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# The Consumer Product Safety Commission (CPSC) and International Trade: Legal Issues

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November 5, 2013

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R43297

## Summary

Most consumer products within the jurisdiction of the U.S. Consumer Product Safety Commission (CPSC) are imported into the United States. The CPSC is the central, federal authority for the promotion and enforcement of consumer product safety. In 2008, following several well-publicized national recalls of toys and children's products, many of which contained lead, Congress passed the Consumer Product Safety Improvement Act (CPSIA), which included provisions addressing the CPSC's role in ensuring the safety of imported and exported consumer products.

With regard to import safety, the CPSC acts in coordination with U.S. Customs and Border Protection (CBP), Department of Homeland Security, to evaluate the safety of consumer products offered for import into U.S. customs territory. Working together with CBP, the CPSC attempts to identify shipments that are likely to contain consumer products which violate import provisions that the agency enforces. The CPSC also determines whether to admit certain consumer products offered for import into U.S. customs territory. Importers of products manufactured outside of the United States must certify that finished products comply with all rules, bans, standards, or regulations applicable to the product under any act enforced by the CPSC.

The export of consumer products from the United States to foreign countries may also be subject to regulation by the CPSC. In the CPSIA, Congress provided that, among other things, the CPSC may prohibit the export from the United States for the purpose of sale any consumer product that violates a safety rule under the Consumer Product Safety Act (CPSA) unless the importing country informs the CPSC that it accepts the importation of the consumer product.

In addition to domestic laws pertaining to the CPSC's regulation of the import and export of consumer products, the United States has also agreed to undertake certain international obligations with respect to the promulgation of standards-related measures (e.g., product safety regulations) by its central government bodies, including the CPSC. These obligations are found in several international agreements to which the United States is party, including the multilateral World Trade Organization (WTO) Agreement on Technical Barriers to Trade (TBT Agreement), as well as bilateral and regional U.S. free trade agreements (FTAs). Among other things, the TBT Agreement establishes rules pertaining to the promulgation of technical regulations by central government bodies like the CPSC, including rules concerning nondiscrimination, transparency, and reliance on international standards as a basis for regulations. U.S. FTAs also contain additional obligations for certain parties with regard to transparency. Standards-related trade obligations have been implemented in U.S. law, particularly in the Trade Agreements Act of 1979.

In the 113<sup>th</sup> Congress, H.R. 1910, the Foreign Manufacturers Legal Accountability Act of 2013, would require the Chairman of the CPSC to mandate that certain foreign manufacturers and producers of consumer products distributed in commerce establish a registered agent in the United States to accept service of process on behalf of such manufacturer or producer for the purpose of any state or federal regulatory proceeding or civil action related to the product.

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## Introduction

Most consumer products under the jurisdiction of the Consumer Product Safety Commission (CPSC) are imported into the United States.<sup>1</sup> Each day in 2011, almost \$1.8 billion in such products entered the United States from 800,000 importers at 327 U.S. ports, according to statistics compiled by the CPSC.<sup>2</sup> More than 80% of the 473 consumer product recalls announced by the CPSC in FY2007 were recalls of imported products, and many of these products originated in China.<sup>3</sup> More recently, the CPSC reported that the agency, along with U.S. Customs and Border Protection (CBP), Department of Homeland Security, had stopped millions of units of imported consumer products that violated U.S. safety rules from reaching consumers in FY2012.<sup>4</sup>

In response to several recalls of lead-contaminated toys that had been manufactured in foreign countries such as China and imported into the United States, Congress passed the Consumer Product Safety Improvement Act (CPSIA) in 2008.<sup>5</sup> Among other things, the act contained new requirements for testing and certification of consumer products, as well as provisions addressing the CPSC's role with regard to the import and export of consumer products.<sup>6</sup>

Overseeing the safety of imported consumer products in cooperation with CBP is one of the roles that the CPSC plays with respect to international trade in consumer products that are under its jurisdiction.<sup>7</sup> The CPSC may also prohibit the export for sale of certain consumer products from the United States to foreign countries.<sup>8</sup> In addition, the CPSC is responsible for promulgating and enforcing certain mandatory product safety rules, bans, and standards.<sup>9</sup> The CPSC relies on voluntary standards issued by other bodies "whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards."<sup>10</sup> However, in some circumstances, the CPSC promulgates its own regulations or Congress enacts a standard.<sup>11</sup> The United States has undertaken international obligations with respect to the promulgation of technical regulations by central government bodies like the CPSC.<sup>12</sup> These obligations are contained in World Trade Organization (WTO) agreements such as the Agreement on Technical Barriers to Trade, as well as

<sup>1</sup> CPSC, International Activities, <https://www.cpsc.gov/en/Business--Manufacturing/International/>.

<sup>2</sup> CPSC, Fiscal Year 2013 Operating Plan 40 (2013), <http://www.cpsc.gov/Global/Budget/2013OperatingPlan.pdf>.

<sup>3</sup> CPSC, Import Safety Strategy 3 (2008), <http://www.cpsc.gov/PageFiles/127661/importsafety.pdf>.

<sup>4</sup> Press Release, Port Surveillance News: More than 4.8M Units of Violative Imported Products Kept at Bay During Fiscal Year 2012 (July 26, 2013), <http://www.cpsc.gov/en/Newsroom/News-Releases/2013/More-than-48M-Units-of-Violative-Imported-Products-Kept-at-Bay-During-Fiscal-Year-2012/>.

<sup>5</sup> P.L. 110-314; David Barboza & Louise Story, *Mattel Issues New Recall of Toys Made in China*, N.Y. Times, Aug. 14, 2007, [http://www.nytimes.com/2007/08/14/business/15toys-web.html?em&ex=1187236800&en=bd108f5b0c2fd997&ei=5087%0A&\\_r=0](http://www.nytimes.com/2007/08/14/business/15toys-web.html?em&ex=1187236800&en=bd108f5b0c2fd997&ei=5087%0A&_r=0).

<sup>6</sup> P.L. 110-314 §§102, 221-225.

<sup>7</sup> 15 U.S.C. §2066 note.

<sup>8</sup> *Id.* §2067.

<sup>9</sup> *E.g., id.* §§2056, 2058, 2064.

<sup>10</sup> *Id.* §2056(b)(1); CPSC, Voluntary Standards, <http://www.cpsc.gov/en/Regulations-Laws--Standards/Voluntary-Standards/>.

<sup>11</sup> *See, e.g.*, 16 C.F.R. Part 1212 (setting forth the safety standard for multi-purpose lighters); 15 U.S.C. §2056b (codifying most of the voluntary toy safety standard by ASTM International (formerly known as the American Society for Testing and Materials (ASTM)) into U.S. law.

<sup>12</sup> Agreement on Technical Barriers to Trade (TBT Agreement), Art. 2.

U.S. free trade agreements (FTAs).<sup>13</sup> Standards-related trade obligations have been implemented in U.S. law, particularly in the Trade Agreements Act of 1979.<sup>14</sup>

This report examines the CPSC's role in regulating U.S. imported and exported consumer products.<sup>15</sup> It also examines some of the international obligations that the United States has undertaken with respect to the promulgation of standards-related measures, such as mandatory consumer product safety regulations.

## Jurisdiction of the Consumer Product Safety Commission

This report focuses on consumer products that fall within the jurisdiction of the CPSC. In 1972, the Consumer Product Safety Act (CPSA) established the CPSC as an independent federal regulatory agency tasked with protecting consumers against unreasonable risk of injury from hazardous products.<sup>16</sup> The CPSC has responsibility for administering and enforcing several federal consumer product safety laws, including the CPSA,<sup>17</sup> the Federal Hazardous Substances Act (FHSA),<sup>18</sup> the Flammable Fabrics Act (FFA),<sup>19</sup> the Poison Prevention Packaging Act of 1970,<sup>20</sup> and the Refrigerator Safety Act of 1956,<sup>21</sup> among others.

The CPSC exercises regulatory jurisdiction over consumer products as defined in the CPSA. The act defines "consumer product" as "any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise."<sup>22</sup>

The CPSC lacks jurisdiction over certain products, including tobacco and tobacco products, motor vehicles or motor vehicle equipment, pesticides, firearms and ammunition, aircraft and components, boats and other marine vessels, drugs, medical devices, cosmetics, food, or any article that is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer.<sup>23</sup> In addition, the CPSC lacks jurisdiction to regulate a risk of injury associated with a consumer product if such risk could be eliminated or reduced to a sufficient extent by actions taken under the Occupational Safety and Health Act, Atomic Energy Act, or

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<sup>13</sup> See, e.g., TBT Agreement, Art. 2; North American Free Trade Agreement, Chapter 9.

<sup>14</sup> 19 U.S.C. Chapter 13, Subchapter II.

<sup>15</sup> For more on the role that CBP plays in facilitating trade, enforcing customs laws, and securing U.S. ports, see CRS Report R43014, *U.S. Customs and Border Protection: Trade Facilitation, Enforcement, and Security*, by Vivian C. Jones and Marc R. Rosenblum.

<sup>16</sup> 15 U.S.C. §2053; H. Rept. 92-1593, at 1, 32 (1972) (Conf. Rep.).

<sup>17</sup> 15 U.S.C. §§2051-2089.

<sup>18</sup> *Id.* §§1261-1278a.

<sup>19</sup> *Id.* §§1191-1204.

<sup>20</sup> *Id.* §§1471-1477.

<sup>21</sup> *Id.* §§1211-1214.

<sup>22</sup> *Id.* §2052(a)(5).

<sup>23</sup> *Id.*

Clean Air Act.<sup>24</sup> The CPSC also lacks the authority to regulate the risk of injury associated with electronic product radiation emitted from an electronic product if such risk of injury is subject to regulation under a certain provision of the Public Health Service Act.<sup>25</sup>

## Import Safety

The CPSC plays a major role in evaluating the safety of consumer products offered for import into U.S. customs territory.<sup>26</sup> In cooperation with CBP, the CPSC attempts to identify shipments intended for import that are likely to contain consumer products that violate import provisions enforced by the agency.<sup>27</sup> The CPSC also determines whether to admit certain consumer products offered for import into U.S. customs territory.<sup>28</sup> The CPSA, as amended, sets forth several prohibited acts involving importation and provides penalties for parties that engage in these acts.<sup>29</sup> Under the amended CPSA and its implementing regulations, importers of finished products manufactured outside of the United States must certify that the products comply with all rules, bans, standards, or regulations applicable to the products under any act enforced by the CPSC.<sup>30</sup> Importers have other responsibilities under the CPSA that are the same as those of manufacturers, including the responsibility to report consumer product safety problems to the CPSC.<sup>31</sup> Under the FHSA and FFA, importers have responsibilities comparable to those of domestic manufacturers and distributors.<sup>32</sup>

## Product Surveillance

The CPSC is required to maintain a permanent program for the surveillance of products offered for import into the customs territory of the United States.<sup>33</sup> According to the CPSIA, the CPSC must develop a risk assessment methodology to identify shipments intended for import that are likely to contain products that violate import provisions enforced by the agency.<sup>34</sup> The CPSC's Office of Import Surveillance coordinates its efforts to identify and examine incoming shipments of consumer products with CBP.<sup>35</sup>

The CPSIA sought to encourage the CPSC and CBP to cooperate further in the evaluation of the safety risks posed by consumer products entering the customs territory of the United States. For example, it tasked the CPSC with developing a plan for sharing information with CBP in order to

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<sup>24</sup> *Id.* §2080.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* §2066.

<sup>27</sup> *Id.* §2066 note.

<sup>28</sup> *Id.* §2066.

<sup>29</sup> *Id.* §§2068(a), 2069.

<sup>30</sup> *Id.* §2063; 16 C.F.R. §1110.7.

<sup>31</sup> 15 U.S.C. §2064(b); *id.* §2052(a)(11) (defining “manufacturer” to include importers).

<sup>32</sup> *Id.* §1274(f); *id.* §1198.

<sup>33</sup> *Id.* §2066(h).

<sup>34</sup> *Id.* §2066 note.

<sup>35</sup> CPSC, Import Safety, <http://www.cpsc.gov/en/Business--Manufacturing/Import-Safety/>.

identify shipments of violative consumer products.<sup>36</sup> In April 2010, the CPSC and CBP signed a memorandum of understanding in which the CBP agreed to allow the CPSC to use shipment data in its Automated Commercial System to evaluate imports for safety risks.<sup>37</sup> In October 2010, the CPSC signed a memorandum of understanding with CBP and several other federal agencies in which the parties agreed to share information about the safety of products imported into the United States through an interagency Import Safety Commercial Targeting and Analysis Center.<sup>38</sup> The CPSC also maintains memoranda of understanding with consumer product safety agencies in foreign countries in an effort to increase the compatibility of the parties' consumer product safety laws and to promote the sharing of publicly available information about unsafe consumer products.<sup>39</sup>

## Prohibited Acts

The CPSA, as amended, makes it unlawful for any person to import into the United States any consumer product or substance under the CPSC's jurisdiction: (1) that fails to conform with an applicable consumer product safety rule promulgated by the CPSC under any act enforced by the agency; (2) to which a manufacturer has taken voluntary corrective action in consultation with the CPSC, provided that the CPSC notified the public of the action or the importer knew or should have known about it; (3) that is subject to a CPSC order for a recall or corrective action or a court order declaring an imminent hazard; or (4) that is a banned hazardous substance.<sup>40</sup>

Under the CPSA, civil penalties for engaging in prohibited acts involving importation may include up to \$100,000 per knowing violation and, in some circumstances, up to \$15 million for any related series of violations.<sup>41</sup> Criminal penalties for knowing and willful violations include up

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<sup>36</sup> 15 U.S.C. §2066 note.

<sup>37</sup> Press Release, CBP, CPSC Sign Agreement to Promote Consumer Safety (April 26, 2010), [http://www.cbp.gov/archived/xp/cgov/newsroom/news\\_releases/archives/2010\\_news\\_archive/04262010\\_2.xml.html](http://www.cbp.gov/archived/xp/cgov/newsroom/news_releases/archives/2010_news_archive/04262010_2.xml.html). "The Automated Commercial System (ACS) is the comprehensive system used by [CBP] to track, control, and process all commercial goods imported into the United States." CBP, Automated Commercial System, [http://www.cbp.gov/ImageCache/cgov/content/publications/yesyoucan\\_2epdf/v1/yesyoucan.pdf](http://www.cbp.gov/ImageCache/cgov/content/publications/yesyoucan_2epdf/v1/yesyoucan.pdf). The ACS is being replaced by the Automated Commercial Environment. For more information, see CRS Report R43014, *U.S. Customs and Border Protection: Trade Facilitation, Enforcement, and Security*, by Vivian C. Jones and Marc R. Rosenblum.

<sup>38</sup> Import Safety Commercial Targeting and Analysis Center, Memorandum of Understanding Among the Import Safety Commercial Targeting and Analysis Center, Participating Government Agencies (October 21, 2010), <http://cpsc.gov/PageFiles/97207/mou10212010.pdf>.

<sup>39</sup> *E.g.*, Memorandum of Understanding Between the U.S. Consumer Product Safety Commission and the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China (April 21, 2004), <http://www.cpsc.gov/PageFiles/114084/mouchina.pdf>; Memorandum of Understanding Between the Consumer Product Safety Commission of the United States of America and the National Institute of Metrology, Standardization, and Industrial Quality of the Federative Republic of Brazil Regarding Cooperation Related to the Safety of Consumer Products (June 10, 2011), <http://www.cpsc.gov/PageFiles/34316/moubrazil.pdf>.

<sup>40</sup> 15 U.S.C. §2068(a). There are exceptions for "any person (1) who holds a certificate issued in accordance with section 14(a) [15 U.S.C. § 2063(a)] to the effect that such consumer product conforms to all applicable consumer product safety rules, unless such person knows that such consumer product does not conform, or (2) who relies in good faith on the representation of the manufacturer or a distributor of such product that the product is not subject to an applicable product safety rule." *Id.* §2068(b).

The CPSA also prohibits the importation by any person of any consumer product bearing a registered safety certification mark owned by an accredited conformity assessment body when the importer knew or should have known that the mark was used in a manner not authorized by the owner of the certification mark. *Id.* §2068(a).

<sup>41</sup> *Id.* §2069.



to five years' imprisonment, a fine, or both.<sup>42</sup> In addition, a person who commits a criminal violation of the CPSA or any other act enforced by the CPSC may have to forfeit assets associated with the violation.<sup>43</sup>

The FHSA and FFA also contain lists of prohibited acts involving the import or export of consumer products.<sup>44</sup>

## **Admissibility Determinations**

The CPSA also sets forth several circumstances in which the CPSC may refuse to admit a consumer product into the customs territory of the United States.<sup>45</sup> These circumstances include when the product sought to be imported

- fails to comply with an applicable consumer product safety rule;
- is not accompanied by certain labels or certificates or, in certain circumstances, is accompanied by a false certificate;
- is or has been determined to be an imminently hazardous consumer product in a proceeding brought under CPSA Section 12;
- has a product defect that constitutes a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA; or
- is a product that was manufactured by a person who is in violation of certain inspection and recordkeeping requirements.<sup>46</sup>

When the CPSC wishes to refuse admission of a consumer product into the United States because it fails to comply with an applicable safety rule or has a product defect that constitutes a substantial product hazard, it first informs CBP.<sup>47</sup> The CPSC may then request that CBP refuse admission to any such consumer product.<sup>48</sup>

Upon the CPSC's request, CBP must deliver samples of consumer products offered for import to the CPSC for examination so that the agency may determine whether to admit the products.<sup>49</sup> If a product may be refused admission into the United States, the CPSA allows for its delivery from

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<sup>42</sup> *Id.* §2070.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* §1263; *id.* §1192.

<sup>45</sup> *Id.* §2066.

<sup>46</sup> *Id.* §2066(a). According to a CPSC report, under current authority "it is possible to have a product that is the subject of a prohibited act not be the subject of a refusal of admission." Staff Report to Congress Pursuant to Section 222 of the Consumer Product Safety Improvement Act of 2008, Risk Assessment Methodology 11 (September 9, 2011), <http://www.cpsc.gov/PageFiles/112804/cpsia222.pdf>. On June 14, 2010, the CPSC began issuing detention notices for consumer products and hazardous substances under its jurisdiction to the importer of record, the customs broker handling the transaction, and CBP. CPSC Detention of Products at Import, Frequently Asked Questions, <http://www.cpsc.gov/PageFiles/110297/detentionFAQ.pdf>. The CPSC does not take custody of detained products. *Id.* CPSC detention decisions are not subject to protest under the Tariff Act. *Id.*

<sup>47</sup> 16 C.F.R. §1115.21(d). The statute and regulations refer to the Secretary of the Treasury although such functions are now undertaken by CBP pursuant to 19 C.F.R. §§0.1-0.2.

<sup>48</sup> 16 C.F.R. §1115.21(d).

<sup>49</sup> 15 U.S.C. §2066(b).



customs custody under bond so that the owner or consignee can modify the product in order for it to gain admission.<sup>50</sup> The CPSA offers the owner or consignee of a product the opportunity for a hearing under the Administrative Procedure Act regarding the importation of the product.<sup>51</sup>

The CPSA provides for the destruction of consumer products that are refused admission into the United States.<sup>52</sup> Under an amendment made to the CPSA by the CPSIA, such products must be destroyed unless the owner, consignee, or importer of record obtains the permission of the customs authorities to export the products instead.<sup>53</sup> If the owner, consignee, or importer obtains the required approval, that party must export the products within 90 days or they will be destroyed.<sup>54</sup>

Other statutes enforced by the CPSC also contain provisions pertaining to the importation of products or substances that fall within the CPSC's jurisdiction.<sup>55</sup> For example, under FHSA Section 14, the CBP is authorized to obtain and deliver samples of hazardous substances being imported or offered for importation to the CPSC, upon its request, for the purpose of inspecting such samples for compliance with the FHSA.<sup>56</sup> The FHSA provides that the CPSC may refuse admission of hazardous substances that are misbranded, banned, or in violation of Section 4(f) of the FHSA.<sup>57</sup> Under Section 9 of the FFA, imported products subject to flammability standards under the FFA shall not be released from customs custody except in accordance with Section 499 of the Tariff Act of 1930,<sup>58</sup> which provides for release only after inspection by CBP for compliance with U.S. laws.<sup>59</sup>

## Certificates of Compliance

The CPSA, as amended, contains general conformity certification provisions that apply to importers of products manufactured outside of the United States.<sup>60</sup> These provisions and their implementing regulations require certification by importers that a finished product complies with all rules, bans, standards, or regulations applicable to the product under any act enforced by the CPSC.<sup>61</sup> This mandate applies to every product that is (1) subject to a consumer product safety rule under any act enforced by the CPSC; and (2) imported for consumption or warehousing, or distributed in commerce.<sup>62</sup> For non-children's products subject to the CPSC's jurisdiction, such

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<sup>50</sup> *Id.* §2066(c).

<sup>51</sup> *Id.* §2066(b). There is an exception for "owners or consignees who are or have been afforded an opportunity for a hearing in a proceeding under section 12 [15 U.S.C. §2061] with respect to an imminently hazardous product." *Id.*

<sup>52</sup> *Id.* §2066(e).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> According to a CPSC policy statement, the agency seeks to "establish, to the maximum extent possible, uniform import procedures for products subject to the Acts the Commission administers." 16 C.F.R. §1009.3.

<sup>56</sup> 15 U.S.C. §1273.

<sup>57</sup> *Id.* §1273(a). Regulations governing imports under the FHSA are located at 16 C.F.R. §1500.265-272.

<sup>58</sup> 19 U.S.C. §1499.

<sup>59</sup> 15 U.S.C. §1198.

<sup>60</sup> *Id.* §2063(a); 16 C.F.R. §1110.7.

<sup>61</sup> 15 U.S.C. §2063(a); 16 C.F.R. §1110.7.

<sup>62</sup> 15 U.S.C. §2063(a); 16 C.F.R. §1110.7.

certifications must be based on a test of the product or a reasonable testing program.<sup>63</sup> For children's products subject to a children's product safety rule, the act mandates that every importer of such product certify compliance based on the testing of the product by an accredited third-party conformity assessment body.<sup>64</sup>

Certificates must accompany the applicable product or shipment of products covered by the certificate.<sup>65</sup> The importer must furnish a copy of the certificate to each distributor or retailer of the product.<sup>66</sup> For imported products, the act specifies that the CPSC may, by rule and in consultation with CBP, provide for the electronic filing of certificates up to 24 hours before an imported product arrives.<sup>67</sup>

On May 13, 2013, the CPSC published a proposed regulation in the *Federal Register* that would mandate the electronic filing of certificates by importers with CBP for finished products manufactured outside of the United States, imported for consumption or warehousing, and not delivered directly to the consumer.<sup>68</sup> The electronic filing would have to be made at the time of filing the CBP entry or the time of filing the entry and entry summary, if both are filed together.<sup>69</sup> The proposed rule would also define "importer" as the "importer of record as defined under the Tariff Act of 1930 (19 U.S.C. §1484(a)(2)(B))."<sup>70</sup> Under the applicable section of the Tariff Act, an importer of record may be the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a person holding a valid customs broker license.<sup>71</sup> This means that a validly licensed customs broker (a term that may include common carriers, contract carriers, third-party logistics providers, and freight forwarders) that serves as the importer of record when bringing products into the United States would be required to furnish the applicable certificate under the proposed rule.<sup>72</sup>

## Export of Consumer Products

The CPSA states that the act does not apply to consumer products if it can be shown that they are manufactured, sold, or held for sale for export from the United States (or if they are imported for export) and are labeled as intended for export.<sup>73</sup> However, the CPSA will apply if the consumer products are distributed in commerce for use in the United States or the CPSC determines that exportation of the products presents an unreasonable risk of injury to consumers within the United States.<sup>74</sup>

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<sup>63</sup> 15 U.S.C. §2063(a).

<sup>64</sup> *Id.*; 16 C.F.R. §1110.7.

<sup>65</sup> 15 U.S.C. §2063(g).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> CPSC, Proposed Rule, Certificates of Compliance, 78 Fed. Reg. 28080, 28108 (May 13, 2013) (would be codified at 16 C.F.R. §1110.13).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 28107.

<sup>71</sup> 19 U.S.C. §1484(a)(2)(B).

<sup>72</sup> CPSC, Proposed Rule, Certificates of Compliance, 78 Fed. Reg. 28080, 28083 (May 13, 2013).

<sup>73</sup> 15 U.S.C. §2067(a).

<sup>74</sup> *Id.* In addition, the CPSA applies to any consumer product "manufactured for sale, offered for sale, or sold for (continued...)"

An exporter of a consumer product that violates a consumer product safety rule in effect under the CPSA must, no fewer than 30 days before export, file a statement with the CPSC notifying the agency of the export.<sup>75</sup> Upon receiving such a filing, the CPSC must notify the government of the importing country of the export and the basis for the safety standard or rule violated.<sup>76</sup>

The CPSIA amended the CPSA to specify that the CPSC may prohibit a person from exporting from the United States for the purpose of sale any consumer product that violates a safety rule promulgated under CPSA unless the importing country has told the CPSC that it accepts the importation of the consumer product.<sup>77</sup> If 30 days have passed since the CPSC provided notice to the importing country of the impending shipment, the agency “may take such action as appropriate within its authority with respect to the disposition of the product under the circumstances.”<sup>78</sup> The amendment was intended to put a stop to the export of consumer products that are in violation of U.S. law.<sup>79</sup> The CPSIA also made a similar amendment to the FFA.<sup>80</sup>

As described above, the CPSA makes it unlawful for persons to engage in certain prohibited acts with respect to importation.<sup>81</sup> Similarly, the CPSA prohibits export from the United States for the purpose of sale of a product or substance within the jurisdiction of the CPSC that (1) is subject to a CPSC order for a recall or corrective action, a court order declaring an imminent hazard, or that is a banned hazardous substance under Section 2(q)(1) of the FHSA; or (2) is subject to a publicly notified voluntary corrective action taken by the manufacturer, in consultation with the CPSC.<sup>82</sup> The FHSA makes it unlawful to fail to notify the CPSC about the export of misbranded hazardous substances or banned hazardous substances.<sup>83</sup>

Other statutes enforced by the CPSC contain provisions pertaining to the export of consumer products, some of which are similar to those under the CPSA. For example, Section 14 of the FHSA states that “[n]ot less than thirty days before any person exports to a foreign country any misbranded hazardous substance or banned hazardous substance, such person shall file a statement with the Commission notifying the Commission of such exportation, and the Commission, upon receipt of such statement, shall promptly notify the government of such country of such exportation and the basis upon which such substance is considered misbranded or has been banned under this Act.”<sup>84</sup> The FFA contains a similar provision.<sup>85</sup>

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(...continued)

shipment to any installation of the United States located outside of the United States.” *Id.*

<sup>75</sup> *Id.* §2067(b).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* §2067(c).

<sup>78</sup> *Id.* This section does not apply to the export of a consumer product permitted by the customs authorities pursuant to 15 U.S.C. §2066(e). 15 U.S.C. §2067(d).

<sup>79</sup> H.Rept. 110-501, at 42 (2007).

<sup>80</sup> 15 U.S.C. §1202(d).

<sup>81</sup> *Id.* §2068.

<sup>82</sup> *Id.* §2068(a)(15). This section does not apply to the export of a consumer product permitted by the customs authorities pursuant to 15 U.S.C. §2066(e). 15 U.S.C. §2067(d).

<sup>83</sup> 15 U.S.C. §1263(i).

<sup>84</sup> *Id.* §1273(d). Regulations governing the procedures for export of noncomplying, misbranded, or banned products under the CPSA, FHSA, and FFA are located at 16 C.F.R. §1019.1-.8.

<sup>85</sup> 15 U.S.C. §1202(c).

## Standards-Related International Trade Obligations

Some international trade agreements classify measures that regulate on the basis of a product's characteristics or processes and production methods as technical regulations, standards, or conformity assessment procedures.<sup>86</sup> These measures are commonly referred to as “standards-related measures” or, when they act as obstacles to international trade, “technical barriers to trade.”<sup>87</sup> Several international agreements contain obligations for the United States with respect to the promulgation of standards-related measures such as product safety regulations promulgated by the CPSC or product safety laws enacted by Congress. These obligations have been implemented in U.S. law.<sup>88</sup>

### Standards-Related Measures as Defined in the TBT Agreement

**Technical Regulation:** Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking, or labelling requirements as they apply to a product, process, or production method.

**Standard:** Document approved by a recognized body<sup>89</sup> that provides, for common and repeated use, rules, guidelines, or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking, or labelling requirements as they apply to a product, process, or production method.

**Conformity Assessment Procedures:** Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

**Source:** TBT Agreement, Annex I.

## World Trade Organization: Agreement on Technical Barriers to Trade

The World Trade Organization (WTO) is an international body created to facilitate trade among its members.<sup>90</sup> To become a member of the WTO, a country or eligible customs territory must agree to follow certain trade rules.<sup>91</sup> These obligations are contained in sources that include the Agreement Establishing the World Trade Organization (WTO Agreement) and the multilateral trade agreements annexed to it.<sup>92</sup> One of the multilateral agreements annexed to the WTO Agreement is the Agreement on Technical Barriers to Trade (TBT Agreement). The TBT Agreement seeks to ensure that standards-related measures do not create unnecessary obstacles to

<sup>86</sup> *E.g.*, TBT Agreement, Annex I.

<sup>87</sup> United States Trade Representative, 2013 Report on Technical Barriers to Trade 5-6, <http://www.ustr.gov/sites/default/files/2013%20TBT.pdf>.

<sup>88</sup> *E.g.*, 19 U.S.C. Chapter 13, Subchapter II.

<sup>89</sup> The term “recognized body” most commonly refers to an international standard-setting body such as ASTM International. For more on this standards-setting body, see About ASTM International, <http://www.astm.org/ABOUT/overview.html>.

<sup>90</sup> Agreement Establishing the World Trade Organization, Art. II.

<sup>91</sup> *Id.*

<sup>92</sup> These agreements are often referred to collectively as the “WTO agreements.”

international trade while at the same time allowing WTO Members to take actions necessary, for example, to protect human health and the environment.<sup>93</sup>

In the United States, the CPSC is the central federal authority responsible for promulgating mandatory consumer product regulations, standards, and bans.<sup>94</sup> As noted above, the CPSC relies on voluntary standards issued by other bodies “whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards.”<sup>95</sup> However, in some circumstances, the CPSC promulgates its own regulations or Congress enacts a standard.<sup>96</sup> The disciplines of the TBT Agreement apply to standards-related measures, including those put in place by central government bodies.<sup>97</sup> Thus, the United States has an obligation to ensure that its central government bodies, including federal agencies like the CPSC,<sup>98</sup> comply with the disciplines of the TBT Agreement.<sup>99</sup> If a WTO Member believes that a statutory standard or regulatory practice of the United States is not in compliance with the country’s obligations under the TBT Agreement, the Member may challenge the statutory standard or regulatory practice as constituting a violation of the United States’ obligations under that agreement.<sup>100</sup> Consultations and dispute settlement under the TBT Agreement are governed by the dispute settlement rules of the General Agreement on Tariffs and Trade and the Dispute Settlement Understanding.<sup>101</sup>

One example of what the TBT Agreement requires of WTO Members is found in the rules governing the preparation, adoption, and application of mandatory technical regulations by central government bodies.<sup>102</sup> Under the agreement’s national treatment and most favored nation provisions, the United States must ensure that the CPSC, when imposing mandatory technical regulations, does not treat imported products less favorably than like domestic products or like products imported from other countries.<sup>103</sup> In addition, in order to ensure that technical regulations do not create unnecessary obstacles to international trade, technical regulations must not be “more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the

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<sup>93</sup> TBT Agreement, Preamble. The obligations of the TBT Agreement are in addition to those for WTO Members under the General Agreement on Tariffs and Trade (GATT) 1994. See Appellate Body Report, *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶ 80 (March 12, 2001). Additional obligations contained in the GATT 1994 are beyond the scope of this report. For more on general GATT obligations, see CRS Report R41306, *Trade Law: An Introduction to Selected International Agreements and U.S. Laws*, by Jeanne J. Grimmett.

<sup>94</sup> 15 U.S.C. §§2056, 2058, 2064.

<sup>95</sup> *Id.* §2056(b)(1); CPSC, Voluntary Standards, <http://www.cpsc.gov/en/Regulations-Laws--Standards/Voluntary-Standards/>.

<sup>96</sup> See, e.g., 16 C.F.R. Part 1212 (setting forth the safety standard for multi-purpose lighters); 15 U.S.C. §2056b (codifying most of ASTM International’s voluntary toy safety standard into U.S. law).

<sup>97</sup> TBT Agreement, Arts. 2, 4, 5, Annex 1. The disciplines do not apply to sanitary and phytosanitary measures or purchasing specifications prepared by governmental bodies addressed in the Agreement on Government Procurement. TBT Agreement, Arts. 1.4, 1.5.

<sup>98</sup> The TBT Agreement defines “central government body” as the “central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.” TBT Agreement, Annex 1.

<sup>99</sup> TBT Agreement, Art. 2.

<sup>100</sup> See TBT Agreement, Art. 14; Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 3.

<sup>101</sup> TBT Agreement, Art. 14.

<sup>102</sup> TBT Agreement, Art. 2.

<sup>103</sup> TBT Agreement, Art. 2.1. These national treatment and most-favored-nation obligations are basic WTO principles articulated in the GATT. See GATT Arts. I, III.

risks non-fulfillment would create.”<sup>104</sup> Among the non-exhaustive list of legitimate objectives provided in the agreement is the “protection of human health or safety.”<sup>105</sup> Members have an ongoing obligation to reassess their technical regulations to ensure that circumstances or objectives still require them and that they are the least trade-restrictive means of addressing such circumstances or objectives.<sup>106</sup>

In addition to these obligations, the TBT Agreement calls upon Members to use relevant international standards as a basis for their mandatory technical regulations except when they would not effectively assist the Member in fulfilling its legitimate objectives.<sup>107</sup> The agreement also states that Members should specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics wherever appropriate.<sup>108</sup>

The agreement also contains provisions intended to increase the transparency of central government bodies’ promulgation of mandatory technical regulations. If the CPSC proposes a technical regulation that may have a significant effect on the trade of other Members in the absence of, or in deviation from, a relevant international standard, the agreement obligates the United States to notify interested parties in other Members and allow them to comment on the proposal.<sup>109</sup> WTO Members must make adopted technical regulations available to interested parties in other Members.<sup>110</sup>

## U.S. Free Trade Agreements

U.S. free trade agreements (FTAs) contain additional obligations for the United States with respect to standards-related measures, including technical regulations. Chapter Seven of the United States-Panama Trade Promotion Agreement contains provisions that are typical of those found in recent FTAs. That chapter, which is titled “Technical Barriers to Trade,” applies to “all standards, technical regulations, and conformity assessment procedures of the Parties’ central government bodies that may, directly or indirectly, affect trade in goods between the Parties.”<sup>111</sup> However, the scope of the chapter does not extend to technical specifications prepared by governmental bodies for the purposes of government production or procurement or to sanitary and phytosanitary measures.<sup>112</sup>

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<sup>104</sup> TBT Agreement, Art. 2.2. A WTO panel has noted that this test involves a two-step inquiry: (1) whether a technical regulation pursues a legitimate objective; and (2) whether the technical regulation is more trade-restrictive than necessary to fulfill that legitimate objective taking into account the risks non-fulfillment would create. Panel Report, *US—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, ¶ 7.382-.387 (September 15, 2011).

<sup>105</sup> TBT Agreement, Art. 2.2.

<sup>106</sup> TBT Agreement, Art. 2.3; Panel Report, *European Communities—Trade Description of Sardines*, WT/DS231/R, ¶ 7.80-.81 (May 29, 2002).

<sup>107</sup> TBT Agreement, Art. 2.4.

<sup>108</sup> TBT Agreement, Art. 2.8.

<sup>109</sup> TBT Agreement, Art. 2.9. The agreement contains an exception to some of these requirements for “urgent problems of safety, health, environmental protection or national security.” TBT Agreement, Art. 2.10.

<sup>110</sup> TBT Agreement, Art. 2.11.

<sup>111</sup> U.S.-Panama Trade Promotion Agreement, Art. 7.2.

<sup>112</sup> *Id.*



A main additional obligation for the United States contained in the chapter is in the area of transparency. For example, the agreement requires each party to permit persons of the other party to participate in the development of standards, technical regulations, and conformity assessment procedures on terms no less favorable than those accorded to its own persons.<sup>113</sup> A party publishing notice under the TBT Agreement of a mandatory technical regulation that may have a significant effect on the trade of other Members in the absence of, or in deviation from, a relevant international standard must include a statement detailing the objective of the proposed technical regulation and the rationale for the proposed approach.<sup>114</sup> The provision contains additional obligations requiring parties to allow time for comments to be received in writing from the other party on the proposal and mandating that parties make available to the public their responses to significant comments no later than when they publish final regulations.<sup>115</sup>

Proposed free trade agreements may also contain provisions pertaining to standards-related measures. For example, negotiators of the proposed Trans-Pacific Partnership (TPP) agreement are including annexes on sector-specific TBT commitment to harmonize their approaches to regulations in key areas.<sup>116</sup>

## Implementation of International Standards-Related Obligations in U.S. Law

As described above, several international agreements contain obligations for the United States pertaining to standards-related measures such as mandatory product safety regulations. These obligations include requirements regarding nondiscrimination, transparency, and the use of international standards as a basis for regulations.<sup>117</sup> International trade obligations of the United States pertaining to standards-related measures have been implemented in domestic laws applicable to the CPSC, particularly in the Trade Agreements Act (TAA) of 1979.<sup>118</sup>

The TAA states that “[n]o Federal agency may engage in any standards-related activity that creates unnecessary obstacles to the foreign commerce of the United States.”<sup>119</sup> Among other things, the act requires federal agencies to ensure that they treat imported products no less favorably than like domestic or imported products with regard to the application of standards-related measures (e.g., product safety regulations) to these products.<sup>120</sup> The TAA requires federal agencies developing standards to take into consideration international standards and to base their standards on international standards when appropriate.<sup>121</sup> Under the act, the United States Trade

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<sup>113</sup> U.S.-Panama Trade Promotion Agreement, Art. 7.7.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> For more information on the TPP, see CRS Report R42694, *The Trans-Pacific Partnership Negotiations and Issues for Congress*, coordinated by Ian F. Fergusson.

<sup>117</sup> *E.g.*, TBT Agreement, Arts. 2.1, 2.4, 2.9, 2.11.

<sup>118</sup> 19 U.S.C. Chapter 13, Subchapter II.

<sup>119</sup> 19 U.S.C. §2532. The TAA’s definition of “federal agency” includes any “independent establishment,” and thus it appears that the CPSC, which is an independent regulatory commission, is subject to the act. *Id.* §2571.

<sup>120</sup> *Id.* §2532.

<sup>121</sup> *Id.*



Representative must consult with federal agencies that have expertise in standards-related matters that are the subject of trade negotiations with foreign countries.<sup>122</sup>

In addition to the requirements of the TAA, the rulemaking provisions contained in the Administrative Procedure Act, CPSA, and other acts enforced by the CPSC could be considered to implement standards-related trade obligations of the United States.<sup>123</sup> These provisions increase transparency by requiring the CPSC to involve the public in its rulemaking proceedings and to consider comments from outside parties, including foreign parties, prior to promulgating a final rule.<sup>124</sup>

## Legislation in the 113<sup>th</sup> Congress: H.R. 1910

### Overview

H.R. 1910, the Foreign Manufacturers Legal Accountability Act of 2013, was introduced in the House on May 9, 2013. The bill shares some similarities with bills introduced in prior Congresses that sought to hold foreign manufacturers—including Chinese manufacturers of toxic drywall—legally responsible for harms caused by their products in the United States.<sup>125</sup> Among other things, H.R. 1910 would require the Chairman of the CPSC to mandate that certain foreign manufacturers and producers of consumer products distributed in commerce establish a registered agent in the United States.<sup>126</sup> This agent would have to be authorized to accept service of process on behalf of such manufacturer or producer for the purpose of any state or federal regulatory proceeding or civil action related to the product.<sup>127</sup> The requirement would apply “if such service is made in accord with the State or Federal rules for service of process in the State in which the regulatory action or case is brought.”<sup>128</sup> When a foreign manufacturer or producer registered an agent, it would be deemed to have consented to the personal jurisdiction of the state or federal courts in which the registered agent is located for the purposes of proceedings related to the product.<sup>129</sup>

Furthermore, the bill would require a person importing a consumer product under the CPSC’s jurisdiction that is manufactured or produced outside of the United States to furnish to CBP a declaration that such person has made an “appropriate inquiry” as to whether the manufacturer or

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<sup>122</sup> *Id.* §2541.

<sup>123</sup> See United States Trade Representative, 2013 Report on Technical Barriers to Trade 19, <http://www.ustr.gov/sites/default/files/2013%20TBT.pdf>.

<sup>124</sup> 5 U.S.C. §553; 15 U.S.C. §2058.

<sup>125</sup> *H.R. 4678, Foreign Manufacturers Legal Accountability Act, and H.R. 5156, Clean Energy Technology Manufacturing and Export Assistance Act: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 111<sup>th</sup> Cong. 2 (2010)* (statement of Sen. Bobby Rush, Chairman, Subcomm. on Commerce, Trade, and Consumer Protection).

<sup>126</sup> H.R. 1910, §5.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* The bill would instruct the Secretary of Commerce to compile a current list of agents registered in this manner.

*Id.*

<sup>129</sup> *Id.*

producer of the consumer product has complied with the registration requirements.<sup>130</sup> The failure to file a declaration or the filing of a false declaration could subject a person to penalties.<sup>131</sup>

## Potential WTO Implications of the Registration Requirement

### GATT Article III:4

If H.R. 1910 became law, there could be implications for the United States under WTO rules. Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT) contains the national treatment requirement for internal regulation.<sup>132</sup> It states that the “products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”<sup>133</sup> If a WTO panel applied the test to determine whether H.R. 1910 (if it became law) discriminated against imported products because manufacturers of these products would be subject to registration requirements not imposed on manufacturers of like domestic products, the panel would face two main questions: (1) whether the registration requirement imposed by H.R. 1910 on foreign manufacturers constituted a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the products made by the manufacturers and imported into the United States; and (2) whether, as a result of this requirement, the imported products received less favorable treatment than the like domestic products.<sup>134</sup>

With regard to (1), a GATT panel has held that

the drafters of the Article intended to cover in paragraph 4 not only laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.<sup>135</sup>

Under H.R. 1910, foreign manufacturers would bear the costs of complying with the registration requirement. Higher costs could lead these manufacturers to raise the prices of their products. This could lead to the sale of the products at higher prices on the U.S. market, making the products less competitive with domestically manufactured products. Thus, the registration requirement could potentially be a requirement affecting the products’ internal sale or purchase that is covered by Article III:4.

With respect to (2), it is unclear whether the registration requirement results in less favorable treatment for imported products as compared to like domestic products. On the one hand, as

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> GATT, Art. III:4.

<sup>133</sup> *Id.*

<sup>134</sup> Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, ¶ 133 (December 11, 2000); Peter Van Den Bossche, *The Law and Policy of the World Trade Organization* 368 (2d ed. 2008).

<sup>135</sup> GATT Panel Report, *Italy—Discrimination Against Imported Agricultural Machinery*, L/833 - 7S/60, ¶ 12 (October 23, 1958).

indicated above, the requirement could lead to higher prices for imported products on the internal market, subjecting them to less favorable treatment by denying them “effective equality of competitive opportunities.”<sup>136</sup> On the other hand, the fact that like domestic and imported products are treated differently does not automatically mean that imported products are treated less favorably.<sup>137</sup> It could be argued that H.R. 1910 merely “levels the playing field” for domestic products by making the foreign manufacturers of imported products subject to legal liability just as domestic manufacturers are. To summarize, although it is unclear whether imported products are in fact treated less favorably than like domestic products under the registration requirement, it is possible that a WTO panel could find that the requirement violates the national treatment obligation contained in Article III:4 of the GATT.

### GATT Article XX(b) and (d) Exceptions

If H.R. 1910 is adopted and later found to violate the requirements of the GATT, the United States could potentially justify the registration requirement under the exceptions provided at Article XX(b) and (d) of the GATT.<sup>138</sup> The defending Member has the burden, at that point, of proving that the measure both fits under one of the exceptions under Article XX and satisfies the requirements imposed by Article XX’s opening clauses, which form its “chapeau.”<sup>139</sup>

Article XX(b) provisionally justifies GATT-inconsistent measures “necessary to protect human, animal or plant life or health.”<sup>140</sup> Presumably, the objective of the registration requirement is the protection of the life and health of the people who come into contact with unsafe consumer products manufactured by foreign companies. Article XX(d) provisionally justifies GATT-inconsistent measures “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT].”<sup>141</sup> The registration requirement is arguably designed to secure foreign manufacturers’ compliance with U.S. consumer product safety laws, which are presumably consistent with the GATT.

Both the Article XX(b) and XX(d) exceptions require a showing of necessity.<sup>142</sup> Under Article XX(b), if a Member makes a *prima facie* case that its measure is “necessary,” this initial finding may ultimately be rejected if the panel finds that a less trade restrictive alternative was “reasonably available.”<sup>143</sup> Similarly, under Article XX(d) the Appellate Body has held that panels should consider whether a WTO-consistent alternative measure that the Member “could reasonably be expected to employ” is available, or whether a less WTO-inconsistent measure is “reasonably available.”<sup>144</sup>

<sup>136</sup> GATT Panel Report, *US—Section 337*, L/6439—36S/345, ¶ 5.11 (November 7, 1989); Van Den Bossche, *supra* note 134, at 383.

<sup>137</sup> GATT Panel Report, *US—Section 337*, ¶ 5.11.

<sup>138</sup> GATT, Art. XX(b), (d).

<sup>139</sup> Appellate Body Report, *U.S.—Standards for Reformulated and Conventional Gasoline*, 22, WT/DS2/AB/R (April 29, 1996); Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 7.359, WT/DS394/R (July 5, 2011).

<sup>140</sup> GATT, Art. XX(b).

<sup>141</sup> GATT, Art. XX(d).

<sup>142</sup> GATT, Art. XX(b), (d).

<sup>143</sup> Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 156, WT/DS332/AB/R (December 3, 2007).

<sup>144</sup> Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 166; Van Den (continued...)

Finally, if a measure is provisionally justified under Article XX(b) or (d), it must also satisfy the Article XX chapeau.<sup>145</sup> The chapeau states that a measure covered by Article XX must be neither “a disguised restriction on international trade” nor “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”<sup>146</sup>

## Possible Result of a WTO Challenge to H.R. 1910

If H.R. 1910 became law and a WTO Member challenged it as constituting a violation of the United States’ obligations under the GATT, a WTO panel or the Appellate Body could potentially determine that the law is inconsistent with one or more of the articles of the GATT and not justified by an exception to the GATT’s requirements.<sup>147</sup> If the United States did not then bring the law into conformity with the recommendations or rulings of a panel or the Appellate Body that had been adopted by the Dispute Settlement Body (DSB), then the DSB could authorize the complaining member to retaliate by, for example, suspending its application of certain tariff concessions to the United States.<sup>148</sup>

## Conclusion

Enforcing consumer product safety laws at the border remains a priority for the CPSC and CBP.<sup>149</sup> In 2008, following widely publicized recalls of children’s toys, Congress passed the CPSIA.<sup>150</sup> Among other things, the act contained provisions modifying the CPSC’s role and authority with regard to the import and export of consumer products.<sup>151</sup>

Some Members of Congress have proposed additional legislation to address the potential harm caused by imported products. H.R. 1910, the Foreign Manufacturers Legal Accountability Act of 2013, was introduced in the House on May 9, 2013. The bill shares some similarities with bills introduced in prior Congresses that sought to hold foreign manufacturers legally responsible for the harms caused by their products in the United States.<sup>152</sup> Among other things, H.R. 1910 would

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Bossche, *supra* note 134, at 633.

<sup>145</sup> Appellate Body Report, *U.S.—Standards for Reformulated and Conventional Gasoline*, 22-23, WT/DS2/AB/R (April 29, 1996).

<sup>146</sup> GATT, Art. XX.

<sup>147</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Art. 19.

<sup>148</sup> DSU, Art. 22.

<sup>149</sup> Press Release, Port Surveillance News: More than 4.8M Units of Violative Imported Products Kept at Bay During Fiscal Year 2012 (July 26, 2013), <http://www.cpsc.gov/en/Newsroom/News-Releases/2013/More-than-48M-Units-of-Violative-Imported-Products-Kept-at-Bay-During-Fiscal-Year-2012/>.

<sup>150</sup> P.L. 110-314; David Barboza & Louise Story, *Mattel Issues New Recall of Toys Made in China*, N.Y. Times, Aug. 14, 2007, [http://www.nytimes.com/2007/08/14/business/15toys-web.html?em&ex=1187236800&en=bd108f5b0c2fd997&ei=5087%0A&\\_r=0](http://www.nytimes.com/2007/08/14/business/15toys-web.html?em&ex=1187236800&en=bd108f5b0c2fd997&ei=5087%0A&_r=0).

<sup>151</sup> P.L. 110-314 §§102, 221-225.

<sup>152</sup> *H.R. 4678, Foreign Manufacturers Legal Accountability Act, and H.R. 5156, Clean Energy Technology Manufacturing and Export Assistance Act: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 111<sup>th</sup> Cong. 2 (2010) (statement of Sen. Bobby Rush, Chairman, Subcomm. on Commerce, Trade, and Consumer Protection).

require the Chairman of the CPSC to mandate that certain foreign manufacturers and producers of consumer products distributed in commerce establish a registered agent in the United States.<sup>153</sup>

If H.R. 1910 became law, it could potentially be subject to challenge before a WTO panel on the grounds that it violates the national treatment requirement contained in Article III:4 of the GATT by requiring foreign manufacturers to bear the costs of establishing a registered agent and becoming subject to product liability lawsuits, therefore possibly hurting the competitiveness of the manufacturers' products in the U.S. market as a result of higher product prices.<sup>154</sup> On the other hand, H.R. 1910 could be characterized as simply "leveling the playing field" for domestic products and not as treating imported products any less favorably.<sup>155</sup>

If H.R. 1910 is adopted and later found to violate the requirements of the GATT, the United States could potentially justify the registration requirement under the exceptions provided at Article XX(b) and (d) of the GATT.<sup>156</sup> Both of these exceptions may require the complaining Member to identify possible alternative measures available to the defending Member that would be consistent—or at least less inconsistent—with the GATT.<sup>157</sup> If a measure is provisionally justified under Article XX(b) or (d), it must also satisfy the Article XX chapeau.<sup>158</sup>

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<sup>153</sup> H.R. 1910, §5.

<sup>154</sup> See the discussion at "GATT Article III:4" above.

<sup>155</sup> *Id.*

<sup>156</sup> See the discussion at "GATT Article XX(b) and (d) Exceptions" above.

<sup>157</sup> See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 156, WT/DS332/AB/R (December 3, 2007)

<sup>158</sup> Appellate Body Report, *U.S.—Standards for Reformulated and Conventional Gasoline*, 22-23, WT/DS2/AB/R (April 29, 1996).