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Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301.570.4544 Fax: 301.570.4545

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Entry into Force Is Next Step for FTAs

President Obama's signing of legislation Oct. 21 to implement the free trade agreements (FTAs) with Colombia, Panama and South Korea may have been the high-water mark for the administration's trade agenda. With the Trans-Pacific Partnership (TPP) the only major trade negotiations underway, the White House continues to be shy about entering new trade talks.

> Nonetheless, in an Oct. 21 op-ed in *Politico*, U.S. Trade Representative (USTR) Ron Kirk claimed that by delaying the three deals "to get these initiatives right, the president cleared a path to a stronger long-term trade policy." The signing of implementing legislation signals more than ratification of the agreements, he said. "It will validate this president's approach to trade: more responsible and more responsive to Americans' concerns," Kirk wrote.

With the signing, the USTR staff is now entering into talks with the three FTA partners to ensure they implement needed legislation or regulations that will allow the president to certify their compliance with the three accords and allow them to enter into force. No deadlines have been set for when that process will be completed, but it isn't likely to occur before the new year. Trade officials of the four countries will consult over the coming weeks to come up with lists of measures that are needed to implement the deals and how long it will take for them to be completed. For Colombia, there will be the extra requirement for Obama to certify that Bogota has kept the promises it made in the labor action plan (see **WTTL**, Oct. 17, page 2).

Court May Revisit NME Ruling in Georgetown Steel

As the House Ways and Mean Committee begins its examination of Chinese trade and currency policies at an Oct. 25 hearing, a federal appellate court may be preparing to reexamine a 1984 ruling on the application of U.S. countervailing duty (CVD) laws to nonmarket economies (NMEs). A new court opinion could run counter to legislation (S. 1619) that would treat China's alleged currency manipulation as a countervailable subsidy. It might also require Congress to reopen the CVD law to apply it explicitly to China.

A three-judge Court of Appeals for the Federal Circuit (CAFC) panel raised questions about the landmark 1984 *Georgetown Steel* decision during oral arguments Oct. 6 on the government's appeal of a 2010 ruling by Court of International Trade (CIT) Judge Jane Restani in *GPX International v. U.S.* Restani had ruled the International Trade Administration (ITA) had acted "unreasonable" in applying a CVD to tire imports from China along with an antidumping duty

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because the agency could not explain how its avoided applying a double remedy to the same behavior (see **WTTL**, Aug. 9, 2010, page 1). The CAFC panel pressed both Justice lawyer Franklin White and GPX's attorney James Durling of Winston & Strawn on whether *Georgetown Steel* could still be applied to China. The judges also questioned how subsidies can be measured in a NME country and whether the rules applying the antidumping law to NMEs through the use of surrogate countries and producers already address the problem.

> *Georgetown Steel* "is still good law for the purpose of holding that, where it is impossible because of the nature of the economy that is being considered, where it is impossible to identify and measure a subsidy, that Commerce is not required to impose the countervailing duty law," White told the court. He suggested that *Georgetown Steel* was intended to apply to Iron Curtain countries.

Durling said Commerce "was trying to escape from the consequences of having designated China a nonmarket economy." He said the statute creates a bright line between market economies and NMEs and that Congress has twice confirmed the *Georgetown Steel* ruling in legislation. "What the agency is trying to do here is create a third category, a category of hybrid countries, which is not permitted by the statute because the statute draws just one line," he told the court. Even when Commerce claims it has discretion under the *Chevron* doctrine to change its interpretation of the law, the department has acted inconsistently, Durling argued.

U.S. Industry Urges Comprehensive, All-Inclusive TPP

With negotiations toward a Trans-Pacific Partnership (TPP) agreement getting further into the details, 43 U.S. industry organizations representing agriculture, manufacturing, retailing, technology and services urged the Obama administration to push for a "comprehensive approach" to a deal. Without offering specific recommendations or goals, a letter from the organizations to President Obama and USTR Ron Kirk Oct. 19 said a TPP agreement "that provides full reciprocal market access and does not exclude any sector, sub-sector, product or service from the market-access provisions or core trade and investment rules of the final TPP is vital."

> As more specific TPP proposals are offered, the potential sticking points and areas of resistance are becoming clearer. Even TPP countries with which the U.S. already has free trade agreements – Australia, Chile, Peru and Singapore -- areas of disagreement are surfacing, including on topics such as investment. Talks will be tougher with TPP countries with which the U.S. has no trade pacts -- Brunei, Malaysia, New Zealand, and Vietnam -- and everything needs to be negotiated.

U.S. negotiators were in Lima, Peru, the week of Oct. 17 for a ninth round of TPP talks, with the goal of having the broad outlines of a TPP deal by the APEC Leaders meeting in Honolulu, Nov. 8-13. In Lima, the U.S. offered a text to address unfair advantages given to state-owned enterprises. This is "an issue that has united labor and business groups in the United States," Deputy USTR Demetrios Marantis told the Washington International Trade Association (WITA) Oct. 14. "We have accomplished a lot and come a long way. But let me be clear. We are engaged in some very difficult work. And we have more hard work ahead of us," he conceded.

Court Allows Extraterritorial Application of Section 337

Section 337 remedies against unfair imports can be used to target the theft of U.S. trade secrets in China, the Court of Appeals for the Federal Circuit (CAFC) ruled Oct. 11 in a case opening the way for the extraterritorial application of the statute. In a split 2-1 decision (case no. 2010-1395) in *TianRui Group v. the International Trade Commission* (ITC), the CAFC upheld an ITC ruling in a 337 case filed by Amsted Industries against imports of cast steel railway wheels from China. The record showed that TianRui had hired former Amsted employees in China who revealed to Tianrui proprietary trade secret information on the production method for making the wheels. "The Commission's interpretation of section 337 as reaching acts of

trade secret misappropriation that occur abroad is consistent with the position it has taken regarding overseas acts of unfair competition since the enactment of section 337's predecessor," wrote Judge William Bryson for the majority. "We have held that the Commission's reasonable interpretations of section 337 are entitled to deference," he added.

> "TianRui argues that the Commission should not be allowed to apply domestic trade secret law to conduct occurring in China because doing so would cause improper interference with Chinese law. We disagree," Bryson wrote. "The Commission's exercise of authority is limited to goods imported into this country, and thus the Commission has no authority to regulate conduct that is purely extraterritorial. The Commission does not purport to enforce principles of trade secret law in other countries generally, but only as that conduct affects the U.S. market," he wrote.

In her dissent, Judge Kimberly Moore agreed that trade secret misappropriation falls squarely within the terms of Section 337, but only for acts in the U.S. "United States trade secret law simply does not extend to acts occurring entirely in China. We have no right to police Chinese business practices," she argued. "The potential breadth of this holding is staggering," she wrote. Moore questioned whether the holding could also apply to labor laws, minimum wages and forced labor. "Absent clear intent by Congress to apply the law in an extraterritorial manner, I simply do not believe that we have the right to determine what business practices, conducted entirely abroad, are unfair," Moore contended.

Long-Brewing Fight with China over Solar Panels to Get Hearing

SolarWorld Industries America Inc. on behalf of itself and six other solar panel firms belonging to the Coalition for American Solar Manufacturing (CASM) filed antidumping and CVD complaints at ITC and ITA Oct. 19 against imports of crystalline silicon photovoltaic cells from China. While the six other CASM members asked for their identities to remain secret, they expressed support for the petitions in a confidential submission to the agencies.

> "The petitions also assert Chinese manufacturers are receiving massive illegal subsidies from the Chinese government, which is deploying contract awards, trade barriers, financing breaks and supply-chain subsidies, among an extensive and pervasive array of other supports and incentives, to advance the exports of Chinese manufacturers," a SolarWorld statement said.

One Chinese respondent, Suntech Power Holdings Co., Ltd., said it adheres to international trade rules. "Anyone can file one of these actions; having filed an action is in no way a validation from the US government as to the merits of the action," it said. "Each individual company, including Suntech, will respond in accordance with ITC & DOC guidelines," it added. The Solar Energy Industries Association (SEIA), which represents about 1,000 firms, took a neutral, arms-length stand on the SolarWorld petition. "These allegations must be thoroughly examined and, if unlawful trade practices are found, action to remedy those practices should be taken. In turn, parties accused of unfair trade practices also have the right to defend themselves in the process of these investigations," said SEIA President Rhone Resch in a statement.

U.S., EU Square Off over Cause-and-Effect of Boeing Subsidies

There was no cause-and-effect between Boeing's contracts with the Defense Department (DoD) and the National Aeronautics and Space Administration (NASA) or state tax breaks and the alleged injury Airbus suffered from lost sales of large civil aircraft, the U.S. argued in the second round of oral arguments before the WTO Appellate Body. The hearing, which was held Oct. 11 and broadcast for the public Oct. 18, heard cross appeals from the U.S. and European Union (EU) over a dispute-settlement panel's ruling that Boeing received subsidies that violated WTO rules and caused injury to Airbus (see **WTTL,** Sept. 5, page 3). The EU contended these programs "were a genuine and substantial cause of significant lost sales, price suppression and

displacement." The EU highlighted the panel's conclusion that NASA and DoD contracts on "critical technological advances provided the 'building blocks' for the application of those technologies on the 787, and 'complemented Boeing's internal product development offers'."

> The hearing also noted the potential impact of the International Traffic in Arms Regulations (ITAR) on the research Boeing conducted for the government. The U.S. and EU debated whether the work fell under the "fundamental research" exemption from controls or whether it was applied research. In one filing, the U.S. had argued that the ITAR-mandated redactions in the scope of work statement it provided the panel were evidence that Boeing could not have used the controlled technology on its aircraft or production process.

The U.S. also objected to the panel's finding that NASA research was "in large part" responsible for Boeing's ability to use third-party supplier technologies on the 787. It claimed the finding is not supported by the examples cited by the EU regarding research on the Joint Strike Fighter and F-22 programs, the use of electric actuators on aircraft, and the Integrated Wing Design project. The EU cited the panel's finding that Boeing's work on the DoD and NASA programs "enabled Boeing to leverage the substantial accumulated knowledge and experience in any future composite-related R&D activity."

* * * Briefs * * *

ITC: Commission formally promoted ALJ Charles Bullock to chief administrative law judge Oct. 20. It also named two new ALJs who both come from Social Security Administration's office of disability adjustment and review in Richmond: Thomas Bernard Pender and David Shaw.

TRADE PEOPLE: With passage of FTAs with Colombia, Panama and Korea, "holds" on President Obama's nominations for trade posts were lifted and Senate Oct. 20 confirmed John Bryson to be secretary of Commerce by 74-26 vote. He was sworn in Oct. 21. Senate by voice vote Oct. 20 also confirmed Michael Punke to be deputy USTR, Islam Siddiqui to be chief USTR agricultural negotiator and Paul Piquado to be assistant secretary of Commerce for import administration.

RUSSIA: USTR Ron Kirk issued statement Oct. 21 welcoming EU agreement with Russia on Russia's accession to WTO. "With regard to the multilateral process, a number of important issues remain to be resolved," Kirk said. "These include final agreement on Russia's automotive investment program, Russia's commitment to join the WTO Information Technology Agreement, and certain issues related to trade in agriculture," he said; also noting need for agreement between Russia and Georgia. "We share the EU's strong interest in seeing Russia and Georgia reach a mutually agreeable resolution of trade-related issues, and encourage both sides to continue their cooperative efforts to that end," he added.

ANTIBOYCOTT: Weiss-Rohlig USA, freight forwarder in Cranford, N.J., agreed to pay $8,000 to settle two charges of violating antiboycott regulations by furnishing information about business relationships with boycotted countries or blacklisted persons and failing to report receipt of request to engage in restrictive trade practice or foreign boycott against country friendly to U.S., BIS announced Oct. 4.

CHINA: As pressure mounts in Congress for legislation to retaliate against China's currency policies, USTR's office continues to pour out complaints against China to show it's being aggressive in protecting U.S. trade rights. In latest move, U.S. submitted request at WTO Oct. 19 seeking information from Beijing on its alleged restrictions on Internet access and disruption of service.

BUY AMERICA: Canadian Trade Minister Ed Fast met with USTR Ron Kirk Oct. 17 to discuss bilateral trade issues, including Canadian concerns about "Buy America" provisions in President Obama's infrastructure jobs bill (see **WTTL**, Oct. 10, page 4). But Obama administration support for Buy American rules was shown by Oct. 18 announcement by Transportation and Commerce of partnership under which Commerce's Manufacturing Extension Partnership is working with Federal Transit Administration (FTA) "to improve its ability to assess the merits of requests for waivers from Buy America requirements, eliminate the need for some waivers, and strengthen FTA's support for these requirements."

EX-IM BANK: Gilberto Baez-Garcia of El Paso, Texas, co-owner of Valcomar Inc., was sentenced Oct. 20 in El Paso U.S. District Court to 24 months in prison for his role in scheme to defraud Ex-Im Bank of more than $3.6 million. Baez was also sentenced to five years of supervised release and ordered to pay $3,614,594 in restitution and $3,614,977 in forfeiture. He had pleaded guilty May 11.