King & Spalding

Trade & Manufacturing Alert

Welcome To The New *Trade & Manufacturing Alert*

A large driver of the trade agenda in every country in the world, including the United States, China, India, Brazil, and the EU, and indeed at the WTO in Geneva, is the relationship between trade and manufacturing. The "Conference on the Renaissance of American Manufacturing," sponsored in part by King & Spalding and recently held at the National Press Club in Washington, highlighted the critical impact of trade policy and trade law upon the U.S. manufacturing sector. Yet, to date, there has not been a systematic effort to track key developments in Trade and Manufacturing, and alert manufacturers, government affairs specialists, and the legal and trade policy community to these developments on a real time basis. This is the purpose of King & Spalding's new *Trade & Manufacturing Alert*, of which this is the first issue. On the first of each month we will summarize the most important developments in this area, and send the *Alert* to our clients, friends, and others interested in the relationship between trade and manufacturing. We welcome your input, advice, and feedback on this new initiative.

December 2010

In This Issue

02 Currency Reform For Fair Trade Act HR 2378

02 USTR Initiates Investigation Into China's Green Technology Policies

03 Impact Of The November Congressional Elections On Trade Legislation And Trade Policy

04 Contacts

Currency Reform For Fair Trade Act HR 2378

On September 29, 2010, the U.S. House of Representatives passed the Currency Reform for Fair Trade Act by a vote of 348 to 79, indicating strong bipartisan support for the measure. The Currency Reform Act, if implemented, would amend the Tariff Act of 1930 to clarify that the U.S. Department of Commerce ("Commerce") can apply a tariff (countervailing duty) to offset subsidies in the form of currency undervaluation on products imported into the U.S. from countries with fundamentally undervalued currency.

Earlier this year, both the House Committee on Ways and Means and the Senate Finance Committee held hearings regarding the U.S.-China Trade imbalance and urged Commerce to carefully consider applying countervailing duties on imports from China to offset subsidies from China's undervalued currency, the renminbi ("RMB"). Expert testimony before these committees established that China's undervalued currency makes China's exports to the U.S. cheaper and makes U.S. exports to China more expensive, than if China allowed its currency to trade freely. Moreover, some experts also believe RMB undervaluation contributes to the overall U.S. trade deficit. In August, however, Commerce declined to investigate these subsidies in two cases involving imports of coated paper and aluminum extrusions from China. Commerce reasoned that because Chinese currency subsidies were provided to parties like tourists, who are not Chinese exporters, then the subsidy is not "contingent upon exportation" as required by one prong of the Tariff Act.

The Currency Reform Act addresses Commerce's position that China's currency regime does not meet the legal requirements for an investigation of a subsidy under the Tariff Act. Specifically, the House Committee Report indicates that Commerce used a more restrictive definition of "contingent upon exportation" than legally required. The legislation provides that "In the case of a subsidy relating to a fundamentally undervalued currency, the fact that the subsidy may also be provided in circumstances not involving export shall not, for that reason alone, mean that the subsidy cannot be considered contingent upon export performance."

As of this writing, the legislation has been referred to the Senate but it is unclear whether the measure will be voted on during the lame duck session. It is also unclear whether President Obama ultimately would sign the legislation. If implemented, however, the Currency Reform Act likely will increase trade investigations filed by U.S. manufacturers seeking tariffs on Chinese imports and could result in increased tariffs on these imports.

USTR Initiates Investigation Into China's Green Technology Policies

On October 20, 2010, the Office of the United States Trade Representative ("USTR") initiated an investigation into China's policies affecting trade and investment in green technologies. *Initiation of Section 302 Investigation and Request for Public Comment: China–Acts, Policies and Practices Affecting Trade and Investment in Green Technology*, 75 Fed. Reg. 64776. The investigation was initiated in response to a petition filed under Section 301 of the Trade Act of 1974 ("Petition") by the United Steelworkers. The green technologies covered by the Petition include products used to produce energy from wind, solar, biomass, geothermal, hydro, and nuclear resources; products to enable the production of energy from coal with fewer greenhouse gas emissions; and products that consume less energy or alternative sources of energy, such as energy-efficient vehicles and energy-efficient lighting.

The Petition alleges that China "employs a wide range of policies to stimulate and protect its domestic producers of green technology," enabling China to become the dominant global supplier of green technologies. These policies include restrictions on access to critical minerals, including rare earth elements; prohibited subsidies contingent on export or domestic content; discrimination against foreign firms and goods; technology transfer requirements for investors; and trade-distorting domestic subsidies. The Petition contends that these policies have permitted China to become the dominant global supplier of green technologies, drained investment from the U.S. to China, transferred technology and research and development from the U.S. to China, cost American workers jobs, and increased the U.S. trade deficit.

In response to USTR's October 20 notice and request for public comments, China's Bureau of Fair Trade, Ministry of Commerce ("MOFCOM") filed a submission requesting that USTR terminate the investigation. MOFCOM contends that the Petition is factually erroneous and legally unfounded. MOFCOM also believes that continuation of the investigation will damage existing U.S.-China collaboration on green technology, damage the countries' overall bilateral relationship, and cast doubt on the U.S. government's commitment to multilateral climate change initiatives.

If USTR elects to move forward with the investigation, it has until January 18, 2011, to request WTO consultations. The U.S. and China would then have 60 days to resolve the dispute. If a resolution is not forthcoming, the United States would then have the right to request the establishment of a panel by the WTO Dispute Settlement Body.

Impact Of The November Congressional Elections On Trade Legislation And Trade Policy

The Republicans made huge gains in the mid-term election, and these gains will affect Congress's international trade legislation agenda. The impact of the Republican gains on trade legislation in the "lame duck" session of Congress for the rest of this year remains unclear. The Republican take-over of the House of Representatives, however, will result in activity in the next Congress that emphasizes trade expansion rather than trade enforcement. Only time will tell whether this will lead to any dramatic shift in the Administration's trade policy agenda or result in legislative initiatives that become law.

The Lame Duck Session. Several important U.S. trade programs will expire at the end of this year unless renewed. These include both the Generalized System of Preferences ("GSP") and the Andean Trade Preferences Act ("ATPA"), as well as funding for the expanded Trade Adjustment Assistance ("TAA") program authorized in the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"). In addition, a Miscellaneous Tariff Bill ("MTB"), popular with many trade and business groups, is under consideration. The MTB would provide duty-free treatment on a number of manufacturing inputs and other products not made domestically. Finally, the Currency Reform for Fair Trade Act (H.R. 2378) passed the House in September on a strong bipartisan vote and is pending in the Senate. While the currency bill still may move in the "lame duck" session, the conventional wisdom is that little, if any, of the pending trade legislation will be passed in this session. This is due to the lack of time, the uncertainty over a legislative vehicle to which to attach such legislation, and the varying degrees of opposition in the Senate to each of these pieces of legislation. The most likely trade legislation to move before the end of the year would be a short-term extension (no more than two years) of GSP and ATPA.

The 112th Congress. The key Republican leaders in the House who will set the legislative and oversight agenda on trade are known as pro-trade, pro-business individuals. These leaders include Dave Camp (R-Michigan) and Kevin Brady (R-Texas), the incoming chairs of the Ways and Means Committee and its Trade Subcommittee, respectively. Congressman Brady already has made it known that he will push the Administration to complete work on and send to Congress for approval the three pending Free Trade Agreements (Korea, Colombia, Panama) negotiated during the Bush Administration. He also will push to enact rapidly any pending trade legislation not passed in the lame duck session. One exception is the Currency Reform for Fair Trade Act, which he vigorously opposes. Congressman Brady also will support the Administration's efforts to conclude negotiations on the Trans-Pacific Partnership and the long-running Doha Round. He also will champion renewal of trade promotion authority if it appears that the Administration is close to finishing those efforts. Both Congressmen Camp and Brady can be expected to block any trade legislation of a restrictive or WTO-inconsistent nature. Less dramatic changes are in store regarding trade in the Senate, where the Democrats lost seats but still retained their majority. Max Baucus (D-Montana) will continue as Chairman of the Senate Finance Committee. Orrin Hatch (R-Utah) will move up to be the Ranking Republican in place of Charles Grassley (R-Iowa), who takes over that position in the Judiciary Committee.

Contacts

Gilbert B. Kaplan
gkaplan@kslaw.com
+1 202 661 7981

S. Bruce Wilson (Bruce)
bwilson@kslaw.com
+1 202 626 5590

Jeffrey M. Telep
jtelep@kslaw.com
+1 202 626 2390

Taryn Koball Williams
taryn_williams@kslaw.com
+1 202 661 7895

About King & Spalding

Celebrating 125 years of service, King & Spalding is an international law firm with more than 800 lawyers in Abu Dhabi, Atlanta, Austin, Charlotte, Dubai, Frankfurt, Geneva, Houston, London, New York, Paris, Riyadh (affiliated office), San Francisco, Silicon Valley, Singapore, and Washington, D.C. The firm represents half of the Fortune 100 and, according to a *Corporate Counsel* survey in August 2009, ranks fifth in its total number of representations of those companies. For additional information, visit www.kslaw.com.

The content of this publication and any attachments are not intended to be and should not be relied upon as legal advice. If you are not currently on our International Trade Practice Group mailing list under your own name, and you would like to join to receive our monthly *Trade & Manufacturing Alert* publication and to receive notices of future programs and occasional commentaries on new legal developments in the industry, you can make that request by submitting your full contact information to manufacture@kslaw.com.