

Trade & Manufacturing Alert

The United States Initiated A WTO Case Against China On Certain Wind Energy Subsidies; USTR Seeks Comments From Interested Parties

On December 22, 2010, the United States requested formal WTO consultations with the Government of China (“China”) with respect to China’s Special Fund for Wind Power Manufacturing. The United States Trade Representative (“USTR”) estimates that grants provided under this program since 2008 may amount to several hundred million dollars. USTR alleges that the program is a WTO-prohibited import substitution subsidy because grants under the program are contingent on Chinese wind power equipment manufacturers using domestic parts and components over foreign-made parts and components. It also appears that China failed to comply with its transparency obligation of making available a translation of the measure in a WTO official language and providing notice of the measure to the WTO.

On December 29, 2010, USTR published a request for comments from interested parties concerning the issues raised in the consultation request. Although USTR will accept comments received anytime during the course of the dispute, USTR requests comments be submitted by January 31, 2011 to be assured timely consideration.

The announcement stems from a formal investigation by USTR initiated on October 15 under Section 301 of the Trade Act of 1974. USTR initiated the investigation in response to a lengthy trade petition filed by the United Steelworkers (“USW”) on September 9, 2010 against a broad

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range of allegedly WTO-inconsistent Chinese policies to promote its clean energy industries.

Section 301 is designed to give U.S. economic interests relief from foreign laws, policies, and practices that impede U.S. access to foreign markets or otherwise create unfair or unreasonable conditions of competition in international trade.

The USW petition addressed five specific areas of concern with respect to Chinese policies that adversely affect U.S. clean energy producers: (1) Restrictions on access to critical materials, which restrictions deny U.S. producers access to these materials and give Chinese producers privileged access to them; (2) Performance requirements on foreign investors, which often result in U.S.

investors having to license key clean energy technologies to their Chinese counterparts as a condition for investing in China; (3) Discrimination against foreign goods and services, including the imposition of local content requirements as a condition for foreign clean energy producers to invest in or sell to China; (4) WTO-prohibited export subsidies and import substitution subsidies that require a certain level of local content or a minimum level of production for export; and (5) Trade-distorting domestic subsidies that have led to increased Chinese production, lost sales, and depressed prices for U.S. producers.

In its announcement on December 22, 2010, USTR indicated that it had made bilateral progress with China on a number of these areas of concern, including at the most recent meeting in mid-December of the Joint Committee on Commerce and Trade. USTR will continue to work on these and other areas of concern bilaterally, but outside the framework of the Section 301 investigation. Questions have been raised as to the reasons USTR requested consultations with respect to only one of the alleged programs and whether industry members may have been reluctant to support or provide information to USTR for fear of retaliation.

The WTO's dispute settlement procedures provide for a mandatory consultation period of 60 days during which the complaining party and the responding party should attempt to reach a satisfactory resolution of the matter. If the matter is not satisfactorily resolved through WTO consultations, the complaining party may then request the establishment of a WTO panel to adjudicate the matter. Once established, a WTO panel normally takes approximately one year to render a judgment as to whether the measure(s) at issue are inconsistent with the provisions of any WTO agreement that may have been invoked in the complaint.

If a WTO panel ultimately adjudicates the case and finds that China violated its WTO obligations and if China fails to bring its measures into conformity with its WTO obligations, USTR must take certain steps before taking any action. In particular, USTR must provide any interested party with the opportunity to present its views on how USTR should proceed in the circumstances, including whether to retaliate against China and, if so, in what manner.

China Announces \$1.5 Trillion Development Plan For Seven Strategic Emerging Industries

On October 10, 2010, China issued the *State Council's Decision to Accelerate the Development of Strategic Emerging Industries*. The *Decision* included seven "strategic emerging industries:" (1) new-generation information technology, (2) energy-saving and environment protection, (3) new energy, (4) biology, (5) high-end equipment manufacturing, (6) new materials, and (7) new-energy cars. China identified these industries as having strong economic development potential.

Although "strategic emerging industries" now account for three percent of China's gross domestic product ("GDP"), China has established a goal for these industries to generate eight percent of the country's GDP by 2015 and 15 percent by 2020. The *Decision*, therefore, mandates increased support to these industries. Industry support will take place in the following manner. First, the government will establish special funds for the research and development of technology and to encourage innovation. Second, the government will give preferential treatment to investors in the form of tax incentives. Third, the government will authorize increased credit loan support. Fourth, the government will provide support to qualified enterprises in their efforts to raise capital. Fifth, the government will provide support to develop venture funds. Currently, several key governmental

agencies are drafting the *Development Plan of Strategic Emerging Industries*, which will contain more details regarding this initiative. The *Development Plan* is expected to be issued in early 2011. Some sources have reported that China is considering investments of up to \$1.5 trillion over the next five years and that the government might contribute approximately 5-15 percent of the \$1.5 trillion each year (*i.e.*, approximately \$30 billion in each of the five years).

Certain provincial and local governments also have established preferential policies to support these strategic industries in their own jurisdictions. For example, the Shandong provincial government has established a special fund of approximately \$300 million in 2010-2012 and provides various other subsidy programs. The Guangdong provincial government will provide approximately \$300 million each year to support the strategic industries through loan interest subsidies and awards. The Suqian municipal government of the Jiangsu Province plans to establish a special fund providing \$3.75 million each year for the next four years, as well as establishing other subsidy programs.

A number of companies that are considered to be strategic industries reported that they already have received subsidies from the government. According to *China Securities Journal*, about 38 companies reported receiving grants from the government, totaling approximately \$157 million in grants this year. China plainly intends to focus on these strategic industries as part of its economic development strategy, and these industries will receive considerable support from the government in the future.

The WTO Decides Section 421 Case On Tires In Favor Of The United States

On December 13, 2010, a WTO dispute settlement panel upheld the United States' imposition of safeguard duties on imports of certain passenger

vehicle and light truck tires from China under Section 421 of the Trade Act of 1974. The duties were imposed for a three-year period on September 26, 2009 at a level of 35 percent the first year, 30 percent the second year, and 25 percent the third year. Upon imposition of the duties, China immediately initiated WTO dispute settlement proceedings alleging the United States had failed to comply with the terms of China's WTO Accession Protocol and other WTO obligations.

Section 421 is the statutory provision enacted in 2000 that allows the President, after a determination by the United States International Trade Commission ("ITC") of market disruption by Chinese imports, to impose special safeguard duties on such imports. The provision incorporates into United States law those terms of China's WTO accession that permit the use of such special safeguards by China's trading partners during the first 12 years of China's WTO membership.

The measures contested by China in this case resulted from a determination by the ITC that certain passenger vehicle and light truck tires from China were being imported into the United States in such increased quantities or under such conditions as to cause market disruption for United States producers. In its investigation, the ITC determined that the three statutory elements necessary to find that rapidly increasing imports were causing disruption were present: (1) imports of the subject product from China were increasing rapidly; (2) the domestic industry was materially injured, or threatened with material injury; and (3) such rapidly increasing imports were a significant cause of the material injury or the threat of material injury. After receiving the ITC report, the President followed the ITC's recommendations and imposed the safeguard duties.

China challenged the United States' action on the grounds that imports of Chinese tires were not "increasing rapidly" and were not a "significant

cause” of injury. The Panel disagreed and determined that “the United States did not fail to comply with its {WTO} obligations.” Although it is still subject to appeal, the Panel Report demonstrates that Section 421 can be an effective, WTO-consistent remedy for United States manufacturers experiencing market disruption due to rapidly increasing imports from China. United States manufacturers interested in seeking a similar remedy must act fast. The provision included in China’s WTO Accession Protocol allowing China’s trading partners to take special safeguard measures against it expires on December 11, 2013.

Korea And The United States Conclude Supplemental Agreement That Clears The Way For Congressional Approval Of The U.S.-Korea Free Trade Agreement

In 2007, Korea and the United States signed a bilateral free trade agreement (“KORUS”). However, congressional consideration of KORUS stalled due to congressional dissatisfaction with certain provisions of the agreement, particularly those relating to automotive trade. On December 3, 2010, the United States and Korea reached a supplemental agreement addressing those concerns. The key elements of KORUS affecting manufacturers, including those in the recent supplemental agreement, are as follows.

Market Access for Manufactured Goods

Currently, 38 percent of United States tariff lines in the Harmonized Tariff Code (“HTC”) and 13 percent of Korean tariff lines in the HTC for manufactured goods have zero rates of duty. Upon entry into force of the agreement, over 80 percent of each country’s tariff lines will immediately have zero rates of duty. Duties for the remaining 20 percent of tariff lines will be phased out over time, with duties for the most sensitive products being phased out over periods of up to 20 years.

Trade Remedy Provisions

KORUS provides for bilateral safeguard measures by one country in the form of temporary duty increases or delays in planned tariff reductions if imports from the other country “constitute a substantial cause of serious injury, or threat thereof” to a domestic industry. The safeguard measures have a maximum duration of two years and may not be applied more than once on the same product.

For antidumping and countervailing duty measures, each country retains its rights and obligations under existing WTO Agreements. Nonetheless, certain procedural changes could prove to be problematic for United States petitioners. Specifically, the agreement contains additional government-to-government consultation provisions concerning trade remedy investigations and commitments that may make it more likely that investigations are suspended in return for agreements to stop unfair trade.

Automotive Provisions

Modification of the original automotive trade provisions was key to concluding the supplemental agreement. Under the modified provisions, periods to phase out most automotive tariffs have been lengthened. For cars, the current United States import tariff of 2.5 percent will remain unchanged until elimination in the fifth year, while Korea’s current import tariff of eight percent will be cut immediately to four percent and eliminated in the fifth year. For light trucks, the current United States import tariff of 25 percent will remain unchanged until its phase-out begins in the eighth year of the agreement and concludes in the tenth year, while Korea’s current 10 percent import tariff will be eliminated immediately.

The revised auto provisions also include a special safeguard provision as well as Korean regulatory

changes that are expected to help alleviate Korean nontariff barriers to United States auto exports.

Prospects for Congressional Approval

Prospects for congressional approval of KORUS in 2011 are good, especially since several key unions, including the United Auto Workers, have now endorsed the agreement. However, legislation to approve and implement KORUS will probably not be submitted to Congress until the spring of 2011 because the Administration must still finalize the legal text and accompanying documentation. During consideration of KORUS, Congress is expected to vigorously debate broader United States trade policy and whether the United States should continue to pursue bilateral free trade agreements. The Administration has not initiated any new free trade agreement negotiations, although it has joined ongoing negotiations toward a Trans-Pacific Partnership agreement. Free trade agreements negotiated by the Bush Administration with Colombia and Panama are still awaiting transmittal to Congress as the Obama Administration tries to resolve certain tax issues with Panama and certain labor issues with Colombia.

News of Note

The Obama Administration Develops Export Initiative Aimed At Renewable And Energy Efficient Industries

The Obama Administration recently announced the establishment of the Renewable Energy and Energy Efficiency Export Initiative (the "Initiative") as part of its National Export Initiative and Trade Promotion Coordinating Committee. The Initiative is divided into two parts: (1) an assessment of the current competitiveness of United States renewable energy and energy efficient goods and services and (2) an action plan of new commitments that

facilitate private-sector efforts to significantly increase United States renewable energy and energy efficient exports within five years. As part of the Initiative, the Administration created www.export.gov/reee, a web portal that consolidates information on government-sponsored export promotion programs. The Initiative also identifies new export finance programs such as the Overseas Private Investment Corporation's energy efficiency subordinated debt product. United States renewable energy exporters also will receive greater market access support from USTR, which has created a Trade Policy Staff Committee focused on renewable and efficient energies, and from the United States Trade And Development Agency.

United States Customs And Border Protection Announces Its Intent To Distribute Withheld Byrd Amendment Funds To Affected Domestic Producers

On December 8, 2010, United States Customs And Border Protection ("Customs") announced that it will distribute withheld funds that were set aside for distribution under the Continued Dumping and Subsidy Offset Act, commonly referred to as the Byrd Amendment.

Congress passed the Byrd Amendment in 2000 to provide monetary relief to United States industries affected by unfair trade practices. In *PS Chez Sidney v. United States* and *SKF USA, Inc. v. United States*, the United States Court of International Trade held that the Byrd Amendment violated the free speech and equal protection guarantees of the United States Constitution because it made eligibility for disbursements contingent on support for antidumping or countervailing duty petitions. In response to those decisions and a deluge of copycat law suits, Customs began voluntarily withholding distributions until the litigation could be resolved.

In February 2009, the United States Court of Appeals for the Federal Circuit reversed the Court

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of International Trade's decision in *SKF*, holding the Byrd Amendment to be constitutional. In October 2010, the Federal Circuit upheld the constitutionality of the Byrd Amendment in *Chez Sidney*.

With the constitutional questions resolved, Customs determined that further delay in distributing Byrd Amendment funds is no longer justified for remaining copycat cases. In mid-December 2010, Customs filed notice of its determination in each of the court cases in which it intends to distribute withheld funds. Parties have an opportunity to respond in early January 2011, and it will be up to the Court to decide whether Customs may proceed with distributions.

China Currency Legislation

Despite extensive efforts by United States manufacturers and a bipartisan coalition of senators, the Senate did not take up the Currency Reform for Fair Trade Act (H.R. 2378) during its lame duck session. The issue will be postponed until the next Congress.

H.R. 2378 passed in the House of Representatives on September 29, 2010 by a bipartisan margin of 348 to 79. The bill clarifies United States law that a foreign country's undervaluation of its currency can be treated as a subsidy and subject to offsetting countervailing duties on a case-by-case basis.

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