

Federal Circuit Clears the Way for Countervailing Duties on Non-Market Economy Imports

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In a key decision for U.S. manufacturers, the U.S. Court of Appeals for the Federal Circuit (CAFC) has cleared the way for the Department of Commerce (the Department) to continue applying the countervailing duty (CVD) laws to "non-market economy" (NME) countries in trade remedy investigations. This case, *GPX Int'l Tire Corporation v. United States*, likely represents the final legal challenge in the United States stemming from the Department's 2006 decision to alter its long-standing policy and to apply the CVD laws to an NME country.

On March 13 2012, in response to a prior CAFC holding, Congress amended the CVD statute to provide explicitly for the application of countervailing duties to NME countries. The amended law applies not only to all future CVD investigations, but also retroactively to all investigations after November 20, 2006, when the Department announced its policy change. GPX challenged this amendment on constitutional grounds, arguing that the statute's retroactive application violates the Ex-Post Facto Clause and the Due Process Clause.

The CAFC rejected both arguments. With regard to GPX's first claim, the court cited its previous holding in *Guangdong Wireking v. United States* that the amended statute did not violate the Ex-Post Facto Clause. The CAFC explained that its holding in *Wireking* was not fact-specific, rejecting GPX's attempt to distinguish on factual grounds. Next, the court analyzed the statute under the five factors enumerated by the Supreme Court of the United States for determining whether retroactive statutes violate the Due Process Clause. It found that each of the five factors weighed in favor of a finding that the law is

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constitutional and rejected GPX's due process claim as well.

While GPX may attempt to appeal to the Supreme Court, it is unlikely that such an appeal would be accepted. The CAFC's decision thus ensures that U.S. industries will be able to continue using the CVD laws as a critical tool for addressing unfairly traded imports from NME countries, including China.