officials, money already allotted for FY 2012 to DOC ITA and USTR will be redirected to help launch the ITEC; and

- **Focus.** Although USTR officials noted during the press conference that ITEC would investigate any country in regard to which US businesses have experienced market access difficulties, sources note that the Center is likely to focus its efforts on the China's allegedly unfair trading practices.

Experts note that, despite the details provided by US officials and in the EO, it remains largely unclear how the ITEC and its "whole-of-government" approach will affect the US government's efforts at international trade enforcement. Although Republican and Democratic lawmakers, including House Ways and Means Chairman Dave Camp (R-MI) and Ranking Member Sander Levin (D-MI), have initially welcomed the establishment of the ITEC, experts note that the lack of opposition stems largely from that 2012 is an election year, and actions perceived as counteracting China's allegedly unfair trading practices generally receive bipartisan voter support. Experts note that lawmakers will likely comment further on ITEC once it commences its trade enforcement activities. In this regard, it is important to note that, although EOs can have the force and effect of law, the US Constitution also gives Congress: (i) the power to pass legislation that alters ITEC's mandate; and (ii) the final say in determining how much money, if any, to allocate to DOC ITA and USTR for the support of ITEC.

House and Senate Lawmakers Urge Stringency in Conflict Minerals Final Rule

Seven Democratic House and Senate lawmakers[6] sent a letter to Securities and Exchange Commission (SEC) Chairwoman Mary Shapiro on February 16, 2012, urging that that the final rule for Section 1502 ("conflict minerals provision") of the Dodd-Frank Wall Street Reform Act not contravene Congress's legislative intent in regard to the required level of transparency and accountability in companies' statutorily submitted reports on mineral sourcing. In this regard, the lawmakers' letter expresses concern over the SEC proposed rule on conflict minerals not requiring companies to file such mineral sourcing reports but, rather, only "furnish" them. In the letter, the lawmakers also urge the SEC to base the eventual final rule's economic cost estimate associated with companies reporting on mineral sourcing on reliable cost data.

[6] Sens. Patrick Leahy (D-VT), Chris Coons (D-DE), Donald Payne (D-NJ) and Karren Bass (D-CA), and Reps. Howard Berman (D-CA), Jim McDermott (D-WA), Gregory Meeks (D-NY)

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Section 1502 of the Dodd-Frank Act states that it is the sense of Congress that the exploitation and trade of "conflict minerals," defined as gold, tin, tungsten and tantalum, originating in the Democratic Republic of Congo (DRC), have financed conflict in the eastern region of that country. The SEC published its proposed rule for the implementation of Section 1502 in December 2010. In its proposed rule, the SEC recommends requiring any issuer under Sections 13 (a) or 15 (d) of the Securities Exchange Act of 1934 for which conflict minerals are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by that issuer to disclose in the body of its annual report whether its conflict minerals originated in the DRC or an adjoining country. If the conflict minerals originated from the specified region, the SEC's proposed rule recommends that the issuer be required to furnish a separate report that includes a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals.

While the SEC has reportedly finalized the rule on companies' disclosure and reporting in regard to conflict mineral sourcing, it has yet to approve the final rule and publish it in the Federal Register. Nonetheless, the lawmakers charge the following with respect to the unpublished, finalized rule:

- **Transparency and Accountability.** The lawmakers claims in the letter that the SEC, in not recognizing that Section 1502 "was designed as a transparency measure to provide investors and the public the information needed to make informed choices," has misinterpreted the intent of congress in including the conflict mineral provision in the Dodd-Frank Act. In this regard, the lawmakers urge the SEC to require in the final rule that companies file, not simply furnish, mineral sourcing reports, and that these reports "contain enough substantive information so that investors and the public can understand what actions a company has taken to make a reasonable country of origin inquiry;"

- **Economic Cost Estimates.** In regard to the Commission's estimate of economic costs associated with a company reporting on its mineral sourcing, the lawmakers' letter urges the SEC to rely only on "those […] estimates [by interested parties] that use credible and publicly cited data, methodologies that rely on practices of companies in the field, and comparisons to costs of truly similar regulations."

In December 2010 the SEC stated its intention, as required by the Dodd-Frank Act, to implement the final rule by April 15, 2011. On February 3, 2011, however, the SEC announced that it was extending the deadline for the submission of comments until March 2, 2011. In April 2011, the SEC revealed revised plans to publish the final implementing rule for Section 1502 between August and December 2011. However, on October 18, 2011, the Commission held a public roundtable at which invited participants discussed several issues relating to the Commission's required conflict minerals rulemaking. Roundtable panelists reflected the views of different constituencies, including investors, affected issuers, human rights organizations and other stakeholders. Despite having missed the self-imposed December 2011 deadline, that the SEC has reportedly finalized the implementing rule having taken under consideration views presented at the October 18 public roundtable increases substantially the pressure on the SEC to publish the rule in the near-term. However, the Democratic lawmakers' February 16 letter will unlikely serve to hasten SEC's publishing of the final rule.

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Mexican Senate Science and Technology Committee Chairman Urges Calderón Administration Not to Sign ACTA; European Approval Also Uncertain

The Chairman of the Mexican Senate Committee on Science and Technology Francisco Javier Castellón Fonseca (PRD-Nayarit) delivered a speech to the chamber plenary on February 18, 2012, urging President Felipe Calderón Hinojosa not to enter Mexico into the Anti-Counterfeiting Trade Agreement (ACTA). Chairman Castellón posited that ACTA contains several provisions that conflict with current Mexican law, including the Mexican constitution.

Officials from the United States, Australia, Canada, Japan, Korea, Morocco, New Zealand and Singapore met in Japan on October 1, 2011 to sign ACTA. ACTA establishes a wide range of minimum standards in regard to intellectual property rights (IPR) protection with which the Agreement's members agree to comply. These minimum standards cover three principle areas: (i) enhancing international cooperation on IPR matters; (ii) promoting effective IPR enforcement practices; and (iii) strengthening national legal frameworks for IPR enforcement in the areas of criminal enforcement, enforcement at the border, civil and administrative actions and distribution of copyrighted material on the internet. The European Union (EU) and Switzerland, in addition to Mexico, were also ACTA negotiating members but, due to difficulties with their respective internal approval procedures, have not signed the Agreement.

Chairman Castellón's remarks before the chamber plenary reflect the conclusions on ACTA issued in July 2011 by the Multiparty Working Group (MWG), comprised of Senators from six political parties which received input on the issue from interested parties over the course of eight public hearings. We summarize below these conclusions:

- **Senate Participation.** MWG asserted that Mexican engagement in the negotiation of ACTA was performed in violation of the Law on the Approval of Economic Treaties, *i.e.*, the lack of transparency in the negotiations prevented the Senate from actively participating as is envisaged under said Law;

- **Constitutional Violations.** MWG asserted that ACTA, by requiring internet service providers (ISPs) to determine which user material is infringing, would violate the right to due process and privacy, as mandated in Articles 14 and 16, respectively, of the Mexican constitution;

- **Ambiguity of Language.** MWG asserted that the ambiguity of certain ACTA provisions would threaten legal security and certainty in Mexico;

- **Digital Divide.** MWG asserted that certain provisions under ACTA could, for the sake of protecting IPR, threaten "internet neutrality," and thus prevent universal access to the internet by all persons; and

- **Freedom of Expression.** MWG asserted that certain provisions under ACTA could lead to the censure of certain online content, which could potentially threaten the normal development of electronic commerce, digital creativity and the otherwise legal dissemination of cultural content.

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Chairman Castellón noted in his February 18 remarks that the MWG's conclusions were adopted by the Senate plenary in November 2012.

The difficulties in achieving Mexican approval of ACTA, as demonstrated by Chairman Castellón's remarks, mirror the difficulties in achieving approval of the Agreement on the part of the EU. On February 22, 2012, EU Trade Commissioner Karel De Gucht referred ACTA to the European Court of Justice (ECJ) so that it may assess whether the Agreement is incompatible with such "fundamental rights" enshrined in EU law as "freedom of expression and information or data protection." The European Commission has already passed ACTA on to national governments for ratification. The Council of the EU adopted ACTA unanimously in December 2011 and subsequently authorized EU Member States to sign the Agreement. The EU Commission has also passed ACTA on to the European Parliament for debate and a future vote. Whether the ECJ makes affirmative findings with respect to the Agreement remains unclear. Commissioner De Gucht's petition to ECJ posed broad questions about "fundamental" rights and, if ECJ's opinion on ACTA's consistency with these fundamental rights is equally as broad, this opinion will likely be inconclusive, thus allowing the Agreement to advance toward ratification in the European Parliament. Nonetheless, ratification in each of the EU member states is necessary for ACTA to take effect for the European Union, and IPR protection-related measures are highly unpopular with many European voters.

In regard to Chairman Castellón's remarks, that the MWG conclusions were approved by the Senate plenary suggests that ratification of ACTA by Mexico will not be easily achieved. IPR protection-related issues are a galvanizing topic in Mexico, and presidential candidates and campaigning lawmakers are aware of this in the context of the July 2012 Mexican elections.

US Firms Allege Unfair Argentine Import Restrictions

On February 10, 2012, the US Chamber of Commerce and several trade coalitions[7] 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. The letter highlights that, despite US officials' efforts to address this problem, Argentina has upheld (or even strengthened) its import substitution policies.

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 "Sworn Advance Import Declaration" (*Declaración Jurada Anticipada de Importación* (DJAI).[8] Furthermore, the letter emphasizes that the

[7] National Association of Manufacturers (NAM); Pharma; United States Council for International Business (USCIB); American Apparel and Footwear Association (AAFA); United States Chamber of Commerce; Tech America; Society of Chemical Manufacturers and Affiliates (SOCMA); American Chemistry Council; Information Technology Industrial Council (ITI); NFTC; and the Emergency Committee for American Trade (ECAT).

[8] General Resolution No. 3252/2012, published in the *Official Gazette* on January 10, 2012, establishes that importers must declare to Argentine Federal Revenue Administration (*Administración Federal de Ingresos Públicos* (AFIP)) the goods to be brought

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Argentine government has increased restrictions on US firms which have formally complained about such restrictions.

The letter asserts that such Argentine measures[9] do not appear to be compliant with World Trade Organization (WTO) rules, the US-Argentina Bilateral Investment Treaty signed in 1991 and Group of 20 (G-20) political commitments, and that this non-compliance poses challenges to US companies engaged in business in Argentina. In this regard, the letter's co-signing organizations urge the adoption of a multilateral approach, *e.g.*, coordinating actions with other similarly concerned countries, to send a clear signal to the Argentine Government that governments globally have substantive concerns surrounding Argentina's current trade practices. In addition, the letter's co-signers highlight that Argentine measures should be a priority matter of the Interagency Trade Enforcement Center (ITEC), which President Obama proposed in his January 24, 2012 State of the Union (SOTU) address to investigate allegedly unfair trading practices in such countries as China.

In light of this situation, the letter's co-signers propose that USTR Ron Kirk and Deputy Advisor Froman explore all policy avenues to seek a remedy for US companies, including possible WTO consultation, and initiate a dialogue with US trading partners similarly impacted by Argentine policies with a view toward launching a coordinated diplomatic initiative in Argentina.

Sources indicate that several countries have expressed similar concern, at both the bilateral and multilateral level (WTO), over Argentina's trade restrictive measures implemented during the past 2 years, including, *inter alia*, the European Union (EU), Brazil, China and Mexico. Although Argentina has, on occasion, implemented targeted modifications to these measures in order to assuage trade tensions, it is unlikely to revise its general "import substitution policies" in the near future. This policy aims to: (i) foster the country's "re-industrialization" program; (ii) reverse Argentina's shrinking trade surplus; and (iii) reduce foreign currency outflows to stem capital flight and protect Argentina´s Central Bank (*Banco Central de la República Argentina* (BCRA)) foreign reserves. According to press sources, such Argentine measures could jeopardize its preferential market access to the US under the Generalized System of Preferences (GSP),[10] which accounts for 14 percent of Argentine total exports to the United States.

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into the Argentine domestic market prior to the issuing of the request, purchase order or similar document used for overseas purchasing operations. General Resolution No. 3252/2012 claims to improve the availability of "strategic information" on imports for domestic consumption and strengthen coordination among Argentine governmental offices.

[9] The letter attached an illustrative list of trade restrictive measures imposed by Argentina, which includes: (i) expansion in the list of products under the non-automatic import licensing regime and delays in the processing time to issue the license; (ii) Argentine importers of electronics must provide "market surveillance reports" before products can clear customs; (iii) "import balancing requirements whereby companies are required to export USD 1 of a product from Argentina in order to import USD 1 of another product; (iv) restrictions on certain cross-border re-insurance operations; and (v) the adoption of a DJAI and excise statement, which must be implemented for each distinct shipment / importing transaction.

[10] The US Generalized System of Preferences (GSP) is a program designed to promote economic growth in developing countries by providing preferential duty-free entry for up to 4,800 products from 129 designated beneficiary countries and territories.

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USTR Announces End to Zeroing Disputes With EU, Japan; Final Rule on Zeroing Forthcoming

On February 6, 2012, the Office of the US Trade Representative (USTR) issued a press release announcing that the US government has signed agreements to end disputes brought against the United States before the World Trade Organization (WTO) Dispute Settlement Body (DSB) by the European Union (EU) and Japan. In these disputes (DS350, DS294 and DS322), the DSB ruled that the Department of Commerce's (DOC) use of "zeroing" violates WTO rules. USTR has also independently confirmed that DOC will publish a final rule within the next week to address the WTO-consistency of its practice of zeroing.

Zeroing refers to the practice whereby an investigating authority sets to zero so-called "negative dumping margins," *i.e.*, when the export price of the product is higher than the price in the exporting country, thus potentially inflating the overall average dumping margin, and leading to the imposition or maintenance of anti-dumping (AD) duties which may not otherwise apply. On January 16, 2007, DOC ended its practice of zeroing in all new AD investigations. Nonetheless, under its current AD administrative review calculation methodology, DOC still disregards any negative dumping margins found, and does not offset an exporter's dumped transactions with non-dumped sales.

Zeroing has been one of the most extensively litigated issues before the WTO DSB. In addition to the cases brought by the EU and Japan, Korea (DS420, DS402), Vietnam (DS404) and Mexico (DS344) have also alleged that DOC's use of zeroing violates WTO rules. On December 28, 2010 DOC proposed a rule to further resolve the issue of zeroing by: (i) changing the fundamental AD calculation methodology used in AD administrative review proceedings; (ii) ending DOC's practice of disregarding negative dumping margins, or (zeroing) in the calculation of overall weighted-average dumping margins for AD administrative review proceedings; and (iii) ending the use of zeroing in AD investigations in which a transaction-to-transaction dumping margin calculation methodology is applied.

In addition to ending the disputes with Japan and the EU, USTR also confirmed that DOC will publish the final version of the December 2010 proposed rule in the forthcoming days. This final rule is expected to address the practice of zeroing in AD administrative reviews. Despite this expected development, USTR stated in their February 6 press release that "the United States will continue to press in ongoing WTO negotiations for affirmation that zeroing is consistent with WTO rules." Experts note that, until the final rule has been issued and analyzed, WTO members will likely continue their pending WTO challenges.

Senate Finance Committee Approves Funding Bill Containing Provision to Divert Tariff Revenue from Motor Vehicle Imports to Highway Trust Fund

On February 7, 2012, the Senate Finance Committee voted 17-6 to approve the funding mechanism for the Surface Transportation Reauthorization Bill (S. 1813). The Finance Committee measure (The Highway Investment, Job Creation and Economic Growth Act of 2012 or "the Act") raises money for the US Highway Trust Fund through several revenue provisions, including one that would earmark, *i.e.*, appropriate, tariff revenues

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collected on certain imported motor vehicles for the Fund. The Act will be incorporated into S. 1813, which will now be considered by the full Senate.

According to Senate Finance Committee Chairman Max Baucus (D-MT), the Act would raise USD 10.5 billion for the Highway Trust Fund, which funds highway and highway safety construction. The Act proposes to raise this money through a number of means, including but not limited to: (i) requiring distributions of inherited Individual Retirement Accounts (IRAs) within five years; (ii) closing the tax loophole for black liquor, a byproduct of the paper-making process; and (iii) diverting tariff revenue received on certain imported motor vehicles from the Treasury Department's General Fund to the Highway Trust Fund for Fiscal Year (FY) 2012 through FY 2016. With respect to (iii), the provision proposes earmarking the tariff revenues collected on the following subheadings of the US Harmonized Tariff Schedule (USHTS):

- **8703.22.00** Passenger motor vehicles with spark ignition internal combustion reciprocating piston engine of a cylinder capacity exceeding 1000 cc but not exceeding 1500 cc; and

- **8703.24.00** Passenger motor vehicles with spark ignition internal combustion reciprocating piston engine of a cylinder capacity exceeding 3000 cc.

If passed, S. 1813 would not be the first US bill to divert tariff revenues from the General Treasury to specific domestic programs. For example, the "Tax Relief and Health Care Act of 2006" (H.R. 6111) established the Pima Cotton Trust Fund, which diverted tariff revenues collected on certain imports of pima cotton products to US manufacturers and spinners of certain pima cotton products.

Should S. 1813 become law in its current form, experts note that the tariff provision could have adverse implications by encouraging lawmakers to keep or increase the earmarked tariffs – or to target other tariff lines for similar treatment – in order to fund new government spending. The provision could also discourage the reduction or elimination of earmarked tariff lines, unilaterally or via reciprocal trade negotiations, because such liberalization would de-fund specific government programs and have to be offset with equivalent spending cuts or revenue increases under congressional "PAYGO" rules (According to Sen. Baucus, the tariff diverting provision will provide USD 2.475 billion to the Highway Trust Fund from FY 2012 to FY 2014 alone). The measure could thus add additional barriers to the completion of US free trade agreements (FTAs) like the Trans-Pacific Partnership (TPP).

It is uncertain whether the tariff earmark provision approved by the Senate Finance Committee will become law. The text of S. 1813 is not yet final, and Senate passage is uncertain. Moreover, any Senate bill will have to be engrossed with the House version of the legislation, known as the "American Energy and Infrastructure Jobs Act of 2012" (H.R. 7), which does not contain the tariff provision, before it can become law.

Senate Majority Leader Harry Reid (D-NV) has scheduled a cloture vote for S. 1813 on February 9, 2012. If cloture is granted, the Senate may limit consideration of the bill to an additional 30 hours of debate. We will continue to monitor the status of the legislation as it proceeds through both chambers.

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Obama Administration Emphasizes Enforcement, Inspection and Reorganization in FY 2013 Budget

On February 13, 2012, the Obama Administration released its proposed budget for fiscal year (FY) 2013, which puts forth changes in budgetary allocations for several trade-related agencies. These suggestions focus on such areas as enforcement of US and multilateral trade laws, import inspection, the reorganization of several trade-related government agencies, US export promotion, farm support and worker aid.

We detail below key trade-related aspects of the proposed FY 2013 budget:

- **Enforcement.** In line with President Obama's January 24, 2012 State of the Union (SOTU) address, the FY 2013 proposed budget seeks additional funds for the Interagency Trade Enforcement Center (ITEC) to bolster US efforts in combating perceived unfair trading practices, particularly subsidies given on the part of China. Under the umbrella of ITEC, new funds would be allocated to the Department of Commerce (DOC) International Trade Administration (ITA) which, in turn, would finance activities of the Office of China Compliance and the China Countervailing Duty Group. The Office of the United States Trade Representative (USTR) would also receive new funds, although much less than those allocated to DOC ITA, to engage in ITEC activities. Obama Administration officials assert that 50 to 60 trade litigators, researchers and analysts will staff ITEC in both the United States and abroad;

- **Inspection.** Also reflecting the 2012 SOTU, the FY 2013 proposed budget seeks additional funds "to improve food safety and medical product imports to the United States through greater [Food and Drug Administration (FDA)] presence" in such countries as China. The FY 2013 budget also proposes new user fee programs under the FDA to fund elements of the Food Safety Modernization Act. Furthermore, the FY 2013 budget seeks additional funds for Customs and Border Protection (CBP) inspection activities to combat trade in unsafe, counterfeit and pirated goods. Homeland Security Secretary Janet Napolitano asserts that this additional CBP outlay "will transform IPR risk-assessment, increase efficiency and support US economic competitiveness;"

- **Reorganization.** The FY 2013 proposed budget seeks to consolidate six primary business and trade-related agencies into one department to carry out the "government's core trade and competitiveness functions," which President Obama put forward in the 2012 SOTU. This single department would absorb USTR, DOC, Small Business Administration (SBA), Export-Import Bank (X-M Bank), Overseas Private Investment Corporation (OPIC) and the Trade and Development Agency (USTDA), as well as parts of the Departments of Agriculture, Treasury, and Labor and the National Science Foundation. The FY 2013 proposed budget asserts that this single department "could better implement a strong, pro-growth policy" with "aligned and deployed trade promotion resources, strengthened trade enforcement capacity, streamlined export finance programs and enhanced focus on investment in the United States;"

- **Export Promotion.** The FY 2013 proposed budget seeks additional funds for the X-M Bank, USTDA and OPIC to promote US exports, particularly from small businesses. The budget also contemplates new funds for DOC ITA's export promotion activities although much of this outlay overlaps with the budget's enforcement proposals, *e.g.*, enforcing US and international trade rules and removing foreign trade barriers.

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The budget also seeks new funds for DOC Bureau of Industry and Security (DOC BIS) to "meet increased responsibilities under the [Obama] Administration's Export Control Reform Initiative […] to advance [US] national security and economic competiveness;"

- **Farm Bill.** The FY 2013 proposed budget seeks to eliminate direct farm payments and reduce subsidies to crop insurance companies. However, the budget does leave intact counter-cyclical payments (CCPs), which Obama Administration officials expect to increase over the coming years. Economists consider direct payments less trade-distorting than CCPs. The budget also leaves intact the guaranteed loan amount for the General Sales Manager (GSM) 102 Program, which Brazil successfully argued before the World Trade Organization (WTO) provides US cotton producers with prohibited export subsidies; and

- **Worker Aid.** FY 2013 proposed budget seeks new funds for the Department of Labor's Trade Adjustment Assistance (TAA) program, which was enlarged in October 2011 as part of the "package deal" to pass through Congress the free trade agreements between the United States and Korea, Colombia and Panama. Although TAA was originally meant to aid workers displaced by trade liberalization, the budget asserts that "it is increasingly difficult to distinguish between trade, technology, outsourcing, consumer trends and other economic shifts that cause [worker] displacement," such that it "proposes a universal core set of services where the focus is on helping all dislocated workers find new jobs."

Reaction to the trade-related items in the proposed FY 2013 budget has been mixed. The proposed allocation for ITEC was generally well received among both Democrats and Republicans, including House Ways and Means Committee Chairman Dave Camp (R-MI), House Democratic Whip Steny Hoyer (D-MD), and Senate Finance Committee Ranking Member Orrin Hatch (R-UT) and Sen. Sherrod Brown (D-OH). Experts note, however, that rhetoric on trade enforcement against China will likely increase in campaigns during the months leading up to the November 2012 presidential and legislative elections if the US jobs market remains sluggish. Allegedly unfair Chinese trading practices are often blamed for US job losses, as can be observed in United Steel Workers President Leo Gerard's reaction to the budget in which he lauds the Obama Administration's efforts to increase enforcement activities.

In contrast to ITEC, the budget's proposal to reorganize several trade-related agencies was not received well, particularly by Republican lawmakers who allege that doing so would diminish the effectiveness of such bodies as USTR. Worth noting is that the proposed FY 2013 budget will unlikely pass unscathed through Congress, as it reflects the Obama Administration's policy priorities and budget strategy. It is therefore unclear whether any of the Obama Administration's budget proposals on trade will come to be, although strong support for bolstered enforcement activities indicates that ITEC, or some version of the same, will likely become a reality.

ITC Commissioners Hold Roundtable to Discuss Trends in Petitions, Investigations and Other Commission Activity

Summary

On February 15, 2012, the American Bar Association (ABA) held a forum titled "Fourth Annual Forum on Section 337 and Other Developments at the US International Trade Commission (ITC)," which featured a roundtable

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discussion with five ITC Commissioners. The roundtable broached a wide range of topics from general discussions on investigations pertaining to patent infringement, dumping and countervailable subsidies to specific discussions pertaining to on-site company visits and ITC methods for data collection and extraction.

Analysis

The forum featured individual presentations from five of the six current ITC Commissioners. The key portions of each Commissioner's presentation are summarized as follows:

- **Commissioner Deanna Tanner Okun (Chairman).** Chairman Okun gave a general overview on the landscape of the ITC's current activities, and noted that the ITC operates within "a much different world" given the changes it has undergone during her twelve years as a Commissioner. A major change, according to Chairman Okun, has been the "dramatic increase" in the number of patent infringement investigations brought before the ITC. In order to meet the demands presented with the increase in workload, Chairman Okun noted the increase in staffing for Administrative Law Judges and the Office of the General Counsel. In addition to an increase in patent infringement complaints, Chairman Okun also referred to antidumping and countervailing duty petitions, and indicated that the number of petitions filed in 2011 brought the total for the filings of such petitions "back to historical levels." Chairman Okun also noted that the ITC has solicited bids for the construction of a third courtroom, and expects construction to begin in spring 2012 and conclude in fall 2012. Chairman Okun concluded her remarks with a discussion on the outlook of the ITC's budget, and opined that, if cuts are made to the proposed budget, the ITC may need to request that Congress assign it fewer responsibilities;

- **Commissioner Irving Williamson (Vice Chairman).** Vice Chairman Williamson focused his remarks on the recent amendments to the ITC Rules of Practice and Procedure concerning the gathering of information pertaining to public interest issues arising from the filing of patent infringement complaints. According to Vice Chairman Williamson, a working group was created in 2009 to develop methods to better achieve the goal of determining the degree to which public interest issues exist in such investigations. A key recommendation from the group, detailed Vice Chairman Williamson, was to reverse ITC procedure and thereby collect information pertaining to public interest issues at the beginning of a proceeding as opposed to the previous practice of collecting such information toward the end of an investigation. The final rule amending the Rules of Practice and Procedure were published in October 2011;

- **Commissioner Daniel Pearson.** Commissioner Pearson discussed on-site company visits by the Commissioners during antidumping and countervailing duty proceedings, and outlined the two key questions to consider when determining whether to schedule an on-site company visit. The first question is whether the visit would be useful to the proceeding. Examples of situations in which Commissioner Pearson deemed an on-site visit to be useful included: (i) when the Commission is unfamiliar with the product; (ii) when the case involves complicated like-product issues; and (iii) when it is necessary for the Commission to see how the product is used. The second question is how to ensure the Commission sees what it needs to during the on-site visit. Commissioner Pearson suggested: (i) providing the Commission with good maps and directions; (ii) clearly identifying at the outset the goals of the visit, particularly in the interest of determining what aspects of the visit could be skipped if time became an issue; and (iii) making the client available during the visit

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because, according to Commissioner Pearson, the individuals working on-site tend to be the most knowledgeable about the product;

- **Commissioner Shara Aranoff.** Commissioner Aranoff outlined the efforts undertaken by the ITC to streamline the collection of data, and indicated that the ITC's focus in this undertaking is to increase the use of electronic means to collect and analyze data. Commissioner Aranoff explained that, because the ITC seeks to obtain information that is not normally available, it is tasked with sending questionnaires to companies subject to various proceedings and investigations. While the amount of questionnaires sent generally varies on a case-by-case basis, Chairman Aranoff noted one congressionally mandated section 332[11] investigation which required the ITC to issue 9,000 questionnaires to US firms. In an effort to eliminate the costs and time delays associated with mailing such questionnaires, Chairman Aranoff explained that the ITC has "modernized" the process by emailing questionnaires to companies and firms; and

- **Commissioner Dean Pinkert.** Commissioner Pinkert focused his remarks on the historical statutory and administrative developments in patent infringement investigations. In noting the range of issues from one investigation to the next, Chairman Pinkert discussed various cases which provided unique circumstances for the Commission to consider in regard to domestic industry concerns, including: (i) whether prior litigation expenses were considered part of a company's licensing program; and (ii) how investments into a patent license portfolio affect the individual patents that comprise the portfolio.

Outlook

The ITC recently released statistical data pertaining to patent infringement cases for Fiscal Year 2011 which indicated that a record number of complaints were filed, which led to a record of 70 new investigations being instituted, up from 51 in the previous Fiscal Year. Chairman Okun opined that this trend would continue into 2012 based on the number of potential Complainants with whom the ITC has already met.

Experts note that the surge in patent infringement cases as well as the return to historical levels of antidumping and countervailing duty investigations is in line with the goals of the Obama Administration as detailed during the President's January 2012 State of the Union address in which he announced stepped-up trade enforcement against such countries as China. According to the Obama Administration, the purpose of these enforcement efforts is to "bring together resources and investigators from across the Federal Government to go after unfair trade practices in countries around the world." In particular, the Obama Administration indicates that trade enforcement efforts will focus on intellectual property rights (IPR) violations, such as patent infringement, and unfair support conferred upon foreign firms, such as countervailable subsidies. As both of these prongs pertain to issues under the ITC's purview, experts believe that the Obama Administration's focus on these specific matters further supports the likelihood of an increase in the workload of the ITC through 2012.

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[11] 332 Investigations are generally conducted by the ITC at the request of the United States Trade Representative (USTR), the House of Representatives Committee on Ways and Means or the Senate Committee on Finance. The final report represents the ITC's objective findings and independent analyses on the requested subject.

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FREE TRADE AGREEMENTS

Free Trade Agreement Highlights

US and Japan Hold High-Level Consultation on TPP

On February 7, 2012, US Trade Representative (USTR) and Japanese Ministry of Foreign Affairs (MOFA) officials held a high-level consultation in regard to Japan's interest in joining the Trans-Pacific Partnership (TPP). The consultation was co-chaired by Assistant USTR (AUSTR) for Japan, Korea and Asia-Pacific Economic Cooperation (APEC) Affairs Wendy Cutler and MOFA Director General for Economic Affairs Takeshi Yagi. According to USTR, US and Japanese officials have agreed to hold a follow-up working-level meeting from February 21-22, 2012 in Washington, DC.

The February 7 meeting was the first high-level consultation the two countries have held regarding the TPP since Japanese Prime Minister Yoshihiko Noda announced at the November 2011 APEC Leaders' Summit Japan's interest in joining the agreement. On December 7, 2011, USTR published a notice in the Federal Register (FR) seeking stakeholder comments in regard to Japan's interest. This comment period ended on January 13, 2012. While most stakeholder comments conveyed cautious support of Japan's possible accession to the TPP, several also expressed a strong desire for the Japanese government to resolve certain bilateral trading issues before acceding to the TPP.

According to USTR, the following was discussed during the February 7 consultation: (i) the status of Japan's domestic consultations regarding the TPP; (ii) the status of Japan's consultations with other TPP member countries in regard to its interest in acceding to the agreement; (iii) general and specific issues raised in response to USTR's December 7 request for comments on Japan's interest in the TPP. According to USTR, stakeholder comments raised "a range of sector-specific issues in the insurance, agriculture and automotive sectors, among others, in addition to cross-sectoral issues"; and (iv) Japan's readiness to engage with the United States on a range of issues going forward.

This high-level consultation comes less than two weeks after USTR's January 27, 2012 announcement of the outcomes of the US-Japan Economic Harmonization Initiative (EHI). The EHI is a bilateral initiative between the United States and Japan which started in February 2011 and aims to contribute to US and Japanese economic growth. According to USTR, the US-Japan Trade Principles for Information and Communication Technology Services ("ICT Principles Agreement"), to which the two countries agreed in January 2012, is one of the main outcomes of the EHI. In addition, USTR released the Record of Discussion of the EHI ("Record of Discussion"), which lists commitments the US and Japanese governments made through the EHI during 2011. According to the document, the Japanese government made commitments related to, *inter alia*: (i) intellectual property rights (IPR) protection; (ii) market access for medical devices and pharmaceuticals; (iii) advertising for cosmetics; and (iv) the review process for anti-monopoly mergers.

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As 2012 is a presidential election year in the United States, experts note that USTR, which works at the behest of the Obama Administration, is wary of appearing less than thorough in its assessment of Japan's readiness to join the TPP. As a result, sources note that US officials will likely engage Japanese officials on the issue of Japan's interest in joining TPP numerous times throughout 2012 before making any concrete commitment to support its accession. Officials will most likely engage on the relevant issues not only at high-level and working-level meetings, but also through the EHI. Sources opine that Japan will likely implement several measures in 2012 in order to address the market access issues raised in stakeholder comments. Nonetheless, experts note that it is unlikely that Japan will be welcomed into the TPP until after the November 2012 elections.

USTR and DOC Discuss TPP Accession with Mexican Secretary of Economy

United States Trade Representative (USTR) Ron Kirk met with Mexican Secretary of Economy (*Secretario de Economía* (SE)) Bruno Ferrari on February 8, 2012 in Washington to discuss Mexico's possible accession to the ongoing negotiations toward the Trans-Pacific Partnership (TPP). SE Ferrari subsequently met with Secretary of Commerce John Bryson, with whom SE Ferrari broached the subject of TPP and several issues relating to US-Mexico cross-border commerce, travel and economic growth. SE Ferrari also met with members of the US Business Coalition for TPP to discuss private sector concerns surrounding Mexico's possible accession to TPP.

According to an SE press release, SE Ferrari reiterated to USTR Kirk and Commerce Secretary Bryson Mexico's continued interest in becoming a full TPP negotiating member "as soon as possible." SE Ferrari pointed to the heightened interest among the Mexican government and private sector in expanding, through accession to TPP, Mexico's already extensive free trade agreement (FTA) network, and emphasized the importance of strengthening US-Mexico cross-border supply chains in order for US and Mexican firms to successfully compete in third country markets, particularly those of current TPP members.

During the November 2011 Asia-Pacific Economic Cooperation (APEC) Summit held in Hawaii, Japan, Canada and Mexico manifested interest in joining TPP, which will enter the eleventh round of negotiations in March 2012 in Australia. While in Washington, however, SE Ferrari urged USTR Kirk and Secretary Bryson to consider Mexico's bid for accession to TPP on its own merits and separately from that of Japan and Canada. In this regard, SE Ferrari asserted that neither Japan nor Canada "has [Mexico's] momentum nor are they as prepared as Mexico [for TPP accession]."

SE Ferrari further noted during the meetings with USTR Kirk and Secretary Bryson that Mexico has already engaged the United States, outside the context of TPP, on several competitiveness-related issues the United States is currently pushing in the context of the TPP negotiations, namely: (i) trade facilitation, through the US-Mexico 21st Century Border Executive Steering Committee (ESC); and (ii) regulatory coherence, through the US-Mexico High-Level Regulatory Cooperation Council (HLRCC). He confirmed Mexico's commitment to deepening this engagement, in addition to fostering rapprochement between the US and Mexican private sectors' respective positions toward Mexico's accession bid.

Since the November 2011 APEC Summit, Mexican trade officials have been meeting with individual TPP members to advocate Mexico's accession bid and hear these members' concerns over the possible expansion of

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the Agreement's membership. Existing TPP members have generally welcomed Mexico's desire to join, in addition to that of Japan and Canada, but have generally put forth the caveat that any potential entrant to the agreement must: (i) not attempt to reopen already negotiated texts; (ii) agree to the high-standard ambition and scope of the agreement; and (iii) not slow the pace of current negotiations. Nonetheless, the looming November 2012 legislative and presidential elections in the United States, the campaigns for which will unlikely shed a positive light on trade liberalization, and an already full TPP negotiating agenda make the accession of Japan, Canada and Mexico during 2012 unlikely.

DOC Publishes Final Rule on Zeroing

On February 14, 2012, the Department of Commerce (DOC) published in the Federal Register (FR) a final rule titled "Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings." Once enacted, the rule will: (i) end DOC's normal practice of disregarding (or "zeroing") negative dumping margins when calculating weighted-average dumping margins and importer-specific assessment rates in AD administrative reviews, new shipper reviews and expedited reviews (collectively, "reviews"); (ii) end DOC's practice of zeroing in original AD investigations when using transaction-to-transaction comparisons; and (iii) ensure that the weighted-average dumping margins that DOC relies upon in five-year AD sunset reviews are consistent with World Trade Organization (WTO) rules. The final rule will become effective in 60 days, or on April 17, 2012.

The most significant change relates to DOC's practice in AD reviews. DOC's normal practice in AD reviews has been to derive dumping margins by comparing monthly weighted-average normal values to transaction-specific export prices, *i.e.,* an average-to-transaction comparison. DOC then weight-averages the dumping margins resulting from each comparison to derive a respondent's overall AD duty deposit rate and, also, the final AD duty assessment rates assigned to individual importers. Under its standard AD review calculation methodology, DOC disregards any negative dumping margins found, *i.e.,* comparisons for which the transaction-specific export price exceeds the monthly average normal value, and does not offset the results of dumped comparisons by the results of non-dumped comparisons.

According to DOC, the WTO has ruled in Dispute Settlement Body (DSB) cases brought against the United States by Mexico (DS344), the European Union (EU) (DS350 and DS294) and Japan (DS322) that certain aspects of DOC's AD calculation methodology in reviews are inconsistent with WTO rules. On February 6, 2012, the United States signed agreements with the EU and Japan to end their respective disputes. As part of the agreements, the United States promised that DOC would publish a final rule based off of DOC's December 28, 2010, proposed rule within 7 days after the agreements were signed *(Please see related W&C Trade Alert from February 6, 2012 and W&C Trade Report from February 8, 2012)*.

With respect to reviews, DOC's final rule is similar to its earlier proposed rule in that both make the following key changes to DOC's normal AD calculation methodology: (i) they both revise DOC's AD review calculation methodology to derive AD margins by comparing monthly weighted-average normal values to monthly weighted-average export prices, *i.e.,* an average-to-average comparison; and (ii) they both end DOC's practice of zeroing under this new AD review calculation methodology. Moreover, like the proposed rule, the final rule notes that

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DOC will use this calculation methodology "except where the Department determines that application of a different comparison method is more appropriate […]."

Elaborating on this exception, the final rule states that DOC will determine on a "case-by-case basis whether it is appropriate to use an alternative comparison methodology by examining the same criteria that [DOC] examines in original investigations pursuant to section 777A(d)(1)(A) and (B) of the [Tariff Act of 1930]." Experts note that this statement is meant to preserve DOC's discretion to use the average-to-transaction comparison method for AD reviews in cases where "targeted dumping" is found, *i.e.,* where DOC determines that the pattern of export prices for comparable merchandise differs significantly among purchasers, regions or periods of time. In targeted dumping cases where DOC decides to use the average-to-transaction comparison method, experts further note that DOC will likely zero, *i.e*., not offset the results of comparisons for which export price exceeded normal value. Sources note that DOC also preserved the option to continue zeroing in cases involving targeted dumping when it ended its normal practice of employing zeroing in original AD investigations (2006 FR 77722).

Although DOC has left open a loophole for targeted dumping cases, legal experts opine that DOC's final rule will likely end zeroing in the majority of dumping cases. Moreover, although the WTO has not yet addressed whether DOC's use of zeroing in targeted dumping cases violates WTO rules, experts note that the practice is not without controversy, and may be challenged before the WTO DSB sometime in the future.

USTR Announces Entry into Force Date for US-Korea FTA; Implementation Timeline for FTAs with Colombia and Panama Unclear

On February 21, 2012, the Office of the United States Trade Representative (USTR) issued a press release announcing that the US-Korea Free Trade Agreement (FTA) will enter into force on March 15, 2012. This announcement follows five rounds of meetings between US and Korean officials, the most recent of which took place February 19-20, 2012, during which the parties reviewed each other's laws and regulations related to the implementation of the Agreement.

Title I, Section 101 of the implementing legislation for the US-Korea FTA authorizes the President of the United States to exchange diplomatic notes with the government of Korea "at such a time as the President determines that Korea has taken measures necessary to comply with those provisions of the Agreement that are to take effect on the date on which the Agreement enters into force." The USTR press release notes that US and Korean officials have now exchanged diplomatic notes confirming that each party has fulfilled the legal obligations and procedures necessary for the Agreement to take effect.

USTR's announcement on the entry into force of the FTA with Korea signals the nearing end to the approximately 5-year effort to implement the Agreement. Concluded and signed in 2007 under then-President George W. Bush, congressional consideration of the Agreement's implementing legislation stalled due to a disagreement between the Bush Administration and Democratic House lawmakers over such disciplines contained in the FTA as intellectual property rights (IPR), labor and environment. Upon taking office in January 2009, the Obama Administration inherited the stalled Agreement and, reportedly under pressure from US organized labor,

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renegotiated several provisions under the FTA, including an elongated phase-out period for US tariffs on certain Korean automobiles. The implementing legislation for the US-Korea FTA, as well as the US-Panama and US-Colombia FTAs (which were signed in 2007 and 2006, respectively), were passed by Congress and enacted into US law in October 2011.

Although the US-Korea FTA will enter into force shortly, similar announcements with respect to the implementation of the US-Panama and US-Colombia FTAs have not been made. The USTR press release asserts that US officials are engaged in discussions with their Colombian and Panamanian counterparts in regard to the Agreements' implementation. Experts posit that the US-Colombia and US-Panama FTAs will likely enter into force in late 2012, although the Agreement with Panama could take effect as late as early 2013.

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MULTILATERAL

Multilateral Highlights

Vietnam and Korea Continue WTO Complaints Against US Zeroing Practice Despite Recent US Amendment Efforts

On February 22, 2012, Vietnam requested World Trade Organization (WTO) consultations with the United States over the US Department of Commerce's (DOC) use of "zeroing"[12] in administrative reviews of anti-dumping (AD) duties applied to US imports of shrimp from Vietnam (DS429).[13] On the same day, the WTO established a Dispute Settlement Body (DSB) panel to review Korea's complaints against DOC's use of zeroing during administrative reviews of AD duties placed on US imports of steel products from Korea (DS420).[14] Vietnam and Korea's actions follow the United States' February 6, 2012 agreements with the European Union (EU) and Japan to resolve their respective zeroing-related WTO disputes (DS294, DS322, and DS350) and DOC's February 14, 2012 publication of a final rule regarding the use of zeroing (*see W&C Trade Report of February 8, 2012 and W&C Trade Alert of February 14, 2012*).

As part of their February 6 agreements with the EU and Japan, DOC published in the Federal Register (FR) on February 14 a final rule titled "Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings." The rule, which is scheduled to become effective on April 17, 2012, will: (i) end DOC's normal practice of zeroing in AD administrative reviews, new shipper reviews and expedited reviews (collectively, "reviews"); (ii) end DOC's practice of zeroing in original AD investigations when using transaction-to-transaction comparisons; and (iii) ensure that the weighted-average dumping margins that DOC relies upon in five-year AD sunset reviews are consistent with World Trade Organization (WTO) rules.

Legal experts note that although DOC's final rule will require significant changes to DOC's AD calculation methodology, it also: (i) does not mandate the review or revision of previously determined AD duty margins in which DOC used zeroing; (ii) provides a loophole that allows for the use of zeroing in cases involving "targeted dumping;"[15] and (iii) does not provide a resolution for several current WTO and US proceedings challenging

[12] Zeroing refers to the practice whereby an investigating authority sets to zero so-called "negative dumping margins," i.e., when the export price of the product is higher than the price in the exporting country, thus potentially inflating the overall average dumping margin, and leading to the imposition or maintenance of anti-dumping (AD) duties which may not otherwise apply.

[13] Vietnam's request for consultations is not limited to the practice of zeroing by the US, and includes additional claims relating to, *inter alia*, the disclosure obligations of DOC, as well as DOC's use of a limited selection of respondents.

[14] Korea has not made any claims other than those relating to DOC's use of zeroing.

[15] Targeted dumping refers to the practice whereby a country sells a product at less than fair value in one area of the United States but also sells the same product at more than fair value in another area.

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DOC's use of zeroing in AD cases prior to the February 14 final rule and allows for the possibility of future WTO proceedings challenging DOC's use of zeroing in targeted dumping cases.

Experts note that Vietnam and Korea's recent WTO actions confirm that recent US efforts have not gone far enough to quell US trading partners' opposition to DOC's use of zeroing. In the instance of both Vietnam and Korea, DOC used zeroing to calculate the respective AD duties prior to the February 14 final rule and, accordingly, neither calculation is subject to automatic review or revision.

In addition to Vietnam and Korea, experts opine that Brazil, in particular, as well as several other WTO members, may take further action to challenge the prospective nature of DOC's final rule. Experts opine that a number of WTO members are also considering whether to challenge the final rule's loophole for targeted dumping. These WTO members will likely wait to see whether DOC uses zeroing in its calculation of AD margins for US imports of refrigerators from Korea and Mexico, for which it has determined targeted dumping occurred, before deciding whether to initiate a WTO dispute regarding the loophole. DOC is expected to issue its final determination in March 2012.

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