



Court Ruling Drives Bid To Alter Tariff Law

By Finlay Lewis, CQ Staff

Congress is poised to undo a court ruling handed down before Christmas that threatens to rob the government of a key weapon in the struggle with China over U.S. jobs and its manufacturing base.

Ruling in China's favor, a unanimous three-judge panel of the U.S. Court of Appeals for the Federal Circuit slammed the door on imposing punitive tariffs on imported Chinese tires. The decision reverberated across American manufacturing and within Congress because it also had the effect of invalidating 22 other tariffs designed to counter what the United States calls predatory Chinese trade practices.

At the heart of the dispute between Washington and Beijing is the role of Chinese government subsidies in opening the U.S. market to Chinese imports and whether the United States can legally use a tariff known as a countervailing duty to respond to the threat those subsidies pose to American industries.

So far the courts have sided largely with China, saying that Congress in the past has ruled out using countervailing duties against state-run economies such as China's and that the Commerce Department has overreached in coupling them with tariffs designed to punish dumping goods below market costs. But in their ruling, the federal judges virtually invited Congress to change the law.

In response, lawmakers from both parties, supported by the Obama administration, have mobilized to negate those rulings by legislation.

"It is, in effect, unilateral disarmament," declared Debbie Stabenow, a Michigan Democrat who sits on the Senate Finance Subcommittee on Trade. Stabenow called countervailing duties "one of the few tools we have right now to fight back against illegal Chinese trade subsidies."

The bipartisan leaders of both the Senate panel and the House Ways and Means Committee have joined forces to fashion a bill that would reactivate the countervailing duties. With polls registering high levels of voter anxiety about the economy and China, any narrowly targeted bill looms as a vehicle for more problematic, and controversial, proposals targeting China.

Steven S. Smith, director of the Weidenbaum Center on the Economy, Government and Public Policy at Washington University in St. Louis, warns that bringing the bill to the Senate floor under an open-amendment process could “open a huge can of worms.”

The escalating trade tensions between the two nations will be a major topic of discussion when China’s vice president, Xi Jinping, the presumed successor to President Hu Jintao, visits the White House on Tuesday.

Fighting the Czars

Countervailing duties first made their appearance in defense of the American market when they were imposed in the 1890s, largely to protect U.S. sugar producers from subsidized competition from Czarist Russia.

They are now the weapons of choice to offset government subsidies that trade partners give, directly or indirectly, to promote their own manufacturers competing with domestic industries.

In the tire case brought by Massachusetts-based GPX International Tire Corp. and its Chinese subsidiary, the court surveyed the legislative history of the kinds of tariffs under challenge by the company and concluded that Congress in the past had “adopted the position that countervailing duty law does not apply” to so-called nonmarket economies such as China.

In fact, Commerce for decades took the position that nonmarket economies could not appropriately or legally be targeted by countervailing tariffs.

After a legal struggle in the early 1980s involving imports of carbon steel wire rods from the then-communist regimes of Poland and Czechoslovakia, the department ruled out using countervailing duties, reasoning that subsidies have no meaning in a nonmarket economy when state fiat sets prices and overrides normal market signals.

In 2007, the department reversed course. Concluding that the Chinese economy had sufficiently abandoned the Maoist model so that subsidies could be identified and measured, Commerce Secretary Carlos Gutierrez announced the imposition of countervailing duties on Chinese shipments of coated free-sheet paper. Gutierrez declared, “The China of today is not the China of years ago. Just as China has evolved, so has the range of our tools to make sure Americans are treated fairly.”

What happened next amounted to a double whammy against Chinese imports. In late July 2008, Commerce imposed both countervailing duties and anti-dumping tariffs on shipments of steel pipes from China, as it later did against a range of imports including the tires made by GPX's Chinese subsidiary, Hebei Starbright.

GPX filed for bankruptcy in late 2009, placing the blame in part on the tariffs, which it said amounted to nearly 44 percent of the value of Hebei Starbright's tires.

China counterattacked, arguing in effect that imposing both countervailing duties and anti-dumping tariffs on a nonmarket economy would amount to a form of double taxation by penalizing the same economic behavior twice. An appellate body of the World Trade Organization sided with China, finding that the Commerce Department was violating a WTO agreement against "double-counting."

The U.S. Court of International Trade reached a similar conclusion on behalf of GPX. The Justice Department, supported by U.S. tire makers and affiliated unions, appealed the trade court's decision to the federal circuit court, which took note of the double-counting issue. However, it decided the case on the narrow grounds that Congress never authorized the use of countervailing duties against nonmarket economies.

The court concluded that "if Commerce believes that the law should be changed, the appropriate approach is to seek legislative change."

A spokesman for the Commerce Department says that the challenged tariffs will remain in effect pending possible appeals, a process that could play out within weeks. Lawyers for both sides in the tire case say the odds weigh against a rehearing by the entire 17-judge court of appeals and are even longer against winning a place on the U.S. Supreme Court's docket.

Legislative Route

Changing the law is just what the two main trade committees in Congress have decided to do.

"We need to act legislatively here to reverse the court of appeals' decision," said Sander M. Levin, the top Democrat on the House Ways and Means Committee. "And it has to be done in the next weeks, especially if the court of appeals *en banc* does not take jurisdiction. We have a limited period of time."

Levin is working with Ways and Means Chairman Dave Camp, a Republican and fellow Michigan lawmaker, on a measure tightly focused on the issues raised in various legal proceedings. So are Senate Finance Chairman Max Baucus, a Montana Democrat, and top Finance Republican, Orrin G. Hatch of Utah.

But Washington University's Smith warns that "it is the kind of thing that could be exploited and blown out of proportion if not managed properly." He adds, "China is

pretty easy to beat up on, and keeping that sentiment corralled is going to be a real challenge for the leadership.”

Stabenow, for example, did not rule out adding language from a Senate-passed bill to punish China for currency manipulation. But she indicated that the urgency of the matter would probably preclude that possibility, given the hostility of the GOP leadership to the currency measure.

It’s more likely that the legislation will wade into the tricky question of how countervailing duties should interact with anti-dumping penalties.

“There is no question Congress can amend the law and say we want to have [countervailing duties] apply to nonmarket countries,” says Daniel L. Porter, one of GPX’s attorneys. “But the WTO says that as a matter of WTO agreements — which, of course, the U.S. is a signatory to — you need to address double-counting. The legislation needs to do that.”

Camp has said that the Ways and Means bill will attempt to do so, although that may prove difficult.

Addressing double-counting “gets into a very weedy technical issue about how to draft it,” says William A. Reinsch, president of the National Foreign Trade Council, who has worked as a Senate staff aide and senior Commerce Department official. “If you think about it academically and figure out how you calculate a subsidy when wages and prices are controlled by the state, you’d discover it’s more complicated than you think.”

There may be opposition to a Baucus-Camp countervailing-duty bill from powerful commercial interests.

In a study last spring for the libertarian Cato Institute, Daniel Ikenson, a trade scholar, contends that over half of U.S. imports provide materials or components for domestic producers. He adds that “import taxes raise the cost of production for U.S. producers and erode their competitiveness at home and abroad.”

Erik Autor, vice president and international trade counsel for the National Retail Federation, says, “For those of us who rely on the global supply and value chains, these actions are hugely disruptive.”

The question of how far China has gone in becoming a market economy is part of the debate.

“China is not a market economy. It is not close to becoming a market economy,” declares Derek Scissors, a research fellow at the Heritage Foundation, a conservative think tank. “When we are pretending China is a market economy, we are just telling a lie.”

Daniel Griswold, who as president of the National Association of Foreign Trade Zones promotes American business interests in the global economy, has a different perspective: “China has moved light-years in the last 30 years toward being a market economy. Today I think it is a market economy — not perfectly so, but essentially a market economy.”

In fact, China will be officially designated a market economy in 2016 in accordance with the terms of its agreement to join the WTO. That will remove the legal barrier to imposing both countervailing and anti-dumping duties on allegedly predatory Chinese imports.

That time frame doesn’t lessen the pressure that lawmakers feel to take action soon on whatever measures will curb Chinese inroads on American markets.

Republican Mary Bono Mack, chairwoman of the House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade, cites evidence that China has been dumping crystalline silicon cells on the American market, posing a significant threat to the domestic solar power industry — a key feature of the economy in her California desert district.

“We need meaningful and effective trade laws, in accordance with international obligations, to react to any unfair trade practices,” Bono Mack said in a written statement to Congressional Quarterly. “Without legislative or judicial action, the court’s ruling could have serious implications for the United States.”

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