

International Trade & Customs Update

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U.S. Appeals Court Rules No Countervailing Duty (Anti-Subsidy) Cases Against Non-Market Economy Countries Like China

On December 19, 2011, the U.S. Court of Appeals for the Federal Circuit ruled that U.S. law does not permit countervailing duty (CVD) (anti-subsidy) cases against imports from non-market economy (NME) countries like China. In [*GPX International Tire Corporation et al. v. United States*](#), the three-judge Federal Circuit panel upheld the original October 1, 2010 U.S. Court of International Trade (CIT) ruling, but on a different, much broader basis. The CIT held that the U.S. Department of Commerce could not impose CVDs to countervail alleged subsidies when the NME country was also targeted in an antidumping (AD) case due to the possibility of “double counting” the subsidy in both cases. The Federal Circuit, however, found that Congress, when it further amended the CVD laws in 1988 and 1994, legislatively ratified earlier administrative and judicial interpretations barring NME CVD cases. The Federal Circuit concluded that Commerce’s 2007 decision to allow NME CVD cases was “contrary to congressional intent,” adding that “if Commerce believes that the law should be changed, the appropriate approach is to seek legislative change.”

The Federal Circuit decision could eventually invalidate all current CVD orders against NME countries such as China. The current orders, however, will not be immediately affected. The U.S. government is likely to seek an *en banc* review by the entire Federal Circuit to rehear the case, which might then be followed by an appeal to the U.S. Supreme Court if that fails. This process could take several months – if not more than a year – to complete. In the meantime, Commerce is expected to maintain the CVD orders against China and to continue any CVD cases and reviews against imports from China, which Commerce is

allowed to do pending judicial review. It is also expected that those opposing the decision will, as the Federal Circuit recommended, press for action to clarify congressional intent on this issue.

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