

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Jeffrey D. Gerrish
Washington, D.C.
202.371.7381
jeffrey.gerrish@skadden.com

James C. Hecht
Washington, D.C.
202.371.7370
james.hecht@skadden.com

Robert E. Lighthizer
Washington, D.C.
202.371.7770
robert.lighthizer@skadden.com

Nathaniel B. Bolin
Washington, D.C.
202.371.7893
nathaniel.bolin@skadden.com

* * *

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

1440 New York Avenue, NW,
Washington, D.C. 20005
Telephone: 202.371.7000

Four Times Square, New York, NY 10036
Telephone: 212.735.3000

WWW.SKADDEN.COM

US Challenges China's Automobile and Auto Parts Export Policies at the WTO While Leaving the Door Open for Additional Trade Actions

The United States has filed a request for consultations at the World Trade Organization (WTO) challenging China's export policies for automobiles and auto parts. A request for consultations is the first step in the dispute settlement process at the WTO and could lead to formal dispute settlement proceedings between the United States and China over the challenged policies. However, the United States has made clear that companies also may pursue other forms of relief under U.S. law against China's alleged unfair trade practices.

The U.S. request for consultations targets a group of 84 policies established by the Chinese central government and certain provincial and local governments in China.¹ These policies seek to develop a series of "export bases" from which China hopes to increase its exports of a variety of products manufactured by its growing automobile and auto parts industry. In its request for consultations, the United States charges that such policies are prohibited under the WTO's Agreement on Subsidies and Countervailing Measures because they represent subsidies that are contingent upon export performance.² The U.S. request also challenges China's failure to notify WTO members of the policies and to administer them through a transparent process in accordance with WTO rules.³ According to the Office of the United States Trade Representative (USTR), which is responsible for litigating the case at the WTO, China used the challenged policies to make at least \$1 billion in export subsidies available to manufacturers in China from 2009 to 2011.⁴

Assuming (as is expected) that bilateral consultations between the United States and China fail to resolve the dispute within 60 days, the United States may request that a WTO dispute settlement panel be established to hear the case. WTO panels typically take around a year to complete their proceedings and issue a decision. The disputing parties can then choose to accept and implement the decision of the WTO panel or can appeal that decision to the WTO Appellate Body, which may take several months to issue its own decision.

If successful, a WTO dispute settlement case could result in China withdrawing the policies in question, as China did with respect to certain import restrictions on auto parts following a WTO case brought by the United States and the European Union in 2006.⁵ Alternatively, if China refused to terminate the challenged policies, the United States could gain the right to impose retaliatory tariffs on a range of imports – not necessarily the automobiles and auto parts themselves – from China. As a result, even if

1 See U.S. Request for Consultations in *China – Certain Measures Affecting the Automobile and Automobile Parts Industries*, WT/DS450/1 (Sept. 20, 2012) (U.S. Request for Consultations).

2 *Id.* at 7.

3 *Id.* at 7-8.

4 "Obama Administration Challenges China's Export Subsidies to Auto and Auto Parts Manufacturers in China," *USTR Press Release* (Sept. 17, 2012).

5 See Report of China to the Dispute Settlement Body in *China – Measures Affecting Imports of Automobile Parts*, WT/DS340 (Aug. 31, 2009).

successful, the U.S. case may not lead directly to the removal of the export subsidies at issue or to the imposition of tariffs on unfairly traded automobiles and auto parts from China.

The U.S. case also does not address a host of other subsidies and unfair trade practices that China is alleged to have used to support its automobile and auto parts industry and to promote exports. These include allegations of currency manipulation, the provision of preferential loans and loan guarantees, favorable tax incentives, import tax exemptions, and the provision of various inputs (such as steel and electricity) for less than adequate remuneration.

The WTO case filed by the United States does not preclude companies that have been injured by China's alleged unfair trade practices from seeking other forms of relief. Specifically, such unfair trade practices could be addressed through antidumping (AD) and countervailing duty (CVD) proceedings and so-called "safeguard" cases filed by affected U.S. companies and workers under U.S. law.⁶ Indeed, immediately following the filing of the WTO case against China's automobile and auto parts export subsidies, an official of the U.S. Department of Commerce was careful to emphasize that the WTO case would not preclude that agency from accepting and investigating AD and CVD petitions involving the same and related allegations of unfair trade practices.

For companies that have been injured by dumped and subsidized imports from China and other countries, AD and CVD cases hold several advantages over dispute settlement proceedings at the WTO. For example, AD and CVD cases offer more effective and concrete relief to the injured U.S. companies in the form of additional duties being imposed on the very imports causing the injury. Such duties serve to level the playing field between the affected U.S. companies and foreign producers. In addition, AD and CVD cases proceed more quickly and result in far more timely relief than WTO proceedings. AD and CVD cases also offer the significant advantage of allowing the affected U.S. companies to control the litigation. WTO dispute settlement proceedings are conducted between governments, and U.S. companies participate in such cases by consulting with the government officials involved. This stands in stark contrast to AD and CVD cases where U.S. companies file and directly litigate the cases. U.S. companies can control the scope of AD and CVD cases and can use such cases to comprehensively address the dumping and subsidization that is harming them.

As the case against China's export policies on automobiles and auto parts exemplifies, the United States can seek to combat unfair trade practices at the WTO. However, given the advantages of AD and CVD cases, it is worth exploring the viability of such mechanisms whenever U.S. companies are harmed by unfairly traded imports.

6 An AD investigation examines whether foreign producers and exporters have sold a product in the United States at unfairly low (*i.e.*, dumped) prices. If successful, an AD investigation will lead to the imposition of additional duties on the imported product in question equal to the amount of the dumping. A CVD investigation examines whether a foreign government has provided subsidies to producers and exporters located in that country. A successful CVD case will result in additional duties on the affected product equivalent to the value of the subsidies in question, thereby offsetting any unfair trade advantage that such subsidies may confer. Safeguard proceedings enable U.S. industries and workers that are injured by increased imports to obtain temporary relief from the imports in the form of increased duties or other measures (such as quotas). Safeguard actions do not require a showing that imports are dumped or subsidized. However, because they require a demonstration of a higher level of injury than that required in AD and CVD cases, safeguard actions are used less frequently.