KING & SPALDING

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China Takes Further Steps To Boost Strategic Emerging Industries

Lingna Yan

As reported in the January 2011 Issue of the Trade & Manufacturing Alert, in October 2010, China unveiled its determination to develop seven strategic emerging industries in the *State Council's Decision to Accelerate the Development of Strategic Emerging Industries*. The seven "strategic emerging industries" are (1) energy-saving and environment protection, (2) new-generation information technology, (3) biology, (4) high-end equipment manufacturing, (5) new energy, (6) new materials, and (7) new-energy cars. Recently, China made an important step to further the 2010 *Decision*. The State Council approved the *12th Five-Year National Development Plan of Strategic Emerging Industries* (the "*12th Five-Year National Plan*") at a standing meeting held on May 30, which is a detailed national plan designed to implement the supporting policies for the development of the seven industries over the 12th Five-Year period, *i.e.*, 2011 to 2015.

The *12th Five-Year National Plan* clarifies the priority development directions and tasks of the seven industries. In particular, the energy-saving and environment protection industry should (1) make breakthroughs in efficient energy utilization, pollutant prevention and safe disposal, and resources recycling technologies; (2) develop new and efficient energy saving, advanced environment protection, and resources recycling equipment and products; and (3) promote clean production and low carbon technologies. The new-generation information technology industry should accelerate the construction of next-generation information networks and make breakthroughs in new-generation information technologies. The biology industry should strengthen the development of biological resources utilization technologies and equipment and accelerate the construction of a modern biology industry. The high-end equipment manufacturing industry should give priorities to developing modern aviation equipment, satellites, modern railway transportation equipment, offshore engineering equipment, and intelligent manufacturing equipment. The new energy industry should promote the industrialization of renewable energy technologies. The new materials industry should give priorities to developing new functional materials, advanced structural materials, and composite materials, and engage in the R&D and industrialization of common basic materials. And the new-energy cars industry should accelerate the R&D and industrialization of the core technologies of key parts and materials. The *Plan* also singles out 20 major projects for government support.

A number of local governments also have formulated detailed plans to cultivate and promote these industries in their jurisdictions. For example, Guangdong Province, one of the largest provinces in terms of the scale of strategic emerging industries, promulgated its provincial *12th Five-Year Development Plan of Strategic Emerging Industries* on March 6, 2012, targeting a 127 percent growth of gross output value by 2015. To accomplish the target, Guangdong Province declares that it will employ a series of subsidy measures to support the strategic emerging industries, including but not limited to loan interest subsidies, grants, tax exemptions and reductions, and equity infusion.

Chinese companies in the strategic emerging industries can expect significant subsidies from both the central government and local governments during the 12th Five-Year period. As reported, the central government has set up a 7.5 billion RMB investment fund this year for the strategic emerging industries. Along with the approval of the *12th Five-Year National Plan*, the central government launched the first batch of the Strategic Emerging Industry Development Special Fund for new-energy cars, new materials, and high-end equipment manufacturing companies, providing funds equal to 15 percent of investment in fixed assets, up to 40 million RMB for a single project. Subsidy contributions from local governments are also substantial. As of the end of 2011, approximately 24 provinces/municipalities established special funds to support the strategic emerging industries. For example, Beijing municipal government has set aside a 20 billion RMB special fund to support technological development and industrialization, and a 20 billion RMB government procurement fund to procure products of these industries over the 12th Five-Year period. Similarly, the provincial government of Guangdong Province has pledged to input 22 billion RMB in subsidies over the 12th Five-Year period for these industries.

China Requests Consultation On 22 U.S. Countervailing Duty Orders

Lee Smith

On May 25, 2012. China requested consultations at the World Trade Organization ("WTO") relating to 22 countervailing duty ("CVD") investigations conducted by the United States. The challenged CVD cases are the investigations that were initiated by the United States other than the four already subject to WTO dispute settlement in *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379). The products at issue in these investigations cover numerous industries, including paper, steel, and solar cells.

China's request focuses primarily to the issue of the provision of manufacturing inputs for "less than adequate remuneration." In all 22 cases, petitioners alleged that China provided inputs such as raw materials, land, and electricity for "less that adequate remuneration," *i.e.*, below a market benchmark price. These subsidy programs accounted for a large portion of each Chinese exporter's total subsidy rate. In order to make a finding of unfair subsidization, the WTO requires that (1) a government or a "public body" make a financial contribution; (2) the provision of the input is specific to an industry or group of industries; and (3) the provision of the input provides a benefit when compared to a market benchmark. In past CVD cases, the U.S. Department of Commerce ("Commerce") has found the company providing an input to be provided by a "public body" if the company is majority-owned by the Government of China. China challenged this approach in DS379. In that dispute, the WTO Appellate Body found that the majority-government-ownership standard was insufficient and that the United States must investigate whether the public bodies are "vested with governmental authority." This finding is likely the basis for China's new appeal.

Other aspects of the 22 CVD cases also are being challenged. China is challenging the sufficiency of the evidence used to make certain determinations, the use of out-of-country market benchmarks to value goods or services, and the use of "facts available" when the Government of China or the respondent in the investigation did not fully cooperate with Commerce's information requests. China also is challenging whether restraints on the exportation of input materials could give rise to an illegal subsidy.

Under WTO procedures, China and the United States have 60 days to consult. Assuming that consultations do not resolve the dispute, China may then request the establishment of a panel to hear its claims before a dispute settlement panel.

Benefits Of Fracking On U.S. Manufacturing

Shannon Doyle

The United States became the world's largest producer of natural gas in 2011, according to BP's Statistical Review of World Energy 2012. Natural gas production in the United States grew by 7.7 percent between 2010 and 2011, the largest volumetric increase in the world. Much of this production growth can be attributed to hydraulic fracturing, which has allowed the United States to tap natural gas reserves in shale deposits that previously were unavailable. Hydraulic fracturing, commonly known as "fracking," uses pressurized fluids to create fractures in layers of rock. The fractures release natural gas, petroleum, or other substances into wells built to capture it. As of 2009, Pennsylvania had the most active wells in the country, but natural gas has also been produced through fracking in North Dakota, Arkansas, Texas, California, Colorado, Ohio, West Virginia, and New Mexico.

Fracking has been a controversial practice, with many expressing concerns over the environmental impact. The natural gas boom, however, has the potential to make a major economic impact. For example, Bloomberg recently highlighted the benefits in Ohio as the oil and gas industry expands in Ohio's Utica Shale. Researchers estimate that $4.9 billion could be added to Ohio's economy in 2014 as a result. Studies put the number of jobs that could be created, directly or indirectly, in Ohio alone between 20,000 and 204,000 by 2015. The situation in Ohio has the potential to be replicated across the country. Members of the industry estimate that shale gas supports 600,000 jobs across the country, with 270,000 additional jobs expected to be added by 2015.

The natural gas boom also has a wider economic impact. Delinquency rates on commercial mortgages in Ohio have dropped considerably, and other industries in the area have seen their revenues increase as the shale gas boom brings more businesses and people to the area. Because the increases in supply have decreased the prices of natural gas, CNBC reports that other industries stand to benefit greatly from the natural gas boom. More affordable energy will help the cost structure of manufacturers, particularly those in energy-intensive industries such as glass, paper, and cement. Chemical companies manufacturing natural gas treatment products expect their industry to grow, with some estimates indicating the possibility of an increase in production of up to $32.8 billion. The Consumer Energy Alliance-Florida notes that lower natural gas prices benefit agricultural producers and manufacturers, as well as the fertilizer industry. As natural gas production continues to increase in the United States, the economic benefits could be even more widely felt.

China Retaliates Against U.S. Renewable Energy Products

T. Augustine Lo

On May 24, the Chinese Ministry of Commerce ("MOFCOM") announced its preliminary determination finding U.S. subsidization of its green energy products in violation of WTO agreements. MOFCOM's decision closely followed a decision by Commerce issued on May 17, which found that China subsidizes its solar panel manufacturers, and which consequently imposed preliminary tariff rates at approximately 31 percent on imported solar panels from 61 Chinese companies. For all other Chinese producers and exporters of solar panels, Commerce imposed a preliminary tariff rate of 249.96 percent.

As reported in January, China initiated an investigation of alleged U.S. subsidization of its green energy products last November following the initiation of a similar U.S. case against Chinese solar panels. Although the original petition by two Chinese trade associations targeted over 2000 federal and state programs as subsidies in violation of WTO obligations, MOFCOM narrowed the scope of the investigation to six renewable energy incentive programs in the states of Washington, Massachusetts, Ohio, New Jersey, and California. These state programs all provide consumers of green energy products with tax incentives to install solar, wind, and hydropower generation equipment that is manufactured within the respective state.

According to MOFCOM's preliminary determination, these six state programs violate both the WTO obligation against prohibited subsidies and the provision against discriminatory treatment of imports. The WTO Agreement on Subsidies and Countervailing Measures prohibits the use of subsidies that are contingent on the use of domestic over imported goods. MOFCOM determined that, by favoring the use of equipment manufactured within the state, each of the six state incentive programs effectively favors U.S. made products over imported merchandise. MOFCOM also noted that the General Agreement on Tariffs and Trade requires member nations to accord treatment to imported products that is equal to that accorded to their national products. This national treatment provision contains an exception for subsidies paid by governments to domestic producers. According to MOFCOM, the six state incentive programs do not qualify for this exception, because the subsidies are paid to consumers, and not the manufacturers, of green energy products.

Numerous Import-Related Investigations Proceed At U.S. Trade Agencies

Josh Snead

Recent decisions by Commerce and the U.S. International Trade Commission ("ITC") have moved forward several investigations of allegedly unfairly traded imports.

Commerce preliminarily found on May 30 that Korea is providing countervailable subsidies to producers/exporters of large residential washers at levels ranging from .22 percent to 70.58 percent, and that Vietnam is providing countervailable subsidies to exporters/producers of steel wire garment hangers at levels ranging from 11.03 percent to 21.25 percent.

Commerce also preliminarily found on May 30 that China is providing countervailable subsidies to producers/exporters of utility-scale wind towers at levels ranging from 13.74 percent to 26.00 percent. The wind tower investigation is the second recent investigation relating to imports of renewable energy products from China. In its ongoing investigation of photovoltaic cells and solar panels, Commerce reached affirmative preliminary CVD and antidumping ("AD") determinations in March and May, respectively. Preliminary CVD rates range from 2.90 percent to 4.73 percent, and preliminary AD margins range from 31.14 percent to 249.96 percent.

Commerce preliminarily found on May 24 that imports of circular welded carbon-quality steel pipe from India, Vietnam, Oman, and the United Arab Emirates are being dumped at margins ranging from 0.00 percent to 48.43 percent.

On the basis of these preliminary determinations, Commerce has instructed U.S. Customs and Border Protection to collect cash deposits or post bonds at the identified rates on all imports of the covered products. Final duties will only be imposed as a result of these investigations if both Commerce's final AD and/or CVD determination and the ITC's final injury determination are affirmative. Commerce is scheduled to release its final determinations in each of these investigations between August and October.

In the investigation on *High Pressure Steel Cylinders from China*, all six ITC commissioners voted unanimously on May 30 that the U.S. industry is materially injured by imports of high-pressure steel cylinders from China, which will allow the imposition of duties due to Commerce's earlier final AD and CVD determinations. Duties will be imposed at AD margins ranging form 6.62 percent 31.21 percent and a CVD rate of 15.81 percent.

In addition to completing the investigations referenced above, as well as others, Commerce and the ITC will be investigating imports of xanthan gum from China and Austria in the coming months as a result of an AD petition that the U.S. industry filed on June 5.

News Of Note

China Agrees To Implement WTO Recommendations Regarding Raw Material Export Restraints

Josh Snead

China, the United States, the European Union, and Mexico circulated a communication to all WTO members on May 30 spelling out China's commitment to comply with an earlier WTO ruling that China's export duties and quotas on eight raw materials used as inputs in the steel, aluminum, and chemicals industries violate commitments China made when it joined the WTO in 2001. China has committed to complying with the WTO's decision by the end of 2012. Although this agreement may help resolve the raw materials dispute, a potentially larger dispute remains unresolved in which the United States, the European Union, and Japan have requested consultations with China at the WTO regarding China's similar export restrictions on a variety of "rare earth" metals that are used in a variety of high tech products manufactured throughout the world.

USTR Celebrates Small Business Week By Focusing On The Benefits Of Free Trade Agreements

Shannon Doyle

USTR marked National Small Business Week (May 20-26, 2012) by highlighting the advantages that free trade agreements can bring to small businesses. Christina Sevilla, Deputy Assistant USTR for Small Business and Market Access, addressed the International Trade Council of Greater Kansas City and emphasized the new opportunities created for companies in Missouri and Kansas by the US-Korea and US-Colombia free trade agreements. According to economic development officials, exports to Korea from Missouri have increased by almost 150 percent during the first quarter of 2012. USTR also included a notice on its website touting the positive impact that the Trans-Pacific Partnership could have on small businesses. USTR plans to address the concerns raised by small and medium-sized business owners, namely the regulatory, legal, and informational barriers facing those who wish to export to the Asia Pacific region, in order to make their exports more competitive in the markets of the U.S.'s Asian trading partners.

Export Promotion Bill Passes In The House Of Representatives
Shannon Doyle

On May 30, 2012, the House of Representatives passed a new export promotion bill (H.R. 4041) to revise the Export Enhancement Act of 1988. The new bill would expand the authority of the Trade Promotion Coordinating Committee ("TPCC"), an interagency task force that develops U.S. trade promotion policies and facilitates coordination among government agencies. Under the new bill, the TPCC would have the authority to review the budgets of agencies with export promotion programs. The bill would also require the Secretary of Commerce to conduct a "global assessment of overseas markets to determine those with the greatest potential for increasing US exports" at least once every five years. Finally, the bill would require the TPCC to take into account recommendations made by U.S. exporters and their U.S. employees, with a focus on small and medium-sized businesses, when drafting a government-wide plan for trade promotion efforts. The bill has been referred to the Senate Banking, Housing and Urban Affairs Committee.

Commerce Finds Double Counting Of Import Duties Imposed On Chinese Products
Richard Lutz

On May 31, 2012, Commerce made a preliminary Section 129 determination that receipt of countervailed input subsidies and use of the non-market economy ("NME") methodology for determining antidumping duties results in a double remedy requiring adjustment. The ruling stems from an adverse WTO Appellate Body Report, which found that Commerce failed to evaluate the degree of double counting arising from the simultaneous imposition of antidumping and countervailing duties on merchandise from NME countries. Historically, double counting of antidumping and countervailing duties was assumed to occur only with regard to export subsidies because of the direct link between the subsidy and a reduced export price. Commerce's new ruling is controversial because it found that the receipt of an input subsidy passed through to the export price. Chinese imported products affected by this decision included Circular Welded Pipe, Laminated Woven Sacks, Light-Walled Rectangular Pipe, and Off-the-Road Tires.

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Presidential Election On Trade & Manufacturing: China Currency
Patrick Togni

Election observers searching for policy differences on international trade-related issues between President Obama and presumptive Republican nominee Mitt Romney need look no further than currency manipulation by China.

During the Obama presidency, the U.S. Department of the Treasury has declined to identify China as a currency manipulator in its semi-annual report to Congress on international economic and exchange rate policies, despite a finding in the most recent report that China's exchange rate "exhibited persistent and substantial undervaluation" over the past decade. In addition, Commerce has declined to initiate investigations of currency undervaluation in China CVD investigations, which has precluded U.S. manufacturers from seeking import relief through the imposition of countervailing duties on imports on that basis.

In contrast, Mitt Romney vows to take a tougher stance on China currency issues. For example, Mr. Romney has stated that he will issue an executive order on his first day in office that identifies China as a currency manipulator. Mr. Romney has also stated that, as president, he would permit the application of the countervailing duty law to currency undervaluation by China. Mr. Romney has taken these positions despite opposition by senior Republican officials in Congress, including House Speaker John Boehner.

This policy difference presents an interesting backdrop to the 2012 presidential campaign in both "Red" and "Blue" states that continue to face job losses and plant closures due to the U.S.-China trade relationship.

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