C-570-913
Administrative Review
POR: 12/17/07 – 12/31/08
Public Document
Office 6: AH

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results in the Countervailing Duty Review of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China

---

I. Summary

On October 19, 2010, the Department of Commerce (the Department) published the preliminary results in the above-mentioned countervailing duty (CVD) administrative review. See New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review, 75 FR 64268 (October 19, 2010) (Preliminary Results).

We have analyzed the comments in case and rebuttal briefs submitted by Hebei Starbright Tire Co., Ltd. (Starbright), the sole respondent in this case, and by Bridgestone Americas Tire Operations, LLC and Bridgestone Americas, Inc. (collectively Bridgestone) and Titan Tire Corporation (Titan), domestic interested parties in the original investigation. The Department's positions are set forth in the "Analysis of Comments" section below, and based on our analysis of these comments we recommend making no changes to the analysis of programs, or the methodologies used to calculate benefits since the publication of the Preliminary Results.

Below is a complete list of the issues in this administrative review for which we received case brief and rebuttal comments from Starbright, Bridgestone and Titan:

I. Analysis of Comments

Comment 1: Application of CVD Law to the People's Republic of China, and Non-Market Economies

Starbright argues that, as a matter of law, the Department lacks the authority to conduct a CVD administrative review against the People's Republic of China (PRC) while simultaneously treating the PRC as a non-market economy (NME) for antidumping (AD) purposes. Starbright points to the findings in Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986) (Georgetown Steel). Starbright also notes that the AD and CVD provisions are part of a single statutory scheme, and that Congressional actions since Georgetown Steel reaffirmed a statutory scheme that does not allow application of the CVD law to NMEs. Starbright also disputes prior statements by the Department that the legislation extending permanent normal trade relations to the PRC demonstrates Congress' understanding that the Department already possesses the legal authority to apply the CVD law to NMEs.

Bridgestone and Titan contend that the statute unambiguously requires the application of the CVD law to the PRC because the language of the statute provides that countervailing duties must be imposed on products from all countries. Bridgestone claims that the unambiguous nature of the statute renders Starbright's arguments regarding Congressional action since Georgetown Steel moot because the Department does not need to look beyond the law. Bridgestone further contends that, even if the CVD statute were ambiguous, Georgetown Steel does not prohibit the application of the CVD law to the PRC, and subsequent Congressional action shows Congress's intent to apply CVD law to the PRC.

Department's Position

We disagree with Starbright regarding the Department's authority to apply the CVD law to the PRC. The Department's positions on the issues raised are fully explained in multiple cases.[1]

[1] See, most recently, Aluminum Extrusions From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 76 FR 18521 (April 4, 2011), and accompanying Issues and Decision Memorandum (IDM) at Comment 1; see also Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 75 FR 59212 (September 27, 2010) (Coated Paper from the PRC), and accompanying IDM at Comment 1; see also Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, 75 FR 57444 (September 21, 2010) (Line Pipe from the PRC), and accompanying IDM at Comment 1; Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 4936 (January 28, 2009), and accompanying IDM at Comment 1; Certain Oil Country Tubular Goods From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination, 74 FR 64045 (December 7, 2009), and accompanying IDM at Comment 1; Lightweight Thermal Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 57323 (October 2, 2008), and accompanying IDM at Comment 1; Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 FR 40480 (July 15, 2008) (OTR Tires from the PRC), and accompanying IDM at Comment A.1; Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 70961 (November 24, 2008) and accompanying IDM at Comment 16; Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007) (CFS from the PRC), and accompanying IDM at Comment 1.

Congress granted the Department the general authority to conduct CVD investigations.[2] In none of these provisions is the granting of this authority limited only to market economies. For example, the Department was given the authority to determine whether a "government of a country or any public entity within the territory of a country is providing . . . a countervailable subsidy . . . ."[3] Similarly, the term "country," defined in section 771(3) of the Act, is not limited only to market economies, but is defined broadly to apply to a foreign country, among other entities.[4]

In 1984, the Department first addressed the issue of the application of the CVD law to NMEs. In the absence of any statutory command to the contrary, the Department exercised its "broad discretion" to conclude that "a 'bounty or grant,' within the meaning of the CVD law, cannot be found in an NME."[5] The Department reached this conclusion, in large part, because both output and input prices were centrally administered, thereby effectively administering profits as well. The Department explained that "{t}his is the background that does not allow us to identify specific NME government actions as bounties or grants."[6] Thus, the Department based its decision upon the economic realities of Soviet-bloc economies. In contrast, the Department has previously explained that, "although price controls and guidance remain on certain 'essential' goods and services in the PRC, the PRC Government has eliminated price controls on most products . . . ."[7] Therefore, the primary concern about the application of the CVD law to NMEs originally articulated in the Wire Rod from Poland and Wire Rod from Czechoslovakia cases is not a significant factor with respect to the PRC's present-day economy. Thus, the Department has concluded that it is able to determine whether subsidies benefit imports from the PRC.

The Georgetown Steel Memorandum details the Department's reasons for applying the CVD law to the PRC and the legal authority to do so. As explained in the Georgetown Steel Memorandum, Georgetown Steel does not rest on the absence of market-determined prices, and the decision to apply the CVD law to the PRC does not rest on a finding of market-determined prices in the PRC.[8] In the case of the PRC's economy today, as the Georgetown Steel Memorandum makes clear, the PRC no longer has a centrally-planned economy and, as a result, the PRC no longer administratively sets most prices.[9] As the Georgetown Steel Memorandum also makes clear, it is the absence of central planning, not market-determined prices, that makes subsidies identifiable and the CVD law applicable to the PRC.[10]

---

[2] See, e.g., sections 701, 771(5), and 771(5A) of the Act.
[3] See section 701(a) of the Act.
[4] See section 701(b) of the Act (providing the definition of "Subsidies Agreement country").
[5] See Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination (Wire Rod from Poland), 49 FR 19374 (May 7, 1984) and Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 FR 19370 (May 7, 1984) (Wire Rod from Czechoslovakia).
[6] See, e.g., Wire Rod from Czechoslovakia, 49 FR at 19373.
[7] See Memorandum from Shana Lee-Alaia and Lawrence Norton to David M. Spooner, Assistant Secretary of Commerce, regarding "Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China, "Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy," (March 29, 2007) (Georgetown Steel Memorandum), on the record of CFS from the PRC.
[8] Id. at 4-5.
[9] Id. at 5.
[10] Id.

As the Department further explains in the Georgetown Steel Memorandum, extensive PRC government controls and interventions in the economy, particularly with respect to the allocation of land, labor, and capital, undermine and distort the price formation process in the PRC and, therefore, make the measurement of subsidy benefits potentially problematic.[11] The problem is such that there is no basis for either outright rejection or acceptance of all the PRC's prices or costs as CVD benchmarks because the nature, scope, and extent of government controls and interventions in relevant markets can vary tremendously from market-to-market. Some of the PRC prices or costs will be useful for benchmarking purposes, i.e., are market-determined, and some will not, and the Department will make that determination on a case-by-case basis, based on the facts and evidence on the record. Thus, because of the mixed, transitional nature of the PRC's economy today, there is no longer any basis to conclude, from the existence of some "non-market-determined prices," that the CVD law cannot be applied to the PRC.

The Court of Appeals for the Federal Circuit (CAFC) recognized the Department's broad discretion in determining whether it can apply the CVD law to imports from an NME in Georgetown Steel.[12] The issue in Georgetown Steel was whether the Department could apply CVD laws (irrespective of whether any AD duties were also imposed) to potash from the USSR and the German Democratic Republic and carbon steel wire rod from Czechoslovakia and Poland. The Department determined that those economies, which operated under the same, highly rigid Soviet system, were so monolithic as to render nonsensical the very concept of a government transferring a benefit to an independent producer or exporter. The Department therefore concluded that it could not apply the U.S. CVD law to those exports, because it could not determine whether that government had bestowed a subsidy (then called a "bounty or grant") upon them.[13] While the Department did not explicitly limit its decision to the specific facts of the Soviet Bloc in the mid-1980s, its conclusion was based on those facts. The CAFC accepted the Department's logic, agreeing that, "Even if one were to label these incentives as a 'subsidy,' in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves."[14] Noting the "broad discretion" due the Department in determining what constituted a subsidy, the Court then deferred to the Department's judgment on the question.[15] Thus, Georgetown Steel did not hold that the Department could choose not to apply the CVD law to exports from NME countries, where it was possible to do so. Instead, the CAFC simply deferred to the Department's determination that it was unable to apply the CVD law to exports from Soviet Bloc countries in the mid-1980s.

The Georgetown Steel Court did not find that the CVD law prohibited the application of the CVD law to all NMEs for all time, but only that the Department's decision not to apply the law was reasonable based upon the language of the statute and the facts of the case. Specifically, the CAFC recognized that:

> {T}he agency administering the countervailing duty law has broad discretion in determining the existence of a "bounty" or "grant" under that law. We cannot say that the Administration's conclusion that the benefits the Soviet Union and the German

[11] Id.
[12] See Georgetown Steel, 801 F.2d at 1318.
[13] See, e.g., Wire Rod from Czechoslovakia, 49 FR at 19373.
[14] See Georgetown Steel, 801 F.2d at 1316.
[15] Id. at 1318.

> Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion.[16]

Georgetown Steel, 801 F.2d at 1318 (emphasis added).

The Georgetown Steel Court did not hold that the statute prohibited application of the CVD law to NMEs, nor did it hold that Congress spoke to the precise question at issue. Instead, as explained above, the Court held that the question was within the discretion of the Department.

Starbright's argument that the intent of Congress was that the CVD law does not apply to NMEs is also flawed. Since the holding in Georgetown Steel, Congress has expressed its understanding that the Department already possesses the legal authority to apply the CVD law to NMEs on several occasions. For example, on October 10, 2000, Congress passed the PNTR Legislation. In section 413 of that law, which is now codified in 22 U.S.C. § 6943(a)(1), Congress authorized funding for the Department to monitor "compliance by the People's Republic of China with its commitments under the World Trade Organization (WTO), assisting United States negotiators with the ongoing negotiations in the WTO, and defending United States antidumping and countervailing duty measures with respect to products of the People's Republic of China."[17] The PRC was designated as an NME at the time this bill was passed, as it is today. Thus, Congress not only contemplated that the Department possesses the authority to apply the CVD law to the PRC, but authorized funds to defend any CVD measures the Department might apply.

This statutory provision is not the only instance where Congress has expressed its understanding that the CVD law may be applied to NMEs in general and the PRC in particular. In that same trade law, Congress explained that "{o}n November 15, 1999, the United States and the People's Republic of China concluded a bilateral agreement concerning the terms of the People's Republic of China's eventual accession to the World Trade Organization."[18] Congress then expressed its intent that the "United States Government must effectively monitor and enforce its rights under the Agreements on the accession of the People's Republic of China to the WTO."[19] In these statutory provisions, Congress is referring, in part, to the PRC's commitment to be bound by the Agreement on Subsidies and Countervailing Measures (SCM Agreement) as well as the specific concessions the PRC agreed to in its Accession Protocol.
The Accession Protocol allows for the application of the CVD law to the PRC, even while the PRC remains classified as an NME by the Department.[20] In fact, in addition to agreeing to the terms of the SCM Agreement, specific provisions were included in the Accession Protocol that involve the application of the CVD law to the PRC. For example, Article 15(b) of the Accession Protocol provides for special rules in determining benchmarks that are used to measure whether the subsidy bestowed a benefit on the company. Paragraph (d) of that same Article provides for the continuing treatment of the PRC as an NME. There is no limitation on the application of Article 15(b) with respect to Article 15(d), thus indicating it became applicable at the time the Accession Protocol entered into effect. Although WTO agreements such as the Accession

[16] Citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984)
[17] See 22 U.S.C. § 6943(a)(1) (emphasis added).
[18] See 22 U.S.C. § 6901(8).
[19] See 22 U.S.C. § 6841(5).
[20] See CFS from the PRC IDM at Comment 1.

Protocol do not grant direct rights under U.S. law, the Accession Protocol contemplates the application of CVD measures to the PRC as one of the possible existing trade remedies available under U.S. law. Therefore, Congress' directive that the "United States Government must effectively monitor and enforce its rights under the agreements on the accession of the People's Republic of China to the WTO," contemplates the application of the CVD law to the PRC.[21] Neither the SCM Agreement nor the PRC's Accession Protocol is part of U.S. domestic law. However, the Accession Protocol, to which the PRC agreed, is relevant to the PRC's and our international rights and obligations. Further, Congress thought the provisions of the Accession Protocol important enough to direct that they be monitored and enforced, a direction codified in U.S. law.

In sum, the Department has authority to apply the CVD law to NMEs under U.S. law. Further, the Department's decision to apply the CVD law to the PRC, as explained in the Georgetown Steel Memorandum, is within the Department's discretion and in accordance with law. Accordingly, the Department's application of the CVD law in this proceeding is appropriate.

Comment 2: Application of CVD Law and Double Remedies

Starbright contends that the Department's application of the CVD law to the PRC while simultaneously treating the PRC as an NME for AD purposes results in the unlawful imposition of a double remedy on Chinese imports. According to Starbright, any time the Department finds both subsidies and dumping in cases where the CVD law and NME AD methodology are applied, and no methodologies are utilized to make a double remedy unlikely, a double remedy must be presumed. Starbright argues that the Department's pervasive use of external benchmarks demonstrates that the Department has found "limited practical distinction between the PRC and other NMEs." Starbright further argues that if the Department "unlawfully" imposes CVDs on the PRC, it must make some adjustments to account for double remedies. Starbright cites the decision in GPX International Tire Corp. v. United States, 645 F. Supp. 2d 1231, 1234 (Ct. Int'l Trade 2009) (GPX) to support its argument.

Bridgestone and Titan argue that the Department's simultaneous application of the CVD law and the NME AD methodologies is not unreasonable and does not necessarily result in double remedies. They argue that the AD and CVD laws address different unfair trade practices. Bridgestone and Titan further contend that the Department's use of out-of-country benchmarks is not evidence of an unreasonable application of the CVD law.

Department's Position

We disagree with Starbright. First, its reliance on the GPX decision is misplaced because those decisions are not final and conclusive; a final order has not been issued and all appellate rights have not been exhausted. Second, the respondent has not cited to any statutory authority for not imposing countervailing duties so as to avoid the alleged double remedies or for making an adjustment to the CVD calculations to prevent an incidence of alleged double remedies. If any adjustment to avoid a double remedy is possible, it would only be in the context of an AD proceeding. We note that this position is consistent with the Department's decisions in recent

[21] See 22 U.S.C. § 6941(5).

PRC CVD cases.[22] The Department's position is more fully detailed in the final determinations of the concurrent AD investigations of the CVD cases cited above.

Comment 3: Whether Application of the CVD Law to NMEs Violates the Administrative Procedures Act

Starbright claims that the Department's imposition of countervailing duties on imports from the PRC violates the Administrative Procedures Act (APA). Starbright states that the APA requires formal rulemaking to amend binding rules and that the Department is not exempt from this process when it engages in rulemaking. Starbright submits that a rule "emerged in 1984 when the Department adopted its position not to apply CVD law to NME," and if this action was not sufficient the Department's position became a binding rule in 1993 with the issuance of the "General Issues Appendix," or when "the Department codified its position when it limited the scope of its authority in new CVD regulations to exclude non-market economies."

Bridgestone contends that Starbright's arguments should be rejected because they fail to establish that the APA applies to CVD proceedings.

Department's Position

The Department disagrees with Starbright that our decision to apply the CVD law to NMEs is subject to the APA's notice-and-rulemaking procedures because those procedures do not apply to interpretative rules, general statements of policy or procedure, or practice. As with the other comments above, we have addressed this argument several times in the past in recent PRC CVD proceedings. See CFS from the PRC IDM at Comment 2, and OTR Tires from the PRC IDM at Comment A2.

[22] See, e.g., Coated Paper from the PRC IDM at Comment 3; Drill Pipe From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, 76 FR 1971 (January 11, 2011), and accompanying IDM at Comment 3; and Line Pipe from the PRC IDM at Comment 3.

Comment 4: Starbright's Creditworthiness for 2006

Titan argues that the Department should revise its preliminary findings that Starbright was creditworthy in 2006. It contends that the Department's reliance on certain financial studies conducted by outside parties and relating to the financial health of Starbright's parent at the time is inappropriate. Rather, Titan argues, the Department should give "no weight to projections regarding the company's financial health, because these were based on erroneous assumptions that the company would benefit from government subsidies without corresponding countervailing duty liability for its exports."

Starbright contends that Titan is advocating for the Department to adopt "a retrospective analysis for uncreditworthy determinations" that would allow it to "critique lending and investment decisions with the benefit of hindsight." Starbright maintains that the Department correctly based its decision on the "facts available to parties in the year in question," and that the Department should continue to find Starbright creditworthy for 2006.

Department's Position

The Department's regulations state that we will determine creditworthiness "based on information available at the time of the government-provided loan…." See 19 CFR 351.505(a)(4)(i).[23] Hence, under subsection (a)(4)(i)(D) of 19 CFR 351.505, when we consider any prospective analyses available in the market at the time regarding the firm's future financial position, our primary concern is not whether any particular projections are borne out by future events, but rather what commercial projections were available at the time. Likewise, there is no indication that the independent parties failed to properly account for any contingent liabilities in their analysis. The studies include discussions of future prospects for the tires market, GPX International Tire Corporation, and Starbright. They also include forecasts of future capital expenditures and income streams, which would require estimates of all future expenses, contingent or actual. There is no indication that the analysis failed to include possible CVD duties, or other liabilities, in these assessments of future prospects, or that the likelihood of future CVD duties was assigned an unreasonably small risk or weight within the overall assessment. Consequently, we find that Titan's argument is misplaced, and we recommend continuing to find Starbright creditworthy in 2006.

[23] The regulation uses the word "loan." While there are no loans under review to which a creditworthiness determination is relevant (i.e., there are no long-term loans), the reasoning underlying this regulation is, by analogy, just as relevant when the creditworthiness determination is applicable to other types of non-recurring subsidies which require the use of a discount rate in order to allocate the benefit over time. As set forth in 19 CFR 351.524(d), the selection of a discount rate is based on the company's cost of funds (i.e., on long-term loan interest rates) and a factor in identifying a company's cost of funds is whether it is creditworthy. Therefore, whether or not Starbright was creditworthy in 2006 affects the discount rate to be used in allocating several types of non-recurring subsidies over time, none of which are long-term loans.

II. Recommendation

We recommend that you accept the positions described above.

_____ _____
Agree Disagree

_____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

_____
Date