



White & Case LLP General Trade Report - JETRO

November 2012

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General Trade Policy 1

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UNITED STATES

GENERAL TRADE POLICY

US General Trade Policy Highlights

ITC Issues Affirmative Final AD/CVD Determinations for Chinese Solar Cells

On November 7, 2012, the US International Trade Commission (ITC) rendered a unanimous affirmative determination that imports of certain crystalline silicon photovoltaic cells and modules from China were materially injuring the US industry. The ITC reached a negative finding with respect to critical circumstances, meaning that duties will not be applied retroactively. The US Department of Commerce (DOC) determined in October 2012 that such imports are subsidized and sold in the United States at less than fair value (*please refer to W&C US Trade Alert dated October 12, 2012*).

Scope

The solar cells covered by the AD/CVD investigations fall under Harmonized Tariff System of the United States (HTSUS) subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030 and 8501.31.8000. The scope of the AD/CVD investigations covers “not only imports of solar cells produced in China and solar modules/panels produced in China from Chinese-made solar cells, but also imports of solar modules/panels produced outside of China from solar cells produced in China [but not covering] imports of modules/panels produced in China from solar cells produced in a third country.”

Reaction to ITC Injury Determination

Reaction to the ITC’s November 7 vote has been mixed:

- **Coalition of American Solar Manufacturing Leader and SolarWorld President Gordon Brisner** lauded the ITC’s affirmative injury determination, noting that it provides “hope that the United States can maintain a viable solar manufacturing base, conduct ongoing research and development and continue to make solar an increasingly viable part of the American renewable energy portfolio;” but
- **Recurrent Energy Chairman and Chief Executive and Solar Energy Industry Association Chairman Arno Harris** expressed concern in regard to the ITC’s affirmative injury determination, noting that imposing AD/CVD duties on such Chinese goods could spark a trade war which would “not be good for anyone,” and that the focus should rather be to “simply [...] drive down the cost of solar [energy].”

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Sen. Wyden (D-OR), whose Oregon constituency includes petitioner SolarWorld's manufacturing plant, also issued a statement, expressing satisfaction with the ITC's affirmative injury determination and noting that, as Chairman of the Senate International Trade Subcommittee, he will ensure that "federal agencies follow through and fully enforce the trade laws." Sen. Wyden previously expressed concern in regard to DOC's refusal in its October 2012 final determinations to expand the scope of the AD/CVD investigations to cover imports of solar modules/panels produced in China from solar cells produced in a third country, noting that he would continue to monitor such "loophole," and would "pursue additional measures if necessary to protect [US] manufacturers and workers."

Next Steps

The ITC's November 7 determination marks the end of the investigation phase in one of the largest and most widely-monitored US-China trade disputes in recent history. However, the ITC's final affirmative injury finding comes as no surprise and is unlikely to "ratchet up" tension in the US' bilateral trade relations with China because Chinese solar producers and exporters largely expected the ITC affirmative injury finding. Also, due to DOC's October 2012 scope revision to exclude imports of solar modules/panels produced in China from solar cells produced in a third country, many Chinese producers and exporters have already begun shifting production in order to fall outside of the investigations' scope.

The ITC is expected to notify DOC of its affirmative injury determination on or before November 30, 2012. DOC will subsequently issue AD and CVD orders.

ITC Issues First Report on Possible Products to be Included in ITA Expansion

On November 5, 2012, the US International Trade Commission (ITC) released the report "The Information Technology Agreement: Advice and Information on the Proposed Expansion." The report identifies as import sensitive 9 of the 130 Harmonized System (HS) product codes proposed for inclusion in the expansion of the Information Technology Agreement (ITA).

In July 2012, the US Trade Representative (USTR) requested that ITC provide advice and information on a list of 130 HS codes proposed by ITA participants for inclusion in an expanded ITA. Sources indicate that the countries involved in compiling the list include Australia, Canada, Costa Rica, the European Union (EU), Japan, Korea, Malaysia, Norway, Thailand, Taiwan and the United States. USTR requested that ITC provide such advice and information in two reports. The first report, released on November 5, provides the ICT and non-ICT purposes of each of the products, and identifies those products US industry and other interested parties view as import sensitive. The second report, due for release in February 2013, will identify the following for each of the products: (i) tariffs in major markets; (ii) the major producing countries; (iii) the leading US export markets; and (iv) the leading sources of US imports. The second report will also survey the benefits to US industry of an ITA expansion.

The table below provides the HS code and description of each of the 9 products identified in the November 5 report as import sensitive.

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HS Code	Description
321511	Printing ink, black
321511	Printing ink (packaged) in the ink jet cartridge
321219	Printing ink, other than black
370790	Other (Chemical preparation for photographic uses (other than varnishes, glues, adhesives and similar preparations); unmixed products for photographic uses, put up in measured portions or put up for retail sale in a form ready for use)
690911	Ceramic wares of a kind used for the production or processing of semiconductor boules or wafers, semiconductor devices, electronic integrated circuits, or flat panel displays
690919	Ceramic wares of a kind used for the production or processing of semiconductor boules or wafers, semiconductor devices, electronic integrated circuits, or flat panel displays
741011	Copper foil or refined copper not backed of thickness not exceeding 0.15 mm designed for printed circuits
741021	Copper clad laminates backed with paper, paperboard, plastics, or similar backing materials of a thickness (excluding any backing) not exceeding 0.15 mm
900110	Optical fibers, optical fiber bundles and cables

In addition to identifying certain products as import sensitive, the report also describes the ICT and non-ICT purposes of each product. Although the report identifies most products as having ICT or both ICT and non-ICT purposes, it also identifies some products as having only a non-ICT purpose. These products include, among others, washing machines and ovens. Sources indicate that numerous ITA participants have opposed the inclusion of such products under an expanded ITA.

In September 2012, ITA participants began formal consultations on additional product coverage under the ITA. At a November 1, 2012 meeting of the ITA Committee, the United States urged participating delegations to be prepared to begin formal negotiations in January 2013. In preparation, ITA participants are expected to circulate an updated list of products to be considered under an expanded ITA by mid-December 2012.

House Passes Russia PNTR Legislation

On November 16 2012, the House voted 365-43 to approve the “Russia and Moldova Jackson-Vanik Repeal Act of 2012” (HR 6156), which, *inter alia*, allows for the extension of Permanent Normal Trade Relations (PNTR), *i.e.*, Most-Favored Nation (MFN) status, to Russia. The legislation will now move to the Senate for consideration by its plenary.

Russia formally joined the World Trade Organization (WTO) on August 22, 2012. However, the United States cannot benefit from the tariff and non-tariff commitments Russia made as part of its WTO accession until President Obama extends PNTR to Russia. Before President Obama can extend PNTR to Russia, Congress must pass legislation to revoke the Jackson-Vanik Amendment’s (under Title IV of the Trade Act of 1974)

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application to Russia. The Jackson-Vanik Amendment prevents the United States from establishing PNTR with a country unless that country fulfills certain “freedom of emigration” conditions under the Amendment.

Although both the House and Senate committees of jurisdiction approved legislation allowing for the extension of PNTR to Russia in July 2012, the August 2012 recess and the November 2012 elections delayed consideration of the legislation by the House and Senate plenaries. In regard to content, HR 6156 and the Senate version of the legislation (S 3406) are almost identical. In addition to determining that the Jackson-Vanik Amendment no longer applies to Russia, both bills, *inter alia*, require the publication of numerous trade and trade-related reports on Russia and determine that the Jackson-Vanik Amendment no longer applies to Moldova (*please refer to W&C US Trade Alert dated July 26, 2012*).

Despite these similarities, HR 6156 and S 3406 contain different versions of the “Sergei Magnitsky Rule of Law and Accountability Act of 2012” (“Magnitsky bill”). The Magnitsky bill requires the US government to, *inter alia*, freeze certain assets and deny US visas to persons named by the Department of State (DOS) as responsible for certain human rights violations. While HR 6156 focuses on Russia-related human rights violations, S 3406 focuses on human rights violations committed anywhere in the world. House and Senate leadership will need to reconcile this difference in scope before sending the resulting ratified piece of legislation to President Obama for enactment.

In response to House passage of HR 6156, Senate Finance Committee Chairman Max Baucus (D-MT) released a statement in which he expressed commitment to achieving Senate passage of the bill before the end of 2012. Despite the need to reconcile the differing versions of the Magnitsky bill, analysts agree that Senate passage of the legislation should not be particularly difficult to achieve. Nonetheless, lawmakers are expected to use the coming weeks to focus on several other high-priority issues, e.g., resolving the so-called “fiscal cliff,” such that passage of the legislation before the end of 2012 cannot be guaranteed.

MOFCOM Considering Imposition of Retroactive AD/CVD Duties on Solar-Grade Polysilicon Imported from European Union, Korea and United States

On November 26, 2012, the Ministry of Commerce (MOFCOM) published Notice No. 84 [2012] announcing the initiation of follow-up proceedings to determine whether to impose retroactively provisional antidumping (AD) and countervailing duty (CVD) cash deposits as part of the ongoing AD/CVD investigations of imports of solar-grade polysilicon from the European Union (EU), South Korea and the United States.

On July 20, 2012, MOFCOM announced the initiation of the AD and CVD investigations of imports of solar-grade polysilicon from Korea and the United States in Notices No. 40 and 41 [2012]. On November 1, 2012, MOFCOM announced the initiation of AD/CVD investigations of imports of solar-grade polysilicon from the EU in Notices No. 70 and 71 [2012], and aligned its procedures with those for Korea and the United States. The subject merchandise is solar-grade polysilicon, which is classified under tariff code 28046190 of *the Import and Export Tariff Code of China*.

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On September 7, 2012, Jiangsu Zhongneng Silicon Technology Development Co., Ltd., China Silicon Corporation Ltd. and Daqo New Energy Co., Ltd., on behalf of the domestic industry, requested MOFCOM to retroactively impose provisional AD/CVD duties against subject imports from Korea and the United States as the imports had increased rapidly within a short period of time following the initiation of the AD/CVD investigation. On November 8, 2012, these three companies filed similar claims against EU imports. On November 26, 2012, MOFCOM officially initiated follow-up proceedings to investigate the Chinese companies' allegations.

Accordingly, within 15 days of the initiation of Notice No. 84 [2012], all relevant exporters from the EU, Korea and the United States are requested to report to MOFCOM their monthly export quantity and value data of subject merchandise to China during the period from January 2012 through October 2012 (for imports from Korea and the United States) and from May 2012 through October 2012 (for imports from the EU). Meanwhile, the relevant domestic importers are also requested to report the inventory data during the same periods. Furthermore, beginning in December 2012, these exporters and importers are requested to report to MOFCOM, on a monthly basis, their quantity and value of imports or exports of subject merchandise, until MOFCOM has issued its provisional AD/CVD decisions in these investigations.

If MOFCOM agrees with the Chinese producers and finds that the subject imports increased rapidly since initiation (which also could affect the provisional cash deposit to be assigned), MOFCOM will decide in its provisional decision to impose the relevant cash deposit on the subject imports retroactively up to 90 days before the date of the provisional decision.

Treasury Declines to Label China a Currency Manipulator

On November 27, 2012, the US Department of the Treasury ("Treasury") submitted to Congress its semi-annual report on international economic and exchange rate policies ("Treasury report" or "report"). The Treasury report found none of the United States' major trading partners, including China, to be manipulating its currency for the purpose of preventing effective balance of payments adjustment or gaining unfair competitive advantage in international trade for the period of January to June 2012. Data from the period of January to November 2012 is also referenced in some sections of the report.

The Treasury report claims that, from June 2010 to early November 2012, China's Renminbi (RMB) appreciated by 9.3 percent against the USD and by 12.6 percent on a real, inflation-adjusted basis. Moreover, China's current account surplus dropped from 2.8 percent of gross domestic product (GDP) in 2011 to 2.6 percent in the first three quarters of 2012. As a result of these developments, the report states that "estimates of the remaining degree of [RMB] undervaluation have narrowed over the past two and a half years." In addition, China's foreign reserve growth slowed to an average of USD 18.7 billion for each of the four quarters ending in September 2012, decreasing from an average of USD 140 billion for each of the four preceding quarters.

Nonetheless, the report cites the following as evidence that the RMB remains "significantly" undervalued: (i) China's high foreign exchange reserves compared to those of other economies; (ii) China's persistent trade and current account surpluses; and (iii) the limited degree of RMB appreciation relative to productivity gains. Consequently, the report calls on China to allow for greater RMB flexibility.

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In addition to China, the report also draws attention to the exchange rate policies of Japan and Korea. In regard to Japan, the report notes that, although Japan has not intervened in the foreign exchange market in 2012, “[Japanese] authorities publicly stated in several instances that they stand ready to ‘take decisive action’ in response to ‘excessive’ or ‘speculative’ market movements.” With respect to Korea, the Treasury report states that, although the Korean government does not publish intervention data, there is evidence that Korean officials intervened in currency markets in 2012. The report promises to press the Korean government to limit their foreign exchange interventions to “the exceptional circumstances of disorderly market conditions.” The report also calls on the Korean government to improve transparency through the publication of intervention data.

According to the International Monetary Fund (IMF), the real effective exchange rates of the Japanese yen (JPY) is moderately overvalued while that of the Korean won (KRW) are moderately undervalued. In June 2012, the IMF deemed China’s RMB as moderately undervalued, a change from previous IMF assessments that the RMB was significantly or substantially undervalued.

Even though the 1988 Omnibus Trade and Competitiveness Act requires that Treasury release the report by April 15 and October 15 of each year, the Obama Administration has consistently delayed the release of the report. Treasury claimed the release of this most recent report was delayed to allow US officials to assess progress related to exchange rates at the November 2012 G-20 Finance Ministers and Central Bank Governors Meeting. Yet analysts agree that the Obama Administration was focused on ensuring the report was not released until after the November 2012 elections.

From 2004 to 2010, legislation to address currency manipulation was introduced in every US election year. Despite Senate passage of the Currency Exchange Rate Oversight Act of 2011 (S 1619) in October 2011, there was no major push to pass similar legislation in the House during the months preceding the November 2012 elections. Nonetheless, China’s alleged currency manipulation was a major campaign issue in both the congressional and presidential races. Most notably, former Republican presidential candidate Mitt Romney strongly criticized the Obama Administration’s demonstrated preference for using bilateral engagement to address China’s alleged currency manipulation and promised, if elected, to label China a currency manipulator.

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