



# White & Case LLP General Trade Report - JETRO

August 2010

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## United States

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### GENERAL TRADE POLICY

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#### *United States General Trade Policy Highlights*

### **Senate Appropriations Bill Includes Language Calling on Administration to Resolve US-Mexico Cross-Border Trucking Issue**

On July 26, 2010, Sen. Patty Murray (D-WA) inserted language into the fiscal year 2011 Transportation, Housing and Urban Development Appropriations Bill (Section 135 of S. 3644) that would require the Secretary of Transportation to submit by October 1, 2010 the first annual report to the House and Senate Appropriations Committees on the safety and security of Mexico-domiciled motor carriers (trucks) in the United States. Furthermore, the report requires the Secretary of Transportation to propose and implement a cross-border trucking program that maintains the safety of US roads and highways and increases the efficiency of US-Mexico bilateral commerce. Section 135 aims to eliminate the tariffs imposed by the Mexican Government on certain US goods in retaliation for the United States closing its southern border to Mexican long-haul trucks in 2009.

Under the North American Free Trade Agreement (NAFTA), Mexican long-haul trucks were to have full access to US roads and highways by 2000 but opposition in the US Congress, largely backed by the International Brotherhood of Teamsters (IBT), a US labor union representing truck drivers, blocked this access for Mexican trucks until 2007 when the United States allowed for a limited cross-border trucking program. On March 11, 2009, President Obama signed into law a spending bill containing a provision that abolished this limited trucking program. In response, the Mexican Government applied retaliatory tariffs on certain US goods. Observers note that President Obama could remove the prohibition on Mexican trucks operating within the United States without the approval of Congress but doing so would cost him and certain other Congressional Democrats the support of labor unions before the November 2010 elections.

The Committee Report on S. 3644 issued by the Senate Subcommittee on Transportation, Housing and Urban Development, of which Sen. Murray is Chairwoman, addresses concerns held by many US lawmakers and certain labor unions (such as the IBT) with regard to the alleged threat Mexico-domiciled trucks pose to US road and highway safety and balances these concerns against the cost borne by US exporters as a result of Mexico's retaliatory tariffs. The committee report posits that the retaliatory tariffs imposed by the Mexican government causes US agricultural goods to lose competitiveness in Mexico and, if the Obama Administration is unable to arrive at a solution to the cross-border trucking issue with Mexico, agricultural growers, processors and packers will be forced to relocate beyond US borders.

The Senate Committee on Appropriations Subcommittee on Transportation, Housing and Urban Development has approved S. 3644 for consideration on the Senate floor. The Senate Majority Leader must now decide when to hold debate on the bill and vote on the same.

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## USTR Requests Comments on China's WTO Compliance, Announces October Hearing

The Office of the United States Trade Representative (USTR) has announced that the interagency Trade Policy Staff Committee (TPSC) will hold a public hearing and seek public comment to assist USTR in the preparation of its annual report to the Congress on China's compliance with the commitments made in connection with its accession to the World Trade Organization (WTO). The hearing will be held on **October 6, 2010**. Interested parties wishing to testify at the hearing must provide written notification of their intention, as well as a copy of their testimony, by **September 22, 2010**. Written comments are due by **September 27, 2010**. Comments should be submitted electronically at <http://www.regulations.gov>.

## US Court of International Trade Opinion Orders End to Countervailing Duties on Off-Road Tires from China

On August 4, 2010, the US Court on International Trade (CIT) issued a slip opinion whereby the CIT ordered the Department of Commerce (DOC) to forego applying countervailing duties (CVD) to off-road tires imported from China (Slip Opinion 10-84 in *GPX International Tire Corporation v. United States* (No. 08-00285)). Until CIT's August 4, 2010 decision, DOC had been applying both antidumping duties (AD) and CVD to imports of Chinese off-road tires despite a prior CIT decision from September 18, 2009 which directed DOC to either forego the imposition of CVDs or adopt additional policies and procedures to adapt its non-market economy (NME) AD and CVD methodologies. Because China is an NME without what the DOC deems "fair market prices," prices of off-road tires in India were used by DOC as a proxy for determining AD duty rates to be applied to the off-road tires imported from China. GPX has argued that DOC already accounted for countervailable subsidies in its NME methodology for determining AD duties and, therefore, the application of CVDs resulted in GPX unnecessarily paying double duties (*i.e.*, double counting).

On April 26, 2010, DOC announced that it would comply with CIT's September 18, 2009 decision and that it would offset the CVDs against GPX's calculated antidumping duty deposit rate. CIT's August 4, 2010 decision questions, however, the validity of the offset because "the same remedial price adjustment can otherwise be obtained by merely conducting an NME AD investigation." CIT therefore holds that DOC did not comply with the court's September 18, 2009 decision (to forego the imposition of CVDs or adapt its NME AD and CVD methodologies) and that DOC's NME methodology for determining AD and CVD duties leads to double counting.

According to CIT Judge Jane Restani, DOC demonstrates "its inability, at this time, to use improved methodologies to determine whether, and to what degree, double counting occurs." Judge Restani further noted that if DOC is unable to modify its NME methodology for determining AD duties such that double counting is eliminated, DOC should stop applying CVDs to goods from NMEs.

The August 4, 2010 CIT decision can be appealed in US Federal Circuit Court of Appeals (CAFC). If CAFC upholds the decision, experts opine that it is likely that Congress will pursue legislation amending US law to expressly allow for the application of both AD and CVD duties to imports from NMEs.

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## APHIS Proposes Definitions for Certain Key Terms under Lacey Act

In an August 4, 2010 Federal Register (FR) notice, the Department of Agriculture's Animal and Plant Health Inspection Service proposed definitions for certain terms under the Lacey Act (75 FR 46859-46861). The Lacey Act, enacted in 1900, serves as an anti-trafficking statute protecting a broad range of wildlife and wild plants. In general, the Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire or purchase any fish, wildlife or wild plants taken, possessed transported, or sold in violation of state, federal, Native American tribal, or foreign laws or regulations that are related to fish, wildlife, or wild plants.

On May 22, 2008, the US Congress approved amendments to the Lacey Act banning commerce in illegally sourced plants and their products through the Food, Conservation, and Energy Act of 2008 (P.L. 110-246 or "the 2008 Farm Bill"). The amendments to the Lacey Act extend the statute's reach to encompass products, including timber, that derive from plants illegally harvested in the country of origin and brought into the United States, either directly or through manufactured products, including products manufactured in countries other than the country where the illegal harvesting took place. The amendments also require importers to declare the country of origin of harvest and species name of all plants contained in their products and establishes penalties for violations of the Lacey Act, including forfeiture of goods and vessels, fines and jail time, among other provisions.

Specifically, under the Lacey Act, "plant" means "any wild member of the plant kingdom, including roots, seeds, parts or products thereof, and including trees from either natural or planted forest stands." Currently, there are three categories of plants that are exempt from the provisions of the Lacey Act: (i) common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof); (ii) scientific specimens of plant genetic material (including roots, seeds, germplasm, parts, or products thereof) that are to be used only for laboratory or field research; and (iii) plants that are to remain planted or to be planted or replanted.

According to the August 4, 2010 FR notice, APHIS is proposing to establish definitions for the terms "common cultivar" and "common food crop." As noted, common cultivars and common food crops are among the categorical exemptions to the provisions of the Lacey Act, and the Lacey Act does not define the terms "common cultivar" and "common food crop" but instead gives authority to the Department of Agriculture and the Department of the Interior to define these terms by regulation. APHIS' proposed definitions would specify which plants and plant products will be subject to the provisions of the Act, including the declaration requirement. APHIS proposes to define the terms "common cultivar" and "common food crop" as follows:

- **Common cultivar.** A plant (except a tree) that: (a) Has been developed through selective breeding or other means for specific morphological or physiological characteristics; and (b) is a species or hybrid that is cultivated on a commercial scale; and (c) Is not listed: (1) In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249); (2) As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); or (3) Pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.
- **Common food crop.** A plant that: (a) Has been raised, grown, or cultivated for human or animal consumption, and (b) Is a species or hybrid that is cultivated on a commercial scale; and (c) Is not listed: (1)

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In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249); (2) As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); or (3) Pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

In addition, APHIS proposes to add a definition for “plant” consistent with the definition in the Lacey Act, to read as follows: “Any wild member of the plant kingdom, including roots, seeds, parts or products thereof, and including trees from either natural or planted forest stands.”

According to APHIS, “these definitions are designed to ensure that the exemptions do not place at risk plants of conservation concern, while exempting plants grown on a commercial scale [and] they are also designed to be consistent with existing and commonly understood definitions of the terms, as well as to be consistent with the provisions of the Lacey Act.”

Comments on the proposed definitions are due by October 4, 2010.

## Senators Introduce “Enforcing Orders and Reducing Circumvention and Evasion Act”

On August 5, 2010, Senate Finance Trade Subcommittee Chairman Ron Wyden (D-OR) and Sen. Olympia Snowe (R-ME) introduced the Enforcing Orders and Reducing Circumvention and Evasion (ENFORCE) Act (S. 3725), a bill that addresses circumvention of US trade laws by foreign exporters and/or US importers. Among other things, the bill would provide the Department of Commerce (DOC) “both a mandate and additional tools to enforce US trade remedy laws, specifically those related to anti-dumping and countervailing duties (AD/CVD).”

The bill “empowers DOC to investigate evasion of trade remedy laws” and imposes strict timelines for US Customs and Border Protection (CBP) to act when presented with evidence of circumvention. The Senators believe that “empowering DOC” to investigate the evasion of an AD/CVD order will help combat unfair trade practices and that the bill will “bolster greater cooperation and information sharing between [DOC and CBP] to combat unfair trade practices that hurt US manufacturing and employment.” The bill would also give the US government 60 days, after an allegation of evasion is put forward, to determine whether there is a reasonable basis to believe an importer is evading an AD/CVD order. If an affirmative preliminary determination is made, the ENFORCE Act would require that AD/CVD duties be collected in cash until the investigation is concluded. The bill also authorizes information sharing among the appropriate agencies when the government determines that an importer may be attempting to evade an AD/CVD order.

According to Sen. Wyden, “the ENFORCE Act would dramatically improve the enforcement of US trade laws designed to create a level playing field for US producers [and would] unleash the resources of the US Department of Commerce to investigate evasion of US trade laws and ensure that the correct trade remedy duties are applied at the border.” Sen. Snowe echoed Sen. Wyden’s statements and added that the bill “seeks to strengthen the process of investigation between Commerce and Customs to combat evasion and ensure we are enforcing the trade remedy statutes that are currently on the books.”

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A press release on the ENFORCE Act notes that trade and industry groups such as the American Honey Producers Association, the Coalition for Enforcement of Anti-dumping and Countervailing Duty Orders, and the Committee to Support US Trade Law, support the bill. The bill was referred to the Senate Finance Committee, although it is unclear when the Committee will review the bill, given the current Congressional August recess.

## USTR Requests Comments for NTE Report on Foreign Trade Barriers, Reports on SPS and Standards-Related Foreign Trade Barriers

In an August 6, 2010 Federal Register (FR) notice, the Office of the United States Trade Representative (USTR) requested comments from interested parties for its annual National Trade Estimate Report on Foreign Trade Barriers (NTE) as well as its annual reports on standards-related measures and sanitary and phytosanitary (SPS) measures that create barriers to US exports (75 FR 47675-47676). Public comments are due by October 4, 2010.

The NTE sets out an inventory of the most important foreign barriers affecting US exports of goods and services, US foreign direct investment, and protection of intellectual property rights. The FR notice states that “to ensure compliance with the NTE’s statutory mandate and the Obama Administration’s commitment to focus on the most significant foreign trade barriers, USTR will be guided by the existence of active private sector interest in deciding which restrictions to include in the NTE and the reports on SPS and standards-related measures.” USTR is seeking comments on the following foreign trade barriers:

- Import policies (e.g., tariffs and other import charges, quantitative restrictions, import licensing, and customs barriers);
- SPS measures;
- Standards-related measures (including standards, technical regulations, and conformity assessment procedures);
- Government procurement restrictions (e.g., “buy national policies” and closed bidding);
- Export subsidies (e.g., export financing on preferential terms and agricultural export subsidies that displace US exports in third country markets);
- Lack of intellectual property protection (e.g., inadequate patent, copyright, and trademark regimes);
- Services barriers (e.g., limits on the range of financial services offered by foreign financial institutions, regulation of international data flows, restrictions on the use of data processing, quotas on imports of foreign films, and barriers to the provision of services by professionals);
- Investment barriers (e.g., limitations on foreign equity participation and on access to foreign government-funded R&D consortia, local content, technology transfer and export performance requirements, and restrictions on repatriation of earnings, capital, fees, and royalties);

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- Government-tolerated anticompetitive conduct of state-owned or private firms that restricts the sale or purchase of US goods or services in the foreign country's markets;
- Trade restrictions affecting electronic commerce (e.g., tariff and non-tariff measures, burdensome and discriminatory regulations and standards, and discriminatory taxation); and
- Other barriers (e.g., barriers that encompass more than one category, such as bribery and corruption, or that affect a single sector).

USTR notes that comments concerning SPS and standards-related measures should be submitted separately from those addressing other foreign trade barriers, and specifies in the FR notice that the following information describing SPS and standards-related measures will help USTR formulate its reports:

- **SPS Measures.** Measures applied to protect the life or health of humans, animals, and plants from risks arising from additives, contaminants, pests, toxins, diseases, or disease-carrying and causing organisms, including but not limited to specific product or processing standards, requirements for products to be produced in disease-free areas, quarantine regulations, certification or inspection procedures, sampling and testing requirements, health-related labeling measures, maximum permissible pesticide residue levels, and prohibitions on certain food additives.
- **Standards-Related Measures.** Standards, technical regulations, and conformity assessment procedures, such as mandatory process or design standards, labeling or registration requirements, and testing or certification procedures.

## Legislation Introduced in the House to Revoke MFN Treatment from Chinese Imports

On July 30, 2010, Rep. Brad Sherman (D-CA) introduced the Emergency China Trade Act of 2010 (H.R. 6071), a bill that would strip Chinese goods of most favored nation treatment (MFN) currently afforded to them by the United States. According to the bill, China has pursued trade policies that violate its obligations as a member of the World Trade Organization (WTO) and result in a "trade imbalance with the United States that threatens the stability of the global economy." The bill includes some examples of these trade policies, such as:

- continued support for export subsidies;
- government control of Chinese enterprises;
- requirements for coproduction agreements between US firms operating in China and Chinese entities; and
- undervaluation of the Chinese currency by as much as 40 percent.

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H.R. 6071 would revoke MFN treatment (referred to as “Normal Trade Relations”) within six months of its enactment. The bill further stipulates that “normal trade relations treatment may not thereafter be extended to the products of [China]” notwithstanding any other provision of law.

In addition to revoking MFN treatment, H.R. 6071 would direct the President to negotiate a US-China trade relationship that achieves and maintains balanced trade (on a balance of payments basis) between the United States and [China] within four years of the bill’s enactment. The President, upon finalizing negotiations, would be required to submit to Congress legislation implementing the negotiated US-China trade relationship. Once the new US-China trade relationship is enacted, the provision of H.R. 6071 which revokes MFN status for Chinese goods would cease to be effective.

The bill is co-sponsored by Rep. Ileana Ros-Lehtinen (R-FL), Rep. Carol Shea-Porter (D-NC), Rep. Walter Jones (R-NC), Rep. Steve Kagen (D-WI), Rep. Patrick Murphy (D-PA) and Rep. Peter DeFazio (D-OR). With the exception of Rep. Ileana Ros-Lehtinen who has voted in favor of ratifying free trade agreements (FTA) with Chile, Singapore, Central America and Peru, analysts note that the sponsors and co-sponsors do not have pro-trade voting records and that bills similar to H.R. 6071 are introduced to Congress once every one or two legislative sessions although, to date, none have been enacted into law. In the context of the upcoming November legislative elections and what has been termed the “Make It In America” agenda backed by the Obama Administration, analysts opine that this bill is likely political in nature and is meant to stoke concerns among private businesses and organized labor about the US trade deficit with China and “job destruction” in the US manufacturing sector. Observers believe that it is unlikely that the House will pass H.R. 6071.

H.R. 6071 has been referred to the House Ways and Means Committee as well as to the House Rules Committee, and it remains unclear when this bill will be marked up and reported for a vote on the House floor.

## Legislators Circulate Draft Letter Urging House Leadership to Vote on China Currency Bill

On August 18, 2010, Reps. Tim Ryan (D-OH) and Tim Murphy (R-PA) circulated a letter among House members that urges House leadership to bring the Currency Reform for Fair Trade Act (H.R. 2378) to a vote. H.R. 2378 directs the Department of Commerce to regard the undervaluation of the Chinese currency (RMB) as a countervailable subsidy such that Chinese goods imported into the United States that are under countervailing duty proceedings would be assessed a countervailing duty at the border which would include an amount reflecting the level of undervaluation of the currency with respect to the US dollar. In antidumping (AD) proceedings, H.R. 2378 directs the Department of Commerce to adjust downward the export (constructed) price of the good by the percentage by which the currency of the producer or exporter is undervalued.

The letter is addressed to House Speaker Nancy Pelosi (D-CA), House Minority Leader John Boehner (R-OH), Majority Leader Steny Hoyer (D-MD) and Minority Whip Eric Cantor (R-VA). As H.R. 2378 concerns tariffs, it must first be referred to and be marked-up by the House Ways and Means Committee before it can be sent to the House floor for a vote. Consequently, the letter is also addressed to Ways and Means Committee Chairman Sander Levin (D-MI) and Ranking Member Dave Camp (R-MI).

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H.R. 2378 is one of several bills introduced in Congress which aim to address what many US lawmakers (representing the sentiment of their respective constituencies) regard as currency manipulation on the part of China that contributes to the outsourcing of production and jobs from the United States to China. Despite pressure from the Obama Administration not to do so, Sen. Charles Schumer (D-NY) has promised to move forward with the Currency Exchange Rate and Reform Act of 2010 (S. 3134), which would treat the undervaluation of the RMB as a countervailable subsidy, much like H.R. 2378. Sen. Schumer has also expressed his intention to move forward with the Currency Exchange Rate Oversight Reform Act of 2009 (S. 1254), which would direct the Department of Commerce to adjust downward the export (constructed) prices in AD proceedings by the percentage by which the currency of the producer or exporter is undervalued.

China had announced that it would revalue the RMB shortly before the G-20 talks in Toronto, Canada in late June 2010 but many lawmakers in the United States have expressed that the promised revaluation has not occurred. Many US lawmakers, including many Democrats, characterize the Obama Administration's approach to addressing China's currency practices through bilateral dialogue and diplomacy as soft-handed and ineffectual. This has been particularly true following the July 8, 2010 release of the Report on International Economic and Exchange Rate Policies in which the Treasury Department took the view that the RMB is undervalued but did not label China a "currency manipulator." The Obama Administration is concerned, however, that legislation such as H.R. 2378, S. 3134 or S. 1254 will be detrimental to US-China relations over the long-term. Nonetheless, Reps. Murphy and Ryan, and Sen. Schumer and others are likely to maintain their vocal criticism of China's currency practices at least until the November 2010 elections or until job creation in the United States gains momentum and cuts into still record-high unemployment numbers.

## Department of Commerce Announces "Trade Law Enforcement Package" Proposals to Address Trade Remedy Practice, NMEs

On August 26, 2010, the Department of Commerce (DOC) announced its "Trade Law Enforcement Package" that consists of proposals meant to address a range of US trade remedies (antidumping and countervailing duties) issues. According to a press release, DOC is introducing the proposals in order to support President Obama's National Export Initiative (NEI) (which calls for a doubling of US exports over the next five years) by addressing "unfair trade practices of governments and firms abroad." DOC will seek input from the public on the proposals over the next several months, "in many cases through a public notice and comment procedure in the Federal Register."

DOC presented its proposals following a survey that the agency conducted on its current trade remedy practices. Secretary of Commerce Gary Locke had ordered the survey "in order to determine how the Department could improve the effectiveness of its existing enforcement tools through administrative and regulatory changes." DOC had also requested comments from interested parties, including but not limited to petitioners and respondents in US trade remedy cases. Based on the review and the public comments received, DOC developed 14 proposals as part of its Trade Law Enforcement Package; these proposals fall into two categories: (i) proposals that may be achieved through administrative action; and (ii) proposals that may involve regulatory changes (and thus require formal notice and comment procedures).

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Proposals that may be achieved through administrative action include:

- Expanding the use of random sampling to select companies as individual respondents in AD investigations and reviews rather than choosing the largest exporters;
- Clarifying DOC's current CVD practice to reiterate that DOC considers state-owned enterprises (SOEs) as constituting a "specific" group when they are alleged to be receiving countervailable subsidies from the government; and
- Updating DOC's practice on the treatment of non-market economies (NMEs) in order to "more closely capture the realities of how entities function in a non-market economy," including:
- Strengthening DOC's current practice regarding the issuance of company-specific AD rates in NME cases;
- Clarifying DOC's current NME practice such that the use of import prices for valuing a production factor should include all applicable freight and handling costs;
- Strengthening the treatment of resellers and other non-reviewed parties in NME cases to ensure that such parties pay the full amount of AD duties;
- Requiring companies to report production inputs for all products produced at each of their facilities for use in DOC's NME dumping calculations; and
- Reconsidering the treatment of export taxes and value-added taxes (VAT) in DOC's NME AD methodology.

Proposals that may involve regulatory change and on which DOC will seek public comment include:

- Adopting a new methodology for valuing wage (labor) rates in NME cases by using surrogate wage rates that capture all labor costs in the NME country (including benefits and taxes paid to workers by their employers);
- Ending DOC's practice of allowing individual companies to be removed from an AD/CVD order based on their ability to show zero dumping margins for three consecutive years in AD cases, or zero subsidy rates for five consecutive years in CVD cases;
- "Tightening the rules" in NME cases for determining when the price of production inputs purchased from market economy countries will be substituted for DOC's standard valuation for such inputs;
- Considering requiring importers to post cash deposits rather than bonds for imports that fall within the scope of the AD/CVD investigation starting with the issuance of DOC's preliminary determination (rather than following the imposition of an AD/CVD order);
- Strengthening the certification process for the submission of factual information to DOC;
- Strengthening the accountability of attorneys and non-attorneys practicing before DOC; and

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- “Tightening the deadlines” for submitting new factual information in AD/CVD cases.

Secretary Locke and other DOC officials have not provided further details on the proposals and how DOC will go about introducing the proposed changes, but they have noted that “in the coming months [DOC] will conduct a transparent review of these proposals and seek public comment through a comprehensive stakeholder process.” Although it is too early for reactions from industry and industry groups, observers point out that most of the proposed policies reflect the interests and comments of domestic petitioners in trade remedy cases as opposed to the interests of respondents in trade remedy cases. None of the new DOC proposals addresses the agency’s treatment of currency practices under the US CVD law – a controversial issue on which DOC is expected to rule in the current CVD investigation of Coated Paper from China. Upon the release of the new trade remedy proposals, DOC did not comment on the currency CVD issue.

## DOC Decides Not to Investigate Chinese Currency Practices as Possible Countervailable Subsidy

On August 31, 2010, the Department of Commerce DOC declined to investigate the alleged undervaluation of the Chinese currency (RMB) as a countervailable subsidy in cases involving coated paper (*Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia*, case number C-570-959) and aluminum extrusions (*Aluminum Extrusions from the People’s Republic of China*, case number C-570-968) imported from China. DOC published the currency decision along with an affirmative determination in the preliminary investigation of non-currency related subsidies afforded by the Chinese government to producers of the above-mentioned imported aluminum extrusions. The United Steelworkers Union petitioned the investigation into subsidies given to coated paper producers on September 23, 2010 and the investigation into subsidies given to producers of aluminum extrusions on March 31, 2010.

According to DOC, it has decided not to investigate the alleged undervaluation of the RMB as a countervailable subsidy because the petitioners’ allegations did not meet the statutory standard needed to initiate a countervailing duty (CVD) investigation. Under US CVD law, a subsidy is defined as financial contribution by a foreign government that benefits the production, manufacture or exportation of goods. Only prohibited “export subsidies” or domestic subsidies that are specific to a company, industry or group of companies or industries may be countervailed. DOC determined that petitioners failed to establish that China’s undervaluation of the RMB could meet the statutory requirements of a countervailable subsidy because the evidence provided did not demonstrate that China’s currency policies targeted Chinese exports or were specific to certain Chinese companies or industries. Consequently, DOC will not initiate a CVD investigation based on the alleged undervaluation. DOC’s latest decision is consistent with past decisions where DOC refused, in all previous CVD cases against Chinese goods, to investigate China’s currency policies because it found that the domestic industry failed to establish under US law that such policies met the legal definition of a subsidy.

The alleged undervaluation of the RMB has drawn close scrutiny from the Obama Administration, US lawmakers and domestic industries in recent months and DOC’s latest decision not to investigate the alleged undervaluation of the RMB as a countervailable subsidy has already drawn criticism from some legislators. House Ways and Means Committee Chairman Sander Levin (D-MI), for example, noted that “the Department of Commerce found

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that two petitions before it failed to allege facts sufficient to initiate an investigation on whether China's currency manipulation is a countervailable subsidy," adding that DOC "did not find that currency manipulation cannot be addressed as a countervailable subsidy [which is an] alternative [that] will be reviewed at the Ways and Means Committee hearing on China's exchange rate policy on September 15, as will other courses of action." Senator Charles Schumer (D-NY) labeled DOC's decision "incomplete" and criticized the Obama Administration for refusing to address China's currency practices. Sen. Schumer has also reaffirmed his intention to push for a vote on the Currency Exchange Rate Oversight Reform Act of 2009 (S. 1254), a bill that would allow the United States to deem China's currency undervaluation a countervailable subsidy, thus subjecting all Chinese exports to potential remedial tariffs. Congress is also considering bills akin to S. 1254 such as the Currency Reform for Fair Trade Act (HR 2378), sponsored by Rep. Tim Ryan (D-OH). DOC's decision not to initiate an investigation on China's currency practices will likely serve as a talking point for legislators that are preparing for the November 2010 legislative elections and lawmakers may push for legislation that addresses what many view as China's unfair currency practices. The RMB has appreciated approximately 0.3 percent since China's announcement at the June 2010 G-20 talks that it would allow more flexibility of its currency. US lawmakers and manufacturers have been commonly citing a 40 percent undervaluation of the RMB in the previous months such that the 0.3 percent appreciation of the Chinese currency since June is unlikely to stop calls from legislators for the Obama Administration to assume a more firm position toward China's currency practices and for Congress to consider legislation that unilaterally addresses this issue.

We attach to this email for your convenience the ITA Press Release and Fact Sheet concerning DOC's decision.

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## Free Trade Agreements

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### *Free Trade Agreements Highlights*

#### **ICSID Tribunal Rejects Arguments from El Salvador for Early Dismissal of Investment Case Brought Under DR-CAFTA**

On August 2, 2010, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) rejected arguments from the government of El Salvador for an early dismissal of claims prior to a full hearing in the case *Pac Rim Cayman LLC v. the Republic of El Salvador*. According to reports, the case - being heard by a tribunal at the ICSID pursuant to the investment provisions of the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) - is the first environmental challenge under the US-Central American trade agreement.

The case centers on Pacific Rim Mining Corp., a Canadian firm ("Pacific Rim"), seeking compensation from the government of El Salvador for the government's failure to approve certain mining activities. According to ICSID documents, in 2002, the government of El Salvador, through the Ministry of Economy and the Ministry of Environment and Natural Resources, "induced and encouraged Pacific Rim . . . to spend tens of millions of US dollars to undertake mineral exploration activities in El Salvador acting with licenses duly granted by [the government of El Salvador], in accordance with Salvadoran law and with the approval of Salvadoran officials."

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Pacific Rim proceeded to explore for and find gold and silver and then to prepare for their extraction. ICSID documents note that Pacific Rim “had devoted enormous resources to approved exploration activities and in pursuing the proper regulatory procedures in order to pursue the subsequent extraction phase,” and that investments made by Pacific Rim in its exploration and extraction activities included “building infrastructure, community development initiatives, mineral exploration and mine development conducted in an environmentally and socially responsible manner.”

However, in March 2008, then-President of El Salvador Elias Antonio Saca “abruptly and without any justification announced that, as President, he opposed granting any new mining permits” to Pacific Rim. The ICSID documents note that “as a result of the Government’s actions and inactions, it is alleged that the rights held by [Pacific Rim] were rendered virtually worthless and the investments in El Salvador were effectively destroyed, causing losses to” Pacific Rim. After El Salvador did not approve the proposed mining operation, Pacific Rim launched the DR-CAFTA arbitration under the agreement’s investor-state provisions, which allow foreign investors from one signatory country to seek arbitration against another signatory country’s government.

Pacific Rim argued that El Salvador failed to issue it an exploitation permit and that in failing to do so, violated articles of the DR-CAFTA , including national treatment, most-favored-nation treatment, minimum standard of treatment, and provisions dealing with expropriation and compensation. In addition, Pacific Rim claimed that El Salvador did not approve the mining activities for political reasons. El Salvador, meanwhile, sought a dismissal of the case before it could proceed to a hearing under Articles 10.20.4 and 10.20.5 of the DR-CAFTA, which allow a challenged government to seek an early dismissal of claims before a full hearing proceeds. The ICSID tribunal’s reject of El Salvador’s objections now means that the case will proceed to the jurisdictional stage.

## ACTA Negotiators Hold 10th Round of Talks in Washington, DC

On August 16-20, 2010, participants in the negotiations for the Anti-Counterfeiting Trade Agreement (ACTA) held the 10th round of negotiations in Washington, DC. Present at the talks were negotiators from Korea, Australia, Canada, the EU, Japan, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the United States. United States Trade Representative (USTR) Ron Kirk and Ron Kirk and Deputy USTR Miriam Sapiro officially served as the hosts of the 10th negotiating round.

The ninth round of ACTA negotiations took place June 28-July 1, 2010 in Lucerne, Switzerland, and observers note that the 10th round in Washington, DC served as an extension of that meeting wherein negotiators continued their discussions on the points they raised in Lucerne. According to reports, at the 10th round of negotiations, participants discussed, among other things, sections of the agreement, including the Preamble, Initial Provisions, General Obligations, Civil Enforcement, Border Measures, Criminal Enforcement, Enforcement Measures in the Digital Environment, International Cooperation, Enforcement Practices, Institutional Arrangements and Final Provisions. Nonetheless, the negotiating ACTA parties did not publicly release any draft texts to come out of the negotiating round.

At the end of the round, participants stressed the importance of ACTA as “an Agreement that will establish an international framework for their efforts to more effectively combat the proliferation of counterfeiting and piracy,” although they noted that ACTA will not interfere “with a signatory’s ability to respect fundamental rights and

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liberties” and will be consistent with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPs Agreement”) and the Declaration on TRIPs and Public Health. Negotiators agreed that Japan would host the next negotiating round in September 2010.

ACTA participants have released no other details or discussion points from the 10th round of negotiations, although observers opine that US and EU officials may have used the latest round (and bilateral meetings held on the sidelines of the round) to discuss contentious issues between the two parties, such as whether the ACTA should address protection of geographic indications (GIs), patents and industrial design, and if end users would fall under the definition for commercial scale infringement. According to reports, on GIs, the EU wants the infringement of GIs to be protected and enforced the same as infringements of trademarks and copyrights, and the EU wants the ACTA to require signatories to empower customs officials in each country to be able to seize goods suspected of infringing GIs protected by that country. The United States, however, is opposed to this approach and has voiced concern that US exports could thus be seized abroad at the border in third countries. According to several reports, Australia, New Zealand and Canada have sided with the United States on the GI issue whereas Switzerland has sided with the EU on the GI issue. In addition, the United States and the EU also appear to disagree on the definition of commercial scale piracy under the criminal enforcement section of the ACTA and whether it should apply to end users. The EU supports the exclusion of end users within this section whereas the United States wants to allow a country to be able to determine whether acts carried out by end users can be included.

Parties to the agreement appear to be continuing with the goal of finalizing the ACTA by the end of 2010.

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## Petitions and Investigations

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### *Petitions and Investigations Highlights*

#### 337 Complaint on Adjustable Height Beds

The following 337 Complaint was filed at the International Trade Commission on August 5, 2010:

Docket No: 2747

**Document Type:** 337 Complaint

**Filed By:** Kathryn L. Clune

**Firm/Org:** Crowell & Morning LLP

**Behalf Of:** Invacare Corporation

**Date Received:** August 5, 2010

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Confidential: Yes

**Commodity:** Adjustable Height Beds

Country: None

**Description:** Letter to Marilyn R. Abbott, Secretary, USITC, requesting that the Commission conduct an investigation under section 337 of the Tariff Act of 1930, as amended regarding Certain Adjustable Height Beds and Components Thereof. The proposed respondents are: Medical Depot, d/b/a Drive Medical Design and Manufacturing, Port Washington, New York and Shanghai Shunlong Physical Therapy Equipment Co. Ltd., Shanghai, China.

**Status:** Pending Institution

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## 337 Complaint on Wind and Solar-Powered Light Posts and Street Lamps

The following 337 Complaint was filed at the International Trade Commission on August 6, 2010:

Docket No: 2748

Document Type: 337 Complaint

Filed By: Amy S. Beard

Firm/Org: Tannenbaum, Helpert, Syracuse, & Hirschtritt LLP

Behalf Of: Duggal Dimensions, LLC, Duggal Energy Solutions, LLC, and Duggal Visual Solutions, Inc.

Date Received: August 6, 2010

Confidential: Yes

Commodity: Wind and Solar-Powered Light Posts and Street Lamps

Country: None

Description: Letter to Marilyn R. Abbott, Secretary, USITC, requesting that the Commission conduct an investigation under section 337 of the Tariff Act of 1930, as amended regarding Certain Wind and Solar-Powered Light Posts and Street Lamps. The proposed respondents are: Gus Power Incorporated, Canada; Efston Science Inc, Canada; King Luminaire Inc, Jefferson, Ohio; and The StressCrete Group, Canada.

Status: Pending Institution

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## 337 Complaint on Flash Memory Chips

The following 337 Complaint was filed at the International Trade Commission on August 6, 2010:

Docket No: 2749

Document Type: 337 Complaint

Filed By: Bureden J. Warren

Firm/Org: McDermott, Will & Emery

Behalf Of: Spansion LLC

Date Received: August 6, 2010

Confidential: Yes

Commodity: Flash Memory Chips

Country: None

Description: Letter to Marilyn R. Abbott, Secretary, USITC, requesting that the Commission conduct an investigation under section 337 of the Tariff Act of 1930, as amended regarding Certain Flash Memory Chips and Products Containing the Same. The proposed respondents are: Samsung Electronics Co., Ltd., South Korea; Samsung Electronics America, Inc., New Jersey; Samsung International Inc, California; Samsung Semiconductor Inc, California; Samsung Telecommunications America, LLC, Texas; Apple, Inc, California; BenQ Corp., Taiwan; BenQ America Corp., California; Qisda Corp, Taiwan; Kingston Technology Company Inc, California; Kingston Technology (Shanghai) Co., Ltd., China; Kingston Technology Far East Co., Taiwan; Kingston Technology Far East (Malaysia) Sdn Bhd, Malaysia; MiTAC Digital Corporation (aka Magellan), California; MiTAC International Corporation, Taiwan; Nokia Corp, Finland; Nokia Inc., Texas; PNY Technologies Inc., New Jersey; Research In Motion Ltd., Canada; Research In Motion Corporation, Texas; Sirius XM Radio, Inc; New York; Transcend Information Inc, Taiwan; Transcend Information Inc (US), California; and Transcend Information Inc., China.

Status: Pending Institution

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## 337 Complaint on Toner Cartridges

The following 337 Complaint was filed at the International Trade Commission on August 20, 2010:

Docket No: 2750

Document Type: 337 Complaint

Filed By: V. James Adduci

Firm/Org: Adduci, Mastriani & Schaumberg

Behalf Of: Lexmark International, Inc.

Date Received: August 20, 2010

Confidential: Yes

Commodity: Toner Cartridges

Country: None

Description: Letter to Marilyn R. Abbott, Secretary, USITC, requesting that the Commission conduct an investigation under section 337 of the Tariff Act of 1930, as amended regarding Certain Toner Cartridges. The proposed respondents are: Ninestar Image Co. Ltd., China; Ninestar Image Int'l, Ltd., China; Seine Image International Co. Ltd., Hong Kong; Ninestar Technology Company, Ltd., New Jersey; Ziprint Image Corporation, California; Nano Pacific Corporation, California; IJSS Inc. California; Chung Pal Shin, California; Nectron International, Inc., Texas; Quality Cartridges Inc., New York; Direct Billing International Incorporated, California; E-Toner Mart, Inc., California; Alpha Image Tech, California; ACM Technologies, Inc., California; Virtual Imaging Products Inc., Ontario; Acecom Inc-San Antonio, Texas; Ink Technologies Printer Supplies, LLC, Ohio; Jahwa Electronics Co., Ltd. South Korea; Huizhou Jahwa Electronics Co., Ltd, China; Copy Technologies, Inc., Georgia; Laser Toner Technology, Inc., Georgia; C & R Services, Inc., Texas; Print-Rite Holdings Ltd., Hong Kong; Union Technology Int'l, Macao; Ninestar.

Status: Pending Institution

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## 337 Complaint on Liquid Crystal Display Devices

The following 337 Complaint was filed at the International Trade Commission on August 23, 2010:

Docket No: 2751

**Document Type:** 337 Complaint

**Filed By:** Tom M. Schaumberg

**Firm/Org:** Adduci, Mastriani & Schaumberg

**Behalf Of:** Chimei-Innolux Corporation, Taiwan; Chimei Optoelectronics USA, Inc., San Jose, CA; and Innolux Corporation, Austin, TX

**Date Received:** August 23, 2010

Confidential: Yes

**Commodity:** Liquid Crystal Display Devices

Country: None

**Description:** Letter to Marilyn R. Abbott, Secretary, USITC, requesting that the Commission conduct an investigation under section 337 of the Tariff Act of 1930, as amended regarding Certain Electronic Devices, Including Display Devices. The proposed respondents are: Sony Corporation, Tokyo, Japan; Sony Corporation of America, New York, NY; Sony Electronics Corporation, Dan Diego, CA; and Sony Computer Entertainment America, LLC, Foster City, CA.

**Status:** Pending Institution

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