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Trade Briefs

ITC's Rationale for Preliminary Determination in Chinese OCTG Case

The International Trade Commission (ITC) recently released its written rationale for its preliminary threat of injury determination in the trade case against Chinese OCTG. For preliminary determinations, the outcome usually provides less guidance than the rationale for the outcome. The legal standard for a preliminary determination is the much lower "reasonable indication" standard—the domestic industry need only provide a "reasonable indication" of either current injury or threat of future injury. However, the Commission often uses the preliminary determination to frame key issues to be revisited in the final investigation. The Commission decision in *OCTG from China* follows this pattern. Therefore, the decision is useful for companies seeking to understand how this major case is proceeding and how the ITC is likely to act in similar cases involving other countries such as Japan.

Threshold Issues: Like Product and Composition of the Domestic Industry

The Commission found a single like product, treating all OCTG as part of that single like product. This decision follows precedent, as in the past the Commission has consistently found OCTG to be a single like product, except for drill pipe. But in *OCTG from China*, drill pipe was excluded from the scope of the case, making the like product issue rather straightforward. No party presented arguments on like product. The Commission also included all producers within the domestic industry. In some past cases, there had been arguments about whether certain domestic OCTG producers were in fact sufficiently oriented toward domestic production to be deemed part of the industry. In this investigation, no such issues arose.

Analysis of Injury Issues

The Commission did not discuss current material injury in this case. In many cases, the Commission first analyzes whether the evidence demonstrates current material injury before analyzing the existence of a threat of injury. Sometimes one or more individual Commissioners will find current material injury, even if the other Commissioners find only threat of future injury. In this case, however, no Commission attempted to justify the decision based on current material injury. Given the very substantial profits earned by the domestic OCTG industry, the Commissioners apparently felt the only basis on which they could justify their decision was threat of future injury.

The Commission discussion of threat is noteworthy in several respects. First, the Commission provided a much more detailed discussion of the legal standard than is often the case. In particular, the Commission provided a detailed discussion of the legal requirement not to attribute to subject imports injury caused by other factors. This so-called "non-attribution" requirement has triggered much litigation under both U.S. law and WTO law. The ITC decision reviews the various court decisions under U.S. law.

In this regard, the Commission provided specific discussion of the role of non-subject imports in its analysis. Even though the U.S. court decision have scaled back somewhat their requirements, footnote 47 makes clear the Commission plans to continue

collecting and studying information about non-subject imports in those cases in which non-subject imports are a significant competitive factor in the market. For *OCTG from China*, the Commission is likely to devote particular attention to non-subject imports in the final investigation, and may well decide to collect additional information about major OCTG industries other than that in China.

Second, the Commission provided a very focused discussion of the conditions of competition. Unlike many cases, the Commission focused its discussion of demand on a single factor—rig counts, and changes in rig counts. This focused approach is not surprising given the nature of the OCTG market, but it sets the stage for an even more focused battle about rig counts and shifts in demand for the final stages. The Commission also discussed supply factors with a balanced treatment of domestic supply, imports from China, and imports from other countries.

Third, the Commission devoted much more attention to inventory levels than would normally be the case. This attention is not surprising, given that the domestic industry stressed inventory levels and argued that excess inventories were both the result of excessive imports from China and were the mechanism through which "injury" would continue to be transmitted to the domestic industry. The Commission noted the inventory build up, but also noted the complexity of understanding why this happened.

Likely Volume of Imports. The Commission reviewed recent trends and concluded that although the absolute volume of imports from China began to decline in November 2008, the market share continued to climb as imports continued a high level relative to the rapidly shrinking market demand. The Commission found that based on the information available, the lag time between orders and deliveries explained some, but not all, of the continued volume of imports from China. The Commission appears to have put particular weight on the size of pending orders in the first quarter of 2009, which were considered to be high relative to known market demand at that time. The Commission also discussed and emphasized, the amount of Chinese capacity, increases in Chinese capacity, and the general export orientation of the Chinese industry. Atypical of these discussions was the specific finding that although the volume of imports from China would likely decline in absolute terms the market share of imports from China would likely increase. In other words, the Commission finding on future volume effects was basically that imports from China were not declining fast enough to avoid increasing their market share, and that increasing market share is itself the problem. These findings raise interesting and complex questions of whether it is legally proper to blame declining imports simply because they were not declining fast enough.

Likely Price Effects of Imports. It is always harder to predict price trends than volume trends, and *OCTG from China* was no exception. The Commission had to struggle with this section of its determination. Unlike the discussion of volume effects, which provided some analysis of the key facts, the discussion of pricing effects was more limited and incomplete. The Commission found underselling likely to continue, yet never discussed what adverse effect the underselling was having or would have in the future.

Likely Impact of Imports. The Commission also struggled to find a causal nexus between imports from China and future injury to the domestic OCTG industry. The

Commission opened its discussion of likely future impact with the argument that all the trends were positive but did not increase as much as apparent domestic consumption because of imports. This argument ignores the issue that the domestic industry could not supply any more OCTG. Indeed, the Commission itself noted the shortages as an important supply factor but then ignored these same facts when asserting that the domestic industry should have done better.

Interestingly, the six Commissioners were split on the question of whether the domestic OCTG industry should be deemed to be "vulnerable" to future injury. Commissioners Aranoff, Pearson, and Okun found that the domestic industry was not vulnerable. In contrast, Commissioners Lane, Williamson, and Pinkert found the industry was vulnerable. Both sets of Commissioners still found threat, but this discrepancy revealed that Commissioners Aranoff, Pearson, and Okun likely remain skeptical of the case that has been presented. Commissioners Lane, Williamson, and Pinkert, in contrast, are likely more persuaded by the petitioners' case.

Implications for Future Cases

This decision in *OCTG from China* has significance beyond just this case. Many domestic industries have been speculating about how the Commission would address the issue of sharply declining demand in trade remedy cases, and they now have their answer. The Commission seems willing to give domestic industries the benefit of the doubt and to allow subject imports still to be deemed a significant factor causing injury even when declining demand is also having a major impact on the domestic industry. This issue will be key for many industries, but especially for other steel industries contemplating trade remedy cases.

This issue will be revisited in the final investigation, and the Commission could well view that more complete and detailed record differently. But in the meantime, domestic industries have a clear signal that cases—at least cases against China—will not be stopped at the preliminary stage because of declining demand.

The Commission also appears unwilling to stop cases at the preliminary stage, even when the domestic industry may have had very strong operating profits in 2008. The domestic OCTG industry has high profitability and profit margins, and yet this determination accepts an approach that allows such profitable industries to bring trade remedy cases anyway. The approach is basically to ignore the current profitability, and instead focus on the weak demand going forward the difficulty of maintaining production, shipments, and profits going forward. As long as the subject imports are still a material factor in the market place—their volume has continued—the ITC seems willing (at least for a preliminary determination) to find a sufficient causal connection to allow the case to go forward.

It remains to be seen how the Commission addresses these issues in the final stage of *OCTG from China*.

Dumping Watch

ITC Votes on 421 Tire Case

On June 18, the International Trade Commission (ITC) held a vote on the Section 421 trade case alleging unfair importation of certain passenger vehicle and light truck tires from China. The ITC reached an affirmative determination, finding that the import of Chinese tires threatened to cause market disruption in the U.S.

The United Steelworkers (USW) filed a Section 421 case in April, arguing that there has been a surge of tire imports from China over the past five years and asking that the government impose strict quotas on Chinese consumer tires. After the petition was filed, the ITC initiated an investigation to determine whether or not the importation of Chinese tires had threatened market disruption for the domestic industry. One unusual aspect of this case is that the USW filed this petition on its own with no domestic industry joining their action. Some respondents questioned whether the ITC could find injury of an industry by market disruption when the industry itself declines to join a request for import restrictions.

On June 18, the ITC voted to affirm the petitioners' claims of injury. The vote was 4-2, with Chairman Shara L. Aranoff and Commissioners Charlotte R. Lane, Irving A. Williamson, and Dean A. Pinkert voting in the affirmative and Vice Chairman Daniel R. Pearson and Commissioner Deanna Tanner Okun voting in the negative. In short, the ITC's affirmative determination meant that the ITC believes that the subject merchandise is being imported in such high quantities that it could cause or threaten to cause a market disruption to domestic producers of like products.

In this phase of the safeguard action, the ITC has not approved or denied the USW's specific request for a quota. This will be decided later. Following this affirmative determination, the ITC will move quickly to propose a remedy to U.S. Trade Representative (USTR) Ron Kirk. The ITC has 20 days to propose such a remedy. Then, the USTR will have 55 days to make its recommendation to President Obama. The President will then make the final decision within 15 days.

AD Review of CORE from Korea Rescinded, In Part

On June 17, the Department of Commerce (DOC) gave notice of partial rescission of the administrative review of the antidumping (AD) duty order on certain corrosion-resistant carbon steel flat products (CORE) from Korea.

The DOC initiated this review in September 2008. The review included seven companies, including Dongkuk Industries Co., Ltd. (Dongkuk). Dongkuk submitted a letter to the DOC, stating that it had no shipments of the subject merchandise to the U.S. during the period of review. Based on the analysis of entry data, the DOC found that Dongkuk is a non-shipper for this review. Therefore, the DOC is rescinding this review with respect to Dongkuk.

Federal Register Notices

International Trade Administration

[A-570-894] Certain Tissue Paper Products from the People's Republic of China:

Affirmative Final Determination of Circumvention of the Antidumping Duty Order 74 FR 29172-29174, June 19, 2009.

[A-570-831] Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews 74 FR 29174-29178, June 19, 2009.

[A-570-891] Notice of Partial Rescission, Intent To Rescind and Extension of Preliminary Results of Antidumping Duty Administrative Review: Hand Trucks and Certain Parts Thereof From the People's Republic of China 74 FR 29178-29179, June 19, 2009.

[A-570-939] Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Final Determination of Sales at Less Than Fair Value 74 FR 29167-29172, June 19, 2009.

[C-570-940] Certain Tow-Behind Lawn Groomers and Certain Parts Thereof From the People's Republic of China: Final Affirmative Countervailing Duty Determination 74 FR 29180-29183, June 19, 2009.

The Manufacturing Council: Meeting 74 FR 29183, June 19, 2009.

[A-201-805] Preliminary Results of Antidumping Duty Changed Circumstances Review: Certain Circular Welded Non-Alloy Steel Pipe and Tube From Mexico 74 FR 28883-28886, June 18, 2009.

[A-570-851] Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty New Shipper Reviews 74 FR 28883-28886, June 18, 2009.

[A-201-836] Preliminary Results of Antidumping Duty Changed Circumstances Review: Light-Walled Rectangular Pipe and Tube From Mexico 74 FR 28883-28886, June 18, 2009.

[A-405-803] Purified Carboxymethylcellulose from Finland; Notice of Final Results of Antidumping Duty Administrative Review 74 FR 28883-28886, June 18, 2009.

[Order No. 1615] Expansion and Reorganization of Foreign-Trade Zone 147, Reading, Pennsylvania Area 74 FR 28883-28886, June 18, 2009.

[A-580-816] Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Rescission of Antidumping Duty Administrative Review, In Part 74 FR 28664-28665, June 17, 2009.

[A-351-838] Certain Frozen Warmwater Shrimp from Brazil: Notice of Rescission of Antidumping Duty Administrative Review 74 FR 28665-28666, June 17, 2009.

Quarterly Update to Annual Listing of Foreign Government Subsidies on Articles of Cheese Subject to an In-Quota Rate of Duty 74 FR 28671-28672, June 17, 2009.

[C-570-944] Certain Oil Country Tubular Goods from the People's Republic of China: Postponement of Preliminary Determination in the Countervailing Duty Investigation 74 FR 28220-28221, June 15, 2009.

International Trade Commission

[Inv. No. 337-TA-678] In the Matter of Certain Energy Drink Products; Notice of Investigation 74 FR 28725, June 17, 2009.

[Investigation No. 337-TA-629] In the Matter of Certain Silicon Microphone Packages and Products Containing the Same; Notice of Commission Final Determination of Violation of Section 337; Issuance of a Limited Exclusion Order; Termination of Investigation 74 FR 28724-28725, June 17, 2009.

Office of the U.S. Trade Representative

[Docket No. WTO/DS382] WTO Dispute Settlement Proceeding Regarding United States--Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil 74 FR 28754-28755, June 17, 2009.

The Week Ahead

- On June 26, the ITC will hold a conference on the preliminary CVD and AD investigations into wire decking from China.