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Feature Article

The Long and Winding Road to CVDs on NMEs

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In its second opinion released in the new year, the U.S. Court of International Trade ruled that [Public Law Number 112-99](#), giving the Department of Commerce the unambiguous right to apply countervailing duties on imports of Chinese goods, is constitutional.¹ This opinion marks another turn in the long and often winding road that has resulted from the application of countervailing duties to non-market economies (NMEs). Below, we review that road, with emphasis on the events since 2007, when the Department of Commerce first indicated its intention to apply countervailing duties to NMEs.

Countervailing duty law may become an even more prominent feature in trade frictions between China and the United States in the years to come. Under the [terms of China's accession to the World Trade Organization](#) concluded in late 2001, the special safeguard law that applies to imports from that country will no longer be available twelve years after its accession; this means that the law in question will expire at the end of this year. The terms of its WTO accession also provided that China would no longer be subject to the special methodology that applies to NMEs in antidumping (AD) investigations after fifteen years had passed, meaning that the attractiveness of the AD law may decline somewhat in another three years. It is therefore reasonable to expect that the CVD law may be invoked in a greater share of the complaints that are brought against China in the years to come, either on its own or in conjunction with AD petitions. The latest developments suggest that neither Congress nor the courts will stand in the way.

Commerce's Decision to Apply CVDs to China

Until 2007, the U.S. Department of Commerce's policy was not to apply countervailing duty law to countries deemed to have non-market economies. This policy was affirmed

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¹ See [GPX Int'l Tire Corp. v. United States, slip op. 13-2](#) (Ct. Int'l Trade Jan. 7, 2013).

[Georgetown Steel v. United States, 801 F.2d 1308](#) (Fed. Circ. 1986).

T. Prusa and E. Vermulst, [United States — Antidumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through](#),

WT/DS379/AB/R (Mar. 25, 2011) (quoting *Georgetown Steel* at 1316).

See U.S. Department of Commerce Memorandum, [Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China — Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy](#) (Mar. 29, 2007).

See U.S. International Trade Commission, [Coated Free-Sheet Paper from China, Indonesia, and Korea](#) (Final), Publication 3965 (December 2007).

Government of the People's Republic of China v. United States, 483 F. Supp. 2d 1282 (Ct. Int'l Trade 2007).

See D. Ahn and J. Lee, [Countervailing Duty Against China: Opening a Pandora's Box in the WTO System?](#), University of Michigan Research Seminar in International Economics, Discussion Paper No. 615 (April 2011) (hereinafter "Ahn and Lee").

[GPX Int'l Co. v. United States, Case No. 08-00285](#) (Ct. Int'l Trade 2008).

GPX Int'l Co. v. United States, 645 Fed. Supp. 2d 1231 (Ct. Int'l Trade 2009).

GPX Int'l Co. v. United States, 715 Fed. Supp. 2d (Ct. Int'l Trade 2010).

by the U.S. Court of Appeals for the Federal Circuit in the *Georgetown Steel* case in 1986. The policy was “based on the view that, given the highly distortionary nature of the role played by the governments of centrally-planned economies with no discernible private sector, it would not be appropriate to apply the countervailing duty legislation to NMEs because a ‘non-market economy would in effect be subsidizing [itself].’”

Over time, China’s economy changed. The Department of Commerce determined that China no longer maintained a Soviet-style command economy that had formed the basis for its policy established in the 1980s. Thus, in 2007, Commerce changed its policy and first applied countervailing duty law to China in the coated free-sheet paper case. Commerce decided that it could determine whether the Chinese government had bestowed a benefit on a producer in China and whether the benefit was specific, as required by the US countervailing duty law. Because the US International Trade Commission made a negative injury determination regarding imports of coated free-sheet paper from China, no countervailing duties were imposed in the case.

While the coated free-sheet paper industry in the United States did not benefit from the imposition of countervailing duties on imports from China, it paved the way for others. During the paper investigation, the Chinese government sued Commerce at the US Court of International Trade (“CIT”) to enjoin Commerce from applying countervailing duties in the case. The Chinese government argued that *Georgetown Steel* prohibited the application of countervailing duties on imports from NMEs. The CIT disagreed, noting that *Georgetown Steel* only resolved the questions as to that particular case and that Commerce generally had broad discretion to determine whether to apply countervailing duties in any particular case.

Thus, the CIT opened the door for other countervailing duty cases on Chinese imports. As discussed in the January 7, 2013 *Washington Trade Report*, many more US industries brought countervailing duty petitions against China and this may have also encouraged the filing of more antidumping cases, because there is a certain economy of scale in bringing cases under both trade remedy regimes. Seven cases resulted in a countervailing duty order in 2008, five in 2009 and six in 2010.

[Pneumatic Off-the-Road Tires and Legal Challenges](#)

One industry benefitting from a countervailing duty order was the pneumatic off-the-road tire industry, which secured its order on September 4, 2008. That event spawned litigation that led to several turns in the road regarding the application of countervailing duties to imports from China. The Chinese respondents subject to the order challenged Commerce’s methodologies at the CIT. The CIT ruled that Commerce did not properly apply the law and ordered Commerce to develop a method to prevent double counting of remedies if it imposes both antidumping and countervailing duties on the same product.

After remand and Commerce’s attempt to avoid double counting, the CIT took a more draconian approach. The CIT decided that Commerce legally could not impose countervailing duties on products from non-market economies “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.” The double remedy problem depends on whether the impact of a

Ahn and Lee at 23.

[WT/DS379/AB/R](#), adopted March 25, 2011, para. 583.

[GPX Int'l Tire Corp. v. United States](#), 666 F.3d 732 (Fed. Cir. 2011).

Id. at 739.

J. Grimmett, [U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview](#), Congressional Research Service (May 23, 2012).

[GPX Int'l Tire Corp. v. United States](#), 678 F.3d 1308, 1311 (Fed. Cir. 2012).

domestic subsidy, which is offset by the countervailing duty is also partially or fully captured by the antidumping duty. Commerce had tried to comply with the remand order by merely offsetting the countervailing duty against the antidumping duty after calculating both using traditional methods. The CIT “ruled the method to be inconsistent with US law by specifically permitting offsets only to export prices.” This, of course, was followed by the inevitable appeal to the US Court of Appeals for the Federal Circuit by the US industry.

In the meantime, however, China had challenged at the WTO the imposition of countervailing duties on four products, including off-the-road tires, as being inconsistent with the Agreement on Subsidies and Countervailable Measures. The WTO Appellate Body did not agree with this argument but ruled that the United States must investigate whether the subsidies caused Chinese producers to lower their export prices to the United States thereby inflating their antidumping margins. Accordingly, the United States would need to adjust the antidumping duty margins to avoid double counting for those imports for which both an antidumping and countervailing duty would be imposed.

Back in the United States, the US Court of Appeals for the Federal Circuit reviewed the CIT decision in the *GPX* case and affirmed it, but on other grounds. The Federal Circuit ruled that the statute unambiguously prohibited Commerce from applying countervailing duties to goods from China, finding that Congress had ratified Commerce’s policy of not applying countervailing duties to Chinese products when it amended and reenacted the countervailing duty statute.

Regarding the countervailing duty law, the court found evidence of congressional awareness of the earlier DOC interpretation of CVD law and the subsequent CAFC decision in *Georgetown Steel* upholding the DOC interpretation in (1) 1984 congressional hearings and, as Congress enacted changes to trade law in the Trade and Tariff Act of 1984, Congress’s rejection of legislation that would have affected trade remedies involving NME imports; (2) the passage of the Omnibus and Competitiveness Act of 1988, during which Congress omitted in conference a provision that would have expressly applied CVD law to NME imports in direct response to *Georgetown Steel*; and (3) the reenactment of CVD law in the URAA of 1994, in which Congress changed the term “bounty or grant” to countervailable subsidy but did not make [other substantive changes].

Congressional Action and New Legal Challenges

Congress swiftly reacted to the Federal Circuit’s decision. While a petition for rehearing *en banc* of the Federal Circuit decision was pending, on March 13, 2012, President Obama signed H.R.4105, “To apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries,” into law as [Public Law Number 112-99](#), which expressly allows the Department of Commerce to impose countervailing duties on non-market economy goods effective November 20, 2006. The law also established procedures for Commerce to address double counting as of the date of enactment of the law on March 13, 2012.

Shortly after the new law was enacted, the Federal Circuit requested briefing on its impact on the *GPX* case. Chinese respondents raised issues regarding the constitutionality of the new law. Because these issues were raised for the first time in a petition for rehearing, the Federal Circuit remanded the case to the CIT so the CIT could evaluate the claims.

Back at the CIT, *GPX* claimed that the new law was unconstitutional for

[GPX Int'l Tire Corp. v. United States](#), slip op. 13-2 (Ct. Int'l Trade Jan. 7, 2013).

Id. at 11.

Id. at 12.

Id. at 14.

Id. at 15.

Id. at 17.

Id. at 18.

Id.

Id. at 22.

Id. at 23.

Id. at 26.

three reasons. GPX argued that the law violated the Ex Post Facto Clause of the Constitution as well as the due process and equal protection rights of the Fifth Amendment to the Constitution. The CIT rejected each of these arguments and ruled that the new law was constitutional. The CIT also remanded the case to Commerce to address various substantive issues related to the countervailing duty calculation that had not been addressed.

The first issue addressed by the CIT was whether the new law was retroactive. Commerce argued that the new law was not retroactive but was merely a “clarification” of existing law, pointing to statements by members of Congress that the law was intended to reverse an erroneous court decision. The CIT responded to this argument by noting the court’s reluctance to rely upon statements of a few members of Congress. The CIT also noted that an effective date for Section 1 of the new law that predated its enactment by nearly six years indicated that the law was a modification and “was needed to overcome the general presumption against retroactivity that typically applies to economic legislation, absent congressional intent to the contrary.” Ultimately, the CIT decided that it would analyze the constitutionality of the new law by assuming that it effected a retroactive change in the law.

Having decided to assume retroactivity, the CIT turned to GPX’s claim that the new law violated the Ex Post Facto Clause of the Constitution because it effectively penalizes certain importers for past conduct. Commerce and the U.S. industry argued that the law was remedial in nature and thus did not implicate the Ex Post Facto Clause, which prohibits the retroactive application of penal legislation. The CIT determined that GPX “failed to demonstrate that the law falls within the scope of the Ex Post Facto Clause.” The CIT noted that both it and the Federal Circuit had consistently upheld the trade remedy laws as remedial and not punitive in nature. The CIT further noted that “[e]ven if the duties imposed by the CVD investigations of goods from NMEs that were initiated between 2006-2012 are presumed to be somewhat higher due to allegedly overlapping remedies, they remain mathematically linked to the measured harm.”

GPX also argued that the new law violated the Fifth Amendment’s due process guarantees “by retrospectively altering legitimate expectations of the level of duties that would be imposed on their imports.” The CIT again rejected this argument, noting that general economic legislation is subject to a rational basis review and that “GPX has failed to demonstrate that the government did not have a rational basis in enacting the New Law or that the New Law upended a vested right.” While the CIT noted that the period of retroactivity was fairly long (back to November 20, 2006), GPX had failed to show a vested right with which the new law interfered. The CIT discussed the retrospective system through which antidumping and countervailing duties are calculated and stated that “[b]ecause, as to trade remedies, neither exporters nor importers have any real certainty as to the final rate on the imported product at the time of entry, they cannot demonstrate that a property right in any particular duty rate has vested, with which Congress may not interfere.” GPX and other importers were aware that their goods could be subject to both customs duties and trade remedy duties. Thus, a modification of the boundaries of those laws does not create a new tax.

Finally, GPX argued that the new law violated the right to equal protection under the law “by applying a different law to respondents whose products were covered by CVD investigations between November 20, 2006 and March 13, 2012, as compared to other firms whose products will be investigated for

Id. at 27.

Id. at 28-29.

Id. at 30.

unfair trade practices after the New Law was enacted.” In briefing, GPX clarified that a single class of persons was treated differently depending on the timing of their imports. The issue is the different effective dates between Section 1 of the new law and Section 2. Section 1, allowing for the imposition of countervailing duties on non-market economies is effective November 20, 2006 while Section 2, containing procedures to avoid a double remedy, is effective March 13, 2102. “During this interim period, goods from NMEs may be subject to the concurrent imposition of duties under the CVD and AD laws without any possible offset for overlapping remedies.” Commerce argued that the Section 1 date was needed to keep the historic CVD investigations from being overturned and the effective date for Section 2 was to keep them from being reopened. The CIT noted that it declined “to evaluate the merits of Congress’ legislative decision regarding the relative expense and administrative burden of reopening the twenty-four investigations permitted by Section 1 but not covered by Section 2.” Once again, GPX failed to overcome the presumption that the new law is constitutional.

The CIT’s decision, however, is not the end of the road. In September 2012, China brought a new WTO case against the new law allowing the Department of Commerce to impose countervailing duties on non-market economy goods and also against the practice of seeking double remedies under both the antidumping and countervailing duty laws at the same time. China is arguing that the retroactive nature of Section 1 violates Article X of the General Agreement on Tariffs and Trade, which prohibits members from enforcing laws prior to their publication. A panel was formed in December 2012 and should issue its ruling by the end of this year.

There is also likely to be an appeal of the January, 2013 CIT decision to the Federal Circuit. As of February 7, 2013 the Chinese respondents in the *GPX* case had not taken an interlocutory appeal of the constitutional issue to the Federal Circuit. They always have the option, however, of waiting until the remaining substantive issues are decided before appealing the CIT’s determination that the new law is constitutional. That appeal will almost certainly occur.

Negotiations & Agreements

EU Prefers Comprehensive Trade Talks, But Expects Only Regulatory “Convergence”

European Council
Brussels 8/February/2013
EUCO 3/13
[Conclusions](#)

European leaders meeting in Brussels for their [annual summit](#) February 7-8 included a brief [statement](#) reaffirming continued interest in pursuing enhanced trade relations with the United States in the “conclusions” statement released at the end of the conference. The provision referring to the proposed US-EU trade talks states in its entirety,

In particular, the European Council looks forward to the report of the EU-US High Level Working Group on Jobs and Growth and its recommendations. The European Council calls upon the Commission and the Council to follow up on these recommendations without delay during the current Presidency. It reiterates its support for a comprehensive trade agreement which should pay particular attention to ways to achieve greater transatlantic regulatory convergence[.]

Earlier reports that the leaders would announce their support for the