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**USING WTO COUNTERVAILING DUTY LAW TO COMBAT ILLEGALLY
SUBSIDIZED CHINESE ENTERPRISES OPERATING IN A NONMARKET-
ECONOMY: DECIPHERING THE WRITING ON THE WALL**

*Garrett E. Lynam**

The complications that will arise under WTO countervailing duty law if the U.S. launches countervailing duties against China for illegally subsidizing nonmarket-economy enterprises are overlooked and gravely problematic. Although the WTO's countervailing duty law should clearly prescribe how its Members can use the surrogate approach when launching countervailing duties against nonmarket-economies, it has failed to do so. With regard to China, only twenty-eight ambiguous words in China's WTO Accession Protocol provide legal guidance for navigating a complex issue in international trade law: how can the WTO's Members use the surrogate approach when launching countervailing duties against China for illegally subsidizing nonmarket-economy enterprises?

I. INTRODUCTION

Imagine that Joe Smith is the owner and operator of an U.S. manufacturing firm that produces widgets. Historically, Joe's business thrived. Joe thought he was well positioned for the future, but his sales recently fell when a Chinese competitor invaded his segment of the U.S. market with low-priced Chinese widgets. Bewildered by the Chinese competitor's ability to sell at such rock-bottom prices, Joe approaches a consulting firm and discovers that the Chinese competitor driving him out of business likely receives subsidies¹ from the Chinese government. These subsidies enable Joe's competitor to export its widgets cheaply and therefore put Joe at a competitive disadvantage. Incensed that his competitor receives such a boost from its government, Joe appeals to the Department of Commerce

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¹ According to the WTO's SCM Agreement, a subsidy is (1) a financial contribution by a government that is (2) specific and (3) confers a benefit. See Agreement on Subsidies and Countervailing Measures art. 1(1), Marrakesh Agreement Establishing the World Trade Organization annex 1A, Apr. 15, 1994, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

(DOC). The DOC's representative, Mr. Tyler, reveals that Joe's Chinese competitor operates in a nonmarket-economy (NME) and receives subsidies from the Chinese government in violation of China's obligations to the World Trade Organization (WTO).²

Mr. Tyler explains that the DOC has two tools to help Joe: anti-dumping duties and countervailing duties (CVDs). Mr. Tyler tells Joe that the DOC has historically launched only anti-dumping duties against China for the illegal subsidization of Chinese NME enterprises³ because the DOC is unsure how to legally calculate CVDs in such a context.⁴ Mr. Tyler explains that this legal uncertainty stems from the fact that NMEs are an anomaly in trade remedy law. Mr. Tyler further clarifies that in order to launch CVDs against China for illegally subsidizing Joe's competitor, the U.S. investigatory agencies must first compare the Chinese fair market value (FMV) of Joe's competitor's widgets to the FMV that those widgets sell for in the U.S. This comparison allows the DOC to calculate the difference in price and apply a duty to eliminate the price difference.⁵ Mr. Tyler then explains that since Joe's competitor comes from NME China, its widgets lack a Chinese FMV.⁶ Thus, Mr. Tyler explains that the DOC must select a

² The DOC defines a NME as "any foreign country the DOC determines to not operate on market principles of cost and pricing structures." See Department of Commerce Glossary of Terms [hereinafter DOC Glossary], <http://ia.ita.doc.gov/pcp/pcp-glossary.html>; 19 U.S.C. § 1677(18) (2006). China is not purely a NME, but some of China's economy operates as a NME. See, e.g., JOINT ECON. COMM., OVERVIEW OF THE CHINESE ECONOMY 1, 5 (July 2005) [hereinafter OVERVIEW OF THE CHINESE ECONOMY], available at <http://www.house.gov/jec/publications/109/07-26-05china.pdf> (acknowledging that China still retains many characteristics of a command economy such as control over powerful state-owned and state-influenced enterprises). As of 2009, the U.S. considered the following countries to be NMEs: Azerbaijan, Armenia, Georgia, Moldova, Belarus, Uzbekistan, Kyrgyz Republic, Tajikistan, Vietnam, and China. See INT'L TRADE ADMIN., EXPECTED WAGES OF SELECTED NON-MARKET ECONOMY COUNTRIES (Dec. 2009), <http://ia.ita.doc.gov/wages/index.html>.

³ In this Note, the phrase "NME enterprises" refers to Chinese enterprises that operate in a nonmarket economy and does not include portions of the Chinese economy that are relatively market-oriented, such as Hong Kong.

⁴ Although U.S. courts have upheld the DOC's ability to launch CVDs against China for illegally subsidizing NME enterprises, the parameters of how the DOC can calculate such CVDs remain uncertain. See, e.g., *GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1234 (Ct. Int'l Trade 2009) (holding that the DOC's methodology for simultaneously applying anti-dumping proceedings and CVDs was "unreasonable.").

⁵ This price comparison allows the investigating country to calculate the amount of the subsidy in terms of the benefit to the recipient. See 19 U.S.C. § 1677b (2006); SCM Agreement, *supra* note 1, art. 14.

⁶ By definition, a NME cannot set a FMV because a NME has no market. See *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315-16 (Fed. Cir. 1986) ("[China's] nonmarket environment is riddled with distortions. Prices are set by central planners. 'Losses' suffered by production and foreign trade enterprises are routinely covered by government transfers. Investment decisions are controlled by the state.") (quoting Carbon Steel

substitute FMV—a procedure known as the surrogate approach—and substitute this proxy for the indeterminable Chinese FMV.⁷

Mr. Tyler tells Joe how the DOC controversially began launching CVDs against China in 2007.⁸ Additionally, Mr. Tyler tells Joe that the surrogate approach has since caused profound problems for the DOC in CVD proceedings brought against China because the U.S. Court of International Trade expresses skepticism about how the DOC estimates price difference.⁹ However, Mr. Tyler assures Joe that the DOC will soon iron out these problems. He promises Joe that it will be only a matter of time before the DOC gains the U.S. Court of International Trade's full approval to launch crippling CVDs against China for illegally subsidizing NME enterprises.

This hypothetical illustrates the current outlook of the DOC towards launching CVDs against China for illegally subsidizing NME enterprises. However, Mr. Tyler is short-sighted if he concludes that the DOC's methodologies for launching CVDs against NME China must only appease the U.S. Court of International Trade. Even if the DOC gains the Court of International Trade's approval to launch CVDs against NME China, the DOC must still align its pursuit of illegally subsidized NME enterprises with the U.S.' WTO obligations. The overlooked complications that will arise under WTO CVD law if the DOC uses the surrogate approach when launching CVDs against China for the illegal subsidization of NME enterprises are gravely problematic.¹⁰ Although WTO CVD law should clearly explain how

Wire Rod from Poland Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,374 (Dep't Commerce May 7, 1984)).

⁷ When using the surrogate approach, the DOC defines a "surrogate country" as a "market economy that the Department has determined is at a comparable level of economic development and is a significant producer of comparable merchandise." DOC Glossary, *supra* note 2.

⁸ See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 Fed. Reg. 60,645 (Dep't Commerce Oct. 25, 2007).

⁹ See, e.g., *Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1234 (Ct. Int'l Trade 2009).

¹⁰ Some discount the ambiguity in WTO CVD law pertaining to how Members may use the surrogate approach to launch CVDs against China for illegally subsidizing NME enterprises. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, CHALLENGES AND CHOICES TO APPLY COUNTERVAILING DUTIES TO CHINA: HEARING ON U.S.-CHINA TRADE BEFORE THE U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION 11–12 (Apr. 4, 2006) (statement of Loren Yager, Director of International Affairs and Trade, U.S. Government Accountability Office), available at <http://www.gao.gov/new.items/d06608t.pdf> (providing that "China's WTO accession agreement specifically permits application of third-country information in CVD determinations," but noting that there is no expiration date or language in the provision that differentiates between China as a market-economy or a NME). Other commentators correctly warn of the effects of the looming 2016 WTO-imposed changes to anti-dumping law. See, e.g., Kenneth J. Pierce & Matthew R. Nicely, *Transitioning to China's Market Economy Antidumping Treatment in 2016*, available at <http://www.abanet.org/intlaw/spring09/materials/Transitioning%20to%20China's%20Market%20Economy%20>

Members can use the surrogate approach in CVD proceedings against China, it has failed to do so. Only twenty-eight ambiguous words in China's WTO Accession Protocol¹¹ provide legal guidance for navigating how Members can use the surrogate approach when launching CVDs against NME China.

The clock is ticking for the U.S. to clarify the haphazard ambiguity in China's WTO Accession Protocol. If market-economy surrogates do not exist in China after 2016¹²—as may very well be the case—WTO trade remedy law will make it increasingly difficult for the U.S. to launch strong anti-dumping duties against China for illegally subsidizing NME enterprises.¹³ Consequently, dumping law may not fully protect the U.S.' interests after 2016. Therefore, launching CVDs against China has a vital strategic advantage because, unlike with anti-dumping duties, the WTO will not narrow the use of the surrogate approach in the context of CVD law after 2016. If the U.S. hopes to launch potent CVDs to combat the illegal Chinese subsidization of NME enterprises, the U.S. needs to address the unworkably vague ambiguities in China's Accession Protocol before 2016. The time to act is now.

This Note explains why the current WTO CVD law regarding the use of the surrogate approach in CVD proceedings launched against China for illegally subsidizing NME enterprises is unworkably vague. Given its ambiguities and dangerous brevity, WTO CVD law does not allow the U.S. to swiftly launch CVDs against China for illegally subsidizing NME enter-

Antidumping%20Treatment%20in%202016.pdf. However, there is little discussion of how the ambiguities in WTO CVD law will affect the U.S.' ability to apply trade remedies.

¹¹ Protocol on the Accession of the People's Republic of China, pt. I, § 15(b), WT/L/432 (Nov. 23, 2001) [hereinafter China's Accession Protocol], available at http://trade.wto.org/english/thewto_e/acc_e/completeacc_e.htm ("In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.").

¹² In past anti-dumping proceedings against China, surrogates for Chinese NMEs have included proxy figures from developed countries despite the fact that China is a developing country. See Qinglan Long, *Conflicting Positions but Common Interests: An Analysis of the United States Antidumping Policy Toward China*, 7 RICH. J. GLOBAL L. & BUS. 133, 136 (2008).

¹³ See China's Accession Protocol, *supra* note 11, § 15(d) (limiting the use of the surrogate approach in anti-dumping proceedings brought against China after 2016 by requiring Members to use only a Chinese surrogate in all anti-dumping proceedings, regardless of whether the Chinese enterprise under investigation operates in a NME). Requiring the use of Chinese surrogates stops Members from having wide discretion in selecting surrogates for use in trade remedy proceedings against China. See Long, *supra* note 12, at 136 (providing that the U.S. chose surrogates from regions such as Western Europe in past anti-dumping proceedings against China). This diminished discretion will curtail the severity of anti-dumping proceedings because Members can no longer choose whatever surrogates suit their needs.

prises. Little analysis currently exists regarding how the U.S. can launch CVDs against China for illegal NME subsidization in conformity with WTO requirements,¹⁴ but this Note analyzes why the U.S. cannot swiftly launch such CVDs and aims to guide policy makers in revising the ambiguous WTO law. To facilitate this revision, this Note prescribes a short-term solution and identifies the long-term issues that the U.S. must lead the WTO to resolve.

Part II discusses the fundamentals of WTO CVD and dumping law. Additionally, it explains the need for the surrogate approach when a country launches CVDs or anti-dumping duties that target a NME enterprise. Part III addresses China's economy and the existence of illegal Chinese subsidies. It emphasizes that merely classifying China as a market economy would not allow the U.S. to swiftly launch CVDs against China for illegally subsidizing NME enterprises. Part IV analyzes the surrogate approach and concludes that WTO CVD law provides little guidance for how to use the surrogate approach when launching CVDs against NMEs such as China. This lack of guidance means that WTO CVD law is haphazardly unclear as to how Members may use the surrogate approach when launching CVDs against a NME. Part V addresses how only twenty-eight words in China's Accession Protocol guide Members in using the surrogate approach when launching CVDs against China for illegally subsidizing NME enterprises. This brevity causes problems because ambiguity riddles the twenty-eight words. Part V also identifies six reasons why the U.S. should not presume that it can swiftly launch CVDs against China that target NME enterprises under the current WTO CVD law. Part V concludes by prescribing a short-term solution and identifying the issues that Members must address in order to implement a successful long-term resolution.

II. OVERVIEW OF WTO CVD AND DUMPING LAW

A. *Illegal Subsidies and WTO CVD Law*

The WTO's overarching goal is to ensure that trade flows as smoothly, predictably, and freely as possible.¹⁵ Illegal subsidies¹⁶ jeopardize

¹⁴ See generally Julia Ya Qin, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs)—A Critical Appraisal of the China Accession Protocol*, 7 J. INT'L ECON. L. 863 (2004) (discussing, inter alia, the implications of the ambiguities in section 15(b) of China's Accession Protocol).

¹⁵ WORLD TRADE ORG., THE WORLD TRADE ORGANIZATION 1 (2009), http://www.wto.org/english/res_e/doload_e/inbr_e.pdf. See also Understanding the WTO: The Agreements—Anti-dumping, Subsidies, Safeguards: Contingencies, etc. [hereinafter Understanding WTO Agreements], http://www.wto.org/english/theWTO_e/whatis_e/tif_e/agrm8_e.htm (last visited Mar. 4, 2010).

¹⁶ There are two types of subsidies that are illegal under the SCM Agreement: (1) subsidies that are prohibited per se; and (2) actionable subsidies. Subsidies that are prohibited per se

the achievement of this goal because they often give the subsidy recipient an unfair comparative advantage.¹⁷ Consequently, Members may take unilateral action against other Members who subsidize their exports in violation of WTO Agreements.¹⁸ Such actions include anti-dumping duties and CVDs.

B. The Use of Dumping Law and CVD Law to Combat Illegal Subsidies

Both CVD law and dumping law are tools for nullifying distortions in international trade.¹⁹ Although there are important differences between these tools, there is overlap in their application. Dumping occurs when a manufacturer sells its merchandise at a lower price in one national market than another.²⁰ The manufacturer may incur a loss when it dumps goods, but selling products at less than the “fair” value gives the manufacturer at least a temporary competitive advantage in international trade.²¹ In compari-

are subsidies “contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance” and subsidies that give preferential treatment to domestic suppliers. SCM Agreement, *supra* note 1, art. 3(1)(a–b) (footnote omitted). Essentially, subsidies that are prohibited per se are those that would directly affect the trade interests of other Members. *See* Subsidies and Countervailing Measures Overview: Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) [hereinafter SCM Overview], http://www.wto.org/English/Tratop_E/scm_e/subs_e.htm (last visited Mar. 4, 2010). Actionable subsidies are more common than prohibited subsidies and arise when a Member proves specific elements. *See id.* (providing that “[m]ost subsidies, such as production subsidies, fall in the ‘actionable’ category.”). Under the SCM Agreement, Members can challenge actionable subsidies by showing “adverse effects.” SCM Agreement, *supra* note 1, art. 5. *See also* SCM Overview, *supra*. To show harm, a Member must normally illustrate one of the following effects: (1) domestic injury; (2) serious prejudice to the interests of another Member; or (3) nullification of impairment of the benefits due to a Member by virtue of their WTO membership. SCM Agreement, *supra* note 1, art. 5(a–c).

¹⁷ WILSON B. BROWN & JAN S. HOGENDORN, INTERNATIONAL ECONOMICS IN THE AGE OF GLOBALIZATION 327 (2000).

¹⁸ *See* SCM Agreement, *supra* note 1, art. 10.

¹⁹ Since subsidization and dumping both involve manipulation of a product’s FMV, this Note often discusses dumping law. However, dumping law and CVD law are separate areas of trade law despite the fact that both are often discussed in tandem.

²⁰ *See* JACOB VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 4 (1966) (“The one essential characteristic of dumping . . . is price-discrimination between purchasers in different national markets.”) (citation omitted). *See also* 19 U.S.C. § 1673(1) (2006) (providing that the DOC may impose anti-dumping duties when the DOC “determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value.”).

²¹ *See* VINER, *supra* note 20, at 132 (“The dumper often resorts to dumping only in order to bring his export prices down to the level prevailing in his export markets.”). *See also id.* at 110 (discussing how if the domestic market is competitive, the dumper’s price reduction “may be met by other producers, with the consequence that the benefit to his sales will be slight and even that cutthroat competition may ensue.”).

son, CVDs seek to eliminate the competitive advantage in international trade that manufacturers gain from illegal subsidization.²² However, since a subsidized product can sell for a lower price in one national market than another, anti-dumping duties are also an appropriate remedy for illegal subsidization.²³

Although anti-dumping duties are not specifically engineered to nullify illegal subsidies, the U.S. has historically used dumping law as its weapon-of-choice for combating illegal NME subsidization.²⁴ This is partly because of the difficulty in identifying illegal subsidy benefits in a NME, which Members must pinpoint prior to launching CVDs.²⁵ Alternatively stated, since a subsidy is often unidentifiable in a NME, it is easier for the investigating country to impose a duty based on an apparent price difference (e.g., via anti-dumping duties) than on an unapparent subsidy (e.g., via

²² See *id.* at 170 (“[illegal subsidies] tend to result in the artificial cheapening of foreign goods, and thus [] give [the subsidy recipient] an artificial advantage in their competition with domestic goods.”).

²³ *Id.* at 4.

²⁴ See, e.g., *Gov’t of the People’s Republic of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int’l Trade 2007) (discussing the DOC’s long standing policy of only applying dumping law to NMEs). Investigating countries can combat illegal subsidies via dumping law because both illegal subsidization and dumping give the manufacturer a similar comparative advantage. See *VINER*, *supra* note 20, at 163 (“Dumping may be systematically practiced . . . if [subsidies] . . . are granted upon export.”). Prior to 2007 the DOC did not launch CVDs against NMEs and instead used dumping law to combat the illegal subsidization of NME enterprises. See *GPX Int’l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1236 (Ct. Int’l Trade 2009). However, the DOC chose to apply CVD law to NME China in a 2007 investigation involving coated free sheet paper, which was described as a “sea change.” See *id.* (citing *Coated Free Sheet Paper from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 60,645 (Dep’t Commerce Oct. 25, 2007)).

²⁵ SCM Agreement, *supra* note 1, art. 1(1)(b). See U.S. GOV’T ACCOUNTABILITY OFFICE, U.S.-CHINA TRADE: COMMERCE FACES PRACTICAL AND LEGAL CHALLENGES IN APPLYING COUNTERVAILING DUTIES, 18 n.34 (2005), available at <http://www.gao.gov/new.items/d05474.pdf> (“WTO officials observed that even the United States—a country wherein government actions that influence the economy are comparatively well documented—has had difficulty identifying and quantifying subsidy information that it is required to report to the WTO.”). See also RICHARD O. CUNNINGHAM, *TRADE POLICIES AND STRATEGIES* 162 (2005) (discussing how the drafters of GATT 1947 CVD law seemed “to have thrown up their hands at the thought of trying to identify individual government subsidies in countries where the government is the economy.”). *But see* *GPX Int’l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1237 (Ct. Int’l Trade 2009) (describing how the DOC justified the application of CVDs to NME China in 2007 because China “had enacted significant and sustained economic reforms, which allowed [China’s] economy to sufficiently advance . . . so that [the DOC] could now determine the transfer of a specific financial contribution and benefit from the government to a producer in China.”).

CVDs). Moreover, as explained in the following sections,²⁶ there is a very weak legal framework underscoring the applicability of CVD law to NMEs.

C. *The Mechanics of WTO CVD Law and the Surrogate Approach*

The WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement) requires that a challengeable subsidy²⁷ and the requisite causation²⁸ exist before Members may launch CVDs against another Member. The SCM Agreement defines a CVD as a "special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise."²⁹ Under no circumstances may the amount of the CVD exceed the amount of the illegal subsidy.³⁰ Since the CVD cannot exceed the amount of the illegal subsidy, the investigating country must determine a FMV for the product in question before it can launch a CVD.³¹ Otherwise stated, the investigating country needs to compare the price of a product before and after illegal subsidization to understand how much of a duty it should add.³² There must be two figures in this price comparison: a foreign FMV and a domestic FMV.³³

Yet finding a domestic FMV creates challenges when the exporting country is a NME. A NME has no market forces and therefore supply and demand principles do not yield a domestic FMV.³⁴ Thus, the centrally-planned NME environment distorts the search for the actionable subsidy.³⁵

²⁶ See discussion *infra* Part V (identifying the weaknesses in China's Accession Protocol regarding the applicability of CVDs to NME China).

²⁷ Either a subsidy prohibited per se or an actionable subsidy is a challengeable subsidy. See *supra* note 16.

²⁸ SCM Agreement, *supra* note 1, art. 11(2).

²⁹ *Id.* art. 10 n.36.

³⁰ *Id.* art. 19(4). See also 19 U.S.C. § 1671(a) (2006) (providing that the DOC must impose a CVD "equal to the amount of the net countervailable subsidy.").

³¹ See Long, *supra* note 12, at 135 (providing that the fair market value of the product must be calculated when determining the "dumping margin" (citing 19 U.S.C. § 1673 (2006))).

³² SCM Agreement, *supra* note 1, art. 19(4) (implying that investigating countries must identify a FMV because a CVD can only recapture the illegal benefit given to a particular product, and nothing more). See Long, *supra* note 12, at 135 (citing 19 U.S.C. § 1673) (recognizing that Commerce creates duties based on the dumping margin by "calculating the average amount by which the fair market value of the product exceeds the price of the product in the United States.").

³³ See Long, *supra* note 12, at 135.

³⁴ See James A. Meszaros, Note, *Application of United States' Law of Countervailing Duties to Nonmarket Imports: Effects of the Recent Foreign Reforms*, 2 ILSA J. INT'L. & COMP. L. 463, 472-73 (1996).

³⁵ See Carbon Steel Wire Rod from Czechoslovakia, 49 Fed. Reg. 19,370, 19,371-72 (Dept. Comm. 1984) (final countervailing duty determination) (discussing how NMEs operate under unique economic principles).

Investigating countries cannot prove that the amount of the CVD only recaptures the subsidy, and therefore they cannot launch the CVD without violating WTO CVD law.³⁶

However, the investigating country could circumvent the problem of the NME's missing domestic FMV by substituting the missing domestic FMV with the FMV from a surrogate market-oriented economy. This methodology is known as the "surrogate approach." By using a surrogate for an incalculable FMV, the investigating country reduces very complicated NME calculations to familiar principles of supply and demand.³⁷ While not wholly accurate,³⁸ the surrogate FMV estimates approximately how much action the investigating country can take against the country that illegally subsidizes a NME enterprise.

The DOC selects surrogate market economies in U.S. anti-dumping proceedings.³⁹ The DOC uses its existing framework for anti-dumping proceedings as a template for calculating CVDs launched against NMEs.⁴⁰ Surrogates for past anti-dumping investigations against China included foreign countries that did not resemble China in terms of geography or economic development. Unsurprisingly, such foreign surrogates resulted in controversial calculations given the developmental, geographic, and economic differences between China and these surrogates.⁴¹ Additionally, the DOC's selection of arbitrary surrogate countries when launching anti-dumping duties

³⁶ See *id.* at 19,372 (providing that "[b]ecause the notion of a subsidy is, by definition, a market phenomenon, it does not apply in a nonmarket setting" and concluding that "we have found that NME systems share certain features that make it impossible to find that a bounty or grant exists.").

³⁷ See Meszaros, *supra* note 34, at 473.

³⁸ See, e.g., CUNNINGHAM, *supra* note 25, at 164–65 (explaining that the DOC's surrogate selection process "allows the [U.S.] to reach whatever result it chooses.").

³⁹ U.S. Dep't of Commerce, Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process, available at <http://ia.ita.doc.gov/policy/bull04-1.html> ("The statute provides broad discretion in the selection of surrogate market economy countries to value NME factors of production."). The DOC places emphasis on a potential surrogate country's economic comparability to the NME country and whether it is a significant producer of comparable merchandise. *Id.*

⁴⁰ *Id.*

⁴¹ Long, *supra* note 12, at 136 ("Developed countries such as Norway, Austria and France have been chosen as surrogates, resulting in great miscalculation."). See also Sanghan Wang, *U.S. Trade Laws Concerning Nonmarket Economies Revisited for Fairness and Consistency*, 10 EMORY INT'L L. REV. 593, 621 (1996) (quoting *Nonmarket Economy Imports Legislation: Hearings on S.1351 Before the Senate Comm. on Finance*, 98th Cong. 18 (1984) (statement of Gary Horlick, Deputy Assistant Secretary of Commerce for Import Administration from 1981–1983)) ("I can tell horror stories about how one goes about choosing a surrogate It just doesn't make any sense."); CUNNINGHAM, *supra* note 25, at 164–65 (discussing how the DOC's methodology for selecting surrogates rivals the complexity of the National Football League's playoff tie-breaker system and that the methodology "allows the [U.S.] to reach whatever result it chooses.").

and CVDs against NMEs has raised controversy in the U.S. due to the potential for “double counting” of trade remedies.⁴² “Double counting” occurs when the country imposes simultaneous anti-dumping penalties and CVDs but does not offset its anti-dumping penalty by its CVD, or vice-versa.⁴³

Per China’s Accession Protocol, Members may use foreign surrogates when launching anti-dumping duties and CVDs against China for illegally subsidizing NME enterprises.⁴⁴ However, in contrast to the relatively clear provisions on WTO dumping law,⁴⁵ WTO CVD law is unclear as to *how* Members may apply the surrogate approach when launching CVDs against China for such illegal subsidization. Since China is part market-economy and part NME, when should a Chinese surrogate be used in a CVD proceeding? And when should a foreign surrogate apply? The answers to these questions are unclear. Consequently, if the U.S. launches CVDs against China for illegally subsidizing NME enterprises, China could leverage the lack of clarity in WTO CVD law to use the WTO to stall the American CVDs.

III. CHINA’S ECONOMY AND ILLEGAL SUBSIDIES

A. *The Chinese Economy and NME Status*

The U.S. labels China as a NME despite the fact that there are pockets of market-oriented economies in China.⁴⁶ However, the U.S.’ label has merit because the Chinese government still controls the Chinese economy’s “commanding heights.”⁴⁷ These “commanding heights” refer to the

⁴² See *GPX Int’l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1240 (Ct. Int’l Trade 2009).

⁴³ See *id.* at 1240–41.

⁴⁴ See China’s Accession Protocol, *supra* note 11, § 15(b). See also *infra* Part V (discussing the legality of using the surrogate approach to launch CVDs against China for illegally subsidizing NME enterprises).

⁴⁵ Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the GATT 1994, and section 15(a) of China’s Accession Protocol provide a relative abundance of guidance for choosing surrogates when launching anti-dumping measures against China. The wealth of guidance does not spill over into WTO CVD law. See discussion *infra* Parts IV, V.

⁴⁶ See OVERVIEW OF THE CHINESE ECONOMY, *supra* note 2, at 1. In *Oscillating and Ceiling Fans from the People’s Republic of China*, 57 Fed. Reg. 24,018 (Dep’t of Commerce 1992) (final determination), the DOC stated that CVD law may be applied to NMEs “if the Department finds that the relevant industry is a market-oriented industry.”

⁴⁷ OVERVIEW OF THE CHINESE ECONOMY, *supra* note 2, at 1. See also U.S. TRADE REPRESENTATIVE, 2008 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE 4 (Dec. 2008), available at http://www.ustr.gov/sites/default/files/asset_upload_file192_15258.pdf (discussing how China has slowed its progress towards market liberalization since 2006).

government's control of important elements of the Chinese economy, such as some pricing and production decisions.⁴⁸

In response to fear that its classification as a NME could make its exports vulnerable to Western protectionists, China is actively seeking to gain market-economy status from the European Union and the U.S.⁴⁹ As of late May 2009, China claimed that ninety-seven countries recognized it as a market-economy.⁵⁰ However, the European Union and the U.S. remain unconvinced on changing their classifications.⁵¹

The differing classifications between Western powers and the ninety-seven countries recognizing China as a market-economy show that the U.S.' classification may be overly simplistic. Even the U.S. informally recognizes that China is not entirely a NME.⁵² Thus, China's proper characterization should lie somewhere in between the two extremes of a purely market-oriented economy and a purely NME.⁵³ However, because countries as a whole are classified as either market economies or NMEs, no hybrid categorization exists.⁵⁴

⁴⁸ *DOC Preliminarily Affirms China's NME Status in AD Investigations*, H.K. TRADE DEV. COUNCIL, June 1, 2006, <http://www.hktdc.com/info/mi/a/baus/en/1X00ABHM/1/Business-Alert-%E2%80%93US/DOC-Preliminarily-Affirms-China-s-NME-Status-in-AD-Investigations.htm>.

⁴⁹ STEPHEN GREEN, CHINA'S QUEST FOR MARKET ECONOMY STATUS 1 (Chatham House, London, Asia Programme Briefing Note, May 2004), available at http://www.chathamhouse.org.uk/files/3168_bnmay04.pdf.

⁵⁰ *China Still Striving for "Market Economy" Status from the EU*, CHINA VIEW, May 21, 2009, http://news.xinhuanet.com/english/2009-05/21/content_11415493.htm.

⁵¹ *Id.* See also *GPX Int'l Tire Corp. v. United States*, 587 F. Supp. 2d 1278, 1288–89 (Ct. Int'l Trade 2008) (providing that although the DOC recognizes that China's economy is more flexible than Soviet-style economies, the DOC nonetheless continues to characterize China as a NME) (citation omitted).

⁵² See *Oscillating and Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24,018 (Int'l Trade Admin. June 5, 1992) (explaining the test that the DOC uses to determine if an industry within a NME is characteristic of a market-economy); *GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1237 (Ct. Int'l Trade 2009) (explaining that "many state-owned enterprises [have] been privatized" and that "China's command economy [has] receded and the majority of prices [have become] liberalized." (citation omitted)).

⁵³ Compare Long, *supra* note 12, at 146 (stating that there is no "'gray area' for transitioning economies, such as China's, that undertake tremendous economic reforms toward a more market-oriented economy." (citing Michael Kabik, *The Dilemma of "Dumping" from Non-Market Economy Countries*, 6 EMORY INT'L L. REV. 339, 379–80 (1992)), with *GPX Int'l Tire Corp.*, 645 F. Supp. 2d at 1237 (qualifying the economic reforms in China by describing the "remaining government restraints," including "the slow process of liberalizing the renminbi to allow development of a normal foreign exchange market, the continuing restrictions on foreign investment, the slow pace of reforms in the banking sector, and the limitations on private ownership." (citation omitted)).

⁵⁴ Long, *supra* note 12, at 146 (citing Kabik, *supra* note 53, at 379–80).

B. Why Relabeling China as a Market-Economy Would Not Solve the Problem at Hand

The WTO does not grant market-economy status.⁵⁵ Therefore, fulfilling its WTO obligations⁵⁶ does not mean that China will earn the market-economy classification it seeks from Members such as the U.S. or the European Union. Instead, the WTO permits each Member to classify other Members as it deems fit.⁵⁷ This underscores a high degree of deference towards individual Members.

Labeling China as a market-economy would not clarify how Members may use the surrogate approach against China in the context of WTO CVD law. This is because labeling China as a market-economy would not change the practical difficulties of unscrambling China's pervasive system of subsidies.⁵⁸ Market-economy classification is an unregulated label that carries little meaning; in theory, the U.S. could label a wholly NME country (i.e., an economy dominated by government control) as a market-economy without WTO interference. What matters is the practical difficulty in identifying a subsidy when supply and demand principles do not apply.⁵⁹ Thus, classifying China as a market-economy does not solve the problem of how to treat it for purposes of WTO CVD law.

C. The Existence of Illegal Subsidies in China

Although China joined the WTO in 2001, illegal subsidies continue to exist in China even though China's Accession Protocol requires China to discontinue the use of such subsidies.⁶⁰ For example, it is believed that China budgeted RMB 1.6 billion (over \$193 million USD)⁶¹ in 2004 for subsi-

⁵⁵ GREEN, *supra* note 49, at 2.

⁵⁶ China's entry to the WTO hinged on it undertaking economic reforms. *See, e.g.*, China's Accession Protocol, *supra* note 11, §§ 3, 4, 6 (pertaining to non-discrimination of enterprises, elimination or conformance of special trade agreements, and alignment of state owned enterprises with WTO regulations).

⁵⁷ GREEN, *supra* note 49, at 2.

⁵⁸ U.S.-CHINA ECON. & SEC. REVIEW COMM'N, 2005 REPORT TO CONGRESS 38-39 (2005) [hereinafter 2005 REPORT TO CONGRESS], *available at* http://www.uscc.gov/annual_report/2005/05annual_report_contents.htm (discussing the difficulties that exist in identifying illegal Chinese subsidies).

⁵⁹ Meszaros, *supra* note 34, at 473.

⁶⁰ *See* China's Accession Protocol, *supra* note 11, § 10 (providing that China must discontinue any subsidies that fall under the category of illegal per se). *See also* Keith Bradsher, *Juggernaut in Exports is Withering in China*, N.Y. TIMES, Jan. 1, 2009, at B1 (providing that the U.S. accused China of providing "illegal subsidies to exporters in a long list of industries as part of a program of trying to build recognizable export brands.").

⁶¹ "RMB" denotes renminbi, which is China's currency. This conversion was calculated by the author by taking the average historical conversion rate between January 1, 2001 and

dy programs that appear to be illegal.⁶² Further, China has recently been the exporting country most frequently targeted by trade remedy investigations, which underscores how illegal Chinese subsidies continue to occur.⁶³

The lack of transparency in China's economy renders it difficult to identify illegal subsidies.⁶⁴ Nonetheless, investigators have identified evidence of potentially illegal subsidies.⁶⁵ For example, a 2007 independent report claims that Chinese steel producers received over \$52 billion USD in subsidies over the past fifteen years.⁶⁶ This report claims that its findings are conservative estimates and that the actual amount of subsidization is "*undoubtedly* many times larger."⁶⁷

IV. THE EVOLUTION OF THE SURROGATE APPROACH IN CVD AND ANTI-DUMPING PROCEEDINGS

Although Members should be able to use the surrogate approach to launch CVDs against China if China illegally subsidizes its NME enterprises,⁶⁸ in practice Members are uncertain about their ability to launch CVDs because of faults in the relevant WTO CVD law. Analyzing the surrogate approach's evolving usage over the past six decades shows that there was virtually no WTO legal support for Members to use the surrogate approach

December 31, 2001. FXHistory: Historical Currency Exchange Rates, <http://www.oanda.com/convert/fxhistory> (last visited Mar. 4, 2010).

⁶² See ALAN H. PRICE ET AL., MONEY FOR METAL: A DETAILED EXAMINATION OF CHINESE GOVERNMENT SUBSIDIES TO ITS STEEL INDUSTRY 27–28 (July 2007) (prepared by Wiley Rein LLP) [hereinafter MONEY FOR METAL], available at http://www.steel.org/AM/Template.cfm?Section=China_Focus&CONTENTID=20996&TEMPLATE=/CM/ContentDisplay.cfm (citing World Trade Org., *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement*, G/SCM/N/123/CHN, at 35–37 (Apr. 13, 2006)).

⁶³ See, e.g., CHAD P. BOWN, THE PATTERN OF ANTIDUMPING AND OTHER TYPES OF CONTINGENT PROTECTION, PREM NOTES No. 144, at 4 (World Bank, Oct. 2009), available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/EXTPREMNET/0,,contentMDK:22357994~pagePK:64159605~piPK:64157667~theSitePK:489961,00.html>; CHAD P. BOWN, PROTECTIONISM CONTINUES ITS CLIMB: SPIKE IN "SAFEGUARD" USE IS MAJOR CONTRIBUTOR TO 12.1% INCREASE IN NEW INDUSTRY DEMANDS FOR IMPORT RESTRICTIONS DURING SECOND QUARTER OF 2009, at 4 (Global Antidumping Database monitoring update, July 23, 2009), available at http://people.brandeis.edu/~cbown/global_ad/monitoring/2009-07-23-Bown-GAD-Monitoring.pdf.

⁶⁴ See 2005 REPORT TO CONGRESS, *supra* note 58.

⁶⁵ See generally *WTO Investigates Allegations of Illegal China Subsidies*, USA TODAY, Aug. 31, 2007, http://www.usatoday.com/money/world/2007-08-31-wto-china_N.htm.

⁶⁶ See MONEY FOR METAL, *supra* note 62, at 3 n.4.

⁶⁷ *Id.* at iii (emphasis added).

⁶⁸ China's Accession Protocol grants Members the right to launch CVDs against China for illegally subsidizing NME enterprises, but it does not adequately explain how Members may calculate such CVDs. China's Accession Protocol, *supra* note 11, § 15(b). See also *infra* Part V.B.

when launching CVDs against NMEs until China's WTO accession in 2001.⁶⁹ Therefore, Members can only rely on the twenty-eight ambiguous words in China's Accession Protocol⁷⁰ for guidance about how to use the surrogate approach when launching CVDs against NME China. Beyond these twenty-eight words, WTO CVD law is silent. The following discussion emphasizes that this ambiguity and surrounding silence makes it very bold for the U.S. to presume that it can swiftly launch NME-targeted CVDs against China under the current WTO law.

A. *The GATT 1947's Faulty Surrogate Approach Framework*

The General Agreement on Tariffs and Trade (GATT 1947) provided its signatories with the rules for international trade from 1948 until 1994.⁷¹ Importantly, it set the fundamental groundwork for the surrogate approach's international acceptance. Although the GATT 1947 did not focus on the trade impact of subsidies, Article VI pertained to anti-dumping duties and CVDs.⁷² Article VI was groundbreaking because, *inter alia*, it authorized the GATT 1947 signatories to use the surrogate approach in anti-dumping proceedings.⁷³ Yet the GATT 1947 (1) did not describe how signatories should treat NMEs; and (2) did not authorize the use of the surrogate approach in CVD proceedings.

To put the shortcomings of the GATT 1947 into perspective, imagine that the introductory hypothetical took place in 1948. If Joe's competitor sells Chinese widgets in the U.S. at a price below the Chinese FMV, dumping occurs.⁷⁴ This dumping is actionable not on the grounds of illegal

⁶⁹ The six decades span from approximately 1947 until 2007. *See* General Agreement on Tariffs and Trade, Oct. 20, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

⁷⁰ *See* China's Accession Protocol, *supra* note 11, § 15(b) ("In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.").

⁷¹ The GATT Years: From Havana to Marrakesh, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Mar. 4, 2010).

⁷² GATT 1947, *supra* note 69, art. VI. *See also* WORLD TRADE ORG., WORLD TRADE REPORT 2006: EXPLORING THE LINK BETWEEN SUBSIDIES, TRADE AND THE WTO 47 (2006) [hereinafter WORLD TRADE REPORT 2006], available at http://www.wto.int/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf. Article XVI of the GATT 1947 generally addresses the use of subsidies, but, except for export subsidies, Article XVI only provides that signatories must provide notice of subsidies and negotiate for the possibility of limiting the subsidization. *See* GATT 1947, *supra* note 69, art. XVI. In the future, signatories of the GATT 1947 would re-address the issue of subsidies at the Tokyo Rounds due to the distorting effects subsidies have on international trade. *See* WORLD TRADE REPORT 2006, *supra*.

⁷³ GATT 1947, *supra* note 69, arts. VI(1)(b)(i–ii) (If there is no domestic price available, then, per Article VI, the investigating country may use the price charged by an exporter in another country or an estimate based on the exporter's estimated cost plus a "reasonable" profit margin).

⁷⁴ *See supra* notes 20–22 and accompanying text.

subsidization, but on the grounds that the American FMV is less than the Chinese FMV. The U.S. thus has legal authority to combat the illegal subsidies via an anti-dumping proceeding.⁷⁵ However, the U.S.' anti-dumping duty must not exceed the amount of the margin of dumping.⁷⁶ The margin of dumping is the difference between the FMV of the Chinese widgets in China and the price of those widgets in the U.S.⁷⁷ But if the Chinese FMV does not exist, then how can the U.S. calculate its anti-dumping duties?

This uncertainty about how to treat NMEs was a major weakness in the GATT 1947. Bizarrely, the guidelines for using the surrogate approach in Article VI seemed to apply only when the country under investigation was a market economy, even though centrally-planned economies such as China, Cuba, and Czechoslovakia signed the GATT 1947.⁷⁸ Article VI recognizes its own weakness in an interpretive note that rehearses how NMEs cannot set FMVs.⁷⁹ This interpretive note provides that calculating the dumping margin of imports originating from NMEs causes "special difficulties."⁸⁰ The GATT 1947's admission of these "special difficulties" suggests that the GATT 1947 intended to allow signatories to use its surrogate approach framework only for dumping investigations involving market economies, since the unique character of NMEs presented "special" problems.

The extent that signatories of the GATT 1947 could use the surrogate approach in anti-dumping actions against NMEs was therefore unclear. Alternatively stated, the GATT 1947 was unclear as to whether the investigating country needed to use a Chinese surrogate, a foreign surrogate, or a hypothetical surrogate. One commentator notes how the GATT 1947's drafters approached the topic of using the surrogate approach in anti-dumping actions with hesitancy.⁸¹ In the case of calculating price comparability vis-à-vis NMEs, Article VI's interpretive note merely states that "importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."⁸² In order to circumvent the lack of a FMV in a NME, Ar-

⁷⁵ *Id.* See also discussion *supra* Part II.B (discussing how investigating countries can use dumping law to combat illegal subsidies).

⁷⁶ GATT 1947, *supra* note 69, art. VI(2).

⁷⁷ See *id.* art. VI(1).

⁷⁸ *Id.* p.mbl.; Robert Franklin Hoyt, Comment, *Implementation and Policy: Problems in the Application of Countervailing Duty Laws to Nonmarket Economy Countries*, 136 U. PA. L. REV. 1647, 1654 n.36 (1988).

⁷⁹ GATT 1947, *supra* note 69, art. VI ad n.2 (1955); CUNNINGHAM, *supra* note 25, at 161–62.

⁸⁰ GATT 1947, *supra* note 69, art. VI ad n.2 (1955); CUNNINGHAM, *supra* note 25, at 161–62.

⁸¹ See CUNNINGHAM, *supra* note 25, at 162.

⁸² GATT 1947, *supra* note 69, art. VI ad n.2 (1955).

ticle VI provides that GATT 1947 signatories would have “due allowance” in calculating the dumping margin.⁸³ Despite the fact that an investigating country’s interpretation of “due allowance” could have affected millions of dollars of international trade, the GATT 1947 contains no definition of “due allowance” and no other language about how to impose a trade remedy against a NME.

Thus, although the surrogate approach was legal when launching anti-dumping duties against NMEs, how signatories could use the surrogate approach in this context was left open-ended under the GATT 1947. Furthermore—and perhaps most importantly—the ambiguous guidelines pertained only to anti-dumping measures; the signatories had absolutely no guidance about how to launch CVDs against NMEs. Referring back to the introductory hypothetical, the GATT 1947 was indecipherable about how the U.S. could use the surrogate approach to launch CVDs against Joe’s competitor.

B. Fixing the Faults in the GATT 1947: The 1979 Tokyo Round Subsidies Code

The 1979 Tokyo Round Subsidies Code (Subsidies Code) provided the next step in creating a legal framework to combat illegal subsidies.⁸⁴ Using the dumping-specific provisions of Article VI of the GATT 1947 as a foundation, the Subsidies Code partially filled in the holes of existing GATT CVD law.⁸⁵ Not only did the Subsidies Code authorize the use of the surrogate approach against NMEs in the context of CVD law, but it also provided specific language to guide signatories in using the surrogate approach when launching CVDs against NMEs.⁸⁶

Importantly, the Subsidies Code collapsed anti-dumping and countervailing measures into a single test for determining the value of NME exports.⁸⁷ Unlike the GATT 1947, the Subsidies Code did not bifurcate how signatories could use the surrogate approach in CVD and anti-dumping proceedings. The Subsidies Code even allowed signatories to extrapolate further in the event that the surrogate approach did not yield satisfactory results.⁸⁸ For example, to suit their needs, signatories could construct proxy

⁸³ *Id.* art. VI(1).

⁸⁴ WORLD TRADE REPORT 2006, *supra* note 72, at 190.

⁸⁵ CUNNINGHAM, *supra* note 25, at 163.

⁸⁶ *See* Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade art. 15(3), 31 U.S.T. 513 (Apr. 12, 1979) [hereinafter Subsidies Code].

⁸⁷ CUNNINGHAM, *supra* note 25, at 163.

⁸⁸ Subsidies Code, *supra* note 86, art. 15(3).

figures or modify the import price.⁸⁹ Recall the introductory hypothetical; if the hypothetical took place when the Subsidies Code was in force, then the U.S. could swiftly launch CVDs against China for illegally subsidizing Joe's Chinese competitor by simply plugging in a hypothetical surrogate FMV. This freedom did not exist under the GATT 1947 because the GATT 1947 did not discuss how signatories could use the surrogate approach to launch CVDs against NMEs.⁹⁰

The Subsidies Code listed two qualifications for using the surrogate approach against NMEs in the context of CVDs. First, signatories of the Subsidies Code could use the surrogate approach when calculating CVDs only to the extent that the prices and costs in the surrogate country represented the NME's level of trade.⁹¹ Second, the time frame of the surrogate country's operations needed to coincide with the operations of the subsidized NME enterprise.⁹²

In comparison to the ambiguous language of the GATT 1947, these two qualifications made the Subsidies Code much clearer than the GATT 1947 in its description as to how signatories could use the surrogate approach when launching CVDs against NME enterprises. However, there is one major problem with the Subsidies Code: it is outmoded. The GATT 1994 and the SCM Agreement—two subsequent agreements that form the basis of WTO CVD law—superseded the Subsidies Code.⁹³ Consequently, WTO trade remedy law prohibits the helpful Subsidies Code from continuing to carry legal authority.

⁸⁹ *Id.* art. 15(2), (3).

⁹⁰ See discussion *supra* Part IV.A (discussing how the GATT 1947 authorized the use of the surrogate approach in anti-dumping proceedings, but noting that this approval did not extend to CVDs).

⁹¹ Subsidies Code, *supra* note 86, art. 15(4).

⁹² *Id.*

⁹³ In *Brazil—Desiccated Coconut*, the Panel held that since the Subsidies Code is an agreement amongst its signatories as to the interpretation of Article VI of GATT 1947, the Subsidies Code carries legal weight only with regard to interpreting the GATT 1947, and not the GATT 1994, upon which WTO CVD law is based. See Panel Report, *Brazil—Measures Affecting Desiccated Coconut*, ¶¶ 255–56, WT/DS22/R (Oct. 17, 1996). Even if the disputing parties were signatories to the Subsidies Code, Article II: 4 of the WTO Agreement provides that the GATT 1994 is “legally distinct” from the GATT 1947. *Id.* ¶ 255. To hold otherwise would be to bind WTO Members who were not signatories to the Subsidies Code. See *id.* ¶ 242 (providing that “[u]nlike the pre-WTO regime, where contracting parties to GATT 1947 could elect whether or not to adhere to the Tokyo Round Subsidies Code, such option has been removed in the present regime.”).

C. *CVD Law Under the GATT 1994: The Return of the GATT 1947's Faulty Surrogate Approach Framework*

In 1994, the GATT 1994 replaced the GATT 1947 even though most of the GATT 1994 mirrored the GATT 1947 word for word.⁹⁴ Additionally, the SCM Agreement was created to constrain the use of trade distortive subsidies and increase the predictability of applicable rules.⁹⁵ Both the GATT 1994 and the SCM Agreement form the basis of WTO CVD law.⁹⁶ However, these two agreements are unclear regarding how Members may use the surrogate approach in the context of WTO CVD law. The lack of clarity about how Members may use the surrogate approach in the GATT 1994 and the SCM Agreement presents three challenges that prohibit Members from swiftly launching CVDs against NMEs.

First, the aforementioned ambiguity in Article VI of the GATT 1947 unfortunately passed unchanged into the GATT 1994.⁹⁷ Article VI of the GATT 1947 had a major fault in that it did not address whether the surrogate approach applied to CVD proceedings brought against NMEs.⁹⁸ With respect to CVD law, Article VI of the GATT 1994 is identical to its counterpart provision in the GATT 1947.⁹⁹ Thus, the faults of the past continue into the present.

Second, the faults of Article VI of the GATT 1947 also passed into the SCM Agreement. Per Article 10 of the SCM Agreement, a Member must launch a CVD according to the provisions of Article VI of the GATT 1994.¹⁰⁰ Since Article VI of the GATT 1994 and Article VI of the GATT 1947 are mirror images, the SCM Agreement inherits the GATT 1947's ambiguous language.¹⁰¹

Third, not only did the creation of the GATT 1994 and SCM Agreement fail to clarify the ambiguity in the GATT 1947, but the two

⁹⁴ Understanding the WTO—The Uruguay Round, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Mar. 4, 2010).

⁹⁵ WORLD TRADE REPORT 2006, *supra* note 72, at 191.

⁹⁶ See Marrakesh Agreement Establishing the World Trade Organization art. II(2), Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

⁹⁷ See *supra* Part IV.A (discussing the ambiguity in Article VI of the GATT 1947). Article VI of the GATT 1994 is a mirror image of Article VI of the GATT 1947. See also Appellate Body Report, Brazil—Measures Affecting Desiccated Coconut, at 4, WT/DS22/AB/R (Feb. 21, 1997).

⁹⁸ See *supra* Part IV.A.

⁹⁹ *Id.*

¹⁰⁰ SCM Agreement, *supra* note 1, art. 10.

¹⁰¹ See Panel Report, Brazil—Measures Affecting Desiccated Coconut, *supra* note 93, ¶ 255 (explaining why the Tokyo Subsidies Code, which clarified the ambiguity in the GATT 1947 about how signatories could launch CVDs against NMEs, cannot be used to interpret the ambiguities in the GATT 1994).

agreements arguably increased the ambiguity by superseding the valuable clarifications set forth in the Subsidies Code.¹⁰² Therefore, the GATT 1994 and the SCM Agreement superseded helpful refinements that took years to develop.

Due to these three problems, the surrogate approach seemed to only apply to dumping law at the time of the WTO's creation. Consequently, the surrogate approach had no clear legal basis for use in CVD proceedings when the WTO formed in 1995.¹⁰³

D. The Surrogate Approach's Lack of Applicability to WTO CVD Law at the Time of China's Accession to the WTO

The problems highlighted in the last section—the carrying over of ambiguity from the GATT 1947 into the GATT 1994 and the SCM Agreement, the outmoding of the Subsidies Code, and the apparent lack of a legal basis for the surrogate approach's use in WTO CVD law—show that WTO CVD law did not provide a clear picture as to the surrogate approach's parameters at the time of China's WTO accession in 2001. Consequently, one would expect that China's WTO Accession Protocol would clarify Members' rights to use the surrogate approach when launching CVDs against China for illegally subsidizing NME enterprises. Section 15(b) of the China's Accession Protocol attempts to provide this clarification. However, despite almost fifteen years of negotiations leading to China's accession,¹⁰⁴ ambiguity still riddles section 15(b) and renders it unclear.

V. CHINA'S WTO ACCESSION PROTOCOL: ANALYZING THE AMBIGUITY IN SECTION 15 AND PRESCRIBING SOLUTIONS

Recall the introductory hypothetical where Joe seeks recourse against illegal Chinese subsidies. If the U.S. attempts to launch CVDs against China, it will need to use the surrogate approach to find a FMV for the Chinese widgets.¹⁰⁵ Yet in doing so the U.S. must fulfill its WTO obligations. When analyzing the WTO CVD law to make sure if its selected surrogate is legal, the U.S. will find that section 15(b) of China's Accession Protocol—which pertains to the use of the surrogate approach in the context

¹⁰² *Id.* (providing that the GATT 1994 and the SCM Agreement superseded the Subsidies Code).

¹⁰³ See WTO Agreement, *supra* note 96, Annex 1A (providing that the GATT 1994, which is essentially a mirror image of the GATT 1947, passes into WTO law).

¹⁰⁴ Press Release, World Trade Org., WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001) [hereinafter China's Entry], *available at* http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

¹⁰⁵ See discussion *supra* Part II.C (describing the mechanics of WTO CVD law and the surrogate approach's role in a CVD proceeding).

of CVDs that target Chinese NME enterprises—has several blatant ambiguities.¹⁰⁶ Thus, the U.S. must address these ambiguities in order to clarify how it can use the surrogate approach when launching CVDs.¹⁰⁷ In doing so, the U.S. will find that several problems—namely, the inconsistent temporal limitations between section 15(b) and section 15(d) and the unconditional application of section 15(b)—emphasize that section 15 needs revision. The following discussion stresses that if section 15(b) is not revised, then the U.S. will not be able to swiftly launch CVDs against China for illegally subsidizing NME enterprises due to the threat of WTO litigation.

Luckily, a revision of section 15(b) can occur. A revision is plausible because China also needs a revision of section 15(b) in order to protect itself from unfairly harsh CVDs. Although China could seize upon the ambiguity to enjoin some CVDs, it might not be able to enjoin all CVDs launched against it. The following discussion explains that if China fails to enjoin a CVD, then the ambiguities in section 15(b) give the launching country a “blank check” to deploy severely punitive CVDs against China for as long as the launching country deems necessary. To avoid this danger, China would be wise to agree to this Note’s suggested U.S.-led renegotiation.

A. *Background on China’s Accession*

China was an original signatory to the GATT 1947.¹⁰⁸ Although China seemed to withdraw from the GATT 1947, it sought to resume its status as a contracting party in 1986.¹⁰⁹ When it applied for WTO membership, China claimed that it was implementing economic reforms to enable its economy to fit the market-based framework of the WTO.¹¹⁰

¹⁰⁶ See China’s Accession Protocol, *supra* note 11, § 15(b). Section 15(b) reads:

In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

Id.

¹⁰⁷ This Note focuses on the ambiguities in the final sentence of section 15(b): “[W]here practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.” *Id.*

¹⁰⁸ China’s Entry, *supra* note 104; GATT 1947, *supra* note 69, pmbl.

¹⁰⁹ Bhushan Bahree, *China Fails in Bid to Rejoin GATT by Own Deadline*, WALL ST. J., Dec. 20, 1994, at A10.

¹¹⁰ China’s Entry, *supra* note 104.

However, China's promises of economic reform did not convince WTO Members that they should treat China like other market-economies. China's unique economy stood in contrast to the economies of other Members, and a Working Party composed of interested Members sought to integrate China's unique economy into the WTO.¹¹¹ This Working Party used a pragmatic approach in determining how to incorporate China into the WTO due to China's significant size, rapid growth, and transitional economy.¹¹²

A substantial part of China's accession consisted of negotiations between China and the Working Party.¹¹³ During these negotiations, Members of the Working Party bargained bilaterally with China in order to influence changes in its trading regime.¹¹⁴ The negotiations took place behind closed doors and their minutes are unavailable.¹¹⁵

Since the records of these negotiations are unavailable, interpreting WTO documents pertaining to China's WTO accession—such as China's Accession Protocol—is limited. Apart from writing China's Accession Protocol, the Working Party provided a Working Report that elaborated upon its deliberations.¹¹⁶ Beyond the Working Report, no authority exists to clarify the Protocol's ambiguities.

B. *Section 15(b) of China's Accession Protocol*

Section 15(b) of China's Accession Protocol authorizes the use of the surrogate approach when launching CVDs against China for illegally subsidizing NME enterprises. However, considering the impact that section 15(b) could have on international trade, its language is haphazardly vague.¹¹⁷ Relative to its significance, the language of section 15(b) needs further tailoring to provide concrete guidance as to how Members may use the surrogate approach when launching CVDs against China.

The following discussion highlights why China and the other Members should agree to a renegotiation of section 15(b). Specifically, section

¹¹¹ *Id.*

¹¹² World Trade Organization Working Party on the Accession of China, Report of the Working Party on the Accession of China, ¶ 9, WT/ACC/CHN/49 (Oct. 1, 2001) [hereinafter Working Party Report], available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm.

¹¹³ China's Entry, *supra* note 104.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ In 2007 the U.S. exported \$62,936,900,000 USD to China and imported \$321,442,900,000 USD (a difference of almost 500%). U.S. Census Bureau, Trade in Goods (Imports, Exports and Trade Balance) with China, <http://www.census.gov/foreign-trade/balance/c5700.html#2007> (last visited Mar. 4, 2010). Thus, a tremendous amount of international trade could turn on how Members interpret and apply section 15(b).

15(b) has several problems that highlight the need for its renegotiation. Remedying these problems will better serve the interests of China and other Members, such as the U.S. The underlying theme linking each of these problems is that there are inconsistencies in section 15(b) that clash with the surrounding circumstances of China's Accession Protocol. These inconsistencies make it unclear as to whether the ambiguity in section 15(b) permits Members wide latitude in selecting surrogates and, consequently, wide latitude in launching CVDs against China for illegally subsidizing NME enterprises.

Of course, some might argue that Members should apply China's Accession Protocol as written to negate these problems. After all, China's Accession Protocol was negotiated at arm's length,¹¹⁸ so perhaps the plain text represents the desired outcome of the parties. However, relying on the plain text of China's Accession Protocol discounts how difficult it would be for the WTO Dispute Settlement Body¹¹⁹ to apply section 15(b)'s glaring ambiguities. Furthermore, given the fact that the arm's length negotiations occurred behind closed doors, no interpretive documents exist besides the Working Party's Report for resolving section 15(b)'s ambiguities. Since section 15(b) is ambiguous—and the Working Party's Report fails to explain the following problems—Members cannot swiftly launch CVDs against China for illegally subsidizing NME enterprises due to the WTO litigation that would almost certainly ensue. Alternatively stated, simply applying section 15(b) of China's Accession Protocol as written will be very difficult due to the ambiguity which, as the following sub-sections discuss, is a double-edged sword for both China and the U.S.

1. Why China should agree to a renegotiation of section 15(b) of its Accession Protocol
 - a. Inconsistent temporal limitations between section 15(a) and section 15(b) make China indefinitely vulnerable to severe CVDs

The first reason why China should agree to a renegotiation of section 15(b) of its Accession Protocol is that the use of the surrogate approach when launching anti-dumping duties against China has a temporal limitation,¹²⁰ but the use of the surrogate approach when launching CVDs does not.¹²¹ Whereas other WTO accessions depend on the readiness of the appli-

¹¹⁸ See discussion *supra* Part V.A (discussing how Members bargained bilaterally with China during accession negotiations).

¹¹⁹ The WTO Dispute Settlement Body settles disputes between Members and is essentially the WTO's court system. See Dispute Settlement, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Mar. 4, 2010).

¹²⁰ See China's Accession Protocol, *supra* note 11, § 15(d).

¹²¹ *Id.*

cant country to undertake specific economic reforms,¹²² China's Accession Protocol has a specific cut-off date—fifteen years from its accession¹²³—beyond which Members must refrain from using a foreign surrogate in anti-dumping proceedings.¹²⁴ Thus, even if the U.S. continues to view China as a NME after 2016, it must limit the way it uses the surrogate approach when launching anti-dumping duties against China per section 15(d).¹²⁵ Such a provision makes sense considering that the purpose of the Chinese Accession Protocol was to highlight an approach in “determining China's need for recourse to transitional periods.”¹²⁶

Due to its lack of a temporal limitation, section 15(b) is an unusual outlier of China's Accession Protocol. The lack of a temporal limitation in CVD proceedings contrasts sharply with the fifteen year limit on anti-dumping proceedings highlighted in section 15(d).¹²⁷ It is unclear why China would indefinitely grant Members latitude in using the surrogate approach against itself in CVD proceedings but not in anti-dumping proceedings.¹²⁸ One commentator suggests that the inconsistent temporal limitation between sections 15(b) and 15(a) “defies logic.”¹²⁹ Indeed, the lack of a temporal limitation on CVD proceedings seems to go against the grain of China's Accession Protocol, i.e., it seems erroneous for a transitional agreement to contain permanent provisions.¹³⁰

- b. Inconsistency between section 15(b) and the intent of China's Accession Protocol means that China cannot protect itself from arbitrary surrogates

The second reason why China should agree to a renegotiation of section 15(b) stems from the fact that the Working Party intended China's Accession Protocol to provide China with favorable treatment in certain areas.¹³¹ In its Report, the Working Party recognized China's insistence on

¹²² China's Entry, *supra* note 104.

¹²³ China's Accession Protocol, *supra* note 11, § 15(d).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Working Party Report, *supra* note 112, ¶ 9.

¹²⁷ *See* Qin, *supra* note 14, at 904.

¹²⁸ This latitude may set China up for unfair treatment by other Members. *See* CUNNINGHAM, *supra* note 25, at 164–65 (discussing how latitude in the surrogate selection processes allows the investigating country to reach any result it chooses).

¹²⁹ *See* Qin, *supra* note 14, at 904.

¹³⁰ *See id.* (providing that the presence of temporal provisions reflects “an understanding that discriminatory treatment of Chinese exports can only be justified on a transitional basis.”).

¹³¹ Working Party Report, *supra* note 112, ¶¶ 8–9.

being classified as a developing country.¹³² The purpose of China's demand was to seek the favorable treatment given to developing country Members.¹³³ The Working Party, which addressed concern about the significant size, rapid growth, and transitional nature of the Chinese economy, compromised and declared that the WTO would provide favorable treatment, but only on a systematic basis that carefully accounted for China's transitioning economy.¹³⁴ These exceptions constitute the body of China's Accession Protocol.¹³⁵

Section 15(a) of China's Accession Protocol, which pertains to how Members may use the surrogate approach in anti-dumping proceedings against China, exemplifies the Working Party's compromise. Section 15(a) allows Members to use a foreign surrogate when launching anti-dumping duties targeted at Chinese NME enterprises, but only to the extent that China cannot demonstrate that market-economy conditions prevail in a Chinese industry producing a "like product."¹³⁶

To illustrate this provision, imagine that the U.S. launches anti-dumping duties against China to punish Joe's NME competitor. Prior to 2016, the U.S. has less latitude in using the surrogate approach to launch anti-dumping duties against NME China than when launching CVDs.¹³⁷

¹³² *Id.* ¶ 8.

¹³³ *Id.* See also WTO Agreement, *supra* note 96, pmb. (recognizing that there "is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.").

¹³⁴ Working Party Report, *supra* note 112, ¶ 9.

¹³⁵ See China's Accession Protocol, *supra* note 11, § 1.3. Section 1.3 reads:

Except as otherwise provided for in this Protocol, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force.

Id. (emphasis added).

¹³⁶ See *id.* § 15(a)(i–ii). Despite its widespread usage in WTO agreements, there is no iron-clad definition of "like product." However, the meaning of the term "like product" has been substantially litigated at the WTO. For example, the appellate body in *EC—Asbestos* held that the term "like product" is, "fundamentally, a determination about the nature and extent of a competitive relationship between and among products." Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 99, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC—Asbestos*]. Additionally, the SCM Agreement defines a "like product" as "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." SCM Agreement, *supra* note 1, art. 15(1) n.46.

¹³⁷ Compare China's Accession Protocol, *supra* note 11, § 15(a) (setting forth rules for using the surrogate approach in anti-dumping proceedings), with *id.* § 15(b) (lacking similar rules for using the surrogate approach when launching CVDs).

This is because China has the right to point out a “like product” Chinese surrogate, should one exist.¹³⁸ Instead of being a Chinese widget from a NME enterprise, this “like product” might be, for example, a Chinese gadget from a market-oriented Chinese industry. The Chinese gadget is not a widget, but it is in a competitive relationship with the Chinese widget and therefore its FMV is an acceptable surrogate.¹³⁹ If a “like product” exists, the U.S. must use its FMV as a surrogate in its anti-dumping proceeding.¹⁴⁰ Also, section 15(a) gives China the chance to protest if the U.S. does not use a Chinese gadget’s FMV.¹⁴¹ For example, if the DOC uses the FMV of an Indian gadget instead of a Chinese one, China could protest to the WTO.¹⁴²

Because of section 15(a), China does not need to subject itself to arbitrary foreign surrogates in anti-dumping proceedings if it shows that another suitable surrogate exists within China. This protection exemplifies the careful compromise that the Working Party intended to advance because it gives China power to rebut the assumption that an investigating country cannot compare China’s NME enterprises with its market-economy enterprises. However, the way that China’s Accession Protocol treats CVDs and anti-dumping duties is asymmetrical. Compared to section 15(a), section 15(b) contains no similar guidelines on using the surrogate approach in the context of CVDs. Consequently, WTO CVD law does not allow China to rebut the assumption that its NME enterprises cannot be compared to other Chinese market-economy enterprises. There is nothing inherent to CVDs or anti-dumping proceedings to justify this asymmetrical treatment.

Furthermore, section 15(b) fails to advance the intent of China’s Accession Protocol because section 15(b) merely implanted general WTO CVD law and did not provide favorable treatment on a systematic basis that carefully accounts for China’s transitioning economy.¹⁴³ The Working Party Report does not explain why China’s Accession Protocol reiterated this default WTO CVD law in a space reserved for China-specific provisions.

- c. Section 15(b) applies unconditionally, regardless of whether China remains classified as a NME

China should also agree to a renegotiation of section 15(b) of its Accession Protocol because the ambiguities in Section 15(b)’s authorized

¹³⁸ *Id.* § 15(a)(i).

¹³⁹ *See, e.g.*, EC—Asbestos, *supra* note 136, ¶ 99.

¹⁴⁰ *See* China’s Accession Protocol, *supra* note 11, § 15(a)(i–ii).

¹⁴¹ *Id.* § 15(a)(ii) (granting China the right to show that market conditions prevail in the industry of a particular NME enterprise).

¹⁴² *Id.*

¹⁴³ *See* Working Party Report, *supra* note 112, ¶ 9. *See also* discussion *supra* Part IV.D (discussing how WTO CVD law inherited the ambiguous language of the GATT 1947).

use of the surrogate approach in CVD proceedings apply regardless of China's status as a NME or market-economy.¹⁴⁴ Upon accession to the WTO, China committed to instituting economic reforms.¹⁴⁵ Should these reforms occur, one would expect that the default rules of WTO CVD law would come into force and the transitory terms of China's Accession Protocol would no longer remain binding. However, section 15(b) does not state that its terms will cease to remain binding after China reforms its economy.

Consequently, China remains bound to section 15(b) no matter how transparent and market-oriented its economy becomes. In theory, China's economy could be wholly market-oriented, but section 15(b) would still apply.¹⁴⁶ This would put China at a severe disadvantage in the WTO because there would be no check against other Members from using section 15(b) to leverage unfair bargaining power. Allowing Members to abuse the power granted in section 15(b) could therefore create a loophole that clashes with the WTO's overarching goals.¹⁴⁷

2. Why other Members such as the U.S. should agree to a renegotiation of section 15(b) of China's Accession Protocol
 - a. Section 15(b) adds no useful clarification as to how Members can launch CVDs against China for illegally subsidizing NME enterprises

Members must renegotiate section 15(b) because it is unclear how Members may launch CVDs under section 15(b) when combating illegal subsidies provided to Chinese NME enterprises. When selecting a surrogate, section 15(b) allows Members to use foreign surrogates, but only if no Chinese surrogate exists or if adjusting a Chinese surrogate would be impracticable.¹⁴⁸ Yet many questions remain, such as when is it "practical" to ignore domestic figures, even if they are adjusted? What does "practical" even mean? How may Members adjust "prevailing terms" in China? China's Accession Protocol and the Working Party Report are silent on these issues. Considering that differing interpretations of these questions could directly

¹⁴⁴ For additional analysis on the unconditional application of 15(b) to China regardless of the status of China's economy, see Qin, *supra* note 14, at 903–04.

¹⁴⁵ See, e.g., China's Accession Protocol, *supra* note 11, §§ 3, 5, 6.

¹⁴⁶ See Qin, *supra* note 14, at 903–04 ("Technically an importing member may invoke [section 15(b)] in a countervailing action against a Chinese subsidy, say, 50 years from now, irrespective of whether by then China may have long established a mature market economy.").

¹⁴⁷ The WTO's overarching goals are to ensure that trade flows as smoothly, predictably, and as freely as possible. WORLD TRADE ORG., *supra* note 15.

¹⁴⁸ China's Accession Protocol, *supra* note 11, § 15(b).

affect substantial amounts of international trade,¹⁴⁹ Members must revise section 15(b)'s haphazardly vague language to avoid unnecessary and unwanted complications.

- b. Section 15(b) is China-specific and does not incorporate the evolving clarifications of WTO CVD law

The second reason why Members must renegotiate section 15(b) is that section 15(b) wipes the slate clean of helpful guidance in the same way that the GATT 1994 and the SCM Agreement superseded the Subsidies Code. The WTO Appellate Body¹⁵⁰ has expanded on how Members may use the surrogate approach in the context of general WTO CVD law, but this clarification does not apply to China because the Appellate Body's ruling is not China-specific.

For example, in *US—Lumber CVD Final*, the Appellate Body clarified how Members may use the surrogate approach in the context of Article 14(d) of the SCM Agreement.¹⁵¹ Article 14(d) pertains to the provision of goods or services by a government for inaccurate remuneration and, since the government centrally plans a NME, it could in theory apply to NME China.¹⁵² The Appellate Body held that a foreign surrogate may be used in the context of a 14(d) CVD proceeding so long as, *inter alia*, (1) the target government's illegal actions distort overall market prices; and (2) that the foreign surrogate reflects prevailing market conditions in the target country.¹⁵³

However, section 15(b) exempts China from the clarifications set forth in *US—Lumber CVD Final* and other WTO cases because section 15(b) is China-specific.¹⁵⁴

¹⁴⁹ China exported over \$300 billion USD of goods to the U.S. alone in 2008. *See* U.S. Consensus Bureau, Trade with China: 2008, <http://www.census.gov/foreign-trade/balance/c5700.html#2008> (last visited Mar. 4, 2010). *See also* John Pomfret, *Chinese Official: U.S. Would Lose Trade War*, WASH. POST, Mar. 22, 2010, at A6.

¹⁵⁰ Unless decided otherwise by a consensus of the Dispute Settlement Body, the reports of the Appellate Body must be unconditionally accepted by parties to the dispute. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17(14), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1226 (Apr. 15, 1994).

¹⁵¹ *See* Qin, *supra* note 14, at 902–03; Appellate Body Report, United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, ¶ 167, WT/DS257/AB/R (Jan. 19, 2004) [hereinafter *U.S.—Lumber CVD Final*].

¹⁵² *See* SCM Agreement, *supra* note 1, art. 14(d).

¹⁵³ *U.S.—Lumber CVD Final*, *supra* note 151, ¶ 167, *quoted in* Qin, *supra* note 14, at 903.

¹⁵⁴ *See* China's Accession Protocol, *supra* note 11, § 1.3 (“Except as otherwise provided for in this Protocol, those obligations . . . annexed to the WTO Agreement . . . are to be implemented . . .”); *id.* § 15 (explaining the China-specific provisions for “price comparability in determining subsidies and dumping”).

The point is that whereas it is becoming clearer as to how Members may use the surrogate approach in the context of general WTO CVD law, precisely how Members may use the surrogate approach when launching CVDs against China for illegally subsidizing NME enterprises remains unclear. Section 15(b) will forever remain unclear until there is a China-specific ruling by the WTO Dispute Settlement Body or until Members revise the language of China's Accession Protocol.

- c. The intent of China's Accession Protocol was not to resolve the long standing ambiguity as to how Members may use the surrogate approach when launching CVDs against a Member for illegally subsidizing NME enterprises

Members should renegotiate section 15(b) of China's Accession Protocol because in the struggle to incorporate China into the WTO, Members likely made precarious shortcuts. Since general WTO CVD law did not explicitly authorize the use of the surrogate approach in CVD proceedings against NMEs,¹⁵⁵ the applicability of CVDs to NMEs at the time of China's accession was unsettled. It is unlikely that the Working Party intended China's Accession Protocol—a transitional agreement—to clarify the long-existing uncertainty.¹⁵⁶ Additionally, China's Accession Protocol reflects the outcome of arm's length negotiations and is not the outcome of a WTO mandate seeking to resolve the long-standing question as to how Members may use the surrogate approach against NMEs when launching CVDs.

In fact, it may have been in both China's and the negotiating Members' best interests to circumvent this contentious issue during the negotiations leading to China's WTO accession. Given China's status as a champion in international trade,¹⁵⁷ the main interests of the arm's length transactions might have been to create a framework that, while imperfect, worked well enough in the short term for all parties to benefit from China's WTO membership. In essence, the thrust of the negotiations may have been to implement the bare necessities and to worry about refinements later on down the road. Since short-term interests played a role in crafting imperfect terms, section 15(b) provides a weak precedent for giving Members an une-

¹⁵⁵ See discussion *supra* Part IV.D (describing the surrogate approach's legal basis in the context of WTO CVD law at the time of China's accession).

¹⁵⁶ See Working Party Report, *supra* note 112, ¶ 9 (noting that the purpose of China's Accession Protocol was to provide China with recourse akin to the special provisions provided to developing country WTO Members).

¹⁵⁷ See *China's Foreign Trade Reaches 1.5 Trillion USD*, PEOPLE'S DAILY ONLINE (ENGLISH), <http://english.peopledaily.com.cn/90001/90778/6473402.html> (last visited Mar. 4, 2010); *China 'Overtakes Germany as World's Largest Exporter'*, BBC, Jan. 10, 2010, <http://news.bbc.co.uk/2/hi/business/8450434.stm>.

quivocal right to use the surrogate approach as they see fit when launching CVDs against China for illegally subsidizing NME enterprises.

C. *A Short Term Solution to the Ambiguity in Section 15(b)*

Now that almost nine years have passed since China's WTO accession, Members need to renegotiate section 15(b) in order to remedy its six problems.¹⁵⁸ If this does not happen, Members will hinder their ability to take quick unilateral action against illegal Chinese subsidies. Additionally, without a renegotiation China is vulnerable to unfair CVDs. Fortunately, a short-term framework exists for remedying these concerns.

In the short-term, Members should negotiate with China to reconstruct section 15(b) in a manner that mirrors section 15(a).¹⁵⁹ This would essentially collapse anti-dumping proceedings and CVDs into a single test for determining the value of NME exports, much like what was done in the outmoded Subsidies Code.¹⁶⁰ The revision would allow Members to use a foreign surrogate when launching CVDs against China for illegally subsidizing NME enterprises, but only to the extent that no other Chinese "like product" exists.¹⁶¹ Allowing China to partially control the punitive measures brought against it will make China more likely to agree to the terms of the renegotiation and should incentivize China to follow through with its promised economic reforms. Also, revising section 15(b) would protect China in the event that market-economy conditions characterize the Chinese economy, thus increasing the chance of successful negotiations. The following discussion further highlights why revising section 15(b) to resemble section 15(a) would be an ideal short-term solution.

1. Why revising section 15(b) to resemble section 15(a) is in China's best interests

If market-economy conditions prevail in China, section 15(b)—which pertains only to NME China—should no longer apply. Instead, general WTO CVD law—as opposed to China-specific WTO CVD law—

¹⁵⁸ The six problems in China's Accession Protocol are the inconsistent temporal limitations between the anti-dumping and CVD provisions, the inconsistencies between the CVD provisions and the intent of the Protocol, the unconditional application of section 15(b) regardless of whether China remains a NME, the ambiguity on the face of section 15(b), the fact that section 15(b) is China-specific, and the unlikelihood that the drafters of China's Accession Protocol intended to resolve the long standing ambiguity as to the extent that Members can use the surrogate approach against NMEs when launching CVDs. *See discussion supra* Part V.B.

¹⁵⁹ Section 15(a) pertains only to anti-dumping proceedings. *See* China's Accession Protocol, *supra* note 11, § 15(a).

¹⁶⁰ *See* CUNNINGHAM, *supra* note 25, at 163.

¹⁶¹ China's Accession Protocol, *supra* note 11, § 15(a)(ii).

should take force because China would deserve equal protection of the rights given to WTO Members. Thus, the approach used in sections 15(a)(i)¹⁶² and 15(a)(ii)¹⁶³ should be inserted into section 15(b) to ensure that Members do not have unfair latitude to indefinitely treat China as an exception from the norm.

This revision would empower China to stop Members from assigning arbitrary and unfair foreign surrogates that distort their CVDs. To illustrate this proposal, imagine that the U.S. launches CVDs against China for illegally subsidizing Joe's NME competitor. If China can show that market-economy conditions prevail in the Chinese widget industry despite the fact that Joe's competitor is a NME enterprise, then the WTO should, as would occur in anti-dumping proceedings per section 15(a), require the U.S. to use Chinese prices and costs when calculating the price differential.¹⁶⁴ Using Chinese prices and costs as surrogates would stop the U.S. from selecting arbitrary surrogates that miscalculate the CVD and provide Joe with unfairly high protection. Alternatively, if market-economy conditions do not exist in the Chinese widget industry, Joe's competitor could attempt to demonstrate that market-economy conditions characterize the industry of a Chinese "like product," such as the Chinese "gadget" industry.¹⁶⁵ The Chinese gadget's FMV would then be the surrogate. This approach is ideal because the U.S. still punishes China for illegally subsidizing Joe's NME competitor and China is not subject to a poorly conducted course of redress. As written, section 15(b) currently provides none of this guidance.

Renegotiating section 15(b) to mirror the terms of section 15(a)(i) and 15(a)(ii) also gives China an opportunity to defend its interests in a fair

¹⁶² Section 15(a)(i) reads:

If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability.

Id.

¹⁶³ Section 15(a)(ii) reads:

The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

Id. §15(a)(ii).

¹⁶⁴ *See id.* § 15(a)(i).

¹⁶⁵ *Id.* § 15(a)(ii). *See supra* note 136 and accompanying text.

manner, thereby making China more inclined to a renegotiation.¹⁶⁶ In past dumping investigations, foreign surrogates used against China have sometimes vastly misrepresented actual conditions inside China.¹⁶⁷ Enabling China to demand that Members use a domestic surrogate in lieu of an arbitrary foreign surrogate empowers China to affect the CVDs brought against it and, therefore, increases the chances of a successful renegotiation.

2. Why revising section 15(b) to resemble section 15(a) is in the best interests of other Members, such as the U.S.
 - a. Mirroring section 15(a) would help clarify the existing ambiguity in section 15(b) and allow the language of section 15(b) to evolve in tandem with general WTO CVD law

Even though section 15(b) gives Members the right to use the surrogate approach in CVD proceedings, only twenty-eight ambiguous words offer guidance for its use.¹⁶⁸ Adopting the “like product” requirement of section 15(a) for use in the context of section 15(b) helps clarify how Members can use the surrogate approach when launching CVDs against China for illegally subsidizing NME enterprises. Since the WTO uses the “like product” requirement in numerous contexts,¹⁶⁹ a relative wealth of precedent could supplement the twenty-eight words of section 15(b) and improve section 15(b)’s workability.

Although the WTO uses the “like product” requirement in numerous contexts,¹⁷⁰ China and the negotiating Members might still disagree over what a “like product” constitutes. However, Members have litigated the definition of “like product” far more than the question of how they may use the surrogate approach when launching CVDs against NME enterprises.¹⁷¹ Therefore, incorporating the “like product” requirement into section 15(b) will not only eliminate the use of arbitrary foreign surrogates in CVD

¹⁶⁶ See Working Party Report, *supra* note 112, ¶ 151 (discussing how Members would implement section 15(a)(ii) in order to give the Chinese sufficient opportunities to defend their interests in a fair manner).

¹⁶⁷ See *supra* note 41 and accompanying text.

¹⁶⁸ See China’s Accession Protocol, *supra* note 11, § 15(b) (“In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.”).

¹⁶⁹ See generally WON-MOG CHOI, ‘LIKE PRODUCTS’ IN INTERNATIONAL TRADE LAW: TOWARDS A CONSISTENT GATT/WTO JURISPRUDENCE (2003) (discussing how many obligations of international trade hinge upon the question of what constitutes a “like product”).

¹⁷⁰ See *id.*

¹⁷¹ See, e.g., EC—Asbestos, *supra* note 136, ¶ 88 n.58 (providing a list of twenty-four proceedings as of March 2001 in which the term “like product” has been addressed in GATT and WTO dispute settlement proceedings).

proceedings launched against China, but it will also ensure that section 15(b) contains language that is not China-specific and therefore evolves in tandem with general WTO CVD law, thus increasing section 15(b)'s workability.

- b. Using the “like product” test allows Members to circumvent the contentious issue of placing a time limit on section 15(b)

To protect its interests, China will likely urge that section 15(b) should have a time limit similar to the fifteen year time limit of section 15(a). China will seek to negotiate a time limit for section 15(b) because (1) China is a recognized transitioning economy;¹⁷² and (2) China will want protection from countries that refuse to acknowledge its transformation to a market-economy.¹⁷³

China might seek a time limit less than or equivalent to fifteen years given the fact that section 15(a)(ii) expires fifteen years after China's accession.¹⁷⁴ Since fifteen years was an appropriate time limit for Members to use the surrogate approach in proceedings concerning NME enterprises in the context of dumping law, it could also be an appropriate limit to place on section 15(b). Yet Members such as the U.S. may seek a longer time frame. This is because the U.S. publicly acknowledges its skepticism of China's ability to satisfactorily transform its economy in a short period.¹⁷⁵ Also, China's major trading partners such as the U.S. will want to ensure that they have latitude in combating illegal Chinese trade practices long after 2016, which is when the WTO will narrow the use of the surrogate approach in the context of anti-dumping proceedings.¹⁷⁶ Consequently, fifteen years may be too short.

However, a solution for this problem exists. If Members use a market-oriented “like product” industry as a surrogate—which could be done by rewriting section 15(b) to resemble section 15(a)—then the WTO gives China partial control over calculating the CVDs brought against it. Giving China this right enables it to protect itself from arbitrary foreign surrogates that might miscalculate the benefit that the Chinese NME enterprises receive from the illegal subsidization. In turn, this partial control incentivizes

¹⁷² Working Party Report, *supra* note 112, ¶¶ 8, 9.

¹⁷³ See discussion *supra* Part III.A (discussing how the U.S. and the European Union refuse to acknowledge China as a market-economy despite Chinese economic reforms).

¹⁷⁴ See China's Accession Protocol, *supra* note 11, § 15(d).

¹⁷⁵ See 2005 REPORT TO CONGRESS, *supra* note 58, at 1–2 (providing that China remains in violation of commitments it made in order to join the WTO and “while some encouraging changes are occurring in China, it is vital for the United States to recognize that . . . China has . . . different interests, goals, and values than the United States.”).

¹⁷⁶ See China's Accession Protocol, *supra* note 11, § 15(d).

China to continue to reform its economy so that China has multiple “like product” industries to select. Thus, using the “like product” test will make China’s concerns over putting a time limit on section 15(b) of little practical value because the “like product” test protects China’s interests, gives China an impetus to continue its economic reforms, and guides Members about how they may use the surrogate approach when necessary.

D. A Long Term Solution to the Problem of Launching CVDs Against NMEs

In the long term, Members must come to a consensus about (1) whether the surrogate approach should extend to CVDs launched against NMEs in general (and not just against China for illegally subsidizing NME enterprises);¹⁷⁷ and (2) how Members can use the surrogate approach in such a context.¹⁷⁸ Members must address these questions because China is not the only NME Member of the WTO. For example, Vietnam joined the WTO in 2007 amid concerns that its economy was continuing the process of transition towards a full market economy.¹⁷⁹ This transition troubled Members who feared that “special difficulties” might arise when launching CVDs against Vietnam.¹⁸⁰ These “special difficulties” likely refer to the lack of a Vietnamese FMV when the product under an anti-dumping or CVD investigation comes from a Vietnamese NME enterprise. Additionally, in the accessions of Moldova and Georgia, Members noted how the both countries were transitioning from centrally planned to market-oriented economies.¹⁸¹ Thus, the problems discussed in this Note may arise in other contexts.

The terms of the outmoded Subsidies Code could provide guidance for implementing a long term solution. Using the Subsidies Code as a foun-

¹⁷⁷ There is no WTO mandate authorizing the use of the surrogate approach against NMEs in the context of general WTO CVD law. Section 15(b)’s authorization is only China-specific. China’s Accession Protocol, *supra* note 11, § 1.3.

¹⁷⁸ This Note focuses on prescribing a short term solution due to the possibility that Members may not be able to agree upon and implement a long term solution before 2016. However, Members need to devise a long term solution in order to make clear the extent that Members may use the surrogate approach when launching CVDs against NMEs.

¹⁷⁹ See World Trade Organization Working Party on the Accession of Viet Nam, Report of the Working Party on the Accession of Viet Nam, ¶ 254, WT/ACC/VNM/48 (Oct. 27, 2006), available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#vnm.

¹⁸⁰ *Id.*

¹⁸¹ See World Trade Organization Working Party on the Accession of Georgia, Report of the Working Party on the Accession of Georgia, ¶ 5, WT/ACC/GEO/31 (Aug. 31, 1999), available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm; World Trade Organization Working Party on the Accession of Moldova, Report of the Working Party on the Accession of Moldova, ¶ 39, WT/ACC/MOL/37 (Jan. 11, 2001), available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm.

dation, Members could create an agreement mandating that Members can only use a foreign surrogate when launching CVDs against NMEs to the extent that the prices, costs, and time frame of the surrogate country's operations represent those of the NME.¹⁸² Additionally, Members could reserve the right to adjust surrogate figures fairly in the event that a pure comparison is inappropriate.¹⁸³ This would give Members flexibility in choosing surrogates and, if drafted well, would provide Members the unequivocal right to swiftly and fairly punish the full breadth of illegal subsidies given to NME enterprises.

VI. CONCLUSION

Recall the beginning of this Note. Joe runs a struggling American manufacturing firm that cannot keep pace with an illegally subsidized Chinese NME competitor. He knows that his competitor receives illegal subsidies from the Chinese government, but what can he do about it?

If the U.S. uses anti-dumping measures to combat the illegal Chinese subsidies, it will need to use the surrogate approach. But when the WTO narrows the use of the surrogate approach in anti-dumping proceedings in 2016, WTO dumping law will no longer provide the U.S. with latitude in combating illegal Chinese subsidies. Thus, it is strategically unwise for the U.S. to continue to rely on dumping law to combat illegal Chinese subsidies. The strategic benefit of launching CVDs against China for illegally subsidizing NME enterprises is that the WTO's 2016 narrowing of the surrogate approach does not apply to CVDs. Consequently, launching CVDs against Joe's Chinese NME competitor ensures that the U.S. will be able to provide its constituents with broad protection against all illegal Chinese subsidies after 2016.

Relying on CVDs for relief is strategically wise, but the U.S. cannot ignore the holes in WTO CVD law. Only twenty-eight ambiguous words in section 15(b) of China's Accession Protocol guide Members in using the surrogate approach when launching CVDs against China for illegally subsidizing NME enterprises. The U.S. must not overlook this problem, since the ambiguities may allow China to stall trade enforcement.

Therefore, the U.S. must be proactive and lead the renegotiation of section 15(b) of China's Accession Protocol. With the looming WTO-imposed restrictions on anti-dumping proceedings only six years away, the time to act is now. Clarifying and expanding upon the twenty-eight words in

¹⁸² See Subsidies Code, *supra* note 86, art. 15(4). Section 15 only requires that Members *should* adjust prevailing terms inside China before using foreign surrogates. China's Accession Protocol, *supra* note 11, § 15(b). Additionally, the term "should" is further qualified by the phrase "where practicable." *Id.*

¹⁸³ *Cf. id.* § 15(a)(ii).

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China's Accession Protocol will give all Members the ability to punish the full breadth of illegal Chinese subsidies. The renegotiation will succeed because China also needs a reworked agreement to protect itself from unfairly severe CVDs. Joe would applaud this initiative because it gives his policy makers the chance to protect his interests at the WTO, and the WTO would benefit from an improved agreement that preserves its overarching goal: to ensure that trade flows as smoothly, predictably, and freely as possible.¹⁸⁴

¹⁸⁴ WORLD TRADE ORG., *supra* note 15.