Client Alert | International Trade

US Customs Bill Addresses Trade Remedy Enforcement, IPR Protection and US Trade Agreements

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On February 24, 2016, President Obama signed into law the Trade Facilitation and Trade Enforcement Act ("the Act"), which covers, inter alia, US trade remedy law enforcement, intellectual property rights (IPR) protection by US trading partners, and US trade negotiations and agreements.

Key features of the Act include (i) a new process for US Customs and Border Protection (CBP) to investigate claims of antidumping (AD) and countervailing duty (CVD) evasion; (ii) a requirement that the US Trade Representative (USTR) develop IPR "action plans" for countries placed on the Priority Watch List in its annual Special 301 report; (iii) provisions permitting the Trade Promotion Authority (TPA) law to apply, under certain circumstances, to US trade agreements with countries that allegedly do not provide sufficient protections against human trafficking; and (iv) the elimination of the "consumptive demand" exception to the general US prohibition on the importation of goods produced using forced or indentured labor. The Act also establishes new US trade negotiating objectives related to trade remedy law enforcement, fisheries, the environment, and immigration. These provisions, along with other sections of the Act summarized below, could have implications for US importers or foreign trading partners of the United States.

Trade Remedies

New procedures for AD/CVD evasion investigations

Title IV of the Act establishes new procedures to be followed by CBP when CBP investigates claims of evasion of antidumping and countervailing duties. These provisions could impose new burdens on US importers, because CBP now has to initiate a formal investigation whenever information "reasonably" available to an interested party "reasonably" supports an allegation that a US importer's materially false or incomplete entry statements have resulted in an "evasion" of AD/CVD cash deposits or duty payments (a low threshold). Implementing Title IV could also pose challenges for CBP, which – unlike the US Department of Commerce (DOC), for example – is unaccustomed to following the formalities that Title IV will now impose on CBP's "evasion" investigations (*e.g.,* deadlines, notices, questionnaires, verifications, administrative reviews, and judicial reviews). CBP must implement the new investigation procedures within 180 days after the date of enactment of the Act (*i.e.,* by August 21, 2016).

The investigation procedures established by Title IV are as follows:

- **Initiations.** CBP must initiate an evasion investigation within 15 business days after either (i) an "interested party" files an allegation (*i.e.,* a claim that merchandise covered by an AD/CVD order has been entered into the United States through evasion) that is "reasonably" supported by information "reasonably" available to it; or (ii) any other federal agency provides CBP with information "reasonably" suggesting evasion.[1] Evasion is defined as entering merchandise subject to an AD/CVD order by means of material and false statements or material omissions that result in a lowering or elimination of an AD/CVD payment or cash deposit.

- **Investigations**. During its investigation, CBP may issue questionnaires, conduct verifications, and draw adverse inferences for failures to cooperate. If CBP cannot determine whether the relevant AD/CVD order covers the merchandise to which an allegation refers, CBP may refer only this scope issue to DOC. (The Act also creates in DOC a new position for a Director of the Trade Remedy Law Enforcement Division, who liaises with CBP in preventing evasion.)

- **Interim measures.** Within 90 days after initiating an investigation, CBP must determine whether there is a "reasonable suspicion" that the covered merchandise was entered into the United States through evasion. If CBP decides that there is such a reasonable suspicion, CBP must suspend liquidation of each unliquidated entry of the covered merchandise and, if CBP determines that they are necessary, require single transaction bonds or cash deposits.

- **Determinations.** Within 300 calendar days after initiation, CBP must determine, based on "substantial evidence," whether the covered merchandise was entered through evasion. This deadline can be extended by 60 additional calendar days if CBP determines that the investigation is extraordinarily complicated. CBP must make the results of its determination available to interested parties and others within 5 days after it is issued.

- **Effect of determinations**. If CBP makes an affirmative determination, it must (i) suspend (or continue to suspend) liquidation of the covered merchandise; (ii) notify DOC of the determination and ask DOC to determine the applicable cash deposit or AD/CVD rates; and (iii) require either cash deposits or duty payments based on those rates. CBP may also take additional enforcement measures as it deems appropriate, such as initiating a 19 U.S.C. § 1592 or 1595a penalty proceeding or recommending that U.S. Immigration and Customs Enforcement (ICE) initiate a civil or criminal investigation. In addition, CBP may require the importer to deposit estimated duties at the time of entry for future importations.

- **Administrative reviews.** Either the accused person or the interested party making the allegation may file an appeal for an administrative review of CBP's determination within 30 business days after the determination is made. This review is "de novo," meaning without deference to any part of the decision previously made in the matter. CBP must complete its administrative review within 60 business days after it receives the appeal.

- **Judicial reviews.** The United States Court of International Trade (CIT) will review CBP's final determination if, within 30 business days after it, either the accused person or the person making the allegation challenges (i) whether CBP "fully" complied with required procedures; or (ii) whether CBP's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Cooperation agreements with foreign countries

Title IV also directs the US Treasury Department to negotiate bilateral agreements to combat trade remedy evasion, and makes it a principal trade negotiating objective of the United States to ensure that future US trade agreements contain anti-evasion provisions. Pursuant to Section 414 of the Act, the Secretary of the Treasury must seek to negotiate and enter into bilateral agreements with foreign customs authorities "for purposes of cooperation on preventing evasion of the trade remedy laws of the United States and the trade remedy laws of the other country." The Secretary must seek to include in such agreements provisions that

[1] An "interested party" means (i) a foreign manufacturer, producer, or exporter, or the United States importer, of covered merchandise (or a trade or business association in which such entities comprise a majority of the membership); (ii) a manufacturer, producer, or wholesaler in the United States of a domestic like product; (iii) a certified union or recognized union or group of workers that is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product; (iv) a trade or business association a majority of the members of which manufacture, produce, or wholesale a domestic like product in the United States; (v) an association a majority of the members of which is composed of interested parties described in items (ii), (iii), or (iv) with respect to a domestic like product; and (vi) if the covered merchandise is a processed agricultural product, a coalition or trade association that is representative of either processors, processors and producers, or processors and growers.

allow (i) the sharing of information to determine if evasion has occurred; (ii) the verification of such information; and (iii) the participation of officials from the importing country in verification activities conducted by the exporting country, including through site visits. Another recommended provision of such agreements would state that, if the exporting country does not allow the importing country to participate in verification activities, the importing country may take this fact into consideration when assessing the compliance of the exporting country's exports with the importing country's trade remedy laws.

Furthermore, Section 415 makes it a principal trade negotiating objective of the United States to include the information sharing and verification provisions listed above in all future US trade agreements, including those currently under negotiation. However, this principle trade negotiating objective is not an amendment to the TPA law, which contains most US trade negotiating objectives and is set to expire on July 1, 2018 (with an optional extension to July 1, 2021). Rather, this principal trade negotiating objective is a standalone measure separate from the TPA law, and will remain in effect unless it is repealed.

Intellectual Property

Intellectual property rights (IPR) action plans for Priority Watch List countries

Section 610 of the Act directs USTR to identify specific steps that certain foreign countries can take to improve their IPR environments, and authorizes the President to take actions – which may include formal investigations and penalties, such as suspension of duty-free treatement under trade preference programs – against countries that fail to implement USTR's recommendations.

Background

The Act requires USTR to develop IPR "action plans" for certain countries that it places on the "Priority Watch List" in its annual "Special 301" report on IPR protection and enforcement by US trading partners. In accordance with the Special 301 provisions of the *Trade Act of 1974* ("*Trade Act*"), USTR identifies in the Special 301 report any foreign countries that allegedly (i) deny adequate and effective protection of IPR; or (ii) deny fair and equitable market access to US persons that rely on IPR protection.[2] Within the Special 301 report, USTR places on the Priority Watch List those countries in which "particular problems" allegedly exist with respect to IPR protection, enforcement, or market access for persons relying on IPR.

Action Plan Requirements

Pursuant to Section 610, USTR must, within 90 days after submitting its annual National Trade Estimate (NTE) report to Congress, develop an IPR "action plan" for any foreign country that has remained on the Priority Watch List for at least one year. The action plan must contain specific benchmarks, such as legislative, institutional, enforcement, or other actions that USTR deems necessary for the country to achieve adequate IPR protection and market access for persons relying on IPR. USTR must also provide an annual report to Congress describing each country's progress in meeting its action plan benchmarks. The Act does not require USTR to consult with foreign government representatives or other stakeholders when developing the action plan.

Implications

If USTR determines that a country has not substantially complied with its action plan benchmarks within one year after the action plan is developed, the President is authorized to "take appropriate action" with respect to the country. The Act does not list specific "appropriate" actions that the President may take, leaving the President with discretion in the event that a country does not comply with its action plan. However, authorities available to the President include potential designation of the country as a "Priority Foreign Country" under the Special 301 provisions, triggering a Section 301 investigation of that country.[3] If USTR determines that the foreign government practices which warranted the PFC designation (and the resulting investigation) involve US rights under a trade agreement (*e.g.,* the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs")), USTR must initiate dispute settlement procedures under the applicable trade agreement and base the determination of its Section 301 investigation on the results of those proceedings.[4] If,

[2] 19 U.S.C. § 2242(a)

[3] 19 U.S.C. § 2242(b)

[4] 19 U.S.C. § 2413(a) and 19 U.S.C. § 2414(a)(1)

however, USTR determines that the practices which warranted the PFC designation do not involve US rights under a trade agreement, USTR will conduct its own investigation under Section 301.[5] The investigation would seek to determine whether the country's IPR-related acts, policies, and practices are "unreasonable or discriminatory" and "burden or restrict United States commerce"[6] because (i) they deny provision of "adequate and effective protection of intellectual property rights" (notwithstanding the fact that the country may be in compliance with the TRIPs Agreement); or (ii) they deny provision of "non-discriminatory market access opportunities for United States persons that rely upon intellectual property protection[.]"[7] Section 301 investigations may result in the imposition of sanctions against a PFC, including withdrawal, limitation, or suspension of duty-free treatment afforded to the PFC under trade preference programs such as the Generalized System of Preferences (GSP).[8] Other sanctions authorized by the statute include import duties and fees or restrictions on the supply of services, but these provisions predate the WTO, have not been used against WTO Members, and are unlikely to be used in the future, as their use would raise concerns under the GATT and the GATS (in particular the most-favoured-nation (MFN) provisions of these agreements).

Import-related protection of IPR

Section 302 of the Act requires CBP to provide IPR holders with undredacted images of imported merchandise that CBP suspects of violating a copyright or trademark, ending CBP's previous practice of redacting all identifying markings and codes before sending images to the IPR holder for authentication. Pursuant to Section 302, if CBP (i) "suspects" that imported merchandise violates a copyright or trademark recorded with CBP; and (ii) determines that examination of the merchandise by the IPR holder would help CBP determine whether a violation exists, CBP must supply the IPR holder with unredacted images of the merchandise and its packaging and labels, and may also provide the IPR holder with unredacted samples of the merchandise.

New Chief Trade Negotiator for IPR issues

Section 609 establishes a new "Chief Innovation and Intellectual Property Negotiator" at USTR. This position will be responsible for conducting US trade negotiations and enforcing agreements related to intellectual property. This change reflects certain US lawmakers' increasing prioritization of IPR issues as a component of US trade agreements.

Amendments to the Trade Promotion Authority law

The Act makes several modifications to the TPA law enacted in June 2015, including new US trade negotiating objectives and a waiver process permitting the TPA law to apply to trade agreements with countries that allegedly do not provide sufficient protections against human trafficking. These changes will take effect as if they were included in the enactment of the TPA law, meaning that they will apply to agreements entered into (*i.e.,* signed) by the President while the TPA law is in force. Although trade negotiating objectives are not binding on US trade negotiators, they are generally followed.

Negotiating objectives on immigration, climate change, and fisheries

Section 914 amends the TPA law by establishing two new trade negotiating objectives for US trade agreements with foreign countries: (i) to ensure that trade agreements do not require changes to the immigration laws of the United States or obligate the United States to grant access or expand access to visas; and (ii) to ensure that trade agreements do not establish obligations for the United States regarding greenhouse gas emissions measures, including obligations that require changes to United States laws or regulations. These objectives largely codify existing US practice, however, because the United States has avoided taking on commitments in these politically-sensitive areas in recent FTAs.

Section 914 further amends the TPA law by establishing new principal US negotiating objectives regarding fisheries: (i) to obtain competitive opportunities for United States exports of fish, seafood, and shellfish products in foreign markets, including by reducing or eliminating tariff and nontariff barriers; (ii) to eliminate fisheries subsidies that distort trade; (iii) to pursue transparency in fisheries subsidies programs; and (iii) to

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[5] 19 U.S.C. § 2414(a)(2).

[6] 19 U.S.C. § 2411(b)(1)

[7] 19 U.S.C. § 2411(d)(3)(B)

[8] 19 U.S.C. § 2411(c)

address illegal, unreported, and unregulated fishing. The recently-signed Trans-Pacific Partnership (TPP) appears to reflect these objectives, as it includes both transparency measures and commitments to eliminate certain fisheries subsidies.

Waiver process for "Tier 3" countries

Section 914 permits the TPA law to apply, under certain circumstances, to US FTAs with "Tier 3" countries (i.e., countries whose governments, according to the US State Department's annual Trafficking in Persons (TIP) Report, do not comply with certain "minimum standards" that pertain to the elimination of human trafficking). Though the exception could be used to facilitate congressional consideration of future US trade agreements with Tier 3 countries, invoking the inception would likely be politically contentious in the United States.

The TPA law provides that legislation to implement trade agreements between the United States and Tier 3 countries shall be ineligible for the expedited (*i.e.,* "fast-track") legislative procedures established by TPA, thus diminishing (i) any such trade agreement's likelihood of being approved by Congress; and (ii) a Tier 3 country's willingness to sign a trade agreement with the United States.[9] Section 914 amends this provision of the TPA law by providing that trade agreements with Tier 3 countries shall be eligible for fast-track consideration if the President submits a letter to the appropriate congressional committees stating that the Tier 3 country "has taken concrete actions to implement the principal recommendations with respect to that country" in the State Department's most recent TIP report. The letter must be accompanied by supporting documentation providing "credible evidence of each such concrete action, including copies of relevant laws or regulations adopted or modified, and any enforcement actions taken[.]" Though this exception to the general prohibition would allow FTAs with Tier 3 countries to be considered under TPA procedures, invoking the exception would be politically contentious and would invite congressional and public scrutiny of the Tier 3 country's laws, policies, and enforcement actions.

Section 914 also requires the President to justify the removal of any country from the Tier 3 list by providing supporting documentation to Congress. Such documentation must include "a detailed description of the credible evidence supporting the change in listing of the country, accompanied by copies of documents providing such evidence[.]" This reporting requirement could make it more burdensome to justify changes in the TIP report's designation of potential FTA partners.

Other significant provisions

Engagement on currency exchange rate policies

Section 701 directs the Treasury Department to hold bilateral discussions with countries whose currencies are allegedly undervalued, and, in the event that the country does not take steps to rectify the undervaluation, requires the President to take remedial actions against the country unless doing so would be detrimental to US interests. The remedial actions authorized by Section 701 are limited, however, to restrictions on development financing and government procurement, increased IMF surveillance, and reconsideration of the relevant country's suitability as a potential FTA partner.

Under Section 701, the US Treasury Department is required to submit biannual reports to Congress containing analyses of the macroeconomic and exchange rate policies of major US trading partners – expanding on the existing biannual reporting requirement established by the *Omnibus Trade and Competitiveness Act of 1988*. The new reports must provide "enhanced analyses" of the policies of any major US trading partner that: (i) has a significant bilateral trade surplus with the United States; (ii) has a material current account surplus; and (iii) has engaged in "persistent one-sided intervention in the foreign exchange market." Treasury is required to initiate "enhanced bilateral engagement" with each country meeting these criteria to express the concern of the United States, to urge policy reforms, and to advise the country that the United States may take remedial actions. However, the Treasury Secretary may waive the requirement to commence enhanced bilateral engagement if doing so would adversely impact the US economy or national security.

If, within one year after enahanced bilateral engagement begins, Treasury determines that the country has failed to adopt appropriate policies to correct the alleged undervaluation and surpluses, the President is

[9] 19 U.S.C. § 4205(b)(6)

required to take one or more of the following actions: (i) prohibit the Overseas Private Investment Corporation (OPIC) from approving any new financing with respect to a project located in that country; (ii) prohibit the US federal government from procuring goods or services from that country (except where such action would be inconsistent with US obligations under international agreements); (iii) instruct the US Executive Director of the IMF to call for rigorous surveillance of the macroeconomic and exchange rate policies of that country (and, as appropriate, formal consultations on findings of currency manipulation); and/or (iv) instruct USTR to take into account the country's alleged failure to cooperate when assessing whether to enter into a bilateral or regional trade agreement with that country. The President may choose not to take any remedial action, however, if doing so would adversely impact the US economy or national security.

Repeal of the "consumptive demand" exception for goods produced using forced labor

Section 902 of the Act repeals the "consumptive demand" exception to the *Tariff Act of 1930's* general prohibition on the importation into the United States of "[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions[.][10] The consumptive demand exception provided that such goods might be imported into the United States – despite being the product of forced, indentured, or convict labor – if similar goods were not produced in the United States in sufficient quantities to satisfy US consumer demand.

The repeal of the consumptive exception took effect on March 10, 2016. As a result, if CBP orders that imported merchandise be denied entry on the grounds that the merchandise is allegedly the product of forced, indentured, or convict labor, US importers will no longer able to invoke the consumptive demand exception to challenge CBP's order. CBP may only impose such orders following a formal investigation under Section 307 of the *Tariff Act*, which CBP may initiate in response to a petition by an interested party or a claim from a CBP official. CBP's orders under Section 307 are company- and product-specific, meaning that they apply only to the companies and products identified in the petition and investigated by CBP, rather than all products of the same kind from the exporting country.

Negotiating objectives related to Israel

Section 909 establishes three new principal trade negotiating objectives designed to discourage US trading partners from boycotting, divesting from, or imposing sanctions against Israel. These new objectives are (i) to discourage actions by potential trading partners that directly or indirectly prejudice or otherwise discourage commercial activity solely between the United States and Israel; (ii) to discourage politically motivated boycotts of, divestment from, and sanctions against Israel and to seek the elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on Israel; and (iii) to seek the elimination of state-sponsored unsanctioned foreign boycotts of Israel, or compliance with the Arab League Boycott of Israel, by prospective trading partners.

These objectives apply to negotiations commenced before, on, or after the date of the enactment of the Customs bill (*i.e.,* February 24). However, the above provision is not an amendment to the TPA law, which contains most US trade negotiating objectives and will remain in force for a limited time. Rather, the above provision will exist as a standalone measure separate from the TPA law, and thus will remain in force permanently unless it is repealed.

Trade preference program for Nepal

Section 915 creates trade preferences allowing for duty-free entry of certain luggage, travel goods, textiles, and apparel exported by Nepal to the United States. Trade preferences for these items will take effect on March 25, 2016, contingent upon a determination by the President that Nepal meets the eligibility criteria of the African Growth and Opportunity Act (AGOA). The trade preferences established by Section 915 may remain in effect until December 31, 2025 unless the President graduates Nepal from the program before that date.

[10] 19 U.S.C. § 1307

Increased *de minimis* threshold

Section 902 provides that individuals may import up to USD 800 in merchandise free of duties into the United States – a substantial increase over the previous *de minimis* threshold of USD 200. This increase took effect on March 10, 2016. The Act also encourages USTR to advocate that other countries establish "commercially meaningful" *de minimis* thresholds.

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