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In This Issue

United States..... 1
General Trade Policy..... 1
Customs..... 15

Table of Contents

UNITED STATES **1**

GENERAL TRADE POLICY **1**
USTR Releases 2012 Trade Policy Agenda 1
US General Trade Policy Highlights ***6***
DUSTR Sapiro: Time is Right to Expand WTO ITA 6
TPP Members Conclude 11th Round of Negotiations 7
USTR Requests WTO Consultations With China Regarding Export Restraints on Rare Earths 10
USTR Requests WTO Consultations With India Regarding Prohibitions on Certain US Agricultural Products 11
House, Senate Pass Legislation Regarding Imposition of CVDs on NMEs 12

CUSTOMS **15**
Customs Highlights ***15***
DOC Finds Countervailable Subsidies to Chinese Solar Cells in Preliminary CVD Determination; Companion AD Determination Forthcoming 15

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

UNITED STATES

GENERAL TRADE POLICY

USTR Releases 2012 Trade Policy Agenda

Summary

On March 1, 2012, the Office of the US Trade Representative (USTR) released the "2012 Trade Agenda and 2011 Annual Report of the President of the United States on the Trade Agreements Program" ("2012 Trade Agenda" or "Agenda" and "2011 Annual Report"). We provide below a brief overview of the 2011 Annual Report as well as details on and analysis of the 2012 Trade Agenda.

Analysis

I. BACKGROUND

Pursuant to Section 163 of the Trade Act of 1974, as amended, USTR released the 2012 Trade Agenda and 2011 Annual Report on March 1, 2012. Together, they discuss the Obama Administration's trade priorities for 2012 and present a summary of 2011 trade-related activities. According to the 2011 Annual Report, trade activities in 2011 included, *inter alia*: (i) the passage of implementing legislation for the free trade agreements (FTAs) between the United States and Colombia, Panama, and Korea; (ii) the completion of Russia's World Trade Organization (WTO) accession agreement; (iii) key WTO Dispute Settlement Body (DSB) developments; (iv) the presentation of the "broad outlines" of the Trans-Pacific Partnership (TPP); (v) the commitments made at the November 2011 Asia-Pacific Economic Cooperation (APEC) Leaders' Summit in Honolulu, Hawaii; (vi) the establishment of the US-European Union (EU) High-Level Working Group; and (vii) the exploration of new bilateral and regional trade initiatives in the Middle East and Africa.

According to the 2012 Trade Agenda, in 2012 the Obama Administration will build on the trade-related activities of 2011 by working to: (i) increase US exports and two-way trade; (ii) enforce US rights in the rules-based trading system; (iii) build and bolster international trading relationships; (iv) partner with developing countries; and (v) promote "inclusive" trade policy, *i.e.,* trade policy that relies on stakeholder participation and addresses such issues as labor rights, environmental protection and public health. Below we provide details on the specific items contemplated in the Agenda.

II. 2012 TRADE AGENDA ITEMS

According to the Agenda, the Obama Administration's trade policy priorities for 2012 include:

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
50 Raffles Place, #30-00, Singapore, 048623
sscoles@whitecase.com

Trade Rules Enforcement

The Agenda emphasizes the importance of trade rules enforcement as a means of increasing US competitiveness. The Agenda mentions numerous ways in which the Obama Administration will seek to enforce trade rules in 2012, most notably through the recently established International Trade Enforcement Center (ITEC). According to the Agenda, ITEC will use the "whole-of-government" approach to enforce US rights under international trade agreements and domestic trade laws. The Agenda states that ITEC's enforcement activities will target the most commercially-significant challenges facing US workers and businesses, as well as emerging international trade issues that are likely to have important implications for international trade.

The Agenda asserts that, in 2012, the United States will also enforce trade rules through active participation before the WTO DSB. In this regard, the United States will both initiate new disputes and continue to participate in those in which it is currently involved. Many of the United States' efforts at the DSB will involve China, including: (i) implementation of DS394, in which the WTO ruled that China's use of export restraints on raw materials is WTO-inconsistent; (ii) DS413, in which a WTO panel is currently addressing, at the United States' request, China's restrictions on the suppliers of electronic payment services (EPS); and (iii) disputes regarding the imposition of antidumping (AD) and countervailing duties (CVD), such as DS427 regarding China's imposition of duties on chicken broiler products from the United States and DS414 regarding China's imposition of duties on US steel exports.

Furthermore, the United States will seek to enforce intellectual property rights (IPR) protection through, *inter alia*: (i) the negotiation of a robust IPR chapter in TPP; (ii) the publication of "Special 301" reports on IPR protection and enforcement in key countries; and (iii) the publication of the Out-of-Cycle Review of Notorious Markets, which identifies physical and online markets that engage in counterfeit trade.

According to the Agenda, the Obama Administration will also work in 2012 to enforce US trading rights under certain trade agreements to which it is party, including but not limited to:

- **US-Canada Softwood Lumber Agreement (SLA).** The Agenda notes that the Obama Administration will promote and defend US trading rights under the SLA in 2012 as it continues to challenge the apparent under-pricing of public timber in the Canadian province of British Colombia;

- **Dominican Republic-Central America Free Trade Agreement (DR-CAFTA).** The Obama Administration will follow-up on its 2011 request for an arbital panel within CAFTA-DR to address Guatemala's alleged labor violations under the Agreement; and

- **US-Peru FTA.** The Obama Administration will work closely with the Peruvian government to ensure it implements its Forestry and Wildlife Law, and continues to carry out its commitments under the Forest Sector Annex of the US-Peru FTA.

FTAs

In 2012, the Obama Administration will work to secure entry into force of the three FTAs between the United States and Colombia, Panama and Korea. The Agenda does not mention the scheduled March 15, 2012 entry

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

into force date for the US-Korea FTA, which USTR announced on February 21, 2012, nor does it provide a timeline for the implementation of the agreements with Panama and Colombia. Instead, the Agenda states that USTR officials are "proceeding with a strong sense of urgency" in their efforts to coordinate closely with Congress, stakeholders and the governments of Korea, Colombia and Panama to ensure that the provisions specified in the agreements are met. In regard to the US-Colombia FTA, the Agenda notes that the Administration will also "maintain intensive engagement" with the Colombian government in support of its efforts, under the April 2011 Colombian Action Plan Related to Labor Rights ("Labor Action Plan"), to provide better protection of workers' rights in Colombia. Once the US-Korea FTA has been implemented, the Agenda states that the Obama Administration intends to request consultations under the 2008 US-Korea beef protocol to discuss its full application.

In addition to the implementation of the three FTAs, the Agenda further states that the Obama Administration will seek to conclude TPP negotiations in 2012. In connection with this goal, the Obama Administration will also explore issues related to Trade Promotional Authority (TPA), *i.e.,* congressional approval for fast-track congressional consideration of the completed TPP agreement. The Agenda further states that the Obama Administration will decide jointly with fellow TPP partners on the possible entry of Japan, Mexico and Canada to Agreement, although the Agenda does not provide a timeline along which this could occur. These and any other countries interested in joining the negotiations towards TPP must, according to the Agenda: (i) demonstrate that they are able to meet the TPP's high standards; and (ii) be prepared to address specific issues of concern.

Lastly, the Obama Administration intends to work with Congress in 2012 to secure implementing legislation for the February 2011 agreement on technical corrections to the textiles and apparel rules of origin (ROO) in DR-CAFTA.

WTO Negotiations and Accessions

The Agenda asserts that, in 2012, the Obama Administration plans to work with Congress to secure legislation to revoke the application of the Jackson-Vanik Amendment (under Title IV of the Trade Act of 1974) to Russia, and authorize President Obama to extend to the country Permanent Normal Trade Relations (PNTR), *i.e.,* most-favored nation (MFN) status. According to the Agenda, "timely passage of this legislation is essential" to ensuring that US firms secure key market share in Russia once it formally accedes to the WTO.

With respect to WTO negotiations, the Agenda reiterates that WTO members have acknowledged that the Doha Round of multilateral negotiations is at an impasse. According to the Agenda, the Obama Administration will work in 2012 to develop "fresh, credible approaches" to revitalizing the negotiations. In this regard, the United States will complement these multilateral negotiations with discussions at the plurilateral level. For example, the Agenda states the the Obama Administration plans to work toward enhancing the product scope of the WTO Information Technology Agreement (ITA) and exploring the option of a WTO services plurilateral.

Other Multilateral Fora

The Agenda puts forth that the United States will work with fellow APEC members to ensure implementation of the agreements made at the November 2011 APEC Leaders' Summit in Honolulu. These agreements include: (i) commitments regarding trade in environmental goods and services; (ii) a pledge to ensure market-driven, non-

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

discriminatory innovation policies; and (iii) the commitment to establish commercially useful *de minimus* values. The Agenda states that the Obama Administration will also work with APEC countries to: (i) facilitate trade in remanufactured goods; (ii) improve the regulatory environment of APEC countries; (iii) streamline import procedures for energy efficient vehicles; (iv) promote small business engagement in trade agreements; (v) combat illegal logging; and (vi) strengthen food safety efforts.

The Obama Administration, according to the Agenda, also intends to work with the Association of Southeast Asia Nations (ASEAN) on the following issues, *inter alia*: (i) digital connectivity; (ii) health care services; (iii) agribusiness; and (iv) consumer products.

Trade Preference Programs

The Agenda states that, in 2012, the Obama Administration will work to consider the future of the Generalized System of Preferences (GSP), which was reauthorized in 2011 until July 31, 2013. In particular, the Obama Administration may consider how GSP can better take into account the growing competitiveness of many GSP beneficiary countries. The Agenda states that the Obama Administration will also continue to ensure that all GSP beneficiary countries comply with eligibility requirements, carefully monitoring and evaluating labor conditions of such GSP beneficiary countries as Bangladesh, Georgia, Niger, Philippines, Sri Lanka and Uzebekistan.

The Obama Administration will reportedly work with Congress in 2012 to enact legislation related to the African Growth and Opportunity Act (AGOA), including the extension of AGOA's third country fabric provision until 2015, and the addition of South Sudan to the list of AGOA beneficiary countries. The Agenda also notes that, following up on its commitment made during the December 2011 WTO 8th Ministerial Conference, the Obama Administration will also work with Congress to expand duty-free, quota-free (DFQF) treatment for imports of Upland cotton from least developed countries (LDCs).

US-China Trade Relations

The Agenda states that the Obama Administration will "use all available tools" in 2012 to ensure that China follows international trade rules. Priority issues include, among others, China's: (i) discriminatory industrial policies; (ii) investment restrictions; (iii) accession to the WTO Government Procurement Agreement (GPA); and (iv) market access barriers in such areas as services and agricultural goods.

The Obama Administration will also reportedly seek to ensure that China follows through on trade-related commitments it has already made, including commitments: (i) to de-link "indigenous innovation" policies from government procurement; (ii) to end the use of illegal software by Chinese government entities; (iii) not to require foreign automakers to transfer technology to Chinese enterprises or establish Chinese brands to invest and sell electric vehicles in China, and to make foreign-invested enterprises eligible on an equal basis for incentive programs for electric vehicles; and (iv) to issue a domestic measure requiring all proposed trade- and economic-related administrative regulations and rules be published on the website of the Legislative Affairs Office of the State Council for a public comment period of at least 30 days.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

Other Potential Trade and Investment Initiatives

The Agenda states that, during 2012, the Obama Administration will engage with the EU through a High-Level Working Group on Jobs and Growth to identify new options for enhancing EU-US trade, including the reduction or elimination of tariff and non-tariff barriers to investment and trade in goods and services.

According to the Agenda, the Obama Administration will "work to conclude" the Model Bilateral Investment Treaty (BIT) review in 2012. The new Model BIT will seek to address the following, *inter alia*: (i) state-owned enterprises (SOEs); (ii) indigenous innovation policies; (iii) labor rights; and (iv) environmental protection. Once the Model BIT review has been concluded, the Agenda states that Obama Administration will seek to re-engage in BIT negotiations with China, India and Mauritius, and consider initiating BIT negotiations with Russia and the East African Community (EAC), among others.

Moreover, the Obama Administration will reportedly continue work to develop a Trade and Investment Partnership Initiative in the Middle East and North Africa. According to the Agenda, work on this Initiative in 2012 will build on efforts made in 2011 and early 2012 to develop a bilateral Action Plan with Egypt and reinvigorate the Trade and Investment Framework Agreement (TIFA) program with Tunisia. The Agenda also states that the Obama Administration will work to advance TIFAs with numerous African countries and the Caribbean Community. Lastly, according to the Agenda, the Obama Administration plans to work with member states of the Gulf Cooperation Council (GCC) to pursue trade and investment opportunities on a regional basis.

Outlook

The Obama Administration's 2012 Trade Agenda emphasizes many of the same priorities outlined in its trade agendas of prior years. For example, the Agenda maintains a strong focus on trade enforcement, a trend that has proven to be a cornerstone of President Obama's trade policy. Like previous trade agendas, the Agenda also asserts that increased US exports and heightened US participation in global supply chains is beneficial for economic growth and job creation.

While the Agenda lays out an ambitious trade agenda for 2012, it is important to note that it provides very few specific timelines for completing the agenda items contained therein. For example, the Agenda does not provide a deadline by which the Administration will decide on whether Canada, Mexico or Japan will join TPP or when it will seek TPA from Congress. Other trade agenda items, such as the completion of the Model BIT review, which has also been listed as a priority agenda item in the Obama Administration's previous trade agendas, are also not given a deadline for completion. Perhaps the most interesting exception to this trend is the Agenda's explicit statement that the Obama Administration intends to complete the negotiations of the TPP in 2012. In addition, the Agenda notes that "timely" extension of PNTR to Russia is important, although the Agenda fails to acknowledge that this status will most likely have to be granted by mid-2012 for US firms to gain key market share.

Experts note that one of the most important reasons the Agenda avoids assigning deadlines to these tasks is that 2012 is a congressional and presidential election year. As Congress and the Obama Administration will direct almost all efforts toward their respective campaigns by late summer, the Obama Administration has only the first

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

half of the year to accomplish key trade agenda items. To this extent, experts opine that most items on the 2012 Trade Agenda will not be completed this year and many may not even be initiated.

In another nod to the 2012 elections, the Agenda takes a tougher stance on China's allegedly unfair trading practices than in previous trade agendas with its claim that the Obama Administration will use "all available tools" to ensure that China follows international trade rules. Experts note that, in previous agendas, the Obama Administration has been more careful to emphasis its policy of using engagement and negotiation to manage the US-China trading relationship. However, as actions to counteract China's allegedly unfair trading practices enjoy bipartisan voter support, experts note that emboldened rhetoric, as exemplified within the Agenda, and supporting actions are to be expected during an election year.

US General Trade Policy Highlights

DUSTR Sapiro: Time is Right to Expand WTO ITA

The Obama Administration is currently working to build support for the expansion of the Information Technology Agreement (ITA). The ITA, which exists within the framework of the World Trade Organization (WTO), requires signatories to reduce import tariffs on a covered list of information technology goods to zero.

The negotiation of the ITA was completed in December 1996, at which point 29 WTO members signed the Agreement. Today, the ITA's membership extends to 73 WTO members, who together represent 97 percent of global trade in information technology products. Colombia is expected to join the Agreement within the near term. Russia also committed to joining the Agreement as part of its WTO accession agreement. Nonetheless, the product scope of the Agreement has not been expanded since 1996. Products such as flat panel displays, video game consoles and global positioning systems (GPS), all of which have been developed since 1996, are not covered by the Agreement. Moreover, a number of products that were already developed in 1996 are also not covered by the Agreement, including certain audio speakers, DVD players and video cameras.

In their 2011 Leaders Declaration, signed at the November 2011 Asia-Pacific Economic Cooperation (APEC) Leaders' Summit, APEC leaders, including the United States, agreed to play a leadership role in launching negotiations to expand the ITA in two ways: (i) expanded product coverage; and (ii) increased membership. In the Obama Administration's 2012 Trade Policy Agenda, the office of the US Trade Representative (USTR) committed to "following up" on this pledge in 2012. Other ITA signatories, namely the European Union (EU), have expressed opposition to the narrow focus of APEC's pledge, noting that any expansion of the ITA must also address the issue of non-tariff barriers (NTBs) in the context of trade in information technology products.

On March 15, 2012, the Information Technology & Innovation Foundation (ITIF) released the report "Boosting Exports, Jobs and Economic Growth by Expanding the ITA," which summarizes, *inter alia*, the potential benefits of expanded product coverage under the Agreement. If the ITA product list is expanded in the manner the

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com
Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

Information Technology Industry Council (ITIC) recommends,[1] the report estimates that the United States would be able to export an additional USD 2.8 billion worth of US-origin information technology goods annually and support the creation of an additional 60,000 jobs in the United States. The report further estimates that the expanded product coverage would benefit ITA members with developing economies, including India, Malaysia, the Philippines, Thailand and Vietnam. By lowering tariffs on a broader range of information technology products, these countries would be: (i) incentivized to use more recently developed information technology products that could play a key role in spurring economic growth; (ii) able to increase the productivity of all other industries within their economy; and (iii) able to increase their participation in global information technology supply chains.

In remarks made regarding the ITIF report, Deputy USTR (DUSTR) Miriam Sapiro noted that a number of factors, including advances in the information technology industry, the increased connectivity of consumer electronic devices and changes to the tariff classification nomenclature, lead her to believe that "the time for ITA participants to negotiate an expansion to the Agreement is right, but [ITA participants] have to frame the negotiations for success." Experts note that this statement reflects the United States' position that negotiations regarding an ITA expansion should not address any issues other than product coverage and membership. DUSTR Michael Punke further explained why the United States opposes addressing NTBs within an expanded ITA in remarks made to the US Chamber of Commerce and BusinessEurope on March 19, 2012. According to DUSTR Punke, ITA participants must define a negotiating scope that allows for rapid progress, tangible deliverables and reinforcement of the ITA membership. Industry officials note that, due to the complex nature of NTBs in the context of trade in information technology products, negotiations aimed at addressing these barriers would take years to complete. If tied to negotiations regarding expanded product coverage and membership, the NTB negotiations could delay the completion of an expanded ITA.

Taking steps towards an expanded ITA is among the Obama Administration's top WTO Doha Development Agenda-related priorities for 2012. The negotiation of a trade facilitation agreement and the exploration of a services plurilateral are other top priorities. Formal talks regarding an expanded ITA have not yet begun. For now, US officials are focused on building widespread consensus among ITA members that: (i) the ITA should be expanded within the near term; and (ii) an ITA expansion should focus solely on product coverage and membership.

TPP Members Conclude 11th Round of Negotiations

On March 9, 2012, the nine current members of the Trans-Pacific Partnership (TPP) concluded the 11th round of negotiations in Melbourne, Australia. Although they achieved progress on certain legal texts during the round, TPP members were unable to significantly advance several other legal texts as well as market access negotiations.

More than 20 working groups met during the 9-day negotiating round to discuss market access and legal texts, including those relating to, *inter alia*: (i) rules of origin (ROOs); (ii) customs; (iii) sanitary and phytosanitary (SPS)

[1] ITIC's recommendations are available here: http://www.regulations.gov/#!documentDetail;D=USTR-2011-0003-0014

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

measures; (iv) technical barriers to trade (TBTs); (v) trade remedies; (vi) government procurement; (vii) investment; (viii) non-conforming measures (NCMs); (ix) financial services; (x) competition and state-owned enterprises (SOEs); (xi) telecommunications; (xii) temporary entry; (xiii) electronic commerce ("e-commerce"); (xiv) intellectual property rights (IPR); (xv) labor rights; (xvi) environment; and (xvii) legal issues.

According to the office of the US Trade Representative (USTR), "notable progress" was achieved during the negotiations with respect to horizontal issues, including: (i) regulatory coherence; (ii) trade capacity building; (iii) better integration of small- and medium-sized enterprises (SMEs) into international trade; and (iv) supply chain linkages. In contrast, the negotiation of a number of other issues did not progress as quickly. These issues include, *inter alia*:

- **Market Access.** The United States and New Zealand have expressed opposing views with respect to market access for dairy products. New Zealand has indicated its interest in complete liberalization for dairy products, while the US dairy industry has warned US officials that a complete liberalization would cause a surge of New Zealand's dairy products into the US market. In addition, Australia and other TPP members with which the United States is already a free trade agreement (FTA) partner have expressed interest in re-negotiating their respective tariff schedules under these FTAs. US officials have responded that they will only engage in market access negotiations with those TPP members with which the United States is not already an FTA partner;

- **Textiles, Apparel and Footwear.** The United States and Vietnam have had difficulty negotiating tariff offers and ROOs for textiles, apparel and footwear. Vietnam is interested in ambitious tariff cuts on the part of the United States with respect to these goods and a "cut and sew"[2] ROO. US negotiators have tabled a "yarn forward"[3] ROO; however, their negotiating position is complicated by the differing stances among the US textile, apparel and footwear actors, *i.e.*, those US firms that import these goods support significant tariff reductions and oppose the yarn forward ROO, while US exporters of these goods have encouraged US officials to maintain high tariff levels on certain goods and push forward with the yarn forward ROO proposal;

- **Investor-State Dispute Settlement (ISDS) Mechanism.** Although Australian negotiators continue to oppose the inclusion of an ISDS mechanism in the agreement, US negotiators have refused to omit an ISDS mechanism in TPP, as they did for the US-Australia FTA. Several TPP members' private sector representatives expressed opposition to Australia's position during the 11th round. Most notably, the Australian Chamber of Commerce issued a press release noting its support for the inclusion of an ISDS mechanism in the TPP. On February 27, 2012, 30 US trade associations and the Council of the Americas also wrote a letter to President Obama warning that the absence of an ISDS mechanism could hinder the ability to achieve a strong final agreement; and

[2] A cut and sew ROO requires that basic production activities, such as the cutting of fabric or sewing of a garment, take place within the countries party to the trade agreement for the product to receive preferential treatment.

[3] A yarn forward ROO requires that the yarn production and all subsequent operations (*i.e.*, fabric production through apparel assembly) occur within the countries party to the trade agreement for the product to receive preferential treatment.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

- **US Intellectual Property Rights (IPR) Proposal.** Several TPP members, including New Zealand and Peru have expressed opposition with respect to the US proposal on IPR. Particularly controversial is the "Trade Enhancing Access to Medicines" (TEAM) text US negotiators tabled during the 8th round of TPP negotiations. Critics of the text assert that it would not provide affordable access to generic medicines as effectively as the approach taken by the "May 10 Agreement."[4] In addition, US negotiators have received pushback on provisions within the US IPR proposal that would require TPP countries to offer expanded copyright protections.

TPP members also addressed the US proposal on competition and disciplines for SOEs. Sources note that negotiations regarding this text were less heated than negotiations regarding the issues listed above. Although TPP members have been careful not to understate opposition from their domestic stakeholders, in a press release issued on March 8, 2012, USTR stated that TPP members were able to achieve a "productive exchange" on the issue.

With regard to trade in information technology products, Deputy USTR (DUSTR) Miriam Sapiro announced on March 15, 2012 that, during the 11th round, US negotiators tabled text that would require all current and future TPP members to join the World Trade Organization (WTO) Information Technology Agreement (ITA). The ITA's 73 signatory members provide duty-free treatment to imports of designated information technology products. Of the current TPP members, only Chile and Brunei have yet to accede to the WTO ITA.

In addition to discussing market access offers and the legal texts of the agreement, TPP members also reported on their consultations with Japan, Mexico and Canada, three countries that expressed interest in joining the agreement at the November 2011 Asia-Pacific Economic Cooperation (APEC) Leaders Summit. Although Brunei, Chile, Malaysia, Singapore, Peru and Vietnam have already determined whether to support the three countries' possible accessions, Australia, New Zealand and the United States have yet to make this determination. Experts opine that Japan, Mexico and Canada, and any other countries that announce interest in joining the TPP this year, are unlikely to be welcomed into the agreement before 2013.

Negotiating bottlenecks are only expected to intensify as TPP negotiations continue. Sources note that, because the negotiation of market access has encountered particular difficulties, the pace of negotiations regarding legal texts is now moving at a faster pace. US negotiators are also likely to hold a number of additional intercessional meetings to address specific issues.

The 12th round of TPP negotiations is scheduled for May 8-18, 2012 in Dallas, Texas. After the 12th round, TPP members will meet at the APEC Trade Ministers conference in June 2012. Although USTR claims that "TPP negotiators remain on track to conclude negotiation of a comprehensive, 21st century agreement," US officials have avoided stating that the negotiators are on track to conclude the agreement in 2012. The Obama

[4] 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 IPR provisions.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

Administration has urged TPP members to conclude the agreement within this timeframe. The upcoming November 2012 US elections and the increasing number of contentious issues related to the agreement lead experts to doubt whether negotiators can meet this goal.

USTR Requests WTO Consultations With China Regarding Export Restraints on Rare Earths

On March 13, 2012 US Trade Representative (USTR) Ron Kirk announced that the United States had requested World Trade Organization (WTO) consultations with China regarding their export restraints on various forms of rare earths, as well as tungsten and molybdenum (DS431). On the same day, the European Union (EU) and Japan also filed essentially identical consultation requests (DS432 and DS433, respectively). The materials at issue are used in the manufacturing of a number of goods, including hybrid car batteries, wind turbines, steel, and advanced electronics.

Pursuant to the WTO Dispute Settlement Understanding (DSU), the United States and China have 60 days to settle the dispute through consultations. If the parties fail to settle the dispute through consultations within the designated timeframe, the United States and the other complainants may request the WTO Dispute Settlement Body (DSB) to establish a panel to consider whether the contested measure is WTO-inconsistent.

According to the United States' Request for Consultations (WT/DS431/1), China imposes a number of export restraints on rare earth minerals, including: (i) export quotas; (ii) licensing requirements for the export of the materials; (iii) fees and formalities required to obtain the right to export the materials; (iv) a minimum price system for exports of the materials; and (v) procedures for the examination and approval of export contracts and export prices. The Request lists 31 laws and regulations through which the Chinese government allegedly imposes these export restraints, and also notes that there appear to be additional unpublished measures which impose further restrictions.

All three Requests state that the Chinese measures are inconsistent with, *inter alia,*: (i) Paragraph 11.3 of Part I of China's WTO Accession Protocol, which commits China to eliminating export duties for certain products; and (ii) Article XI of the General Agreement on Tariffs and Trade 1994 (GATT 1994), which generally prohibits restrictions on exports other than taxes, duties and charges. Other claims concern certain of China's obligations which relate to trading rights, fees and formalities, administrative procedures, and transparency.

USTR's March 13 press release on the US Request for Consultations notes that because China is a top producer of the materials at issue, the restrictive measures provide a means by which the Chinese government can increase the price of the exported materials while lowering their domestic price. According to USTR, the price differential gives Chinese producers that use the materials a significant advantage when competing against their US counterparts. The press release also states that these measures create an incentive for US and other non-Chinese downstream producers to move their operations to China.

The US Consultations Request was expected. USTR has expressed disapproval regarding China's export restraints on rare earths for several years. Moreover, in their September 2010 petition under Section 301 of the Trade Act of 1974, the United Steelworkers Union (USW) alleged that China contravenes WTO rules by

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

restricting exports of rare earths. The United States won an earlier WTO dispute against China's imposition of similar export restraints on certain raw materials (DS394), and many opined that it was the test case for purposes of the present challenge to rare earths.

In its press release, USTR portrays the United States' March 13 Request as the latest in a series of WTO disputes the United States has initiated against China, including those that challenge China's electronic payment services policies (DS413), wind power equipment subsidies (DS419) as well as duties imposed on grain oriented flat-rolled electrical steel (DS414) and chicken broiler products (DS427). The United States will likely file other WTO disputes against China in 2012. As the November 2012 elections approach, the Obama Administration is expected to work with lawmakers and US industry to pursue additional WTO disputes against China, in an effort to demonstrate to voters its ability to compel China to follow global trade rules

USTR Requests WTO Consultations With India Regarding Prohibitions on Certain US Agricultural Products

On March 6, 2012, US Trade Representative (USTR) Ron Kirk announced that the United States had requested World Trade Organization (WTO) consultations with India regarding import prohibitions on certain US agricultural products (DS430). According to USTR, India's claims that the ban is aimed at preventing the spread of avian influenza are unfounded.

Pursuant to the WTO Dispute Settlement Understanding (DSU), the United States and India have 60 days to settle the dispute through consultations. If the parties fail to settle the dispute through consultations within the designated timeframe, the United States may request the WTO Dispute Settlement Body (DSB) to establish a panel to consider whether the contested measure is WTO-inconsistent.

In its Request for Consultations (WT/DS430/1), the United States alleges that through the "Indian Livestock Importation Act" and orders issued by India's Department of Animal Husbandry, Dairying, and Fisheries (DAHD), India prohibits the importation of US agricultural products, including: (i) domestic and wild birds; (ii) day old chicks, ducks, turkeys, and other newly hatched avian species; (iii) unprocessed meat and meat products for Avian species, including domesticated and wild birds and poultry; (iv) hatching eggs; (v) eggs and egg products; (vi) un-processed feathers; (vii) live pigs; (viii) pathological material and biological products from birds; (ix) products of bird origin intended for use in animal feeding or agricultural or industrial use; and (x) semen of domestic and wild birds, including poultry.

According to the Request, India's importation prohibitions are inconsistent with: (i) the General Agreement on Tariffs and Trade 1994 (GATT 1994) Article I ("Most-Favored Nation" Treatment); (ii) GATT 1994 Article XI (General Prohibition on Quantitative Restrictions); and (iii) Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.5, 5.6, 5.7, 6.1, 6.2, 7 and Annex B, paragraphs 2, 5, and 6 of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), which, *inter alia*, require WTO members to take steps to ensure that regulations to protect human, animal or plant health are science-based and do not constitute a disguised form of protectionism.

USTR's March 6 press release on the new dispute notes that India has formally imposed a ban on the importation of these products since 2007 in an alleged effort to prevent the spread of avian influenza. However,

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

USTR stated that there has not been an outbreak of High Pathogenic Avian Influenza (HPAI) in the United States since 2004, and that international standards for avian-influenza control do not support the imposition of import bans due to detections of low pathogenic avian influenza (LPAI), which is the only kind of avian influenza found in the United States. According to the press release, the United States has repeatedly asked India to justify its ban, but to date India has not provided a valid, scientifically-based justification for its trade measures.

USTR's Request for Consultations with India regarding this issue was not without warning. On December 12, 2011 the USA Poultry and Egg Export Council (USAPEEC) and the National Chicken Council (NCC) encouraged USTR to request WTO consultations with India regarding the import prohibition on certain US agricultural products. On January 20, 2012, a bipartisan group of 46 lawmakers sent a letter to USTR Kirk urging him to consider bringing a legal challenge against India on the same issue. During a February 29, 2012 House Ways and Means Committee hearing, USTR Kirk acknowledged that the Obama Administration was "extraordinarily frustrated" with India's ban.

The USTR announcement comes one week after President Obama's February 28, 2012 Executive Order (EO) establishing the Interagency Trade Enforcement Center (ITEC). According to the EO, ITEC is meant to enhance the US government's ability to enforce US rights under international trade agreements, such as those agreed upon within the WTO. To that end, experts note that USTR's Request for Consultations with India is likely to be the first of a number of WTO disputes the Obama Administration initiates in 2012, as it seeks to prove to voters its commitment to ensuring that US trading partners "play by the rules."

House, Senate Pass Legislation Regarding Imposition of CVDs on NMEs

Both chambers of Congress have passed a bill "to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes," and President Obama is expected to sign the legislation into law this week. On March 5, 2012 the Senate passed by unanimous consent its version of the bill (S 2153), and a day later the House passed, by a vote of 370-39, identical legislation (HR 4105). The legislation was passed in response to the United States Court of Appeals for the Federal Circuit's (CAFC) December 19, 2011 ruling in *GPX International Tire Corp. v. United States* ("*GPX* case"), which found that the US Department of Commerce (DOC) lacks the legal authority to impose countervailing duties (CVD) on imports of merchandise from countries designated as "nonmarket economies" (NMEs) under the US antidumping law. China and Vietnam are the two remaining NME countries with significant exports to the United States.

In a January 18, 2012 letter to the Chairs and Ranking Members of the Senate Finance Committee and the House Ways and Means Committee, Commerce Secretary John Bryson and US Trade Representative (USTR) Ron Kirk asked the lawmakers to pass a bill amending US CVD law in response to the CAFC's December 19 ruling. The letter states that the Obama Administration was considering its appeal options, but that if the CAFC ruling were finalized without corrective legislation, DOC would be required to revoke the 24 existing CVD orders from China and Vietnam, which cover an annual value of USD 4.7 billion in goods trade, and 7 pending CVD petitions filed against the same two countries.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

Section 1 of HR 4105 and S 2153 essentially invalidates the CAFC ruling by amending Section 701 of the Tariff Act of 1930 to include an additional section specifically stating that CVDs can be applied to imports from NME countries. The legislation ensures that such an amendment applies to all CVD orders already in place by stating that it will apply to: (i) all legal challenges to DOC's previous practice of applying CVDs to NMEs; and (ii) all proceedings initiated on or after November 20, 2006. Sources note that November 21, 2006 is the date on which DOC initiated its first CVD case against imports from an NME (*Coated Free Sheet Paper from China*).

Section 2 of the legislation addresses the issue of "double counting," *i.e.*, the simultaneous application of both antidumping (AD) duties and CVDs on imported merchandise from NMEs. In such a scenario, subsides are offset twice for the same product, once by the NME antidumping duty and once by the countervailing duty. In March 2011, the World Trade Organization's (WTO) Appellate Body ruled in a dispute brought by China (DS379) that DOC's concurrent imposition of both AD and CVD on NME imports contravenes WTO rules because it risks double counting and because DOC did not act to remedy such a risk.

Section 2 of the bills states that, in the event a countervailable subsidy has been provided to imported merchandise from an NME country for which DOC has already made an AD determination, DOC shall reduce the AD duty (thus mitigating the risk of double counting) where two conditions are met: (i) the foreign exporter has demonstrated that such a countervailable subsidy has reduced the average price of its US imports of the subject merchandise; and (ii) DOC determines that it can "reasonably estimate" the extent to which the countervailable subsidy has increased the dumping margin for the merchandise. If the requirements specified in (i) and (ii) can both be met, the legislation states that the AD duty rate for the merchandise must be reduced by the amount of the increase in the AD margin calculated in (ii). If, on the other hand, the requirements specified in (i) and/or (ii) cannot be fulfilled, DOC can simultaneously impose AD and CVD on imports from NMEs without adjusting the AD duty rate to account for the risk of double counting. Given these two conditions, legal experts note that the new law will provide DOC with ample discretion as to whether, and to what extent, it will remedy double counting in concurrent AD/CVD investigations and reviews of NME imports. Unlike Section 1, the double counting provisions of HR 4105 and S 2153 apply from the date of enactment, *i.e.,* they do not apply retroactively to the 24 completed CVD investigations of imports from China of Vietnam.

According to the Congressional Budget Office (CBO), HR 4105 and S 2153 will increase federal revenues by USD 160 million over the years 2013-2022. Although HR 4105 and S 2153 were not the only pieces of legislation introduced to address the CAFC ruling[5], they received strong support from key House and Senate leaders from both parties, including House Ways and Means Chairman Dave Camp (R-MI) and Ranking Member Sander Levin (D-MI), House Ways and Means Subcommittee on Trade Chairman Kevin Brady (R-TX), Senate Finance Committee Chairman Max Baucus (D-MT) and Senate Minority Leader Mitch McConnell (R-KY). Ambassador Kirk and Commerce Secretary Bryson also articulated the Obama Administration's support for the legislation. Only 39 Republican Congressmen voted against the House bill.

[5] The "China Hurts Economic Advancement Through Subsides Act (CHEATS Act)" (HR 4071) was introduced by Rep. Tammy Baldwin (D-WI) on February 17, 2012.

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Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
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Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

Lawmakers introduced and passed HR 4105 and S 2153 in less than a week's time. The bill's supporters have explained that the bills were considered in an expedited fashion due to the impending March 5, 2012 deadline by which the US government must file a petition with the CAFC for a rehearing of the case. Although the Obama Administration urged lawmakers to enact legislation addressing the CAFC's December 19th ruling before March 5, legal experts note that such a rush was unnecessary, as the CAFC ruling is not likely to be formally finalized for several months. The Obama Administration filed its petition for a rehearing on March 5, and an appeal to the US Supreme Court is expected if the CAFC rejects the petition for rehearing. Thus, many have speculated that the bills' expedited consideration was due for political reasons – mainly to limit opposition or amendment – rather than the March 5 deadline.

Despite the successful passage of HR 4105 and S 2153, legal experts note that the legislation includes several provisions which could be contested in US courts or at the WTO, including: (i) Section 1's retroactive application of the amendment to Section 701 of the Tariff Act of 1930; and (ii) Section 2's prospective application of the double counting provisions (thus exempting all previously decided investigations from the new disciplines); and (iii) Section 2's failure to eliminate the risk of double counting and imposition of an initial burden on foreign exporters to demonstrate that subsidies have lowered their US export prices. It remains unclear, however, whether China or Vietnam will bring such challenges. Nevertheless, the passage of this legislation has elicited criticism from both countries and is likely to be a subject of debate in bilateral and multilateral fora.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

CUSTOMS

Customs Highlights

DOC Finds Countervailable Subsidies to Chinese Solar Cells in Preliminary CVD Determination; Companion AD Determination Forthcoming

The Department of Commerce (DOC) issued a preliminary determination on March 20, 2012, finding that countervailable subsidies are being provided to producers and exporters of crystalline silicon photovoltaic ("solar") cells originating in the People's Republic of China ("China")). DOC's preliminary countervailing duty (CVD) determination follows a December 2011 International Trade Commission (ITC) preliminary determination that there is reasonable indication that US industry is materially injured due to allegedly subsidized imports of Chinese-origin solar cells being sold in the United States at less than fair value.

DOC's March 20 preliminary determination assigned the following subsidy rates:

Company	Subsidy Rate
Changzhou Trina Solar Energy Co., Ltd. Trina Solar (Changzhou) Science and Technology Co., Ltd. (collectively, Trina Solar)	4.73 percent *ad valorem*
Yangzhou Rietech Renewal Energy Co., Ltd. Zhenjiang Huantai Silicon Science & Technology Co., Ltd. Kuttler Automation Systems (Suzhou) Co., Ltd. (collectively, Wuxi Suntech)	2.9 percent *ad valorem*
All Others Rate	3.61 percent *ad valorem*

DOC states in its March 20 preliminary determination that the following programs have been found to be countervailable:

- **Golden Sun Demonstration Program,** which provides financial assistance, technological support and market intelligence to advance China's domestic solar power industry and promote its solar power generation;

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Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

- **Preferential Policy Lending,** whereby debt financing on preferential terms is made available specifically to solar cell producers;

- **Provision of Polysilicon for Less than Adequate Remuneration (LTAR),** whereby the Chinese government provided solar cell producers with polysilicon, a key input, at less than fair market value, *i.e.*, LTAR.

- **Provision of Land for LTAR,** whereby the Chinese government provided solar cell producers with land at less than fair market value, *i.e.*, LTAR.

- **"Two Free, Three Half" Program for Foreign-Invested Enterprises (FIEs),** which partially or wholly exempts productive FIEs from having to pay income tax ;

- **Preferential Tax Programs for High or New Technology Enterprises,** which provides income tax reductions to firms recognized as high- or new-technology enterprises;

- **Import Tariff and Value Added Tax (VAT) Exemptions for Use of Imported Equipment,** which exempts both FIEs and certain domestic firms from VAT and tariffs levied on imported equipment;

- **VAT rebates on FIE purchases of Chinese-Made Equipment,** whereby the PRC government refunds the VAT on purchases of certain Chinese produced equipment to FIEs if such equipment is used for certain government-encouraged projects;

- **Sub-Central Government Subsidies for Development of "Famous Brands" and "China World Top Brands,"** whereby firms receive lump-sum awards for having received a "famous brands" certificate; and

- **Discovered Grants,** whereby firms received non-recurring financial support from the Chinese government.

DOC initiated the CVD investigation into solar cells from China on November 8, 2011. However, on January 3, 2012, the Chinese government cited the December 19, 2011 Court of Appeals for the Federal Circuit (CAFC) ruling ("GPX ruling") that DOC lacks the authority to apply CVD law to countries considered non-market economies (NMEs) by the United States, and requested that DOC terminate the CVD investigation. Nonetheless, legislation was enacted into law on March 13, 2012 that clarifies DOC does, in fact, have the authority to apply CVD law to such countries as China (HR 4105).

Experts assert that reaction to DOC's preliminary CVD determination on the part of Chinese solar cell producers and exporters as well as the corresponding US importers of such goods will likely be muted as the countervailable subsidy rates contained therein are particularly low, *i.e.*, 2.90 to 4.73 percent *ad valorem*. Furthermore, its is commonplace for countervailable subsidy rates put forth in the final CVD determination, expected to be issued in Fall 2012, to be even lower than those stated in the preliminary determination and, if such definitive rates fall below *de minimis* levels, *i.e.*, 2 percent, DOC will not impose the CVD order. However, DOC stated in the preliminary CVD determination that, in addition to the above-listed countervailable programs, there are other programs for which DOC seeks greater information, such as those relating to: (i) land-use rights; (ii) provision of electricity; and (iii) research and development (R&D) tax deductions. Were DOC to determine in

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Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com

its post-preliminary analysis that these additional programs are also countervailable, the subsidy rates contained in the preliminary CVD determination could instead be adjusted upward. Also, DOC has yet to issue the companion preliminary antidumping (AD) determination –expected in Spring 2012– which could claim dumping rates significantly higher than the countervailable subsidy rates claimed in the preliminary CVD determination.

Experts note that there are a few special considerations specific to this case that are worth noting:

- **Critical Circumstances.** DOC has determined in this case that "critical circumstances" exist, finding that there have been massive imports into the United States of such solar cells over a relatively short period of time by Chinese producers and exporters. Consequently, DOC will instruct Customs and Border Protection (CBP) to retroactively suspend liquidation of all entries of such goods for the 90 days prior to the date on which the preliminary CVD determination is published in the Federal Register;

- **Scope.** DOC's preliminary CVD determination widens the scope of the investigation to cover "[m]odules, laminates, and panels produced in a third-country from cells produced in [China]," *i.e.*, the assembled solar cells need not come from China in order to be covered by the CVD investigation. Experts assert that DOC having widened the scope in this manner is common practice in semiconductor cases, and that it is done to account for disproportionately high costs associated with the production of such semiconductors as solar cells as compared to the cost associated with the assembly of the finished good. Worthy of noting is that, in contrast, modules, laminates, and panels produced in China of solar cells produced in a third-country are not covered by the investigation; and

- **Double Counting.** In the case of a NME-origin good into which AD and CVD investigations are initiated in the United States, HR 4105 provides for the reduction on the AD duties under certain circumstances in order to prevent so-called "double counting," *i.e.*, the double counting of overlapping subsidy and dumping rates which can lead to greater AD/CVD remedies being applied. It will remain unclear how DOC plans to implement this provision under HR 4105 until DOC releases in Spring 2012 its preliminary AD determination, which will include the such dumping rates.

Contacts:
Scott Lincicome, Esq.
701 13th Street NW, Washington, DC 20005
slincicome@whitecase.com

Samuel Scoles
8 Marina View, #27-01, Singapore, 018960
sscoles@whitecase.com