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The Washington Monitor is a product of the Japan Fair Trade Center in cooperation with the international trade practice of the U.S. law firm of Winston & Strawn LLP. All questions concerning its content should be addressed to:

Washington Monitor
Winston & Strawn L.L.P.
1700 K Street, N.W.
Washington, D.C. 20006
massony@winston.com

Trade Briefs

Possibility of Rising Protectionism in 2009

For a number of reasons, 2009 will likely see a resurgence of various types of trade restrictions in the United States. Trade experts foresee a resurgence in trade restrictions in 2009 for both economic and political reasons. Economically, trade restrictions increase during economic downturns. During economic downturns, there is greater need for U.S. companies to pursue trade restrictions for competitive advantages. Moreover, during downturns it is easier to make the case—both politically and economically—that trade restrictions are justified. Since some trade restrictions require demonstrating "material injury," it is much easier to make this showing during types of economic downturns.

Politically, trade restrictions tend to increase during Democratic Administrations. Although both Republican and Democratic Administrations impose trade restrictions, in general Democratic Administrations with stronger ties to labor unions and other working class constituencies are more sympathetic to requests for trade restrictions. For this reason, under Democratic Administrations various domestic interest groups often seek a wider range of trade restrictions and make such requests more frequently. This phenomenon is likely to be particularly severe in 2009 because the U.S. will have both a Democratic President and very strong Democratic majorities in both house of Congress. Even if President Barack Obama tries to pursue a more moderate trade agenda, he is likely to be pushed to more extreme positions by an intensely Democratic Congress with strong views on trade policy.

The coming year will bring the convergence of both severe economic weakness in the U.S. economy and a new Democratic Administration. In this crisis environment in which many new approaches are being explored, domestic industry groups are likely to pursue import restrictions of various forms as part of the overall U.S. response to the economic crisis. Some of these efforts could involve trade restrictions that can be invoked automatically, such as antidumping cases. Other efforts could involve trade restrictions that require the exercise of some political judgment, such as safeguards.

Antidumping Measures

Historically, antidumping measures have been the trade restriction of choice for U.S. industries seeking protection. One reason is that under the U.S. system domestic industries can file a petition and the process must go forward; there is virtually no discretion in the system that would allow the U.S. Government to stop the case. Another reason is that the Department of Commerce (DOC) has developed policies that are favorable to domestic petitioners, making it highly likely that antidumping margins will result.

The only real variable is whether the International Trade Commission (ITC) finds "material injury" or not, which is a precondition for an antidumping duty to be imposed. Historically the ITC has been somewhat balanced in making its decisions, rejecting about half of the petitions filed. Over the 1980 to 2007 period, the ITC voted affirmative in 49 percent of the

cases and voted negative in 51 percent of cases. For the coming year, however, there have been two important trends. First, the economy has weakened dramatically, making it much easier to show "injury" to the domestic industry. Second, the recent appointments to the ITC have been somewhat more sympathetic to domestic industries, and willing to give petitioners the benefit of the doubt in many cases. Given this history, and the expected greater ease of satisfying the need to prove injury, trade experts are predicting an increase number of antidumping petitions and an increased number of affirmative ITC injury findings that lead to the imposition of antidumping duties.

Antidumping measures are likely to be particularly important for Japan. Generally, Japan has been a frequent target of antidumping measures. Globally, Japan is the fifth most frequently targeted country in terms of the numbers of antidumping (AD) petitions filed. Moreover, Japan could get caught up in cases that primarily target China. Under U.S. law, because of the requirement to assess the cumulative effect of multiple sources, a petitioner has a strong incentive to bring its case against multiple sources. Therefore, Japan is often at risk of being included in petitions against China.

Countervailing Duty Measures

Historically, countervailing duty (CVD) cases have been less popular than antidumping cases. The primary reason has been that average dumping margins were higher than average CVD margins, so the domestic industry did not receive any additional "protection" from the CVD case. According to the official ITC tabulation for the 1980 through 2007 period, about 71 percent of so-called "Title VII" cases were antidumping cases. More recently, over the five year period from 2002 to 2006, there were only 17 CVD cases, about 12 percent of the total Title VII cases.

This pattern changed in 2007 and 2008. Because of a change in policy that allowed CVD cases against China, there has been a surge in CVD cases. In 2008, 7 out of 28 cases, or a quarter of the total, were CVD cases. Japan has not been targeted with a CVD investigation in over a decade, but this could change due to the shifting environment for international trade.

Safeguard Measures

Safeguard measures have been much less common than antidumping or CVD cases under Title VII. According to data compiled by the ITC, there have been 1458 Title VII cases over the 1980 to 2008 period and only 31 global safeguard cases. Over the past ten years, there have been only 6 safeguards cases. The last such case was against steel products in 2001. There have been no safeguard cases over the past five years.

Although there are some advantages to safeguard actions, they have one major disadvantage that makes them much less popular: they do not lead to automatic trade protection. Unlike antidumping and CVD actions, where meeting the conditions (show an unfair practice and prove injury) means winning protection, safeguards require a discretionary act by the

president to impose the protection. Put differently, if the President so decides, he can decide to impose no protection.

Notwithstanding this history, it is possible that one or more U.S. industries may try to pursue safeguard actions in the coming year. Some industries may believe that the combination of a Democratic President and a Democratic Congress may create the right political environment to push through actual import protection. Given the unique economic circumstances, it may be easier for an industry to point to increasing imports and argue they need a "time out" to adjust and recover.

Beyond such actions for global safeguards, it is also possible—indeed, more likely—for one or more industries to pursue special safeguards against China under Section 421. These special actions are allowed under the China protocol of accession to the WTO. Over the past several years, there have been six such cases filed in the United States. Over the past five years, although there have been zero global safeguard actions, there have been four different safeguard actions against China under Section 421.

Other Restrictions

Antidumping, CVD, and safeguard measures are all explicit, WTO-consistent trade restrictions. It is likely that most trade restrictions in 2009 and beyond will fall into this well-recognized categories. However, there has been a reemergence of some other restrictions, such as negotiated restrictions, WTO complaints, and complaints over currency manipulation.

Negotiated restrictions may or may not be completely WTO-consistent. Such measures were very common prior to 1995. Under Article 11 of the WTO Agreement on Safeguards, such "gray measures"—export moderation agreements, voluntary restraint agreements, price monitoring mechanisms—were to be prohibited. For many years, the U.S. stuck to both the letter and the spirit of this obligation, but this trade policy tool is being employed once again.

The Bush Administration has been less active in filing WTO complaints than its predecessor. Under the second Clinton Administration, from 1997 to 2000 the U.S. filed 45 WTO complaints. Under the first Bush Administration, from 2001 to 2004 the U.S. filed only 12 complaints, and matched that passive record in the second Bush Administration from 2005 to 2008 with only 10 new complaints. Even taking into account the fact that in the early years there were pent up cases to be filed, the Bush Administration has been very passive in using the WTO as a tool of trade policy. Trade experts expect the Obama Administration to be more active in bringing WTO cases, though it is not clear how the Obama Administration will prioritize this kind of action.

Congress has been pushing to address what they deem currency manipulation, and there have been efforts to push the Bush Administration into taking some action. This issue primarily involves China, since many in Congress believe that China has kept its currency artificially weak to encourage exports, thus leading to the massive trade deficit with China.

Although this issue primarily involves China, it is highly likely that any initiatives in this area could spill over and affect Japan. In discussions of this issue, Japan and Korea are often mentioned with China as the leading practitioners of currency manipulation. As a practical and political matter, it is hard for Congress to attack only China, so there is tendency to find one or two other targets for criticism.

Dumping Watch

DOC to Reinstate Dumping Order on SSI Hot-Rolled Carbon Steel Flat Products

On December 30, the Department of Commerce (DOC) gave notice that it had reached preliminary results of the changed circumstances review regarding the antidumping (AD) duty order on certain hot-rolled carbon steel flat products from Thailand. In May 2006, the DOC revoked the AD duty order on these steel products for one manufacturer: Sahaviriya Steel Industries Public Company Limited (SSI). The DOC had determined that SSI had not sold these hot-rolled carbon steel flat products at less than normal value for a period of three years. However, in requesting revocation, SSI agreed to immediate reinstatement of the AD duty order if they were found to be selling these products at less than normal value subsequent to the revocation. A domestic interested party requested a changed circumstances review, alleging that SSI had resumed dumping. In April 2008, the DOC decided to conduct such a review. And on December 30, DOC reached preliminary results in this review and determined that SSI has indeed been selling hot-rolled steel at less than normal value. Therefore, the DOC will immediately reinstate the AD duty order on these steel flat products from SSI. The DOC calculated the weighted-average dumping margin for SSI to be 9.05%.

New Shipper Review on Korean Circular Welded Non-Alloy Steel Pipe

On December 31, the DOC gave notice that it was initiating a new shipper review of the AD duty order on circular welded non-alloy steel pipe from Korea. On November 28, the DOC received a request for a new shipper review for this dumping order from A-JU Besteel Co., Ltd. (Ajubsteel). Ajubsteel has certified that it is an exporter and producer of this type of steel but that it did not export this product to the U.S. during the period of investigation. Also, Ajubsteel has never been affiliated with any exporter or producer who would have been subject to the dumping order. The DOC will subsequently initiate a new shipper review, the preliminary results of which are due within 180 days. During this review, Ajubsteel will still be required to post cash deposits of the estimated AD duties for the entry of this type of steel.

Federal Register Notices

International Trade Administration

[A-570-827] Certain Cased Pencils from the People's Republic of China: Extension of Time Limit for Preliminary Results of the Antidumping Duty Administrative Review 73 FR 80364-80365, December 31, 2008.

[A-475-818] Certain Pasta from Italy: Notice of Extension of Final Results of Antidumping Duty Changed Circumstances Review 73 FR 80365, December 31, 2008.

[A-580-809] Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Initiation of New Shipper Antidumping Duty Review 73 FR 80365-80366, December 31, 2008.

[A-570-901] Certain Lined Paper Products from the People's Republic of China: Extension of Time Limits for Final Results of Antidumping Duty Administrative Review *73 FR 80366-80367*, December 31, 2008.

[A-469-814] Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review *73 FR 79789-79791*, December 30, 2008.

[C-533-821] Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review *73 FR 79791-79802*, December 30, 2008.

[A-357-812] Honey from Argentina: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order in Part *73 FR 79802-79809*, December 30, 2008.

[A-549-817] Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Preliminary Results of Changed Circumstances Review and Intent To Reinstate Sahaviriya Steel Industries Public Company Limited in the Antidumping Duty Order *73 FR 79809-79814*, December 30, 2008.

[A-570-886] Notice of Extension of Time Limit for Final Results of Antidumping Duty Administrative Review: Polyethylene Retail Carrier Bags From the People's Republic of China *73 FR 79442*, December 29, 2008.

[A-821-819] Notice of Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review: Magnesium Metal from the Russian Federation *73 FR 79442-79443*, December 29, 2008.

[A-570-928] Uncovered Innerspring Units From the People's Republic of China: Final Determination of Sales at Less Than Fair Value *73 FR 79443-79447*, December 29, 2008.

International Trade Commission

[Investigation No. 332-505] Use of the "First Sale Rule" for Customs Valuation of U.S. Imports *74 FR 119-120*, January 2, 2009.

[Investigation No. 337-TA-615] In the Matter of: Certain Ground Fault Circuit Interrupters and Products Containing Same; Notice of Commission Determination To Extend the Deadline for Receiving Written Submissions on Remedy, the Public Interest and Bonding; Extension of Target Date *73 FR 80426-80427*, December 31, 2008.

[Investigation No. 337-TA-608; Investigation No. 337-TA-612] In the Matter of Certain Nitrile Gloves and in the Matter of Certain Nitrile Rubber Gloves; Notice of Commission Determination of No Violation of Section 337; Termination of the Investigation *73 FR 79909-79910*, December 30, 2008.

The Week Ahead

- On Monday, January 5, the ITC held a vote on a five-year sunset review adequacy determination regarding refined brown aluminum oxide from China.

- On Tuesday, January 6, the ITC will hold a hearing on the final phase AD investigation into small diameter graphite electrodes from China.
- On Thursday, January 8, the ITC will hold a hearing on its general fact-finding investigation into the economic effects of import restraints.