



INTERNATIONAL TRADE UPDATE

U.S. Court of Appeals Invalidates Application of Anti-Subsidy Law to China and Other Non-Market Economy Countries

On December 19, 2011, the U.S. Court of Appeals for the Federal Circuit (CAFC) issued a landmark [decision](#) invalidating the application of U.S. anti-subsidy, or countervailing duty (CVD), law to non-market economy countries (NMEs), including China. Barring intervention by the U.S. Supreme Court or the U.S. Congress, this decision will halt or overturn scores of CVD proceedings involving China, profoundly impacting the administration of trade remedies in the United States. However, an immediate suspension of pending investigations and reviews or unwinding of existing orders is unlikely.

In *GPX International Tire Corporation v. United States*, the CAFC considered an appeal from the U.S. Court of International Trade (CIT) in which certain Chinese tire manufacturers and exporters challenged the application of U.S. CVD law to China by the U.S. Department of Commerce (DOC). As [previously reported](#), the CIT objected to the DOC's application of the U.S. CVD law for several reasons. The most contentious of the CIT's objections concerned the issue of "double-counting" subsidies. The CIT found that the DOC needed to take steps to ensure that the application of CVD duties did not remedy the same unfair trade practices as the application of antidumping duties, often applied simultaneously in proceedings involving China and other NME countries (including Vietnam). Double-counting is of particular concern in proceedings involving NME countries because of the special methodologies used by the DOC to determine whether an NME respondent has sold its products at less than fair value in the United States (*i.e.*, engaged in dumping). After several remands, the DOC was unable to devise a reasonable method for avoiding the double-counting identified by the CIT. As a result, the DOC declined to impose CVD duties under protest, permitting further appeal to the CAFC.

On appeal, the CAFC avoided the controversial double-counting issue altogether. Although the CAFC agreed with the CIT that the DOC's application of the U.S. CVD law to China was unsustainable, the CAFC did so on other grounds. Specifically, the CAFC found that the DOC lacked statutory authority to apply the U.S. CVD law to NME countries. The CAFC observed that when the U.S. Congress amended the U.S. trade laws in 1988 and 1994, it was aware of and legislatively ratified the DOC's then prevailing position that the CVD law did not apply to NME countries. Because the position was incorporated into statute, the DOC could not exercise its otherwise broad interpretative discretion to change its previous position. Accordingly, the CAFC upheld the CIT's conclusion that the U.S. CVD law cannot be applied to China and other NME countries.

In light of this decision, hundreds of Chinese manufacturers and exporters can be expected to challenge the application of CVD duties to their products, which range from aluminum extrusions, steel grating and drill pipe to paper products,

kitchen shelving racks and magnets. Similar challenges also can be expected from Vietnamese manufacturers and exporters. These challenges will involve ongoing CVD investigations and administrative reviews of existing CVD orders, as well as pending cases before the CIT and CAFC.

The likelihood of success of these challenges depends upon two key factors. First, the DOC and the domestic tire industry may choose to request consideration by the U.S. Supreme Court, which could reverse the CAFC's decision. The high-profile nature of the *GPX* case suggests that such an appeal is likely, although the U.S. Supreme Court historically has agreed to consider only a handful of trade cases.

Second, the DOC and the domestic industry may seek a legislative solution. In *GPX*, the CAFC expressly noted that the DOC could request from the U.S. Congress the necessary statutory authority to apply the U.S. CVD law to NMEs. However, if Congress were to amend the law in this manner, it almost certainly would need to take into consideration a March 2011 decision by the World Trade Organization (WTO) Appellate Body identifying concerns under WTO rules with the same double-counting practice that troubled the CIT under U.S. law in the *GPX* case. The Appellate Body faulted the DOC for not assessing whether double counting arose in each challenged CVD investigation, notwithstanding the DOC's assertion that the U.S. CVD law provides no authority for the DOC to make an adjustment to CVD calculations to prevent double-counting.

Sidley Austin LLP has a team of lawyers experienced in cases involving the application of U.S. trade remedy laws to NME countries. We would be pleased to help companies and governments assess the impact of this judicial precedent on their interests.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

The International Trade and Arbitration Practice of Sidley Austin LLP

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