

Twisting In The Wind: US-China Green Tech Trade

Law360, New York (January 25, 2011) -- The United States announced on Dec. 22, 2010, that it has sought the World Trade Organization's intervention to address U.S. concerns over support for the domestic wind power industry in the People's Republic of China. According to U.S. Trade Representative (USTR) Ron Kirk, the U.S. filed a request for consultations with China under the WTO agreement's dispute settlement provisions concerning China's Special Fund for Wind Power Manufacturing program. This request is the first step in a potential WTO case.

China's government provides official support, in the form of monetary grants and other benefits, to develop its domestic wind power manufacturing industry. In its filing, the U.S. asserts that the program provides subsidies and other support that is contingent on the use of domestic Chinese parts and components, which is prohibited by the WTO Agreement on Subsidies and Countervailing Measures (SCM). The U.S. also claims that China failed to notify the WTO of its wind power program, which is inconsistent with China's obligations under the SCM agreement.

After a 60-day consultation period (or shorter if the parties agree), the U.S. could ask the WTO to establish a dispute settlement panel. If the panel agrees with the U.S. and any related appeals fail, the WTO could permit the U.S. to raise tariffs on Chinese imports. The amount of permitted U.S. retaliation generally would be proportional to any injury the WTO panel finds. Potential U.S. retaliation could be substantial — the U.S. alleges that the program provides prohibited support worth several hundred million dollars.

The U.S. action stems from an investigation under Section 301 of the Trade Act of 1974. That investigation, opened Oct. 15, 2010, was spurred by a United Steel Worker's Union (USW) Sept. 10, 2010 Section 301 petition. If a Section 301 investigation reveals practices allegedly inconsistent with a trade agreement, the law requires the USTR to seek formal consultations to address those practices.

The USW petition went beyond the wind power program targeted in the U.S. government's filing. The USW contended that China violates its WTO commitments by imposing export restrictions on "rare earth" minerals used to produce several green technology products, including advanced batteries, solar panels and fluorescent light bulbs.

The petition further accused China of providing prohibited direct and indirect subsidies to its clean energy industry, including research and development grants, low-interest loans and export credit guarantees. The USW also alleged that China discriminates against foreign investors through domestic content and technology transfer requirements. All of these measures, according to the USW, cause “serious prejudice to U.S. interests.”

The USTR stated that the U.S. was able to effectively address a substantial portion of the claims in the USW’s petition during the course of the Section 301 investigation through its bilateral engagement with China (including confirmation that two other subsidy programs have been terminated).

With respect to the remaining allegations, USTR will continue to investigate them and, if sufficient evidence is developed, may begin additional WTO litigation, even though no further formal action is being taken under the Section 301 statute.

The Dec. 22 action has major implications for the U.S.-China relationship. Businesses that produce or trade wind power-related, or other “green industry” products, should follow this issue closely. This dispute could also impact the broader U.S.-China trade relationship, and potential retaliatory measures could affect businesses and investment unrelated to green technology.

The U.S. action may also mean the resurrection of Section 301 as a tool for U.S. businesses and workers to address international trade issues. In recent years the U.S. has frequently rejected Section 301 petitions, and thus Section 301 has been considered an ineffective tool for prompting government action on trade issues. However, the current action may signal that the U.S. government is now more receptive to Section 301 petitions.

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