

## International Trade

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This article outlines the most important developments in international trade law during 2012.<sup>1</sup> It summarizes developments in international trade negotiations (both in the WTO and bi-lateral negotiations), WTO dispute settlement activities, and U.S. trade remedies cases.

### I. Negotiation Developments

#### A. WTO NEGOTIATIONS

The Doha negotiations remained deadlocked in 2012 with members turning their attention to less ambitious goals, including discussions related to a trade facilitation agreement, expansion of the Information Technology Agreement (ITA),<sup>2</sup> and the accession of

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1. For developments during 2011, see Timothy Brightbill et al., *International Trade*, 46 INT'L LAW. 81 (2012). For developments during 2010, see Pablo M. Bentes et al., *International Trade*, 45 INT'L LAW. 79 (2011).

2. See *ITA Negotiations Could Start in Early 2013, China Looks to Limit Scope*, INSIDE U.S. TRADE (Nov. 8, 2012), <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-11/09/2012/ita-negotiations-could-start-in-early-2013-china-looks-to-limit-scope/menu-id-710.html>.

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China to the Government Procurement Agreement.<sup>3</sup> Proposals have also been floated for a multilateral agreement to eliminate tariffs on environmental goods and a deal on tariff rate quota administration in agriculture.<sup>4</sup>

Some WTO members have started discussing a Plurilateral Agreement on Services to expand market access commitments and provide enhanced disciplines related to trade in services.<sup>5</sup> Any agreement would initially apply only to trade among the participating members of the proposed agreement.<sup>6</sup> Members currently involved in the talks include the United States, Australia, the European Union (EU), Canada, Colombia, Costa Rica, Hong Kong, Israel, Japan, Mexico, New Zealand, Chile, Norway, Peru, South Korea, Switzerland, Taiwan, Turkey, and Panama.<sup>7</sup>

The WTO approved new guidelines to streamline the process for the least developed countries to join the organization.<sup>8</sup> During 2012, Russia, Montenegro,<sup>9</sup> Samoa,<sup>10</sup> and Vanuatu<sup>11</sup> became WTO members, and Laos is expected to become a member in early 2013.<sup>12</sup> On December 20, 2012, U.S. President Barack Obama lifted restrictions on trade with Russia that had resulted from Title IV of the Trade Act of 1974<sup>13</sup> (also known as the Jackson-Vanik amendment) following favorable action by Congress, and Russia was granted Permanent Normal Trade Relations (PNTR) status.<sup>14</sup> The United States can now fully benefit from Russia's WTO membership.

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3. Pascal Lamy, Dir.-Gen., World Trade Org., *The Future of Trade: A Conversation with World Trade Organization Director-General Pascal Lamy* 36 (Oct. 1, 2012), available at [http://www.brookings.edu/~media/events/2012/10/01%20wto%20lamy/20121001\\_trade\\_lamy.pdf](http://www.brookings.edu/~media/events/2012/10/01%20wto%20lamy/20121001_trade_lamy.pdf).

4. *Id.* at 3, 30; *Brazil Pushes for Inclusion of AG Issues as Part of Early Doha Package*, INSIDE U.S. TRADE (June 14, 2012), <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-06/15/2012/brazil-pushes-for-inclusion-of-ag-issues-as-part-of-early-doha-package/menu-id-710.html>.

5. *See Services Plurilateral Emerges as Potential New Forum for SOE Disciplines*, INSIDE U.S. TRADE (Nov. 9, 2012), <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-11/09/2012/services-plurilateral-emerges-as-potential-new-forum-for-soe-disciplines/menu-id-710.html>.

6. *See EU to Seek New Mandate for Potential Services Plurilateral Negotiations*, INSIDE U.S. TRADE (Nov. 2, 2012), <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-11/02/2012/eu-to-seek-new-mandate-for-potential-services-plurilateral-negotiations/menu-id-710.html>.

7. *See WTO Members Discuss Services Deal Elements Linked to Potential Expansion*, INSIDE U.S. TRADE (Oct. 5, 2012), <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-10/05/2012/wto-members-discuss-services-deal-elements-linked-to-potential-expansion/menu-id-710.html>.

8. *See General Council Approves Streamlined WTO Membership Talks for Poorest Countries*, WORLD TRADE ORG. (July 25, 2012), [http://www.wto.org/english/news\\_e/news12\\_e/gc\\_25jul12\\_e.htm](http://www.wto.org/english/news_e/news12_e/gc_25jul12_e.htm).

9. *See Press Release*, World Trade Org., *Montenegro and Samoa Strengthen WTO* (Apr. 30, 2012), [http://www.wto.org/english/news\\_e/pres12\\_e/pr660\\_e.htm](http://www.wto.org/english/news_e/pres12_e/pr660_e.htm).

10. *Id.*

11. *See Press Release*, World Trade Org., *WTO Membership Rises to 157 with Entry of Russia and Vanuatu* (Aug. 22, 2012), [http://www.wto.org/english/news\\_e/pres12\\_e/pr671\\_e.htm](http://www.wto.org/english/news_e/pres12_e/pr671_e.htm).

12. *See General Council Accepts Laos' Membership, Only Ratification Left*, WORLD TRADE ORG. (Oct. 26, 2012), [http://www.wto.org/english/news\\_e/news12\\_e/acc\\_lao\\_26oct12\\_e.htm](http://www.wto.org/english/news_e/news12_e/acc_lao_26oct12_e.htm).

13. 19 U.S.C. § 2431 (2006).

14. *See* Doug Palmer, *Obama Grants Russia "Permanent Normal Trade Relations"*, REUTERS (Dec. 20, 2012, 12:17 PM), <http://www.reuters.com/article/2012/12/20/us-usa-russia-trade-idUSBRE8BJ0XB20121220>.

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B. BILATERAL AND REGIONAL NEGOTIATIONS

1. *Entry into Force of the Colombia, Korea, and Panama Free Trade Agreements*

During 2012, the U.S. free trade agreements (FTAs) with Colombia, Korea, and Panama all entered into force. These agreements provide benefits and protections in a variety of areas, including consumer and industrial goods tariffs, agricultural tariffs, services, investments, intellectual property rights, and government procurement.

The U.S.-Korea FTA entered into force on March 15, 2012,<sup>15</sup> and U.S. Customs and Border Protection (CBP) published its interim regulations governing the tariff treatment and customs-related provisions of the FTA on March 19, 2012.<sup>16</sup> According to the Office of the U.S. Trade Representative (USTR), almost 80 percent of U.S. exports to Korea of consumer and industrial goods became duty-free immediately when the FTA entered into force, with most remaining tariffs on such goods to be eliminated in five to ten years.<sup>17</sup>

The U.S.-Colombia FTA entered into force on May 15, 2012,<sup>18</sup> and CBP published its interim regulations governing the tariff treatment and customs-related provisions of the FTA on September 26, 2012.<sup>19</sup> According to the Office of the USTR, “over 80 percent of U.S. exports of consumer and industrial goods to Colombia [became] duty free immediately” when the FTA entered into force, “with remaining tariffs on such goods [to be] phased out over 10 years.”<sup>20</sup> According to the Colombian Ministry of Trade and Industry, exports from Colombia to the United States increased 18 percent since the FTA came into force with particular benefit to certain flowers, prepared foods, sugar, sugar products, and glassware sectors.<sup>21</sup>

The U.S.-Panama FTA entered into force on October 31, 2012.<sup>22</sup> According to the Office of the USTR, “[o]ver 86 percent of U.S. exports of consumer and industrial products to Panama [became] duty-free immediately” when the FTA entered into force, “with remaining tariffs [on such goods to be] phased out over ten years.”<sup>23</sup>

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15. Proclamation No. 8783, 77 Fed. Reg. 14,265 (Mar. 9, 2012); *New Opportunities for U.S. Exporters Under the U.S.-Korea Trade Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited Feb. 2, 2013).

16. U.S.-Korea Free Trade Agreement, 77 Fed. Reg. 15,943, 15,943 (Mar. 19, 2012).

17. *New Opportunities for U.S. Exporters Under the U.S.-Korea Trade Agreement*, *supra* note 15.

18. Proclamation No. 8818, 77 Fed. Reg. 29,519, 29,523 (May 18, 2012); M. ANGELES VILLARREAL, CONG. RESEARCH SERV., RL34470, THE U.S.-COLUMBIA FREE TRADE AGREEMENT: BACKGROUND AND ISSUES 1 (2012).

19. U.S.-Colombia Trade Promotion Agreement, 77 Fed. Reg. 59,064, 59,064 (Sept. 26, 2012).

20. *U.S.-Colombia Trade Agreement: Increasing American Competitiveness*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/uscolombiatpa/facts> (last visited Feb. 2, 2013).

21. Press Release, Ministerio de Comercio, Industria y Turismo [Ministry of Com., Industry & Tourism], Colombian Exports to the United States Grew 18%, (Oct. 19, 2012), <https://www.mincomercio.gov.co/englishmin/publicaciones.php?id=4735>.

22. Proclamation No. 8894, 77 Fed. Reg. 66,507, 66,511 (Oct. 29, 2012); J.F. HORNBECK, CONG. RESEARCH SERV., RL32540, THE U.S.-PANAMA FREE TRADE AGREEMENT 1 (2012).

23. *U.S.-Panama Trade Agreement: Growing America's Economy Through Exports*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/uspanamatpa/facts> (last visited Feb. 2, 2013).

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2. *Bilateral Investment Treaties*

The Obama administration's review of the U.S. Model Bilateral Investment Treaty (BIT), which began in 2009 and ended on April 20, 2012 with the release of the new Model BIT.<sup>24</sup> The Model BIT was last updated in 2004.<sup>25</sup> The 2012 Model BIT includes various new provisions, including provisions related to state-owned enterprises (SOE), domestic technology requirements, labor, the environment, and transparency.<sup>26</sup> With regard to SOEs, the new Model BIT provides an explanation of when governmental authority has been delegated to an SOE.<sup>27</sup> New language in Article 8 provides that a party may not require the purchase or use of domestic technologies or accord a preference to domestic technologies in order to afford protection to its own investors, investments, or technology.<sup>28</sup> New language in Article 11 provides for enhanced transparency with regard to the regulations of the central level of government and the development of standards and technical regulations. New language in Articles 12 and 13 clarifies and expands parties' obligations with respect to application and enforcement of environmental and labor laws.

3. *Trans-Pacific Partnership Negotiations*

Great strides were made in 2012 for the expansion of the Trans-Pacific Partnership (TPP). Adopted by the United States in 2009, TPP is a free trade agreement aimed at expanding the economic reach of the Pacific's most dynamic countries.<sup>29</sup> In 2012, both Canada and Mexico were formally accepted into negotiations.<sup>30</sup> Already members of the North American Free Trade Agreement (NAFTA), these inclusions add to the United States' ability to expand trade possibilities within the continent. And, unlike some of the date restrictions of NAFTA, the TPP has new century provisions that apply to modern topics like intellectual property and patent rights.<sup>31</sup>

Bringing the count to eleven countries, Canada and Mexico joined Australia, Brunei, Singapore, Chile, the United States, Peru, New Zealand, Malaysia, and Vietnam.<sup>32</sup> U.S. Trade Representative Ron Kirk also indicated that the TPP can expect to receive bids from South Korea, Japan, and Taiwan. Current signatories have not indicated any intention of limiting the number of countries that may join negotiations.

Certain U.S. non-profit organizations, like Public Citizen, have raised concerns regarding U.S. involvement in the TPP negotiations.<sup>33</sup> These concerns stem from the inconsis-

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24. U.S. DEP'T OF STATE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, *available at* <http://www.state.gov/documents/organization/188371.pdf>.

25. U.S. DEP'T OF STATE, 2004 MODEL BIT, *available at* <http://www.state.gov/documents/organization/117601.pdf>.

26. See Press Release, U.S. Dep't State, Model Bilateral Investment Treaty (Apr. 20, 2012), <http://www.state.gov/r/pa/prs/ps/2012/04/188199.htm>.

27. See U.S. DEP'T OF STATE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, art. 2, n.8.

28. *Id.* art. 8(1)(h).

29. IAN F. FERGUSSON ET AL., CONG. RESEARCH SERV., RL 42694, THE TRANS-PACIFIC PARTNERSHIP NEGOTIATIONS AND ISSUES FOR CONGRESS 3 (2012).

30. *Id.*

31. See *id.* at 31.

32. *Id.* at 2.

33. See *TPP Government Procurement Negotiations: Buy American Policy Banned, a Net Loss for the U.S.*, PUBLIC CITIZEN, <http://www.citizen.org/documents/TPP-Buy-American.pdf> (last visited Jan. 18, 2013).

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tency of member states' obligations to international agreements, which have different restriction levels. Issues also arise from the actual text of the TPP. To date, a copy of the draft TPP text has never been publically released. Although some portions of the text have been leaked, many provisions, including any country obligations, are not known.

In 2012, signatories and negotiating members settled any disputes or proposals with various rounds of negotiations. The fifteenth round of negotiations was held on December 3rd-12th in Auckland, New Zealand.<sup>34</sup>

4. *U.S.- Canada Softwood Lumber Agreement Arbitration*

On January 23, 2012, the United States and Canada agreed to a two-year extension, until October 12, 2015, of the Softwood Lumber Agreement between the Government of the United States and the Government of Canada (SLA 2006).<sup>35</sup> The SLA 2006 restricts U.S. imports of Canadian-origin softwood lumber products through export taxes (collected by Canada for exports from some Canadian provinces) or a combination of export taxes and quotas (collected and enforced by Canada for other Canadian provinces).<sup>36</sup> The SLA 2006 settled ongoing litigation between the United States and Canada in a number of forums, including NAFTA, the WTO, and U.S. federal courts.<sup>37</sup> Under its original terms, the SLA 2006 would have expired on October 12, 2013.<sup>38</sup> Article XVIII, however, permitted a two-year extension upon agreement of the parties.<sup>39</sup> The SLA 2006 is now extended through October 12, 2015.<sup>40</sup>

On July 18, 2012, an arbitral tribunal convened under the dispute settlement provisions of the SLA 2006 issued a final award dismissing claims, in their entirety, brought by the United States against alleged circumvention of the SLA 2006 by British Columbia.<sup>41</sup> The United States alleged that British Columbia provided impermissible benefits to softwood lumber producers by selling certain timber killed or damaged by the mountain pine bark beetle at a discounted price.<sup>42</sup> This arbitration is the fourth concluded since entry into effect of the SLA 2006.<sup>43</sup>

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34. FERGUSSON ET AL., *supra* note 29, at 3.

35. See Agreement between the Government of the United States of America and the Government of Canada Extending the Softwood Lumber Agreement between the Government of the United States of America and the Government of Canada, as Amended, U.S.-Can., Jan. 23, 2012, *available at* [http://www.ustr.gov/webfm\\_send/3255](http://www.ustr.gov/webfm_send/3255) [hereinafter Extending the Softwood Lumber Agreement].

36. See Softwood Lumber Agreement, U.S.-Can., Sept. 26, 2006, U.S. Trade Rep., art. XII, Hein's No. KAV 8209, 8310, *available at* [http://www.ustr.gov/webfm\\_send/3254](http://www.ustr.gov/webfm_send/3254).

37. *Id.* art. II, annex 2A.

38. See *id.* art. XVII.

39. *Id.*

40. Extending the Softwood Lumber Agreement, *supra* note 35, art. I.

41. U.S. v. Can., Case No. 111790, Final Award, at 130 (London Ct. of Int'l Arb. 2012), *available at* <http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/111790.pdf>.

42. *Id.* at 33-37.

43. *Softwood Lumber*, FOREIGN AFFAIRS & INT'L TRADE CAN., [http://www.international.gc.ca/controls-controles/softwood-bois\\_oeuvre/index.aspx?menu\\_id=19&view=d](http://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/index.aspx?menu_id=19&view=d) (last modified Jan. 23, 2013).

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5. *U.S.–EU High Level Regulatory Cooperation Forum*

On September 28, 2012, the U.S.–EU High Level Regulatory Cooperation Forum (Forum) invited comments on methods to reduce trans-Atlantic regulatory barriers to trade.<sup>44</sup> Co-chaired by the U.S. Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget and the EU’s Director-General of the Directorate General for Enterprise and Industry, the Forum provides a venue for senior officials to exchange ideas on regulatory policy.<sup>45</sup> The Forum occurs as the United States and the European Union are beginning to explore the feasibility of a bilateral free trade agreement (FTA).

By October 31, 2012, the closing date for the comment period, the Forum received a number of responses from U.S. trade associations, including the U.S. Chamber of Commerce, Pharmaceutical Research and Manufacturers of America, National Association of Manufacturers, U.S. Personal Care Products Council, and the American Chemistry Council.<sup>46</sup> Generally, the comments urged the Forum to incorporate mutual recognition principles when adopting safety, inspection, labeling and certification rules, duty-free and tariff reduction measures, and a comprehensive approach to biotechnology-related approvals.

6. *Conditions on U.S. Market Access*

Over the past year, access to U.S. markets has increasingly been influenced by heightened government-to-government, legislative, regulatory, and independent retailer scrutiny of environmental and human rights issues. A number of actions confirmed a trend of increasing use of conditions on U.S. market access to promote compliance with certain environmental and human rights standards abroad.

a. *Environmental Conditions*

In May 29-31, 2012, Peru and the United States held meetings on, inter alia, Peru’s efforts to implement timber producer and exporter audits under the U.S.–Peru FTA’s Environment Chapter.<sup>47</sup> The United States already bans imports of illegally logged timber under 2008 amendments to the Lacey Act.<sup>48</sup> The U.S.–Peru FTA is the first U.S. FTA

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44. Promoting U.S. EC Regulatory Compatibility, 77 Fed. Reg. 59,702, 59,702 (Sept. 28, 2012); see also Letter from Boris Bershteyn, Acting Administrator, Office of Information and Regulatory Affairs, Daniel Calleja Crespo, Dir. Gen., Directorate Gen. for Enter. & Indus., Jean-Luc Demarty, Dir. Gen., Directorate Gen. for Trade, & Ambassador Miriam Sapiro, Deputy U.S. Trade Representative, Office of U.S. Trade Representative, to EU & U.S. Stakeholders on Promoting Greater Transatlantic Regulatory Compatibility (Sept. 7, 2012), available at <http://www.whitehouse.gov/sites/default/files/omb/oira/irc/eu-us-joint-solicitation-09072012.pdf>.

45. See Office of Mgmt. & Budget, *United States-European Union High-Level Regulatory Cooperation Forum*, WHITE HOUSE, (last visited Feb. 4, 2013); *EU-USA – Regulatory Cooperation*, EUROPEAN COMMISSION, [http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/regulatory-cooperation/index\\_en.html](http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/regulatory-cooperation/index_en.html) (last updated Feb. 4, 2013).

46. See *Comments Submitted in Response to 77 Fed. Reg. 59702*, REGULATIONS.GOV, <http://www.regulations.gov/#!searchResults;rpp=25;po=0;s=USTR-2012-0028> (last visited Feb. 5, 2013).

47. See U.S.–Peru Free Trade Agreement, U.S.–Peru, ch. 18, Apr. 12, 2006, T.I.A.S. No. 06-105.1, as amended, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset\\_upload\\_file\\_953\\_9541.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file_953_9541.pdf).

48. 16 U.S.C. § 3372 (2006).

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that expressly conditions U.S. market access on a demonstration that certain imported forestry products do not originate from unlawfully logged timber.

On July 17, 2012, the U.S. Food and Drug Administration (FDA) banned a widely-used industrial chemical with estrogen-like properties—bisphenol A (BPA)—from baby bottles and children’s drinking cups.<sup>49</sup> The FDA acted at the request of a key chemical industry trade association, the American Chemistry Council, in light of a growing trend among major U.S. retailers—like Wal-Mart—to self-impose similar BPA bans in response to increasing consumer concerns.

b. Human Rights Conditions

On August 2, 2012, the U.S. House of Representatives and Senate voted to extend the Third-Country Fabric provision of the African Growth and Opportunity Act (AGOA).<sup>50</sup> First enacted in 2000, AGOA requires the President to determine whether sub-Saharan countries remain eligible for substantial trade preferences, based in part on progress made toward poverty reduction and protection of worker rights.<sup>51</sup>

On August 22, 2012, the Securities and Exchange Commission (SEC) adopted a rule requiring companies to publicly disclose their use of conflict minerals from the Democratic Republic of the Congo (DRC), Angola, Burundi, Central African Republic, Rwanda, South Sudan, Tanzania, Uganda, and Zambia under section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).<sup>52</sup> The regulation aims to reduce the financing of armed groups and their use of extreme violence in the DRC through trade in tantalum, tin, gold, tungsten, and their derivatives. Shortly after the SEC published the rule in the *Federal Register*, several organizations, including the National Association of Manufacturers and the U.S. Chamber of Commerce, filed suit in the U.S. Court of Appeals for the District of Columbia Circuit challenging the validity of the rule.<sup>53</sup> Among other things, the plaintiffs asserted that the SEC erred in its economic analysis of the rule because the SEC never estimated the benefits of the Rule and even acknowledged that there might be no benefits at all; wrongly concluded that the statutory text left it no authority to create a de minimis exception despite its general exemptive authority;<sup>54</sup> and wrongly interpreted the term “did originate” in the Dodd-Frank Act to mean “reason to believe . . . may have originated.”<sup>55</sup> The D.C. Circuit may rule on the case by mid-2013.

On November 16, 2012, the U.S. House of Representatives voted 365 to 43 to normalize trade relations with Russia, while allowing visa denials and asset freezes of Russian officials found to have participated in human rights abuses (the Magnitsky Act).<sup>56</sup> The sanctions provisions refer to the torture and death in imprisonment of Sergei L. Magnit-

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49. Indirect Food Additives: Polymers, 77 Fed. Reg. 41,899, 41,900, 41,902 (July 17, 2012) (to be codified at 21 C.F.R. pt. 177).

50. See 158 CONG. REC. S5901, 5920 (daily ed. Aug. 2, 2012).

51. Trade and Development Act of 2000, Pub. L. No. 106-200, § 104, 114 Stat. 251, 254 (2000).

52. Conflict Minerals, 77 Fed. Reg. 56,274, 56,274 (Sept. 12, 2012).

53. Brief for Petitioner, Nat’l Ass’n of Mfrs. v. SEC, No. 12-1422 (D.C. Cir. filed Oct. 19, 2012).

54. *Id.* at 35-40.

55. *Id.* at 3-5, 53.

56. 158 CONG. REC. H6401, H6417 (daily ed. Nov. 16, 2012).

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sky, a Russian lawyer who investigated government corruption.<sup>57</sup> This legislation also implements, under U.S. law, Russia's accession to the WTO, permitting the United States (among other things) to file complaints against Russia in the WTO dispute settlement process.<sup>58</sup>

## II. WTO Dispute Settlement Activity

A significant increase in WTO dispute settlement activity was registered in 2012. At the time of writing, twenty-five new complaints had been brought before the WTO, more than three times the number of disputes initiated in 2011.<sup>59</sup> Reflecting growing friction in trade relations between developing countries and China, about a third of the new cases initiated in 2012 involved China and either the United States or the European Union, alternating roles as complainants or respondents.<sup>60</sup> As in previous years, trade remedy cases continued to account for a majority of cases brought before the WTO, although complaints under the GATT, China's Accession Protocol, and the Technical Barriers to Trade (TBT) Agreement were also frequent.<sup>61</sup>

In contrast, 2012 registered a significant decline in WTO dispute settlement decision-making. A total of only four Panel Reports and six Appellate Body Reports were issued at the time of writing, the most significant of which are discussed below.

### A. PANEL AND APPELLATE BODY REPORTS

#### 1. U.S. – *Large Civil Aircraft*

On March 12, 2012, the Appellate Body issued its report in the long-standing *U.S.-Large Civil Aircraft* dispute.<sup>62</sup> The Appellate Body largely upheld the Panel's conclusions that NASA and Department of Defense (US DOD) research and development (R&D) subsidies, FSC/ETI (Foreign Sales Corporation/Extraterritorial Income Exclusion) subsidies, and certain tax exemptions granted to Boeing by the State of Washington and by the City of Everett, caused serious prejudice to EU interests through lost sales and significant price suppression with respect to the 200-300 seat LCA market. But the Appellate Body reversed the Panel's findings that these subsidies threatened to displace or impede the Airbus 200-300 seat LCA from the third-country markets of Kenya, Iceland, and Ethiopia (but not Australia).<sup>63</sup> The Appellate Body also reversed the Panel's finding that FSC/ETI subsidies and Washington State Business & Occupation (B&O) tax reduction had caused significant price suppression, significant lost sales, and displacement and impedance in the 100-200 and 300-400 seat LCA market, but completed the legal analysis to find that those

57. *Id.*

58. As noted above, the Senate also approved this legislation on December 6, 2012, and the President granted Russia PNTR on December 20, 2012. Presidential Proclamation No. 892,077 Fed. Reg. 76,797 (2012).

59. See Chronological List of Disputes Cases, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last visited Feb. 2, 2013).

60. See *id.*

61. See <http://www.worldtradelaw.net/dsc/database/searchcomplaints.asp>. (last visited Nov. 19, 2012).

62. Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R (Mar. 12, 2012).

63. *Id.* ¶ 1126.



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subsidies had caused significant lost sales for Airbus in the 100-200 seat LCA market.<sup>64</sup> The City of Wichita industrial revenue bonds were found by the Appellate Body to complement and supplement the effect of those subsidies in causing significant lost sales in the 100-200 seat LCA market.<sup>65</sup>

On September 23, 2012 the United States notified implementation of the recommendations and rulings of the DSB (Dispute Settling Body) in *U.S. – Large Civil Aircraft*.<sup>66</sup> Two days later, the European Union requested compliance proceedings under Article 21.5 of the DSU (Dispute Settlement Understanding)<sup>67</sup> and requested the DSB to authorize retaliation in the amount of US \$12 billion.<sup>68</sup> At the time of writing, the compliance panels in this dispute, and in the parallel *EC – Large Civil Aircraft* (DS316) dispute, had not completed their work.

2. *China – Raw Materials*

On January 30, 2012, the Appellate Body circulated its report in *China – Measures Related to the Exportation of Raw Materials*.<sup>69</sup> Although the Appellate Body largely upheld the Panel's findings that duties and quotas imposed by China on exports of certain minerals were inconsistent with Article XI:1 of the General Agreement on Trade and Tariffs (GATT) and Article 11.3 of China's Protocol of Accession to the WTO, the Appellate Body also made two findings of systemic importance.

First, in a significant tightening of the jurisprudence on the jurisdiction of panels, the Appellate Body held that the U.S., EU, and Mexican panel requests did not comply with the requirement in Article 6.2 of the DSU to identify the specific measures at issue and the legal basis of the complaint "sufficient to present the problem clearly."<sup>70</sup> The Appellate Body reasoned that the requests did not establish a sufficiently clear link between the thirty-seven measures at issue, and the thirteen legal provisions invoked by the complainants. As a result, the Appellate Body set aside the Panel's findings of inconsistency concerning export quotas allocation and administration, export licenses, minimum export prices, and formalities and fees imposed in connection with exportation.<sup>71</sup>

Second, the Appellate Body upheld the Panel's finding that the general exception of Article XX(g) of the GATT, which permits WTO violations in cases of measures "relating to conservation of exhaustible natural resources," was not available to China as a defense to justify export duties otherwise inconsistent with Article 11.3 of China's Accession Protocol.<sup>72</sup> This finding seems to resolve the question of whether Article XX of the GATT is generally available to justify violations of China's Protocol of Accession in the negative.

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64. *Id.* ¶ 1274.

65. *Id.* ¶ 1349.

66. Communication from the United States, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/15 (Sept. 26, 2012).

67. Request for Consultations by the European Union, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/16 (Oct. 2, 2012).

68. Request by the European Union for Authorization to take Countermeasures, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/17 (Oct. 2, 2012).

69. Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Mar. 11, 2011).

70. *See id.* ¶ 234.

71. *See id.* ¶ 235.

72. *See id.* ¶ 307.

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Rather, following the reasoning in the earlier *China – Audiovisuals* case, the application of Article XX will depend on a textual “hook” into the particular substantive obligation for which the exception is being invoked.

3. *TBT Disputes*

In 2012, the Appellate Body issued a trilogy of reports addressing the consistency of U.S. measures with the disciplines of the TBT Agreement. In *U.S. – Clove Cigarettes*,<sup>73</sup> *U.S. – Tuna II*,<sup>74</sup> and *U.S. – COOL*,<sup>75</sup> the Appellate Body addressed various provisions of the TBT agreement, but in particular Article 2.1, which had been raised and interpreted differently by panels in each dispute.

The Appellate Body confirmed that the question of “likeness” under Article 2.1 must be assessed primarily from a competition perspective, and that the “no less favorable treatment” standard of Article 2.1 prohibits a detrimental impact on imports only where such impact does not “stem from a legitimate regulatory distinction.” The Appellate Body reasoned that this would be the case where the technical regulation at issue is not “even-handed” in the manner it addresses risk. Applying this standard to the facts of the three cases, the Appellate Body found in *U.S. – Clove* that the ban on flavored cigarettes was not even-handed because, even though they raised the same youth-smoking risk, virtually all of the banned cigarettes were clove cigarettes imported from Indonesia, while a vast majority of permitted menthol cigarettes were domestically produced.<sup>76</sup> In *U.S. – Tuna II*, the Appellate Body similarly found that the “dolphin safe” labeling requirement discriminated against Mexican tuna because it was not consistent in the manner in which it addressed risks posed to dolphins inside and outside the Eastern Tropical Pacific Ocean.<sup>77</sup> Finally, in *U.S. – Cool*, the Appellate Body found that the country-of-origin labeling regulation was discriminatory because record-keeping and verification requirements imposed a disproportionate burden on the processing of imported vis-à-vis domestic meat.<sup>78</sup>

### III. U.S. Trade Remedies

#### A. NEW RULEMAKINGS

The U.S. Department of Commerce (Commerce) published a final rule modifying its methodology for calculating the weighted-average antidumping margins and assessment rate in administrative reviews, new shipper reviews, and sunset reviews in order to elimi-

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73. Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (Apr. 4, 2012).

74. Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012).

75. Appellate Body Report, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS386/AB/R (June 29, 2012).

76. *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, *supra* note 74, ¶¶ 224–26.

77. Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 297–98, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).

78. *United States – Certain Country of Origin Labeling (COOL) Requirements*, *supra* note 75.

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nate “zeroing.”<sup>79</sup> Commerce’s modification is intended to comply with a series of WTO dispute settlement body reports that have found the U.S. practice inconsistent with WTO obligations. In administrative reviews and new shipper reviews, Commerce has made comparisons between transaction-specific export prices and average normal values, without offsetting any dumping margins in individual sales by “negative” margins in other transactions. The new rule provides that Commerce will use a methodology in administrative reviews that parallels the methodology it uses in original investigations. This is intended to result in Commerce calculating weighted-average margins of dumping and antidumping duty assessment rates in a manner that provides offsets for non-dumped comparisons, while using monthly average-to-average comparisons instead of transaction-to-average comparisons. But the language of the new rule also reserves discretion to the agency to make comparisons on other bases, and its full impact will be unclear until they have made individual determinations. This final rule covered preliminary review determinations issued after April 16, 2012.

On May 21, 2012, Commerce finalized its rule to eliminate automatic revocation of antidumping or countervailing duty orders with respect to individual exporters who have obtained zero or de minimis dumping margins for three consecutive administrative reviews or zero subsidy rates for five consecutive years.<sup>80</sup> The new rule applies to all reviews initiated on or after June 20, 2012.

On August 30, 2012, Commerce issued<sup>81</sup> revised determinations in a number of investigations to implement a decision by a WTO dispute settlement panel<sup>82</sup> that, among other things, Commerce had essentially granted “double remedies” to petitioners in cases in which both countervailing duties were assessed and antidumping duties were imposed on the same merchandise using non-market economy antidumping calculation methodology. Commerce stated that it had examined whether a countervailable subsidy provided to a class or kind of merchandise had reduced the average price of imports during the relevant period, and whether they could reasonably estimate the extent to which that subsidy, in combination with the use of surrogate-based normal value, had increased the dumping margin. Commerce identified a subsidy-(variable) cost-price link in the case of input price subsidies in the relevant industry. Commerce then applied a test derived from a documented ratio of price-cost changes in the relevant manufacturing sector to estimate the extent of price responsiveness to changes in variable cost. Commerce stated that it reduced the antidumping duty by the estimated amount of increase in the weighted average dumping margin attributable to the subsidy.

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79. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 77 Fed. Reg. 8,101 (Feb. 14, 2012) (to be codified at 19 C.F.R. pt. 351).

80. Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, 77 Fed. Reg. 29,875 (May 21, 2012) (to be codified at 19 C.F.R. pt. 351).

81. Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act, 77 Fed. Reg. 52,683 (Aug. 30, 2012).

82. Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (Mar. 11, 2011).

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B. SIGNIFICANT DEPARTMENT OF COMMERCE CASES

1. *Crystalline Silicon Photovoltaic Cells from China*

On October 10, 2012, Commerce announced affirmative final determinations in the antidumping (AD) and countervailing duty (CVD) investigations on crystalline silicon photovoltaic (c-Si PV) cells and modules from China.<sup>83</sup> The solar AD/CVD cases were the largest trade remedy investigations, measured by the value of trade affected, ever filed regarding Chinese imports.<sup>84</sup>

Commerce determined that Chinese respondents were selling c-Si PV cells and modules in the United States at less than fair value (LTFV) (or “dumping”) at rates ranging from 18.32 to 249.96 percent.<sup>85</sup> It further found that imports of Chinese c-Si PV cells and modules were subsidized by the Chinese government at levels ranging from 14.78 to 15.97 percent.<sup>86</sup> Commerce found that Chinese solar producers benefited from subsidies in the form of inputs (including polysilicon) for less than adequate remuneration, preferential loans and grants, and preferential tax programs, among others. The solar CVD case marked the first time that Commerce found countervailable export subsidies in the form of preferential financing to customers.

In a highly contested decision on the investigations’ scope, Commerce decided that the orders would apply to modules assembled in third-party countries from Chinese cells, but not to modules assembled in China from third-party country cells. Throughout the investigation, the domestic industry argued (ultimately unsuccessfully) that the petition was intended to apply to modules assembled in China from third-party country cells, and that Commerce had a duty to define the scope of the investigation in accordance with the petition’s intent.

Because the U.S. International Trade Commission also returned an affirmative decision, Commerce is now expected to issue AD and CVD orders, directing CBP to collect cash deposits at the calculated rates on imports of c-Si PV cells and modules from China.

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83. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part, 77 Fed. Reg. 63,791, 63,791 (Oct. 17, 2012); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination, 77 Fed. Reg. 63,788, 63,788 (Oct. 17, 2012).

84. In 2011, the United States imported approximately US \$1.9 billion worth of Chinese c-Si PV modules. See Crystalline Silicon Photovoltaic Cells and Modules from China, Inv. Nos. 701-TA-481, 731-TA-1190, USTIC Pub. 4360 (Nov. 17, 2012) (Final).

85. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part, 77 Fed. Reg. 63,791, 63,791 (Oct. 17, 2012).

86. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination, 77 Fed. Reg. 63,788, 63,788 (Oct. 17, 2012).

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2. *Commerce's Surrogate Country Selection Process in Utility Scale Wind Towers and High Pressure Steel Cylinders*

In two cases in 2012, Commerce appears to have shifted its preference in selecting one surrogate country to value all factors of production (FOPs) in AD cases involving Chinese goods to a preference for the most specific input costs, regardless of the surrogate country.

In 2011, Commerce announced that India—previously its primary surrogate country for Chinese cases—was no longer economically comparable to China.<sup>87</sup> Commerce previously used India as the primary surrogate country in non-market economy cases because it provided public, reliable, and contemporaneous data. In accordance with its stated preference, Commerce had generally valued all FOPs using only India.<sup>88</sup>

But, in *High Pressure Steel Cylinders* and *Utility Scale Wind Towers*, Commerce selected Ukraine from among several possible surrogate countries, despite the lack of useable Ukrainian financial statements, to derive financial ratios.<sup>89</sup> In each case, Commerce had a complete set of FOPs from other surrogate country choices. But in selecting Ukraine as the most appropriate surrogate country, Commerce noted that the Ukrainian data was more specific to the inputs used in these cases.<sup>90</sup> In both the final determination in *High Pressure Steel Cylinders* and the preliminary determination in *Utility Scale Wind Towers*, Commerce put greater emphasis on which of the surrogate countries provided the most specific data for valuing the primary input.<sup>91</sup> Thus, it appears that Commerce may be shifting from its stated preference of valuing all FOPs with a single surrogate country and granting “specificity of the data” more weight in determining surrogate values.

3. *Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico*

On November 2, 2011, Commerce preliminarily determined that bottom mount refrigerator-freezers (refrigerators) from Korea and Mexico were or were likely to be sold at LTFV.<sup>92</sup> The investigation was initiated in April 2011.<sup>93</sup>

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87. See *High Pressure Steel Cylinders from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 77 Fed. Reg. 26,739, 26,739 (May 7, 2012) [hereinafter *Steel Cylinders*]; *Utility Scale Wind Towers from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 77 Fed. Reg. 46,034, 46,034 (Aug. 2, 2012) [hereinafter *Utility Scale Wind Towers*].

88. See *Steel Cylinders*, 77 Fed. Reg. at 26,739; Issues and Decision Memorandum accompanying Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Recession of the Seventh Antidumping Duty Administrative Review, 77 Fed. Reg. 15,039, cmt. 2A (Mar. 14, 2012).

89. *Steel Cylinders*, 77 Fed. Reg. at cmt. 1.

90. *Id.* at cmt. 1; see Memorandum from Lilit Astvatsatrian and Trisha Tran, International Trade Compliance Analysts, AD/CVD Operations, Office Four, to Robert Bolling, Program Manager, *Utility Scale Wind Towers from the People's Republic of China: Preliminary Determination Surrogate Value Memorandum* (July 26, 2012) (on file with author).

91. *Steel Cylinders*, 77 Fed. Reg. at cmt. 1; *Utility Scale Wind Towers*, 77 Fed. Reg. at 46,037.

92. Notice of Preliminary Determination of Sales at Less than Fair Value, Postponement of Final Determination, and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico, 76 Fed. Reg. 67,688, 67,689 (Nov. 2, 2011) [hereinafter *Refrigerators from Mexico Prelim*]; Notice of Preliminary Determination of Sales at Less than Fair Value, Postponement of Final Determination and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea, 76 Fed. Reg. 67,675, 67,675 (Nov. 2, 2011) [hereinafter *Refrigerators from Korea Prelim*].

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In the Korea investigation, Samsung Electronics initially refused to report the majority of its home-market sales of kimchi refrigerators, asserting that they fell outside the investigation's scope. Commerce deemed Samsung's response to these and other requests a failure to cooperate, meriting adverse factual inferences.

The final determinations affirmed the preliminary LTFV determinations.<sup>94</sup> Commerce declined to amend the scope's definitions or exclude kimchi or Quatro cooling refrigerators from the scope.<sup>95</sup> Commerce found that LG Electronics and Samsung engaged in targeted dumping.<sup>96</sup> Commerce also found that LG Electronics Monterrey Mexico (LGEMM) and Samsung Mexico had engaged in targeted dumping, but the targeted dumping margins did not differ significantly from the non-targeted dumping margins.<sup>97</sup>

Commerce also reaffirmed its use of the multinational corporation (MNC) provision<sup>98</sup> in the final Mexico determination to calculate normal value (NV) for LGEMM. The requisite statutory criteria had been fulfilled because: 1) LG partially owned LGEMM, 2) comparing LGEMM's home market sales to U.S. sales was not viable, and 3) the NV of the product produced in Korea was higher than the NV of products produced in Mexico.<sup>99</sup>

Thus, Commerce based NV for LGEMM on the prices of sales made by the parent company, LGE, in Korea, and calculated the dumping margin accordingly.<sup>100</sup> This represented the first time Commerce had ever applied the MNC provision.

Commerce also conducted a CVD (Countervailing Duty) investigation of Korean refrigerators. The final determination reversed the preliminary result and found that producers and exporters of refrigerators from Korea were receiving countervailable subsidies. The reversal was partly due to the use of adverse inferences<sup>101</sup> against Samsung because Commerce found that Samsung "failed to cooperate by not acting to the best of its ability" by withholding information requested and providing information that could not be verified.<sup>102</sup>

#### 4. *Large Residential Washers from Korea and Mexico*

Commerce preliminarily determined on August 3, 2012, that large residential washers from Korea and Mexico were being or were likely to be sold at LTFV within the United

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93. Refrigerators from Korea Prelim, 76 Fed. Reg. at 67,675-76; Refrigerators from Mexico Prelim, 76 Fed. Reg. at 67,690.

94. Notice of Final Determination of Sales at Less than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea, 77 Fed. Reg. 17,413, 17,414-15 (Mar. 26, 2012) [hereinafter Refrigerators from Korea]; Notice of Final Determination of Sales at Less than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico, 77 Fed. Reg. 17,422, 17,422 (Mar. 26, 2012) [hereinafter Refrigerators from Mexico].

95. Refrigerators from Korea, 77 Fed. Reg. at 17,414; Refrigerators from Mexico, 77 Fed. Reg. at 17,423.

96. Refrigerators from Korea, 77 Fed. Reg. at 17,414-15; Refrigerators from Mexico, 77 Fed. Reg. at 17,423.

97. Refrigerators from Mexico, 77 Fed. Reg. at cmt 1.

98. 19 U.S.C. § 1677b(d) (2006).

99. Refrigerators from Mexico, 77 Fed. Reg. at 17,424.

100. Refrigerators from Mexico Prelim, 76 Fed. Reg. at 67,692-93.

101. Refrigerators from Korea, 77 Fed. Reg. at 17,412.

102. *Id.* at cmts. 9-10.

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States.<sup>103</sup> The scope of the investigations includes all automatic clothes washing machines, except for commercial and stacked washer-dryers. Automatic washing machines with vertical, rather than horizontal, rotational axes and a capacity less than 3.7 cubic feet were similarly excluded in response to scope requests from interested parties.

A CVD investigation of Korea was initiated with the AD investigations and shares the same scope. On June 5, 2012, Commerce preliminarily determined that Korean washing machine exporters were receiving countervailable subsidies.

C. SIGNIFICANT INTERNATIONAL TRADE COMMISSION CASES

1. *Negative Commission Determinations in May 2012*

In the span of four days, the U.S. International Trade Commission (Commission) made final negative determinations in three of five investigations,<sup>104</sup> including *Bottom Mount Combination Refrigerators-Freezers*. In that case, the Commission noted the complicated nature of the consumer retail market, characterized by new models with attractive features, aggressive price discounting to stimulate sales, and consumers that make purchasing decisions based on subjective evaluations of the product's value.<sup>105</sup>

The Commission also made negative final determinations in *Certain Steel Wheels from China* and *Galvanized Steel Wire from China* in May 2012. It made final affirmative determinations in *Certain Steel Nails from the United Arab Emirates* and *Certain Stilbenic Optical Brightening Agents from China and Taiwan and Mexico* that month.

2. *Large Power Transformers from Korea*

Another significant investigation this year was *Large Power Transformers*.<sup>106</sup> Unlike the commodity products the Commission normally investigates, large power transformers are produced to customer specifications and purchased on a made-to-order basis using a bidding system. In finding that the domestic industry was materially injured, the Commission collected information from 315 bids which demonstrated significant underselling by subject imports.<sup>107</sup>

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103. Large Residential Washers from Mexico: Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination, 77 Fed. Reg. 46,401, 46,401 (Aug. 3, 2012); Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Large Residential Washers from the Republic of Korea, 77 Fed. Reg. 46,391, 46,391 (Aug. 3, 2011).

104. See *Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico*, Inv. Nos. 701-TA-477, 731-TA-1180-1181, USITC Pub. 4318 (May 2012) (Final) [hereinafter *Refrigerators*]; see also *Certain Steel Wheels from China*, Inv. Nos. 701-TA-478, 731-TA-1182, USITC Pub. 4319 (May 2012) (Final); see also *Certain Steel Nails from the United Arab Emirates*, Inv. No. 731-TA-1185, USITC Pub. 4321 (May 2012) (Final); see also *Certain Stilbenic Optical Brightening Agents from China and Taiwan*, Inv. No. 731-TA-1186-1187, USITC Pub. 4322 (May 2012) (Final); see also *Galvanized Steel Wire from China and Mexico*, Inv. Nos. 701-TA-479, 731-TA-1183-1184, USITC Pub. 4323 (May 2012) (Final).

105. *Refrigerators*, Inv. Nos. 701-TA-477, 731-TA-1180-1181, USITC Pub. 4318 at 37.

106. *Large Power Transformers from Korea*, Inv. No. 731-TA-1189, USITC Pub. 4346 (Aug. 2012) (Final).

107. *Id.* at 17, 20, 23.

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3. *Crystalline Silicon Photovoltaic Cells and Modules from China*

On November 7, 2012, the Commission issued an affirmative determination in the AD and CVD cases on c-Si PV cells and modules from China.<sup>108</sup> The Commission's determination was unanimous, with all six commissioners finding that the U.S. solar industry was materially injured by reason of subject imports from China.

The Commission made a negative determination on the subsidiary issue of critical circumstances, with two commissioners voting in favor of a critical circumstances finding and four against. Although subject imports increased significantly after the petition was filed, respondents argued that this resulted from the expiration of federal tax incentives at the end of 2011 and not from an effort to rush in product before the imposition of preliminary duties. As a result of the negative determination on critical circumstances, AD and CVD duties will not be applied retroactively to goods that entered the United States prior to March 26, 2012, for CVD duties and May 25, 2012, for AD duties.

D. COURT APPEALS – THE GPX CASE

The most significant trade remedies court appeal issue in 2012 concerned whether Commerce can legally apply both AD and CVD duties on imports from a non-market economy (NME) country, such as China. Appellate rulings in *GPX International Tire Corporation v. United States*<sup>109</sup> and the ensuing response from the legislative and executive branches dramatically changed the way CVDs and ADs are applied to NME country imports.

The *GPX* case began as importers of Chinese off-road tires appealed the imposition by Commerce of both AD and CVD duties on the same tire imports from China—so-called “double remedies” or “double counting” of subsidies. The “double remedies” theory was derived from inconsistencies in the AD statute for NME versus market economy countries, which provides an adjustment to reduce any ADs by “the amount of any countervailing duty imposed on the subject merchandise . . . to offset an export subsidy.”<sup>110</sup> The NME provisions provide no such adjustment. *GPX* further argued that Commerce's action was contrary to its own prior policy and statutory interpretation, which it applied until 2006, and which the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) upheld in *Georgetown Steel*.<sup>111</sup>

The *GPX* case is the first case for the courts to analyze Commerce's new policy and statutory interpretation.<sup>112</sup> The U.S. Court of International Trade (CIT) agreed with *GPX* and held that Commerce's new statutory interpretation was erroneous based on the

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108. *See id.*

109. *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011), *reb'g granted*, 678 F.3d 1308 (Fed. Cir. 2012).

110. 19 U.S.C. § 1677a(c)(1)(C) (2006).

111. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). Unlike the U.S. AD laws, U.S. CVD laws were not traditionally applied to NMEs due to a Commerce decision in 1984 that was affirmed by the Federal Circuit in *Georgetown Steel*. *Id.*

112. *See GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009) (remanding the decision to Commerce to address the double remedies); *GXP Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337 (Ct. Int'l Trade 2010) (ordering Commerce to not apply the CVD law because no adjustments were made for the double remedies in its remand determination).



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“double counting” theory.<sup>113</sup> The U.S. government and domestic industry appealed, and the Federal Circuit affirmed the CIT’s holding that U.S. CVD law does not permit Commerce to apply CVDs to NME country imports.<sup>114</sup> It further held that Commerce’s earlier policy and statutory interpretation (ratified in *Georgetown Steel*) prevails, absent a congressional amendment or U.S. Supreme Court ruling.

While a petition for rehearing was pending in the Federal Circuit, Congress passed, and the President signed new legislation to override the courts. The new law, enacted on March 13, 2012, permits Commerce to apply CVDs on NME products, effective as of November 20, 2006 (the date Commerce effectively changed its practice of imposing CVDs against NME imports),<sup>115</sup> and provides Commerce a statutory mechanism for addressing double counting in simultaneous AD and CVD investigations, effective as of the date the law was signed.<sup>116</sup> The Federal Circuit remanded the *GPX* case to the CIT to address the constitutionality of the new law.<sup>117</sup>

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113. *GPX Int’l Tire Corp.*, 645 F. Supp. 2d at 1242.

114. *GPX Int’l Tire Corp.*, 666 F.3d at 745.

115. See 19 U.S.C. § 1671(a).

116. See 19 U.S.C.A. § 1677f-1 (amended 2012).

117. *GPX Int’l Tire Corp. v. United States*, 78 F.3d 1308 (Fed. Cir. May 9, 2012) (granting the order for rehearing and remanding to the U.S. Court of International Trade).

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