Department of Commerce Issues First-Ever Determination That Currency Undervaluation Is a Countervailable Subsidy

Skadden

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On November 4, 2020, the U.S. Department of Commerce issued its preliminary determination that passenger vehicle and light truck tires from Vietnam benefited from a range of government subsidies, including subsidies based on Vietnam's undervalued currency.[1] This is the first time Commerce has applied new regulations that allow it to impose countervailing duties on imports from countries where government action has contributed to an undervalued currency. This determination is preliminary, and the final determination is not expected until March 2021. But Commerce's findings shed important light on the meaning and significance of the new rules and coincide with a broader crackdown by the U.S. government on currency practices.

Commerce's Determination

Commerce initiated the countervailing duty (CVD) investigation in June 2020, following a petition filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC.[2] This case was accompanied by a parallel investigation concerning whether tires from Vietnam, Korea, Taiwan and Thailand were dumped on the U.S. market.[3]

After obtaining questionnaire responses and submissions from interested parties, Commerce preliminarily determined that producers and exporters of passenger vehicle and light truck tires from Vietnam benefited from seven subsidy measures, one of which was Vietnam's undervalued currency.[4] On a preliminary basis, Commerce considered that the evidence met each element of the test for determining whether a countervailable subsidy exists.

This is the first determination in which Commerce has applied new regulations on currency subsidies. In February 2020, Commerce amended its regulations to provide for currency undervaluation to be treated as a countervailable subsidy.[5] Under the amended regulations, Commerce may find that a foreign government's intervention to weaken its currency qualifies as a countervailable subsidy if it meets the traditional requirements — *i.e.*, the government or a public body provides a "financial contribution" that confers a "benefit," and the subsidy is "specific" to an enterprise or industry, or a group of enterprises or industries. If Commerce finds in the affirmative, and if the U.S. International Trade Commission (ITC) finds that the currency-related subsidy causes or threatens to cause material injury to a U.S. industry, this could lead to the imposition of additional duties, called countervailing duties, on imports of products found to benefit from the subsidy.

1 U.S. Department of Commerce, "Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination," Case No. C-552-829 (November 4, 2020) (Notice of Preliminary CVD Determination); *see also* U.S. Department of Commerce, FAQ: "Preliminary Determination in the Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires From Vietnam."

2 U.S. Department of Commerce, "Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation," 85 Fed. Reg. 38850 (June 29, 2020).

3 U.S. Department of Commerce, "Passenger Vehicle and Light Truck Tires From the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations," 85 Fed. Reg. 38854 (June 29, 2020).

4 U.S. Department of Commerce, "Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam," at 13-28 (October 30, 2020) (Decision Memorandum).

5 U.S. Department of Commerce, "Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings," 85 Fed. Reg. 6031 (Feb. 4, 2020).

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In the tires investigation, Commerce found that Vietnamese producers and exporters received a "financial contribution" from foreign currency exchange transactions with state-owned commercial banks (Vietinbank and Vietcombank), which play an important role in the Vietnamese economy.[6] Likewise, Commerce found that, due to Vietnam's implementation of laws and decrees on foreign exchange, private Vietnamese and foreign-owned banks were "entrusted or directed" to confer such a financial contribution through currency exchange transactions.[7]

Commerce also found that these subsidies were "specific" within the meaning of the CVD regulations. Drawing on an element of the new currency-related rules, Commerce preliminarily found that the currency subsidies at issue here were specific to a group of enterprises — *i.e.*, the group of enterprises in Vietnam that buy or sell goods internationally. After examining data concerning the inflow of U.S. dollars into Vietnam, Commerce found that the vast majority of these flows came from goods exports. As a result, it determined that enterprises that buy or sell goods internationally are the predominant users of Vietnam's currency undervaluation subsidy and that the program is *de facto* specific.[8]

Turning to whether the currency subsidies conferred a "benefit" on Vietnamese producers and exporters, Commerce essentially adopted an analysis provided by the U.S. Department of Treasury. Consistent with the new currency regulations, Commerce solicited comments from Treasury on whether Vietnam's currency, the dong, was undervalued. Treasury explained that in 2019 there was a gap between Vietnam's real effective exchange rate (REER) and the "real effective exchange rate that achieves an external balance over the medium term that reflects appropriate policies" (the equilibrium REER). Treasury found that the Vietnamese government's actions with respect to the exchange rate had the effect of undervaluing the dong relative to the dollar by 4.7%.[9]

Based on Treasury's analysis, Commerce preliminarily found that these subsidies conferred a benefit on the two leading Vietnamese producers, Kumho Tire (Vietnam) Co., Ltd. (KTV) and Sailun (Vietnam) Co., Ltd. Commerce divided the currency benefits for each company in 2019 by their total sales in U.S. dollars and assigned a subsidy rate of 1.69% to KTV and 1.16% to Sailun.[10]

[6] Decision Memorandum, at 20-21.

[7] Decision Memorandum, at 21-22.

[8] Decision Memorandum, at 23-24.

[9] Decision Memorandum, at 24-25.

[10] Decision Memorandum, at 25.

US Government Efforts To Rein In Currency Manipulation

The Vietnam CVD investigation is one of three investigations into foreign government currency practices and dovetails with a broader initiative by the U.S. government to crack down on currency manipulation by other countries.

As reported in a previous Skadden client alert, on October 8, 2020, the Office of the U.S. Trade Representative (USTR) launched an investigation into the valuation of Vietnam's currency under the same statutory authority that led to the imposition of successive rounds of tariffs on China — Section 301 of the Trade Act of 1974 (Section 301).[11] USTR is investigating the acts, policies and practices of Vietnam related to the valuation of Vietnam's currency, focusing on interventions by the State Bank of Vietnam in exchange markets and other "related actions" that contribute to the undervaluation of Vietnam's currency.[12]

In addition, Commerce initiated an investigation in July 2020 to determine whether twist ties from China received unfair subsidies.[13] One of the subsidy programs under investigation is China's alleged undervaluation of its currency.

Furthermore, the United States has included currency disciplines in its most recent trade agreements. The United States-Mexico-Canada Agreement[14] and the Phase One Agreement between the United States and China[15] both contain chapters that impose disciplines on exchange rate practices. These are the first trade agreements to contain enforceable currency commitments, and they reflect the U.S. government's focus on reining in what it sees as unfair currency practices.

[11] Office of the U.S. Trade Representative, Notice, "Initiation of Section 301 Investigation: Vietnam's Acts, Policies, and Practices Related to Currency Valuation," 85 Fed. Reg. 63637 (Oct. 8, 2020).

[12] Office of the U.S. Trade Representative, Notice, "Initiation of Section 301 Investigation: Vietnam's Acts, Policies, and Practices Related to Currency Valuation," 85 Fed. Reg. 63637 (Oct. 8, 2020). In tandem with this investigation, USTR also launched a Section 301 investigation into Vietnam's acts, policies and practices related to the use of timber that is illegally harvested or traded. Office of the U.S. Trade Representative, Notice, "Initiation of Section 301 Investigation: Vietnam's Acts, Policies and Practices Related to the Import and Use of Illegal Timber," 85 Fed. Reg. 63639 (Oct. 8, 2020).

[13] U.S. Department of Commerce, "Twist Ties From the People's Republic of China: Initiation of Countervailing Duty Investigation," 85 Fed. Reg. 45188 (July 27, 2020).

[14] Agreement Between the United States of America, the United Mexican States and Canada, Chapter 33.

[15] Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, Chapter 5.

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Next Steps in the Vietnam CVD Investigation

Commerce's CVD investigation of Vietnamese tires will continue to unfold in the coming months. Commerce will give interested parties opportunities to submit additional arguments and may solicit additional evidence through questionnaires. Under the current schedule, Commerce will issue its final CVD determination by March 15, 2021. For its part, the ITC has already found that there is a "reasonable indication" that the U.S. industry is materially injured due to subsidized and/or dumped tire imports from Korea, Taiwan, Thailand and Vietnam,[16] and it is scheduled to provide its final injury determination by April 2021. If both Commerce and the ITC issue affirmative final determinations, Commerce could issue an order imposing countervailing duties on tire imports from Vietnam in May 2021.

Regardless of the final outcome, Commerce's preliminary CVD determination confirms that currency undervaluation is a potentially viable basis for asserting a CVD claim. This determination will likely encourage petitioners to file more currency-based CVD allegations in other cases.

[16] U.S. International Trade Commission, "Passenger Vehicle and Light Truck Tires From Korea, Taiwan, Thailand and Vietnam," ITC Publication No. 5093 (July 2020).