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Newly Enacted Law Retroactively Reinstating Countervailing Duty Remedies to China and Other Non-Market Economy Countries

On March 13, 2012, President Obama signed legislation that requires the U.S. countervailing duty (CVD) law to be applied to imports from any country designated as a non-market economy (NME) country. The legislation was introduced to overturn *GPX International Tire Corporation v. United States*, 666 F.3d 732 (Fed. Cir. 2011), a December 19, 2011, decision by the U.S. Court of Appeals for the Federal Circuit that held CVD remedies cannot be applied to imports from NME countries.

Significantly, ***the new law applies retroactively, covering all proceedings initiated on or after November 20, 2006***. As a result, several CVD duty orders that the DOC had issued against various imports from China will remain in effect. Without the retroactive provision, the *GPX* decision would have appeared to invalidate all such CVD orders against imports from China.

Background

Until 2007, the U.S. Department of Commerce (DOC) had maintained that U.S. CVD law does not apply to imports from NME countries, based on the precedent of *Georgetown Steel Corp. v. United States*, 801 F.2d 1308) (Fed. Cir. 1986). *Georgetown Steel* held that government payments to a producer in a NME country do not constitute "countervailable subsidies" within the meaning of the CVD statute because the purpose of the CVD law is to "offset the unfair competitive advantage" that foreign producers enjoy from government subsidies, yet in an NME economy, the government itself owns or controls most businesses and assets and therefore to label government payments as "subsidies" in such situations would mean in effect that the NME government would be subsidizing itself. The *Georgetown Steel* case involved alleged countervailable subsidies by the Government of Poland at a time when that country was run as a centrally-planned, "Soviet-style" economy.

The DOC's view of the CVD law as inapplicable in the NME context continued until 2007, when the DOC reversed its policy and concluded that it could apply the CVD law against

China. The DOC reasoned that while China was still a NME, it was significantly different from the "Soviet-style" economies examined in *Georgetown Steel*, and those differences were sufficient to allow the DOC to identify and measure government subsidies to specific industries.

The *GPX* Case

Later in 2007, the U.S. tire industry filed simultaneous antidumping (AD) and CVD petitions regarding certain pneumatic off-the-road tires from China. The DOC ultimately imposed both AD and CVD duties, and a group of Chinese manufacturers, led by GPX, then brought suit at the U.S. Court of International Trade (CIT). GPX argued that the DOC's application of CVD duties was unlawful in light of the *Georgetown Steel* precedent that appeared to forbid application of CVD duties to imports from NME countries. In addition, GPX argued that the DOC's application of CVD duties resulted in unlawful double-counting of remedies, because the special AD calculation methodology that the DOC uses for NME countries already offsets many of the same distortions to market prices that would be offset a second time by CVD duties.

The CIT held that *Georgetown Steel* did not prevent the DOC from applying CVD law to imports from NME countries, but agreed with GPX that simultaneous imposition of AD and CVD duties when the DOC uses its special NME methodology runs the risk of impermissible double-counting of remedies, and that the DOC therefore cannot apply the CVD law and the AD law using the NME methodology, unless it can identify and eliminate instances of double-counting of remedies. The DOC was unable to provide a methodology satisfactory to the CIT to avoid double remedies, and so the CIT ultimately held that the DOC could not apply the CVD law in the case. The DOC and the U.S. producers then appealed to the Federal Circuit. While the GPX appeal was pending at the Federal Circuit, in March 2011 the Appellate Body of the World Trade Organization (WTO) ruled that the United States violated the WTO Agreement as a result of double-counting, when simultaneously applying AD duties using the NME antidumping methodology and applying CVD duties.

In the December 19, 2011, *GPX* decision, the Federal Circuit ultimately arrived at the same result as the CIT, *i.e.* forbidding application of CVD duties, but on different grounds. The Federal Circuit avoided directly ruling on the double-counting issue, but held that the DOC could not apply the CVD law to NME countries in light of the *Georgetown Steel* precedent and several subsequent changes to the statute by Congress that appeared to endorse the DOC's pre-2007 view that CVD duties could not be lawfully applied to NMEs.

The New Law

In response to the Federal Circuit's *GPX* decision, last week both houses of the U.S. Congress passed legislation that President Obama signed on March 13. The new law expressly states that CVD remedies can be applied to NMEs. As noted above, ***the new law applies retroactively, covering all proceedings initiated on or after November 20, 2006.***

The new law also purports to fix the "double remedy" problem that was identified in the CIT decision in the *GPX* case, and in the March 2011 WTO Appellate Body decision. Under the new law, if the DOC finds both countervailable subsidies and dumping (using the NME dumping methodology), and if the DOC finds that the countervailable subsidy "has been demonstrated to have reduced the average price of imports" subject to investigation, and if the DOC "can reasonably estimate" the extent of the double counting, then the DOC will reduce the AD duty to the extent that the countervailable subsidy inflated the dumping margin. The double-counting offset, however, only applies to investigations and administrative reviews initiated on or after the date of enactment of the statute (March 13, 2012), and to any redeterminations that the DOC is required to make pursuant to WTO dispute settlement decisions.

Next Steps

The new law may not end the dispute, however. According to press reports, counsel for *GPX* may be contemplating challenge to the new law on various grounds, including the claim that the retroactive application of the law is unconstitutional.

If the law withstands further court challenges, the question remains how the DOC will administer the portion of the law designed to address the double-counting situation. It is unclear whether the DOC will develop rules for determining in what situations offset of particular subsidies would lead to double-counting of remedies already offset by antidumping duties. It may well be that the DOC will place the burden on foreign producers to prove that double-counting is occurring, and to propose workable methods of offsetting the dumping margin to eliminate the double-counting. We will continue to monitor developments.

If your imports from China were covered by a CVD order and you believe that the *GPX* decision would have relieved your company of CVD duty liability, please contact us so we can discuss possible options going forward.

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