US Court of International Trade Orders US Government to Cancel Countervailing Duties on Chinese Off-the-Road Tires

On August 4, 2010, the US Court of International Trade (CIT) rejected an attempt by the US Department of Commerce (Commerce) to continue applying countervailing duties (CVD) against imports from China of certain off-the-road tires as long as Commerce continues to treat China as a nonmarket economy (NME) and until such time as Commerce can demonstrate that its NME antidumping duties (AD) and CVD calculation methodologies avoid the double counting of subsidies. This decision follows the CIT's September 18, 2009, ruling (*GPX 1*) directing Commerce to cease simultaneous application of AD and CVD against the same imports from China "[w]ithout some type of adjustment" that avoids the potential for "double counting."[1]

In an August 4, 2010, opinion, Chief Judge Jane Restani ruled that because Commerce could not demonstrate that its NME AD and CVD calculation methodologies avoided the double counting of subsidies, Commerce was specifically instructed to forego the imposition of CVD duties. This latest decision — *GPX International Tire Corp. v. United States*, 2010 WL _____ (CIT August 4, 2010) (*GPX 2*) — creates a significant impediment (though not a prohibition) to US industries looking to get Commerce to apply simultaneous AD and CVD cases against Chinese products as long as China is treated as an NME country.

Background

US AD law enables the US government to remedy injuries caused to domestic producers and workers from low-priced imports by offsetting the price advantage with AD duties that are applied in addition to any normal tariffs. CVD duties operate in the same manner, except they are meant to offset the benefit conferred on foreign producers and exporters by government subsidies.

For countries that are considered "market economies," Commerce calculates a "normal" price or "value" using prices or costs in the exporter's home market. If a foreign company's export price to the United States is lower than its normal value (NV), AD duties are applied. However, in countries that are considered non-market economies, such as China and Vietnam, Commerce applies a different methodology using prices and values from other market economies to establish the NV. Again, if the export price is below the NV established by Commerce, the difference between the two amounts is the AD "margin" (or duty).

For more than 20 years, Commerce refused to apply the US CVD law to NMEs because the centrally planned nature of these economies made it essentially impossible, in Commerce's opinion, to disaggregate the actions of the government that would constitute a subsidy. The Court of Appeals for the Federal Circuit affirmed this view in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1314-18 (Fed. Cir. 1986) ("[e]ven if one were to label these incentives as a 'subsidy,' in the loosest sense of the term, the government of those [NMEs] would in effect be subsidizing themselves").

In 2007, Commerce determined that while China remained an NME, sufficient economic reforms had taken place to enable Commerce to determine the specific financial contribution and benefit of a subsidy in China. As a result of this decision, Commerce began applying the US CVD law to imports from China. *See Coated Free Sheet Paper From the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 60,645 (Oct. 25, 2007). Since then, nearly every new AD petition filed against imports from China has been accompanied by a CVD petition. Commerce took similar action against Vietnam in 2009.

The GPX 2 Decision

In the August 4, 2010, *GPX 2* decision, the CIT did not rule: (i) that Commerce was forever prohibited from applying the US CVD law to imports from China; (ii) that Commerce could not continue its NME methodology with respect to China in AD proceedings; or (iii) that the application of AD and CVD duties to the same product from China was facially invalid. Instead, the court held that the application of both AD and CVD duties to the same product from an NME country like China creates the "potential" for penalizing the same government distortion — the subsidy — twice. According to the court, this problem occurs because Commerce imposes a CVD to offset a government subsidy and then compares a subsidy-free NV (derived from unsubsidized values in market economies) with the original subsidized export price to calculate the dumping margin.

In the *GPX 2* decision, the CIT stated that Commerce's application of both NME AD and CVD cases against the Chinese products double-counted the alleged subsidies. Accordingly, the CIT ruled conclusively that Commerce is *prohibited* from applying CVD to the subject Chinese tires. According to the court:

> Commerce must forgo the imposition of the countervailing duty law on the nonmarket economy ("NME") products before the court because its actions on remand clearly demonstrate its inability, at this time, to use improved methodologies to determine whether, and to what degree double counting occurs when NME antidumping remedies are imposed on the same good, or to otherwise comply with the unfair trade statutes in this regard.

What's Next?

The CIT has specifically directed Commerce to cancel the CVD duties against the subject Chinese off-road tires. Accordingly, with respect to this case and this product (off-the-road tires), Commerce would have to appeal to the US Court of Appeals for the Federal Circuit if it wants to continue applying CVD to Chinese off-the-road tires. Such an appeal is very likely.

However, this *GPX 2* decision is important well beyond this particular case and product. Specifically:

- Chinese producers in other cases facing simultaneous AD & CVD actions will certainly challenge the legality of simultaneous AD & CVD duties against their products citing to the *GPX 2* decision.
- Unless Commerce itself can affirmatively demonstrate that its NME AD and CVD calculation methodologies do not double count subsidies, those future cases should result in the CIT similarly ordering Commerce to forego those CVD duties.

Chinese exporters, US importers of Chinese goods, and US consumers of those goods will view this decision as a significant victory.

However, while the outcome of this battle has been decided, the war is by no means over. Certainly, Commerce and the US government have options for responding to the *GPX 2* decision and for future similar challenges, which include:

- Appealing this particular decision to the Court of Appeals for the Federal Circuit.

- Attempting to devise an adjustment or other methodology that addresses the potential for double counting identified by the court.
- Passing new US legislation that specifically directs Commerce to simultaneously apply AD and CVD duties on NME products regardless of any double counting, when all other requirements of the US AD and CVD laws are met.

We think for a host of practical and political reasons the US will attempt all three.

Endnote

[1] For more information about the Sept 18, 2009 decision in GPX International Tire Corp. v. United States, 2009 WL 2996511 (CIT Sept. 18, 2009), see our legal update, "US Court Rejects Simultaneous Application of Antidumping and Countervailing Duties to Chinese Imports," available at http://www.mayerbrown.com/globaltrade/article.asp?id=7607&nid=5935.

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