WHITE & CASE

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General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

House and Senate Hold Hearings on Russia's Accession to the WTO and Granting Russia PNTR

Summary

On June 20 and 21, 2012, the House Ways and Means Committee and the Senate Finance Committee held hearings on Russia's accession to the World Trade Organization (WTO) and the extension of Permanent Normal Trade Relations (PNTR), *i.e.,* Most-Favored Nation (MFN) status, to Russia. Witnesses included US Trade Representative (USTR) Ron Kirk, US Department of Agriculture (USDA) Secretary Tom Vilsack, and Department of State (DOS) Deputy Secretary William Burns, among others. Lawmakers and witnesses discussed various trade-related issues including, among others: (i) intellectual property rights (IPR) protection; (ii) Russia's commitment to join the WTO Government Procurement Agreement (GPA); (iii) market access for US agricultural products; (iv) market access for US services; and (v) investment protection. They also discussed non-trade related concerns in the context of granting Russia PNTR, most notably legislation to address reported human rights issues in Russia.

Analysis

I. BACKGROUND

WTO members formally invited Russia to join the WTO in December 2011. According to Russia's WTO accession agreement, Russia has until July 23, 2012 to ratify its accession agreement. Russia will become a full WTO member 30 days after it notifies the WTO that it has ratified such accession agreement. In order for US firms to benefit from the tariff and non-tariff commitments Russia made as part of its WTO accession, Congress must pass and the President must enact legislation establishing PNTR with Russia. Granting Russia PNTR requires that Congress revoke the Jackson-Vanik Amendment's (under Title IV of the Trade Act of 1974) application to Russia.

After Russia was invited to join the WTO, lawmakers held their first hearings to discuss the need to revoke the application of the Jackson-Vanik amendment's application to Russia in March 2012 in both the House Foreign Affairs Committee and the Senate Finance Committee. Although a number of US-Russia trade issues were addressed at these hearings, non-trade related issues, such as Russia's allegedly poor human rights record, were also broached. In an effort to address human rights concerns in Russia, Sen. Ben Cardin (D-MD) introduced the "Sergei Magnitsky Rule of law Accountability Act of 2011" (S. 1039, the "Magnitsky bill"). Analysts

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suspect that this bill will be linked, either directly or indirectly, to legislation granting Russia PNTR. (*Please see W&C Trade Alert from April 20, 2012*).

On June 20, 2012, the House Ways and Means Committee held its first hearing specifically dedicated to the issue of granting Russia PNTR. On June 21, 2012, the Senate Finance Committee considered this issue for the second time. As private sector representatives -but no US government officials- testified at the first Senate Finance Committee hearing, in late May 2012, 11 Republican Senators requested that Senate Finance Committee Chairman Max Baucus (D-MT) hold an additional hearing at which US government officials could provide testimony on the issue. The discussion in both committees involved a wide range of issues as summarized below.

II. OPENING REMARKS

Below we summarize the opening remarks as delivered by the Senate Finance Committee and House Ways and Means Committee leadership:

- **House Ways and Means Chairman Dave Camp (R-MI).** In his opening remarks, Rep. Camp asserted that legislation granting Russia PNTR should be ~~c~~lean," *i.e.,* the legislation should not include any provisions other than those granting Russia PNTR. Although Rep. Camp claimed that granting Russia PNTR has clear economic benefits, he also addressed concerns over Russia's inadequate IPR protection and abuse of sanitary and phytosanitary (SPS) requirements on US agricultural exports. He also noted that non-trade related issues such as human rights issues in Russia should be discussed. Nonetheless, Rep. Camp cautioned that the extension of PNTR should not be delayed by non-trade related concerns as such a delay would not increase the United States' leverage in dealing with such concerns. Instead, the delay would cost US firms critical market share in Russia;

- **House Ways and Means Ranking Member Sander Levin (D-MI).** In his opening remarks, Rep. Levin noted that PNTR legislation should not only repeal the Jackson-Vanik amendment's application to Russia, but should also enact the Magnitsky bill. He further proposed attaching to PNTR legislation various provisions on specific trade issues relating to Russia, including IPR protection, Russia's commitment to join the WTO Information Technology Agreement (ITA), and the technical barriers imposed on US exports. Rep. Levin also suggested that the House delay floor action on the legislation to observe Russia's engagement with Syria in regard to its domestic conflict;

- **Senate Finance Chairman Max Baucus (D-MT).** In his opening remarks, Sen. Baucus noted that granting PNTR is ~~a~~ one-sided deal in America's favor." He entered into the record a letter from six former USTRs of both political parties urging the US government to grant PNTR to Russia by August 2012. He predicted that passing PNTR would double US exports to Russia within five years through lower tariffs for US aircraft and automotive exports, market access to Russia's telecommunications and banking sectors, and greater market access for US farmers and ranchers. However, he noted that economic concerns with Russia remain, including inadequate IPR protection and barriers to US agricultural exports. He also proposed adding the Magnitsky bill to the PNTR bill when they mark up the PNTR bill in the Senate Finance Committee; and

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- **Senate Finance Ranking Member Orrin Hatch (R-UT).** In his opening remarks, Sen. Hatch argued that PNTR legislation should not be a clean bill because Russia's commercial environment is permeated with investor disputes, rampant corruption, inadequate IPR protection, and market access barriers for US agricultural products. He criticized the Obama Administration for losing leverage by supporting the WTO in inviting Russia to join the Organization and for failing to devise a clear and consistent strategy with respect to Russia. Although he expressed his support for passing PNTR and helping US firms take advantage of Russia's WTO membership, he also called on the Congress to hold Russia accountable for its policies.

III. QUESTION AND ANSWER

Following opening remarks, Committee members and witnesses proceeded to a question and answer period. Below we paraphrase questions asked and answers given during the hearings in regard to certain key trade- and non-trade-related concerns:

- **IPR.** Lawmakers expressed particular concern regarding Russia's ability to provide IPR protection and enforcement during the House hearing. Rep. Camp raised the specific issue of internet piracy in Russia. In response to these concerns, USTR Kirk emphasized that Russia will enhance its IPR protection after becoming a formal WTO member because Russia will have to comply with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (~~"~~TRIPS Agreement"). He also noted that the Obama Administration is currently engaged in separate negotiations with Russia on an IPR action plan to obtain further IPR commitments from Russia;

- **Russia's Commitment to Join the GPA.** Rep. Charles Boustany (R-LA) and Rep. Diane Black (R-TN) raised issues about Russia's commitment to join the WTO GPA. In response, USTR Kirk asserted that Russia agreed to join the GPA within four years from when it becomes a formal WTO member, and the Obama Administration has already begun working with Russia in this regard;

- **Market Access for Agricultural Products.** Secretary Vilsack urged lawmakers to grant Russia PNTR, noting that, in the case of US pork exports, delay would ~~"c~~ede potential market access for our pork products to global competitors." With respect to sanitary and phytosanitary (SPS) measures, Rep. Adrian Smith (R-NE) alleged that Russia uses non-science-based and arbitrary measures. USTR Kirk responded that, once Russia becomes a WTO member, it will be subject to the disciplines of the WTO SPS Agreement. He added that the Obama Administration intends to monitor Russia's SPS measures and challenge those that violate WTO rules. If Congress does not grant Russia PNTR, USTR Kirk warned that the United States would not be able to challenge such measures. In the Senate hearing, Sen. Charles Grassley (R-IA) asked whether the Obama Administration intends to sign an agreement on plant equivalency with Russia. A plant equivalency agreement will require treating US plants as equivalent to Russia's plants in regard to SPS standards. Normally, a country can achieve this agreement with an acceding country through a bilateral agreement or an exchange of letters. USTR Kirk asserted that the issue of plant equivalency is one of the top concerns and that the Obama Administration will have more tools to address this issue once Russia becomes a WTO member;

- **Market Access for Services.** Rep. Lynn Jenkins (R-KS) asked whether WTO membership would provide US services with better access to the Russian market. USTR Kirk noted that, although US services providers

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currently have no market access in Russia, if Congress grants PNTR to Russia, such providers will have access to the fully liberalized services markets of Russia, which includes banking, financial services, telecommunication, and audiovisual services. Rep. Black asked which US services sectors stand to benefit the most from greater access to Russia's market. USTR Kirk indicated that some US services providers, including those that provide architectural, financial, and engineering related services, will likely find tremendous opportunities for growth in Russia;

- **Investment Protection.** Rep. Kenny Merchant (R-TX) asked whether granting PNTR would enhance protection for US investors in Russia. In response, Ambassador Burns asserted that, although WTO rules provide some investment protection, full protection would not be available until a new bilateral investment treaty (BIT) is negotiated between the United States and Russia. USTR and DOS released the new Model BIT in April 2012. He added that Russia committed under its WTO accession that it would be open to greater investment and allow US investors 100 percent ownership of companies in Russia. Rep. Richard Neal (D-MA) also raised concerns over the expropriation of US investments in the Yukos oil firm. Yukos had been the most successful company in Russia before the Russian government froze its assets in 2003. According to Rep. Neal, US investment across Russia totaled USD 12 billion. Ambassador Burns expressed his support of US investor interests, and asserted that the US government is closely monitoring issues related to international arbitration and has prioritized the defense of US claimants; and

- **Non-Trade Related Issues.** Discussions in both the House and Senate also covered non-trade-related concerns, including, *inter alia*: (i) the strength of Russia's rule of law; (ii) human rights issues in Russia; (iii) the threat of Russia-launched cyber-attacks; and (iv) Russia's relations with Syria and Iran. It is important to note, however, that both USTR Kirk and Ambassador Burns recommended adopting a clean bill for granting PNTR to Russia and addressing these non-trade related issues separately.

Outlook

Although most lawmakers agree that the United States should extend PNTR to Russia, the content of the legislation and timing for doing so remains unclear. The Senate Foreign Relations Committee approved the Magnitsky bill on June 26, 2012. Sen. Baucus has stated that he is willing to attach the Magnitsky bill to legislation granting PNTR to Russia when the Senate Finance Committee marks up PNTR legislation. In contrast, Obama Administration officials and several Republican members of the House Ways and Means Committee, including Rep. Camp, have expressed their preference for passing a clean bill.

In addition to the Magnitsky bill, lawmakers are also considering whether to pass the "Russian World Trade Organization Commitments Act" (S. 3327), which was introduced on June 21, 2012 by Sen. Sherrod Brown (D-OH), in conjunction with PNTR legislation. If passed, the bill would: (i) require USTR to issue an annual public report assessing Russia's efforts to fulfill its WTO commitments; and (ii) allow members of the House Ways and Means and Senate Finance Committees to request that USTR take action regarding any of Russia's particular WTO commitments. USTR would be required to respond to such a request within 15 days, explaining what action it will take or why it will not take action.

With respect to timing, Russia is expected to become a full WTO member by August 2012. Sen. Baucus has suggested that the Senate Finance Committee will mark up PNTR legislation in July 2012. Sources contend that

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the House will likely wait until the Senate has passed PNTR legislation to move on the legislation. If lawmakers do not pass PNTR legislation before the August 2012 recess, the legislation may be held up until after the November 2012 elections, which would effectively negate Russia MFN market access for US firms in the meanwhile.

Treasury Declines Again to Label China a Currency Manipulator and Continues to Express Concern over Japanese FX Interventions

Summary

On May 25, 2012, the US Department of the Treasury ("Treasury") submitted to Congress its semi-annual report on international economic and exchange rate policies ("Treasury report" or "report"). The Treasury report found none of the United States' major trading partners, including China, to be manipulating its currency for the purpose of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade from the July 2011 through mid-May 2012 period. However, the report calls on China to achieve greater exchange rate flexibility of the *yuan* (or "RMB") and expresses continued concerns over Japanese intervention in foreign exchange markets to curb appreciation of the *yen*.

Analysis

I. THE REPORT'S FINDINGS

Under the 1988 Omnibus Trade and Competitiveness Act, Treasury is required to submit a report to Congress twice a year that determines "whether countries manipulate the rate of exchange between their currency and the US dollar (USD) for purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade." Although the law requires that Treasury release the report by April 15 and October 15 of each year, Treasury delayed the release of the latest report by more than a month. Some sources opine that Treasury delayed the release to avoid bilateral tensions with and secure stronger commitments from China during the May 2012 Strategic and Economic Dialogue (S&ED).

The Treasury report found none of the United States' major trading partners,[1] including China, to be manipulating its currency for the above-cited purposes during the period of analysis. In the case of China, the report considers various factors, including: (i) China's high foreign exchange reserves; (ii) the persistence of China's current account surplus; and (iii) the disparity between China's real effective exchange rate and "rapid productivity growth in the traded goods sector." After assessing these factors, the report declared that the real exchange rate of the RMB is "significantly undervalued and further appreciation of the RMB against the dollar and other major currencies is warranted." However, such undervaluation proved insufficient for Treasury to label China a "currency manipulator." That the Treasury report stopped short of labeling China a "currency manipulator" allows the Obama Administration to avoid taking the steps prescribed in Section 3004 (b) of the 1988 Omnibus Trade

[1] The report covers China, Japan, South Korea, the Euro area, Switzerland, the United Kingdom, Brazil, Canada, and Mexico.

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and Competitiveness Act, *i.e.*, the Treasury Secretary initiating negotiations with China, within the International Monetary Fund (IMF) or bilaterally, to ensure that China regularly and promptly adjusts the USD-RMB exchange rate to ~~p~~permit effective balance of payments adjustments and to eliminate any unfair advantage."

The report notes that, from June 2010, when China announced it had de-pegged the RMB from the USD, through May 2012, the RMB appreciated, in nominal terms, by 8 percent against the USD. After inflation adjustment, the RMB appreciated by 12.5 percent against USD over the same period. Since the start of 2012, the exchange rate of the RMB against the USD has remained relatively unchanged, depreciating by 0.36 percent. The report also notes that China's current account surplus continued to drop from 9.1 percent in 2008 of GDP to 2.8 percent in 2011. The current account surplus dropped to USD 24.7 billion in the first quarter of 2012. The report calls for continued structural reforms to assist with this reduction. China's foreign exchange reserve accumulation slowed to USD 11.7 billion in the fourth quarter of 2011, but increased again to USD 74.8 billion in the first quarter of 2012. As of March 2012, China held 3.3 trillion USD in foreign reserves, accounting for 45 percent of China's GDP in 2011.

The report notes that a meaningful appreciation of the RMB is in China's interest, and urges Chinese authorities to take needed policy steps toward greater exchange rate flexibility. Treasury asserts that RMB appreciation is a critical step China needs to take as part of its effort to achieve economic rebalancing and sustainable growth as a strong RMB will help increase domestic consumption by increasing purchasing power and encouraging household spending. This, in turn, will help to shift the economy away from export-led growth. While the report notes that further work is necessary, it welcomes the commitments China made at the May 2012 S&ED to, *inter alia*: (i) cut import tariffs on consumer goods; (ii) reduce taxes in the services sector; (iii) increase the dividend payout ratio of state-owned enterprises (SOEs); and (iv) promote more market-based interest rates. Of these commitments, the Treasury report insists that ~~r~~rebalancing cannot take place without foreign exchange rate reform."

In regard to Japan, Treasury's report notes that Japanese authorities intervened twice in 2011 (in August and October, respectively) to stem appreciation of the *yen*, in response to alleged ~~s~~speculative and disorderly exchange rate movements." Although these interventions temporarily depreciated the *yen* by approximately 3 percent, the *yen* continued to appreciate during the fourth quarter of 2011 and first quarter of 2012. However, in mid-February 2012, the *yen* depreciated by 7 percent because of, among other things, the expansion of its domestic asset purchase program and the announcement by the central bank of Japan of a 1 percent inflation goal. Although the *yen* started to appreciate again in March 2012, the Japanese government has not intervened. The report reiterates the importance that the Japanese government ~~t~~take fundamental and thoroughgoing steps to increase the dynamism of the domestic economy" in *lieu* of intervening in the foreign exchange market.

II. REACTION TO THE REPORT

Most, although not all, reaction to the report has been negative, with some lawmakers and industry groups expressing disappointment at Treasury's decision not to take a more firm position toward China:

- **US-China Business Council (USCBC) President John Frisbie** issued a statement supporting the Treasury report's findings. President Frisbie expressed his belief that Treasury made the right policy decision, as

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labeling China a ―currency manipulator" would not help achieve ―the goal of a fully convertible currency and market-driven exchange rate," and would adversely affect China's efforts in this regard;

- **Alliance for American Manufacturing (AAM)** expressed disappointment at Treasury's findings, and noted that the report would only hasten legislative measures to address with China's currency practices;

- **Sen. Charles Schumer (D-NY)** expressed his disappointment with Treasury's failure to label China a currency manipulator and emphasized that the US government should take more assertive action against China with respect to its currency policies; and

- **Sen. Sherrod Brown (D-OH)** expressed his disappointment with China's ―free pass" on currency manipulation. He warned of China's increasing efforts to support such sectors as clean and solar energy, advanced manufacturing and auto parts.

Outlook

Treasury's decision not to label any countries, including China, a currency manipulator in its latest report is not unexpected. Treasury has not labeled China a currency manipulator since 1994. Furthermore, the Obama Administration has expressed a clear preference for using bilateral engagement to address such bilateral trade issues.

Two weeks after the Treasury report's release, on June 8, 2012, David Lipton, First Deputy Managing Director of the IMF, stated that the IMF now assesses the RMB to be ―moderately undervalued" instead of ―significantly" or ―substantially" undervalued. The IMF's softened stance is seen as an acknowledgement of the recent decrease in China's current account surplus and corresponding appreciation of the RMB. Nonetheless, the extent to which this announcement will influence the US domestic debate over how to respond to China's currency policies, and other countries' currency policies in general, remains uncertain. From 2004 to 2010, legislation to address currency manipulation was introduced in every US election year. With the November 2012 legislative elections approaching quickly, lawmakers are likely to at least consider introducing such legislation again. In addition, several stakeholder groups, including such US-based manufacturers as the Alliance for American Manufacturing, as well as members of the House Auto caucus, have pushed the Obama Administration to include provisions in the Trans-Pacific Partnership (TPP) Agreement to address currency ―manipulation." Such provisions would likely be aimed at addressing the currency policies of the Japanese government, which has expressed interest in potentially joining the TPP negotiations, but could also apply to any future Chinese bid to join the Agreement.

US General Trade Policy Highlights

EU-US High Level Working Group on Jobs and Growth Releases Interim Report

On June 19, 2012, the European Union (EU)-United States High Level Working Group on Jobs and Growth (the ―Working Group") released its Interim Report (―Report"). According to the Report, the Working Group ―has made

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significant progress in analyzing jointly a wide range of potential options for expanding transatlantic trade and investment."

During the November 28, 2011 EU-US Summit, EU and US leaders directed the Transatlantic Economic Council (TEC) to establish the Working Group, which they tasked with identifying policies and measures to increase EU-US trade and investment to support job creation, economic growth and international competitiveness. The Working Group was directed to submit an interim report by June 2012 and make its final recommendations and conclusions by the end of 2012. *(Please see W&C Trade Alert from December 1, 2011).*

According to the Report, the Working Group has reached the preliminary conclusion that, of the various policies and measures considered, the one with the greatest potential to support jobs, growth and competitiveness is a comprehensive agreement between the EU and the United States that addresses both trade and investment issues. Although the Working Group has identified a number of areas in which the United States and the EU would likely agree in the context of such an agreement, it has also identified certain areas that require "further substantive work," *i.e.,* areas in which the United States and the EU will not easily agree. The Working Group will not make its final recommendation and conclusions until it carries out further research and analysis regarding these more contentious areas. If the Working Group is able to address these contentious areas in a "satisfactory" manner, it may recommend that the United States and the EU pursue a comprehensive agreement.

According to the Report, such a trade and investment agreement would be comprised of the following elements:

- **Tariffs.** Although the goal of the agreement would be to eliminate all duties on bilateral trade, the Report notes that the United States and the EU would "consider options" for the treatment of their respective sensitive sectors;

- **Regulatory Issues and Non-Tariff Barriers.** Both sides would seek to negotiate: (i) a "sanitary and phytosanitary (SPS)-plus" chapter that would, *inter alia*, establish a bilateral forum for dialogue on SPS issues; (ii) a "Technical Barriers to Trade (TBT)-plus" chapter that would, *inter alia*, establish a bilateral forum to address issues related to technical regulations, conformity assessment procedures and standards; (iii) disciplines regarding regulatory coherence and transparency for goods and services; and (iv) disciplines that promote additional regulatory compatibility within specific sectors;

- **Services.** Both sides would aim to negotiate new market access opportunities for services while also recognizing the sensitive nature of certain sectors. The Report notes that the agreement would also include commitments to provide, *inter alia*: (i) transparency; (ii) impartiality; and (iii) due process in regard to licensing and qualification requirements and procedures;

- **Investment.** According to the Report, investment issues within the agreement would be negotiated on the basis of the highest levels of liberalization and protection contemplated under the parties' respective free trade agreements (FTAs);

- **Procurement.** Both sides would aim to achieve greater access to government procurement opportunities at all levels of government, which is a departure from normal practice for the United States where state-level

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government procurement is often afforded special treatment. The agreement's government procurement provisions would be negotiated on the basis of national treatment;

- **Intellectual Property Rights (IPR).** The Report notes that it would not be feasible to reconcile, within the context of the EU-US trade and investment agreement currently being considered, certain IPR obligations included in past US and EU trade agreements, *e.g.*, geographical indicators is an area in which the EU's firm stance is unlikely compatible with that of the United States. Nonetheless, both parties would consider alternative ways in which to address IPR within the agreement; and

- **Rules.** Both sides would negotiate a set of rules to influence not only bilateral trade, but also third-country policies and multilateral trade agreements. These rules would relate to the following: (i) trade facilitation and customs; (ii) trade-related aspects of competition and state-owned enterprises (SOEs); (iii) trade-related aspects of labor and environment; (iv) horizontal provisions for small- and medium-sized enterprises (SMEs); (v) strengthening supply chains; and (vi) access to raw materials and energy.

In response to the release of the Report, President Obama, European Commissioner President Jose Manuel Barroso and European Council President Herman Van Rompuy issued on June 19, 2012 a ~~"J~~oint US-EU Statement on the High Level Working Group on Jobs and Growth" (~~"J~~oint Statement"). In their Joint Statement, the EU and US leaders noted that they were encouraged by the Report's analysis. They urged the Working Group to complete consultations with public and private stakeholders and submit its final recommendations and conclusions as quickly as possible.

The task with which the Working Group was charged reflects the interest in restructuring the EU-US trade relationship in such a way that both the EU and the United States overcome their current challenges of high levels of debt and unemployment as well as slow economic growth. Nonetheless, key information not included in the Report reveals the cautious nature with which the Working Group has conditionally supported the negotiation of a comprehensive agreement between the United States and the EU. For example, the Report does not specifically list the contentious areas in which further work is needed before the Working Group can submit its final recommendations and conclusion. Although the Report indicates that IPR is likely to be one of the contentious areas, experts note that other issues are likely to include government subsidies, market access for agricultural products and standards. These issues reflect longstanding trade irritants between the United States and the EU, and the Report provides no estimations regarding the likelihood that the Working Group will be able to address these issues in a ~~"sa~~tisfactory" manner before the end of 2012.

John Bryson Resigns as DOC Secretary

On June 21, 2012, President Obama issued a statement announcing that he has accepted John Bryson's resignation as Secretary of the Department of Commerce (DOC). According to the statement, Rebecca Blank will continue to serve as Acting DOC Secretary.

Mr. Bryson was sworn in as DOC Secretary on October 21, 2011. Following an automobile accident and treatment for seizures on June 9, 2012, he announced he would take a medical leave of absence starting on

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June 11, 2012. He called on Deputy DOC Secretary Rebecca Blank to serve as Acting DOC Secretary during his absence.

In his June 20, 2012 letter of resignation, Mr. Bryson stated that he has ~~c~~oncluded that the seizure [he] suffered on June 9 could be a distraction from [his] performance as Secretary." In his statement, President Obama thanked Mr. Bryson for his service. He further noted that Mr. Bryson will continue to serve on the President's Export Council.

Canada, Mexico Invited to Join TPP as Negotiating Partners

On June 18, 2012 the nine current negotiating partners of the Trans-Pacific Partnership Agreement (TPP)[2] extended an invitation to Mexico to join the negotiations towards the completion of the Agreement, ~~p~~ending successful completion of domestic procedures." A day later, on June 19, 2012, the nine partners invited Canada to also join the negotiations. These announcements took place on the sidelines of the Group of 20 (G-20) Summit in Los Cabos, Mexico.

Mexico and Canada, as well as Japan, formally expressed interest in joining the TPP negotiations at the November 2011 Asia-Pacific Economic Cooperation (APEC) Leaders' Summit. Following their statement of interest, the nine TPP negotiating members began bilateral consultations with each of the three countries to assess their readiness to join the negotiations. According to Office of the US Trade Representative (USTR), the decision to admit new members to the TPP could only be made ~~b~~y a consensus of the current members." Although many of the current members completed their consultations with the three countries in early 2012, the United States' approval proved to be the last hurdle Canada and Mexico had to overcome before they were welcomed as negotiating partners.

Japan is not expected to receive a similar invitation to join the TPP negotiations within the near term. Experts note that several outstanding US-Japan bilateral trade issues need to be resolved before the United States will support its entry into the Agreement. Furthermore, certain constituent groups within Japan remain opposed to the country's possible accession to the TPP.

News sources allege that on June 15, 2012 the United States offered to support Mexico and Canada's entry into the TPP on several conditions, including, *inter alia*: (i) that neither country would have the ability to reopen any existing agreements already made by the nine current partners, unless those nine partners agreed to revisit aspects to which they had previously agreed; and (ii) that neither country would have the ability to object, and thus keep open for additional negotiation, a chapter of the Agreement that the nine current members agree to close. That Canada and the United States came to an agreement regarding Canada's entry a day after Mexico was welcomed into the Agreement suggests that Canada pushed back against these conditions. Nonetheless, the specific conditions upon which each country was invited to join the TPP negotiations remain unclear.

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[2] The nine current members include the United States, Australia, New Zealand, Peru, Chile, Brunei, Vietnam, Singapore, and Malaysia.

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Although Trade Promotion Authority (TPA), a fast-track procedure by which Congress can pass the implementing legislation for free trade agreements (FTAs), expired in 2007, USTR issued press releases on June 18 and 19, 2012 that reveal the Obama Administration's intension to follow TPA procedure with respect to Canada and Mexico's accession to the TPP negotiations. More specifically, the press releases state the Obama Administration will now notify Congress of its intent to include Mexico and Canada in the TPP negotiations. Once USTR has sent such notification, a 90-day consultation period between the Obama Administration and Congress will commence regarding the two countries' accession to the Agreement. USTR also intends to publish a notice in the Federal Register (FR) requesting comments on Mexico and Canada's accession to the Agreement.

Mexico and Canada's invitations to join the TPP negotiations have been met with the approval of key lawmakers, including House Ways and Means Chairman Rep. Dave Camp (R-MI) and Ranking Member Sander Levin (D-MI), as well as private sector groups, including the Chamber of Commerce. The next round of TPP negotiations will be held July 2-10, 2012 in San Diego, California. Because the 90-day consultation period will not have concluded by the time this 13th round begins, USTR has confirmed that neither Canada nor Mexico will be permitted to participate in the negotiations.

Deputy USTR Punke Participates in China's WTO Trade Policy Review

On June 12, 2012, Deputy US Trade Representative (USTR) Michael Punke provided comments on China's trade and trade-related policies at China's fourth Trade Policy Review (TPR), which took place from June 12-14, 2012 at the World Trade Organization (WTO) headquarters in Geneva, Switzerland. TPRs are an exercise, mandated by the WTO Agreements, in which member countries' trade and trade-related policies are examined and evaluated at regular intervals. China, as one of the four WTO members with the largest world trade volume (the other three are the European Communities, the United States and Japan), is subject to a TPR every two years.

During a TPR, the Trade Policy Review Division under the WTO Secretariat prepares a report on the trade policies and practices of the member country under review with the cooperation of that member country. The member country also prepares a policy statement independently. Before the TPR meeting starts, the WTO Secretariat distributes these two documents. Either before or during the TPR meeting, other WTO member countries submit written questions or comments based on the two documents. During the TPR meeting, the member country under review addresses those questions and comments accordingly. As a final step, the WTO publishes the TPR documents, questions, comments, and responses.

In his comments made during China's fourth TPR, Ambassador Punke lauded China for the progress it has made in key areas of economic reform, but expressed the concern that, since 2006, China's progress towards further market liberalization has slowed. Since China's last TPR, held in 2010, Ambassador Punke noted that ~~t~~he trend toward state intervention in the Chinese economy has intensified." He cited a number of policy areas over which the United States has expressed particular concern, including:

- **Intellectual Property Rights (IPR)**. Ambassador Punke alleged that, despite various measures adopted by the Chinese government, IPR infringement in China remains rampant. He proposed gauging China's ability

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to protect and enforce IPR by measuring the extent to which legitimate goods and services purchased in large volumes around the world can also achieve ~~"r~~easonable" levels of sales in China;

- **Industrial Policies**. Ambassador Punke expressed concern over China's increasing use of industrial policies to support key industries and enterprises. These industrial policies include those that promote the following, among others: (i) the use of standards unique to China; (ii) discriminatory government procurement practices; (iii) investment restrictions; (iv) forced technology transfer; and (v) selective export rebates and restraints;

- **Services**. Ambassador Punke noted that US stakeholders have encountered various market access barriers to China's services industries, including, among others: (i) regulatory procedures that are discriminatory in nature; (ii) inconsistent and unpredictable licensing and operating requirements; and (iii) informal bans on market entry. Key affected sectors include telecommunications, banking, insurance, express delivery, electronic payment, and legal services;

- **Agriculture**. Ambassador Punke expressed disappointment that China has not completely aligned itself with the international standards and science-based rulemaking associated with sanitary and phytosanitary (SPS) measures. According to Ambassador Punke, Chinese authorities intervene, in an unpredictable manner, in the country's agricultural market. Adversely affected products include US exports of beef, poultry and pork;

- **Transparency.** Ambassador Punke called on the Chinese government to increase its transparency. Although he lauded China's efforts to solicit public comments for draft laws and regulations, he noted that such efforts have been insufficient. He also expressed frustration with China's failure to provide notifications, in a timely and comprehensive manner, to the WTO regarding: (i) subsidies, including those within the agricultural sector, as well as those distributed at the sub-central level; (ii) SPS measures and proposed standards; and (ii) technical regulations and conformity assessment processes;

- **Government Procurement**. Ambassador Punke noted that the United States appreciates China's commitment to submit a revised Government Procurement Agreement (GPA) accession offer before the last GPA committee meeting in 2012. The coverage of China's forthcoming offer remains a top concern of the United States; and

- **"Tit-for-Tat."** Ambassador Punke also noted that China has adopted a ~~"tit~~-for-tat" use of trade remedies in recent years, *i.e.*, the Chinese government seems to employ its domestic trade remedy procedures against US imports in response to actions taken by the United States under its own trade remedies laws. It is the opinion or the United States that such practices run afoul of WTO disciplines regarding the application of trade remedies. Ambassador Punke encouraged China to instead use the WTO's dispute settlement mechanism to resolve trade disputes.

During their TPR, China's Assistant Minister of Commerce Yu Jianhua warned WTO members not to politicize the process, implying that members such as the United States use the TPR to prove to constituents their commitment to addressing US-China trade irritants. Experts note that bilateral trade issues between the United States and China are more effectively addressed through dialogue and engagement, as well as the WTO dispute settlement mechanism. Nonetheless, Ambassador Punke's speech provides a concise overview of the key bilateral trade-related issues the United States hopes to address.

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Bilateral Trade Issues Discussed at Third Annual US-India Strategic Dialogue

On June 13, 2012, US Secretary of State Hilary Clinton and Indian Minister of External Affairs Shri S.M. Krishna met in Washington for the third annual US-India Strategic Dialogue (~~"D~~Dialogue"). At the conclusion of the Dialogue, the leaders released a ~~"J~~Joint Statement on the Third US-Strategic Dialogue," (~~"S~~Statement") in which they addressed several bilateral trade issues and initiatives.

During the Dialogue, the leaders discussed a broad range of bilateral issues, including, *inter alia*: (i) strategic cooperation; (ii) regional security; (iii) energy and climate; (iv) economics, trade and agriculture; (v) science and technology; and (vi) public health and innovation. In their Statement, the leaders agreed to take several steps to increase bilateral trade and investment flows. Most notably, they agreed to better facilitate the movement of professionals, investors and business travelers between the United States and India. Experts note that this commitment directly addresses India's concern over rising US visa costs for Indian professionals. In addition, the leaders welcomed their governments' decision to establish the following: (i) a Sustainable Manufacturing dialogue; and (ii) an Enhancing Cooperation in Standards dialogue. Both dialogues will take place under the US-India Commercial Dialogue.

Secretary Clinton and Minister Krishna also called for ~~"a~~an expeditious conclusion" to negotiations toward a US-India Bilateral Investment Treaty (BIT). India and the United States stalled their BIT negotiations in 2009 when the Obama Administration announced its intention to review the Model BIT. On April 20, 2012, USTR and the State Department (DOS) announced the conclusion of the review and released the 2012 Model BIT. *(Please see related W&C Trade Alert from April 23, 2012)*. Although no official press release was issued, the Office of the US Trade Representative (USTR) has confirmed that the United States and India held the third round of negotiations towards a BIT from June 4-6, 2012 in New Delhi.

It remains unclear how soon the United States and India will be able to conclude their negotiations towards a BIT. Nonetheless, officials from both countries will have the opportunity to take stock of the negotiations later this month. From June 27-28, 2012, Treasury Department (~~"T~~Treasury") Secretary Timothy Geithner will travel to India for the third US-India Economic and Financial Partnership meeting. According to Treasury, the meeting will address macroeconomic policy, the financial sector and infrastructure financing, among other issues.

APEC Trade Ministers Meet in Russia

From June 4-5, 2012, Asia Pacific Economic Cooperation (APEC) member country Trade Ministers[3] met in Kazan, Russia to discuss regional and multilateral trade issues. On the sidelines of this meeting, the Trade Ministers of countries party to the Trans-Pacific Partnership Agreement (TPP), all of which are also APEC

[3] APEC member countries include: Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Taiwan, Thailand, the United States and Vietnam

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members, met to discuss such Agreement. Although the Trade Ministers did not make any major announcements regarding the TPP, US officials expressed support for the issues discussed during the APEC Trade Ministers' meeting.

As the 2012 APEC host, Russia identified four key priorities to direct the APEC Trade Ministers' annual meeting, including: (i) trade and investment liberalization, and regional economic integration; (ii) strengthening food security; (iii) establishing reliable supply chains; and (iv) intensive cooperation to foster innovative growth. As a result of their June 4-5 meeting, the Ministers released several documents, including the ~~"~~2012 Meeting of APEC Ministers Responsible for Trade," (~~"~~Statement") in which they addressed the above-mentioned priority areas:

- **Trade and Investment Liberalization, and Regional Economic Integration**. Among other things, the Trade Ministers: (i) reaffirmed their commitment to play a leadership role in launching negotiations that expand the product coverage and membership of the World Trade Organization (WTO) Information Technology Agreement (ITA); (ii) encouraged efforts to liberalize trade in services; and (iii) agreed to dedicate ~~"~~all available resources" to develop, by the APEC Leaders' Summit in September 2012, a list of environmental goods on which APEC countries will reduce their applied tariff rates to 5 percent or less by the end of 2015;

- **Strengthening Food Security.** The Trade Ministers emphasized, *inter alia*: (i) the importance of an open and rules-based multilateral trading system to agricultural trade; and (ii) the need for APEC members to continue to harmonize their domestic regulations with international standards on sanitary and phytosanitary (SPS) measures, as well as technical regulations on food safety and quality;

- **Establishing Reliable Supply Chains.** The Trade Ministers noted their support for, *inter alia*: (i) discussions regarding trade facilitation; (ii) the facilitation of global supply chains and the participation of small- and medium-sized enterprises (SMEs) in global production chains; and (iii) the further facilitation, simplification and harmonization of customs procedures in APEC countries; and

- **Intensive Cooperation to Foster Innovative Growth.** The Trade Ministers, *inter alia*: (i) welcomed work done by APEC members to promote effective, non-discriminatory, and market-driven innovation policies, including the April 2012 APEC Conference on Innovation and Trade; and (ii) reaffirmed their commitment to strengthening the protection and enforcement of intellectual property rights (IPR).

On June 5, 2012 the TPP Trade Ministers gathered to discuss the current status of TPP negotiations. According to a June 5 press release issued by the Office of the US Trade Representative (USTR), the Ministers instructed their negotiators to complete as much of the legal text of the Agreement as possible during the 13th round of TPP negotiations, which is scheduled to take place in July 2012. TPP Trade Ministers also discussed their respective bilateral consultations with Japan, Mexico and Canada regarding these countries' interest in joining the Agreement. The Trade Ministers did not make any decisions regarding the possibly entry of any of the countries.

With respect to the outcomes of the APEC Trade Ministers' meeting, USTR Ron Kirk expressed satisfaction with the commitment to push for a finalized list of environmental goods by the APEC Leaders' Summit. This commitment stems from the pledge APEC Leaders made in November 2011 to develop, in 2012, a list of environmental goods for which APEC countries will reduce applied tariff rates to 5 percent or less. According to

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USTR Kirk, ―[c]lear convergence is emerging around a set of environmental goods." The APEC Leaders' Summit will be held from September 1-8, 2012 in Vladivostok, Russia. President Obama is not expected to attend the Summit because of the forthcoming November 2012 presidential election.

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CUSTOMS

US Department of Commerce Announces Possible End to 1999 Russian Hot-Rolled Steel Suspension Agreement

Summary

The US Department of Commerce (DOC) announced on May 23, 2012 its preliminary plan to terminate a thirteen year-old agreement that suspended the 1998-1999 antidumping duty (AD) investigation of hot-rolled steel imports from the Russian Federation. DOC issued its decision as part of the preliminary results of an annual administrative review of Russian hot-rolled steel imports covered by the suspension agreement. The 1999 agreement established volume limits and minimum prices, or reference prices, for exports of Russian hot-rolled steel to the United States. DOC updates these reference prices quarterly by using the average unit values of ~~"f~~fairly traded" hot-rolled steel imports from countries not subject to AD or countervailing duty orders. In its May 23 announcement, DOC concluded the 1999 suspension agreement is no longer preventing ~~"p~~price undercutting" of domestic hot-rolled steel prices, including quarterly reference prices that now track below US producers' own raw material costs.

Analysis

Under US AD law, DOC is required to ensure that certain types of suspension agreements (including the type used in the Russian hot-rolled steel investigation) are preventing the ~~"s~~suppression or undercutting" of domestic prices. US producers of hot-rolled steel have argued in the administrative review proceeding that imports of Russian hot-rolled steel are undercutting domestic hot-rolled steel prices. Although DOC acknowledged the Russian government's overall compliance with the terms of the 1999 agreement, DOC officials preliminarily agreed that the suspension agreement is no longer preventing ~~"u~~undercutting." DOC plans to terminate the agreement if the price-undercutting issue cannot be resolved through negotiations with Russian government counterparts. According to DOC officials, this would be the first time DOC terminated a suspension agreement solely on the basis of a price-undercutting finding.

DOC officials expect US and Russian interested parties—including US steel producers Nucor, ArcelorMittal, US Steel, Gallatin, Steel Dynamics, SSAB, and Russian steel producers Severstal and Magnitogorsk—to file comments on the preliminary decision, with DOC slated to publish its final results within 120 days of the publication of the preliminary results (i.e., early October). The preliminary results also mention, however, that DOC is considering whether there is ~~"g~~good cause" to accelerate the issuance of the final results (i.e., before 120 days).

If DOC terminates the agreement, an AD order on hot-rolled steel from Russia would be imposed, with imports subject to AD cash deposit rates ranging from 73.59 percent to 184.56 percent. These were the rates calculated in the final determination of the currently suspended AD investigation. These high cash deposit requirements likely would lead to a sharp decline in US imports of Russian hot-rolled steel.

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DOC also revealed in the May 23 announcement its plan to direct US Customs to retroactively suspend liquidation of any imports of hot-rolled steel from Russia that enter US Customs territory up to 90 days prior to the date of publication of the final results. With an early October publication date, DOC could suspend the liquidation of Russian hot-rolled steel entering US Customs territory beginning in early July. Of course, if the DOC publishes the final decision earlier, the suspension of liquidation could occur earlier. These entries could then be subject to the collection of final AD duties. DOC does not have authority to impose suspension of liquidation or collect AD duties on entries made prior to the 90-day period. DOC officials acknowledge the May 23 preliminary results will raise many questions and arguments among US and Russian interested parties, including whether DOC can (i) suspend liquidation and require cash deposits or bonds on entries made 90 days prior to the final results, and (ii) collect final AD duties on any entries pre-dating the publication of the preliminary or final results.

Outlook

If DOC and Russian government officials reach an agreement to adjust the underlying methodology related to the hot-rolled steel reference prices, the minimum prices for exports of Russian hot-rolled steel to the United States likely will increase significantly. If an agreement is reached, Russian exporters could continue to ship hot-rolled steel to the United States in line with the higher reference prices, but without concern for suspension of liquidation, cash deposit requirements, or antidumping duty liability. Any new reference prices likely would be determined at the time of the final results in early October (or earlier), and would apply prospectively, although the effective date of any new reference prices is uncertain at this point.

Customs Highlights

DOC Issues Preliminary Determinations Aimed at Addressing "Double Counting"

On May 31, 2012, the Department of Commerce (DOC) released its Section 129 determinations for the four cases underlying the World Trade Organization (WTO) dispute in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379).[4] The Section 129 determinations detail how DOC aims to address the adverse WTO Appellate Body (AB) Report findings on so-called "double remedies"[5] in DS379. As a result of the adverse AB Report and consistent with Section 129 of the Uruguay Round Agreements (URAA), which governs DOC actions following adverse WTO Dispute Settlement Body findings, DOC is revising the final determinations in the four antidumping (AD) and countervailing duty (CVD) investigations examined under DS379.

[4] The four cases are (i) circular welded carbon quality steel pipe (CWP); (ii) certain new pneumatic off-the-road tires (OTR); (iii) light-walled rectangular pipe and tube (LWRP); and (iv) laminated woven sacks ("sacks").

[5] "Double remedies" refers to the double counting of overlapping CVD and AD rates that DOC applies to NME-origin goods where both AD and CVD orders are in place.

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The AB ruled in March 2011 that the imposition of double remedies in four AD and CVD cases involving China-origin imports is inconsistent with the Agreement on Subsidies and Countervailing Measures (SCM Agreement). To implement the AB findings on double remedies, DOC announced the following in its May 31 Section 129 determinations:

- **Type of Subsidy.** DOC will adjust its calculation methodology only in regard to input subsidies (*e.g.*, materials provided by the government to a producer at less than adequate remuneration (LTAR)), but will not do so in regard to other types of subsidies such as low-cost loans, land provided at LTAR, tax breaks or direct state-to-producer cash transfers, etc.; and

- **Pass Through.** DOC will adjust its calculation methodology only to the extent that the value of the subsidies impacted variable costs, (*i.e.*, input subsidies, were ~~"p~~passed through" to export prices, such that DOC will reduce the CVD rate by this pass-through rate, but will only do so for input subsidies).

In this regard, DOC's proposed path forward on addressing double remedies adjusts the calculation methodology in regard to only one of the many types of subsidies and, in addition, offsets only a fraction of the alleged double remedies.

Reaction to the Section 129 determinations from Chinese officials, producers and exporters, particularly those involved in the four cases disputed before the WTO DSB, has been muted thus far, although analysts note that these officials, producers and exporters are likely still in the process of evaluating the impact and implications of the determinations. It remains unclear whether DOC's proposed path forward on double remedies brings DOC's practice on concurrent AD/CVD investigations of NME-origin goods into compliance with US obligations under WTO agreements, particularly the SCM Agreement. It is unlikely that China will accept DOC's proposed methodology of offsetting the potential for double remedies with this offset limited to one type of subsidy as compliant with the AB's findings.

DOC's May 31 Section 129 determinations follow China's May 25 request for consultations with the United States under the WTO Dispute Settlement Understanding (DSU) in regard to 22 US CVD investigations which China alleges are inconsistent with WTO agreements. In its request for consultations, China cited several issues disputed under DS379 such as DOC's practice on: (i) public bodies; (ii) LTAR; (iii) export restraints; and (iv) and adverse facts available (*Please see W&C Trade Alert from May 31, 2012*). China's May 25 request for consultations did not specifically cite double remedies, although it did reserve China's right to challenge the United States on such an issue at a later time. Experts note that such a challenge is now more likely in light of DOC's Section 129 determinations.

CBP Announces Policy Change That Will Permit Importers to Rely on Transfer Pricing Policy to Determine Customs Value

On May 30, 2012, US Customs and Border Protection (CBP) announced a change in its position as to when a price determined pursuant to a transfer pricing policy may be used for purposes of determining transaction value for CBP purposes. It is now CBP's position that transaction value (*e.g.*, the invoice price) may be used for customs purposes even when based on a price determined pursuant to a formula set forth in a transfer pricing

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policy. CBP also clarified that post-importation adjustments can be used to revise customs value to receive refunds (or determine additional duties).

Transfer prices between US companies and their foreign affiliates give rise to issues under both income tax and customs valuation laws and regulations. Customs valuation laws differ from the tax requirements under which intercompany transfer prices are set. The preferred method of appraising imported merchandise for customs purposes is transaction value, which is defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States," plus certain statutorily prescribed additions to the extent they are not already included in the price. Transaction value between related parties is acceptable if the circumstances of the sale of the imported merchandise indicate that the relationship did not influence the price actually paid or payable ("arm's length"), or if the transaction value closely approximates "test values:' When value cannot be determined based on transaction value, imported goods must be valued according to one of five alternative bases of appraisement, according to a hierarchy. Importers generally prefer to use transaction value because it is less burdensome than the alternative bases of appraisement.

While customs valuation and income tax laws share the common goal of ensuring that related parties value their transactions at arm's-length prices, that an importer's transfer price satisfies Internal Revenue Service (IRS) requirements is not determinative of whether CBP will accept such price for customs valuation purposes. Tax rules often require a company to make transfer pricing adjustments after goods have been imported into the United States, which CBP has generally found problematic with respect to imported goods valued under the transaction value method. CBP has determined that the price must be fixed at the time of importation for transaction value to be an appropriate basis of appraisement. Although CBP has considered the fixed price rule to be satisfied when the price is determinable by an objective formula agreed upon prior to importation, it has held that any post-importation adjustments must be triggered by some event or occurrence over which neither the seller nor the buyer has any control.

CBP's change in policy takes a step toward converging views of customs valuation and tax authorities by allowing an importer to use transaction value for appraising imports from related-party sellers, even when the transfer prices are subject to post-importation adjustments. In new ruling letter HQ W548314, which revokes HQ 547654, CBP recognized that the events in a transfer pricing formula that trigger post-importation price adjustments are often, to some extent, within the control of the buyer and/or the seller. CBP determined that—notwithstanding that there may be some element of control on the part of the buyer and/or seller—an intercompany transfer pricing formula that provides for post-importation adjustments to the price is considered an objective formula. Consequently, transaction value may be used, and post-importation adjustments are to be taken into account in determining transaction value, if all five of the below criteria are met:

- A written "*Intercompany Transfer Pricing Determination Policy*" is in place prior to importation and the policy is prepared taking IRS code section 482 into account.
- The US taxpayer uses its transfer pricing policy in filing its income tax return, and any adjustments resulting from the transfer pricing policy are reported or used by the taxpayer in filing its income tax return.
- The company's transfer pricing policy specifies how the transfer price and any adjustments are determined with respect to all products covered by the transfer pricing policy for which the value is to be adjusted.

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- The company maintains and provides accounting details from its books and/or financial statements to support the claimed adjustments in the United States.

- No other conditions exist that may affect the acceptance of the transfer price by CBP.

CBP further stated in HQ W548314 that importers who want to apply the transaction value method where post-importation transfer pricing adjustments are made "are strongly encouraged" to use reconciliation to report the post-importation adjustments to CBP. Reconciliation allows an importer to file entry summaries with CBP with the best available information at the time of importation, and with the mutual understanding that certain elements, such as the declared value, remain outstanding. When the declared value is later determinable, the importer may file a reconciliation that provides the final and correct information.

Note that the above five factors address the "payable" aspect of the price actually paid or payable in transaction value, and whether post-importation adjustments are to be taken into account in determining transaction value. In order for transaction value to be considered an acceptable basis of appraisement, related parties must still separately demonstrate either that: (i) the circumstances of sale indicate that the relationship did not influence the price; or (ii) the transaction value of the imported merchandise closely approximates certain test values.

In order to benefit from CBP's policy change, importers should take steps to:

- Identify potential duty savings in the form of potential downward post-importation adjustments to the customs value.

- Apply to participate in CBP's reconciliation program in order to revise customs value to account for post-importation adjustments.

- Review their current customs valuation methodology to ensure they are in compliance with CBP requirements.

DOC Announces Change to AD Margin Calculation Methodology for China and Vietnam

On June 19, 2012, the Department of Commerce (~~D~~OC") published a Federal Register (FR) Notice entitled ~~M~~ethodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings" (77 FR 36481) (the ~~N~~otice"). The Notice details changes to the method by which DOC will calculate export price (~~E~~P") or constructed export price (~~C~~EP") in future antidumping (AD) proceedings involving certain non-market economies (NMEs), namely China and Vietnam. This change, which DOC published as a Proposed Rule in January 2011, will apply to any antidumping investigations or administrative reviews initiated after June 19, 2012.

According to Section 772(c)(2)(B) of the Tariff Act of 1930 (the ~~A~~ct"), as amended, DOC must reduce the EP or CEP used in the AD margin calculation by ~~t~~he amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." DOC's goal in making these deductions is to calculate normal values, net prices (EP and CEP) and, ultimately,

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AD margins that are tax neutral. Nonetheless, DOC's practice has been to only make such deductions in AD proceedings for market economies. In contrast, DOC has concluded that it cannot make these export tax and value-added tax (VAT) deductions to the EP and CEP in AD proceedings for NMEs for the following reasons: (i) DOC does not rely on prices and costs in NME countries; and (ii) government intervention in NMEs makes it difficult for DOC to determine if an NME exporter's prices includes export taxes or VAT. However, under pressure from domestic petitioning industries and labor unions, DOC has now changed its stance by adopting the change under the Notice.

Pursuant to its June 19 Notice, DOC will now consider deducting any non-rebated export taxes or VAT from EP or CEP in AD investigations and administrative reviews involving goods imported into the United States from China and Vietnam. According to DOC, the justification for the methodological change lies in the fact that the economies of China and Vietnam are now considered sufficiently different from Soviet-style economies, and thus should be subject to Section 772(c)(2)(B) of the Act. Moreover, DOC now applies the countervailing duty (CVD) law to China and Vietnam, which means DOC believes it can "identify and measure" Chinese government subsidies and tax programs. DOC indicated in its Notice that the change in the net price calculation methodology could apply to other NMEs in the future.

This methodological change was originally proposed as part of DOC's 2010-2011 "Trade Law Enforcement Package," the primary objective of which was to outline and then implement technical changes to the underlying practices employed in NME AD and CVD proceedings. The initiatives were put forward in response to the National Export Initiative (NEI), a plan initiated by President Obama in 2010 with the aim of doubling US exports by 2015. The change in the AD net price calculation methodology detailed in the June 19 Notice is one of the fourteen proposals included as part of the "Trade Law Enforcement Package."

Sources note that the deduction of non-rebated taxes and VAT will have the overall effect of lowering EP or CEP and, thus, increasing AD margins for China- and Vietnam-based exporters, assuming all other factors remain equal. Therefore, this change may adversely affect US industries that rely on inputs from China and Vietnam that are subject to AD proceedings. US domestic interested parties, on the other hand, support the change because they believe it will level the playing field for US manufacturers.

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