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UNITED STATES

GENERAL TRADE POLICY

US General Trade Policy Highlights

USTR Announces Removal of Israel From Special 301 Priority Watch List

On September 24, 2012, US Trade Representative (USTR) Ron Kirk announced that Israel will no longer appear on the "Special 301 Priority Watch List." According to a USTR press release issued the same day, the decision follows key steps taken by the Israeli government to increase intellectual property rights (IPR) protection as prescribed in a Memorandum of Understanding (MOU) signed by the United States and Israel on February 18, 2010.

USTR's annual "Special 301 Report" includes the following: (i) a discussion of developments in intellectual property rights (IPR) protection and enforcement; and (ii) a list of countries whose alleged lack of IPR protection and enforcement is of concern to US industry and the US government. Specifically, the Report divides countries of concern into four categories: (i) those of greatest concern are designated as "Priority Foreign Countries;" (ii) those of next greatest concern are listed on the "Priority Watch List;" (iii) countries of less concern than those on the Priority Watch List are listed on the "Watch List;" and (iv) those who do not require being placed on a list but are still of concern are designated under the category "Section 306 Monitoring." Israel appeared under the Priority Watch List for numerous years, including from 2005-2009 and 2010-2012.

Under the February 2010 MOU, the United States commits to lowering Israel from the Priority Watch List to the Watch List once Israel submits three pieces of IPR-related legislation to the Knesset, *i.e.,* the Israeli legislature. The United States further commits to removing Israel from the Watch List once the three pieces of legislation are enacted. The three pieces of legislation include those that address:

- **Data Protection.** The MOU directs Israel to submit a bill to the Knesset that extends the term of protection for pharmaceutical confidential test and other data submitted for obtaining marketing approval against unfair commercial use. The MOU provides specific details regarding the content of such a bill. For example, the term of protection should extend to six years from the date on which the medical preparation first received final marketing approval in Israel, or six and a half years if the marketing approval was received in a country other than Israel;

- **Patent Term Protection.** The MOU directs Israel to submit to the Knesset a bill that amends Israel's patent term extension (PTE) law to reflect, among other things, a reduction in Israel's list of PTE reference countries, *i.e.,* countries whose PTEs Israel references when determining whether and how long to provide a PTE, to include only five countries from the European Union (EU) as well as the United States; and

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- **Publication of Patent Applications.** The MOU directs Israel to submit to the Knesset a bill that, among other things, requires the publication of patent applications promptly after the expiration of a period of 18 months from the date on which the patent was filed with Israel's Patent Office.

In its 2012 Special 301 Report, published on April 30, 2012, USTR noted that although Israel had already enacted legislation regarding data protection and submitted to the Knesset legislation regarding publication of patent applications, it had not yet submitted to the Knesset legislation regarding patent term protection. Thus, USTR Kirk's September 24 announcement reflects recent developments with regard to legislation on patent term protection.

Although not necessarily applicable to other countries on a Special 301 list, the US-Israel MOU provides key details regarding the process by which the United States removed a country from a Special 301 list. Under the MOU, the United States set specific circumstances under which it agreed to remove Israel from certain Special 301 lists. In addition, the United States provided significant details regarding what provisions the three pieces of IPR-related legislation should include.

Click here for a copy of USTR's September 24, 2012 press release.

Click here for a copy of the February 2010 US-Israel MOU.

DOC Issues Affirmative Final AD/CVD Determinations for Chinese Solar Cells; Scope of Investigation Remains Unchanged

The Department of Commerce (DOC) issued on October 10, 2012 affirmative final determinations in the antidumping (AD) and countervailing duty (CVD) investigations into imports of crystalline silicon photovoltaic ("solar") cells from China. These affirmative final AD/CVD determinations follow the affirmative preliminary CVD and AD determinations on such Chinese solar cells issued in March and May 2012, respectively.

In the May 2012 AD preliminary determination, DOC found that Chinese producers and/or exporters sold solar cells in the United States with dumping margins ranging from 31.14 to 249.96 percent. DOC made some adjustments in the October 10 final determination such that dumping margins now range from 18.32 to 249.96 percent:

Exporter	Producer	Margin
Wuxi Suntech Power Co., Ltd., Luoyang Suntech Power Co., Ltd., Suntech Power Co., Ltd. or Wuxi Sun-Shine Power Co., Ltd.	Wuxi Suntech Power Co., Ltd., Luoyang Suntech Power Co., Ltd., Suntech Power Co., Ltd. or Wuxi Sun-Shine Power Co., Ltd.	31.73 percent
Changzhou Trina Solar Energy Co., Ltd. or Trina Solar (Changzhou) Science & Technology Co., Ltd.	Changzhou Trina Solar Energy Co., Ltd. or Trina Solar (Changzhou) Science & Technology Co., Ltd.	18.32 percent

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Exporter	Producer	Margin
Separate Rate Companies		25.96 percent
China-Ride Entity		249.96 percent

In the March 2012 preliminary CVD determination, DOC found that Chinese producers and/or exporters received countervailable subsidies ranging from 2.90 to 4.73 percent. DOC found in the final determination that subsidies range from 14.78 to 15.97 percent:[1]

Producer/Exporter	Margin
Wuxi Suntech Power Co., Ltd., Luoyang Suntech Power Co., Ltd., Suntech Power Co., Ltd., Yangzhou Rietech Renewal Energy Co., Ltd., Zhenjiang Huantai Silicon Science & Technology Co., Ltd., Kuttler Automation Systems (Suzhou) Co., Ltd., Shenzhen Suntech Power Co., Ltd., Wuxi Sunshine Power Co., Ltd., Wuxi University Science Park International Incubator Co., Ltd., Yangzhou Suntech Power Co., Ltd., and Zhenjiang Rietech New Energy Science & Technology Co., Ltd.	14.78 percent
Changzhou Trina Solar Energy Co., Ltd. and Trina Solar (Changzhou) Science & Technology Co., Ltd.	15.97 percent
All others	15.24 percent

Scope, "Critical Circumstances" and Export Subsidies

The solar cells covered by the AD/CVD investigations fall under Harmonized Tariff System of the United States (HTSUS) subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030 and 8501.31.8000. The scope of the AD/CVD investigations remains unchanged from the preliminary determinations, covering "not only imports of solar cells produced in China and solar modules/panels produced in China from Chinese-made solar cells, but also imports of solar modules/panels produced outside of China from solar cells produced in China [but not covering] imports of modules/panels produced in China from solar cells produced in a third country."

[1] DOC found that all subject producers and exporters benefitted from an export subsidy, *i.e.*, an "export buyer's credit," of 10.54 percent. U.S. law requires DOC to reduce the AD rates by the amount of the export subsidy.

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DOC also found in the final CVD determination that "critical circumstances" exist because there were massive imports into the United States of solar cells over a relatively short period of time. Likewise, DOC found that critical circumstances existed in the AD final determination with respect to all companies except Wuxi Suntech.

Reaction to Final Determination

A sampling of reactions to DOC's final determination appears below:

- **House Democratic Whip Steny Hoyer (D-MD)** noted in an October 10 press release that the determination is an example of President Obama having "consistently taken a hard line in support of [US] exports by increasing enforcement of trade laws and imposing new tariffs to help ensure a level playing field;"

- **Sen. Ron Wyden (D-OR)** expressed dismay at DOC's refusal to expand the scope of the investigations to include imports of modules/panels produced in China from solar cells produced in a third country, noting that he will continue to monitor this "loophole," and will "pursue additional measures if necessary to protect [US] manufacturers and workers;"

- **Coalition for Affordable Solar Energy (CASE) President Jigar Shah**, which claims to represent the 97-98 percent of the US solar industry that is opposed to the imposition of antidumping and countervailing duties, expressed in a press statement gratification that DOC did not expand the scope of the investigation and, also, that DOC "did not significantly increase" the remedial tariffs from those contemplated in the preliminary determinations.

The solar panel investigation is at the center of a heated national discussion over the current direction of the US-China trade relationship, particularly in the context of the November 2012 presidential and legislative elections, and high unemployment. A recurring campaign theme among both Democrat and Republican candidates has been China's allegedly unfair trading practices as well as the alleged need for China to play by global trade rules.

The US International Trade Commission (ITC) is scheduled to vote on November 7 and to transmit its views to DOC by November 23, 2012. If the ITC reaches an affirmative final determination that imports of solar cells from China materially injure, or threaten material injury to, the domestic industry as it did in its preliminary determination, DOC will issue AD and CVD orders. However, the investigations will be terminated if the ITC makes a negative injury determination.

Click here for a copy of DOC's Fact Sheet on the affirmative AD/CVD final determinations.

Mexico and Canada Formally Join TPP

On October 7, 2012, the 90-day consultation period between Congress and the Obama Administration regarding the inclusion of Mexico in the negotiations towards the Trans-Pacific Partnership (TPP) Agreement concluded. The corresponding consultation period for Canada's inclusion in the TPP negotiations concluded a day later, on October 8, 2012. As a result, Mexico and Canada formally became the 10th and 11th countries to join the TPP negotiations.

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The other nine TPP members invited Mexico and Canada to join the negotiations on June 18 and 19, 2012, respectively. In US Trade Representative's (USTR) June 2012 press releases announcing the decision to invite Mexico and Canada to join negotiations, USTR noted that the two countries' inclusion in the Agreement would be contingent upon the conclusion of TPP countries' domestic procedures.

Trade Promotion Authority (TPA), a legislative mandate that provides, among other things, negotiating objectives for the President to use in Free Trade Agreement (FTA) negotiations as well as a fast-track procedure by which Congress can consider the implementing legislation for such FTAs, defines US domestic procedure in this regard. However, legislation authorizing the President with TPA expired in 2007. The Obama Administration nonetheless followed TPA procedure when, on July 9 and 10, 2012 USTR Ron Kirk sent letters to Speaker of the House John Boehner (R-OH) and President Pro Tempore of the Senate Daniel Inouye (D-HI) notifying them of the Obama Administration's intent to include Mexico and Canada, respectively, in the TPP negotiations. The letters to Congressional leaders opened a 90-day consultation period between the Obama Administration and Congress that concluded on October 7 and 8, respectively.

In his letters, USTR Kirk assured Congressional leaders that the Obama Administration had already conducted "in-depth" discussions with Canada and Mexico regarding the objectives of the TPP Agreement, and that both countries had, in turn, communicated their preparedness to achieve such "high standards" within the TPP. USTR Kirk also committed to continuing to consult with Congress on all elements of the TPP.

During the 90-day consultation period, the Obama Administration also followed TPA procedure when it requested input on the following with respect to Mexico and Canada's inclusion in the Agreement:

- **Negotiating Objectives.** On July 23, 2012, USTR published two Federal Register (FR) notices "Request for Comments on Negotiating Objectives With Respect to Mexico's Participation in the Proposed Trans-Pacific Partnership Trade Agreement" (77 FR 43133) and "Request for Comments on Negotiating Objectives With Respect to Canada's Participation in the Proposed Trans-Pacific Partnership Trade Agreement" (77 FR 43131). The FR notices announced USTR's intention to hold public hearings regarding matters relating to Mexico and Canada's inclusion in the TPP negotiations, and requested comments regarding such inclusion. Specifically, the FR notices requested that commenters address the following with respect to Mexico and Canada, among other things: (i) general and product-specific negotiating objectives; (ii) adequacy of existing customs measures; (iii) existing sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBTs) that should to be addressed; and (iv) relevant labor and environmental issues that should be addressed through the negotiations. On September 21 and 24, 2012, USTR held public hearings on matters relating to Mexico and Canada's participation in the TPP, respectively; and

- **Probable Economic Effect.** On August 10, 2012, the US International Trade Commission (ITC) issued the FR notice "US-Trans-Pacific Partnership Free Trade Agreement Including Canada and Mexico: Advice on the Probable Economic Effect of Providing Duty-Free Treatment for Imports" (77 FR 47880). The FR Notice was issued in response to USTR Kirk's July 19, 2012 letter to the ITC requesting that the ITC provide a report on the probable economic effect of providing duty-free treatment for imports of products from Canada, Mexico and the other eight countries currently participating in the TPP negotiations on the following: (i) US industries producing like or directly competitive product; and (ii) consumers. USTR Kirk further requested that the ITC

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provide analysis on the probable economic effect of eliminating tariffs applied to imports of certain agricultural products, including, *inter alia*, fruits, vegetables, sugar and dairy products, from the ten TPP negotiating members on the following: (i) US industries that produce the product; and (ii) the US economy as a whole. USTR Kirk instructed the ITC to perform this analysis under the assumption that known US non-tariff barriers (NTBs) will not be applicable to imports from the TPP countries. In its FR Notice, the ITC invited interested parties to submit comments and/or participate in a public hearing regarding the requested analysis. The ITC held a public hearing on the issue on September 12, 2012. The ITC is expected to deliver its report to USTR no later than November 19, 2012. The sections of the report that relate to the advice and assessment of probable economic effects will be classified.

Now that Canada and Mexico have formally joined the negotiations, both countries are expected to participate in the upcoming 15th round of negotiations in Auckland, New Zealand from December 3-12, 2012. Although TPA is considered necessary to pass the implementing legislation for the finalized TPP Agreement, the Obama Administration is not expected to pursue legislation reauthorizing TPA until the Agreement is close to completion. If President Obama is reelected in the November 2012 US Presidential election and TPP members decide to invite additional countries, *e.g.,* Japan, to join the negotiations before the Agreement is finalized, the Obama Administration is likely to repeat the procedure followed for Mexico and Canada when it prepares to include such additional countries in the TPP negotiations.

Click here to access a copy of USTR's letter to Congressional leaders regarding Mexico's inclusion in the TPP.

Click here to access a copy of USTR's letter to Congressional leaders regarding Canada's inclusion in the TPP.

Click here to access a copy of 77 FR 43133.

Click here to access a copy of 77 FR 43131.

EU and US Officials to US Media: EU-US High Level Working Group Set to Recommend Launch of Trade Agreement Negotiations

On October 17, 2012, the major US media outlet *Reuters* published an article reporting information provided by anonymous US and European Union (EU) officials that indicates the EU-US High Level Working Group ("Working Group") is set to recommend that the EU and the United States pursue trade agreement negotiations. Neither the United States nor the EU has released an official statement confirming this decision. The *Reuters* article comes as the Working Group prepares to provide its final recommendations by December 2012.

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 EU and US leaders further directed the Working Group to submit an interim report by June 2012, and provide its final report by the end of 2012. In its June 2012 interim report, the Working Group stated that, if its members were able to "satisfactorily" address certain issues on which the United States and the EU would likely disagree in the

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context of trade agreement negotiations, the final report would endorse the pursuit of a comprehensive agreement *(please refer to W&C US Trade Alert dated June 25, 2012).*

According to the October 17 *Reuters* article, titled "EU, US to Negotiate Free-Trade Deal From Spring 2013; Officials," an anonymous senior EU official stated that the Working Group's final recommendations will endorse the negotiation of a comprehensive agreement between the EU and the United States. Although it remains unclear whether the United States and the EU would launch trade agreement negotiations in direct response to the Working Group's recommendation to do so, US officials communicated to *Reuters* that an announcement regarding the decision to pursue negotiations is not expected until after the November 2012 US Presidential election. Another EU official is quoted as estimating that such negotiations could commence as early as spring 2013.

When the Working Group released its June 2012 interim report, analysts were skeptical as to whether the Working Group could "satisfactorily" address longstanding EU-US trade irritants in the areas of government-afforded subsidies, agricultural market access and regulatory coherence, among others. The information EU and US officials have provided to *Reuters* serves as a counterbalance to such skepticism. Nonetheless, the article does not provide details on the scope of the agreement. Even if the Working Group recommends that the United States and the EU pursue trade agreement negotiations, and the Parties decide to follow such a recommendation, it remains unclear whether -and how- such contentious issues would be resolved.

Click here for a copy of the October 17, 2012 *Reuters* article "EU, US to Negotiate Free-Trade Deal From Spring 2012; Officials."

Bipartisan Group of Senators Urge End to NAFTA Trade Remedy Dispute Settlement in TPP

On October 3, 2012, a bipartisan group of 11 Senators[2] wrote a letter urging US Trade Representative (USTR) Ron Kirk to include language in the Trans-Pacific Partnership (TPP) Agreement superseding language contained in the North American Free Trade Agreement (NAFTA) to ensure all parties to the Agreement are subject to judicial review with respect to the application of domestic trade remedy laws. According to the Senators, judicial review is necessary to ensure the vitality of the US forestry industry.

Chapter 19 of NAFTA allows any party, *i.e.,* Canada, Mexico or the United States, involved in an antidumping (AD) and/or countervailing duty (CVD) final determination to obtain a bi-national panel review of such determination in lieu of judicial review in the country of issuance. The bi-national panel decides whether such AD/CVD determinations are in accordance with the domestic laws of the country importing the product at issue. The panel may uphold the determination or remand it to the issuing agency, *i.e.,* in the case of the United States,

[2] Sens. Ron Wyden (D-OR), Mike Crapo (R-ID), Olympia Snowe (R-ME), Saxby Chambliss (R-GA), John Tester (D-MT), Susan Collins (R-ME), Jeffrey Merkley (D-OR), Jim Risch (R-ID), Thad Cochran (R-MS), Lindsey Graham (R-SC) and Johnny Isakson (R-GA).

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the Department of Commerce (DOC) or the International Trade Commission (ITC), to issue a new determination in accordance with the panel's ruling.

Of the AD/CVD determinations reviewed by NAFTA's Chapter 19 trade remedy dispute settlement mechanism, those involving US-Canada trade in softwood lumber have become particularly contentious. In an effort to resolve the parties' disputes, the United States and Canada signed in 2006 the Softwood Lumber Agreement (SLA), under which, *inter alia*: (i) the United States agreed to revoke AD/CVD orders on Canadian lumber; and (ii) Canada agreed to impose export measures on Canadian exports of softwood lumber to the United States under certain conditions. Since the parties implemented the SLA, however, the United States has, on several occasions, challenged Canada's adherence to the Agreement's provisions.

In their October 3 letter, the Senators urge USTR Kirk to ensure that the TPP "put[s] an end to the inequities established under NAFTA, and thus re-establish[es] the critical role of the US Courts in the proper enforcement of the US trade laws." In a similar letter sent to President Obama on August 3, 2012, 23 members of the Congressional Lumber Caucus further explained the "inequities" of NAFTA's Chapter 19 system, noting that "[i]nstead of allowing US Courts to determine whether the US government has properly applied US trade laws, NAFTA Chapter 19 transfers that authority to private non-US citizens – who interpret US law and make binding decisions upon US federal agencies." The August 3 letter further argued that, "[g]iven Canada's track record of providing massive subsidies to its forestry industry and unfair lumber trade practices, a TPP [A]greement that includes Canada must provide for normal domestic judicial review of trade law actions with respect to all TPP members."

That certain lawmakers are interested in amending key aspects of NAFTA is unsurprising; this is a recurring theme in US politics, particularly during election seasons. Entered into force in 1994, NAFTA is one of the first FTAs to which the United States became party. Consequently, numerous US industries are interested in using TPP as a vehicle to update the Agreement. Nonetheless, it remains unclear the extent to which TPP will supersede pre-existing FTAs between the United States and other TPP members. In addition to Mexico and Canada, the United States has pre-existing FTAs with four other TPP countries, namely Chile, Peru, Australia and Singapore. While the United States has maintained that it is negotiating market access only with the TPP participants with whom it does not have an FTA, it has demonstrated interest in amending certain architectural elements contained in pre-existing FTAs. For example, news sources contend that USTR would like all TPP members, including Australia, to agree to an investor-state dispute mechanism within the TPP even though the US-Australia FTA does not include such mechanism.

Click here for a copy of the October 3 letter.

US and Panama Announce Entry Into Force Date for Bilateral FTA

On October 22, 2012, US Trade Representative (USTR) Ron Kirk and Panamanian Minister of Commerce and Industry Ricardo Quijano exchanged diplomatic notes in which they agreed the US-Panama Free Trade Agreement (FTA) will enter into force on October 31, 2012. The United States and Panama signed their bilateral FTA in June 2007 under then-President George W. Bush. Panama's legislature approved the Agreement in July 2007. In a reported effort to ease US Congressional passage of the Agreement, the United States and Panama

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signed in April 2011 a Tax Information Exchange Agreement (TIEA) that addressed allegations that Panama encouraged tax-haven activities *(please refer to W&C US Trade Alert dated April 19, 2011)*. According to USTR, from 2009-2011 Panama also took a series of legislative and administrative actions to strengthen its labor laws. The US Congress approved implementing legislation for the US-Panama FTA in October 2011.

Title I, Section 101 of the implementing legislation for the US-Panama FTA envisages the exchange of diplomatic notes "at such a time as the [US] President determines that Panama has taken measures necessary to comply with those provisions of the Agreement that are to take effect on the date on which the Agreement enters into force." According to an October 22 USTR press release, the exchange of diplomatic notes follows the completion of a thorough review by the United States and Panama of their respective laws and regulations related to the implementation of the Agreement.

The October 22, 2012 announcement regarding the Agreement's entry into force follows recent actions taken by the Panamanian government to fulfill obligations under the FTA. For example, on October 5, 2012, Panamanian President Ricardo Martinelli enacted several laws regarding: (i) patent protection; (ii) protection of new plant varieties; and (iii) the definition of "wholesale commerce." Most recently, on October 10, 2012, President Martinelli enacted measures that: (i) change Panama's copyright protection regime; and (ii) adjust the way Panama administers its tariff-rate quota (TRQ) system for US agricultural products under the bilateral FTA.

The US-Panama FTA is the last to enter into force of the three FTAs the implementing legislation of which Congress approved in October 2011. The other two FTAs – the US-Korea FTA and the US-Colombia FTA – entered into force on March 15, 2012 and May 15, 2012, respectively. Although the US-Panama FTA was widely considered to be the least controversial of the three FTAs, because market opportunities Panama presents to US businesses are not as substantial as those offered by Korea and Colombia, experts agree USTR prioritized the implementation of the US-Korea and US-Colombia FTAs ahead of that of the US-Panama FTA. Nonetheless, the October 22 USTR press release notes that the Agreement will provide US companies with key opportunities, including improved access to Panama's USD 22 billion services market. Upon entry into force, the Agreement will also provide for duty free entry for 86 percent of US exports of consumer and industrial products to Panama and almost 50 percent of US exports of agricultural commodities to Panama. In addition, USTR notes that Panama's location as a major shipping route enhances the significance of the FTA; two-thirds of the Panama Canal's annual transits are coming from or going to the United States.

Click here for a copy of USTR's October 22 press release.

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