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**INTERNATIONAL TRADE &
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Recent CIT Decision May Limit Antidumping and Countervailing Duty Remedies Against China and Other Non-Market Economy Countries

On August 4, Chief Judge Jane Restani of the U.S. Court of International Trade (CIT) issued a decision that could force the U.S. Department of Commerce to change its policy regarding companion antidumping (AD) and countervailing duty (CVD) cases involving China and other non-market economy (NME) countries. The decision could reduce duties on U.S. imports of products subject to such cases—unless the CIT is overruled either by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) or Congress.

In concurrent AD and CVD cases against China, Commerce now treats China as an NME in the AD case and, in effect, as a market economy (ME) in the CVD case. Specifically, in AD cases against China, Commerce compares a Chinese company's U.S. price to a surrogate "normal value" constructed from non-subsidized costs incurred in an ME. The dumping calculation therefore remedies the Chinese government's subsidization of the company; in CVD cases against China, however, Commerce separately calculates the level of subsidization the Chinese company receives from the Chinese government.

In *GPX International Tire Corp., et al. v. United States*, 08-CV-00285, Slip Op. 10-84 (www.cit.uscourts.gov/slip_op/Slip_op10/10-84.pdf), Judge Restani ruled that if Commerce uses the NME methodology for calculating an AD margin while also separately calculating a CVD margin, then the Chinese company is penalized twice for the same behavior.

In response to Judge Restani's first remand, Commerce responded that it can only eliminate the "double-counting" problem by subtracting the value of the CVD margin from the existing AD margin. In her August 4 decision, Judge Restani insisted that this fix "renders concurrent CVD and AD investigations unnecessary because the same remedial price adjustment can otherwise be obtained by merely conducting an NME AD investigation." This would be unfair, Judge Restani said, to the foreign parties that spent many months and large sums of money to go through a CVD investigation rendered essentially useless due to the offset; further, such a result would be inconsistent with the law identifying what offsets to export price are permissible. Because of Commerce's tacit admission that it cannot otherwise eliminate "double-counting," Judge Restani remanded the matter to Commerce with instructions to forego the imposition of CVD law to China.

The decision is very likely to be appealed; during the pendency of that appeal, we expect Commerce to continue to apply its current policy, irrespective of Judge Restani's order. If the Federal Circuit ultimately upholds her decision, Commerce would be forced either to identify better methodological tools to eliminate "double-counting" or eliminate the imposition of CVD duties against NME countries when an AD duty is also imposed.



Congress could ultimately make these court decisions moot by passing a law that specifically allows Commerce to do what Judge Restani has found unlawful.

For now, we expect Commerce to continue to apply its current policy, allowing concurrent application of AD and CVD laws against NME countries. If the Federal Circuit upholds Judge Restani's decision, we will soon know if Congress allows continued application of current Commerce policy.

It is possible, in the meantime, that fewer combined AD/CVD cases will be filed against imports from NME countries, as some risk remains whether the CVD remedy will be imposed. Until the issue is fully resolved, risk-averse U.S. industries may decide to file an AD or CVD case against China, but not both.

FOR MORE INFORMATION

Please contact **Matthew R. Nicely** or any member of our **International Trade & Customs** practice group for more information.

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