

Trade & Manufacturing Alert

World Trade Organization Forms Compliance Panel In Airbus Case

Josh Snead

The World Trade Organization's ("WTO") Dispute Settlement Body ("DSB") last month accepted a U.S. request to establish a compliance panel in the case *European Communities — Measures Affecting Trade in Large Civil Aircraft*, WT/DS316. The U.S. requested that the WTO consider whether the European Union ("E.U.") has complied with an earlier finding that the European aircraft consortium Airbus has received illegal government subsidies that caused adverse effects—in the form of displacement of exports and lost sales—for U.S. aircraft maker Boeing.

In a May 2011 ruling in this dispute, the WTO Appellate Body found that the governments of France, Germany, Spain, and the United Kingdom provided illegal subsidies to Airbus in the form of launch-aid loans, infrastructure support, and equity infusions. The United States has stated that these illegal subsidies to Airbus totaled \$18 billion, although the E.U. has argued that the total is significantly lower. The E.U. was given six months—until December 1, 2011—either to withdraw these subsidies or remove the adverse effects of the subsidies. The E.U. informed the DSB in December 2011 that it had brought its measures into compliance with the Appellate Body's ruling by taking actions including securing repayment of certain loans and terminating certain launch-aid loan agreements.

The United States disagreed, insisting that the E.U. had provided no evidence to support its claimed compliance. The United States asserted that the

May 2012

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E.U. had failed to remove the subsidies in question, and had even granted new subsidies to Airbus. As a result, the United States requested the establishment of a compliance panel. U.S. Trade Representative Ron Kirk stated that the "United States cannot accept anything less than an end to this subsidized financing," and that "[t]he United States remains prepared to engage in any meaningful efforts that will lead to the goal of ending subsidized financing at the earliest possible date." The United States told the DSB that the E.U.'s notification to the WTO regarding compliance "shows that it has not changed its behavior in any meaningful way."

The Office of the U.S. Trade Representative on April 19 published a notice requesting comments on this compliance dispute (77 Fed. Reg. 23539). Any

comments should be submitted by May 21 in order to ensure consideration.

The E.U. and the United States have negotiated a procedural agreement under which the two sides agreed to work together to ensure that the compliance panel can issue its ruling within 90 days. If the U.S. prevails in the compliance dispute, a WTO arbitration proceeding would then determine the permissible level of U.S. countermeasures.

The procedural agreement between the two sides also applies to a separate WTO dispute in which the Appellate Body in March concluded that Boeing had received illegal subsidies of between \$3.2 and \$4.3 billion. The United States is required to comply with this ruling by September 2012.

USTR Details Issues And Progress On Foreign Trade Barriers

Rebecca Woodings

The U.S. Trade Representative has issued three reports addressing trade barriers for U.S. exports. Each report focuses on a subset of trade barriers, identifying existing significant barriers to U.S. exports and reviewing recent efforts by the U.S. Government to reduce or eliminate barriers.

The *2012 National Trade Estimate Report on Foreign Trade Barriers* (“*2012 NTE Report*”) addresses the widest range of trade barriers: (1) import policies (e.g., tariffs, quantitative restrictions); (2) government procurement; (3) export subsidies; (4) inadequate intellectual property protection; (5) barriers to trade in services; (6) barriers to foreign investment; (7) foreign anticompetitive conduct; (8) restrictions affecting electronic commerce; and (9) barriers that encompass more than one category, or that affect a single sector. The *2012 NTE Report* discusses 58 countries as well as regional groups and other entities. One-tenth of the entire report, or 40 pages,

addresses tariff barriers in China. In terms of merchandise trade, the report addresses China’s import-substitution policies, variable VAT rates, and export subsidies, quotas, duties, and licenses. The report also notes “inadequate protection and enforcement of IPR” as a barrier to U.S. exports and investment.

Since March 2010, the U.S. Trade Representative has addressed two categories of trade barriers in separate reports. The *2012 Report on Sanitary and Phytosanitary Measures* (“*SPS Report*”) focuses on trade barriers affecting U.S. food and agricultural exports. SPS measures are rules and procedures aimed at ensuring that foods and beverages are safe to consume and protect animals and plants from pests and diseases. The *SPS Report* focuses on such measures judged by U.S. officials to be unnecessarily discriminatory. According to the *SPS Report*, during 2011, U.S. negotiators eliminated specific SPS barriers in Japan and Korea affecting U.S. cherries and citrus, and barriers in South Africa and Sri Lanka affecting U.S. exports of apples and seed potatoes. Negotiations also addressed barriers in Kuwait and Taiwan affecting U.S. exports of poultry and poultry products and barriers in the United Arab Emirates affecting U.S. exports of beef.

The *2012 Technical Barriers to Trade Report* (“*TBT Report*”) focuses on trade barriers that take the form of product standards, testing requirements, and similar technical requirements affecting the sale of U.S. products and services abroad. The *TBT Report* highlights progress on reducing technical barriers to trade as a result of passage of free trade agreements with Korea, Colombia, and Panama. The *TBT Report* also attributes reduction in technical barriers to trade to discussions undertaken in the other multilateral and bilateral negotiating fora. In particular, the *TBT Report* notes that U.S. negotiators are pursuing reduction of technical barriers to trade within the context of the Trans-Pacific Partner

The “Bigger Brazil” Industrial Plan Grows Again

Jennifer Jones

In a continuing effort to boost Brazilian manufacturing, the Government of Brazil announced another \$35 billion in stimulus measures on April 3. This second phase of the Brasil Maior (“Bigger Brazil”) Industrial Plan eliminates payroll taxes for some Brazilian manufacturers and greatly expands low-cost lending facilities offered by Brazil’s National Development Bank, BNDES.

Brazil’s 20 percent payroll tax, long criticized as hampering Brazil’s industrial competitiveness, has been eliminated for certain sectors. The first phase of Bigger Brazil, announced last August, eliminated the payroll tax for clothing, footwear, call centers, and software sectors. In the recent announcement, eleven new sectors qualify for payroll tax elimination, including textiles, auto parts, capital goods, plastics, furniture, electrical materials, buses, shipping industry, airplane industry, hotels, and microchip design. For these industrial sectors, the payroll tax will be replaced by a tax on gross revenues at the rate of 1 percent for industries and 2 percent for service sectors.

BNDES also received \$24.7 billion from Brazil’s National Treasury to expand its industrial loan programs. BNDES announced a number of changes to reduce the cost of financing for industries and extend loan terms and amounts. The BNDES PSI Program, which provides loans for industrial purchases of machinery and equipment, was extended through December 2013. Interest rates for this program were also reduced, from 8.7 percent to 7.3 percent for large companies, and from 6.5 percent to 5.5 percent for micro, small, and medium-sized enterprises. For export loans, BNDES is extending the loan term from 24 to 36 months, with interest rates continuing at 9 percent for large companies and 7 percent for micro, small, and medium enterprises.

Additionally, BNDES announced a new PSI program, directed at promoting technological development. The BNDES Transforming Projects program, focused on knowledge and engineering-intensive sectors, provides loans for investments that promote technological and production capacity for products not currently manufactured in Brazil. These loans will be issued for up to 144 months at 5 percent interest.

At the recent Latin America Summit in Colombia, Brazil’s President, Dilma Rousseff, stated that Brazil’s actions are necessary to protect Brazilian companies and jobs from other countries’ predatory trade practices. Since we first reported on Bigger Brazil in the [September 2011 Trade & Manufacturing Alert](#), the government has continued to intervene in the currency markets to prevent further appreciation of the Real. The Real’s appreciation has made Brazilian products more expensive in export markets. In addition, Brazilian manufacturers continue to face competition in Brazil from lower cost imports manufactured in countries with weaker currencies.

Commerce Department Reports On The Impact Of Intellectual Property On The U.S. Economy

Augustine Lo

On April 11, 2012, the Economics and Statistics Administration and the U.S. Patent and Trademark Office released a report entitled “Intellectual Property and the U.S. Economy: Industries in Focus.” The report describes in statistical terms the role of intellectual property (“IP”) in the U.S. economy. According to Commerce Secretary John Bryson, “This first of its kind report shows that IP-intensive industries have a direct and significant impact on our nation’s economy and the creation of American jobs.”

The report identifies 75 of 313 types of industries as “IP-intensive,” which rely heavily on the use of

intellectual property (i.e., rights protected by patents, copyright, and trademarks). In 2010, these industries added \$5.06 trillion to the U.S. economy, or one-third of the gross domestic product.

According to the report, between 2010 and 2011, these industries grew at a rate of 1.6 percent, which was 60 percent faster than the average growth rate of 1.0 percent for other industries. The highest growth rate was reportedly in copyright-intensive industries, which grew at a pace of 2.4 percent. IP-intensive industries accounted for \$775 billion, or 60.7 percent of merchandise exported from the United States in 2010.

In 2010, these industries directly accounted for 27.1 million jobs, or 18.8 percent of total U.S. jobs. Of this total, about 60 trademark-intensive industries accounted for 22.6 million jobs; 26 patent-intensive industries accounted for 3.9 million jobs; and 13 copyright-intensive industries accounted for 5.1 million jobs. Furthermore, IP-intensive industries indirectly contributed to 12.9 million jobs in other industries that either supplied or provided services to IP-intensive industries. Thus 40 million jobs, over one-fourth of all U.S. jobs, either directly or indirectly relied on IP-intensive industries. The states with the highest concentration of IP-intensive employment in 2010 were California, Connecticut, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin.

There is a sizable difference in wages between IP-intensive industries and other industries. The average weekly wage for IP-intensive industries was \$1,156 in 2010, which was 42 percent greater than the \$815 paid on average in other industries. This wage difference nearly doubled between the years 1990 and 2010. The most significant increase in this wage difference was in copyright-intensive industries, rising from 65 percent in 2005 to 77 percent higher wages in 2010.

The Obama administration seeks to foster continued growth of IP-intensive industries by bolstering IP

protections. In the news release accompanying the report, Deputy Commerce Secretary Rebecca Blank said, “[s]trong intellectual property protections encourage our businesses to pursue the next great idea, which is vital to maintaining America’s competitive edge and during our overall prosperity.” Secretary Bryson said, “When Americans know that their ideas will be protected, they have greater incentive to pursue advances and technologies that help keep us competitive, and our businesses have the confidence they need to hire more workers.”

U.S. Government Intervenes In Action Alleging Evasion Of Import Duties

Rebecca Woodings

The U.S. Department of Justice intervened in a lawsuit alleging falsification of country-of-origin documents to U.S. Customs and Border Protection. At issue is whether a Japanese company, Toyo Ink International Corp., two U.S. affiliates, and a Mexican joint venture partner (collectively “Toyo”) misrepresented the country of origin for U.S. imports of carbazole violet pigment number 23 (“CVP-23”) in order to evade antidumping and countervailing duties. According to the lawsuit, Toyo falsely certified that its CVP-23 imports were of Mexican and/or Japanese origin and improperly marked the products’ packaging as being made in Mexico or Japan, rather than China.

The United States has imposed antidumping duties on imports of CVP-23 from China since 2004. Although a few Chinese companies have lower rates, the “all others” antidumping rate applicable to most Chinese exporters of CVP-23 is 241 percent *ad valorem*. Significant antidumping and countervailing duties also apply to CVP-23 imported from India.

Two U.S. producers filed the cases against CVP-23 from China and India in 2003. One of the petitioners, National Ford Chemical Company

(“National Ford”), has identified itself as the only current U.S. producer of crude CVP-23. The second petitioner, Sun Chemical Corporation, operates as a toll producer for National Ford, converting its crude CVP-23 to a finished form for sale.

The lawsuit at issue was filed in October 2009 by the Chairman of the Board and Chief Executive Officer of National Ford. The suit was filed under the whistleblower provisions of the False Claims Act, which permits private parties to sue, on behalf of the United States, companies or individuals that are alleged to have falsely claimed federal funds. In such actions, the U.S. Government may intervene, as it has done in this case. The whistleblower provisions of the False Claims Act enable the whistleblower to share in any funds recovered by the Government.

The lawsuit asserts that Toyo failed to pay tens of millions in duties by fraudulently misreporting the country of origin of its imports. In announcing its intervention in the lawsuit, a Department of Justice spokesperson stated that “Companies taking advantage of United States markets must comply with the law, including the payment of import duties levied to protect domestic manufacturers and producers from unfair competition abroad.”

News Of Note

Highlights From The Joint Statement Of The NAFTA Free Trade Commission

Shannon Doyle

The NAFTA Free Trade Commission (“the Commission”) met in Washington, D.C. on April 3, 2012. In a joint statement released following the meeting, the Commission reiterated its commitment to “expand trade and investment, reduce administrative costs, and thereby further strengthen North American competitiveness.” Trade among the

NAFTA countries has more than tripled since 1993, rising to \$1 trillion in 2011.

The joint statement highlights several initiatives related to North American trade. The Commission acknowledges the North American Steel Trade Committee for its role in “drawing attention to issues of importance to the manufacturing sector and promoting cooperation between North American industry and governments in areas of mutual interest.” The Commission also notes that NAFTA’s Working Group on Rules of Origin has completed the fourth revision of the NAFTA rules of origin, and that all three countries will work to implement the changes quickly. The Commission commits to enhancing trade in chemicals, in part by asking NAFTA working groups to address challenges pertaining to rules of origin, customs procedures, and classification. The joint statement highlights the new publication “The NAFTA Certificate of Origin: Frequently Asked Questions,” which is available online as part of the Commission’s goal to help small and medium-sized enterprises more easily access information. The joint statement also addresses the Trans-Pacific Partnership, stating that “[t]he United States welcomes Canada’s and Mexico’s interest in joining TPP as ambitious partners.”

U.S. International Trade Commission Makes Unanimous Preliminary Injury Determination In Investigation Of Dumped And Subsidized Chinese Drawn Stainless Steel Sinks

Patrick Togni

Elkay Manufacturing Company of Oak Brook, IL successfully obtained an affirmative determination by the U.S. International Trade Commission (“ITC”) that there is a reasonable indication that a U.S. industry is materially injured by reason of allegedly dumped and subsidized imports of drawn stainless steel sinks from China.

The record of this proceeding shows a situation that is all too familiar to many U.S. manufacturers in recent years: a handful of U.S. companies facing unfair competition by a massive export-oriented Chinese industry that benefits from large government subsidies and sells its products at unfairly low prices in the U.S. market. Indeed, Chinese companies are responsible for 85 percent of all U.S. imports of drawn stainless steel sinks and the volume of Chinese imports grew by more than 60 percent in the last two years.

Following the conclusion of this initial stage at the ITC, the proceedings will now move toward preliminary countervailing and antidumping duty determinations by the U.S. Department of Commerce, in May and August, respectively.

ITC Rejects Several Antidumping And Countervailing Duty Cases

Rebecca Woodings

The ITC voted on numerous antidumping and countervailing duty investigations in April 2012. The ITC made negative final determinations in antidumping and countervailing duty investigations on imports of refrigerators with bottom-mounted freezers from Korea and Mexico, imports of steel wheels from China, and imports of galvanized wire from China and Mexico. These determinations terminate the investigations, but are subject to

appeal in the federal courts. The ITC made affirmative final determinations in the antidumping investigations on imports of stilbenic optical brightening agents from China and Taiwan and imports of steel nails from the United Arab Emirates. Following these affirmative decisions, the Department of Commerce will issue antidumping duty orders.

Suspension Of Argentina's GSP Eligibility; Designation Of South Sudan As GSP Beneficiary

Lee Smith

President Obama issued a proclamation suspending benefits to Argentina under the Generalized System of Preferences (“GSP”) program and designating South Sudan as a GSP least developed beneficiary country on March 26, 2012. The GSP program promotes economic growth in the developing world by providing preferential duty-free treatment for thousands of products from beneficiary countries. Least developed countries are granted duty-free treatment for additional products. The suspension of Argentina’s GSP designation was based on its failure to pay two longstanding arbitral awards in favor of U.S. companies and demonstrates that U.S. companies may seek recourse under the GSP program against countries that fail to pay arbitration awards.

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