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Recent International Trade Developments Newsletter

Volume 3 – June 19, 2007

[Ed. Note: Thank you to Irina Kashcheyeva, one of Honigman's eleven Summer Associates, who drafted several articles in this volume of the Newsletter.]

BREAKING NEWS!!

On June 13, U.S. Senators Baucus (D-MT), Grassley (R-IA), Schumer (D-NY), and Graham (R-SC) introduced *The Currency Exchange Rate Oversight Act of 2007.* Senators Baucus and Grassley, respectively, are the Chairman and Ranking Minority Member of the Senate Finance Committee – which will have jurisdiction over this legislation.

The bill requires the U.S. Treasury to identify "fundamentally misaligned" currencies to Congress twice a year – designating for "priority action" those currencies whose misalignment is clearly caused by a foreign government's economic policies. Treasury will be required to consult with any country with fundamentally misaligned currency. Currencies that are labeled "priority action" may be subject to additional consequences, including: calculation of the misalignment in connection with antidumping duty margins; suspension of U.S. government procurement; requests for special consultation by the International Monetary Fund; and suspension of loans and private insurance from the Overseas Private Investment Corporation to U.S. companies wishing to operate in that nation. Further, if issues are not resolved within one year, the legislation requires the U.S. Trade Representative to commence World Trade Organization dispute settlement proceedings.

While the legislation does not specifically identify any particular country/currency and, indeed, any number of currencies might fit the definition of fundamentally misaligned, it is no secret that the bill is directed at China's alleged direct manipulation of its currency.

The Bush Administration has not yet issued a public statement on the measure, but has generally preferred to softly prod China on currency, rather than threaten sanctions or other retaliatory actions..

In related developments: (i) Senators Dodd (D-CT) and Shelby (R-AL), respectively the Chairman and Ranking Minority Member of the Senate Banking Committee, also announced plans to introduce currency legislation; (ii) the Office of the United States Trade Representative (USTR) rejected a petition filed on May 17 by several Members of the House of Representatives seeking the invocation of a WTO dispute settlement against China in connection with its exchange rate policies; and (iii) the U.S. Department of Treasury just released its *Semiannual Report on International Economic and Exchange Rate Policies* – it can be obtained at: http://www.treasury.gov/offices/international-affairs/economic-exchange-rates/

The Byrd Amendment Coming to an End

The Continued Dumping and Subsidy Offset Act (CDSOA) or *Byrd Amendment* sunsets October 1, 2007. Slipped into appropriations legislation by Senator Robert Byrd (D-WV) in 2000, the controversial CDSOA was intended to allow companies that filed or supported successful antidumping and/or countervailing duty (AD/CVD) petitions to receive a share of the remedial tariffs collected. Absent CDSOA, such tariff revenue would otherwise be treated as general revenue of the U.S. Treasury.

The theory underlying the CDSOA was several-fold, including:

- That continued dumping or subsidization of imported products after the imposition of remedial tariffs frustrates the purpose of the laws by preventing market prices from returning to fair levels.
- Where dumping or subsidization continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit.

Almost immediately upon enactment into law, the CDSOA was challenged as "illegal" under the World Trade Organization (WTO)

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rules. In 2003, the Appellate Body of the WTO determined that the CDSOA was inconsistent with international obligations, and the WTO subsequently authorized various U.S. trading partners to "retaliate" against the U.S. while the CDSOA remained in effect. Although many in Congress continued to support the CDSOA after the WTO ruling, it was prospectively repealed in 2006.

While most companies eligible to receive an offset have likely availed themselves of the process and obtained a share of the tariffs, a recent Court of International Trade (CIT) decision has opened the door to yet additional prospective recipients. The CIT ruled that companies that publicly opposed the imposition of AD/CVD tariffs are, contrary to the law as enacted, eligible to seek an offset.

Companies that believe they may be eligible to receive the offset, whether by virtue of the CIT decision or otherwise, must request the U.S. International Trade Commission to add the Company to the list of eligible producers. Upon such determination by the ITC, the company would be permitted to submit offset certifications to the U.S. Customs and Border Protection Agency (CBP). Notably, certifications for 2007 distributions must be filed with the CBP by July 30, 2007.

In April, the CBP issued a preliminary list of remedial tariff revenue that would be available for distribution. The list may be accessed at: http://www.cbp.gov/linkhandler/cgov/import/add_cvd/cont_dump/2007_final_prlim_rpt.ctt/2007_final_prlim_rpt.pdf

What Does It Mean for My Company? If your Company is part of a domestic industry which has successfully petitioned for trade relief, it might be eligible to receive a share of related remedial tariffs, irrespective of whether the Company supported the trade action. For more information, please contact sring@honigman.com

Duty Drawback Program: Qualifying for a Refund for Certain Exports

Companies that use imported goods in their exported products may recoup almost all of the attendant import duties through the Customs and Border Protection drawback program. Put in general terms, drawback represents a rebate of import duties paid back to the entity when the imported good is re-exported or used as input to the production of an exported good. Under the applicable statute, companies may get ninety-nine percent of the duties attributable to the foreign, duty-paid content of the qualified exported article returned to them as drawback. While the drawback program has been labeled by Customs officials as "the most complex commercial program the [agency] administers," some basic categories of goods eligible for drawback refund are listed below:

- *Direct Identification Manufacturing*: Companies that export or destroy articles manufactured in the United States with the use of imported merchandise are eligible to receive as drawback the duties paid on the imported merchandise.
- *Substitution Manufacturing*: If both imported and domestic merchandise of the same kind and quality were used in manufacturing the articles, a refund can be received for the exported or destroyed goods—regardless of whether actual imported or domestic merchandise was used in the exported or destroyed goods.
- *Rejected Merchandise*: Whenever the exported merchandise does not conform with samples or specifications and is rejected for this reason, or has been shipped without the consent of the consignee, or determined to be defective as of the time of importation, the duties paid on this merchandise may be recovered as drawback.
- *Unused Merchandise*: Companies can also get back the import duties paid on the merchandise if that merchandise was never used before being exported or destroyed under the supervision of the Customs.
- *Substitution Unused Merchandise*: Companies may recover as drawback import duties, taxes, or fees paid for imported merchandise if that merchandise or the commercially interchangeable domestic merchandise is exported or destroyed under Customs supervision and, at the time of exportation or destruction, the merchandise – whether imported or commercially interchangeable domestic – has not been used.

A series of statutory timing provisions constrain the availability of drawback refund to companies. Generally, drawback is not allowable if more than five years have passed between the importation of an article and its exportation or destruction. However, a shorter three-year import-to-export period may apply in such claims as ones for unused merchandise drawback or drawback for merchandise not conforming to sample or specifications. Additionally, manufacturing operations, if any, must take place within three years of the receipt by the manufacturer of the designated imported merchandise. Lastly, to still be viable, a drawback claim must be filed within three years from the date

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of exportation or destruction of a qualified article.

Bottom Line: If your company uses imported materials in manufacturing goods for export, it should determine whether it might avail itself of the drawback program. Additional information may be obtained at: http://www.cbp.gov/linkhandler/cgov/toolbox/publications/trade/drawback.ctt/drawback.pdf.

Using Customs Registration to Address Counterfeiting and Pirated Goods in China

Counterfeiting is big business. It can cost companies millions of dollars if the integrity in which customers associate with a brand or product is lost and severely damage the company's future. Counterfeiting is a global problem, it is essential to properly organize and coordinate enforcement actions. Close co-ordination of enforcement activities allows for consistency in approach and facilitates cross-border sharing of information. Larger counterfeiting operations are no longer confined within domestic or even regional borders. They frequently consist of multinational networks of manufacturing sources, freight forwarders, trading companies, distributors, wholesalers and retailers. The reduction in trade barriers over the past years means that international trade, whether that trade is legal or illegal, has never been easier. So what are you doing to protect your company's coat of arms? Near the top of the list should be to record Intellectual Property Rights ("IPR") with Customs authorities and to engage in regular training with law enforcement agencies, especially Customs.

In fact, the Special 301 Report dated April 30, 2007 from The Office of the United States Trade Representative highlights the prominence of concerns with respect to China, in spite of some evidence of improvement. (This report may be obtained at: **http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf**). Chinese government officials are committed to tackle the problem of enforcement of IP rights. There has been some improvement over the years. For example in 2005 there were 1,210 seizures of goods valued at over 12 million US dollars, up from 2004 in which there were 1,051 seizures of goods valued at over $10 million US dollars. Even though there has been improvement in China, to date the measures taken have not been sufficient to deter infringement and counterfeiting activities. Therefore, the best protection is prevention. China is a member to international agreements to protect IP rights including the WIPO, the Berne Convention and the Paris Convention, among others, however, a company must register its patents and trademarks with the appropriate Chinese agencies and authorities for those rights to be enforceable in China. Copyrights do not need to be registered but registration with the relevant Chinese authority will be helpful in enforcement actions. Customs regulations ban the import/export of IPR infringing goods. In order for an IPR holder to take advantage of the regulations banning the import/export to infringing or counterfeit goods, the IPR holder must register with the General Administration of Customs ("GAC") in Beijing using local counsel. Registering with Customs may provide protection for all categories of IPR, including patents, designs, trademarks and copyrights, and prohibit the import or export of goods in violation of those rights.

To register with Chinese Customs an application needs to be completed with some basic information about the IPR's rights and business in China with a power of attorney. Generally, it takes one to two months to for an application to be processed by the GAC. The recordal certificate issued by Customs is valid for ten years and is renewable for additional 10 year periods.

For more information about registering with Chinese Customs, please contact Jennifer Sheehan Anderson at 248-566-8532 or janderson@honigman.com.

Potential Changes in Review of Foreign Investments

The Senate Committee on Banking, Housing, and Urban Affairs recently approved the *National Security Foreign Investment Reform and Strengthened Transparency Act of 2007,* which clarifies and strengthens the process of assessing national security threats posed by acquisitions of U.S. businesses by foreign entities. The bill has already passed in the House of Representatives, where it was introduced in response to the public discontent surrounding last year's near-acquisition of various U.S. ports by Dubai Ports World, a United Arab Emirates company.

Certain provisions in the legislation, also referred to as the *CFIUS (Committee on Foreign Investment in the United States) Reform Act* represent a significant departure from the current law; it would, among other things:

- empower the CFIUS to issue subpoenas and conduct formal hearings, including administering oaths, receiving evidence, and compelling testimony;
- allow the CFIUS to re-open an already approved transaction if a

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company is found to have been untruthful in its disclosures or if it failed to comply with the National Security Agreement (an option available only in cases where there is no other "remedy or enforcement tool" to address this failure);
- place under increased scrutiny transactions involving entities controlled or owned by foreign governments; and
- permit extensions of the CFIUS investigations beyond the 45-day period currently in place, and give authority to the President and the CFIUS members to request such extensions.

Consideration and passage of the bill in the full Senate is expected as early as this month.

Bureau of Industry and Security's Proposal to Expand Export Control Entity List

The Bureau of Industry and Security (BIS) is soliciting public comment on a proposed rule to broaden the list of foreign entities triggering a license requirement for U.S. exporters. In addition to the bases set forth under current regulations for license requirements, the proposed rule lists as conduct that could be contrary to U.S. national security, and thereby require an exporter to obtain a license prior to exportation, the following:

- supporting persons engaged in terrorism;
- actions that could enhance the military capability of, or the ability to support terrorism of governments that have been designated by the Secretary of State as supporting acts of international terrorism;
- transferring, developing, servicing, repairing, or producing conventional weapons in a manner that is contrary to the U.S. national security or foreign policy interests;
- deliberately failing or refusing to comply with an end use check conducted by or on behalf of the BIS or the Department of State;
- engaging in conduct that poses an imminent risk of a violation of the Export Administration Regulations.

Bottom line: Whether or not the proposed rule is adopted as a final rule, and it likely will be, if your company is engaged in the export of merchandise to entities that might be deemed to be adverse to the U.S. and/or the export is of merchandise that might have military purpose in addition to a non-military purpose, it is important to know in advance of the transaction whether there is an affirmative duty or obligation to seek permission to engage in the transaction.

Congress Orders Fact-Finding Investigation into Causes of the U.S-China Trade Imbalance

In light of the widening U.S.-China trade imbalance, which reached a record high of $233 billion last year, the House Committee on Ways and Means recently requested the U.S. International Trade Commission to conduct a broad fact-finding investigation into its potential causes. In particular, the Committee requested that the investigation focus on the practices and policies of the Chinese governmental bodies regarding supporting and influencing decision-making in the country's manufacturing, agricultural, and services sectors. The study is also aimed at examining the sectors of the Chinese economy that are closed to the U.S. exports. A third component of the study is to analyze the impact of Chinese subsidies and interventions on the U.S. trade relationship with other Asian partners, such as Japan and Korea.

The first study concentrating on the Chinese government's policies in supporting domestic producers is due in seven months from the date of the request (May 23, 2007); the second study analyzing the sectors of the Chinese economy closed to the U.S. producers is due within 14 months of the request; finally, the third study examining the impact of Chinese policies on the U.S. trade patterns with other Asian countries is expected within 24 months. A formal schedule for these studies will be announced by the ITC shortly.

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Honigman Miller Schwartz & Cohn LLP is a full-service law firm based in Detroit. We have been named the best corporate law firm in Detroit by *Corporate Board Member*, and proudly serve domestic and international clients alike across a wide cross-section of industries. Honigman attorneys have a wide array of experience in a number of international trade disciplines. From customs and intellectual property enforcement to international tax planning and unfair trade investigations, our attorneys assist companies in complying with relevant laws and policies governing particular international transactions, as well as identifying strategies and opportunities to maximize supply chain management. Please contact Sanford "Sandy" Ring if you would like additional information at sring@honigman.com, or at 517.377.0733

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