Holland & Hart

David Glynn

Of Counsel
303.295.8071
Denver
djglynn@hollandhart.com

Foreign Currency Policy: A New Duty Risk for U.S. Importers?

Insight — March 2, 2020

In an unprecedented move, the U.S. Department of Commerce's International Trade Administration (ITA) has recently raised the stakes, and the potential duty liability risk, for U.S. importers. On February 4, 2020, the ITA announced in the Federal Register a final rule expanding the scope of Countervailing Duty proceedings to include consideration of the exporting country's currency valuation practices.

Under the new rules, if the ITA finds a country is manipulating its currency below what is considered an equilibrium rate, the ITA may impose additional duties on imports from that country to offset the alleged benefit received, including, in particular, increased exports by that country.

What's Changing?

Historically, countervailable subsidies involved tax breaks, government grants, below-market rate loans, or the provision of goods or services free of charge or at a reduced rate. With these regulatory changes announced by the ITA, a new type of government action – intentional devaluation of its currency – can be deemed a subsidy.

In assessing whether a country's currency is undervalued, the ITA would set a countervailing rate equal to the extra amount of domestic currency received by a firm because of the undervaluation. While similar to a subsidy, the benefit would accrue to all exporters, not just exporters of specific products.

What's the Impact?

The new rules give the ITA another tool to address what it determines to be unfair trading practices. U.S. domestic industries could potentially benefit from these changes, but any such benefit will likely make the importation of products determined to have benefited from currency manipulation that much more expensive.

The final rule includes some guardrails on the U.S. Government's ability to find countervailable subsidies. The ITA will be required to seek input from the Treasury Department when evaluating currency undervaluation. Treasury's evaluation will be put on the record and the ITA will allow the public's submission of factual information to rebut, clarify, or correct Treasury's assessment. However, the ITA has made clear that the ultimate determination will continue to be made by the Commerce Department.

Furthermore, Treasury's currency manipulator determinations are separate and distinct from the ITA's currency undervaluation subsidy decisions. It remains to be seen if administrative policy considerations may override a pure financial analysis of a subsidy benefit, especially given the United States' current trade relationship with China.

Although Treasury determined in a January 2020 semiannual report to Congress that China is no longer a currency manipulator, this does not necessarily mean the ITA is restricted under its new regulations from imposing currency undervaluation countervailing duties on Chinese products. If the ITA does so, such an action could end any trade war truce resulting from the U.S.-China Phase I Trade Deal as China has indicated it would consider imposition of currency undervaluation countervailing duties to be a breach of that agreement.

Additional Considerations

The new regulations are set to take go into effect on April 6, 2020. However, these changes will likely face challenges in the U.S. Court of International Trade or the WTO's Dispute Settlement Body. Any such opposition poses a credible threat to the ITA's ability to apply these new rules since the WTO's definition of actionable subsidies does not include a reference to currency undervaluation.

It may be tempting to consider these changes as impacting only trade with China. Yet, unlike the current set of Section 301 tariffs, products from any country could potentially be subject to these extra duties even in the absence of other types of government subsidies. In recent years, many countries, including Germany, Japan, and Mexico have allegedly adopted monetary policies resulting in undervalued exchange rates. The scope of the ITA's regulatory changes clearly has a global reach.

The bottom line is that U.S. domestic producers will have yet another opportunity to seek redress for trade practices resulting in an unfair advantage in the U.S. market. U.S. importers should monitor these currency undervaluation investigations and be ready to take action to mitigate the financial impact.
