WASHINGTON TRADE REPORT

Volume XXVIII Number 14 *April 23, 2012*

WASHINGTON TRADE REPORT
1318 Independence Avenue SE
Washington, D.C. 20003
Phone (202) 544-2881
www.washingtontradereport.com
editor@washingtontradereport.com

Feature Article

§337: New Weapon in the Trade Secret Arsenal

Prepared by Laura Fraedrich
Kirkland & Ellis LLP
(202) 879-5990
lfraedrich@kirkland.com

The increasing globalization of business keeps the Administrative Law Judges at the U.S. International Trade Commission (ITC) very busy. They hear and adjudicate cases brought under 19 U.S.C. §1337 (Section 337) regarding "unfair acts in the importation of articles" into the United States. Approximately 90% of the Section 337 cases brought to the ITC involve patents.

Although the ITC proceedings under Section 337 do not provide for money damages, the ITC can issue exclusion orders to prevent products from entering the United States and cease-and-desist orders stopping the sale of products that are already in the United States. A recent ITC determination involving trade secret misappropriation, and subsequent court decision affirming the ruling, may make the ITC judges even busier.

This comes at a time when the use of other trade-remedy laws is on the decline, with the rate of filings under the antidumping statute in recent years being well below the averages in the 1980s and 1990s, and no global safeguard cases being filed since 2001. The Section 337 law is overtaking those other, better-known instruments to become the most frequently invoked of the unfair trade laws.

Section 337 Background and History

U.S. companies exploiting intellectual property rights have been bringing cases in increasing numbers against importers of products alleged to be infringing those intellectual property rights. Petitioners filed 69 Section 337 cases last year, the most ever in a single year (see Table 1). The rise in these investigations is greatly outpacing the increase in new patent filings by U.S. persons, as can be seen from the data in Figure 1. While the number of utility patents filed by U.S. individuals and corporations in 2011 was 25.5% higher than the 2000-2002 average, during that same period the number of Section 337 cases grew 3.5 times. In other words, the rate of patent litigation is rising faster than the rate of patent innovation.

Relief at the ITC has several potential advantages over pursuit of claims in U.S. Federal district court. First, the

Table 1: Investigations under Section 337

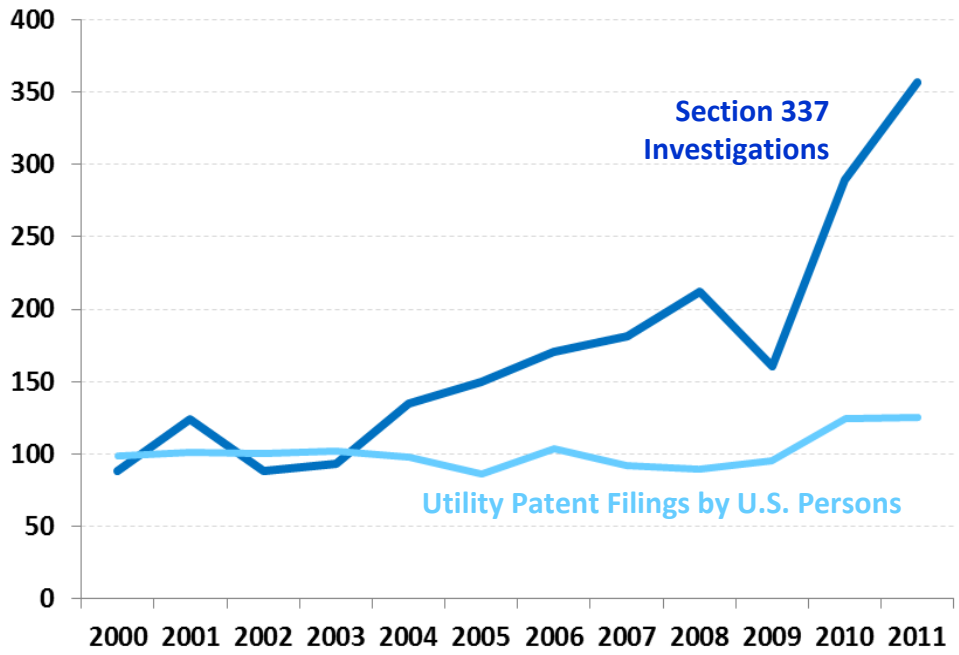
Annual Initiations of Investigations at the International Trade Commission

——Average Annual Investigations——				—— Annual Investigations ——				
1972-81	1982-91	1992-01	2002-06	2007	2008	2009	2010	2011
11.2	22.0	13.4	24.6	35	41	31	56	69

Source: Calculated from U.S. International Trade Commission data.

Figure 1: Relative Growth in Section 337 Cases and Patent Filings

Index Values, 100 = Average for 2000-2002



Source: Calculated from data of the U.S. International Trade Commission (investigations) and the U.S. Patent and Trademark Office (patents).

See the ITC's list of Outstanding Section 337 Exclusion Orders and the 337 Investigational History database.

exclusion orders and cease-and-desist orders that the ITC issues are not subject to the four-factor test to determine whether patent infringement claims merit injunctive relief, as must be applied in Federal district court. Section 337 cases also have the virtue of being speedy. The statute requires quick proceedings, resulting in a hearing within a year after filing and a final determination within about 16 months. In contrast, litigation in Federal district court over intellectual property rights can drag on for a much longer time.

The New Weapon for Trade Secrets

A recent ITC determination, affirmed by the U.S. Court of Appeals for the Federal Circuit, may result in even more Section 337 cases in the future. As noted above, while approximately 90% of Section 337 cases relate to patent rights, *TianRui Group Co. v. International Trade Commission*, 661 F.3d 1322 (Fed. Cir. 2011), instead relates to trade secret protections. The decision may lead to even more Section 337 cases because it provides U.S. companies with a new weapon to counter trade secret misappropriation that occurs outside of the United States, even when the trade secret is not being practiced in the United States.

Amsted Industries Inc. brought the Section 337 action that is the subject of the *TianRui* decision. Amsted manufactures cast steel railway wheels and developed the trade secret at issue in the case. That trade secret consisted of the "ABC Process" for producing cast steel railway wheels. Amsted licensed the ABC Process to Datong ABC Castings Company Limited in China. Later, TianRui Group Company Limited and TianRui Group Foundry Company Limited (collectively "TianRui"), also in China, sought a license from Amsted, but the parties could not reach agreement on terms. Undeterred in its quest for the ABC Process, TianRui hired Datong employees who had been trained in the ABC Process. The employees signed confidentiality agreements before leaving Datong. Nevertheless, according to Amsted, "the former Datong employees disclosed information and documents to TianRui that revealed the details of the ABC process and thereby misappropriated Amsted's trade secrets." 661 F.3d at 1324. Subsequently, TianRui partnered with another company to form a joint venture, and both the partner and joint venture imported TianRui wheels into the United States.

In response, Amsted filed a complaint at the ITC alleging that TianRui had misappropriated its trade secrets in violation of 19 U.S.C. §1337(a)(1)(A). That provision prohibits "[u]nfair methods of competition and unfair acts in the importation of articles ... into the United States ... the threat or effect of which is ... to destroy or substantially injure an industry in the United States." TianRui argued that Amsted's case did not meet the requirements of the statute in two respects. First, TianRui argued that the misappropriation occurred in China and that Congress did not intend for Section 337 to apply extraterritorially. Second, TianRui argued that Amsted did not satisfy the domestic industry requirement of Section 337 because it did not practice the ABC Process in the United States. The ITC rejected these arguments and issued a limited exclusion order to prohibit further importation of cast steel railway wheels using the ABC Process. TianRui appealed to the U.S. Court of Appeals for the Federal Circuit, but fared no better there than it had at the commission.

Extraterritorial Application

TianRui's appeal focused on the fact that the unauthorized disclosure of the trade secret information occurred in China and argued that Section 337 could not apply to this extraterritorial conduct. Both Amsted and the ITC claimed that the ITC did not apply the statute extraterritorially because "trade secrets were misappropriated in the United States as a legal matter when railway wheels made by exploiting those trade secrets were imported into the United States and sold to customers." 661 F.3d at 1326.

Before the Federal Circuit could decide this central issue of the case, however, it needed to determine what law to apply. The court noted that the question of what law applies in a Section 337 case involving trade secrets was a matter of first impression for the court. The ITC applied Illinois trade secret law because the parties had their principal place of business in Illinois. The Federal Circuit rejected this approach, however, and stated that "where the question is whether particular conduct constitutes 'unfair methods of competition' and 'unfair acts' in importation, in violation of section 337, the issue is one of Federal law and should be decided under a uniform Federal standard, rather than by reference to a particular state's tort law." While this determination resolved an important procedural issue, it did not otherwise affect the outcome of the case, which the Federal Circuit noted would have been the same whether Illinois law or Federal law applied.

Thus, the Federal Circuit moved onto the central issue – did the ITC decision represent an improper extraterritorial application of Section 337? The majority of the three-judge panel ruled that it did not, but Judge Moore was not convinced.

The majority opinion acknowledged the canon of statutory construction that legislation of Congress is presumed to apply only within the territorial jurisdiction of the United States unless a contrary intent appears. 661 F.3d at 1328. The majority, however, named three reasons why this presumption against extraterritoriality did not govern this case. First, the court noted that the focus of Section 337 is on importation – an inherently international transaction – and analogized Section 337 to immigration laws. Second, the court stated that it was not sanctioning purely extraterritorial conduct. Instead, "the foreign 'unfair' activity at issue in this case is relevant only to the extent that it results in the importation of goods into this country causing domestic injury." 661 F.3d at 1329. Judge Moore, in dissent, disagreed with this proposition, and focused on the unfair act of trade misappropriation, which occurred entirely in China. Thus, she characterized the potential breadth of the holding as "staggering" and cautioned that the court had "no right to police Chinese business practices." 661 F.3d at 1338. She suggested that Section 337 could next be applied to "unfair practices" such as operations that did not meet U.S. labor law requirements or minimum wage standards.

Finally, the Federal Circuit ruled that the legislative history of Section 337 supported the ITC's interpretation of the statute "as permitting the Commission to consider conduct that occurs abroad" and that this determination was entitled to deference. 661 F.3d at 1330, 1332. Thus, the Federal Circuit noted that even if it were to conclude that Section 337 was "ambiguous with respect to its application to trade secret misappropriation occurring abroad, we would uphold the Commission's interpretation of the scope of the statute." 661 F.3d 1332.

Domestic Industry Requirement

But TianRui had yet another challenge to the ITC determination. TianRui argued that Amsted's claim did not meet the statutory requirement that the acts of unfair competition threaten "to destroy or substantially injure an industry in the United States." 19 U.S.C. §1337(a)(1)(A)(i). TianRui claimed that there could be no Section 337 relief in a trade secret case unless the domestic industry practiced the misappropriated trade secret. Because Amsted did not practice the ABC process in the United States, Amsted should get no relief under Section 337.

The Federal Circuit began its analysis of the issue by noting the different standards that apply for statutory intellection property rights (patents, copyrights, and registered trademarks) and for nonstatutory rights such as trade secrets. To obtain relief under Section 337 when imports infringe statutory intellectual property rights, an industry relating to the protected articles must exist or be in the process of being established. 19 U.S.C. §1337(a)(2). The "domestic industry" threshold is met if there is significant domestic investment or employment related to the protected articles. 19 U.S.C. §1337(a)(3). On the other hand, to obtain relief under Section 337 in the case of trade secret misappropriation, in addition to showing that a domestic industry exists, the domestic industry must show threat of destruction or substantial injury. 19 U.S.C. §1337(a)(1)(A). TianRui argued that the domestic industry must practice the asserted trade secret.

The Federal Circuit disagreed with TianRui, noting that "there is no express requirement" that the domestic industry relate to the asserted intellectual property. The court further noted the evidence that the imported TianRui wheels

Thomas Carey, "When Trade Secrets Are Stolen Overseas, Can the Thief Compete in the U.S.?" (2011) at http://www.martindale.com.

directly competed with wheels produced in the United States by Amsted, even though Amsted was not using the same process in the United States. That type of competition was "sufficiently related to the investigation to constitute an injury to an 'industry' within the meaning of section 337(a)(1)(A)." 661 F.3d 1337.

TianRui moved for rehearing and rehearing *en banc,* which motions the Federal Circuit denied on February 1, 2012.

Theft of trade secrets is a risk that companies take when doing business overseas. Even when, as here, a company requires confidentiality agreements with its employees, things can go awry and theft can occur. Dissenting Judge Moore suggested that companies should protect themselves by obtaining a patent. But as one commenter noted, "[t]his advice is of no use, however, to companies with trade secrets that have been in commercial production for more than a year. Moreover, many companies prefer the potentially perpetual lifespan of a trade secret over the 20-year term of a patent. Thus, the majority ruling is both practical and warranted." While possibly practical and warranted, one can wonder whether the ruling is called for by the statute or may also include judicial activism aimed at a sometimes contentious trading relationship with China.

TianRui helps companies that are the victim of trade secret theft if the products manufactured with the trade secrets are later imported into the United States. Moreover, the Federal Circuit's decision to apply Federal common law, rather than state law or the law of another country, may help these companies to prove trade secret theft. Thus, the Administrative Law Judges at the ITC are destined to remain busy for the foreseeable future.

Openings for Trade Professionals in the Federal Government

Agency	Job Title	Salary Range	Close
U.S. International Trade Commission	Systems Accountant	$89,033-136,771	April 23
Commerce Dept./Int'l Trade Admin.	Program Analyst	$62,467-115,742	April 23
Commerce Dept./Int'l Trade Admin.	Program Specialist	$51,630-67,114	April 23
Export-Import Bank	Loan Specialist	$76,644-118,481	April 23
Commerce Dept./Int'l Trade Admin.	International Trade Specialist	$74,872-97,333	April 25
Export-Import Bank	Business Analyst	$62,467-97,333	April 27
Department of the Treasury	Dep'y Asst. Gen. Coun. (Int'l Affairs)	$119,554-179,700	April 28
U.S. Trade Representative	Minister Couns. for Trade (Beijing)	$119,554-165,300	April 30
Commerce Dept./Int'l Trade Admin.	Senior Imp. Admin. Officer (Beijing)	$94,064-138,137	April 30
Department of Labor	International Relations Analyst	$51,630-97,333	May 1
Consumer Product Safety Comm.	International Trade Specialist	$62,467-97,333	May 1
U.S. Agency for Int'l Development	Project Development Officer	$38,394-63,071	May 4
USDA Economic Research Service	Director, Market & Trade Econ. Div.	$119,554-179,700	May 21
U.S. Patent and Trademark Office	Attorney Advisor	$89,033-155,500	June 7
USDA Economic Research Service	Research Agricultural Economist	$74,872-115,742	Aug. 31
USDA Economic Research Service	Research Agricultural Economist	$74,872-155,500	Aug. 31

Negotiations & Agreements

Revised Model Bilateral Investment Treaty Renews Divisions over Labor Rights

Click here to see the previous (2004) Model BIT, and here to access the texts of the existing U.S. BITs.

See also the CENTRAL guide to Trade and Investment.

In the culmination of a review process that began just weeks after President Obama took office, the State Department and the Office of the U.S. Trade Representative issued on April 20 the first revision in the model Bilateral Investment Treaty (BIT) since 2004. The most divisive subject in the consultations over this template concerns how these investment treaties should deal with labor and environmental issues. Provisions in the 42-page revised model BIT move the U.S. position on these issues closer to the stance favored by Democrats, but do not go far enough to satisfy labor leaders, while also raising concerns on the part of Republicans and business organizations.

The terms of this new model BIT will be familiar to anyone who follows the corresponding debate over labor issues in free trade agreements. Under the new model, parties cannot waive or derogate from their domestic labor and environmental laws in order to encourage investment. Labor issues are also subject to more detailed consultations than in the old model. More specifically, Article 13 (Investment and Labor) of the revised model reads as follows:

1. The Parties reaffirm their respective obligations as members of the International Labor Organization ("ILO") and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work* and its Follow-Up.
2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.
3. For purposes of this Article, "labor laws" means each Party's statutes or regulations, or provisions thereof, that are directly related to the following:
   (a) freedom of association;
   (b) the effective recognition of the right to collective bargaining;
   (c) the elimination of all forms of forced or compulsory labor;
   (d) the effective abolition of child labor and a prohibition on the worst forms of child labor;
   (e) the elimination of discrimination in respect of employment and occupation; and
   (f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.
4. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.
5. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

These revisions got mixed reviews. President Calman Cohen of the Emergency Committee for American Trade (ECAT) applauded "the Obama Administration's commitment to open markets, eliminate foreign barriers and protect U.S. investment overseas." He nonetheless said that "ECAT is highly concerned about whether the expanded Model BIT language relating to labor and environment could be counterproductive and is very disappointed that the new 2012 Model BIT does not strengthen core protections for U.S. investors overseas." The response of the United States Council for International Business was along similar lines, though less direct and negative.

Labor is just as critical of the model as ECAT but does so from an entirely different direction. AFL-CIO Deputy Chief of Staff Thea Lee told WTR that the union "regret[s] that the new model BIT does not go further in laying out a new approach to international investment agreements." Ms. Lee said that while the AFL-CIO "appreciate[s] the strengthening of the labor and environment provisions" it is "deeply disappointed that these provisions remain outside of any dispute settlement or enforcement framework." She went on to call these provisions "little more than paper commitments, without any recourse in the event that consultation fails to resolve a problem," thus standing "in in sharp contrast to the rights of multinational corporate investors in the model text, which remain extraordinarily well protected, as individual investors retain the right to sue governments directly over regulations they find burdensome."

In announcing the new text the USTR also stressed two other topics. One concerns state-led economies, a subject of special importance in the anticipated BIT negotiations with China. The model provides a new discipline to prevent parties from imposing domestic technology requirements; includes new language requiring parties to allow investors of the other party to participate in the development of standards and technical regulations on non-discriminatory terms; and has a new footnote aimed at ensuring that the actions of state-owned enterprises and other entities acting under delegated governmental authority are fully covered by the BIT's obligations.

On the subject of transparency and public participation the new model BIT requires the parties to consult periodically regarding how to improve their transparency practices; bolsters parties' obligations to publish proposed regulations, explain their purposes and rationales, and address substantive comments provided by stakeholders; and provides for the possibility of a future multilateral appellate mechanism. Thea Lee told WTR that the AFL-CIO hopes that "these improvements will strengthen the role of civil society in engaging with governments over regulations and standards." Even so, "the new model BIT remains lopsided in terms of granting overly broad rights and protections to multinational corporations."

In related news, the International Chamber of Commerce (ICC) on April 21 released its updated *Guidelines for International Investment* at the World Investment Forum organized by the United Nations Conference on Trade and Development in Doha (see next article). More information on the revision of the ICC Guidelines for International Investment is available on ICC's website.

Controversy Precedes this Week's UNCTAD XIII Conference

This week the United Nations Conference on Trade and Development (UNCTAD) will hold the 13th of its quadrennial meetings, gathering this time in the same city that lent its name to the Doha Round of multilateral trade negotiations. That round is being held under the auspices of the World Trade

Organization (WTO), an institution that coexists uneasily with UNCTAD. These two Geneva-based groups are associated with very different views of trade. While UNCTAD is no longer wedded to the anticolonial rhetoric of the 1960s and 1970s-era demands for a "new international economic order," it remains institutionally more friendly to demands that the trading system be made more accommodating to developing countries.

The tensions between industrialized and developing countries have been much in evidence in the weeks leading up to UNCTAD XIII, with sharp clashes over the scope of the agenda in the conference. While many developing countries prefer that the work program be defined expansively, and that UNCTAD undertake a broad review of what ails the global economy, some industrialized countries — especially the United States — favor a narrow scope.

The wrangling over the agenda has erupted with a strongly worded protest from a high-level group of former UNCTAD officials and consultants. Signed by heavyweights such as former UNCTAD Secretary General Rubens Ricupero, the April 11 declaration proudly observes that "UNCTAD has always been a thorn in the flesh of economic orthodoxy" but warns that "efforts are afoot to silence that voice" because "a few countries want to suppress any dissent with the prevailing orthodoxy."

The unnamed countries that (according to the statement) "now wish to stifle debate," Geneva sources tell WTR, are the members of the JUSCANZ group. Pronounced "juice cans," this group is usually comprised of those countries that acronymically provide its name (Japan, United States, Canada, Australia, New Zealand) plus several other countries that are either industrialized (e.g., Switzerland, Norway) or are putatively still developing (e.g., Korea, Mexico, and sometimes Israel), but not the European Union.

Are the JUSCANZ countries truly seeking to stifle debate and emasculate UNCTAD, or is this letter an overreaction to the usual give-and-take that always accompanies the maneuvering over what will and will not be on the agenda in an international conference? WTR is on site in Doha to find out. The feature story in our April 30 report (Volume 28 Number 15) will focus on the debate in Doha, especially what it tells us about the prospects for reviving, replacing, or burying the moribund Doha round of multilateral trade negotiations in the WTO.

U.S.-EU Agreement on Airline Passenger Personal Name Record Data

The European Parliament approved a new agreement with the United States on April 19 that would allow the transfer of EU air passengers' personal data to U.S. authorities. The EU-US Personal Name Record (PNR) agreement establishes legal conditions for the transfer and use of the data and includes rules on storage periods, use, data protection, safeguards, and administrative and judicial redress.

PNR data are collected by air carriers during the reservation process and include names, addresses, credit card details, and seat numbers of air passengers. Under U.S. law, air companies are obliged to make these data available to the Department of Homeland Security prior to flights to or from the United States. The agreement replaces a provisional agreement that was put in place in 2007. It is expected to be approved by the ministers of Justice and Home Affairs on April 26, allowing it to be implemented for a period of seven years.

Laws & Regulations

Administration Report Recommends Relaxing U.S. Export Restrictions on Satellites

Section 1248 of the "National Defense Authorization Act for Fiscal Year 2010" (Public Law 111-84) requires that the Secretary of Defense and the Secretary of State "carry out an assessment of the national security risks of removing satellites and related components from the United States Munitions List."

Section 1513 of the "Strom Thurmond National Defense Authorization Act for Fiscal Year 1999" (Public Law 105-261) moved commercial satellites (COMSATs) from the CCL to the USML. It specifically removed the President's authority to change the jurisdictional status of satellites and related items. Rather, the law requires that the United States treat space-related items differently than other controlled technologies.

See also the CENTRAL guide to Security, Sanctions, and Compliance.

The Obama administration is, as anticipated (WTR Vol. 28 No. 13), urging Congress to permit it to move commercial satellites and some remote-sensing satellite technology from the restrictive U.S. Munitions List (USML) to the more permissive Commerce Control List (CCL). The departments of State and Defense recommend in the *Report to Congress: Section 1248 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84) Risk Assessment of United States Space Export Control Policy* that the U.S. satellite technology export law be amended to give the president the authority to make this change.

Under Public Law 105-261 Congress retains the sole authority over granting export licenses for militarily sensitive space technology, including such dual-use items as commercial satellites (COMSATs). Section 1513 of that law moved this category of goods from the CCL to the USML. COMSAT exports peaked at $1.1 billion in 1998, the same year that Congress enacted that law. Exports plummeted over the next two years, and in 2010 and 2011 exports of complete COMSATs (as opposed to parts) fell to nothing (see Figure 2, next page). The administration report recommends that hundreds of thousands of items can safely be transferred back to the CCL.

The report identified two satellite types and related items that are not purely defense-related and should not be designated as defense articles on the USML or controlled under the International Traffic In Arms Regulations (ITAR). These satellites and related items do not contain technologies unique to the U.S. military industrial base nor are they critical to national security, the report argued. In particular, the departments believe the following items are more appropriately designated as dual-use items:

- COMSATs that do not contain classified components;
- Remote sensing satellites with performance parameters below certain thresholds; and
- Systems, subsystems, parts and components associated with these satellites and with performance parameters below thresholds specified for items remaining on the USML.

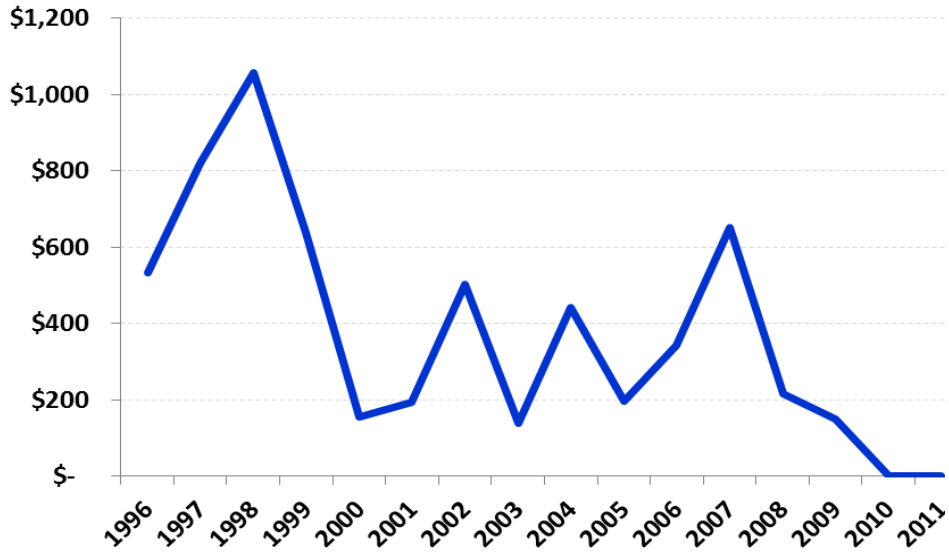
The report notes that there are still items that carry much higher risk and should therefore remain on the USML, which is managed by the State Department. Items that should not be transferred off of the USML include:

- Satellites that perform a purely military or intelligence mission.
- Remote sensing satellites with high performance parameters.
- Parts and components unique to the above satellite types and not common to dual-use satellites.
- Services in support of foreign launch operations for USML and non-USML designated satellites.

There is also substantial risk associated with certain services and therefore special export controls will still be needed, the report stated. These areas include satellite failures and anomaly resolution, launch know-how, launch services, and launch failure analysis.

Figure 2: U.S. Exports of Communications Satellites, 1996-2011

Millions of Dollars of Exports of HTS Subheading 8802.60.30.00



Source: U.S. International Trade Commission's DataWeb.

The 1248 report was done in tandem with the Obama administration's effort to rebuild the USML and introduce new export control reforms. The goal is to create "higher walls around fewer items." The report concluded that, "Transferring select items from the USML to the CCL would allow for controls consistent with other technologies and would help enhance the competitiveness of the U.S. space industrial base, while continuing to protect U.S. national security needs." This step "would also provide the flexibility needed to apply U.S. export control personnel and resources to higher priority issues, increasing protection of those items that do provide the United States with significant military or intelligence advantages."

Representative Howard Berman (D-CA), ranking member of the House Foreign Affairs Committee, received the report enthusiastically. He said that "restricting exports of all commercial satellites and components as if they were lethal weapons, regardless of whether they're going to friend or foe, has gravely harmed U.S. space manufacturers." Berman and 14 cosponsors introduced the Safeguarding United States Satellite Leadership and Security Act of 2011" (H.R.3288). His bill would authorize the president to remove commercial satellites and related components from the USML but prohibit any satellite or related component from being transferred to China, Cuba, Iran, Sudan, Syria, or North Korea. The administration strongly supports Berman's bill.

Leading Republicans in Congress do not appear convinced by the report. Chairman Ileana Ros-Lehtinen (R-FL) of the House Foreign Affairs Committee expressed great caution about moving soon on any legislative changes. "History taught us a valuable lesson of caution when in the 1990s U.S. satellite technology ended up in the hands of the Chinese regime," she said, and "Congress must carefully scrutinize this report and determine what controls need to be in place to ensure these materials do not fall into the wrong hands." Ros-Lehtinen is the author of the "Export Administration Renewal Act of 2011" (H.R.2122). That bill, which is currently pending before her committee, would prioritize the removal of low-sensitivity parts and components from the USML.

The report itself described a recent attempt by China to buy a fully functional European Satellite imaging constellation, speculated to refer to the RapidEye system operated by a German company that declared bankruptcy in 2011. The RapidEye system includes U.S. technology. The State Department prevented this sale. The report assured Congress that the U.S. technology incorporated in this (unnamed) constellation would not be included in the items considered for relisting from the USML to the CCL. "As part of the Administration's recommendations in this report, this technology would remain subject to the USML." The firm was ultimately bought by Canada's Iunctus Geomatics Corp. of Lethbridge, Alberta, which currently operates the system.

Senator Jon Kyl (R-AZ), who was one of the leaders in the fight to win Senate approval of the 1999 law that yanked satellite-technology export-licensing authority from the president expressed strong doubts about returning authority over export licensing for commercial satellite technology to the executive. He released a statement following the delayed issuance of the report castigating the Obama administration for "once again" seeking to weaken U.S. national security. He said that "The Obama Administration should focus its export control reform initiative on closing the gaping holes in U.S. export control compliance and enforcement, including preventing the transshipment of dual-use technologies and defense items to rogue states like Iran," but instead "is taking its eye off the ball and once again weakening U.S. national security by proposing to further loosen export controls."

Earmark Controversy Continues as More Tariff-Suspension Bills Are Introduced

The efforts to decouple the proposed miscellaneous tariff bill (MTB) from the ban on earmarks got a boost on April 20 when 65 freshmen Republican members of the House of Representatives signed a letter supporting the bill. These signatories, representing over three-quarters of the 85-member freshman Republican class in this 112th Congress (2011-2012), argue that failure to enact an MTB would amount to a tax increase and that the benefits of the tariff suspensions are available to all manufacturers. This followed a similar letter that Americans for Tax Reform sent to committee leaders on Congress on April 17, also arguing that the MTB is a tax cut that should not be confused with earmarks.

As discussed in our last report (WTR Vol. 28 No. 13) an MTB is a bill that brings together dozens or hundreds of separate measures to suspend or reduce tariffs on specific items. The association of these bills with special-interest earmarks has, however, prevented the enactment of a new MTB since 2010, and threatens to delay or defeat the current initiative.

The arguments presented in the freshmen's letter are not universally persuasive. Among those who continue to see the MTB as comparable to earmarks are Chairman Paul Ryan (R-WI) of the House Budget Committee, who is a very popular leader of the "deficit hawks," and the non-partisan group Taxpayers for Common Sense.

As an alternative to the present system, which is driven by members of Congress who promote specific tariff suspensions that benefit firms and industries in their constituencies, a bill sponsored by Senator DeMint (R-SC) would transfer the initiative to the U.S. International Trade Commission (USITC). His "Removing Hurdles for American Manufacturers Act of 2011" (S.1162) would instead have the USITC propose MTBs that Congress would then approve or reject.

In the meantime, new bills are piling up as the April 30 deadline approaches. Members of the House and (to a much lesser degree) the Senate introduced 64 new tariff suspension bills after returning from their break last week, as summarized in Table 2. If previous years are any indication, there may be many dozens or even hundreds more introduced in the final days of this month, after which the vetting process will begin. While that vetting of the separate bills is under way, members of Congress — and especially members of the Republican caucus — will continue to debate whether the final product of this process can be enacted without violating the pledge against earmarks.

Table 2: Tariff-Suspension Bills Introduced April 16-19

Bill	Sponsor	Subheading
H.R.4354	Mulvaney	4-propylbenzaldehyde
H.R.4355	Mulvaney	Quinaldine
H.R.4356	Mulvaney	Leucoquinizarin
H.R.4357	Mulvaney	1-nitroanthraquinone
H.R.4358	Mulvaney	2-methyl-5-nitrobenzenesulfonic acid
H.R.4359	Mulvaney	Benzenesulfonyl chloride
H.R.4380	Young	Capacitor grade homopolymer polypropylene resin
H.R.4392	Honda	Subassemblies for apparatus measuring electrical quants.
H.R.4393	Honda	Parts of apparatus for measuring electrical quantities
H.R.4416	Bishop	Certain acrylic filament tow
H.R.4417	Bishop	Certain acrylic filament tow
H.R.4418	Bishop	Certain acrylic staple fibers
H.R.4419	Bishop	Certain acrylic filament tow
H.R.4420	Bishop	Certain acrylic filament tow
H.R.4422	Carney	Certain staple fibers of viscose rayon
H.R.4423	Carney	Cyan 854 inkjet printing ink
H.R.4424	Carney	Cyan 1 ro inkjet printing ink
H.R.4425	Carney	Black 661 inkjet printing ink
H.R.4426	Carney	Black 820 inkjet printing ink
H.R.4427	Carney	Phenyl (4,6-dimethoxy-pyrimidin-2-yl) carbamate
H.R.4428	Carney	[chemical with a very lengthy name]
H.R.4429	Carney	Lamps used in liquid chromatographs/spectrophotometry
H.R.4430	Carney	Pyrithiobac-sodium
H.R.4431	Carney	Ethyl 2-(isocyanatosulfonyl)benzoate
H.R.4432	Carney	Flutolanil
H.R.4433	Carney	Buprofezin
H.R.4434	Carney	Pyraflufen-ethyl
H.R.4435	Carney	Triasulfuron
H.R.4436	Carney	Phosphoric acid
H.R.4437	Carney	Thiamethoxam
H.R.4438	Carney	Trifloxysulfuron-sodium
H.R.4439	Carney	Fenpyroximate
H.R.4440	Cassidy	Glyoxylic acid
H.R.4445	Coble	Certain acrylic staple fibers
H.R.4446	Coble	Certain acrylic staple fibers

Bill	Sponsor	Subheading
H.R.4447	Coble	Certain acrylic staple fibers
H.R.4448	Coble	Certain acrylic staple fibers
H.R.4449	Coble	Certain acrylic staple fibers
H.R.4450	Coble	Certain acrylic staple fibers
H.R.4451	Coble	Certain acrylic staple fibers
H.R.4452	Coble	Certain acrylic staple fibers
H.R.4453	Coble	Certain acrylic staple fibers
H.R.4455	Higgins	Certain bags for toys
H.R.4456	Higgins	Certain infants' products
H.R.4459	Luetkemeyer	Thidiazuron
H.R.4460	Luetkemeyer	Fenamidone
H.R.4461	Luetkemeyer	Spirodiclofen
H.R.4462	Luetkemeyer	2,4-dichloroaniline
H.R.4463	Luetkemeyer	Thiacloprid
H.R.4464	Luetkemeyer	Pyrimethanil
H.R.4465	Luetkemeyer	Pyrasulfotole
H.R.4466	Luetkemeyer	Fosetyl-al
S.2302	Leahy	Ski boots, cross country ski footwear & snowboard boots
S.2305	Lieberman	Yarn of carded hair of kashmir (cashmere) goats
S.2306	Lieberman	Fine animal hair of kashmir (cashmere) goats
S.2307	Lieberman	Yarn of carded cashmere 19.35 metric yarn count
S.2308	Lieberman	Yarn of combed cashmere or yarn of camel hair
S.2309	Lieberman	Camel hair, carded or combed
S.2310	Lieberman	Woven fabrics containing 85% or more of vicuna hair
S.2311	Lieberman	Waste of camel hair
S.2312	Lieberman	Camel hair, not processed
S.2313	Lieberman	Camel hair, processed
S.2314	Lieberman	Noils of camel hair
S.2315	Lieberman	Yarn of carded camel hair

Note: Only chief sponsors are listed. A bill may have one or more co-sponsors.

Senate Agriculture Committee Leaders Introduce Joint Farm Bill

The debate over the 2012 farm bill entered a new phase on April 20 when the two leaders of the Senate Committee on Agriculture, Nutrition and Forestry jointly unveiled their 2012 Farm Bill Committee Print. This massive, 900-page draft that Chairman Debbie Stabenow (D-MI) and Ranking Member Pat Roberts (R-KS) introduced will form the basis for the committee's efforts to devise and enact a new bill this year.

The current, 2008 farm bill expires this year. It remains uncertain whether the 112th Congress (2011-2012) will succeed in enacting a new farm bill in the heat of an election year, or if it will instead be limited to some form of roll-over that continues most of the terms of the 2008 law (perhaps with some tweaks) until a new bill can be enacted either in a post-election "lame duck" session or in the 113th Congress (2013-2014).

Like most of the other proposals that have been floated in recent months, much of this draft is based on the elimination of direct payments to farmers. These payments would instead be replaced by insurance programs (called

"risk management" in the bill) that compensate farmers for losses. This trend is viewed with concern by some trade experts, for whom the movement in past decades from price supports to direct payments was seen as a reform that made subsidies less trade-distorting. To put matters in World Trade Organization terms, those earlier reforms moved subsidies from the "amber box" to the "green box," but the trend today may move in the opposite direction.

Other trade-related aspects of the bill will also come under close scrutiny. This will include provisions concerning cotton, where the bill may not square with the commitments that the United States made to Brazil in the settlement of the cotton case, as well as sugar, dairy products, and export-promotion programs.

A future issue of the WTR will examine this bill more closely, together with an analysis of what the 2012 Farm Bill debate means for U.S. agricultural trade policy and negotiations.

Hearing on Bill to Encourage Exports to Africa

House Foreign Affairs Committee's Subcommittee on Africa, Global Health, and Human Rights hearing webcast.

The House Foreign Affairs Committee's Subcommittee on Africa, Global Health, and Human Rights held a hearing on April 17 to examine the "Increasing American Jobs through Exporting to Africa Act" (H.R.4221/S.2215). Sponsored by Subcommittee Chairman Chris Smith (R-NJ), and representatives Jim McDermott (D-WA) and Bobby Rush (D-IL), the bill would expand existing programs, including tied aid and investment resources, Federal development agencies involved in export promotion, the African Growth and Opportunity Act resources, and other facilities to improve U.S. competitiveness among African countries. The bill is aimed particularly at improving U.S. competitiveness in the region as exporters and investors face challenges for resources and markets from China and other countries developing trade partnerships on the African continent.

The subcommittee heard testimony from State Department's Assistant Secretary for Bureau of African Affairs Johnnie Carson who supported the bill. Noting that "[o]ur efforts to increase our commercial engagement in Africa are a part of Secretary Clinton's global focus on economic statecraft," Carson told the subcommittee that his bureau "has instituted a number of programs that move beyond the traditional focus on development assistance and that place a special interest on promoting a full range of commercial and trade activities."

At the end of his testimony the ambassador made a special plea for Congress to move as quickly as possible to reauthorize the textile and apparel provisions of September, 2012. The looming expiration of the program, he said, is already hurting apparel orders to Least Developed Developing Countries of the AGOA. He was joined in this request by Assistant U.S. Trade Representative Florizelle Liser.

The subcommittee also took testimony from human rights activist Isaiah Washington of The Gondobay Manga Foundation, who regretted the paucity of information on the attractive opportunities in Africa for foreign investors. Arguing that higher income African Americans could be a natural group to attract to African investments, Washington said, "This bill could be the catalyst to open the floodgates of American investment and business-to-business relationships with African partners that will fulfill the promise of AGOA and create more development than any aid program could ever hope

to achieve." Scott Eisner of the U.S. Chamber of Commerce and Reginald Maynor of Luster Products Inc. also enthusiastically supported the bill.

Hearing on Encouraging Domestic Manufacturing

The House Energy and Commerce Committee's Subcommittee on Commerce, Manufacturing and Trade held a hearing on April 19 to discuss obstacles to domestic manufacturing and the role of Congress in improving the environment for domestic manufacturing. Subcommittee Chairwoman Mary Bono Mack (R-CA) bemoaned the hit taken by manufacturing during the current recession, but included hope that the sector could revive. The purpose of the hearing was to examine several questions, including "What are the most important policy areas for Congress to address in order to remediate the external policy-related costs imposed on the manufacturing sector?"

Commerce Secretary John Bryson testified, listing the Obama administration's effort to increase U.S. exports, and to open foreign markets. He lauded Congress' quick approval of legislation allowing the use of countervailing as well as antidumping trade remedies against unfairly subsidized or dumped products from nonmarket economies (the "GPX" bill). He also called on Congress to pass legislation reauthorizing the Export-Import Bank and revocation of Jackson-Vanik as it applies to Russia. "Without Congressional action on both, our exporting manufacturers will be at a competitive disadvantage," Bryson warned.

Al Lubrano of the National Association of Manufacturers recommended that Congress should address a "pro-manufacturing tax rate," including reducing the corporate tax rate to 25%, eliminating tax disadvantages to U.S. multinational companies, and other tax changes. He called for a "progressive international trade policy" that limits costs and other impediments imposed on U.S. manufacturers, opens foreign markets to U.S. products, levels the playing field for American exporters in terms of exporter support, and supports effective and enforceable compliance to transparent rules of fair competition.

Among the glimmers of good news for the U.S. manufacturing sector that the subcommittee pointed to was a report by the Boston Consulting Group that predicts a return of manufacturing to the United States from China. The report postulates that rising wages and the rising cost of energy and real estate in China, and the rising cost of transporting goods back to the United States my soon reduce the competitive edge that China has enjoyed.

Bill to Ban Sale or Trade in Pesticides Containing Atrazine

Representative Keith Ellison (D-MN) and two cosponsors have introduced an untitled bill (H.R.4318) that would ban the use, production, sale, importation, or exportation of atrazine (pesticide chemical 2-chloro-4-ethylamino-6-isopropylamino-1,3,5-triazine) or an atrazine-containing product. Atrazine is an herbicide intended for use in killing weeds. The bill has been referred to four committees.

Explosive Materials Import Identification

Bureau of Alcohol, Tobacco, Firearms and Explosives
Comment request
Deadline: May 17, 2012

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) will be submitting the following information collection request to the Office of Management and Budget (OMB). ATF says that the information is necessary

Federal Register: April 17, 2012 (Vol.77 No.74)
Contact: William Miller (202) 514-4304

to ensure that explosive materials can be effectively traced. All licensed importers are required to identify by marking all explosive materials they import for sale or distribution. The process provides valuable information in explosion and bombing investigations, according to ATF.

Country-of-Origin Markings for Containers and Imported Articles

U.S. Customs and Border Protection
Comment request
Deadline: May 21, 2012
Federal Register: April 19, 2012 (Vol.77 No.76)
Contact: Tracey Denning (202) 325-0265

U.S. Customs and Border Protection (CBP) is submitting to the Office of Management and Budget its request to continue information collection of marking requirements for imported articles or their containers with no change to the existing requirement. Section 304 of the Tariff Act of 1930 as amended (19 U.S.C. 1304) requires each imported article of foreign origin, or its container, to be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article or container permits, with the English name of the country of origin.

FMC Invites Comments on NVOCC Tariff-Requirement Exemption

Federal Maritime Commission
Notice of Inquiry
Comment deadline: June 18, 2012
Federal Register: April 18, 2012 (Vol.77 No.75)
Contact: Karen V. Gregory (202) 523-5725

The Federal Maritime Commission seeks comments on its rules that exempt non-vessel-operating common carriers (NVOCCs) who enter into service arrangements from certain tariff filing requirements of the Shipping Act of 1984. The rule allows NVOCCs to enter into NVOCC service arrangements (NSAs) with their customers in lieu of publishing those arrangements in a publicly-available tariff, as otherwise would be required by Sections 8(a) and 10 of the Shipping Act. In the preamble to the final rule, the Commission stated that it would continue to consider how it could remove limitations on shipper participation while ensuring that the criteria of Section 16 were met.

In 46 CFR part 531, the Commission's rules define an NSA as a written contract other than a bill of lading or receipt between one or more NSA shippers and an individual NVOCC or two or more affiliated NVOCCs in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level. An NSA shipper is a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, a shippers' association, or a non-vessel-operating common carrier. Specifically, the exemption allows individual NVOCCs (including corporately affiliated NVOCCs), who are compliant with the other requirements of the Shipping Act and FMC regulations to enter into an NSA with one or more NSA shippers.

In its Plan for Retrospective Review of Existing Rules, published on November 4, 2011, the Commission announced its intention to conduct a full review of part 531, governing NSAs, no later than 2013. The purpose of the review is to determine whether the NSA regulations should be modified, streamlined, expanded, or repealed to make them more effective or less burdensome. Accordingly, the Commission now invites comment and information from all members of the interested public (whether they be located in the United States or elsewhere), including ocean common carriers, ocean transportation intermediaries, exporters, and beneficial cargo owners, on ways to improve or change part 531. The Commission specifically requests comments and current information on (1) extending the exemption to allow two or more unaffiliated NVOCCs to jointly offer NSAs, and (2) how to make the NSA rules less burdensome and more effective in achieving the

objectives of the Shipping Act. Comments that are specific and provide supporting data are most helpful.

Commercial Vessel Passenger and Crew Lists

U.S. Customs and Border Protection
Comment request
Deadline: May 17, 2012
Federal Register: April 17, 2012 (Vol.77 No.74)
Contact: Tracey Denning (202) 325-0265

U.S. Customs and Border Protection (CBP) is submitting to the Office of Management and Budget its request to continue information collection of Passenger List/Crew List (CBP Form I-418). CBP Form I-418 is prescribed by the Department of Homeland Security, Customs and Border Protection (CBP), for use by masters, owners, or agents of vessels in complying with Sections 231 and 251 of the Immigration and Nationality Act (INA). This form is filled out upon arrival of any person by commercial vessel at any port within the United States from any place outside the United States. The master or commanding officer of the vessel is responsible for providing CBP officers at the port of arrival with lists or manifests of the persons on board such conveyances.

Added Requirement for Persons Shipping under End-User Authorization

Bureau of Industry and Security
Proposed rule
Comment deadline: June 18, 2012
Federal Register: April 17, 2012 (Vol.77 No.74)
Contact: Karen H. Nies-Vogel (202) 482-5991

The Bureau of Industry and Security (BIS) proposes to amend the Export Administration Regulations (EAR) by adding a requirement for persons shipping under Authorization Validated End-User (VEU) to send written notice of such shipments to the recipient VEU. BIS further proposes to amend the EAR to clarify that when items subject to item-specific conditions under Authorization VEU no longer require a license for export or reexport or become eligible for shipment under a license exception, as set forth in the EAR, VEUs are no longer bound by the conditions associated with such items.

ITAR Change: DSP-53 International Import Certificate Replaced by DSP-61 Form

State Department
Final rule
Effective date: May 17, 2012
Federal Register: April 17, 2012 (Vol.77 No.74)
Contact: Candace Goforth (202) 663-2792

The Department of State is amending the International Traffic in Arms Regulations (ITAR) to remove reference to the International Import Certificate (Form BIS-645P/ATF-4522/DSP-53). This amendment ceases the department's practice of accepting DSP-53 submissions. Instead, the DSP-61 is to be used by importers when necessary. The department also is making administrative changes to other sections.

FDA: Submit only Standard Entry Docs through ITACS Temporarily

The Food and Drug Administration (FDA) issued a notice on April 16 asking Import Trade Auxiliary Communication System (ITACS) users to submit only standard entry documentation (CF3461, Invoice, Packing List, etc.) through ITACS at this time. Compliance documentation such as private lab submissions, reconditioning proposals, extension requests and copies of labeling should continue to be submitted through traditional means until the agency can resolve a document retrieval issue on our side.

The FDA would also like to advise filers that entry documentation may be submitted via ITACS at the time an entry is filed, rather than waiting for a document request. Doing so may assist the agency's staff in reviewing entries in a timely manner.

Please send any questions about this message or ITACS to itacssupport@fda.hhs.gov.

Info to Help CBP Identify Counterfeit Merchandise at the Border

U.S. Customs and Border Protection
Comment request
Comment deadline: May 17, 2012
Federal Register: April 17, 2012 (Vol.77 No.74)
Contact: Tracey Denning (202) 325-0265

U.S. Customs and Border Protection (CBP) is submitting to the Office of Management and Budget its request to continue information collection from trademark and trade name owners and those claiming copyright protection who may submit information to CBP to enable CBP officers to identify violating articles at the border. Parties seeking to have merchandise excluded from entry must provide proof to CBP of the validity of the rights they seek to protect. The information collected by CBP is used to identify infringing goods at the border and determine if such goods infringe on intellectual property rights for which Federal law provides import protection.

Fresh Pomegranates from Chile without Methyl Bromide Fumigation

Animal and Plant Health Inspection Service, Agriculture Department
Final rule
Effective date: May 17, 2012
Federal Register: April 17, 2012 (Vol.77 No.74)
Contact: Claudia Ferguson (301) 851-2352

The Animal and Plant Health Inspection Service (APHIS) will allow the importation into the continental United States of pomegranates from Chile, subject to a systems approach. Under this systems approach, the fruit would have to be grown in a place of production that is registered with the national plant protection organization of Chile and certified as having a low prevalence of *Brevipalpus chilensis*. The fruit would have to undergo pre-harvest sampling at the registered production site. Following post-harvest processing, the fruit would have to be inspected in Chile at an approved inspection site. Each consignment of fruit would have to be accompanied by a phytosanitary certificate with an additional declaration stating that the fruit had been found free of *Brevipalpus chilensis* based on field and packinghouse inspections. APHIS believes this approach will allow for the safe importation of fresh pomegranates from Chile using mitigation measures other than fumigation with methyl bromide.

2012 Tariff Rate Quota for Canned Tuna

U.S. Customs and Border Protection
Announcement
Federal Register: April 17, 2012 (Vol.77 No.74)
Contact: HQ Quota Branch (202) 863-6560

Each year, the tariff-rate quota for tuna described in subheading 1604.14.22, HTSUS, is based on the apparent United States consumption of tuna in airtight containers during the preceding Calendar Year. This document sets forth the tariff-rate quota for Calendar Year 2012. The 2012 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1, through December 31, 2012.

USDA Increases FY2012 Beet and Cane Sugar Tariff Rate Quota

Agriculture Department
Notice
Effective date: April 19, 2012
Federal Register: April 19, 2012 (Vol.77 No.76)
Contact: Angel Gonzalez (202) 720-2916

The Agriculture Department announces a 51,000 short tons raw value (STRV) increase in the Fiscal Year (FY) 2012 Overall Allotment Quantity (OAQ), a reassignment of projected surplus beet sugar marketing allocations between beet processors, and a reassignment of surplus cane sugar marketing allotment from domestic sugarcane processors to a 420,000 STRV increase in the FY 2012 raw sugar tariff-rate quota.

The Office of the U.S. Trade Representative has now allocated this increase among supplying countries and customs areas, but (as of this writing) has not posted the announcement to its website.

Cases & Sanctions

Argentina Doubles Down: Expropriation of YPF-Repsol

See WTR Vol. 28 No. 11 on both the GSP case and the complaints against Argentina's import restrictions.

The proposed expropriations of YPF and YPF Gas, respectively, are described more fully in Decreto 530/2012 of April 16 and Decreto 557/2012 of April 18, both of which are accessible at http://www.boletinoficial.gov.ar/Inicio/Index.castle.

Relations between Argentina and its partners in North America and Europe grow more confrontational by the week. At a time when Buenos Aires is already engaged in a renewed war of words with Britain over the Falklands (or Malvinas), the country's refusal to honor arbitral awards led to its loss of duty-free access to the U.S. market under the Generalized System of Preferences, and a large and diverse group of countries issued a stern warning in the World Trade Organization against Argentina's recent import restrictions, a new dispute has broken out over the expropriation of Yacimientos Petrolíferos Fiscales (YPF) from the Spanish energy group Repsol.

The episode began on April 16 when, in a lengthy and discursive speech, President Cristina Fernández de Kirchner sent to the Argentine Congress a draft law for the expropriation of YPF. The action effectively increases the Government of Argentina's ownership from 26% to 51%. The severe criticism that this move came under in the following days did not prompt her government to retreat. Quite to the contrary, she doubled down on this bet by announcing on April 19 that her government would also expropriate YPF's Argentine gas subsidiary.

In her April 17 remarks, EU High Representative for Foreign Affairs and Security Policy Catherine Ashton called the expropriation "cause for grave concern" that "sends a very negative signal to international investors and … could seriously harm the business environment in Argentina." Noting her "alarm" that President Kirchner has also referred to investments in other sectors such as telecom and banking, Ashton said that, "As a result of this announcement, we have decided to postpone the EU-Argentina Joint Cooperation Committee which had been scheduled to take place on Friday this week," and that "[a]ll possible options are being analysed."

The case has thus far attracted more attention in Europe, and especially Madrid, than in the United States. The State Department initially responded cautiously, with a spokesman having stated at a April 16 press briefing that the department is "following developments on this issue" and was not "not currently aware of any WTO complaints related to this issue." A European Union official more correctly noted in an interview the following day that investment issues *per se* are not within the purview of the WTO, apart from those affecting countries' commitments on trade in services. That point has apparently not prevented both Spain and Colombia from threatening to bring action in that body.

The more likely path for this case, apart from heavy diplomatic pressure on Argentina, is arbitration in the International Center for the Settlement of Investment Disputes (ICSID). ICSID is the principal body where cases involving expropriations and violations of bilateral investment treaties (BITs) are heard. Chairman Antonio Brufau of Repsol said the group will demand $10 billion in compensation at ICSID, which is two orders of magnitude higher than the larger Argentine cases that have previously been brought to that body.

Argentina has no fewer than 56 BITs, according to ICSID's catalog, including treaties with Spain (in force since 1992) and the United States

See the U.S. Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment.

(since 1994). That is only a slightly larger number than the total arbitration cases that have been brought against Argentina in ICSID (49). This one country has in fact accounted for 12.9% of all cases brought to ICSID, most of them involving oil, gas, electricity, or water. The last such case was brought in 2009, but these latest developments suggest that more complaints against Argentina are about to come in a new and larger wave. Argentina has a poor track record of abiding by the rulings made in ICSID, however, a fact that led to the Obama administration's recent suspension of Argentina's GSP privileges.

Argentina's decision hurts future investment in Latin America, according to Chilean Economy Minister Pablo Longueira. Speaking in advance of a meeting of Group of 20 trade officials, Minister Longueira called for G20 countries to stand against protectionism. Argentina is a G20 member, though Chile is not. If the editorial board of the *Wall Street Journal* had its way, however, at least the first half of that statement would be revised.

See the Wall Street Journal's April 18 editorial entitled "Why not Expel a Thieving Buenos Aires from the G-20?"

The G20 trade ministerial offered an opportunity for 19 of the countries to level criticism at one among them. It is difficult to read the recommendations emerging from that meeting as anything other than a rebuke of Argentina, as they placed a heavy emphasis on investment measures. Their six points included declarations that "The G20 must lead by example by endorsing measures that promote trade and investment instead of choosing those that reject them," "The G20 must support the advancement of specific issues on the WTO agenda by order of priority," and "The G20 must reiterate its support to a policy of open borders to promote investment as an engine for triggering development, growth and job creation."

Harbor Maintenance Tax Case Settled at Court of Appeals for the Federal Circuit

Prepared by Laura Fraedrich
Kirkland & Ellis LLP
(202) 879-5990
lfraedrich@kirkland.com

CAFC Affirms Denial of HMT Refunds

Ford Motor Co. v. United States, slip op. 2011-1224 (Fed. Cir. Apr. 16, 2012)

The U.S. Court of Appeals for the Federal Circuit reviewed the decision of the U.S. Court of International Trade ("CIT") ruling that Ford did not submit the proof of payment of export taxes required by the applicable regulations to obtain refunds of Harbor Maintenance Tax ("HMT"). The Federal Circuit agreed with this result. Ford sought refunds of an additional $2.5 million dollars, using various documents to support these claims. The Federal Circuit noted that U.S. Customs and Border Protection had explained that it would "accept as proof of payment, when required to be submitted, whichever type of document Customs accepted with the payment at the time it was made." Ford simply did not submit the documentation to clearly prove that payments were made for export HMT in the amounts sought to be refunded.

Commerce Fails to Support AFA Rate

Maclean-Fogg Co. v. United States, slip op. 12-47 (Ct. Int'l Trade Apr. 4, 2012)

An exporter and four U.S. importers of extruded aluminum from China challenged the all-others countervailing duty rate calculated by the Department of Commerce. Commerce used the 374.15% adverse facts available rate assigned to the mandatory respondents who did not participate in the investigation and did not use the much lower rates calculated for two voluntary respondents.

The CIT first considered plaintiffs argument that the statute prohibited Commerce from excluding rates calculated for voluntary respondents and rejected this argument. The CIT also rejected the argument that the regulations on the subject were not validly promulgated. However, the CIT agreed with plaintiffs that Commerce's choice of the rate was not adequately supported and remanded the matter to Commerce. The CIT noted that "there is nothing in Commerce's decision which indicates a logical connection between the AFA rate and Commerce's conclusion to apply that rate to the remaining parties."

Sawblades Saga Continues

Diamond Sawblades Manufacturers. Coalition v. United States, slip op. 12-46 (Ct. Int'l Trade Mar. 29, 2012)

Procedural debates continue in the longstanding dispute regarding the antidumping duty investigation of diamond sawblades from Korea. The U.S. Government moved to amend the injunction against liquidation of the diamond sawblades to permit liquidation of entries on or after the effective date of a notice revoking the order, which would impact relief sought by the U.S. industry in its challenge to the dumping margin Commerce calculated in the investigation. The U.S. industry also moved to amend its complaint. The CIT denied the requested amendment to the injunction, noting that the revocation notice was interlocutory and that amendment of the injunction could moot most of the relief sought in the case. On the other hand, the CIT granted the motion to amend the complaint. finding that there was no actual unfair disadvantage as a result of the timing of the motion or otherwise.

U.S., EU, Japan Move to Lift Some Sanctions on Burma

See the page on U.S. sanctions in place against Burma posted by the Office of Foreign Assets Control. These include the Burmese Freedom and Democracy Act of 2003 (P.L.108-61) and the Block Burmese JADE Act of 2008 (P.L. 110-286).

Chairman Jim Webb (D-VA) of the Senate Foreign Relations Committee's Subcommittee on East Asian and Pacific Affairs said on April 19 that the United States should open trade relations with Myanmar (Burma) in recognition of President Thein Sein's "bold leap" in political reform. Webb, who travelled to Burma earlier this month to meet with the newly elected parliamentarian Aung San Suu Kyi and others in the opposition party, said that a U.S. move to relax sanctions would be appropriate at this time to bolster the reform effort. Senator Webb has long made U.S. relations with Burma a top personal priority. He opted not to seek a second term in this year's election.

Following the April 1 elections in that country, the Obama administration said that the United States would begin easing some sanctions on Burma. On April 4 Secretary of State Hillary Clinton announced that the United States would initiate a series of steps as the reform process unfolds.

Investment and financial services sanctions against Burma have been in place since 1997. Executive Order (EO) 13047, signed by President Clinton in 1997, bars new investment by U.S. persons or the export of financial services by U.S. persons. In recent years, Congress has enacted two laws banning trade in Burmese goods, especially Burmese gems, as well as targeted sanctions against senior government officials and their relatives.

The European Parliament reached a preliminary decision on April 19 to lift most of Europe's sanctions against Burma for a one-year period. The EU is expected to approve the 12-month suspension of sanctions today, April 23 during a meeting of EU foreign ministers in Luxembourg. Only the embargo on arms sales would remain.

In further support for Burma's reform effort, the government of Japan is reportedly prepared to waive Burma's $3.7 billion debt, and resume

assistance to the country. Prime Minister Yoshihiko Noda is currently expected to announce the two-phase waiver at a meeting with President Thein Sein scheduled for later this week.

India Files Its Steel Complaint against the United States in WTO

On April 12 India requested consultations with the United States under dispute-settlement procedures of the World Trade Organization (WTO) with regard to the imposition of countervailing duties (CVD) by the United States on certain hot rolled carbon steel flat products from India (DS436) (WTR Vol. 28 No. 13). The details of the complaint were delayed at the time but have now been posted. The complaint concerns a CVD order (C-533-821) dating from 2001, and reaffirmed in a sunset review conducted in 2007 for a further five years. The request covers the CVDs and other measures, if any, applied on the subject goods from India through any notice, determination, decision memorandum, order, or any other instrument issued by the United States from time to time in connection with the case.

U.S.-Mexico Poultry Dispute Continues; Senators Signal Strong Interest

Mexico's antidumping investigation of chicken parts from the United States appears to be proceeding toward a final determination, expected in late July. Behind the scenes, however, U.S. and Mexican officials have been holding talks to resolve the dispute. According to a source who has been following the meetings closely, despite rumors that those negotiations had collapsed late last week, they have not. One individual speculated that "the Mexican Government might just be trying to make the whole thing go away. But [the negotiations] haven't collapsed. Maybe it's just wishful thinking on their [Mexican government's] part."

U.S. poultry exporters have been fighting the trade-remedy investigation since well before it was initiated last summer. They offered to support an import quota that would have capped total U.S. exports of chicken parts while allowing an uninterrupted flow across the border, but were turned down. Mexico's largest poultry producers then filed a complaint that initiated the antidumping investigation against chicken leg quarters from the United States, contending that they were being sold at a lower price than in the United States. The preliminary finding of 129.5% has not been imposed however, pending the final determination.

The issue is of particular concern to senators representing poultry-producing states. On April 2 a bipartisan group of 16 senators led by Senator Tom Carper (D-DE) wrote to U.S. Trade Representative Ron Kirk (WTR Vol.28 No.12) complaining about the "flawed" and "frivolous" antidumping investigation. They called on the USTR to negotiate a termination of the investigation. One Senate aide told WTR that the senators are "keenly interested. This is not just one of those things where they write a letter and that's it. They are asking for updates frequently." The aide said that the senators believe it is "very important that the Mexican Government knows that this is not going away. And it is in their interest for this to be resolved." The senators link this dispute to "flaws in NAFTA," the aide said. "Our constituents have a certain perception about that trade agreement and it's like a ghost that haunts every other" trade agreement, the aide continued, so "if they think they're being treated unfairly in this trade agreement, why would they support [the TransPacific Partnership], especially for Mexico?"

One aide told WTR that some senators would like to impress upon Mexico that its trade-remedy action violates that country's NAFTA commitments, and could be taken into consideration as Mexico seeks U.S. support to join the TransPacific Partnership trade negotiations. The aide said that staffers for several of the interested senators are "busy gathering as much information about this as we can." They expect to discuss the current situation over the next few days and weeks to consider next steps.

Airports That May Accept Flights to/from Cuba

U.S. Customs and Border Protection
Final rule; technical amendment
Effective date: April 20, 2012
Federal Register: April 20, 2012 (Vol.77 No.77)
Contact: Arthur A. E. Pitts, Sr. (202) 344-2752

Customs and Border Protection is updating the list of airports authorized to accept aircraft traveling to or from Cuba. Those airports include some of the largest in the United States, such as Hartsfield-Jackson Atlanta International Airport, Dallas/Fort Worth International Airport, and O'Hare International Airport. These approved airports are added to the original list of three airports authorized to accept flights to or from Cuba, namely John F. Kennedy International Airport, Los Angeles International Airport, and Miami International Airport.

A CBP official told WTR that any carrier that wants to participate in the U.S.-Cuba service is invited to apply with the Treasury Department's Office of Foreign Assets Control (OFAC). To date 16 such applications have been approved, but the office declined to divulge the total number of applications received. No applications have been filed in the last month.

USTR Invites Comments on Airbus Dispute in WTO

Office of the U.S. Trade Representative
Comment request
Deadline: May 21, 2012
Federal Register: April 19, 2012 (Vol.77 No.76)
Contact: Willis S. Martyn (202) 395-3150

On March 30, 2012, the United States requested establishment of a dispute settlement panel in the World Trade Organization (WTO) regarding the proceeding regarding Airbus subsidies (DS316). The Office of the U.S. Trade Representative invites written comments from the public concerning the issues raised in this dispute.

USTR: No Countries Deny U.S. Fair Market Opportunity for Airport Construction

Office of the U.S. Trade Representative
Notice
Federal Register: April 20, 2012 (Vol.77 No.76)
Contact: Jean Heilman Grier (202) 395-4678

Pursuant to section 533 of the Airport and Airway Improvement Act of 1982, as amended (49 U.S.C. 50104), the U.S. Trade Representative has determined not to list any countries as denying fair market opportunities for U.S. products, suppliers, or bidders in foreign government-funded airport construction projects.

Anti-Tobacco Group Urges USTR to Comply with WTO Ruling

Former Secretary of Health, Education, and Welfare Joseph Califano and former Secretary of Health and Human Services Louis Sullivan, M.D. cosigned a letter to U.S. Trade Representative Ron Kirk on April 18 strongly endorsing the recent ruling by the Appellate Body of the World Trade Organization (WTO) regarding a ban on the use of cloves and other flavoring agents in cigarettes. The panel sided with Indonesia in its complaint against the "Family Smoking Prevention and Tobacco Control Act." That law prohibits the use of characterizing flavorings such as cloves, in cigarettes; the only flavoring allowed by the law is menthol. The Citizens'

Commission to Protect the Truth asked the USTR to ask the Food and Drug Administration "to exercise its regulatory authority in accordance with the recommendation of its own Congressionally-appointed committee to ban menthol cigarettes."

Actions Taken under the Trade-Remedy Laws by the International Trade Administration (ITA) and the U.S. International Trade Commission (ITC)

Law	Product	Exporters	Action	FR Vol.77
AD	Frozen shrimp	Vietnam	ITA final results of changed circumstances review	#75
AD	Brass sheet and strip	France, Germany, Italy, Japan	ITC affirmative determinations of sunset reviews	#76
AD	Orange juice	Brazil	ITA revocation of order	#77
AD	Silicon metal	China	ITA continuation of order	#77
AD/ CVD	Drawn stainless steel sinks	China	ITC affirmative preliminary determinations	#77
AD	Stilbenic optical brightening agents	China, Taiwan	ITC affirmative determinations	ITC
AD	Steel nails	United Arab Emirates	ITC affirmative determination	ITC
AD/ CVD	Steel wheels	China	ITC negative determinations	ITC
AD	Tapered roller bearings and parts	China	ITA amended final results of administrative review weighted average margin is 14.98 percent	#78
AD/ CVD	Corrosion-resistant carbon steel flat products	Germany, Korea	ITC determination to conduct full five-year reviews	#78
AD	Lightweight thermal paper	Germany	ITA final results of 2009-2010 administrative review weighted average margin is 3.99 percent	#68
AD	Ammonium nitrate	Russia	ITA invites requests for administrative review	#69
AD	Cut-to-length carbon-quality steel plate	Korea	ITA final results of administrative review weighted average margin is 1.64 percent	#69
AD	Crawfish tailmeat	China	ITA final results of administrative review weighted average margin ranges from 18.87 to 70.12 percent and rescission of review in part	#69
AD	Glycine	China	ITA preliminary partial affirmative determination of circumvention of order and initiation of scope inquiry	#69
AD	Wooden bedroom furniture	China	ITA final rescission of new shipper review	#69

Studies & Events

Treasury Misses Deadline for Currency Manipulation Report

The Treasury Department missed its statutory deadline of April 15 for the semi-annual report to Congress on international economic and exchange rate policies of major trading partners. The department blamed several recent and upcoming international meetings for the failure to meet the deadline (WTR Vol. 28 Nos. 11, 13). Treasury did not give any prediction regarding when the report will be published.

The report is eagerly awaited in Congress, primarily because, under the Omnibus Trade and Competitiveness Act of 1988 under which the report is mandated, Treasury is supposed to name those countries that are deliberately manipulating their currency valuations "for purposes of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade." In its most recent report, released in December, 2011, Treasury observed,

> [I]n light of the persistent misalignment of the RMB at a substantially undervalued level, Treasury assesses that movement of the RMB to date is insufficient and more progress is needed. Treasury will continue to closely monitor the pace of RMB appreciation and press for policy changes that yield greater exchange rate flexibility, level the playing field, and support a pronounced and sustained shift to domestic-demand led growth.

In related news, Ford Motor Company's Michael Sheridan held an online presentation on April 17 in which he advocated a new trade policy that incorporates foreign-exchange policy measures in all future free-trade agreements. Sheridan said that new models of free-trade agreements must have a "core principle" of no currency manipulation. As he envisioned such trade agreements, participating countries would agree on definitions of what constitutes currency manipulation, as well as under what circumstances a country could artificially influence currency levels. Countries that fail to meet such guidelines would lose the benefits of the free-trade agreements, Sheridan said. The TransPacific Partnership (TPP) free trade agreement, which is being heralded as a high-standards agreement, would be an ideal accord in which to establish such a "new standard" for dealing with currency manipulation, Sheridan said.

World Bank Selects Kim as President

The World Bank's Board of Executive Directors selected the U.S. nominee for the position, Jim Yong Kim, to replace the retiring Robert Zoellick as the institution's next president. The Bank's choice continues the 68-year tradition of selecting the U.S. candidate for the office. Kim will assume the presidency of the institution as of June 1.

Senator Hatch of the Finance Committee Faces Primary Challenge

Senator Orrin Hatch (R-UT) will have to undergo a primary battle to secure his place as the Republican nominee in the November 6 general election. He fell slightly short of the 60 percent of ballots needed at the April 21 Utah Republican Convention to assure his victory as the Republican

candidate. Instead, because he garnered 59.1% of the vote, he will face former Utah State Sen. Dan Liljenquist in the June 26 primary election. If, as expected, Hatch is victorious and goes on to win a seventh term in the November 6 election, he will at least retain his position as ranking member of the Senate Finance Committee. If the Republicans take control of the Senate a reelected Hatch would assume the chairmanship of the committee.

NIST Invites Suggested Topics on Standards for Workshops

National Institute of Standards and Technology
Request for workshop recommendations
Federal Register: April 18, 2012 (Vol.77 No.75)
Contact: Mary Jo DiBernardo, (301) 975-5503

The National Institute of Standards and Technology (NIST) invites all interested parties, including U.S.-based manufacturers, U.S. industry and trade associations, and Federal government agencies, to submit recommendations and suggestions for workshops. Those workshops may cover specific sectors and targeted countries or regions of the world where training in the U.S. approaches to development and use of standards, including assessment of conformity to standards, that may facilitate trade, increase U.S. exports, and/or benefit U.S. industry.

Standards in Trade (SIT) workshops are designed to introduce U.S. stakeholders to emerging standards and conformity assessment issues in other countries and regions; identify regulatory information and market access issues; and provide timely information to foreign officials on U.S. practices in standards, metrology and conformity assessment. Interested parties must consider Administration priorities outlined in the current National Export Strategy.

NIST will offer a limited number of workshops each year. Most workshops will be scheduled for a three to five day period at NIST in Gaithersburg, Maryland. NIST will evaluate all recommendations and may use the suggested topics in planning its workshops, subject to the availability of resources. Additional guidance is available on the NIST Standards in Trade (SIT) workshop program Web page. The notice is not an invitation for proposals to fund grants, contracts, or cooperative agreements of any kind.

Teleconference on Exporting Renewable Energy and Efficiency Products

Renewable Energy and Energy Efficiency Advisory Committee
Teleconference dates: May 2-3, 2012
Federal Register: April 18, 2012 (Vol.77 No.75)
Contact: Brian O'Hanlon (202) 482-3492

The Renewable Energy and Energy Efficiency Advisory Committee (RE&EEAC) will meet via conference call to consider and vote on proposed recommendations from the Domestic Policy, Finance and Trade Subcommittees that address issues affecting U.S. competitiveness in exporting renewable energy and energy efficiency (RE&EE) products and services, such as access to finance and removal of trade barriers. The RE&EEAC will also review and vote on a draft letter to Secretary of Commerce, John Bryson, regarding the need for a strong domestic policy to encourage growth in the U.S. RE&EE markets as a strong base for exports.

CBP: ACE Reports Now Contain the Most Up-to-Date Data

U.S. Customs and Border Protection (CBP) announced on April 21 that the Automated Commercial Environment (ACE) data load has completed that affected all Entry Summary reports, all Declaration reports (under the Account Management folder), and AD-8027 (Trade Aged Liquidation ADCVD Entry Summary Report). These reports now contain the most up-to-date data.

Calendar of Events

For the full calendar of trade events go to http://www.WashingtonTradeReport.com/calendar

Date	Type	Event	More Information
April 23	Remedies	USITC final injury vote in AD/CVD investigation of galvanized steel wire from China and Mexico	USITC
April 23	Report	USITC report to House Ways and Means Committee on the global competitiveness of the U.S. business jet aircraft industry	USITC release
April 23-25	Meeting	2nd Annual International Trade Compliance Conference	On line
April 23-25	Meeting	Council of Supply Chain Management Professionals 8th European conference	On line
April 24	Meeting	WTO Dispute Settlement Body meeting	Agenda
April 24-26	Course	Complying with U.S. Export Controls (Milpitas, CA)	Bureau of Industry and Security
April 26	Data	BEA releases advance GDP by industry 2011	Bureau of Economic Analysis
April 27	Remedies	Approx. date for ITA final AD determination on high pressure steel cylinders from China	Fed.Reg. Vol.76 No.241
April 27	Data	BEA releases advance estimate of 1st quarter 2012 GDP	Bureau of Econ. Analysis
April 27	Regulatory	Due date for comments to APHIS on an information collection for restricted and controlled importation of nonfood animal and poultry products and byproducts	Fed.Reg. February 27, 2012 (Vol.77 No.38)
April 28-May 6	Legislative	House of Representatives not in session	House Calendar
April 30	Legislative	Due date for the submission of bills in Congress for inclusion in the 2012 miscellaneous tariff bill	—
April 30	Report	Due date for conclusion of the USTR's annual review of trading partners' protection of intellectual property rights	Fed.Reg. Vol.76 No.249
April 30-May 3	Course	U.S. Export Controls on Non-U.S. Transactions (London)	ECTI
May 1-2	Meeting	WTO General Council meeting	Agenda TBD
May 4	Data	BLS releases April employment report	Bureau of Labor Statistics
May 6	Election	Presidential election in France (second round)	Election Guide
May 6-9	Meeting	Warehousing Education and Research Council conference	WERC
May 7-8	Course	Complying with U.S. Export Controls (Washington, D.C.)	Bureau of Industry and Security
May 8	Regulatory	Due date for comments to Coast Guard on proposed amendments to regulations on the transfer of hazardous materials	Fed.Reg. March 9, 2012 (Vol.77 No.47)