CURRENCY REFORM FOR FAIR TRADE (H.R. 2378, AS AMENDED)

NEED FOR THE LEGISLATION

China suppresses the value of its currency (the RMB), making China's exports cheaper than they would be if China allowed its currency to be set by the market. China's currency policy places a drag on U.S. economic growth and job creation. Nobel Prize winning economist Paul Krugman estimates that China's currency policy reduces U.S. GDP by 1.4 percentage points annually. According to Fred Bergsten of the Peterson Institute, allowing the RMB to appreciate to its real value would make U.S. manufacturers more competitive and create an estimated 500, 000 U.S. manufacturing jobs here in the United States.

As a general matter, under the U.S. countervailing duty law, remedial tariffs can be imposed on imports benefitting from foreign government subsidies for export, if it is shown that imports benefitting from such subsidies cause or threaten injury to a U.S. industry producing the same or similar products. To date, however, the Department of Commerce has declined to investigate foreign government currency practices as a countervailable subsidy.

KEY ELEMENTS OF H.R. 2378, AS AMENDED

The most important element of the bill, as amended, reverses a long-standing Commerce practice that is far more restrictive than required under U.S. law and WTO disciplines. Specifically, in the past, Commerce has resisted finding an export subsidy if the subsidy is not limited exclusively to circumstances of export (i.e., when non-exporters may benefit). The Currency Reform for Fair Trade Act, as amended, precludes Commerce from imposing this bright-line rule and, instead, requires Commerce to consider all the facts in making its determination of export contingency.

The Currency Reform for Fair Trade Act, as amended, also provides important guidance to Commerce in assessing whether a "benefit" exists in circumstances involving material currency undervaluation resulting from government intervention. Specifically, Commerce is directed to assess "benefit" in terms of the additional currency the exporter receives as a result of the undervaluation and to use widely-accepted IMF methods for determining the level of undervaluation.

In all cases, however, the Act, as amended, preserves Commerce's authority – and responsibility – to consider each case on its facts and make a determination as to whether all the necessary legal elements of an export subsidy are met.

H.R. 2378, AS AMENDED, IS WTO-CONSISTENT

As amended, H.R. 2378 is WTO-consistent because countervailing duties may only be imposed when Commerce finds, based on an assessment of all the facts, that the WTO criteria for an export subsidy have been satisfied, i.e., only if: (1) the foreign government's interventions in the currency markets result in a "financial contribution"; (2) a "benefit" is thereby conferred; and (3) the resulting subsidy is "contingent on export".

The key element of the amended bill – indicating to Commerce that it may no longer dismiss a claim based on the single fact that a subsidy is available in circumstances in addition to export – is consistent with WTO precedent. One relevant case is the U.S.-FSC case, which expressly stated that a subsidy may still be export contingent, even if it is available in some circumstances that do not involve export.

Importantly, the amended bill does not legislatively "deem" that a finding of fundamental currency undervaluation satisfies the requirement of export contingency, as the original bill did. With the elimination of this requirement, as well as other changes, the amended bill avoids the WTO vulnerabilities that may have been attributed to earlier versions of the legislation.