

## Preview of International Issues for 2012

International Alert

**01.19.2012**

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## Introduction

*By Homer Moyer*



The year 2011 may more accurately foreshadow what will follow in the coming year than has been the case in previous years.

In the world of the Foreign Corrupt Practices Act ("FCPA"), the unprecedented number of cases that were litigated began a trend that, based on the number of cases already scheduled for trial in 2012, will continue. This will almost certainly lead to additional judicial decisions and the beginnings of an FCPA jurisprudence of court decisions rather than negotiated settlements. In the wake of decisions in both the U.S. and the UK, courts may also play an increasingly active role in reviewing Deferred Prosecution Agreements and settlements. Setbacks that enforcement agencies suffered in court in 2011 may temper, but not halt, the tendency toward increasingly aggressive enforcement.

More severe and varied FCPA penalties have undoubtedly intensified calls by the U.S. Chamber of Commerce and others for legislative changes which, in turn, have been met with firm opposition from the government and supporters of the law. Handicappers have to question whether proposed amendments will succeed in 2012, as the proposed changes would reduce the range of prohibited conduct and could raise the issue of consistency with international treaties for which the United States led the fight. FCPA guidelines from the Department of Justice ("DOJ"), promised for the spring, will undoubtedly be designed to blunt the call for legislative changes.

The incentives to build robust, tested compliance programs have never been higher. The Dodd-Frank Wall Street Reform and Consumer Protection Act's ("Dodd-Frank") whistleblower provisions will surely ramp up the number of allegations brought directly to the government. Enforcement agencies continue to say that they will reward companies with effective compliance programs through their charging decisions and in resolutions. And in 2011, we saw the agencies fulfill their promise to do so, most recently in resolving the Aon matter. These developments will prompt companies to continue to drive towards having effective FCPA compliance programs.

Election years tend not to be the occasion for major trade developments. However, the campaigns will undoubtedly increase public debates about the extent to which exports fuel economic growth and whether and how trade liberalization affects living standards and job creation. The President is currently proposing to reorganize multiple agencies involved with international trade into an expanded (and, without NOAA, contracted) Commerce Department ("Commerce"). It is not yet clear, however, whether this proposal will gain traction in an election year or how it might affect the importing and exporting communities. In the trade trenches, although there was a burst of activity to close 2011, administrative litigation to settle trade disputes remains out of favor, a trend that continues to defy the conventional wisdom that dumping and countervailing duty cases are counter-cyclical. For multilateral and plurilateral trade negotiations, 2012 may be less a year of accomplishments than a year of preparations for 2013 and years to follow.

The election year may also further excite an already substantial congressional appetite for mandating economic sanctions legislatively rather than authorizing the Executive Branch to apply and adjust them as circumstances demand. The so-called Comprehensive Iran Sanctions, Accountability and Divestment Act ("CISADA") amendments that authorize the imposition of sanctions against foreign companies and financial institutions are strong political messages popular with many members of Congress. They are also reminiscent, however, of sanctions mandated under the Iran Libya Sanctions Act ("ILSA"), Helms-Burton (Cuba), and the "pipeline" sanctions of the early 1980s (the Soviet Union) that amounted to secondary boycotts and that ultimately proved unenforceable, unacceptable to our allies, and contrary to international law. U.S. and foreign corporations may find

themselves in the crossfire.

In the coming year, China and Russia will continue to be a focus of interest and issues. China's status as a non-market economy, its currency policies, its random anti-corruption enforcement (focused more domestically than on its own state-owned companies operating abroad), and its trade policies will keep China in the spotlight. Russia, which remains a difficult business environment, is now a new WTO initiate and is on track for acceding to the OECD's anti-corruption convention and, ultimately, OECD membership. Changes throughout the Arab world, though modest compared to the changes that followed the fall of the Berlin Wall, will produce new governments and some new market dynamics.

A preview of 2012 thus points to some predictable issues, some new opportunities, and continuing changes in the regulatory and enforcement picture for international business.

## **FCPA Enforcement Compliance**

### **The Big Broom of FCPA Industry Sweeps**

*By Homer Moyer*



Inaugurated by the series of so-called "Panalpina cases," which focused on companies doing business with the giant Swiss freight forwarding company, FCPA enforcement has seen additional industry-wide government investigations that have come to be known as "industry sweeps." Focusing on particular industries -- pharmaceuticals and medical devices come to mind -- industry sweeps are investigations that grow out of perceived FCPA violations by one company that enforcement agencies believe may reflect an industry-wide pattern of wrongdoing.

Industry sweeps are often led by the Securities and Exchange Commission ("SEC"), which has broad subpoena power as a regulatory agency, arguably broader oversight authority than prosecutors. They are different from internal investigations or traditional government investigations, and present different challenges to companies. Because the catalyst may be wrongdoing in a single company, agencies may have no evidence or suspicion of specific violations in the companies subject to an industry sweep. A sweep may thus begin with *possible cause*, not probable cause. In sweeps, agencies broadly solicit information from companies about their past FCPA issues or present practices. And they may explicitly encourage companies to volunteer incriminating information about competitors. This practice not only fuels the "salesman's defense" (that "everybody does it"), but can also generate anecdotal or speculative information that simply leads to additional rounds of inquiries.

Inevitably, industry sweeps become organic and evolve, with government investigators using information from one company as the basis for additional requests to others. Pooling information about unreliable third parties, suspect government instrumentalities, and information about employees who have worked for multiple companies can prolong an investigation or cause its scope to expand or turn in new directions.

The coming year could well force some of the issues of industry sweeps to the surface. What threshold of evidence is appropriate to target a particular company in an industry sweep? What prevents sweeps from becoming fishing expeditions that are costly to the companies and unconstrained in the agencies? What are the disclosure considerations for a company in a sweep investigation focused on Asia if issues arise in Latin America? Can a company decline to participate or cooperate, and, if so, what are the risks or trade-offs for doing so? Answers to questions such as these -- which often raise policy issues, not legal ones -- could affect corporate attitudes about disclosure generally, and possibly result in challenges to the agencies.

### **New Year, New Legislation?**

*By John Davis*



Will 2012 see new amendments to the FCPA? Various stakeholders have long-wrestled with the balance between enforcement priorities and perceived disadvantages created by the FCPA to U.S. businesses as against other competitors less constrained by legal restrictions against foreign bribery. Also, guidance on the boundaries of what behavior could cause an FCPA violation has been affected by the lack of court precedent (most actions are settled) and by the DOJ's own approach, which declined a Congressional request in the 1988 amendments for regulations in favor of an opinion review process that is not often used.

The current effort to modify the Act is being led by the U.S. Chamber Institute for Legal Reform, which released a white paper in October 2010 proposing several amendments to the FCPA. The change receiving the most attention was a proposed defense by which companies could rebut criminal liability that might occur if "rogue" individuals violated the FCPA despite the company's robust compliance program (citing as a model the compliance safe harbor under the new UK Bribery Act). Other proposals included: restricting successor liability so that acquiring companies would not be liable for criminal or other actions taken by their new subsidiaries before the acquisition occurred; clarifying the scope of the term "foreign official"; improving procedures for guidance and advisory opinions from the DOJ; adding a "willfulness" requirement for corporate criminal liability; and limiting a parent company's liability for acts of a subsidiary not known to the parent.

As discussed in several of our FCPA Reviews, several witnesses, including former U.S. Attorney General Michael Mukasey, have advocated for these and other changes during several Congressional hearings in late 2010 and 2011. At both hearings and in other public statements, the DOJ has taken the position that none of the proposed amendments are needed, and that at least some of them had the potential to "water down" the statute and inhibit enforcement. However, key lawmakers from both parties appear to have been unswayed by the DOJ's concerns, and continued to suggest that draft legislation amending and clarifying the FCPA is needed.

In November 2011, the DOJ acknowledged the debate over whether reforms are needed and stated that in 2012 it will issue new detailed guidance on its enforcement positions under the Act, as we noted recently in our [FCPA Winter Review 2012](#). Whether this guidance will forestall reform proposals from moving forward, however, is unclear. For example, Senators Amy Klobuchar (D-MN) and Chris Coons (D-DE) confirmed in late November 2011 that they still planned to introduce amendments to give U.S. companies a "better roadmap" to compliance with the FCPA.

Some of these issues are under active consideration by the courts. For example, several federal district courts have recently weighed in on the factors for defining an "instrumentality" and thus a "foreign official." More rulings will follow this year, which will doubtless provide ammunition for both sides of any reform debate. Also, while it is unclear whether members of Congress will wait as long as the predicted six- to twelve-month timeframe expected for the DOJ to issue its promised guidance, the content and timing of that effort likely will affect any draft legislation.

Any reform bill will almost certainly attract substantial opposition, both from the agencies and from other interested parties (some civil society organizations have already mobilized against the Chamber's proposals). Such a bill would also need to be consistent with various U.S. treaty obligations, such as those under the OECD, OAS and UN anti-corruption conventions.

Of course, this being an election year, all of this ultimately may be deferred to 2013 amid other priorities. Unless the proposed reforms can be characterized as creating a significant number of U.S. jobs, there will likely be an updated version of this piece in next year's Preview.

## **Meeting Dodd-Frank's Compliance Challenge**

*By James Tillen*



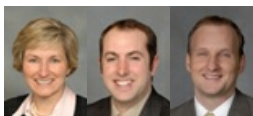
When Dodd-Frank was signed into law on July 21, 2010, corporate America held its breath waiting to see if employees would beat a path to the SEC's door to report potential securities violations in an attempt to reap significant rewards under the Act's whistleblower provisions. In November 2011, the SEC issued its first [Annual Report](#) on the Dodd-Frank Whistleblower Program, which provided insight into the amount of reporting to the SEC. In the seven weeks from August 12, 2011 -- the date the SEC adopted final rules for the Whistleblower Program -- until the end of the Commission's 2011 fiscal year on September 30, 2011, the SEC received 334 whistleblower tips, roughly 48 per week. The complaints related to various potential securities violations, including market manipulation (16.2%), corporate disclosure (15.3%), offering fraud (15.6%), insider trading (7.5%), unregistered offerings (5.4%), trading and pricing (5.1%), and FCPA (4%).

The statistics confirm that corporate whistleblowers are reporting to the SEC and the numbers will likely increase as awareness of the Program spreads, in particular, after individuals begin to collect awards. In light of this reality, companies can take a number of steps to mitigate the opportunities for, and the effects of, whistleblowers.

- First, preventing the lapses that provide fodder for whistleblowers is the most effective measure. An effective compliance program -- including policies and procedures tailored to a company's risk profile and innovative training -- can prevent violations from occurring. Moreover, an effective compliance program can position a company to avoid prosecution or obtain a reduction in penalties in the event a violation is reported to the SEC.
- Second, enhancing the detection mechanisms of the company (such as auditing, compliance program assessments, and third-party testing) can assist companies in uncovering violations, and risks that could lead to violations, before they become systemic or come to the attention of a potential whistleblower.
- Third, companies can incentivize employees to "keep it in the family" and first report issues internally before, or in lieu of, reporting to the SEC. The current SEC rules allow (but don't require) whistleblowers to first report issues to their employers and maintain their whistleblower status with the SEC, as long as the whistleblower reports the potential violations to the SEC within 120 days after reporting it to the company (currently, there is a bill pending to require reporting to employers first). Incentivizing employees to report internally can involve promoting the companies' reporting mechanisms (such as help lines, compliance department personnel, ombudsmen) and protections for employees reporting issues, including anonymous reporting and non-retaliation policies. In addition, companies can train managers in how to respond appropriately to employee concerns.
- Finally, companies can develop procedures to ensure the prompt review of issues reported internally. Investigative procedures that require companies to review issues within a target deadline will allow companies to make an informed decision regarding disclosure to the SEC within the 120 day window in which a whistleblower could report to the SEC. Moreover, written procedures can also ensure a consistent approach from investigation to investigation, implementation of remediation, communication of findings and remediation to key personnel (i.e., audit committee, legal, HR), and preservation of the attorney-client privilege. Investigative procedures can also ensure that investigative and remedial steps are fully-documented. The ability to document the thoroughness of an investigation and implementation of remediation increases the chances that the SEC will rely on the results of a company's investigation rather than conducting its own intrusive review of potential violations.

## **FCPA Enforcement and Cases to Watch**

*By Kathryn Atkinson, James Tillen, and Marc Bohn\**



As reported in our recent [FCPA Winter Review 2012](#), the U.S. government's enforcement of the FCPA in terms of settled actions was off the record pace set in 2010. One possible reason for the decline is the increase in the number of FCPA-related trials, which may be diverting DOJ resources from settling ongoing enforcement actions. A total of four trials involving 15 defendants charged with FCPA-related

violations commenced in 2011. With 19 individuals scheduled to go to trial this year and dozens of others involved in some stage of pre-trial, trial or post-trial proceeding, 2012 could be a record year for FCPA enforcement against individuals. Here are a few of the cases we will be tracking in 2012:

- **SHOT Show Trials:** With 18 of the 22 original SHOT Show defendants currently being tried or awaiting trial, the SHOT Show prosecution remains the most extensive and intensely litigated matter in the FCPA's history. The defendants have been split into four groups. The first set of defendants, whose trial ended in a [mistrial](#) in July 2011 after the jury could not agree on a verdict, is scheduled to be re-tried in May 2012. Five individuals from the second set of SHOT Show defendants are still in trial, with closing arguments under way in January 2012. In the course of this proceeding, the judge has dismissed the conspiracy charges against the defendants (substantive FCPA charges remain) but rejected the defendants' request for a mistrial. Trials against the third and fourth sets of SHOT Show defendants are currently scheduled to begin in February and May 2012, respectively.
- **Former Siemens Executives:** On December 13, 2011, the DOJ [charged](#) eight former employees and contractors of Siemens AG and its Argentinean subsidiary for their roles in an alleged scheme to bribe Argentinean government officials in an effort to secure, implement, and later recoup the profits from a \$1 billion contract for Siemens AG in Argentina. On the same day, the SEC filed its own complaint against six of these former executives. All of the defendants are non-U.S. citizens who currently live abroad and may require extradition, which could complicate their prosecution and present the courts with questions about the extraterritorial reach of U.S. law.

Despite the [setbacks](#) in the *Lindsey* and SHOT Show matters, to which must be added the January 16, 2012 dismissal of FCPA charges against John J. O'Shea, we do not expect the DOJ's and SEC's enthusiasm in pursuing FCPA-related enforcement actions to dampen in 2012. We do, however, anticipate additional and perhaps more critical review of enforcement decisions and increased oversight of trials by each agency's supervising attorneys, as part of an effort to ensure that the right cases are pursued and are pursued more effectively. The additional review may continue to slow the pipeline flow of enforcement actions, but perhaps with more refined decision-making as the tradeoff. We expect as part of that refinement that the agencies will continue to impose monitorships and self-reporting obligations, but with a wider array of configurations and timelines better tailored to the individual situations presented.

We are also optimistic that the events of 2011 may lead to a healthier level of engagement on substantive issues in the context of settlement-heavy FCPA enforcement. In recent years, not only have most matters been settled, but some have settled with little debate over (or public discussion of) the application of the statutory elements to the facts. In an adversarial system, however, these debates are essential. Each side must be prepared to challenge the other's view of the facts, and their relevance under the law, and to have its own view challenged as well. When this system breaks down, the substantive dialogue is lost. It is likely the shortage of this substantive dialogue, more than actual ambiguity in the statute itself, that has given rise to recent discussions at conferences, in the media and online, and in Congress expressing frustrations about a lack of clarity in FCPA enforcement. A vigorous exploration of substantive issues in the context of our adversarial system should provide some relief from these frustrations and lead us to more effective and efficient prevention and deterrence.

## Export Controls & Sanctions

### Proposed Brokering Rules under ITAR

*By David Hardin\**



On December 19, 2011, the U.S. State Department, Directorate of Defense Trade Controls ("DDTC") issued a long-awaited proposed rule ("Proposed Rule") addressing the brokering provisions of the International Traffic in Arms Regulations (the "ITAR"). The Proposed Rule reflects significant changes from the ITAR's existing brokering provisions and will surely be a noteworthy and controversial topic in the coming year as DDTC proceeds to implement all or some of the changes. Those changes include:

- **Clarification of "Brokering Activities":** The Proposed Rule narrows the scope of "brokering activities" subject to the ITAR by excluding activities "that do not extend beyond administration services, such as providing or arranging office space and equipment, hospitality, advertising, or clerical, visa, or translation services, or activities by an attorney that do not extend beyond providing legal advice to a broker." This change is a welcome one given the ability of the current definition to capture broadly almost any activity, no matter how minor or ministerial, including those explicitly excluded under the new definition.
- **Confirmation of Extraterritorial Jurisdiction:** The Proposed Rule confirms DDTC's position on the ITAR brokering provisions' extraterritorial reach by explicitly extending them to foreign persons located abroad in two ways, even though such persons may not be dealing in items with any U.S.-origin content: when such persons import defense articles or services into the United States and when such persons act "on behalf of a U.S. person." Given past attempts by DDTC to expand its jurisdictional reach, this change will undoubtedly be controversial, having the ability to capture foreign affiliates of U.S. companies otherwise falling outside the scope of the ITAR's brokering provisions.
- **Exemptions from the Brokering Registration Requirement:** The Proposed Rule exempts foreign persons from the brokering registration requirement in two instances: when such persons are identified as "exclusive brokers" on a U.S. person's DDTC Statement of Registration (DS-2032) and the brokering activities involve: 1) defense articles or services subject to an approval obtained by the U.S. person, or 2) defense articles or services obtained from a U.S. manufacturer or source for export outside the United States under an approval. These exemptions would alleviate many foreign affiliates of U.S. companies from separately registering as brokers under the ITAR and paying the broker registration fee.
- **Streamlined Brokering Registration Process:** The Proposed Rule exempts U.S. persons registered as manufacturers/exporters under Part 122 of the ITAR from registering separately as brokers, as required under current ITAR brokering provisions. In addition, the Proposed Rule explicitly exempts the U.S. person's subsidiaries, joint ventures, and other affiliates identified in the Statement of Registration, and their "bona fide and full-time regular" employees, from separately registering as brokers, which is arguably required for those entities under current ITAR brokering provisions.

Comments on the Proposed Rule are due by February 17, 2012. We encourage interested parties to comment given the significance of these issues.

## Iran Sanctions and Embargo

*By Larry Christensen\* and Welles Orr\*\*\**



Iran will be the major target of enhanced sanctions in 2012, just as it was in 2011. The United States and its allies in Europe continue to believe Iran is developing nuclear weapons, a belief recently supported by a United Nations study. As noted in recent news accounts, the tensions between the United States and Iran have spiked yet again as both parties have rattled swords over access to the Strait of Hormuz.

**EU Agrees to Stop Crude Oil Imports from Iran.** On January 3, 2012 media reports indicated the European Union ("EU") agreed in principle to embargo Iranian crude and refrain from importing it into the EU. In recent history, the EU has been the second largest importer of Iranian crude, behind only China, according to some sources. Greece, Italy, and Spain are heavily dependent on Iranian crude and may push for a grace period for implementation and to allow shipments of crude oil to repay Iranian debts.

Iran has responded that it can find new buyers for its crude. The fungible nature of crude oil suggests this is true, especially because other major buyers have not committed to join the embargo. In 2012, businesses should follow closely the scope, implementation and effectiveness of the EU crude oil embargo.



**New U.S. Sanctions Already in Place for 2012.** On December 31, 2011, President Obama signed into law the fiscal year 2012 defense authorization bill, which contains new sanctions provisions targeting Iran. First, and most importantly, it provides that the President "shall" prohibit correspondent accounts in the U.S. with foreign financial institutions the President determines have conducted significant financial transactions with the "Central Bank of Iran or other Iranian financial institutions" related to the sale or purchase of Iranian petroleum or petroleum products. Second, the law reiterates that the President may impose sanctions on the Central Bank of Iran under the International Emergency Economic Powers Act ("IEEPA").

During 2012, the Administration will be forced to make decisions regarding the implementation of sanctions designed to prevent Iranian crude from entering the world supply chain and to pressure the government in Tehran by denying it a critical source of revenue. The statute allows the President to issue a security waiver. It also seems to permit the Executive Branch to consider world oil supplies and to permit time for buyers of Iranian crude to adjust. Critics suggest such a step will in fact reduce the effectiveness of the sanctions.

**Prospects for Other U.S. Sanctions.** Members of Congress continue to propose new means to sanction Iran.

Some would argue existing sanctions are working. The President has highlighted his active use of the amendments to the Iran Sanctions Act known as CISADA to force non-U.S. companies to pull out of the petroleum business in Iran. The tough sanctions include denial of access by a third country company to the United States banking and U.S. dollar payment system. This is a potential sanction against non-U.S. corporations, for non-U.S. conduct that is lawful under the host country's laws. There are some rumblings that certain members of Congress would like to extend CISADA to other industry sectors in third countries that continue to deal with Iran. The extraterritorial reach of this prescriptive law is extraordinary, but no industry has challenged its reach in court. The U.S. Government claims that the sanctions are an exercise of territorial jurisdiction within the United States.

The New Year will tell whether Congress will continue its quest for more and enhanced sanctions, perhaps to the point of weakening the existing coalition lined up against Iran. In all likelihood, we can expect a continuation of tough sanctions on Iran, with U.S. corporations and non-U.S. corporations caught in the middle for a long time to come.

## **USML Revisions and Industry Participation**

*By Larry Christensen\**



2012 presents a magnificent opportunity for exporters to shape the rules they live by. In short, the government is re-writing the United States Munitions List ("USML"). Affected concerns will want to monitor developments, assess potential impact, and ensure advocacy for their interests.

In 2012, we will see whether the "crown jewels" of export control reform will come to fruition or flounder. Rewriting the USML to create a more "positive" list is the critical goal of reform. A rewritten USML that describes controlled items by functionality and performance criteria, rather than controls shaped by subjective design intent for military application, is essential to improve the national security of the United States. It is also important to all affected companies. Several parts and component manufacturers see this effort to draft a positive USML as a once in a generation opportunity both to improve the national security of the United States and to make USML easier to administer. Starting with former Secretary of Defense Gates, the Administration has committed to a substantial reduction in the ITAR controls over parts and components.

**The Importance of USML Reform and Status.** Many challenges exist in the area of export controls and trade sanctions, but commodity jurisdiction exceeds all others. The admirable goal of the Departments of Defense, State, and Commerce is to draw a bright line between the USML and the Commerce Control List ("CCL"). To this end, agency personnel led by the Department of Defense ("DOD") are conducting a wholesale redrafting of each category of the USML. Some of the draft results of the rewrite of the USML have been published, and State and Commerce will publish their proposed changes to the remaining categories of the USML in 2012. The Administration has published five categories, is about to publish three more, and will draft revisions to twelve categories between now and mid-summer. As the government completes its list revisions in 2012, it is important for industry to



review and comment on those proposed categories.

The Administration has not yet settled on a definition for "specially designed." It is the most important definition in the USML drafting exercise. In early 2012, we expect the Administration to finish its review of comments on the topic and to publish another proposed definition of "specially designed." Watch for this development and comment.

**The Role of the Congress.** The private sector should remember Congress's oversight role. Under §38 of the Arms Export Control Act, State may not remove an item from the USML without first giving 30-days notice to the Senate and House oversight committees. It is up to industry to play its role to indicate to Congress the importance of rewriting the control lists. Without such support, the important work of DOD in rewriting the control lists could be lost.

**Industry Comments.** In 2012, as companies review and evaluate the Administration's proposed revisions to the USML and CCL, they should submit comments to the agencies and make their views known to Congress. For both the Administration and the Congress, if you like something, say something. 2012 may be the last time in a generation to achieve the major benefit of export control reform, making the control lists positive and clear.

## Customs

### Lacey Act Amendments Revision

*By Daniel Wendt*



In 2012, Congress will likely review and may revise the Lacey Act Amendments ("Amendments") that apply to imports of wood and various wood products. Supported by various stakeholders, including the domestic forest industry, Congress amended the Lacey Act in 2008 to expand the Act's prohibitions against importing and selling covered plant products to include wood and products made from wood. A new import declaration requirement was added as well, although APHIS and U.S. Customs and Border Protection ("CBP") have limited the scope of the declaration's applicability by implementing it only for particular classes of goods (such as timber and furniture).

Two factors may drive revisions to the Amendments in 2012. First, the current Administration should soon publish a now-overdue report to Congress regarding implementation. The report may generate support for revisions to the Amendments to ease any inefficient or unnecessary administrative burdens.

The second and stronger force that may lead to revisions is the fallout from the U.S. Government's raids against Gibson Guitars. Specifically, in 2009, and again last year, the Government raided Gibson's facilities in Tennessee, confiscating guitars and pallets of wood. These raids have been particularly surprising, given that Gibson's CEO previously served on the Board of Directors of the Rainforest Alliance until the first raid in 2009. The first raid focused on products containing rosewood from Madagascar, which was alleged to have been harvested illegally, but the second raid focused on rosewood and ebony from India that was exported contrary to a ban in India (but not harvested illegally, according to Gibson). Gibson has defended itself vigorously against these actions. Many commentators have cited these raids as another example of "over criminalization" at the federal level, arguing that the trend needs to be reversed. Legislators from Tennessee have already introduced federal legislation to carve back the Lacey Act Amendment. In response, however, industry and environmental groups have defended the effectiveness of the Amendments, setting the stage for a vigorous debate in 2012. Although it is possible that Congress may significantly reshape the law, the most likely outcome is that the 2008 amendments will remain in place, with Congress simply refining the exact contours of the legal and regulatory requirements.

### CBP Proposes Importer Transaction Valuation Change

*By Richard Abbey\* and Saskia Zandieh\**



CBP is considering a policy change that would make it easier for importers to report a post importation value adjustment if such adjustment is based on a formal transfer pricing policy or Advance Pricing Agreements ("APAs"). In a notice published in the December 28, 2011 Customs Bulletin, CBP proposes to revoke a prior valuation ruling and issue a new ruling on post-importation value adjustments, and invites the public to submit written comments on the proposal before January 27, 2012.

Currently, CBP requires an importer to report post-importation value adjustments that increase the dutiable value of imported goods, but it does not permit such adjustments that decrease the value of such goods, even if the adjustment is based on a formal transfer pricing policy or an APA. However, CBP's proposed policy change would allow an importer to use a formal transfer pricing policy or an APA in calculating transaction value for purposes of requesting either an upward or downward post importation adjustment, so long as (1) the transfer pricing policy or APA was set before importation; (2) the importer is the U.S. taxpayer, and it uses its transfer pricing methodology in filing its corporate income tax returns; (3) the company's transfer pricing policy specifically covers the products for which the value is to be adjusted; (4) the policy specifies what adjustments must be made to the transfer price, and the company provides detailed explanations and calculations of the adjustments incurred and claimed in the U.S.; (5) there is an absence of other conditions which may indicate that the compensating adjustments do not result in an arm's length price between the parties; and (6) the adjustment is reported to CBP through its Reconciliation program.

This proposal is "sea change" in CBP valuation policy and to a large extent reflects the growth of related-party trade, which accounted for over 48% of imports in 2010. The proposal, if adopted, could benefit importers by eliminating the need to file a prior disclosure in order to report a post entry adjustment resulting in an increase in value, and by permitting importers to receive a refund of duties when there is a downward adjustment in the transfer price.

However, companies will have to weigh these benefits against the costs and associated risks. As noted in the proposal, whether an APA or transfer pricing policy meets CBP's requirements will vary from case-to-case, which means that an importer that wants to take advantage of the benefits should, in the exercise of reasonable care, consider obtaining its own ruling. In obtaining a ruling, an importer will not only have to furnish CBP with a significant amount of data, calculations, explanations, and justifications relating to the transfer pricing adjustments, it will also have to establish to CBP's satisfaction that the related-party prices were not influenced by the relationship which, based on prior CBP rulings, is not always an easy thing to do.

## Trade Policy

### Advancing the Trans-Pacific Partnership Negotiations

*By Welles Orr*



If history is any guide, major trade liberalizing legislative initiatives rarely move along in Congress in presidential election years. Thus, we do not expect 2012 to yield the same level of trade liberalization success reached in 2011 with, for example, passage of the free trade agreement ("FTA") implementing bills with South Korea, Colombia and Panama or resolution to the NAFTA dispute with Mexico on cross-border trucking. However, the Administration will continue to focus on advancing the Trans Pacific Partnership ("TPP") negotiations.

Prospects are good that when the nine countries in the current TPP negotiations -- Australia, Brunei Darussalem, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam and the U.S. -- meet in Australia for the 11th round of talks in March, that a final deal could possibly be concluded in 2012. These countries make up the United States' fourth largest trading bloc, with two-way goods trade of almost \$170 billion. While the White House has made clear it will not set any false deadlines for reaching a final deal, TPP is and will be the only game in town in terms of this Administration's free trade initiatives this year. The TPP also enjoys fairly deep bipartisan support in Congress, which has enjoyed a substantive level of consultation from the U.S. Trade Representative ("USTR") negotiating team like no other agreement before it.

One challenge that will be front and center this year in the TPP will be the handling of consultations with Japan, Canada and Mexico, and the possibility of those countries joining the negotiations. Congressional trade leaders have signaled that Japan and Canada will need to put all outstanding bilateral market access issues on the table to understand whether the potential new TPP entrants could meet the high standards already committed to by the current countries. USTR will undertake serious consultations over the next several months with those three countries, to gauge their respective level of commitments on market access on autos, pharmaceuticals, services and agriculture, namely beef in the case of Japan and with Canada on IPR, services and agricultural market access, especially dairy. However this process unfolds, U.S. negotiators have said that any new entrants will have to adhere to the terms of the TPP already negotiated at this point. This may already be the non-starter for Japan, but USTR wants to make sure that the pace of negotiations stays on track and the talks with new entrants on accession terms doesn't derail any progress made thus far.

Another challenge for U.S. negotiators is that House and Senate Republican trade leaders have signaled that Congressional support and approval for any final TPP deal would be jeopardized if the labor provisions went beyond the scope of the labor chapter contained in the South Korean, Colombia, Peru and Panama FTA's. Lawmakers have signaled that going beyond current FTA provisions would potentially expose the U.S to unnecessary and unwarranted litigation and trade sanctions by foreign government critics and by the International Labor Organization. Watch for developments on how the Administration handles demands by organized labor for stronger labor rights language in the negotiations.

One other important aspect to the movement of TPP will have to involve Executive-Legislative branch discussions on the extension of fast-track negotiating authority. The Administration this year will have to unveil its intentions with respect to privileged consideration by Congress of any final TPP deal and presumably for that of any other major free trade initiative contemplated over the next several years.

## **New WTO Member Russia to Achieve Permanent MFN Trade Status?**

*By Welles Orr*



Russia's long slog of accession negotiations with the United States and other members of the World Trade Organization ("WTO") came to a successful conclusion last month when Russia was approved as its newest member. While this has been a priority over many years and several Administrations, the hard part and the final act -- getting Congress to approve the granting of most-favored nation ("MFN") status for Russia -- is only just beginning. For U.S. companies to take advantage of the favorable access terms afforded by Russia's new WTO accession commitments, Congress must repeal the 1974 Jackson-Vanik amendment, which conditioned trade access to non-market economy former communist countries based on whether they granted free emigration to Jewish citizens. Russia was always granted the required annual waiver, but the unconditional MFN treatment required by WTO membership requires the U.S. to remove the application of this special condition. Otherwise Russia will be able to deny American exporters preferential market access.

The Administration and business community have begun a hard court press on Congress to act to repeal Jackson-Vanik. However, election year politics suggests the road to a Congressional vote is decidedly uphill this year. Republicans in Congress likely are unwilling to hand President Obama any legislative trade or foreign policy victory before next November. Moreover, Russia has very few champions in the Congress and is saddled with concerns about arms control brinksmanship, human rights abuses, and rule of law issues, not to mention past poultry and other agricultural market access restrictions on U.S. exporters. The educational lobbying on why Russia's WTO commitments merit the granting of permanent MFN will require a heavy lift on the part of the White House and business community over the next several months. In the meantime, the Russian Duma begins the process of passing legislation in order for it to formally accede to the WTO, expected sometime in May.

## **Continuing U.S.-China Trade Frictions**

*By Welles Orr*



2012, like 2011, will see the Administration heavily engaged in pressing China for further market access liberalization, and USTR will continue to undertake its strong enforcement efforts. With no shortage of attention to the ongoing trade disputes from 2011, namely over intellectual property rights ("IPR"), market access for autos, steel and financial services, imposition of sanitary and phytosanitary ("SPS") requirements on certain agricultural imports and continued subsidies for solar panels, wind energy equipment and tires, the U.S.-China trade agenda continues to swell in size and importance. However, the overwhelming consensus among government China policy hands and industry stakeholders is that trade frictions will worsen before they make a move for the better.

At the end of 2011, for example, China petitioned Commerce to drop its countervailing duty ("CVD") investigation of solar panel imports from China following a December 2011 appellate ruling that the Department lacks the authority to apply CVDs on domestic subsidies in non-market economies (See our section on Trade Remedies for more details). While Commerce is expected to appeal this decision, the Administration may be forced to seek a legislative fix, as suggested in the court ruling. However, the legislative route to addressing this issue presents a challenge, as legislation passed in the Senate in 2011 to address the long-running *renminbi* exchange rate issue proposed to use the very CVD and antidumping ("AD") remedies the appellate ruling says Commerce doesn't have the authority to impose.

All of this suggests that the U.S.-China trade policy agenda facing both the White House and Congress will only become more and more complicated. We expect that Representative Sander Levin (D-MI) will again push the Currency Reform for Fair Trade Act introduced last year, which has 230 co-sponsors. However this bill and the Senate counterpart bill approved in October will likely not see action due to opposition from the Republican leadership. Nonetheless, against the backdrop of a weak economy in an election year, members of Congress will showcase this legislation as a much needed jobs bill and pressure will mount to move a bill that has such strong support. We expect the White House will only ramp up its "get tough" rhetoric to rein in China "to play by the rules." In reality, though, this saber rattling will play out through the normal diplomatic channels, high level engagement and dialogue through the Strategic Economic Dialogue and the Joint Commission on Commerce and Trade, and of course speeches on the presidential campaign trail.

## **Doha Round Still Alive, But on Life Support**

*By Welles Orr*



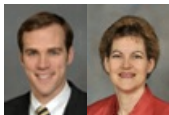
Last month's 8th WTO Ministerial Conference in Geneva yielded no real clues about the future of the stalled Doha Round. The general consensus is that there is still enough interest and hope on the part of most WTO members to salvage something out of the ten years of negotiations. What that is remains the great unknown, but member countries are resigned to the idea that business as usual is unacceptable.

Director General Pascal Lamy, who announced his decision to retire at the end of his term in 2013, has committed to pulling together major stakeholders to explore what elements of Doha could be ripe for agreement and report back at the end of this year. While there is no expected deliverable this year, the political climate has improved since the last ministerial in 2009, which suggests that members will be more open to creative ways to move elements of Doha forward. The Administration appears to agree with that thinking, and we expect USTR will advance a proposal to launch a plurilateral negotiation on a high-standard services agreement, which has the support of the EU, Japan, Australia and New Zealand. The White House also likely will give support to another idea strongly backed by the U.S. services industry: to advance and expand the WTO's Information Technology Agreement, which requires signatory countries to remove import tariffs on a wide range of over 180 products, from semiconductors to telecommunications equipment.

## **Trade Remedies**

### **AD/CVD Regime at a Crossroads**

*By Daniel Wendt and Claire Palmer\*\**



The relative lack of AD and CVD cases filed in 2010 and early 2011 suggested that the AD/CVD statute was becoming a marginal law used by only a few industries. However, a recent surge in activity suggests that there may be a steady -- albeit modest -- stream of AD/CVD petitions in 2012.

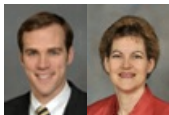
Although numerous practitioners expected new investigations to grow as the global financial crisis adversely affected U.S. manufacturers in 2008-2010, in general poorer financial results of U.S. producers were matched by decreased imports, which made it more difficult to prove injury due to an increase of dumped or subsidized imports. The nadir of AD/CVD investigations seems to have been 2010 and early 2011. Some data suggests that U.S. imports may be bouncing back more quickly than U.S. producers' financial results, which could allow U.S. industries to state more clearly that their continued injury is due to unfairly-traded imports and not just a poorly-performing U.S. economy. That trend could explain why 19 new cases alone were filed in the fourth quarter of 2011, including nine in the final three days of December. Each industry filing AD/CVD petitions has its own particular circumstances, of course.

We see two items of particular interest that may affect trends in the coming year. First, the vast majority of CVD investigations on a product basis in the last five years have involved non-market economies ("NMEs"). The Court of Appeals for the Federal Circuit's ("Federal Circuit") decision in *GPX Int'l Tire Corp. v. United States*, Nos. 2011-1107 to -09 (Fed. Cir. filed Dec. 19, 2011) ("[GPX Intl. Tire](#)"), described separately in this Preview, may preclude the imposition of CVD on imports from NMEs such as China and Vietnam, barring any Congressional actions. While the legal maneuvering continues, we expect Commerce to continue to investigate CVD allegations against NMEs, unless and until the courts prevent them, and CVD petitions were filed against imports from NMEs in late December after the *GPX Int'l. Tire* decision was issued. However, this information suggests that if the courts do preclude Commerce from imposing countervailing duties against imports from NMEs, use of the CVD law may lapse. Similarly, it is possible that the number of AD cases for NMEs may likewise decline, if domestic industries are not able to file for AD and CV duty relief simultaneously.

On the other hand, two cases filed late in 2011 suggest that AD/CVD cases may continue by spreading to a new industry -- the green energy sector. The cases involve crystalline silicon photovoltaic cells and modules, used in the solar panel industry, and wind towers for turbines with a generating capacity of more than 100kW. These cases may put the current Administration in a bind, requiring a choice between protecting American manufacturing and encouraging energy independence, although clearly the current push for protecting jobs will take priority.

## Federal Circuit Rules Against CVDs on Imports from NMEs

By Daniel Wendt and Claire Palmer



In the most important decision of the year involving the AD and CVD laws, the Federal Circuit determined that the CVD law, as currently written, does not apply to NME countries, such as China and Vietnam. See *GPX Int'l Tire*. Since 2007, when Commerce first held that CVD laws applied to NME countries, most of the new U.S. CVD cases have targeted China, and there are now 23 CVD orders against Chinese products. The U.S.

Government will almost certainly petition for *en banc* review by the Federal Circuit, and most likely would seek writ of *certiorari* to appeal the decision to the U.S. Supreme Court if necessary, given its importance to the current Title VII regime. If so, a final decision on this issue will be delayed for several more years, during which time we expect Commerce, if permitted by the courts, to continue to investigate CVD allegations against NMEs.

Commerce first determined that the CVD law did not apply to NMEs in 1984. This decision was litigated and, in 1986, the CAFC agreed with Commerce in *Georgetown Steel Corp. v. United States*, 801 F.2d 1309 ("*Georgetown Steel*"). In 2007, Commerce issued a memorandum repudiating its reasoning in *Georgetown Steel*, stating that China's economy was substantially changed from the former Soviet managed economies that formed the basis for Commerce's prior decision, and that the differences enabled Commerce to calculate whether the Chinese Government subsidized specific goods. The first CVD order on a Chinese product involved certain pneumatic off-the-road tires; one of the Chinese companies investigated was Hebei Starbright Tire Co. (owned by GPX International Tire Corp. ("GPX")).

In litigation involving the GPX CVD order, the Court of International Trade ("CIT") decided that Commerce's determination was "unreasonable" because of the high likelihood of "double counting" when both AD and CV duties were assessed on the same product. This left the possibility open that Commerce could find a calculation methodology that did not double count.

The Federal Circuit affirmed the CIT, but for a different reason that closes the CIT's possible exception. The Federal Circuit observed that the *Georgetown Steel* case was in 1986 and that, while the AD/CVD statutes had been amended by Congress since then (in 1988 and 1994), those amendments did not overturn the 1986 decision. The Federal Circuit determined that this inaction by Congress effectively ratified the *Georgetown Steel* reasoning and quoted *Lorillard v. Pons*, 434 U.S. 575, 580 (1978): "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." According to the Federal Circuit, the proper action for Commerce therefore is to seek legislative change. Legislation to that effect will undoubtedly be introduced in Congress this year. Given election year politics and the political sensitivities, both domestically and internationally, between the United States and China, it remains to be seen whether a proposed bill will become law, particularly if the case goes before the Supreme Court. In the meantime, importers of goods subject to CVD orders for goods from NME countries such as China and Vietnam should be prepared to protest the liquidation of any entries (although most CVD orders and administrative reviews will likely be tied up in similar litigation, preventing any liquidation instructions).

## International Department News

### New Faces

We continued to welcome new colleagues in 2011. In October, Dave Resnicoff joined the International and Litigation practices as a Member. Most recently, Dave served as Associate General Counsel and Vice President, Ethics and Compliance, at Baxter International, where he designed and operated Baxter's Global Compliance Program. Prior to joining Baxter, Dave served as Associate Compliance Counsel and Director and Counsel for Investigations for Tyco International, and before that was with the U.S. Attorney's Office for the Eastern District of Pennsylvania. Dave's breadth of experience as a federal prosecutor, as in-house counsel, and as a private practitioner places him in a unique position to advise clients navigating a variety of international compliance and enforcement related issues.

This fall, we also welcomed Leila Babaeva as an associate in the International Department. Leila has experience as a judicial clerk and at the State Department, and adds a number of languages to our pool.

Finally, we are pleased that two lawyers with extensive international experience here at Miller & Chevalier, [Dan Wendt](#) and [Lamia Matta](#), are now Members of the firm. Dan will continue to focus his practice on counseling companies on issues arising under the FCPA (including investigations and due diligence reviews), United States customs laws, and trade remedy litigation before U.S. agencies and courts. Lamia will continue to represent both U.S. and non-U.S. corporations and governments in complex litigation matters and investigations, utilizing her recognized experience in the Middle East and North Africa.

### Upcoming Conferences and Speaking Engagements

Our website includes regular updates and information on the [extensive speaking engagements](#) by lawyers in Miller & Chevalier's International Department. Please contact us with any interest in particular events.

### Publications

The website also covers [client alerts, conference papers, articles, and book chapters](#) authored or co-authored by International Department lawyers and other personnel. Department personnel are [quoted regularly in press reports and articles](#); this information can also be accessed through the website.

*\*Former Miller & Chevalier attorney*

*\*\*Former Miller & Chevalier consultant*

*\*\*\*Former Miller & Chevalier advisor*

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