



A-570-912

Section 129 Determination (WTO DS449)

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June 26, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Section 129 Proceeding (WTO DS449): 2008-2009 Antidumping
Duty Administrative Review of Certain New Pneumatic Off-the-
Road Tires from the People's Republic of China – Final
Determination

SUMMARY

Consistent with section 129 of the Uruguay Round Agreements Act (URAA), which governs the actions of the Department of Commerce (the Department) following adverse World Trade Organization (WTO) dispute settlement findings, and pursuant to a request from the Office of the U.S. Trade Representative, the Department is revising certain aspects of the final determinations in the countervailing duty (CVD) and antidumping duty (AD) proceedings examined in *United States — Countervailing and Anti-dumping Measures on Certain Products from China*, (WT/DS449), including the AD administrative review of certain new pneumatic off-the-road tires (OTR tires) from the People's Republic of China (PRC) covering the period February 20, 2008, through August 31, 2009 (2008-2009 administrative review).

We are revising the analysis underlying these determinations in accordance with findings in the relevant reports adopted by the WTO Dispute Settlement Body (DSB). Specifically, the DSB found that the Department acted inconsistently with the obligations of the United States under Article 19.3 of the Subsidies and Countervailing Measures Agreement (SCM Agreement) and, consequently, under Articles 10 and 32.1 of the SCM Agreement. This was due to the Department's imposition of ADs calculated on the basis of the methodology for nonmarket economy (NME) countries prescribed by section 773(c) of the Tariff Act of 1930, as amended (the Act), concurrently with the imposition of CVDs upon the same products without having assessed whether "double remedies," (*i.e.*, the offsetting of the same subsidy twice) arose from such concurrent duties. This finding is relevant to the dumping rates originally calculated in the 2008-2009 administrative review.

On January 28, 2015, the Department initiated a section 129 proceeding concerning the 2008-2009 administrative review and subsequently sent questionnaires concerning the issue of double remedies. No party responded to the Department's request for information. On April 15,



2015, the Department issued the Preliminary Determination and provided interested parties an opportunity to comment.¹ Petitioners² commented on the Preliminary Determination;³ no other party provided comments.

For the reasons discussed below, we did not make any changes to the Preliminary Determination. Specifically, because no party responded to the Department's request for information in this section 129 proceeding, we determine that, without the requested information, there is no basis for making an adjustment for potential overlapping remedies under Section 777A(f)(1)(B) of the Act.

In accordance with section 129(b)(4) of the URAA, the U.S. Trade Representative may, after consulting with the Department and Congress, direct the Department to implement this determination, in whole or in part.

BACKGROUND

On April 25 and April 26, 2011, the Department published the final results of the AD and CVD reviews of OTR tires from the PRC, respectively.⁴ In those determinations, the Department made no adjustment to account for potential "double remedies" ostensibly caused by the imposition of CVDs concurrently with ADs calculated under the NME methodology.⁵ The Department specifically determined that respondent parties had failed to assert a claim or provide record evidence to support their claim of a double remedy.⁶ The Department also found that the legal authority cited by respondent parties did not provide a basis for the requested adjustment.⁷

WTO Panel Report and Appellate Body Report

Subsequent to the final results of the OTR tires from the PRC administrative reviews, the Government of the PRC (GOC) requested the establishment of a WTO dispute settlement panel (the Panel) to address, among other issues, the United States' WTO obligations with respect to the possibility of double remedies in several sets of AD and CVD proceedings, including the

¹ See Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Section 129 Proceeding (WTO DS449): 2008-2009 Antidumping Duty Administrative Review of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China – Decision Memorandum for Preliminary Determination," (April 15, 2015) (Preliminary Determination).

² Petitioners are Titan Tire Corporation and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.

³ See Letter from Petitioners titled "Section 129 Proceeding on the Administrative Review (2/20/08-8/31/09) of the Antidumping Duty Order on New Pneumatic Off-The-Road Tires from China (A-570-912): Petitioners' Comments on the Preliminary Determination," dated April 27, 2015 (Petitioners' Comments).

⁴ *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review*, 76 FR 22871 (April 25, 2011), and accompanying Issues and Decision Memorandum (OTR Tires AD IDM); *New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 76 FR 23286 (April 26, 2011), and accompanying Issues and Decision Memorandum (OTR Tires CVD IDM).

⁵ See OTR Tires AD IDM at Comment 13; OTR Tires CVD IDM at Comment 2.

⁶ See OTR Tires AD IDM at Comment 13.

⁷ See OTR Tires AD IDM at Comment 13; OTR Tires CVD IDM at Comment 2.

OTR Tires AD and CVD first administrative reviews (DS449 dispute). The Panel circulated its report on March 27, 2014.⁸

On the issue of double remedies, the Panel followed the findings of the WTO Appellate Body (the Appellate Body) in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (March 11, 2011) (DS379 WTO AB Report). The Panel stated that the United States had not presented “cogent reasons” to depart from the Appellate Body’s prior interpretation of Article 19.3 of the SCM Agreement. Specifically, the Panel found that an investigating authority has an “affirmative obligation” to determine whether the concurrent imposition of CVDs and ADs calculated under an NME methodology may result in double remedies.⁹ By virtue of the Department not affirmatively undertaking this inquiry in the sets of investigations at issue in the DS449 dispute, the Panel concluded, based on the reasoning of the DS379 WTO AB Report, that the United States had acted inconsistently with its obligations under Article 19.3, and by consequence, Articles 10 and 32.1 of the SCM Agreement.¹⁰

On April 17, 2014, the United States appealed certain procedural aspects of the Panel’s findings with respect to the issue of double remedies to the Appellate Body.¹¹ The Appellate Body issued its report on July 7, 2014.¹² In its report, the Appellate Body upheld the Panel’s findings on the procedural ruling that China had presented a “brief summary of the legal basis of the complaint sufficient to present the problem clearly” in its initial request for the establishment of a panel in the DS449 dispute.¹³ On July 22, 2014, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.¹⁴

On August 21, 2014, the United States announced to the DSB that it intended to implement the DSB’s recommendations and rulings in this dispute. The United States also stated that it would need a reasonable period of time to do so.¹⁵

On January 13, 2015, pursuant to section 129(b) of the URAA, the U.S. Trade Representative requested that the Department issue determinations that would render the Department’s actions in the affected proceedings, including the OTR tires from the PRC administrative review, not inconsistent with the recommendations and rulings of the DSB. Further, the U.S. Trade Representative also notified the Department that the GOC had agreed to

⁸ *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, WT/DS449/R (March 27, 2014) (Panel Report).

⁹ *Id.* at para. 7.342.

¹⁰ *Id.* at para. 7.392-7.395.

¹¹ *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, “Notification of an Other Appeal by the United States,” WT/DS449/7 (April 17, 2014). The United States did not appeal the Panel’s findings with respect to the United States’ obligations under Article 19.3, and consequently, Articles 10 and 32.1 of the SCM Agreement.

¹² *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, WT/DS449/AB/R (July 7, 2014) (Appellate Body Report).

¹³ *Id.* at para. 4.52.

¹⁴ *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, “Action by the Dispute Settlement Body,” WT/DS449/10 (July 22, 2014).

¹⁵ *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, “Communication from the United States,” WT/DS449/11 (August 21, 2014).

a reasonable period of time for implementation of the DSB's recommendations and rulings of twelve months from the date of the DSB's adoption of the Panel Report and Appellate Body Report.

Governing Provisions

Section 129 of the URAA is the applicable provision governing the nature and effect of determinations issued by the Department to implement adverse findings by WTO panels and the Appellate Body. Specifically, section 129(b)(2) of the URAA provides that notwithstanding any provision of the Act, upon written request from the U.S. Trade Representative, the Department shall issue a determination that would render its actions not inconsistent with an adverse finding of a WTO panel or the Appellate Body. The *Statement of Administrative Action*¹⁶ variously refers to such a determination by the Department as a "new," "second," and "different" determination.¹⁷ This determination is subject to judicial review separate and apart from judicial review of the Department's original determination.¹⁸

In addition, section 129(c)(1)(B) of the URAA expressly provides that a determination under section 129 applies only with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative directs the Department to implement that determination. In other words, as the SAA clearly provides, "such determinations have prospective effect only."¹⁹ Thus, "relief available under subsection 129(c)(1) is distinguishable from relief in an action brought before a court or a NAFTA binational panel, where . . . retroactive relief may be available."²⁰

On March 13, 2012, the President signed into law Public Law 112-99, "To apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes." Public Law 112-99, codified at section 777A(f) of the Act, amended the Act to provide for an adjustment to ADs imposed upon imports from NME countries that are also subject to CVDs to account for AD and CVD remedies demonstrated to overlap, among other purposes.²¹ The provision applies, subject to subsection (c) of section 129 of the URAA, to "all determinations issued under subsection (b)(2) of that section on or after the date of the enactment of this Act," which includes this preliminary determination.²²

Section 129 Proceedings

On January 28, 2015, the Department initiated a section 129 proceeding concerning the 2008-2009 AD administrative review of OTR tires.²³ Subsequently, the Department sent a questionnaire to Hebei Starbright Tire Co., Ltd. (Starbright), the mandatory respondent in the

¹⁶ H. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA).

¹⁷ See SAA at 1025, 1027.

¹⁸ See 19 USC § 1516a(a)(2)(B)(vii).

¹⁹ SAA at 1026.

²⁰ *Id.*

²¹ See section 777A(f) of the Act; Pub. L. No. 112-99, 126 Stat. 266 (2012).

²² See Pub. L. No. 112-99, 126 Stat. 266-267 (2012).

²³ See Letter to Interested Parties from Eric B. Greynolds, Acting Office Director, dated January 28, 2015.

administrative review, concerning the issue of double remedies on February 10, 2015.²⁴ On March 12, 2015, GPX International Tire Corporation, Starbright's U.S. sales affiliate, submitted a letter to the Department stating that it was withdrawing from the Section 129 proceeding, as it was unable to obtain the information necessary to answer the Department's questionnaire on behalf of its former manufacturer, Starbright.²⁵ Starbright itself did not respond to the questionnaire.

On April 15, 2015, the Department issued the Preliminary Determination and provided interested parties an opportunity to comment.²⁶ On April 27, 2015, Petitioners filed comments on the Preliminary Determination.²⁷ Petitioners stated that the Department's Preliminary Determination was correct and should be maintained for the final determination because the requirements of section 777A(f) of the Act have not been met.²⁸ No other party commented on the Preliminary Determination.

ANALYSIS

In applying section 777A(f) of the Act, the Department examines (1) whether a countervailable subsidy (other than an export subsidy) has been provided with respect to a class or kind of merchandise, (2) whether such countervailable subsidy has been demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period, and (3) whether the Department can reasonably estimate the extent to which that countervailable subsidy, in combination with the use of NV determined pursuant to section 773(c) of the Act, has increased the weighted-average dumping margin for the class or kind of merchandise.²⁹ For a subsidy meeting these criteria, the statute requires the Department to reduce the AD by the estimated amount of the increase in the weighted-average dumping margin subject to a specified cap.³⁰ In conducting this analysis, the Department has not concluded that concurrent application of NME ADs and CVDs necessarily and automatically results in overlapping remedies. Rather, a finding that there is an overlap in remedies, and any resulting adjustment, is based on a case-by-case analysis of the totality of facts on the administrative record for that segment of the proceeding as required by the statute.

Further, the Department has determined that it could obtain specific data for purposes of an analysis under 777A(f)(1) by requesting information from the respondents to the proceeding selected for individual examination.³¹ The Department has determined that direct evidence from individual respondents regarding subsidies and costs is preferable for meeting the statutory

²⁴ See Letter to Starbright, "Section 129 Determination (WTO DS449): Antidumping Duty Review of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China – Domestic Subsidies Questionnaire," dated February 10, 2015 (DR Questionnaire).

²⁵ See Letter from GPX International Tire Corporation titled "GPX's Notification of Withdrawal from Section 129 Proceeding: New Pneumatic Off-the-Road Tires from China: Section 129 Proceeding," dated March 12, 2015.

²⁶ See Preliminary Determination.

²⁷ See Petitioners' Comments.

²⁸ *Id.* at 3-6.

²⁹ See section 777A(f)(1)(A)-(C) of the Act.

³⁰ See section 777A(f)(1)-(2) of the Act.

³¹ See, e.g., *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 76970 (December 23, 2014) (*CSPV Products from the PRC*), and accompanying Issues and Decision Memorandum at Comment 18.

requirements under Section 777A(f)(1)(A) and (C) of the Act. Such data also contributes to the Department's analysis of the statutory requirements of Section 777A(f)(1)(B). As such, for this Section 129 proceeding, the Department requested company-specific information from Starbright. However, Starbright did not respond to the DR Questionnaire.

The Department determined, for purposes of this proceeding, that whether the statutory requirements for a double remedies adjustment are met is best assessed on the basis of direct evidence and information from the respondent, including information on subsidies and the cost and export/import prices of the subject merchandise. However, Starbright did not provide such information or data.

As such, the Department finds that, based on the lack of evidence on the record, the statutory requirements for permitting an adjustment for a potential overlapping remedy between the AD and CVD orders on OTR tire imports have not been met.

Separate Rate Companies and the PRC-Wide Entity

To calculate the extent of the domestic subsidy pass-through for the separate rate respondents and the PRC-wide entity, the Department's current practice is to adjust the margin using the domestic subsidy pass-through calculated during this proceeding, subject to section 777A(f)(2) of the Act.³² However, in this case and as previously stated, Starbright did not meet the statutory requirements for making an adjustment for potential overlapping remedies under Section 777A(f) of the Act. Therefore, the Department finds no basis for an adjustment to the separate rate respondents or the PRC-wide entity margins under Section 777A(f) of the Act.

CONCLUSION

To grant an adjustment under Section 777A(f) of the Act, the statute requires, in part, a demonstration of a reduction in the average price of imports, for which the Department examines the links between the countervailed subsidy programs and the impact on the respondent's costs.³³ Without the requested information from Starbright, the Department has determined that such a demonstration has not been made at the OTR tire industry-specific level. As a result, we find that there is no basis for making an adjustment to the AD rates under Section 777A(f)(1)(B) of the Act. As such, the Department is not making adjustments pursuant to section 777A(f) of the Act to the AD rates from the administrative review.

FINAL DETERMINATION

As a result of this determination, we determined that the following antidumping duty margins apply. In accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, if the U.S. Trade Representative, after consulting with the Department and Congress, directs the Department to implement, in whole or in part, this determination, the following margins will

³² See *Aluminum Extrusions From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission, in Part; 2012/2013*, 79 FR 36003 (June 25, 2014) and accompanying Preliminary Decision Memorandum at 35-36.

³³ See, e.g., *CSPV Products from the PRC* Issues and Decision Memorandum at Comment 18.

serve as the prospective basis for cash deposit rates effective as of the date of implementation under section 129(b)(4) of the URAA, unless superseded by an intervening administrative review.

Exporter	Weighted-Average Margin ³⁴
Hebei Starbright Tire Co., Ltd.	28.97%
Hangzhou Zhongce Rubber Co., Ltd.	28.97%
KS Holding Limited/KS Resources Limited	28.97%
Laizhou Xiongying Rubber Industry Co., Ltd.	28.97%
Qingdao Taifa Group Co., Ltd.	28.97%
Weihai Zhongwei Rubber Co., Ltd.	28.97%

RECOMMENDATION

In light of the findings of the Panel and Appellate Body and based on our analysis, we recommend adopting the above positions, which will render our determination not inconsistent with the recommendation and rulings of the DSB.

Agree Disagree



 Paul Piquado
 Assistant Secretary
 for Enforcement and Compliance

26 JUNE 2015
 (Date)

³⁴ Consistent with our practice, where the product was also subject to a concurrent countervailing duty proceeding, the weighted-average margins listed here reflect an adjustment for the countervailing duty determined to constitute an export subsidy.