King & Spalding

Trade & Manufacturing Alert

California Congressman Introduces Make It In America Act "To Bring Good Manufacturing Jobs Back To America"

Patrick Togni

Congressman John Garamendi (D-CA) recently introduced H.R. 613, the *Airports, Highways, High-Speed Rail, Trains, and Transit: Make It In America Act* ("*Make It In America Act*"). The legislation would make amendments to Buy America Act provisions of current law regarding various transportation sectors, including airports, highways, high-speed rail, Amtrak, buses, light rail, and heavy rail. The *Make It In America Act* is part of the Make It In America agenda and legislative initiative for Democrats in the U.S. House of Representatives whose goal is to rebuild manufacturing in America.

Specifically, the *Make It In America Act* would eliminate certain types of waivers to Buy America Act requirements that otherwise mandate use of steel, iron, and manufactured goods that are produced in the United States.

Airports, Buses, Light Rail, and Heavy Rail

Under current law, waivers to Buy America Act requirements may be obtained in situations where the requirement to use only steel, iron, and manufactured goods produced in the United States is "inconsistent with the public interest" or the U.S.-origin steel or goods "are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality."

The *Make It In America Act* eliminates these waivers and instead would allow limited use of non-U.S. steel, iron, and manufactured goods provided that at least 60 percent of the components are produced in the United States for obligations made on or before December 31, 2011 and at least 80 percent of the components are produced in the United States for obligations made in the period from January 1, 2012, through December 31, 2012. This phase-out period would end completely on January 1, 2014, thus ending the potential for waivers completely at that time should the proposed bill be enacted.

Highways, Roadways, and High Speed Rail

The *Make It In America Act* eliminates most waivers available under current law and instead would allow use of non-U.S. steel and manufactured goods only where "including domestic material will increase the cost of the overall project by more than 25 percent."

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Amtrak

The *Make It In America Act* eliminates all waivers available under current law that apply to Amtrak projects where the "articles, materials, or supplies bought" are priced at at least $1,000,000.

Prospects For Enactment

The prospects for action on *Make It In America Act* before the 2012 elections are uncertain, but it is clear that the proposed legislation will be a part of the blueprint for Congressional Democrats to revitalize American manufacturing for some time to come.

The United States Challenges China's Auto Case At The WTO

Lee Smith

The United States recently challenged duties imposed by China on U.S. auto exports at the World Trade Organization ("WTO"). The duties, ranging from 2 to 21.5 percent, were imposed by China after the government conducted antidumping ("AD") and countervailing duty ("CVD") investigations. The United States is challenging numerous aspects of China's autos determination.

The challenged duties were imposed on U.S.-produced cars and SUVs with an engine capacity of at least 2.5 liters -- most midsize vehicles and larger. The Chinese duties cover more than 80 percent of U.S. auto exports to China and fall disproportionately on General Motors and Chrysler because of bail-out funds provided by the U.S. Government during the financial crisis. China was reportedly the fourth-largest export market for U.S. new passenger vehicles in 2011.

The United States' new challenge comes on the heels of its WTO victory against China in the grain oriented electrical steel ("GOES") case. In the GOES case, the United States challenged systematic problems in China's AD and CVD investigations. The Panel in GOES determined that China acted inconsistently with its obligations by initiating a CVD investigation without sufficient evidence and by failing to comply with the "objective examination" and "positive evidence" requirements with respect to its injury analysis. The United States' autos challenge involves some of the same issues challenged in the GOES case.

In the autos case, the United States also is challenging China's initiation and standing analysis. In autos, the United States alleged that China "failed to examine the degree of support for, or opposition to," the domestic Chinese producers' petition prior to initiation. The United States also alleges that China failed to meet its WTO obligations by initiating the investigations "when domestic producers supporting the application accounted for less than 25 percent of total production of the like product" and China failed to "examine or review the accuracy and adequacy of the evidence" provided by petitioners.

These two cases demonstrate that the U.S. Government is proactively challenging measures applied by China against U.S. manufactures to ensure that U.S. manufactures receive a fair investigation in China. If the U.S. victory in the GOES investigation is upheld, China will be required to remove the duties on U.S.-produced GOES. The United States seeks to achieve a similar victory in the autos case while attempting to ensure that China does more to meet its transparency and due process commitments in future AD and CVD cases.

Pratt & Whitney Canada Pleads Guilty To Export Control Violations For Selling Military Software To China

Shannon Doyle

On June 28, Pratt & Whitney Canada pleaded guilty to violating the Arms Export Control Act and to

making false statements to the U.S. government about its export activities. Pratt & Whitney Canada sold commercial helicopter engines and modified software to the Chinese government. The software, originally developed for use in U.S. military helicopters, is controlled under the International Traffic in Arms Regulations.

The U.S. government does not allow the export of defense equipment and technology to China. Certain "dual-use" items that may have both a military and civilian use, such as the helicopter engines, may be exported under a license provided that they are not intended for military use. Pratt & Whitney Canada allegedly knew that the Chinese government would use the technology to develop a military attack helicopter, but proceeded with the sale despite the embargo with the hope that the company would be able to break into the civilian helicopter market in China.

Pratt & Whitney Canada, its parent company, United Technologies Corporation, and United Technologies' U.S. subsidiary Hamilton Sundstrand Corporation, all agreed to pay more than $75 million in fines in order to settle with the State Department and the Justice Department. The companies will be eligible to have $20 million of the penalty suspended if the money is used to put remedial compliance measures in place. Additionally, the State Department has announced a partial debarment of Pratt & Whitney Canada for new export licenses. Pratt & Whitney Canada still will be able to request exemptions in order to receive export licenses on a case-by-case basis. The company will be eligible for reinstatement in a year.

Russia Ratifies WTO Accession Protocol

T. Augustine Lo

On July 21, 2012, Russian president Vladimir Putin signed Russia's protocol of accession to the WTO. As reported in January, Russia finalized its WTO accession protocol last December. Under that protocol, Russia agreed to reductions in its tariffs on imports of manufactured goods and agricultural products, as well as technical barriers to trade.

On July 10, the Russian legislature, the Duma, ratified the protocol of accession despite significant domestic opposition. President Putin's signature formally ends Russia's eighteen-year long quest to join the WTO. With Russia's accession, the WTO regime covers over 97 percent of worldwide trade.

According to Mark Thompson, a corporate partner at King & Spalding's London office and co-chair of the firm's private equity practice, Russian accession to the WTO bears both promises and risks:

> Our clients view Russia's accession to the WTO as potentially being very important. It will take some time for them to digest the full impact of Russia's membership, but global clients that import goods into Russia from the pharmaceutical industry, to aviation to heavy manufacturing see a lot of potential. We are spending time with many international companies helping them to understand the impact of Russia's accession on their industries and potential remedies. The impact of WTO accession in Russia will not only impact existing operations of clients, but could also have significant ramifications on acquisitions in Russia. Consequently, particularly while the WTO is relatively new to Russia, companies should pay particular attention to WTO issues when conducting due diligence. When reviewing their position in Russia, it is also a good time for companies to evaluate other potential WTO issues around the world as well.

Mr. Thompson emphasizes, however, "that it is too early to see how the Russian government is going to behave in the new WTO regime."

Russia's accession does not immediately affect U.S.-Russia trade. Current U.S. law, which dates to

the Soviet period, prevents the United States from according Most-Favored-Nation trading status to Russia. Accordingly, Russia is not required at present to reduce its trade barriers vis-à-vis the United States. Although President Obama has asked Congress to revisit this law before Russia formally joins the WTO in August, the drive to extend "permanent normal trade relations" to Russia has met significant opposition. Many members of Congress express concerns over Russia's commitment to the WTO regime and its deficient record in the area of human rights and the rule of law.

News Of Note

China Unveils Supporting Policies For The New-Energy Auto Industry Over 2012-2020

Lingna Yan

Following the promulgation of the *12th Five-Year National Development of Strategic Emerging Industries*, on June 28 the State Council of China issued the Energy-Saving and New-Energy Automobile Industry Development Plan (2012-2020) ("the Plan") to further direct and support the development of China's new-energy auto industry, one of the seven strategic emerging industries strongly boosted by the Chinese government, over the period of 2012 to 2020. The Plan emphasizes the importance of the commercialization of energy-saving and new-energy vehicles, the construction of supporting facilities, and the development of key core technologies. With the goal of selling 500,000 electric and hybrid vehicles by 2015 accumulatively and 5 million by 2020, the Plan promotes the new energy auto industry via a number of subsidy programs, including tax incentives and financing supports to auto and key auto parts makers, grants for research and development, commercialization, construction of support facilities projects, incentives for car purchases, and government procurement programs.

Canada, Mexico To Join Trans-Pacific Partnership Negotiations

Josh Snead

U.S. Trade Representative Ron Kirk informed Congress in letters sent on July 9 and 10 of the Obama administration's intent to bring Canada and Mexico into ongoing negotiations for the Trans-Pacific Partnership trade agreement. The Congressional notification triggered an automatic 60-day public comment period, after which Canada and Mexico would join the formal negotiations provided that the other eight members of the negotiations also approve of their inclusion. The 13th round of TPP negotiations (which did not yet include Canada and Mexico) concluded in San Diego in early July. Although participating countries have stated a goal of concluding negotiations by the end of 2012, many observers believe it is unlikely the negotiations, which began in 2009, will be concluded before 2013.

India Moves Forward With World Trade Organization Challenge To U.S. Duties On Hot-Rolled Steel

Josh Snead

India requested the establishment of a dispute settlement panel at the July meeting of the WTO's Dispute Settlement Body ("DSB") to determine whether the U.S. violated WTO rules when it imposed a countervailing duty order on imports from India of hot-rolled carbon steel flat products. India had previously requested consultations with the United States on this issue in April 2012. The United States blocked India's initial request to establish a panel, but under WTO rules the United States would not be able to block a second request by India at a future meeting of the DSB. India is challenging the U.S. conclusion that Indian steel producers received a countervailable subsidy through the purchase of iron ore from a state-owned producer for less than adequate remuneration.

WTO Appellate Body Issues Decision In U.S. Country Of Origin Labeling Case
Shannon Doyle

On June 29, the WTO Appellate Body circulated its report in *United States - Certain Country of Origin Labelling (COOL) Requirements.* Although the Appellate Body upheld the Panel's decision that the COOL requirements are inconsistent with Article 2.1 of the Agreement on Technical Barriers To Trade ("TBT") Agreement, it did so on different grounds.

The Appellate Body found that the COOL requirements accord less favorable treatment to imported livestock than to like domestic livestock due to its recordkeeping and verification requirements. The Appellate Body reversed the Panel's decision with respect to Article 2.2 of the TBT Agreement. The Appellate Body agreed with the Panel that the provision of consumer information on origin is a "legitimate objective." However, the Appellate Body found that the Panel erred in stating that the COOL requirements do not fulfill their stated objective because they fail to convey "meaningful origin information to consumers." The Appellate Body ultimately determined that the record before it contained insufficient information to complete the legal analysis under Article 2.2, and therefore made no conclusive finding as to whether the COOL requirements are more trade restrictive than necessary to fulfill its legitimate objective.

The next step in the case is for the WTO Dispute Settlement Body to adopt the Appellate Body's recommendations and rulings. As part of its markup of the 2012 Farm Bill, the House Committee on Agriculture included an amendment setting a 90-day limit for the USDA to report to Congress how it will ensure that the United States complies with the WTO ruling.

For additional information on the COOL requirements and the November 2011 ruling of the WTO Dispute Settlement Panel ruling, see the January 2012 and April 2012 editions of the Trade and Manufacturing Alert.

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