

Trade & Customs - USA

Court Challenges Commerce over Imports from Non-market Economy Countries

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Introduction

In what could be a significant development with respect to anti-dumping and countervailing duty investigations against imports from non-market economy countries (eg, the People's Republic of China and Vietnam),(1) the US Court of International Trade recently issued a decision instructing the Department of Commerce to reconsider several aspects of its application of countervailing duties to non-market economies. The most contentious of the court's directions may be its requirement that the department develop methodologies to prevent the double-counting of subsidies if it applies anti-dumping and countervailing duties simultaneously on imports of the same product.

The issue of double-counting arises because of the 2007 decision by the department to apply the countervailing duty law to China, reversing an earlier, long-held position that it is not possible to measure subsidies in non-market economies because, by definition, state control and intervention in the economies of those countries are pervasive. While the Department of Commerce continues to treat China as a non-market economy for purposes of the anti-dumping law, it has now concluded that China's economy has been sufficiently liberated from government control to permit the identification of subsidies and the quantification of benefits conferred upon producers and exporters. Earlier this year, in an investigation involving plastic retail carrier bags, the department similarly concluded that it is now possible to identify and measure subsidies in Vietnam.

Until the 2007 change of policy the assumption was that the special methodology used by the department to calculate the margin of dumping for non-market economies already accounted for any subsidies that the government may have provided to the affected industry. That methodology essentially calculates the price that would have been charged for the merchandise, had it been sold under market economy conditions, by relying on surrogate values from market economies at a similar level of development.

The opportunity to seek both anti-dumping and countervailing duties against products of non-market economies has spurred US industries to file combined anti-dumping and countervailing duty petitions against products from China, and more recently Vietnam. Among the products made in China that are now subject to both anti-dumping and countervailing duty orders are certain pneumatic off-road tyres. Two Chinese exporters subject to those orders filed suit in the US Court of International Trade challenging the department's determinations. In a decision issued on September 18 2009 in *GPX International Tire Corporation v United States*, the court concluded that the department had not applied US law correctly and ordered it to revisit and, if necessary, to recalculate the anti-dumping and countervailing duty margins within 90 days. Although it is almost certain that the department will ultimately appeal the decision to the Court of Appeals for the Federal Circuit, the Court of International Trade's decision has the potential to reshape dramatically the landscape that the department has moulded with respect to anti-dumping and countervailing duty petitions against non-market economies.

Three Key Findings

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The most important aspect of the Court of International Trade's decision in *GPX* is its finding that the Department of Commerce needs to take steps to make sure that the simultaneous application of anti-dumping and countervailing duties does not result in the double-counting of subsidies. While concluding that the department has the authority to apply the countervailing duty law to products of a non-market economy, the court found unreasonable the department's interpretation of how to apply the anti-dumping and countervailing duty laws simultaneously to the same products. If the department wants to impose both remedies against the same product from a non-market economy, the court advised, it bears the burden of proving that there is no double-counting as a consequence and the responsibility of developing methodologies to prevent double-counting from occurring. If it cannot develop these methodologies, the department must refrain from imposing simultaneous anti-dumping and countervailing duties.

A second key finding is that the department failed to consider whether *GPX* should be treated as a 'market-oriented enterprise' for the purposes of the calculation of anti-dumping duties. In 2007 the department had solicited public comment on whether to recognize that particular manufacturers or exporters doing business in a non-market economy country operate under market principles, and therefore that their dumping margins should be calculated based on their actual costs rather than the surrogate methodology that normally applies to non-market economy enterprises. However, no further action was taken by the department on that rulemaking. *GPX* argued that in the off-road tyres investigation, the department failed to consider the possibility of market-oriented enterprise status for the company, saying that it had no policies, procedures or standards for evaluating market-oriented enterprise status. The court ruled that the department's refusal even to consider application of the market-oriented enterprise treatment to a respondent was arbitrary, capricious and unsupported by substantial evidence.

The third major holding of the case concerned the department's use of a single cut-off date for identifying and measuring countervailable subsidies in China. It selected the date of China's accession to the World Trade Organization (December 11 2001) as that date. The petitioners before the department, who appeared before the court as defendant intervenors, argued that the department should analyze the existence of alleged subsidies on a programme-by-programme basis, going back the full number of years over which subsidies would be amortized in the relevant industry (14 years, in the case of off-road tires). The court agreed, calling the use of a single cut-off date arbitrary and unsupported by substantial evidence.

Looking Ahead

Although the *GPX* decision does not invalidate the application of simultaneous anti-dumping and countervailing duty measures against products from non-market economy countries, it has the potential to limit significantly the department's ability to impose such dual measures.

However, whether in fact occurs depends on two critical factors. The first is whether the department can develop policies and procedures on remand that:

- prevent double-counting of anti-dumping and countervailing duties to a reasonable degree;
- permit consideration of market-oriented enterprise status for individual respondents; and
- require analysis of potentially countervailable subsidies on a programme-by-programme basis.

It is still unclear how difficult the development of these policies and procedures will be for the department. However, given the complexity of its existing analysis of products from non-market economy countries, the methodological changes required by the *GPX* decision are likely to be challenging. On remand, the department may have difficulty convincing the court that its new methodologies sufficiently address the concerns identified in *GPX*.

Second, regardless of whether the department succeeds in developing satisfactory policies and procedures on remand, it is almost certain to appeal the court's decision to the Federal Circuit. On appeal, the Federal Circuit, which is generally viewed as deferential to the department, may reverse the court's decision. If this occurs, the department will be able to revert to its practice of applying both anti-dumping and countervailing duty measures against products from non-market economy countries without the more rigorous policies and procedures required by the *GPX* decision. On the other hand, if the Federal Circuit affirms the *GPX* decision, the department will be required to apply the principles of this decision to future investigations. Depending on the outcome of the first factor identified above, this could mean that the department will

be required to apply more rigorous policies and procedures when simultaneously considering both anti-dumping and countervailing duty measures against products from a non-market economy country. Alternatively, this could mean that the department will be required to refrain from applying countervailing duty measures against products from non-market economy countries that are also subject to anti-dumping duty measures.

In the meantime, the department may require more than the 90 days authorized by the court's remand order to respond to its instructions. This is particularly true in light of the absence of key political level officials at the agency, pending completion of the nomination and confirmation process. To date, the Senate Finance Committee consideration of Francisco Sanchez, President Obama's nominee for under secretary of international trade, is still unscheduled. Reportedly, nominations for the assistant secretary positions that would report to the under secretary, including the assistant secretary for import administration, which is responsible for conducting anti-dumping and countervailing duty investigations, are on hold until there is movement on the under secretary position.

There is also a question as to whether and how the department will handle pending anti-dumping and countervailing duty proceedings involving imports from China or Vietnam, of which there are quite a few, in light of the *GPX* decision. Although it is possible that the decision will create turmoil in these cases because parties now have an incentive to place the double-counting, market-oriented entity and cut-off date issues on the record to establish a basis for a potential court challenge, the department may decline to apply the instructions from *GPX* to any other proceedings and may continue its existing practices unless and until compelled to do otherwise.

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Endnotes

(1) The current list of countries designated as non-market economies for purposes of the US trade remedy laws includes Armenia, Azerbaijan, Belarus, Georgia, the Kyrgyz Republic, Moldova, the People's Republic of China, the Socialist Republic of Vietnam, Tajikistan, Turkmenistan and Uzbekistan.

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