

Fighting the Urge to Protect: Technical Trade Barriers and the WTO



Since taking office last year, US Trade Representative (USTR) Ron Kirk has made clear that challenging foreign technical and health barriers to trade will be a high priority for American trade enforcement efforts. These barriers can range from discriminatory labeling requirements and technical standards and regulations to health inspection requirements that operate as barriers to imports.

Of course, these potential trade barriers in foreign markets can also exist in the United States. As described in another Arent Fox report, imports into the United States will be closely scrutinized to enforce safety and health standards. While such import safety programs generally are conducted in a fair manner, foreign trading partners are themselves quite vigilant in ensuring that the rules are being enforced in a non-discriminatory manner. As discussed below, the United States is currently fighting off a challenge from Canada and Mexico at the World Trade Organization (WTO). Balancing a defense of American practices while challenging similar practices overseas will be a difficult task for the USTR and others involved in American trade policy during 2010.

The international rules governing technical and health issues are set forth in the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on Sanitary and Phyto-Sanitary Measures (SPS Agreement). Currently, Canada and Mexico are challenging the recently-enacted American retail labeling law for beef and other products at the WTO because they claim the law discriminates against products from other countries, in violation of the TBT. They charge that the law imposes heavier burdens on imported inputs because labeling requirements require segregation of imported products and American products made from them. This dual distribution system allegedly imposes significant extra costs on the imports.

From a company's perspective, when issues like these arise, litigation at the WTO clearly is a last resort. The US Government recognizes this as well. Negotiations are always preferable, but negotiations can only be based on a deep understanding of the legal rules and the developing jurisprudence of the WTO. When economic times are tough, domestic regulators are tempted to give in to pressure from domestic industries and manipulate labeling, standards, and health requirements to discriminate against imports. All companies involved in international trade need to be vigilant in staying abreast of these trends and be willing to speak up when necessary to keep their export markets open.

Should you have any questions, please contact the Arent Fox attorney with whom you work or a member of Arent Fox's International Trade Practice Group.