

## **Fisher Says Countervailing Duty Measure Backs Approach of Georgetown Steel Memo**

### **Attorney Sees Bill Backing Georgetown Steel Memo**

**Key Development:** Bill could weigh on March 5 filing.

**Potential Impact:** Bill needs enactment to be seen as reliable indication of congressional intent.

**By Len Bracken**

Legislation responding to a decision by the U.S. Court of Appeals for the Federal Circuit has bipartisan, bicameral support but will not pass prior to the probable administration filing March 5 for a rehearing in the case, but the bill is likely to figure into the submission of briefs in the case, Bart Fisher, a professor and practitioner of international trade law, told Bloomberg BNA.

The bill, "To apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes" (H.R. 4105), would essentially overturn the Dec. 19 decision in *GPX International Tire Co. v. United States* that would prohibit the Commerce Department from applying countervailing duties (CVD) to nonmarket economies (NMEs) such as China.

Fisher was the lead attorney in the *Georgetown Steel Corp. v. United States* case, by GPX which figured largely in the Federal Circuit's reasoning in the case, and he has also been a counsel for the government of China from 1999 to 2000.

He described this new legislation as a vindication of the "Georgetown Steel doctrine," which is a shorthand way to refer to the application of countervailing duties to nonmarket economies, connoting the June 2007 Commerce Department Georgetown Steel Memo that was referenced frequently in the decision. The legislation, however, will have to be enacted for the court to see it as a reliable indication of congressional intent, he said.

It is not known what strategy the administration will use in its March 5 filing, but generally, when a combined petition for panel rehearing and petition for rehearing en banc is filed, the petition for panel rehearing is decided first in the same manner as a petition for panel rehearing without an accompanying petition for rehearing en banc. If the panel grants the requested relief, the petition for rehearing en banc is deemed moot.

### **Commerce Found Market Forces in China.**

In 1983, Georgetown Steel went to the International Trade Administration of the Commerce Department with its case, and the International Trade Administration said that countervailing duties do not apply to NMEs.

The case went to court in 1985 and the court found that CVD did apply, but Commerce then appealed to the U.S. Court of Appeal for Federal Circuit in 1985. At that time, Commerce took the position that CVDs did not apply to NME countries. In 1986 the appeals court reinstated Commerce's decision in the *Georgetown Steel Corp. v. United States*.

The Commerce Department decided in 2007 the Chinese economy of that time was different from the command economy that prevailed in previous decades and issued the Georgetown Steel Memo to that effect.

"The department said that this point China is fundamentally a market-oriented economy," Fisher said. "If you look at China, the experts will tell you that 55 percent of the gross domestic product is owned and run by state-owned enterprises, but those enterprises are responding to market forces within China."

In addition to being a graduate of Harvard Law School, Fisher has a Phd. in economics from the Johns Hopkins University School of Advanced International Studies.

"Anyone who knows China, as I do, will tell you that they are driven by market forces—you have state-owned enterprises that are referred to as 'dinosaurs' and they get an inordinate share of funds from state-owned banks, but still in all they are constrained by market forces," he said.

Fisher is the co-author with John Barton of the 1986 Little, Brown case book *International Trade and Investment: Regulating International Business* that comprises the Georgetown Steel case.

### **Bill Passage Needed to Indicate Intent.**

The U.S. Court of Appeals for the Federal Circuit decision, affirming the U.S. Court of International Trade but on other grounds, was based on the "legislative ratification" by Congress of the non-applications of these duties to nonmarket economies.

The U.S. Court of Appeals for the Federal Circuit said in its decision that it is up to Congress "to provide any additional remedies it deems appropriate." Fisher noted, however, that the court said in its opinion that bills that have been introduced and not passed are unreliable indicators of congressional intent.

"Bills that are introduced but don't pass were cited by the court as being the third and least plausible indicator of congressional intent," Fisher said. "If the bill were passed and signed into law, that would be significant—it might moot the whole case."

At that point, Fisher suggested, the Justice Department might ask all parties to drop the appeal and go forward with the new statute.

The House majority leader said March 1 that the House will consider the bill the week of March 5 under suspension of the rules and the Senate is considering the bill on "hotlining" procedures (41 ITD, 3/2/12).

### **Regulations on Offsets Could Be Required.**

The legislation responds specifically to the court decision by clarifying congressional intent by asserting that adequate calculations can be obtained concerning subsidies even for nonmarket economies for NMEs. Countervailing duties are the remedy used to target subsidies whereas antidumping duties look at the price to determine if an unfair trade practice is being used.

The bill seeks to take the Commerce Department practice back to the status quo ante, but there might some additional guidance or implementing regulation on the issue double remedies, Fisher said, which involves price-determined antidumping duties.

The legislation states that the Commerce Department should adjust antidumping duties to address any possible double remedy.

Fisher explained that if a foreign exporter in a dumping case is able to demonstrate that there was an increase in its export prices due to a countervailed domestic subsidy, and use of surrogate value methodology, Commerce could make a reasonable estimate of the increase in the dumping margin due to the subsidy and then make a corresponding reduction in the dumping margin.

### **WTO Ruled Against Double Counting.**

The bill directs Commerce to not double count and thereby to be consistent with the WTO Appellate Body decision of March 11, 2011.

The ruling was adverse to the United States in the dispute settlement case (DS379) brought by China and states that countries should try to avoid the double counting that can arise from the application of both countervailing and antidumping duties in the NME context. The United States has until April 25 to implement the recommendations and rulings.

Fisher explained the argument against double counting is as follows: Calculation of the antidumping margin is based on the low price, which is a result of the subsidy, so the addition of the subsidy through the countervailing duties amounts to double counting.

Commerce now routinely offsets or adjusts for this possible double counting, but there are also cases that have subsidies but no dumping, so the United States would like to apply countervailing duties, Fisher said. While lawyers tend to always seek both antidumping and countervailing claims, Fisher noted that some claims are better than others and offsets can remedy double counting problems.

### **Fisher Cites Surrogate Methodology.**

The key, Fisher said, was that this legislation makes it possible for there to be remedies to dumping and subsidies against China.

Fisher explained with a hypothetical example of China complaining about the application of any antidumping duties because of the U.S. methodology of using a surrogate market economy, such as India. China argues that Commerce always picks economies that are not comparable but are more advanced and hence a higher antidumping duty.

"When I represented China, that was a big issue—we would always address that," Fisher said, noting that he

argued that India was not appropriate in the wax candles case and unsuccessfully tried to use Egypt as a surrogate. **Subsidies Raise Question of 'China Price.'**

Fisher noted that in 2011 the United States had a \$273 billion trade deficit with China, the largest ever with any country.

"You would have to say that the subsidies are a big part of that, a big reason for that," he said. "When you get into the subsidies issue, you get into what we call the issue of the 'China price.'"

Fisher cited an estimate by Peter Navarro, an economics professor at the University of California, Irvine, that direct export subsidies comprise 7.3 percent of the price advantage, but the currency subsidy must be included.

This subsidy, Fisher said, is somewhere in a range between the 25 percent estimated by John Williamson of the Peterson Institute for International Economics and the 40 percent estimate of economist Ernest Preeg, who has testified to Congress on the currency issue.

"If you take the high range of the currency subsidy estimate, 40 percent, plus the 7.3 percent export subsidy, you're looking at nearly half the reason China is coming into the U.S. market with such tremendous quantities of goods," Fisher said.

#### **ITC Hears Many NME Subsidy Cases.**

Given that so many of these subsidy cases at the International Trade Court deal with China and nonmarket economies, Fisher said this legislation, once passed and signed into law, will be an important response to the principle trade threat to the United States. He described one of the primary means of subsidizing state-owned enterprises and other firms was through nonperforming loans by the major Chinese banks.

"They just keep pumping money into these sclerotic state-owned enterprises and that is one of the things that we are countervailing against," Fisher said.

"China has been warned by the International Monetary Fund to stop the practice because the whole economy will collapse if they don't stop it—so in a way this is good for China by forcing them to become more market oriented," he added.

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