

# Kazakhstan Joins the WTO

By Samat Karmys, Senior Associate, Tax & Law Services, EY

*On 12 October 2015 Kazakhstan ratified the Protocol on Kazakhstan's accession to the World Trade Organization (WTO). As of 15 December 2015 Kazakhstan was announced the 162<sup>nd</sup> member of the WTO. WTO accession requires Kazakhstan's legislation to be brought into conformity with the provisions of international trade law, including WTO rules. To that effect, the President of Kazakhstan has already signed the relevant law to introduce amendments into a number of legislative acts.*



Some of the relevant legislative changes, however, were additionally driven by Kazakhstan's need to balance its WTO obligations with those relating to its membership in the Eurasian Economic Union (EAEU),<sup>1</sup> of which Kazakhstan is also a Member State.

Below we outline some of the major conditions for Kazakhstan's accession to the WTO that triggered changes to local and EAEU legislation, and reservations that Kazakhstan has negotiated for transition period.

## IMPORT DUTIES

Currently Kazakhstan imposes import duties according to the Common Customs Tariff (CCT) of EAEU, the common external customs tariff applied to goods imported into any of the Member States of the EAEU from outside of the EAEU. Within five years after accession to the WTO, Kazakhstan is expected to decrease import duties on certain commodities to the level determined by its WTO accession obligations (Kazakhstan's bound tariff rates). In effect, upon accession, Kazakhstan's duty rates will be lower than the rates contemplated by the CCT of the EAEU.

According to Kazakhstan's schedule of concessions, import customs duties of 3,081 items will be decreased by 2-5 % or reduced to 0%, depending on the type of goods.

In this regard the EAEU has adopted a list of goods (the Withdrawal List), that are subject to lower import customs duty rates than those set out by the CCT of the EAEU. The Withdrawal List currently contains 1,347 items, including: pharmaceuticals, agricultural products, precious stones and metals, textiles, transportation goods, and others.

In line with its EAEU obligations, Kazakhstan has undertaken commitments not to allow goods on the Withdrawal List that are imported at lower customs duty rates from other WTO members to be exported to other EAEU Member States.

What it means in practice is that goods on the Withdrawal List imported into Kazakhstan should be imported either at Kazakhstan's bound tariff rates without the right of export to other EAEU Member States, or at the rates of CCT of the EAEU, if the goods will be further exported to other EAEU Member States.

For purposes of monitoring the movement and trade of goods on the Withdrawal List, the EAEU has also introduced changes in the rules for executing customs declarations. Thus, when importing goods on the Withdrawal List, importers must submit a separate customs declaration if these goods are imported subject to Kazakhstan's bound tariff rates. Besides, companies were mandated to issue electronic invoices in the event of sale and export of goods on the Withdrawal List to other EAEU member-states irrespective of the type of customs duty rate applied (CCT or Kazakhstan's bound tariff rates).

Failure to comply with the above requirements leads to administrative sanctions and a prohibition on exporting goods on the Withdrawal List to other EAEU Member States.

## EXPORT DUTIES

Kazakhstan has reserved the right to continue to impose export duties on certain goods that are currently subject to export duty in Kazakhstan (e.g. crude oil and oil products, remnants and scrap of ferrous and non-ferrous metals, elements of locomotive rolling-stock, wool and domestic animal hide, and others).

In line with its WTO schedule of concessions, Kazakhstan started calculating export duties for crude oil and oil products according to special formulas (instead of previously applied fixed rates).

Export duty rates on crude oil are determined in accordance with the average market price of crude oil calculated based on the special formula for the previous period. Average market price of crude oil is calculated by the State Revenue Committee of the Ministry of Finance of the RK and published on its official website before 25th day of a month preceding a month when the so calculated export duties must be applied.

Calculation of export duty rates on oil products is performed by the Ministry of National Economy of the RK quarterly using special formula which envisages consideration for arithmetic mean value of average market prices of crude oil for three calendar months. In case of decrease of average market price on crude oil lower than USD 375 per ton (approximately USD 49 per barrel), export duty rates on oil products are approved in fixed amount without application of the formula.

<sup>1</sup> Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia

## STATE SUBSIDIES

Upon WTO accession, Kazakhstan is required to discontinue all subsidies, such as financial assistance, grants, state loans, guarantees on loans, tax and customs exemptions or other benefits intended to promote export and import substitution activities.

Kazakhstan may continue to grant state subsidies to a particular industry, or a particular project or a group of projects, that are unrelated to export or import substitution. Such subsidy funding, however, is to be discontinued or restricted if it causes proven injury to an industry of another WTO member.

On the other hand, Kazakhstan is entitled to grant unrestricted subsidies to the following categories and activities:

- socially and economically disadvantaged groups and regions
- state sectors
- research and development
- to promote national culture and history

VAT (value-added tax) exemptions of up to 70% for agricultural producers and agricultural processing businesses will be effective until 1 January 2018.

Customs duty and VAT exemptions for participants of special economic zones and owners of free warehouses which export goods outside the special economic zones' and free warehouses' territory will be effective until 1 January 2017.

Customs duty and VAT exemptions for assembly of vehicles from imported parts under special regimes will be effective until 1 July 2018.

Existing state assistance measures for small and medium-sized businesses will remain in force, as they are not contrary to WTO rules.

## RESERVATIONS IN FAVOR OF DOMESTIC PRODUCERS OF GOODS AND SERVICE PROVIDERS

In accordance with the WTO's general MFN (most favoured nation) rules, suppliers from the WTO member states must be subject to equal treatment as domestic suppliers.

Kazakhstan has negotiated certain reservations to the general MFN rule, as follows:

Local content requirements for goods procured under subsoil use contracts concluded before 1 January 2015 will be effective until expiry of such subsoil use contracts or 1 January 2022 (whichever occurs earlier). This requirement will be waived in the contracts concluded after 1 January 2015.

Kazakhstan has also reserved the right to require up to 50% of services related to subsoil use operations to be procured from Kazakhstani legal entities.

For purposes of services procurement, local content ratio with regard to human resources will be gradually decreased to allow more Kazakhstani legal entities to qualify for a conditional 20% discount. A conditional 20% discount is applied to tender bids of Kazakhstani manufacturers and service providers, to help them win tenders. Under existing requirements, to be considered a Kazakhstani manufacturer or service provider and to qualify for the conditional 20% discount, 95% of the employees of a Kazakhstani legal entity must be Kazakhstan nationals.

The conditions of Kazakhstan's accession to the WTO include changes to the concept of a "Kazakhstan manufacturer of works / services". Now this is defined as "individual entrepreneurs or legal entities in Kazakhstan, 95% of whose employees are Kazakhstani citizens, excluding managers and specialists engaged in labour activity in the territory of Kazakhstan within intra-corporate transfer ("ICT")". The number of ICT engaged foreign workers should not exceed 25% of the total number of managers and specialists of the company before 1 January 2022, and after 1 January 2022 they should not exceed 50%.

The local content requirements of the National Welfare Fund "Samruk-Kazyna"<sup>2</sup> procurement procedures will be abolished after Kazakhstan's accession to the WTO.

The local content requirements in government procurements were abolished before Kazakhstan's accession to WTO. Within four years, Kazakhstan also plans to negotiate the conditions for accession to the WTO Government Procurement Agreement.

*The conditions of Kazakhstan's accession to the WTO include changes to the concept of a "Kazakhstan manufacturer of works / services". Now this is defined as "individual entrepreneurs or legal entities in Kazakhstan, 95% of whose employees are Kazakhstani citizens, excluding managers and specialists engaged in labour activity in the territory of Kazakhstan within intra-corporate transfer ("ICT")". The number of ICT engaged foreign workers should not exceed 25% of the total number of managers and specialists of the company before 1 January 2022, and after 1 January 2022 they should not exceed 50%.*

## INVESTMENT CLIMATE

In line with the WTO obligations, Kazakhstan committed to improving the existing investment climate through liberalization of access for foreign investments to the Kazakhstan market. The main changes will affect the following areas and industries:

- **Telecommunication services** – upon expiry of two and a half years as from the date of Kazakhstan's accession to the WTO the currently existing restrictions on 49% foreign participation threshold in a charter capital of companies providing services in the capacity of telecommunications provider, will be cancelled. Kazakhtelecom JSC (major national telecommunications operator) will continue to be subject to the existing restriction (relating to 49% threshold of foreign participation in the charter capital). Commercial presence of foreign participation in Kazakhstan telecommunication sector will be permitted only in the form of Kazakhstan legal entity;

<sup>2</sup>The National Welfare Fund "Samruk-Kazyna" is a state-owned sovereign wealth fund



- **Banking services** – upon expiry of the five-year-period as from the date of Kazakhstan’s accession to the WTO foreign companies will be able to provide banking services in Kazakhstan through branches without the requirement of incorporating a legal entity in Kazakhstan. At the same time, Kazakhstan may determine special conditions in respect of non-resident banks applying for establishing a branch, such as (i) minimal amount of the bank’s consolidated assets being not less than \$ 20 billion (ii) minimal amount of deposit from an individual which may be accepted by the bank’s branch in Kazakhstan not less than \$ 120 thousand;
- **Insurance (reinsurance)** – upon expiry of the five-year period as from the date of Kazakhstan’s accession to the WTO foreign companies will be able to provide insurance services in Kazakhstan through branches without the requirement of incorporating a legal entity in Kazakhstan. At the same time, Kazakhstan is allowed to determine special conditions in respect of non-resident insurance companies applying for establishing a branch, such as (i) minimal amount of the insurance company’s consolidated assets not less than \$ 5 billion (ii) not less than ten years of experience of the parent non-resident company in the relevant area of insurance (re-insurance);
- **Medical services** - upon Kazakhstan’s accession to the WTO, commercial presence in Kazakhstan will be allowed in the form of a Kazakhstan legal entity only. Foreign

participation interest in the charter capital of such a Kazakhstan legal entity should not exceed 49%.

- **Services in the area of subsoil use and construction** – upon Kazakhstan’s accession to the WTO, commercial presence in Kazakhstan will be permitted in the form of a Kazakhstan legal entity only.

In addition, the conditions for Kazakhstan’s WTO accession envisage liberalisation of entry and temporary stay in Kazakhstan in respect of foreign labour force within internal corporate transfers (the “ICT”).

After the date of Kazakhstan’s accession to the WTO the entry quota for highly qualified personnel (managers, specialists) will be suspended as regards the ICT. Upon expiry of the five-year-period after Kazakhstan’s accession to the WTO when issuing permits for intake of foreign labour force within ICT a test on economic expediency (ability to meet the demand on labour power at the cost of internal employment market) will not be applied.

In one company within the ICT the total number of foreign managers, specialists should not exceed 50% of the total number of employees of the company.

### INTELLECTUAL PROPERTY

The effective provisions of the Kazakhstan legislation will be brought into conformity with the WTO requirements in the following areas:

- enhancing liability mechanisms combatting trademark infringement (including introducing destruction of the counterfeit goods);

- introducing of ban on disclosure and use, for the commercial purposes, of confidential information on the results of preclinical and clinical studies of drugs containing new chemicals. This novelty is introduced for the purposes of protection of rights of the development designer of an original drug from bad faith commercial use within a six-year period when no other drug can be registered with the reference to the testing results;
- enhancement of use an object of industrial property without permission/licence of the right holder. For these purposes the term for non-application of patented object will be reduced from 4 (four) to 3 (three) years, once expired any person is entitled to ask the court for granting a non-voluntary, non-exclusive licence for the use of the object. Furthermore, for the purposes of improvement of access to the generics market (copies of drugs) cases related to granting non-voluntary non-exclusive licence by the court have been supplemented with the cases of granting non-voluntary licence should the healthcare interests or the national security require so.

In addition to the above, as other accession implementation measures continue to be introduced, Kazakhstani companies as well as companies exporting to Kazakhstan and the EAEU need to assess the implications of Kazakhstan’s WTO accession as a wide range of products and industry sectors will be affected.