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General Trade Report - JETRO

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UNITED STATES

GENERAL TRADE POLICY

USTR Releases 2012 Special 301 Report on IPR Protection and Enforcement

Summary

On April 30, 2012, the Office of the US Trade Representative (USTR) released its "2012 Special 301 Report" ("Report" or "2012 Report"). The annual 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 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." While much of the Report's content remains the same as USTR's 2011 Special 301 Report, the 2012 Report discusses new developments and makes several changes to the Country Reports section. Below we discuss the Report's contents, generally, and provide analysis on major substantive changes made to the Report, as compared to the 2011 Report.

Analysis

I. BACKGROUND

Pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act, the Report provides an overview of the state of intellectual property rights (IPR) protection and enforcement among US trading partners.

According to the Report, USTR's designation of certain countries within the Country Reports section is necessarily done on a case-by-case basis. Each designation is the result of deliberations among all relevant agencies within the US government, informed by consultation with stakeholders, foreign governments, Congress and other interested parties. With respect to public consultation, USTR requested written submission from the public through a Federal Register (FR) notice published on December 28, 2012. In addition, USTR conducted a public hearing at which interested parties testified on IPR protection and enforcement issues. In making its designations, the Report also states that USTR takes into account trends and issues listed in its "Developments in IPR Protection and Enforcement" section of the Report, as well as each country's level of development and its international obligations.

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In its 2011 Report, USTR invited trade partners listed on the Priority Watch List or Watch List to work with the United States to develop a mutually accorded action plan designed to lead to that country's removal from the relevant list. In its 2012 Report, USTR provides a brief follow-up on this invitation, noting that it is currently working with several trading partners to develop such actions plans.

II. DEVELOPMENTS IN IPR PROTECTION AND ENFORCEMENT

Similar to the 2011 Report, the 2012 Report discusses the following topics in its first of two sections, titled "Developments in IPR Protection and Enforcement": (i) positive developments in IPR protection and enforcement; (ii) initiatives to strengthen IPR protection and enforcement internationally; (iii) best IPR practices by US trading partners; (iv) capacity building efforts; (v) trends in trademark counterfeiting and copyright piracy; (vi) piracy over the internet and digital piracy; (vii) trademarks and domain name disputes; (viii) government use of software; (ix) intellectual property and health policy; (x) supporting pharmaceutical and medical device innovation through market access; (xi) implementation of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of IPR (TRIPS Agreement); and (xii) WTO dispute settlement.

In addition to these developments, the 2012 Report also lists the following new development in IPR protection and enforcement:

- **Trade Secrets and Forced Technology Transfer.** According to the Report, US companies operating outside the United States are experiencing an increase in the theft of their trade secrets, upon which a company's competitiveness often depends. The Report also cites several "troubling" policies relating to so-called "indigenous innovation," including, *inter alia*: (i) requiring the transfer of technology as a precondition for market access; (ii) requiring use of, or indicating preference for, products or services in which IPR is either developed or owned locally; (iii) manipulating the standards development process to give domestic firms an advantage; and (iv) requiring unnecessary disclosure of confidential business information for regulatory approval. The Report urges its trading partners to reject these policies, noting that strong IPR protection can provide incentives for voluntary transfer of technology, which the Report asserts can promote economic growth and create jobs, especially in developing and least-developed countries.

With respect to positive developments, the 2012 welcomes certain steps related to IPR protection and enforcement taken by the following trading partners in early 2012 and 2011: (i) Malaysia; (ii) Spain; (iii) Israel; (iv) Philippines; (v) Russia; (vi) China; and (vii) Korea and Colombia.

III. COUNTRY REPORTS

Similar to the 2011 Report, the 2012 Report does not list any country as a Priority Foreign Country. The 2012 Report identifies 13 countries on the Priority Watch List, 26 countries on the Watch List and one country for Section 306 Monitoring.

Priority Watch List

The 2012 Report lists the following countries on its Priority Watch List: (i) Algeria; (ii) Argentina; (iii) Canada; (iv) Chile; (v) China; (vi) India; (vii) Indonesia; (viii) Israel; (ix) Pakistan; (x) Russia; (xi) Thailand; (xii) Ukraine; and

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(xiii) Venezuela. This list is almost identical to the Priority Watch List included in the 2011 Report; the only difference is that the 2012 Report added the following country to the List:

- **Ukraine.** According to the 2012 Report, Ukraine has made minimal progress in implementing its 2010 IPR action plan commitments. Specific issues include the following: (i) the use of unlicensed software; (ii) insufficient copyright laws; (iii) counterfeit and pirated goods; (iv) a reduction in the number of IP inspectors; and (v) the illegal transshipment of counterfeit and pirated goods. Ukraine was listed on the Watch List of the 2011 Report.

For each country listed on the Priority Watch List, the Report: (i) discusses positive developments with respect to IPR enforcement and protection that occurred in the country within the last year; and (ii) lists IPR-related issues within that country. Below we list those countries on the Priority Watch List for which USTR either mentioned new IPR-related issues or did not mention IPR-related issues previously listed in the 2011 Report:

- **China.** The 2012 Report lists the following additional issues: (i) a growing number of cases in which the trade secrets of US firms have been stolen for use by Chinese companies; (ii) reports that market access and investment approvals for US firms have been conditioned on the sale or licensing of IPR and other prioprietary information to Chinese firms; and (iii) the extent to which China provides effective protection against unfair commercial use, as well as unauthorized disclosure, of undisclosed test or other data generated to obtain market approval for pharmaceutical products;

- **India.** The 2012 Report also mentions the need for better coordination between enforcement officials of certain state governments within India. Unlike the 2011 Report, the 2012 Report does not urge the Indian government to combat optical disc piracy;

- **Indonesia.** The 2012 Report also mentions: (i) growing piracy over the Internet; and (ii) concern regarding the possible effects of a recent decree that imposes strict limitations on the delivery of ringtones;

- **Israel.** Unlike the 2011 Report, the 2012 Report does not: (i) urge Israel to confirm that enterprises are criminally liable for end-user software piracy; and (ii) urge Israel to submit legislation on patent publication;

- **Pakistan.** Although both Reports mention issues with piracy in Pakistan, unlike the 2011 Report, the 2012 Report does not mention issues with trademark piracy, specifically;

- **Russia.** Unlike the 2011 Report, the 2012 Report does not mention concern over Russia"s accreditation process for collecting societies, especially those collecting royalties on behalf of performers and record companies; and

- **Thailand.** The 2012 Report also states that Thailand should provide an effective system for protecting against the unfair commercial use, as well as unauthorized disclosure, of test or other data generated to obtain marketing approval for pharmaceutical and agricultural chemical products.

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Watch List

The 2012 Report lists the following countries in their Watch List: (i) Belarus; (ii) Bolivia; (iii) Brazil; (iv) Brunei Darussalam; (v) Colombia; (vi) Costa Rica; (vii) Dominican Republic; (viii) Ecuadaor; (ix) Egypt; (x) Finland; (xi) Greece; (xii) Guatemala; (xiii) Italy; (xiv) Jamaica; (xv) Kuwait; (xvi) Lebanon; (xvii) Mexico; (xviii) Norway; (xix) Peru; (xx) Philippines; (xxi) Romania; (xxii) Tajikistan; (xxiii) Turkey; (xxiv) Turkmenistan; (xxv) Uzbekistan; and (xxvi) Vietnam.

In contrast with the 2011 Report, the 2012 Report removes the following countries from the Watch List: (i) Malaysia; and (ii) Spain. As mentioned above, both countries were identified in the "Developments on IPR Enforcement and Protection" section of the 2012 Report as countries in which positive developments with respect to IPR enforcement and protection had occurred in 2011. Notably, Israel, Philippines, Russia, China and Colombia were also identified as countries that took important steps toward improving their respective IPR protection and enforcement efforts, although they remain on either the Priority Watch List or the Watch List of the 2012 Report.

For each country listed on the Watch List, the Report: (i) discusses positive developments with respect to IPR enforcement and protection that occurred in the country within the last year; and (ii) lists IPR-related issues within that country. Below we list those countries on the Watch List for which USTR either mentioned new IPR-related issues or did not mention IPR-related issues previously listed in the 2011 Report:

- **Belarus.** The 2012 Report urges Belarus to enact regulations to implement the 2011 law on copyright and related rights;

- **Brazil.** Although the 2011 Report commended a Federal Attorney General opinion regarding the patent review requirements for pharmaceuticals, the 2012 Report urges Brazil to formalize this opinion. While the 2011 Report welcomes steps taken by Brazil to address it backlong of pending patent application, the 2012 Report calls on Brazil to further address this issue;

- **Brunei Darussalam.** Although issues related to piracy were mentioned in both the 2011 and 2012 Reports, unlike the 2011 Report, the 2012 Report does not specifically cite the availability of pirated music and the downloading of pirated works over the internet as an issue;

- **Colombia.** Unlike the 2011 Report, the 2012 Report does not encourage Colombia to develop an effective system to address patent issues expeditiously in connection with applications to market pharmaceutical products;

- **Ecuador.** Unlike the 2011 Report, the 2012 Report does not express concern regarding compulsory licensing of pharmaceutical and agricultural chemical products in Ecuador;

- **Egypt.** The 2012 Report urges the Egyptian government to do the following: (i) enact regulations clarifying that border officials have the authority, *ex officio*, to destruct counterfeit goods; (ii) ratify the World Intellectual Property Organization (WIPO) Internet Treaties; and (iii) counteract the reported proliferation of businesses offering pirated television content;

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- **Greece.** The 2012 Report urges the Greek government to do the following: (i) implement legislation regarding copyright protection, especially that which pertains to administrative fines for software infringement and to civil actions by rights holders concerning internet piracy; (ii) establish an effective mechanism for addressing piracy over the internet; and (iii) improve the efficiency of its judicial system in dealing with IPR-related matters;

- **Guatemala.** The 2012 Report mentions the need for Guatemala to improve its judicial system with regard to IPR-related crimes;

- **Jamaica.** The 2012 Report mentions reports that: (i) Jamaica"s largest cable operator has not compensated performing rights organizations for the public performance of music; and (ii) cable operators are offering unauthorized programming;

- **Lebanon.** The 2012 Report encourages the Lebanonese government to: (i) clarify its protection against the unfair commercial use, as well as unauthorized disclosure, of test or other data generated to obtain marketing approval of pharmaceutical products; and (ii) complete its accession to the WIPO Internet Treaties;

- **Mexico.** The following were mentioned as additional issues in the 2012 Report: (i) the need for Mexico to sign, ratify and implement the Anti-Counterfeiting Trade Agreement (ACTA); (ii) the availability of pirated and counterfeit goods; and (iii) unauthorized camcording of motion pictures in theaters;

- **Peru.** The 2012 Report urges the Peruvian government to, pursuant to its obligations under the US-Peru Trade Promotion Agreement, increase its protections against piracy over the Internet;

- **Philippines.** The 2012 Report urges the Philippines government to: (i) provide an effective system for protecting against the unfair commercial use, as well as unauthorized disclosure, of test or other data, generated to obtain marketing approval for pharmaceutical and agricultural chemical products; and (ii) address policies that, according to the Report, inhibit US exports of IP-intensive goods, such as pharmaceutical products, to the Philippines;

- **Turkey.** The 2012 Report alleges that a lack of regulatory transparency and predictability for pharmaceutical products minimizes market access for those goods;

- **Uzbekistan.** The 2012 Report urges Uzbekistan to provide its new Agency for Intellectual Property with the necessary tools and resources it needs to operate effectively. Unlike the 2011 Report, the 2012 Report does not state that Uzbekistan has not fully implemented its IPR-related commitments under the 1994 US-Uzbekistan Trade Agreement; and

- **Vietnam.** Unlike the 2011 Report, the 2012 Report does not urge Vietnam to increase coordination and clarify certain administrative procedures and responsibilies of Vietnam"s IPR enforcement agencies.

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Section 306 Monitoring

Similar to the 2011 Report, the 2012 Report lists Paraguay as the only country for Section 306 Monitoring. Below we list major substantive changes to USTR"s list of IPR-related issues in Paraguay:

- **Paraguay.** The 2012 Report states that Paraguay should: (i) improve the efficiency of its judicial system so that additional IPR violations can be addressed through its 2009 Penal Code amendments; and (ii) provide an effective system for protecting against the unfair commercial use, as well as unauthorized disclosure, of test or other data generated to obtain marketing approval of agricultural chemical products. Unlike the 2011 Report, the 2012 Report does not urge the Paraguayan government to increase public awareness regarding IPR protection and enforcement.

Outlook

A comparison of the 2012 and 2011 Reports highlights the progress, or lack thereof, made on IPR-related issues by US trading partners as well as shifts in the Obama Administration"s policy of promoting IPR protection and enforcement. In this regard, there were several key differences between the 2012 and 2011 Reports. First, USTR removed Malaysia and Spain from the Watch List, and moved Ukraine from the Watch List to the Priority Watch List. These changes are particularly significant in the case of Malaysia, which is involved in negotiations with the United States and seven other countries toward the Trans-Pacific Partnership Agreement (TPP). The United States is interested in negotiating a stringent IPR chapter within TPP, although the text of the chapter remains a contentious negotiating issue. Notably, Chile, Peru, Brunei Darussalam and Vietnam, other TPP negotiating partners, remain on the 2012 Report"s Priority Watch and Watch Lists. Canada and Mexico, two countries that have formally expressed their interest in joining the TPP, also remain on the Priority Watch List and the Watch List, respectively.

The 2012 Report"s listing of trade secrets and forced transfer of technology is also noteworthy. Although the Report"s overview of this issue does not specifically name countries in which it is an issue of particular concern, mention of the issue within the Report"s Country Reports section is almost exclusively restricted to China. Indeed, the Report notes there has been a recent, "alarming increase" in the number of cases of trade secret theft in China. Although China"s IPR-related issues continue to be priority issue of concern for the United States within the US-China bilateral trade relationship, the 2012 Report"s designation of yet another emerging IPR-related issue in China suggests that the United States has only achieved limited progress in resolving IPR-related issues in China.

Finally, industry groups have expressed concern over Russia"s lack of progress on IPR-related issues, as detailed in the 2012 Report. Although the Report welcomes certain positive IPR-related developments that occurred in Russia during the last year, the Report"s assessment of Russia"s IPR-related issues remains, along with China, the longest and most comprehensive in the Report"s Country Reports section. In anticipation of Russia"s expected formal accesion to the WTO later this year, US lawmakers and private sector representatives have identified IPR protection and enforcement, along with human rights, as a key issue of concern.

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MOFCOM Announces Preliminary Results of Foreign Trade Barrier Investigation Against US Subsidies for Renewable Energy Industry

On May 24, 2012, China"s Ministry of Commerce (MOFCOM) published Notice No. 26 [2012] announcing the preliminary results of the foreign trade barrier investigation against US government policy support and subsidies for the renewable energy industry in several states.

The petition was filed on October 24, 2011 by the China Chamber of Commerce for Import and Export of Machinery and Electronic Products and the New Energy Chamber of the All-China Federation of Industry & Commerce. The investigation, initiated on November 25, 2011, covered products, equipment and accessories related to wind energy, solar energy, water energy, and other types of renewable energy (please refer to the W&C China Trade Alert dated on November 29, 2011).

In the preliminary results, MOFCOM concluded that the following six US subsidy programs constituted prohibited subsidies as defined under the countervailing rules of the World Trade Organization (WTO):

- State of Washington: Renewable Energy Cost Recovery Incentive Program
- State of Massachusetts: Commonwealth Solar II
- State of Ohio: Ohio Wind Production and Manufacturing Incentive Program
- State of New Jersey: Renewable Energy Incentive Program
- State of New Jersey: Renewable Energy Manufacturer"s Incentive Program
- State of California: Self-Generation Incentive Program

Interested parties can submit comments regarding the preliminary results to MOFCOM within 20 days from the date of the announcement. A definitive decision will be made no later than August 25, 2012. In the case of a definitive decision, MOFCOM will either hold bilateral consultations with the US government, or request for a settlement mechanism before the WTO, or take any other proper measures, according to circumstances.

US General Trade Policy Highlights

CAFC Remands *GPX* Case to CIT to Consider Constitutionality of New "CVD/NME" Law

On May 9, 2012 the Court of Appeals of the Federal Circuit (CAFC) ordered that the Court of International Trade (CIT) reconsider the case *GPX International Tire Corp. v. United States* ("*GPX* case"). Specifically, the CAFC instructed the CIT to determine the constitutionality of legislation passed in response to the CAFC"s December 19, 2011 ruling in the *GPX* case. The CAFC"s remand was made in response to the Obama Administration"s March 5, 2012 request for a rehearing of the *GPX* case.

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On December 19, 2011, the CAFC ruled that the 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. The CAFC's ruling upheld the 2010 decision of the CIT in the same case. *(Please see related W&C Trade Report from January 25, 2012.)*

On March 13, 2012 President Obama signed into law legislation essentially invalidating the CAFC's ruling. HR 4105 and S 2153 contain two main provisions: (i) the first retroactively grants DOC the authority to pursue CVD cases on imports from NME countries; and (ii) the second prospectively requires DOC to address the issue of "double counting," *i.e.,* the simultaneous application of both antidumping (AD) duties and CVDs on imported merchandise from NMEs. (*Please see related W&C Trade Alert from March 7, 2012*.)

Following the law's enactment, the CAFC ordered the parties participating in the *GPX* case to submit briefs discussing the impact of the legislation. In their May 9 order, the CAFC noted that, in their briefs, the plaintiffs argue that the legislation is unconstitutional for two reasons: (i) the retroactive application of the first provision of the legislation attempts to overrule the CAFC's December 19 ruling; and (ii) due to the differing effective dates of the legislation's two main provisions, it creates a "special rule" for the CVD investigations on imports from NMEs that were carried out before the law's enactment. While the law gave DOC the retroactive authority to impose CVDs in these investigations, the law did not require DOC to address the issue of double counting in these same investigations.

The Court dismissed the plaintiffs' first argument regarding the legislation's constitutionality, noting that when Congress creates a retroactive law, the Court must consider the retroactive applicability of the law when reviewing its judgment. The CAFC noted, however, that there is no precedent for how to address the second argument. The CAFC further noted that the US government, in its brief, argued that the case should be remanded to a lower court should the plaintiffs argue the legislation is unconstitutional. The CAFC agreed and remanded the case to the CIT.

The CAFC's order is noteworthy in that it acknowledges that Congress enacted legislation with the aim of reversing its December 19 ruling. While legal experts were not surprised that the CAFC refused to rule on the plaintiffs' constitutionality claims, the Court's decision to remand the case to the CIT for consideration of the constitutionality of the legislation was unexpected. The case will now be considered at the CIT by Judge Jane Restani, who presided over the case in 2009 and 2010. During this time frame, Judge Restani twice ruled against DOC's methodology for simultaneously applying CV and AD duties on imports from NMEs. The CIT is not under any deadline by which it must consider the case.

US, Japan Announce Trade-Related Initiatives, Say TPP Consultations Will Continue

On April 30, 2012, President Obama met with Japanese Prime Minister Yoshihiko Noda in Washington to discuss a number of issues related to the US-Japan bilateral relationship, including those pertaining to, *inter alia*, business, trade, energy and security. The leaders announced several trade-related initiatives and confirmed that they will continue their bilateral consultations on the Trans-Pacific Partnership Agreement (TPP). Prime Minister

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Noda announced in November 2011 Japan"s intention to begin consultations with TPP countries toward joining the TPP negotiations.

Prime Minister Noda"s visit resulted in the release of several key documents, including the "United States-Japan Joint Statement: A Shared Vision for the Future" ("Statement") and "Fact Sheet: United States-Japan Cooperative Initiatives" ("Fact Sheet"). The Fact Sheet highlights several new trade-related initiatives, including:

- **Energy Initiatives.** Prime Minister Noda and President Obama agreed to four new clean energy initiatives, including a program to collaborate on recycling rare earth elements. The new initiatives will be administered by the US-Japan Clean Energy Dialogue;

- **Global Supply Chain Security.** The Fact Sheet notes that the United States and Japan signed on April 30, 2012 a "Joint Statement on Global Supply Chain Security,"[1] which outlines the two countries" intention to, *inter alia*: (i) enhance mutual recognition between the United States" Customs-Trade Partnership Against Terrorism (C-TPAT) program and Japan"s Authorized Economic Operators (AEO) program; and (ii) accelerate negotiations toward an air cargo security mutual recognition arrangement;

- **Travel Facilitation.** The United States and Japan have agreed to work together toward expediting immigration clearance for trusted travelers from both countries. To achieve this goal, Japan will participate in the United States" "Global Entry" program; and

- **Innovation, Entrepreneurship and the Internet Economy.** According to the Fact Sheet, the leaders devised a work plan for the recently established "US-Japan Innovation and Entrepreneurship Council." The goal of the Council is to identify policies and initiatives to foster new businesses that promote growth and jobs in both countries. The leaders also established a "Cloud Computing Working Group," to be administered by the Internet Economy Dialogue. One of the key goals of the Working Group will be to influence global regulatory practices on emerging internet technologies and cross-border data flows.

The Statement highlights the importance of the bilateral trade relationship, affirming, *inter alia*, the two countries" commitment to regional economic integration, consistent with the Asia Pacific Economic Cooperation (APEC) goal of establishing a Free Trade Area of the Asia-Pacific (FTAAP). In this regard, the Statement briefly mentions that the two countries will "continue to advance [their] ongoing bilateral consultation on the Trans-Pacific Partnership (TPP)".

Some experts originally saw the April 30 meeting between President Obama and Prime Minister Noda as an opportunity for the two countries to announce progress on their consultations regarding Japan"s possible accession to the TPP. However, expectations dwindled for several reasons as the date of the meeting neared.

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[1] The "Joint Statement on Global Supply Chain Security" is available here: http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Press%20releases/US_Japan_Joint_Statement_Global_Supply_Chain_Security_30_Apr_2012.pdf

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First, certain constituent groups within Japan have expressed strong opposition to the country's possible accession to the TPP.

In addition, the United States and Japan have not made progress on certain bilateral trade issues the United States seeks to address before Japan joins the Agreement. These bilateral trade issues include, *inter alia*, market access for US beef and autos, as well as competition issues related to Japan Post. Although the Japanese government asked its Food Safety Commission in December 2011 to study whether it could relax its restrictions on US beef imports, there have been no policy changes to date in this regard. More recently, concern has been expressed over legislation passed in late April 2012 by the Japanese parliament, known as the Diet, to revise the Postal Privatization Law, which outlines reform plans for Japan Post. According to US industry groups, the legislation "raises new and serious questions regarding Japan's commitment to fulfilling its international [General Agreement on Trade in Services (GATS)] obligations and provide a level playing field to all insurers and other financial institutions in Japan."

Before a new country accedes to the TPP, the Obama Administration is likely to give Congress 90 days' notice. The Obama Administration has urged TPP negotiators to finalize the Agreement by the end of 2012. Assuming this deadline is feasible, TPP members will have to welcome Japan, Canada and/or Mexico, to the Agreement in the near-term if they are interested in having these countries participate in the negotiation towards the finalization of the Agreement. Nonetheless, contentious negotiating issues suggest that negotiators will most likely be unable to meet such a deadline. In this regard, the absence of an announcement on April 30 regarding Japan's possible accession to the TPP suggests that the United States may be increasingly interested in waiting until after the TPP has been concluded to allow additional countries to accede to it.

Obama Administration Issues Executive Order on International Regulatory Cooperation; Initiative Holds Possible Implications for TPP Negotiations

President Obama issued an Executive Order (EO) on May 1, 2012, reiterating the purpose of the US regulatory system, delegating to the existing Regulatory Working Group (RWG) the task of coordinating international regulatory cooperation, and delineating federal agencies' responsibilities in promoting such international regulatory cooperation. The May 1 EO, titled "Promoting International Regulatory Cooperation," builds on EO 12866 of September 1993, titled "Regulatory Planning and Review" and on EO 13563 of January 2011, titled "Improving Regulation and Regulatory Review."

EOs 12866 and 13563, issued by Presidents Clinton and Obama, respectively, establish guidelines for current US federal government rulemaking, and Section 4 under EO 12866, as reaffirmed and supplemented by EO 13563, directs the Office of Information and Regulatory Affairs (OIRA) to convene a RWG to "serve as a forum to assist [federal] agencies in identifying and analyzing important regulatory issues," including: (i) the development of innovative regulatory techniques; (ii) the methods, efficacy and utility of comparative risk assessment in regulatory decision-making; and (iii) the development of short forms and other streamlined regulatory approaches for small businesses and other entities. The May 1 EO further delegates to RWG the following duties relating to international regulatory cooperation:

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- **Common Understanding across US Federal Government Agencies.** The May 1 EO states that RWG shall serve as a forum through which US government agencies will develop consensus on the following: (i) international regulatory cooperation activities reasonably expected to lead to significant regulatory actions; (ii) federal government efforts to support significant, cross-cutting international regulatory cooperation activities; and (iii) promotion of good regulatory practices internationally; and

- **Strategy, Best Practices and Other Considerations.** The May 1 EO states that RWG shall examine, among other things: (i) strategies for developing regulatory approaches through international regulatory cooperation; (ii) best practices for international regulatory cooperation in regard to regulatory development, information exchange and other regulatory tools; and (iii) other factors that agencies should consider when considering alternative regulatory approaches.

In regard to federal agencies‟ responsibilities, the May 1 EO establishes the following under normal circumstances:

- **International Regulatory Cooperation Activities.** Federal agencies‟ yearly Regulatory Plans, which are mandatory under EO 13563, must include a summary of their respective international regulatory cooperation activities that are reasonably anticipated to lead to significant regulations;

- **International Impact.** Federal agencies must also designate significant regulations having significant international impacts as such in the Unified Agenda of Federal Regulatory and Deregulatory Actions; and

- **Reform.** Federal agencies must consider, with the help of stakeholder input, reforms to existing significant regulations that address unnecessary differences in regulatory requirements between the United States and its major trading partners.

Analysts note that international regulatory cooperation has been a focus of the Obama Administration‟s trade policy, with an aim to better facilitate US firms‟ foreign business transactions. For example, within the context of the negotiations toward the Trans-Pacific Partnership (TPP) agreement, the Office of the United States Trade Representative (USTR), which operates at the behest of the Obama Administration, has aggressively urged fellow TPP negotiators to agree to language in the Agreement on “regulatory coherence.” While entering into a free trade agreement (FTA) often requires parties to modify some standing domestic legislation and/or regulation, certain TPP members are reportedly concerned that the United States‟ insistence that TPP members adopt its proposed language on regulatory coherence –and assume the resulting long-term domestic regulatory implications– could prove unfeasible. With TPP negotiations ongoing and a conclusion to the same unlikely before 2013, it remains unknown to what extent US negotiators will achieve the inclusion of regulatory coherence-related language in the Agreement, but the May 1 EO does signal to other TPP members the Obama Administration‟s intentions in this regard.

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DOC Issues Affirmative Preliminary AD Determination on Chinese Solar Panels and Finds Critical Circumstances; Approach on Double Counting Remains Unclear

The Department of Commerce (DOC) announced on May 17, 2012 its affirmative preliminary determination in the antidumping duty (AD) investigation of imports of crystalline silicon photovoltaic ("solar") cells from China. This preliminary AD determination follows DOC's March 20, 2012 affirmative preliminary determination in the companion countervailing duty (CVD) investigation on such Chinese solar cells.

DOC preliminarily determined that Chinese producers/exporters sold solar cells in the United States at the below-detailed dumping margins:

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.	31.22 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.	31.14 percent
Separate Rate Companies		31.18 percent
China-Ride Entity		249.96 percent

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. According to DOC, the scope of the AD/CVD investigations "covers 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 [and] does not cover imports of modules/panels produced in China from solar cells produced in a third country."

Also, DOC preliminarily determined 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 require a cash deposit or bond based on these preliminary rates applicable to all entries of such goods for the 90 days prior to the date on which the preliminary AD determination is published in the Federal Register (FR).

According to analysts, DOC's finding of AD margins that far exceed the margins found in the parallel CVD investigation was largely expected as such disparity in AD and CVD margins is common in US AD/CVD investigations into goods from non-market economy (NME) goods due to the differences in methodologies used

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to calculate AD and CVD margins. However, DOC has not provided any explanation in regard to how it has addressed 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 in the case of an NME-origin good into which AD and CVD investigations are initiated in the United States. Currently law provides for the reduction on the AD duties under certain circumstances in order to prevent such double counting, but it remains unclear how –or if– DOC has done so in this case.

DOC will likely issue its final AD determination in early October 2012. If DOC makes an affirmative final determination, and the US International Trade Commission (ITC) arrives at an affirmative final determination that Chinese solar cell imports materially injure, or threaten material injury to, the domestic industry, DOC will issue an AD order. Such ITC determination is expected by mid-November 2012.

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FREE TRADE AGREEMENTS

Free Trade Agreements Highlights

House Lawmakers Urge Protection of "Buy American" Policies in TPP

Sixty-nine House lawmakers[2] sent a letter to President Obama on May 3, 2012, expressing support for "Buy American" procurement policies and urging him to direct the Office of the United States Trade Representative (USTR) not to provide national treatment for US government procurement in the context of the ongoing negotiations toward the Trans-Pacific Partnership (TPP). Providing such treatment, according to the lawmakers' letter, would limit the reach of "Buy American" provisions in standing US law, thus "adversely impact[ing] [US] jobs, workers, and manufacturers."

Congress has enacted several domestic sourcing statutes that govern the purchases by the federal government and sub-federal government entities that award federal funds, the oldest of such statutes being the Buy American Act of 1933. In addition to the federal rules, several US states also have "Buy American" or "buy local" laws in effect.

The lawmakers' letter asserts that, under the TPP framework, the federal government and individual US states "would be obligated to bring existing and future [Buy American] policies into compliance with norms set forth in 26 proposed TPP chapters, including one covering government procurement policy," and the US government would be subject to "lawsuits before international dispute resolution tribunals empowered to authorize trade sanctions against the [United States]" were the United States to fail to bring its domestic policies in line with such TPP provisions. The lawmakers therefore posit that affording fellow TPP members national treatment for US government procurement would "limit the ability of Congress and US state legislatures to determine what procurement policies are in [the United States'] national interest."

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[2] The House lawmakers are Reps. Donna Edwards (D-MD), Walter Jones (R-NC), John Dingell (D-MI), Charles Rangel (D-NY), Marcy Kaptur (D-OH), Peter DeFazio (D-OR), Nick Rahall (D-WV), John Conyers, Jr. (D-MI), George Miller (D-CA), Jesse Jackson, Jr. (D-IL), Dennis Kucinich (D-OH), Brad Sherman (D-CA), Janice Schakowsky (D-IL), Daniel Lipinski (D-IL), John Garamendi (D-CA), Lois Capps (D-CA), Linda Sanchez (D-CA), Earl Blumenauer (D-OR), Steve Cohen (D-TN), Suzanne Bonamici (D-OR), Larry Kissell (D-NC), Bruce Braley (D-IA), Leonard Boswell (D-IA), Henry Johnson, Jr. (D-GA), John Tierney (D-MA), Keith Ellison (D-MN), Michael Michaud (D-ME), Bill Pascrell, Jr. (D-NJ), Barbara Lee (D-CA), John Sarbanes (D-MD), Betty Sutton (D-OH), Mark Critz (D-PA), Lynn Woolsey (D-CA), Dale Kildee (D-MI), Gary Peters (D-MI), Bob Filner (D-CA), Christopher Murphy (D-CT), Emanuel Cleaver (D-MO), Brian Higgins (D-NY), David Cicilline (D-RI), Tammy Baldwin (D-WI), James McGovern (D-MA), Betty McCollum (D-MN), Eleanor Holmes Norton (D-DC), Hansen Clarke (D-MI), Rosa DeLauro (D-CT), Gene Green (D-TX), Raul Grijalva (D-AZ), Tim Holden (D-PA), Ruben Hinojosa (D-TX), Mike McIntyre (D-NC), Danny Davis (D-IL), Tim Ryan (D-OH), Rush Holt (D-NJ), Michael Capuano (D-MA), Joe Baca (D-CA), Pete Stark (D-CA), Jerrold Nadler (D-NY), Maurice Hinchey (D-NY), Lucille Roybal-Allard (D-CA), Dave Loebsack (D-IA), Chellie Pingree (D-ME), Luis Gutierrez (D-IL), Jerry Costello (D-IL), Mazie Hirono (D-HI), Peter Welch (D-VT), Martin Heinrich (D-NM), Jerry McNerney (D-CA) and Laura Richardson (D-CA)

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The lawmakers note in the letter that their concern is "of considerable urgency given the stated goal of completing [TPP negotiations] this [boreal] summer [2012] and the special TPP intercessional negotiations on procurement held [in] early [April 2012]." Analysts assert, however, that the Obama Administration has not set the goal for concluding TPP negotiations for summer 2012 but, rather, before 2013, an ambitious timeline that it will unlikely realize given the unpopularity of pushing trade liberalization during the current presidential and legislative campaign season.

USTR Tables "Harm Test" Text on SOEs for TPP

At the 12th round of negotiations toward the Trans-Pacific Partnership (TPP), held from May 8-18, 2012 in Dallas, the Office of the United States Trade Representative (USTR) tabled new text to further supplement its previously-tabled proposal on state-owned enterprises (SOE). USTR noted in a May 16 press release that the nine TPP negotiating members "had valuable exchanges on the [US SOE] proposal [which is] intended to lay out rules to ensure that these enterprises compete fairly with private companies."

USTR first tabled its SOE proposal during the 9th round of TPP negotiations, held in October 2011 in Peru, but forewent seeking negotiations on the discipline until the current Dallas round in order to allow fellow TPP partners to form a position. The harm test language tabled in Dallas supplements the October proposal by establishing a threshold in regard to the amount of harm financial contributions conferred by a TPP member government can exact on TPP member private sector firms before triggering certain remedial provisions under the Agreement. These remedial provisions may include termination or reimbursement to the government of financial contributions conferred.

Experts note that the US harm test language could resemble or further build on language contained in Article 5 of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). Article 5 states that "[n]o Member should cause, through the use of [certain subsidies], adverse effects to the interests of other Members," and subsequently provides a broad definition of what constitute "adverse effects." Whether "harm" in the USTR text is intended to be equivalent to the "adverse effects" found in Article 5 of the SCM Agreement remains to be seen.

TPP Members Conclude 12th Round of Negotiations

On May 16, 2012 the nine current members of the Trans-Pacific Partnership (TPP) agreement formally concluded the 12th round of negotiations in Dallas, Texas. According to a May 16 press release issued by the Office of the US Trade Representative (USTR), negotiators "can now see a clear path forward toward conclusion of most of the more than 20 chapters of the agreement."

During the round, TPP members made progress on a number of chapters addressing "cross-cutting" issues. Negotiators were able to complete negotiations on a chapter regarding small- and medium-sized enterprises (SMEs). They also moved toward completing negotiations on chapters aimed at: (i) promoting regulatory coherence; (ii) facilitating supply chain linkages; and (iii) promoting development.

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TPP members held discussions on a US proposal regarding cross-border data flows, which would be placed within the TPP chapter on electronic commerce ("e-commerce"). The US proposal would prohibit, *inter alia*: (i) TPP countries from blocking the cross-border transfer of data over the internet; and (ii) TPP countries from conditioning market access on a company locating its data servers in that country's territory.

The 12th round gave rise to key developments regarding several contentious texts addressing the following issues:

- **State-Owned Enterprises (SOEs).** The 12th round represented the first time TPP members engaged in in-depth negotiations on the US proposal on disciplines for SOEs. USTR first tabled its SOE proposal during the 9th round of TPP negotiations. This proposal was supplemented at the beginning of the 12th round with language on a "harm test" to be used for measuring the impact of financial contributions given to SOEs by TPP governments (*Please see W&C Trade Alert from May 18, 2012*);

- **Labor.** In negotiations regarding the US proposal on labor rights, Brunei and Vietnam expressed a willingness to discuss the scope of the proposal. Although such willingness may facilitate negotiation on certain aspects of the proposal, both countries remain opposed to linking labor obligations within the TPP to dispute settlement procedures; and

- **Intellectual Property Rights (IPR).** The US IPR proposal continued to receive pushback from other TPP members. In an effort to move the negotiations forward, several TPP countries, including New Zealand, Australia and Singapore, proposed replacing language from the US proposal regarding criminal enforcement with language from the Anti-Counterfeiting Trade Agreement (ACTA). ACTA's language on criminal enforcement is considered more flexible than that contained within the US proposal. The United States is not expected to agree to this proposal, however, as the ACTA language is not considered as stringent as that contained within other free trade agreements (FTAs) to which the United States is party, namely the US-Korea FTA.

During the press conference that followed the closing of the 12th round, Australian and New Zealand officials expressed their intention to seek commitments from TPP countries on key agricultural issues, including: (i) agricultural export subsidies; and (ii) the trade-distorting aspects of food aid. Although these issues have traditionally been addressed within multilateral trade negotiations, Australia and New Zealand's interest in addressing them within the TPP serves as further evidence that the World Trade Organization (WTO) Doha agriculture negotiations are not likely to progress within the near- to mid-term.

TPP members will next meet at the Asia-Pacific Economic Cooperation (APEC) Trade Ministers Meeting in Kazan, Russia in early June 2012. According to USTR, TPP Trade Ministers will meet on the sidelines of the APEC meeting to "discuss progress achieved [on TPP] to date and agree on a plan forward." TPP Trade Ministers will also discuss the interests of Mexico, Canada and Japan in joining the agreement. Experts doubt that any significant announcements regarding the agreement or the possible accession of Japan, Mexico and Canada will be made during this time. Following the APEC Trade Ministers Meeting, TPP negotiators will meet in San Diego, California from July 2 – 10, 2012 to conduct the 13th round of negotiations. No intercessional meetings will be held before the 13th round commences.

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USTR"s claim that TPP negotiators see a clear path forward towards completing the negotiation of many of the Agreement"s chapters suggests that the agreement can only be finalized once outstanding issues in the remaining chapters have been resolved at a higher political level, *i.e.,* by TPP Trade Ministers. Nonetheless, the contentious issues, including SOEs, labor, IPR and market access, among others, are many. As long as TPP negotiators continue to make only piecemeal progress on these contentious issues, it remains unlikely that the agreement will be finalized by the end of 2012. Experts cite the May 22, 2012 signing of an FTA between Malaysia and Australia, as evidence that, among the TPP negotiating members, confidence in the ability to move the agreement forward within the near term may be dwindling.

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CUSTOMS

Customs Highlights

DOC Announces Initiation of Anti-Circumvention Inquiry into Uncovered Innerspring Units from Malaysia

On May 23, 2012, the Department of Commerce (DOC) initiated an anti-circumvention inquiry to determine whether imports of uncovered innerspring units were circumventing an antidumping (AD) duty order against such merchandise originating in China. The Petitioner, the largest US producer of innersprings, requested the anti-circumvention inquiry, arguing that Reztec Industries Sdn Bhd, a Malaysian company, exports from Malaysia to the United States uncovered innerspring units produced of Chinese-origin components subject to the February 2009 AD order.

DOC reviewed Reztec as part of its second administrative review of the AD order. Reztec, as part of the review, submitted a no-shipment letter to the DOC stating that it had not exported uncovered innerspring units from China to the United States. Reztec further stated that it purchased raw materials from China, and assembled the materials into uncovered innerspring units in Malaysia for domestic sale and export. Since the imposition of the AD order, exports increased from China to Malaysia of raw materials used in the production of the uncovered innerspring units. Additionally, the Petitioner argued that this assembly in Malaysia for subsequent export of the units to the United States is "minor further assembly in a third nation," thus constituting circumvention of the AD order.

DOC found the Petitioner's argument to be sufficient to launch a formal circumvention inquiry, as the firm provided information indicating that: (i) the merchandise in question produced in Malaysia may be of the same kind as that covered by the AD order; (ii) the raw materials purchased in China and used in the production of the units in Malaysia constitute a significant portion of the total costs of production of the units; and (iii) the production that occurs in Malaysia is minor. In evaluating how significant the production that occurs within Malaysia is, DOC considered the following assertions made by the Petitioner: (i) Reztec invests little in its Malaysian operations relating to the subject merchandise; (ii) Reztec engages in production processes that do not alter the fundamental characteristics of the subject merchandise so as to remove it from under the scope of the AD order; and (iii) Reztec uses production processes in Malaysia that add minor value to the subject merchandise.

Experts note that DOC's initiation of this anti-circumvention investigation comes amidst a bipartisan congressional call for greater enforcement of AD/CVD orders. Such pressure exerted by lawmakers falls in line with the sentiment of certain US private sector actors who have, in the recent past, achieved similar anti-circumvention investigation initiations (*Please see White & Case Trade Alert from August 17, 2011*).

DOC intends to issue its final determination in regard to this inquiry on or before March 19, 2013.

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China Challenges United States before WTO over Standing US CVD Measures; "Public Body" a Key Point of Contention, Among Others

On May 25, 2012, China's Permanent Mission to the World Trade Organization (WTO) requested consultations with the United States in regard to 22 US countervailing duty (CVD) measures (*i.e.*, cases) against Chinese goods. According to a press statement released by the Chinese Ministry of Commerce (MOFCOM) following the request for consultations, certain US CVD practices against China "constitute the abuse of trade remedy measures which undermines the legitimate interests of China's enterprises." China challenges DOC's practice on public bodies but reserves for a later time the right to challenge the United States on so-called "double remedies."

China's request for consultations establishes as the measures at issue 22 preliminary and final CVD measures issued by the United States Department of Commerce (DOC). These measures include, *inter alia*, the decision to initiate the CVD investigations, the conduct of such investigations, any preliminary or final CVD determinations relating to such investigations, and any definitive CVDs imposed as a result of such investigations.

The legal basis for China's complaint, according to the official request for consultations, is the inconsistency of the 22 US CVD measures with certain obligations under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and the General Agreement on Tariffs and Trade (GATT) 1994, including:

- **Public Body.** China asserts that DOC's presumption in regard to whether state-owned enterprises (SOEs) can be classified as "public bodies" is inconsistent with the SCM Agreement and GATT 1994. China alleges in the request for consultations that this presumption is "rebuttable," arguing that DOC has, thus far, failed to provide sufficient evidence to support its position that, except under certain circumstances, a government's majority ownership in an SOE qualifies such SOE as a public body;

- **Less Than Adequate Remuneration.** China asserts that DOC acted inconsistently with the SCM Agreement in regard to allegations relating to "less than adequate remuneration" (LTAR) for the provision of input and and land/land-use rights. To this effect, China specifically cites DOC's (i) qualification of certain SOEs as public bodies; (ii) determinations in regard to specificity of subsidies conferred; and (iii) calculations of benefits conferred by certain subsidies.

- **Export Restraints.** China asserts that the US acted inconsistently with the SCM Agreement in regard to export restraints allegedly maintained by China. With respect to such alleged export restraints, China states in the request for consultations that DOC "improperly determined that export restraints provided a „financial contribution" within the meaning of [the SCM Agreement];"

- **Adverse Facts Available.** China asserts that DOC's use of adverse facts available is inconsistent with the SCM Agreement. In this regard, China refers to DOC's practice of selecting the most adverse facts available on sales in order to highlight the targeted exporter, thus encouraging other exporters to cooperate with a CVD investigation.

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The public body issue appears as a central component of China"s request for consultations; China highlights DOC"s practice in regard to public bodies in its "as applied" claims concerning LTAR and, also, as a separate "as such" claim. Experts note that China"s focus on public bodies is likely a response to DOC"s May 18 memorandum titled "Section 129 Determination of the Countervailing Duty Investigation of [Certain Good from China]: An Analysis of Public Bodies in the People"s Republic of China in Accordance with the WTO Appellate Body"s Findings in WTO DS 379." This memorandum set forth DOC"s findings as to which Chinese SOEs constitute public bodies, findings with which Chinese trade authorities reportedly disagree firmly.

the May 25 request for consultations does not challenge the United States on the issue of double remedies resulting from the DOC"s dual application of AD and CVD duties on goods originating in nonmarket economy (NME) countries, including China, but the request does specifically note that "China reserves the right to raise additional claims and legal matters regarding the [challenged] measures during the course of the consultations." In this regard, the MOFCOM press statement which followed the request for consultations specifically cites DOC"s alleged failure to avoid the application of double remedies, and questions the legality of the recently enacted HR 4105 which amends Section 701 of the Tariff Act of 1930 to include an additional section affirming that DOC has the authority to apply CVDs to imports originating in NME countries. As DOC is still determining how to implement HR 4105 concurrently with Section 129 proceedings in order to comply with the WTO"s findings in DS 379 on double remedies, China will likely await such Section 129 determination on the part of DOC before adding its claims on double remedies to the May 25 request for consultations and potential dispute proceedings stemming therefrom.

CBP Allows for Cancellation of Enhanced Bonds under Certain Circumstances

US Customs and Border Protection (CBP) published a general notice in the Federal Register on May 31, 2012 announcing that, upon accepting a qualified superseding bond application and contingent upon certain other criteria, it will cancel continuous bonds in cases in which the liability amount for such bonds was calculated according to enhanced bonding requirements ("EBR bond"). The CBP general notice follows an extensive judicial review of the enhanced bonding requirements, triggered by several cases brought against CBP by the National Fisheries Institute, Inc.

CBP will accept, except under certain circumstances, a qualified superseding bond application that meets the following conditions:

- **Liability Limit.** A superseding bond must feature a limit of liability in an amount no less than the dollar amount of the continuous importer bond that CBP would have accepted had the enhanced bonding requirement not existed on the bond effective date of the EBR bond;

- **Coverage Period.** A superseding bond must be for the same time period for which the related preceding EBR bond was in place; and

- **Posting Requirements.** A superseding bond posted must include the posting of cash or other security for each annual period that the related EBR bond was in effect.

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Additionally, to qualify for cancellation and replacement by a superseding bond under the policy contemplated in CBP's general notice, the EBR bond must: (i) **not secure any remaining sum certain or contingent debt, including, *inter alia*, unliquidated entries and certain matters involving actual or potential loss of revenue**; and (ii) not cover certain entries subject to a pending protest. A superseding bond application, including supporting documentation, must be received by CBP within 90 calendar days from the date that the related preceding EBR bond no longer secures any remaining sum certain or contingent debt.

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MULTILATERAL

WTO Appellate Body Report: United States - Tuna II

Summary

Decision: The WTO Appellate Body has ruled that the US "dolphin safe" labeling scheme for canned tuna violates the national treatment obligations of the United States under the WTO Agreement on Technical Barriers to Trade ("TBT Agreement"). However, it rejected Mexico's claims that the labeling law was "more trade-restrictive than necessary" to fulfill the US objectives of dolphin conservation.

Commentary – Significance of Decision: The decision of the Appellate Body in *US – Tuna II* is the second in a trilogy of Appellate Body rulings that will help to define what WTO Members can and cannot do when adopting technical regulations. The other two cases are *US – Clove Cigarettes*, on which the Appellate Body ruled in April, and *US – Country of Origin Labeling*, which will be released in June 2012.

After two decisions, the Appellate Body has provided a clear indication of its interpretive approach to key provisions of the TBT Agreement. Importantly, the Appellate Body has adopted a *competition-based approach* to determining whether a technical regulation provides "less favourable treatment" to imported like products. In *US – Tuna II*, the Appellate Body affirmed the approach it adopted in *US – Clove Cigarettes* that, in assessing a claim of less favorable treatment for imports under TBT Article 2.1, a panel should "seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products or like products originating in any other country."

The Appellate Body has thus definitively resolved a fundamental issue that had previously remained an open question. Although the competition-based approach is well-established for trade in goods under the GATT, it had been uncertain whether a different approach was required for technical regulations, where governments adopt measures to pursue regulatory objectives such as health, safety or environmental protection.

Indeed, in *US – Clove Cigarettes*, the Panel opted for a regulatory approach over a competition test. It stated that "we do not believe that the interpretation of Article 2.1 of the TBT Agreement, in the circumstances of this case where we are dealing with a technical regulation which has a legitimate public health objective, should be approached primarily from a competition perspective." Instead, it considered that the "declared legitimate public health objective" of the US law had to "permeate and inform our likeness analysis." The Appellate Body reversed the Panel on this issue, stating that it disagreed that Article 2.1 should focus on "the legitimate objectives and purposes of the technical regulation, rather than on the competitive relationship between and among the products." According to the Appellate Body, regulatory concerns could be taken into account "to the extent that they are relevant to the examination of certain likeness criteria and are reflected in the products' competitive relationship." As noted above, the competition approach was affirmed by the Appellate Body in *US – Tuna II*.

These two decisions thus root the national treatment disciplines of the TBT Agreement firmly within the jurisprudence that has been developed under the GATT. The Appellate Body's approach is sound and has a

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strong textual basis, given the parallel wording of the national treatment provisions of the GATT and the TBT Agreement.

Applying these principles in the current case, the Appellate Body found that the US measures provided "less favourable treatment", as the lack of access by Mexican tuna to the "dolphin safe" label had a "detrimental impact on the competitive opportunities of Mexican tuna products in the US market."

The Appellate Body's ruling in *US – Tuna II* has been heavily criticized by a number of groups, which view the decision as evidence of the WTO's supposed hostility to conservation or environmental objectives. Yet the problem in this case was not the US objective of protecting dolphins, but rather the means chosen to pursue that goal. The US law focused on one area of the oceans: the Eastern Tropical Pacific (ETP). Tuna harvested outside the ETP were eligible for the "dolphin safe" label, even if dolphins had in fact been killed or injured in those areas. Mexico had argued that the United States applied "relaxed compliance standards" outside the ETP, and the Appellate Body agreed. In the view of the Appellate Body, the US measure was not "calibrated" to "the risks to dolphins arising from different fishing methods in different areas of the ocean" and therefore the detrimental impact of the US law on Mexican tuna did not stem "exclusively from a legitimate regulatory distinction."

One way for the United States to comply with this ruling would be to apply its "dolphin safe" scheme to tuna harvested in all areas of the ocean. During the appeal, the United States objected to this on the grounds of cost, as it would require the use of observers to certify that dolphins had not been killed or injured outside the ETP. But such an approach would address the Appellate Body's finding that the US regulation did not address dolphin conservation in an "even handed" way.

Analysis

Background: The US "dolphin safe" label

Mexico challenged a series of US statutory and regulatory provisions that together established the conditions for the use of the "dolphin safe" label on canned tuna sold in the United States. The US law conditioned the availability of the "dolphin safe" label on a variety of factors, particularly the type of fishing technique used, and the area in which the tuna was harvested.

Under the US measure, the "dolphin safe" label could not be used for any tuna caught by "setting on" dolphins. The technique of "setting on" dolphins, according to the Appellate Body, involved "chasing and encircling the dolphins with a purse seine net in order to catch the tuna swimming beneath the dolphins."

The US law also targeted the ETP, where the "tuna-dolphin association" occurred more frequently than in other areas of the ocean. The Appellate Body pointed to the uncontested finding of the Panel that, where tuna was caught outside the ETP, it would be eligible for the US "dolphin safe" label, "even if dolphins have in fact been caught or seriously injured during the trip, since there is, under the US measures as currently applied, no requirement for a certificate to the effect that no dolphins have been killed or seriously injured outside the ETP."

US "dolphin safe" labeling scheme is "mandatory"

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The Appellate Body recalled its earlier jurisprudence that, for a measure to be considered as a "technical regulation" under the TBT Agreement, a document had to "apply to an identifiable product or group of products, it must lay down one or more characteristics of the product, and „compliance with the product characteristics must be mandatory."" Only the latter criterion – mandatory compliance – was at issue in this dispute.

The United States argued that its labeling scheme was not "mandatory", as exporters were free to sell tuna in the United States without the "dolphin safe" label. However, the Appellate Body found that "the mere fact that it is legally permissible to sell a product on the market without using a particular label" was not determinative. It ruled that "the measure at issue sets out a single and legally mandated definition of a „dolphin-safe" tuna product and disallows the use of other labels on tuna products that do not satisfy this definition." Thus, the Appellate Body considered the US measure to be "mandatory", and confirmed that it was a "technical regulation" for the purposes of the TBT Agreement.

National treatment: technical regulations cannot modify "conditions of competition"

Article 2.1 sets out the core national treatment and MFN disciplines of the TBT Agreement. It provides that "Members shall ensure that, in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country."

The Appellate Body set out the three elements that had to be established in order to demonstrate a breach of this provision: (i) the measure was a "technical regulation"; (ii) the imported and domestic products were "like"; and (iii) the treatment accorded to imported products was "less favourable" than that accorded to like domestic products or the like products of other countries.

As noted above, the Appellate Body affirmed its ruling in *US – Clove Cigarettes* that in examining claims under TBT Article 2.1, panels had to determine whether the technical regulation modified the conditions of competition to the detriment of imports. The panel then had to "analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."

US "dolphin safe" labeling scheme not "even-handed"

The Appellate Body found that "the lack of access to the „dolphin-safe" label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market."

The Appellate Body rejected the US argument that the detrimental impact on Mexican tuna resulted from "the actions of private parties", *i.e.*, the consumers who chose not to buy tuna without the "dolphin safe" label. The Appellate Body reasoned that "even if Mexican tuna products might not achieve a wide penetration of the US market in the absence of the measure at issue due to consumer objections to the method of setting on dolphins, this does not change the fact that it is the measure at issue, rather than private actors, that denies most Mexican tuna products access to a „dolphin-safe" label in the US market."

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The Appellate Body next considered "whether this detrimental impact reflects discrimination." Mexico argued that "[i]mports of tuna products produced from tuna harvested outside the ETP – in other words, virtually all of the tuna products currently sold in the US market – can be labelled as dolphin-safe under relaxed compliance standards even though there are no protections for dolphins outside the ETP."

The Appellate Body noted that "the participants do not contest that, as currently applied, the US measure does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP, and that tuna caught in this area would be eligible for the US official label, even if dolphins have in fact been killed or seriously injured during the trip." The Appellate Body concluded that "the United States has not demonstrated that the difference in labeling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is „calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean." The United States therefore had "not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction."

The Appellate Body concluded that the US measures were not "even-handed in the way in which they address the risks to dolphins arising from different fishing techniques in different areas of the ocean." The Appellate Body therefore reversed the Panel's ruling and found that the US "dolphin-safe" labeling provisions violated Article 2.1 of the TBT Agreement.

US measure not "more trade restrictive than necessary"

Article 2.2 of the TBT Agreement provides in part that "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade." It adds that "[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."

The Appellate Body considered that whether a technical regulation "fulfills" an objective requires an assessment of "the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective." It stressed that "Article 2.2 does not prohibit measures that have any trade-restrictive effect. It refers to „unnecessary obstacles" to trade and thus allows for some trade-restrictiveness…." Article 2.2 was "concerned with restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective."

With respect to the "risks non-fulfillment would create", the Appellate Body opined that this suggested that "the comparison of the challenged measure with a possible alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfillment of the legitimate objective."

The Panel had found that a reasonably available, less trade-restrictive alternative to the US measure was the "coexistence" of the US "dolphin-safe" labeling scheme and the label provided under the multilateral Agreement on the International Dolphin Conservation Program (AIDCP).

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The Appellate Body found the Panel"s analysis on this proposed alternative to be flawed, in part because the geographic scope of application of the AIDCP rules was limited to the ETP. Thus, according to the Appellate Body, "the conditions for fishing *outside* the ETP would be identical under the alternative measure proposed by Mexico, since only those set out in the US measure would apply. Therefore, for fishing activities *outside* the ETP, the degree to which the United States' objectives are achieved under the alternative measure would not be higher or lower than that achieved by the US measure, it would be the same [original emphasis]."

More importantly, the Appellate Body ruled that "the alternative measure proposed by Mexico would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labeled „dolphin-safe."" Thus, the Appellate Body concluded that "the Panel's comparison and analysis is flawed and cannot stand." It reversed the Panel"s finding that the US measure breached TBT Article 2.2.

"International standardizing body" must be open to all WTO Members

As a final issue, the Appellate Body considered the US measure against the requirements of TBT Article 2.4. This provision states in part that "[w]here technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them…as a basis for their technical regulations except when such international standards… would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued…."

The Appellate Body found that "a required element of the definition of an „international" standard for the purposes of the *TBT Agreement* is the approval of the standard by an „international standardizing body", that is, a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all [WTO] Members." It reached this conclusion in part based on a decision of the TBT Committee, which it considered to be a "subsequent agreement" within the meaning of the *Vienna Convention on the Law of Treaties*. As the AIDCP was not open to all WTO Members, it was not an "international standardizing body" for the purposes of the TBT Agreement. The Appellate Body therefore affirmed the Panel"s finding that the US measure did not violate TBT Article 2.4.

The decision of the Appellate Body in United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS381) was released on May 16, 2012.

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