KING & SPALDING

Trade & Manufacturing Alert

WTO Approves Terms Of Accession For Russia

After eighteen years of negotiations, World Trade Organization ("WTO") members voted on December 16 - during the WTO's 8th Ministerial Conference - to approve Russia's terms of accession to join the organization as its 154th member.

Russia's commitments under its accession package include reduced tariffs, elimination of industrial subsidies, and provision of greater market access to foreign companies. With respect to tariffs, upon entering the WTO, Russia's average bound tariff will be 7.3 percent for manufactured products (compared with 9.5 percent currently) and 10.8 percent for agricultural products (compared with 13.2 percent currently). Russia also agreed to modification of some technical barriers applicable to agricultural imports and was granted special investment flexibilities for its automobile industry, allowing it to continue some local content rules until 2018 that are intended to benefit Russia's domestic manufacturers.

Russia's lower house of Parliament (the Duma) must now ratify the accession package for Russia's entry into the WTO to have legal effect. Russia's Deputy Prime Minister Igor Shuvalov stated at the Ministerial Conference that the Russian government will wait to submit the accession package to the Duma until the second quarter of 2012. He attributed the delay to the government needing to consult with industry and to determine the extent of necessary changes to federal law. Some observers have speculated that the government also wants to wait until after the March 4 presidential election to submit the package to the Duma due to the controversial nature of some Russian concessions.

The United States indicated at the Ministerial Conference that it would not be able to extend its

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own WTO obligations to Russia until the U.S. Congress passes legislation to revoke the applicability of the so-called Jackson-Vanik amendment to Russia. The Jackson-Vanik amendment is a 1974 U.S. law that denies permanent Most Favored Nation status to certain nations that restrict emigration, including Russia. Russia has no obligation under the WTO to extend the benefits of its own WTO commitments to the United States as long as the United States does not apply WTO benefits to Russia.

President Obama recently stated that he will push Congress to repeal the Jackson-Vanik amendment for Russia early in 2012 so that U.S. businesses can enjoy opportunities afforded by Russia's WTO membership. Congressional debate on this subject is expected to be intense as a number of Members of Congress have already indicated that they oppose revoking the Jackson-Vanik amendment for Russia.

Second Annual Conference On The Renaissance Of American Manufacturing--Jobs, Trade And The Presidential Election, March 27, 2012

The Second Annual Conference On The Renaissance Of American Manufacturing will occur on Tuesday, March 27, 2012, at the National Press Club in Washington, D.C. Panel topics will address whether the United States can be successful without U.S. manufacturing, how the decline in manufacturing affects U.S. national defense and our relationship with China, the correlation between manufacturing and the U.S. job base, what the presidential candidates are saying about manufacturing and what they should be saying, and what we need to do on trade.

The Conference is presented by the Committee to Support U.S. Trade Laws, The Economic Strategy Institute, The U.S. Economy/Smart Globalization Initiative at the New America Foundation, The Alliance for American Manufacturing, The United States Business and Industry Council, The Kearney Alliance, King & Spalding LLP, Kelley Drye & Warren, LLP, Wiley Rein LLP, and The Law Offices of Stewart and Stewart. For more information or to sign up contact Lauren Donoghue at +1 202 626 8999 or ldonoghue@kslaw.com.

Federal Circuit Holds That The U.S. Countervailing Duty Law Cannot Be Applied To Non-Market Economy Countries

The U.S. Court of Appeals for the Federal Circuit issued its decision in *GPX International Tire Corporation, et al. v. United States* on December 19, 2011, in which it prohibited the use of the U.S. countervailing duty ("CVD") law to counteract illegal subsidies on goods from non-market economy countries, including China.

The dispute started when the U.S. Department of Commerce ("Commerce") issued antidumping duty ("AD") and CVD orders on off-the-road tires from China. GPX, a U.S. importer of off-the-road tires, contended that a 1986 decision from the Federal Circuit in *Georgetown Steel v. United States* prevented Commerce from using the CVD law to counteract subsidies on goods manufactured in modern-day China. *Georgetown Steel* had affirmed Commerce's discretion not to use the CVD law to counteract subsidies in the Soviet-era state controlled economies of the 1980s because such subsidies were impossible to measure. Commerce concluded that imports from China were subject to the CVD law because China's economy, unlike Soviet-style state-controlled economies of the 1980s, allowed for the calculation of subsidies provided by the government to particular goods. GPX and certain Chinese tire producers filed an appeal at the U.S. Court of International Trade ("CIT") challenging the application of the CVD law to China. In challenging that decision, GPX cited the fact that Commerce had not applied the CVD law to China before 2007, argued that any application of the CVD law to a non-market

economy was inconsistent with U.S. law and, alternatively, that application of the CVD law resulted in the assessment of overstated duties. The CIT held that the challenged subsidies were unlawful because in some respects they duplicated the AD duties imposed on the same goods, not because Commerce was prohibited from applying the CVD law to China.

In *GPX*, a three-judge panel of the Federal Circuit held that the CVD law could not be applied to non-market economy countries because the U.S. Congress had effectively amended the trade laws over time in a manner that ratified Commerce's pre-2007 policy of not applying the CVD law in non-market economy cases. The Court stated that "Congress legislatively ratified earlier consistent administrative and judicial interpretations that government payments cannot be characterized as 'subsidies' in a non-market economy context, and thus that countervailing duty law does not apply to NME countries." The Federal Circuit's decision in *GPX* has the potential to disrupt Commerce's use of the CVD law against China and other non-market economies in dozens of other cases currently pending before the agency.

The parties to the Federal Circuit decision have until February 2, 2012 to seek rehearing *en banc* before a panel of all the Federal Circuit judges, and may seek *certiorari* review before the Supreme Court if their petition for *en banc* review is unsuccessful.

WTO Dispute Settlement Panel Rules Against U.S. Country Of Origin Labeling Requirements

On November 18, 2011, a WTO dispute settlement panel issued its report in the case *United States--Certain Country of Origin Labeling (COOL) Requirements*. The dispute concerns U.S. statutory provisions and regulations establishing mandatory country of origin labeling ("COOL") for beef and pork, which are intended to allow consumers to distinguish meat from cows and pigs born or raised in other countries but processed in the United States. Canada and Mexico both challenged the U.S. COOL requirements, which were added to the 2002 Farm Bill, as a violation of the WTO Agreement on Technical Barriers to Trade ("TBT") and the General Agreement on Tariffs and Trade 1994 ("GATT"). While the Panel affirmed the right of the United States to use country of origin labeling for meat products, it concluded that the COOL requirements had been drafted and implemented in a WTO-inconsistent manner.

The Panel first ruled that the COOL statutory provision and accompanying regulations are technical regulations subject to the TBT Agreement. According to Article 2.1 of the TBT Agreement, WTO members must ensure that products imported from any other member are treated no less favorably than like domestic products or like products originating in any other country with respect to technical regulations. The Panel determined that the COOL measures accord less favorable treatment to Canadian and Mexican cattle and hogs than to like domestic products, and thus the COOL requirements violate Article 2.1.

Article 2.2 of the TBT Agreement also requires countries to ensure that technical regulations are not "prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade," and as a result must be "no more restrictive than necessary to fulfill a legitimate objective." The Panel held that the United States also violated Article 2.2 because, as drafted and implemented, the COOL requirements do not fulfill the legitimate objective of providing consumers with information on origin.

Finally, the Panel found that a letter issued by the U.S. Secretary of Agriculture regarding the implementation of the COOL requirements violated Article X:3(a) of the GATT 1994, which requires

WTO members to administer all laws, regulations, decisions and rulings pertaining to the classification or valuation of products for customs purposes "in a uniform, impartial and reasonable manner." More specifically, the Panel found that the letter did not meet the minimum standards of procedural fairness because it suggested industry compliance with "voluntary" labeling requirements that were different and more strict than those appearing in the regulation, thereby creating uncertainties for the industry. Therefore, the letter was an "unreasonable administration" of the COOL statute and regulations.

Under WTO rules, the panel report will be adopted by the WTO's Dispute Settlement Body (DSB) and given legal effect unless it is appealed within 60 days, or by no later than 17 January 2012 in this case. The U.S. government has not yet indicated whether it intends to appeal nor how it would seek to make the measures WTO-consistent if no appeal is filed.

MOFCOM Investigates U.S. Aid To Renewable Energy Industry

Following the recent decision by the U.S. International Trade Commission ("ITC") to initiate investigations into Chinese governmental subsidies of its solar energy industry, two Chinese trade associations representing the Chinese renewable energy sector filed their own petition in China in late October, asking the P.R.C. Ministry of Commerce ("MOFCOM") to conduct an investigation of federal and state subsidies in the U.S. renewable energy industry. On November 25, MOFCOM announced its initiation of an investigation into U.S. state programs as subsidies in contravention of the WTO Agreement on Subsidies and Countervailing Measures ("SCM"). This announcement indicated that the investigation would primarily focus on renewable energy incentives that lend support to solar, wind, and hydropower technologies in Washington State, Ohio, New Jersey, Massachusetts, and California.

The investigations allege that targeted state programs provide companies located within those states with financial incentives to either manufacture or install solar and wind technology. These programs are said to provide additional incentives for the use of components manufactured within the respective state. The targeted program in California is unique because it operates through public utility companies to encourage consumers to install on-site generation facilities to reduce aggregate demand on the electric grid. The petition treats electricity rates set by the California Public Utilities Commission as a financial contribution provided by government.

MOFCOM appears not to have accepted the entire range of programs cited by the Chinese petitioners. In addition to the aforementioned programs, the Chinese petitioners listed federal procurements under the Buy-American Provision of the American Recovery and Reinvestment Act of 2009 as a violation of article 3.1 of the SCM, among other WTO obligations. Furthermore, the Chinese trade associations sought an investigation of another 2,324 state and federal programs that are allegedly "actionable" subsidies under article 5 of the SCM. These federal and state programs include appropriations, tax rebates, loan guarantees, bond issues, individual and corporate income tax deductions and exemptions, sales and property tax exemptions that relate either to the use of renewable energy technology or energy conservation. A U.S. Department of Energy database of federal and state incentives for renewable energy and energy conservation may have inadvertently assisted the Chinese petitioners.

News Of Note

ITC Votes Affirmative In Solar Panel Case

The ITC ruled in December 2011 that there is a reasonable indication that imports of crystalline silicon photovoltaic cells and modules from China are causing material injury to U.S. producers. The products at issue are used in integrated solar power generating systems. The value of the imports from China reached $1.2 billion in 2010. This affirmative preliminary determination by the ITC means that the investigation will continue at the U.S. Department of Commerce and the ITC and preliminary duties could be imposed in early 2012, with final decisions coming later in the year.

After Filing Trade Cases Against China In The United States, SolarWorld May Follow Suit In Europe

Solar manufacturer SolarWorld recently filed antidumping and countervailing duty petitions in the United States. The U.S. Department of Commerce initiated both investigations, and the ITC preliminarily determined that Chinese imports of solar cells and panels into the United States are injuring American solar manufacturers.

It remains unclear whether SolarWorld will file similar petitions before the European Commission. Recent press reports indicated that SolarWorld AG was working to solicit support from other European manufacturers, and had set a goal of obtaining support from companies that account for at least 50 percent of European production before filing, or double the amount that is required under applicable law. The company has previously stated its belief that Chinese industrial policy directly harms solar manufacturers in both Europe and the United States. Thus, the filing of a counterpart complaint in Europe may occur.

European Union Initiates Antidumping Proceedings On Bioethanol From The United States

In response to a complaint by the European Producers Union of Renewable Ethanol Association ("ePure"), the European Union initiated an antidumping proceeding on November 25, 2011, which could result in the imposition of import duties on bioethanol from the United States similar to the duties imposed on biodiesel from the United States and Canada. ePure alleges that tax credits and biofuel grant programs in Illinois, Minnesota, Nebraska, and South Dakota have allowed U.S. exporters to cut their selling prices by 40 percent in the EU. ePure also alleges a 500% increase in imports of bioethanol from the United States between 2008 and 2010. If the EU decides to uphold the complaint, it could impose duties on imports of bioethanol beginning in August of 2012.

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What The Candidates Are Saying: Newt Gingrich

In an answer to a question at Vermeer Corporation headquarters in Pella, Iowa, Gingrich stated:

> I strongly supported all three trade agreements {with South Korea, Colombia, and Panama} …. Look, I would like to get the most wide-open markets … . We should be dramatically more aggressive. I'd like to look around the country, I'm not normally pro trial lawyer, but I would like to look around the country, and find the toughest, most energetic trial lawyer in America, make them U.S. Trade Representative and tell them their job is to go around and kick in doors for the United States every day and the more doors they kick in the happier we're going to be.

Back in 2007, Gingrich posted on his website:

> In the US, there exists a coalition of union leaders who prefer protection over competition. This liberal coalition complains about companies' outsourcing jobs while insisting on corporate taxes that encourage companies to go overseas. They prefer that government impose on business obsolete, absurd work rules, even though these raise costs, lower productivity, and make America less competitive in the world market.
>
> The challenge to American economic supremacy from 1.3 billion Chinese and more than 1.1 billion Indians is vastly greater than anything we have previously seen. India's embrace of capitalism and China's bizarre combination of Marxist-Leninist government and free market initiatives will create a future where one-fourth of the world's markets will be controlled by these countries. Those who advocate economic isolationism and protectionism are advocating a policy that could help China and India surpass the US in economic power in our children's or grandchildren's lifetime.

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