



# White & Case LLP General Trade Report - JETRO

January 2013

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## UNITED STATES

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### GENERAL TRADE POLICY

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## USTR Releases 11<sup>th</sup> Annual Report to Congress on China's WTO Compliance

### Summary

On December 21, 2012, the US Trade Representative (USTR) issued its 11<sup>th</sup> annual "Report to Congress on China's WTO Compliance" ("Report").<sup>1</sup> The Report was prepared pursuant to Section 421 of the US-China Relations Act of 2000, which requires USTR to report annually to Congress on the extent to which China has complied with the commitments it made in connection to its 2001 accession to the World Trade Organization (WTO). In addition to detailing key areas of concern, the Report also outlines developments and trends related to the US-China bilateral trade relationship.

### Analysis

#### I. TRENDS

According to the Report, China's WTO membership has been characterized by two different phases. In the years immediately following China's accession, the Report notes that the Chinese government took "impressive" steps to implement a number of WTO commitments, including: (i) the elimination of non-tariff barriers (NTBs); (ii) the reduction of tariffs; and (iii) the promotion of regulatory transparency. Starting in 2003 with the establishment of the State-owned Assets Supervision and Administration Commission (SASAC); however, the Report argues that China began to de-emphasize its reliance on market signals and, instead, embrace state capitalism. From 2006 on, this policy shift became more evident as China took steps to institutionalize preferences for state-owned enterprises (SOEs). In 2012, the Report claims that China's interventionist role in the state economy was a main driver of US-China trade tensions. To address this issue, the United States calls on China to, among other things: (i) curtail the role of the Chinese government in planning the economy; (ii) implement reforms for SOEs; and (iii) complete the adoption of rule of law. According to the Report, these steps are "critical to realizing the tremendous potential presented by China's WTO membership."

#### II. 2012 DEVELOPMENTS

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<sup>1</sup> The Report is available here: [http://www.ustr.gov/webfm\\_send/3620](http://www.ustr.gov/webfm_send/3620)

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#### Contacts:

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

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

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According to the Report, in 2012, the Obama Administration sought to increase the benefits the United States derives from its trade relationship with China through bilateral dialogue and, when necessary, use of the WTO Dispute Settlement Body (DSB). With respect to bilateral dialogue, the Report notes that Vice President Xi Jinping visited Washington, DC in February 2012, and the US and Chinese governments held their 4<sup>th</sup> Strategic and Economic Dialogue (S&ED) in May 2012 and their 23<sup>rd</sup> Joint Commission on Commerce and Trade (JCCT) in December 2012. In addition, the Report notes that USTR brought three new WTO cases against China, namely: (i) *Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (DS 431); (ii) *Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States* (DS 440); and (iii) *Certain Measures Affecting the Automobile and Automobile-Parts Industries* (DS450).

### III. PRIORITY AREAS

The Report outlines six areas of particular concern to the US government and stakeholders in terms of China's approach to the obligations of WTO membership. We summarize these areas below:

- a. **Intellectual Property Rights (IPR).** According to the Report, additional improvements to China's legal framework for IPR protection are needed, namely: (i) improved measures for copyright protection on the Internet; and (ii) rectification of deficient criminal IPR enforcement measures. With regard to IPR enforcement, the Report notes that counterfeiting and piracy in China "remain at unacceptably high levels." In 2012, the United States pressed China with particular urgency on the issue of trade secrets. Key accomplishments with regard to China's IPR enforcement in 2012 include, *inter alia*: (i) at the 2012 S&ED, China agreed to prioritize the issue of trade secrets; (ii) China confirmed that it requires SOEs and state-owned banks under the central government's supervision to purchase and use legal software; and (iii) at the 2012 JCCT, China announced that the Chinese Supreme People's Court will publish a Judicial Interpretation on Internet Intermediary Liability;
- b. **Industrial Policies.** The Report identifies a number of China's industrial policies as areas of concern, including, *inter alia*: (i) indigenous innovation; (ii) export restraints; (iii) subsidies to domestic industries; (iv) value-added tax rebates; (v) standards; (vi) government procurement; (vii) investment restrictions; and (viii) the retaliatory use of trade remedies. In regard to government procurement, the Report notes that China submitted another revised offer to join the WTO Government Procurement Agreement (GPA) in November 2012. The United States found the offer "highly disappointing in scope and coverage." In this regard, the Report notes that China has expressed a willingness to engage the United States on the relationship between SOEs and government procurement;
- c. **Trading Rights and Distribution Services.** According to the Report, many of the United States' concerns regarding trading rights and distribution concerns have been addressed. China took a step towards addressing remaining issues in February 2012 with its commitment to, among other things, increase the number of foreign films imported and distributed in China each year. Nonetheless, the US government is still concerned with the unwarranted restrictions the Chinese government places on US direct selling services;
- d. **Agriculture.** Although China became the United States' largest agricultural export market in 2010, the Report notes that "China remains among the least transparent and predictable of the world's major markets for agricultural products." According to the Report, the US government is particularly concerned with the

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#### Contacts:

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

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

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sanitary and phytosanitary (SPS) measures and customs practices the Chinese government imposes on US beef, poultry and pork products;

- e. **Services.** Although the United States enjoys a trade surplus in trade in services with China, the Report cites numerous challenges US services suppliers have encountered in China. More specifically, the Report notes the Chinese government's continued use of "discriminatory regulatory processes, informal bans on entry, overly burdensome licensing and operating requirements and other means to frustrate efforts of US suppliers of banking, insurance, express delivery, telecommunications, legal and other services"; and
- f. **Transparency.** According to the Report, China agreed to implement many of the commitments it made in regard to transparency immediately after it acceded to the WTO. Nonetheless, the Report highlights several areas in which the Chinese government has not yet fulfilled these commitments. More specifically, the Report notes that many of China's ministries have not been consistent in publishing draft rules and regulations for public comment. While many ministries publish regulations and rules, they are less likely to publish other forms of legally-binding trade-related measures, including opinions, circulars, orders, directives and notices. In addition, the Chinese government has not fulfilled its WTO commitment to make available, in a consistent manner, all trade-related laws, regulations and other measures in one or more of the WTO languages (English, French and Spanish).

## Outlook

In 2012, the United States faced congressional and presidential elections while China underwent its own political transition. The Report notes that China's new leaders gave several indications in 2012 that they acknowledge the need for further economic reforms. Specifically, a Chinese government think tank worked with the World Bank to publish a joint report in February 2012 that recognizes the need for China's economic development model to adapt to meet new challenges. In addition, Vice President Xi decided in December 2012 to make Shenzhen, China the location of his first official visit as General Secretary of the Chinese Communist Party. This action echoes a similar decision made by former Chinese leader Deng Xiaoping, who travelled to Shenzhen in 1992 to voice his commitment to economic reform. Despite these developments, the legacy of China's new leaders' economic policies will take time to emerge. Meanwhile, the United States and China are likely to continue to experience trade tensions in 2013 over many of the same issues they faced in 2012, including, among others, the use of trade remedy laws, indigenous innovation, forced technology transfer, government procurement and IPR protection and enforcement.

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### Contacts:

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

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

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## *US General Trade Policy Highlights*

### **USTR Notifies Congress of Intent to Enter into Negotiations Toward International Services Agreement**

On January 15, 2013, US Trade Representative (USTR) Ron Kirk sent a letter to the leaders of Congress notifying them of the Obama Administration's intent to enter into negotiations toward an international services agreement (ISA). According to the letter, USTR intends to begin negotiations toward the agreement within 90 days of the date the letter was transmitted to Congress.

With the 2007 expiration of Trade Promotion Authority (TPA), a fast-track procedure by which Congress can pass the implementing legislation for trade agreements, USTR is not required to notify Congress of its intent to enter trade negotiations. USTR's January 15 notification underscores USTR's intention to nonetheless follow TPA procedure. USTR similarly followed TPA procedure with regard to Canada and Mexico's October 2012 accession to the Trans-Pacific Partnership (TPP) negotiations (*please refer to W&C US Trade Alert dated October 15, 2012*).

Following the December 2011 World Trade Organization (WTO) Eighth Ministerial Conference, at which WTO members acknowledged that the Doha round of negotiations is at an impasse, the United States began exploratory talks with other interested WTO members regarding the negotiation of an ISA. Several months later, in July 2012, the United States and other interested WTO members released a statement agreeing that an ISA should have the following three characteristics: (i) be comprehensive in scope; (ii) ensure improved market access for services; and (iii) contain new and strengthened rules for trade in services (*please refer to W&C US Trade Alert dated July 9, 2012*).

The January 15 letter states that the United States will be negotiating the agreement with 20 other WTO members, namely Australia, Canada, Chile, Taiwan, Colombia, Costa Rica, European Union (EU), Hong Kong, Iceland, Israel, Japan, Korea, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, and Turkey. Although the letter notes that these countries represent a mix of developed and developing countries, several major emerging economies with significant services industries, namely China, India, Brazil, South Africa and Russia, are not included as negotiating members. These countries have indicated that their opposition to an ISA stems from their belief that such a plurilateral agreement within the WTO would weaken their negotiating positions within the WTO Doha round.

The letter also makes several references to the US position in regard to the content of the agreement, including, *inter alia*:

- **National Treatment.** Although specific details regarding national treatment within an ISA are not provided, USTR Kirk notes that the ISA should "place a high priority on enabling [US] service suppliers to compete on the basis of quality and competence rather than nationality";
- **Coverage.** The letter notes that the agreement should not only cover all existing services, but also cover services that have not yet been conceived;

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

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

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- **Domestic Regulations.** According to USTR Kirk, the United States will seek an ISA that requires parties to provide the public with advance notice and an opportunity to comment on proposed regulations. At the same time, the letter articulates the US position that an ISA should “respect the role of regulatory authorities across all levels of government and protect their ability to introduce new regulatory policies”; and
- **New Issues.** The letter states that an ISA must address new issues in trade in services. For example, USTR Kirk notes that the United States will seek the inclusion of provisions addressing trade in services through electronic channels in an ISA. Media sources contend that the United States is also likely to push for a commitment to allow for the free flow of data across borders. Although the issue of state-owned enterprises (SOEs) is not mentioned in the letter, House Ways and Means Ranking Member Sander Levin (D-MI) issued a press release praising USTR’s notification in which he noted that the agreement “can establish new rules to address critical emerging issues, such as the trade-distorting actions of state-owned enterprises.”

USTR’s notice of intent to negotiate an ISA represents an important step that is in part attributable to a compromise reached in fall 2012 regarding the architecture of the agreement. Media sources contend that the United States, the European Union (EU) and other participating countries agreed to a “hybrid” approach to ISA negotiations. Specifically, the countries agreed that a “positive list” approach, *i.e.*, services covered would be limited to those specifically listed, will be used to negotiate market access commitments. A “negative list” approach, *i.e.*, all services would be covered under the agreement except those specifically listed, will be used to negotiate national treatment disciplines. Despite this step, ISA participants are likely to encounter a number of both substantive and technical issues once negotiations begin that may hinder the pace of such talks. These issues include, but are not limited to, whether and how to multilateralize the agreement to attract future ISA participation by developing countries – a goal which some ISA participants, including the EU, would argue could be met with a positive list approach and incorporation of key General Agreement on Trade in Services (GATS) principles into the ISA architecture – and what types of new issues to address.

Click [here](#) for a copy of USTR’s January 15 letter.

## United States and Russia Agree to IPR Action Plan

On December 21, 2012, the Office of the US Trade Representative (USTR) issued a press release announcing that the United States and Russia have agreed to the “United States-Russian Federation Intellectual Property Rights Action Plan” (“Plan”). According to USTR Ron Kirk, the Plan “delivers on shared US and Russian objectives, as reaffirmed by the recent G8 Ministerial Declaration, to promote strong IPR protection and enforcement to advance our innovative economies.” The announcement came on the same day USTR declared that it had taken the steps necessary to establish legal ties between Russia and the United States under the World Trade Organization (*please refer to W&C US Trade Alert dated January 2, 2013*).

In its “2011 Special 301 Report,” USTR issued an open invitation to all countries identified in the Report to develop an action plan with the United States to resolve IPR issues of concern. USTR’s Special 301 Report has consistently placed Russia on its “Priority Watch List,” *i.e.*, list of countries whose alleged lack of IPR protection and enforcement the US government considers of considerable concern. Under the IPR Action Plan, Russia and

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Scott Lincicome, Esq.  
701 13th Street NW, Washington, DC 20005  
[slincicome@whitecase.com](mailto:slincicome@whitecase.com)

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
[sscoles@whitecase.com](mailto:sscoles@whitecase.com)

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the United States commit to the shared goal of achieving the IPR-related improvements necessary to remove Russia from the Priority Watch List. However, the IPR Action Plan does not elaborate on which specific improvements will result in such removal.

The IPR Action Plan endorses action on a broad range of IPR issues, including:

- **Enforcement Actions Targeting Piracy over the Internet.** The IPR Action Plan endorses the following, *inter alia*: (i) measures to disrupt the capabilities of web sites that allow for criminal copyright infringement; (ii) actions against the creators and administrators of web sites responsible for IPR-related crimes; (iii) consultations with rights holders to identify and prioritize action on IPR-infringing web sites; (iv) the provision of sufficient resources to both existing and new law enforcement entities authorized to focus on combatting internet piracy; and (v) coordination with foreign governments to combat internet piracy through relevant mechanisms, *e.g.*, mutual legal assistance treaties (MLATs);
- **General Enforcement Actions against IPR Violations.** The IPR Action Plan endorses the following, *inter alia*: (i) enforcement actions against IPR crimes, including software piracy, unauthorized camcording, and the circumvention of technological protection measures; (ii) unannounced raids of plants, retail outlets and warehouses to detect, seize and destroy IPR-infringing goods; (iii) the seizure and destruction of the equipment and materials used to produce IPR-infringing goods;
- **Legislation-Related Steps for Russia to Take.** The Plan supports the following: (i) coordination in regard to Russia's draft internet service providers (ISP) liability law; (ii) consultations between Russia and the United States regarding the implementation of Russia's WTO data protection commitments; and (iii) consultations between Russia and the United States regarding measures to enhance administrative penalties in such a way that deters IPR violations; and
- **Further Collaboration between Russia and the United States on IPR Protection.** The Plan also discusses the following, *inter alia*: (i) the possibility for Russian rights holders to use the "Copyright Alerts" system, *i.e.*, a system in which content owners notify a participating ISP when they believe their copyrights are being misused via the Internet by a specific Internet Protocol (IP) address; (ii) the exchange of information and best practices between Russia and the United States with respect to judges handling IPR cases; (iii) regular meetings of the Russian Federation-United States IPR Working Group.

USTR's December 21 press release notes that the IPR Action Plan is particularly important in light of Russia's recent WTO membership. Russia became a WTO member in August 2012. The United States could not benefit fully from Russia's WTO membership until December 2012, when President Obama was able to extend permanent normal trade relations (PNTR) to Russia. In legislation that allowed for President Obama to extend PNTR to Russia (HR 6156), lawmakers addressed numerous issues of concern, including those related to human rights, sanitary and phytosanitary protection (SPS) measures and IPR protection, among others. With regard to IPR protection, HR 6156 called on USTR to devise an action plan for ensuring greater IPR protections in Russia.

Click [here](#) for a copy of USTR's press release.

Click [here](#) for a copy of the IPR Action Plan.

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**Contacts:**

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

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

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## United States Allows for Application of WTO Agreement Between United States and Russia, United States and Moldova

On December 21, 2012, the US Trade Representative (USTR) issued a press release announcing that the United States had withdrawn its notices to the World Trade Organization (WTO) declaring the non-application of the Marrakesh Agreement Establishing the WTO and the Multilateral Trade Agreements in Annexes 1 and 2 thereto (“WTO Agreement”) between the United States and Russia as well as between the United States and Moldova. According to USTR, Russia also withdrew its notice of non-application with regard to the United States. The effect of the United States’ December 21 action is its consent to having the WTO Agreement apply between the United States and Russia and the United States and Moldova. The United States will now be able to enjoy the full benefits of both Russia and Moldova’s WTO memberships.

Russia became a WTO member in August 2012; Moldova joined in July 2001. At the time these countries were invited to join the WTO, the United States notified the WTO of its invocation of Article XIII of the Marrakesh Agreement Establishing the WTO, which allows a WTO member to declare the non-application of the WTO Agreement between it and another WTO member. Russia similarly filed a notice of non-application with regard to the United States. Moldova did not submit such a notification. The United States was unable to withdraw its notices and enjoy the full benefits of Russia and Moldova’s WTO memberships until it extended permanent normal trade relations (PNTR), *i.e.*, most-favored nation (MFN) status, to each country.

To extend PNTR to Russia and Moldova, Congress was required to pass, and President Obama was required to sign into law, legislation revoking the application of the Jackson-Vanik Amendment (under Title IV of the Trade Act of 1974) to Russia and Moldova. The Jackson-Vanik Amendment prohibits the extension of PNTR to certain countries unless they fulfill key “freedom of emigration” conditions. On December 14, 2012 President Obama signed into law the “Russia and Moldova Jackson-Vanik Repeal Act of 2012” (HR 6156). The President’s action followed the Senate’s December 6, 2012 and the House’s November 16, 2012 approval of HR 6156.

In addition to determining that the Jackson-Vanik Amendment no longer applies to Russia and Moldova, the legislation contains, among other things, the “Sergei Magnitsky Rule of Law and Accountability Act of 2012” (“Magnitsky bill”). By passing HR 6156 without amendment, the Senate approved the House version of the Magnitsky bill, which authorizes the US government to, *inter alia*, freeze certain assets and deny US visas to persons named by the Department of State (DOS) as responsible for certain human rights violations in Russia.

Once Congress passed, and the President signed into law, HR 6156, President Obama was able to extend PNTR to Russia and Moldova. On December 20, 2012 President Obama signed a Presidential Proclamation “To Extend Nondiscriminatory Treatment (Normal Trade Relations Treatment) to the Products of the Russian Federation and the Republic of Moldova.” The Proclamation went into effect on December 20, 2012. The Proclamation was the last step before USTR could withdraw its notices of non-application and allow for the establishment of legal ties between the United States and Russia and the United States and Moldova under the WTO. With the establishment of legal ties, the United States can now benefit from the tariff and non-tariff commitments Russia and Moldova made as part of their WTO accessions. The United States can also hold Russia and Moldova accountable to their respective WTO obligations by bringing disputes against them before the WTO Dispute Settlement Body.

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

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

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Click [here](#) for a copy of USTR's December 21 press release.

Click [here](#) for a copy of the Presidential Proclamation.

Click [here](#) for a copy of HR 6156.

## Republican and Democratic Leadership Announce Trade Committee Membership for 113<sup>th</sup> Congress

Senate Republican and Democratic leadership announced on January 3 and 4, 2013, respectively, committee assignments for the 113<sup>th</sup> Congress, including the Senate Committee on Finance. House Republican and Democratic leadership announced assignments to the Committee on Ways and Means in November and December 2012, respectively. Committee assignments are still subject to approval by each Party's caucus and under full organizing resolutions in each chamber.

Sens. Johnny Isakson (R-GA), Rob Portman (R-OH), Pat Toomey (R-PA), Sherrod Brown (D-OH) and Michael Bennet (D-CO) will join the Senate Finance Committee, the jurisdiction of which covers, *inter alia*, customs, ports of entry/delivery, reciprocal trade agreements, and tariff and import quotas. Sen. Max Baucus (D-MT) will return as Chairman, and Sen. Orrin Hatch (R-UT) will return as Ranking Member. Subcommittee composition and leadership, including that of the Senate Finance International Trade, Customs and Global Competitiveness Subcommittee, will remain unknown until full committee organization is approved by the Republican and Democratic caucuses, which is expected in January 2013.

In regard to the Republicans, Sens. Portman and Toomey have strong voting records against trade barriers, e.g., votes in favor of free trade agreements, etc., and against government subsidies. While Sen. Isakson's voting record shows support for dismantling trade barriers, he has rarely voted against (re)authorizing subsidies. In regard to the Democrats, both Sens. Brown and Bennet have voting records strongly supporting trade barriers and subsidies.

Reps. Tim Griffin (R-AR), Mike Kelly (R-PA), Todd Young (R-IN), Allyson Schwartz (D-PA), Danny Davis (D-IL) and Linda Sánchez (D-CA) will join the House Ways and Means Committee, the jurisdiction of which covers, *inter alia*, customs revenue, and ports of entry and delivery, and reciprocal trade agreements. Rep. Dave Camp (R-MI) will return as Chairman, and Rep. Sander Levin (D-MI) will return as Ranking Member.

In regard to the Republicans, Reps. Griffin and Kelly have strong voting records against trade barriers and subsidies. While Rep. Kelly's voting record shows support for dismantling trade barriers, he has rarely voted against (re)authorizing subsidies. In regard to the Democrats, Reps. Schwartz, Davis and Sánchez all have voting records largely supporting the establishment and/or maintenance of trade barriers and subsidies.

House Ways and Means subcommittee composition and leadership will remain unknown until full Committee organization is approved by the Republican and Democratic caucuses, which is expected in January 2013. However, Rep. Devin Nunes (R-CA) is widely expected to replace Rep. Kevin Brady as Chairman of the House Ways and Means Trade Subcommittee when Rep. Brady moves to Chair the House Ways and Means Health

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slincicome@whitecase.com

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

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Subcommittee. Rep. Nunes is an outspoken champion of expanding trade ties with Latin America, enforcement of trading partners' international obligations in regard to sanitary and phytosanitary (SPS) measures, and reform of the Generalized System of Preferences (GSP) program.

Click [here](#) for a copy of the Senate Republican Finance Committee assignments, [here](#) for a copy of Senate Democratic Finance Committee assignments, and [here](#) for a copy of House Ways and Means Committee assignments for both Republicans and Democrats.

## CIT Holds Provision of US Law Retroactively Applying CVDs to NME Imports Constitutional

On January 7, 2013, the United States Court of International Trade (CIT) found Section 1 of US Public Law 112-99, a provision that permits the retroactive application of countervailing duties (CVDs) on imports of merchandise from countries designated as "nonmarket economies" (NMEs). The CIT remanded the case, *GPX International Tire Corp. v. United States* ("GPX case") to the US Department of Commerce (DOC), albeit merely to determine company specific calculation issues. The CIT decision came in response to a remand from the Court of Appeals for the Federal Circuit (CAFC) on May 9, 2012, ordering the CIT to consider the constitutionality of the retroactive portion of the law (*please refer to W&C US Trade Alert dated May 9, 2012*).

DOC began conducting CVD investigations of NMEs in November 2006. Prior to that time, DOC's position was that CVDs could not be applied to NMEs. Following various legal challenges, the CAFC eventually ruled that DOC lacked the legal authority to impose CVDs on imports of merchandise from NME countries. The CAFC's ruling upheld an earlier CIT decision (*please refer to W&C US Trade Report dated January 25, 2012*).

In March 2012, and before the CAFC's decision was final, President Obama signed Public Law 112-99 which applied "the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes." Public Law 112-99 contains two sections: Section 1 retroactively required DOC to impose CVDs on identified subsidies from NME countries for investigations that were commenced from November 20, 2006 through the enactment of the law. Section 2 prospectively required DOC to address the issue of "double counting," *i.e.*, the simultaneous application of both AD duties and CVDs on imported merchandise from NMEs (*please refer to W&C US Trade Alert dated March 7, 2012*.) Because the case was still pending but the issues had not been briefed, the CAFC remanded the *GPX* case to the CIT in May 2012 for a determination of the constitutionality of Section 1 of the law.

The CIT upheld the constitutionality of Section 1 over plaintiffs' challenges. First, the CIT held that Section 1 did not violate the "ex post facto" clause of the Constitution because trade laws are remedial, and a law must be punitive in order run afoul of the Constitution. Second, the CIT held that Section 1 did not violate the Due Process Clause of the Constitution because there was a rational basis for it (*e.g.*, protecting U.S. industries from unfair trade practices) and plaintiffs had no vested right in the payment of a certain amount of duty. Finally, the CIT held that applying Section 1 retroactively but not Section 2 did not violate the Equal Protection Clause of the Constitution because the CIT found that there was a rational basis for not applying Section 2 retroactively because it meant that cases that already had been decided did not need to be redone.

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Scott Lincicome, Esq.  
701 13th Street NW, Washington, DC 20005  
[slincicome@whitecase.com](mailto:slincicome@whitecase.com)

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
[sscoles@whitecase.com](mailto:sscoles@whitecase.com)

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The CIT did remand the *GPX* case to DOC, but only for company specific issues associated with calculating the appropriate CVD rate.

This case is notable because, if undisturbed, it means that all of the CVDs that DOC has imposed on NMEs since reversing its policy in 2006 will apply. Plaintiffs are likely to appeal the CIT's decision on the constitutionality of Section 1 to the CAFC once the remand proceedings are complete. Because the CIT's decision involves questions of law, the CAFC is free to review it without deference.

Click [here](#) for a copy of the CIT slip opinion.

## House Ways and Means Committee Leadership Introduce MTB Legislation

On January 1, 2013, the House Ways and Means Chairman Dave Camp (R-MI), Ranking Member Sander Levin (D-MI), as well as Trade Subcommittee former Chairman Kevin Brady (R-TX) and Ranking Member Jim McDermott (D-WA) announced the introduction of legislation derived from more than 2,000 Miscellaneous Tariff Bills (MTBs) titled the "US Job Creation and Manufacturing Competitiveness Act of 2013" (HR 6727). Each MTB aims to provide for the temporary reduction in or suspension of tariffs on certain intermediate imported products in order to reduce costs for US manufacturers and ultimately increase US competitiveness.

The MTBs contained within HR 6727 were introduced in the House and Senate through a process that began on March 30, 2012. Senators and Representatives were given from March 30-April 30, 2012 to submit bills proposing one of the following: (i) a temporary duty suspension or reduction; (ii) an extension of an existing temporary duty suspension or reduction; or (iii) a technical correction. Each bill could only propose that one product, as identified by an 8-digit US Harmonized Tariff Schedule (HTSUS) code, be subject to one of the aforementioned actions. Before they could be included in HR 6727, each bill had to be reviewed by a number of groups, including, among others: (i) the public; (ii) the US International Trade Commission (ITC); and (iii) the Department of Commerce (DOC), which led the Obama Administration's review of the bills (*please refer to W&C US Trade Alert dated April 3, 2012*).

In November 2012 the House Ways and Means Committee released the Obama Administration's review of the MTBs. In its review, the Obama Administration objected to more than 50 MTBs proposing either extensions of duty suspensions or new duty suspensions for footwear products, arguing that enactment of such bills "would undermine trade negotiations." Although no reference to specific negotiations was made, the comment likely refers to the ongoing Trans-Pacific Partnership (TPP) negotiations. Both lawmakers and industry groups expressed opposition to the Obama Administration's position. Since its original review, the Obama Administration submitted, in November and December 2012, three re-reviews of the MTBs. In these re-reviews, the Obama Administration dropped its objections to most of the MTBs proposing extensions of duty suspensions for footwear.

The path forward for HR 6727 remains unclear. Although the House Ways and Means Committee leadership claim the legislation has broad bipartisan support, numerous Senators have expressed opposition to the current MTB process, arguing that it is inconsistent with the ban on earmarks, or guarantees of federal expenditures to

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### Contacts:

Scott Lincicome, Esq.  
701 13th Street NW, Washington, DC 20005  
[slincicome@whitecase.com](mailto:slincicome@whitecase.com)

Samuel Scoles  
8 Marina View, #27-01, Singapore, 018960  
[sscoles@whitecase.com](mailto:sscoles@whitecase.com)

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particular recipients in appropriations-related documents. In June 2012 Senator Claire McCaskill (D-MO) introduced the “Temporary Duty Suspension Process Act of 2012” (S 3292). The legislation would reform the MTB process used to compile HR 6727 by allowing companies to submit their proposals for duty suspension directly to the ITC, and reserving final approval for Congress.

Click [here](#) for a copy of HR 6727.

Click [here](#) for further information on the 2012 MTB process as provided by the House Ways and Means Committee, including links to public comments, ITC reports and the Obama Administrations reviews of the MTBs.

## USTR Requests WTO Consultations With Indonesia Regarding Agricultural Import Restrictions

On January 10, 2013, US Trade Representative (USTR) Ron Kirk issued a press release announcing that the United States had requested World Trade Organization (WTO) consultations with Indonesia regarding its non-automatic import licensing regime for horticultural products, animals, and animal products. According to the press release, Indonesia’s import licensing regime impedes the entry of numerous US products, including, but not limited to, fruits, vegetables, flowers, dried produce, juice, beef, and other animal products.

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

In its Request for Consultations (WT/DS455/1), the United States alleges that Indonesia requires importers of horticultural products to apply to the Indonesian Ministry of Agriculture, which considers domestic market conditions prior to issuing a recommendation certificate, and to register and receive approval with the Indonesian Ministry of Trade. For animals and animal products, importers must obtain a recommendation from the Indonesian Ministry of Agriculture, which also administers and allocates quotas. They must also receive an import license from the Ministry of Trade, which refuses to issue licenses unless there is inadequate domestic supply at reasonable prices.

According to the Request, Indonesia’s licensing regime appears inconsistent with: (i) Articles X:3(a) and XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), which require transparency and impose a general prohibition on quantitative import restrictions respectively; (ii) Article 4.2 of the Agriculture Agreement, which prohibits discretionary import licensing for agricultural products; and (iii) Articles 1.2, 3.2, and 3.3 of the Import Licensing Agreement, which respectively require that import licensing procedures must conform to GATT 1994 with a view to preventing trade distortions, prohibit non-automatic licensing regimes with trade-restrictive or distortive effects going beyond those caused by the imposition of the restriction, and require publication of sufficient information to show the basis for granting licenses.

The consultation request is the latest in a series of efforts by the United States to reduce the burdens that Indonesia’s import licensing requirements pose for US agricultural exports. A USTR fact sheet concerning the

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### Contacts:

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

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

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consultation request notes that although the United States has repeatedly raised the issue with Indonesia, its concerns have not been addressed. More than 20 members of the US Congress led by representatives of the major fruit-exporting state of Washington wrote letters to USTR and the Indonesian government in June and August 2012, seeking to modify or remove the import licensing regime. USTR's press release further notes that Indonesia recently announced "drastic reductions" in their quotas for beef and other animal product imports. This announcement likely contributed to the United States' decision to request consultations.

Click [here](#) for a copy of the United States Request for Consultations (WTO/DS455/1).

Click [here](#) for a copy of USTR's press release.

Click [here](#) for a copy of USTR's fact sheet.

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8 Marina View, #27-01, Singapore, 018960  
[sscoles@whitecase.com](mailto:sscoles@whitecase.com)

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