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Testing the Limits of Trade Law Rationality: The GPX Case and Subsidies in Non-Market Economies

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Keywords

GPX International Tire Corp. -- Trials, litigation, etc., United States. Court of International Trade, United States. Dept. of Commerce, International trade -- Lawsuits & claims, Antidumping duties -- Law & legislation -- United States, Foreign trade regulation -- United States, Commercial products -- China, Actions & defenses (Law) -- United States

ARTICLE

TESTING THE LIMITS OF TRADE LAW RATIONALITY: THE *GPX* CASE AND SUBSIDIES IN NON-MARKET ECONOMIES

ELLIOT J. FELDMAN & JOHN J. BURKE*

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INTRODUCTION

Chinese merchandise has been the subject of most international trade disputes, all over the world, for several years. All of China's principal trading partners, including the United States, Japan, and the European Union, treat China as a non-market economy¹ (NME), applying special methodologies for determining whether Chinese enterprises are exporting merchandise at less than fair value. However, until 2006 the recognition of China as an NME meant that unfair trade allegations were based on pricing theories for antidumping, never government programs or actions unfairly subsidizing exported merchandise. The general rule was that government subsidies are countervailable only when they distort markets, and NMEs have no markets to distort.

The United States began launching simultaneous antidumping duty (AD) and countervailing duty (CVD) investigations of Chinese merchandise after the November 2006 congressional elections. This change in practice inevitably triggered legal disputes that collectivized under the banner of GPX, an American importer of off-the-road tires (OTR Tires) from China. The U.S. Court of International Trade (CIT) and the U.S. Court of Appeals for the Federal Circuit (CAFC) were asked to decide whether CVD investigations into merchandise from NMEs were in accordance with law and, if they were, whether they could be conducted simultaneously with antidumping investigations. The United States Congress, unhappy with the decisions of the appellate court, swiftly rewrote the law. The constitutionality of the revised statute then was challenged in the same courts.

I. BACKGROUND: SUBSIDIES, TRADE LAW, AND NON-MARKET ECONOMIES

A. *Why GPX?*

This Article is about a single line of cases (identified collectively as GPX) that arose from investigations at the U.S. Department of Commerce (Commerce), were appealed to the CIT, and on to the CAFC. Decisions of those courts led to an act of Congress that was introduced and passed in record time, despite congressional paralysis on virtually all other issues, only to have the new law brought before

1. A non-market economy (NME) is defined as "any foreign country that . . . does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A) (2006).

the same courts on complaints that it is not constitutional. The CIT recently found the new law constitutional, but that decision, at the time of this writing, is not yet final and could be appealed to the CAFC. While United States courts grapple with the new law, the People's Republic of China (PRC) has taken the matter before the World Trade Organization (WTO), requesting an application of international law to the actions in the United States.

The *GPX* cases arise from CVD and AD petitions filed simultaneously in 2006 against OTR Tires from the PRC. The United States treats the PRC as an NME, which means that the United States analyzes allegations of unfair trade in the PRC differently from the way in which it treats almost every other country in the world.² The PRC wants to be treated by the United States as a market economy, and in 2016 the United States will be required to accord it that treatment pursuant to the protocol on the PRC's accession to the WTO in 2001.³

The analysis that the United States currently applies to the PRC as an NME increases the likelihood of finding dumping when investigating allegations of unfair trade, and tends to increase the amount of alleged dumping (the "margins") when dumping is found at all.⁴ However, until 2006, the PRC was exempt from CVD investigations because, as Commerce periodically indicated, what makes a government subsidy countervailable is its market-distorting effects.⁵ Without a market, subsidies cannot distort.

2. The United States also treats the Republic of Vietnam as an NME. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Vietnam's Accession to the World Trade Organization (WTO)* 2 (2006), available at <http://www.usvtc.org/trade/wto/USTRFactSheet-WTOBilateral06.pdf>. The United States does not trade with Cuba or North Korea, but presumably would treat Cuba and North Korea as NMEs if there were any trade.

3. See *Protocol on the Accession of the People's Republic of China*, pt. I.15, WT/L/432 (Nov. 23, 2001), available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002123.pdf> (setting the automatic expiration of the provision that currently allows an NME value calculation fifteen years following China's accession to the WTO).

4. Normal value (NV) represents the fair price of the imported good. It is calculated differently in NMEs and market economies. See Aaron Ansel, Note, *Market Orientalism: Reassessing an Outdated Anti-Dumping Policy Towards The People's Republic of China*, 35 BROOK. J. INT'L L. 883, 891-92 & n.59 (2010) (explaining how the NME valuation process disfavors an exporter like the PRC because of the higher dumping margins, noting that the average China-wide normal value rate was thirteen times greater than the average market economy rates over the same timeframe).

5. See, e.g., Countervailing Duties, 63 Fed. Reg. 65,348, 65,360 (Nov. 25, 1998) (noting the practice at the time was to not apply CVD law to NMEs); see also Ansel, *supra* note 4, at 900 (discussing the pre-2006 practice of not imposing CVD duties on NMEs because subsidies are immeasurable in a government-controlled market). Not all subsidies are countervailable, as the duties are designed to offset their value to the exported merchandise. In addition to non-countervailable "green box" subsidies designated by the WTO (such as for R&D), subsidies are not countervailable unless

The *GPX* cases are about application of CVD law to the PRC.⁶ They are also about simultaneous dumping and subsidy investigations of imports from the PRC and consequent measurement problems.⁷ In these cases, the PRC itself attempted to intervene, which it had previously elected not to do,⁸ reserving its legal actions entirely for the international body of the WTO rather than United States courts.⁹ The Application of Countervailing Duty Provisions to Nonmarket Economy Countries Act,¹⁰ fashioned to overturn judicial decisions of the CIT and CAFC, precipitated a constitutional contest over legislation given retroactive effect and resulted in a new Chinese complaint at the WTO.¹¹

they are specific to an enterprise or industry, or a group of enterprises or industries. For example, governments may pay for roads; when roads are in general use, the cost for their construction and maintenance is not a countervailable subsidy. See Pub. L. No. 112-99, 126 Stat. 265 (2012) (to be codified at 19 U.S.C. §§ 1671, 1677f-1).

6. A helpful background of the *GPX* cases can be found in Gregory Spak et al., *2011 International Trade Law Decisions of the Federal Circuit*, 61 AM. U. L. REV. 1105 (2011). Briefly stated, in *GPX International Tire Corp. v. United States (GPX V)*, 666 F.3d 732 (Fed. Cir. 2011), *superseded by statute*, Pub. L. No. 112-99, 126 Stat. 265 (2012), *as recognized in GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1311 (Fed. Cir. 2012), the Federal Circuit held that U.S. law prohibits the application of CVDs to NMEs. *Id.* at 1125.

7. See *GPX Int'l Tire Corp. v. United States (GPX II)*, 645 F. Supp. 2d 1231, 1240 (Ct. Int'l Trade 2009) (determining that the use of both countervailing and antidumping laws was unreasonable because it results in an overlap in punishment for a single trade violation), *aff'd*, 666 F.3d 732 (Fed. Cir. 2011), *reh'g*, 678 F.3d 1308 (Fed. Cir. 2012); see also Garrett E. Lynam, Note, *Using WTO Countervailing Duty Law to Combat Illegally Subsidized Chinese Enterprises in a Nonmarket-Economy: Deciphering the Writing on the Wall*, 42 CASE W. RES. J. INT'L L. 739, 747-48 (2010) (explaining that the simultaneous imposition of antidumping and countervailing penalties creates the potential for "double counting" of the trade remedies).

8. See Motion to Intervene by the Government of the People's Republic of China at 1, *GPX II*, 645 F. Supp. 2d 1231 (No. 08-00285), ECF No. 155. The PRC's motion was later denied for failing to demonstrate good cause. *GPX Int'l Tire Corp. v. United States*, No. 08-00285, 2009 WL 362136, at *1 (Ct. Int'l Trade Feb. 12, 2009).

9. A critical exception was its intervention in the case of *Coated Free Sheet Paper*. See *Gov't of the People's Republic of China v. United States (Coated Free Sheet Paper)*, 483 F. Supp. 2d 1274 (Ct. Int'l Trade 2007). Here, the PRC intervened to file a motion for a temporary restraining order and a preliminary injunction to halt the investigation, which ultimately was dismissed by the CIT. See *id.* at 1275 (dismissing the PRC's request for a preliminary injunction because the court determined it did not have jurisdiction to hear the PRC's claims). This intervention had an enduring impact on the *GPX* cases that are the subject of this Article.

10. Pub. L. No. 112-99, 126 Stat. 265 (2012) (to be codified at 19 U.S.C. §§ 1671, 1677f-1).

11. Request for Consultations by China, *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/1 (Sept. 20, 2012) [hereinafter China WTO Request for Consultations] (requesting consultations with the United States regarding Public Law 112-99).

B. Trade Remedy Law

The trade remedy laws of the United States, such as the AD and CVD laws, are based on four ideas:

(1) that goods whose production or export is subsidized by a foreign government are not fairly traded when entering the United States and may be subject to “countervailing duties” that would offset the value of the subsidies. Offsetting duties then would force the goods to compete “on a level playing field” against American-made goods whose production has been achieved without government subsidy;¹²

(2) that goods imported into the United States and sold at a price lower than the price at home, or their cost of production, are “dumped” and may be subject to “antidumping duties” that would offset the “margin” of dumping, which is determined by adding to the “dumped price” the difference between the marketed price and the home price or the cost of production (plus an allowance for profit);¹³

(3) that goods whose importation into the United States suddenly surges, displacing competing American goods because of their sheer and sudden volume, should be subject to a “safeguard,” a limitation on quantity determined through a quota or tariff or tariff-rate quota;¹⁴ and

(4) that goods that infringe on U.S. intellectual property rights should not be imported for sale at any price.¹⁵

This Article concerns only the first two types of trade remedies: CVDs and ADs. United States trade analysis is bifurcated between Commerce, which determines whether there is dumping and whether there are countervailable subsidies,¹⁶ and the U.S.

12. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986) (explaining that the purpose of CVD law is “to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments” (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 456 (1978))).

13. JOSEPH E. PATTISON, *ANTIDUMPING & COUNTERVAILING DUTY LAWS* § 1:2 (2012), available at Westlaw ANTIDUMP (explaining that AD laws are intended to restrict the unfair practice of price discrimination in different national markets by imposing a duty that offsets the advantages otherwise gained through price discrimination). Not every WTO member includes profit in its antidumping calculations.

14. See 19 U.S.C. § 2251(a) (2006) (permitting the President to take action if the article being imported into the U.S. at increased quantities injures or threatens to injure the domestic industry).

15. See *id.* § 1337(a)(1)(B) (defining an unlawful trade practice to include importing a good that infringes on a U.S. patent or copyright).

16. 19 U.S.C. § 1671(a) (designating Commerce as the “administering authority,” which provides the responsibility of determining whether to impose a CVD); *id.* § 1673(1)

International Trade Commission (ITC), which determines whether a domestic industry is materially injured by unfairly traded imports, or threatened with material injury by reason of imminent quantities of unfairly traded imports.¹⁷ When Commerce reaches an affirmative determination, finding dumping or subsidies, it goes on to measure by how much, proposing “margins” to be implemented as tariffs that are expected to “level the playing field,” offsetting the amount of dumping or subsidies so that the goods are effectively fairly traded when entering the United States.¹⁸ However, only when the ITC affirmatively finds injury or threat of injury are tariffs imposed.¹⁹ This Article concerns only Commerce’s determinations in the *GPX* cases.

The central issue presented by the parties in the case on appeal, *GPX International Tire Corp. v. United States*²⁰ (*GPX V*), was the application of the principles governing both CVD and AD laws together when merchandise is imported from an NME.²¹ The CIT elected to combine the AD and CVD records in these cases, which the United States and the petitioning parties challenged as beyond the scope of the court’s authority.²²

Although CVD and AD appeals normally are heard separately, this case presented a unique question: whether a country designated an NME for AD purposes could be subject to a subsidies investigation.²³ There had never been a methodology for examining subsidies in an NME.²⁴ Rather, it was generally understood that all unfair trade

(delegating to Commerce the responsibility to determine whether merchandise will be sold in the United States at less than fair value).

17. *Id.* § 1673(2).

18. See Ansel, *supra* note 4, at 886–87 (tracing the procedural steps taken by Commerce in an AD investigation); see also Robert H. Lantz, *The Search for Consistency: Treatment of Nonmarket Economies in Transition Under United States Antidumping and Countervailing Duty Laws*, 10 AM. U. J. INT’L L. & POL’Y 993, 1001 (1995) (explaining how Commerce “fixes” the dumping margin in an AD investigation).

19. See Lantz, *supra* note 18, at 1001–02 (describing the role the ITC plays in determining injury).

20. *GPX V*, 666 F.3d 732 (Fed. Cir. 2011), *reh’g*, 678 F.3d 1308 (Fed. Cir. 2012), *remanded to* 2013 WL 64465 (Ct. Int’l Trade Jan. 7, 2013).

21. See *id.* at 734 (summarizing the issue as whether both CVDs and ADs apply to a nonmarket country).

22. See *GPX Int’l Tire Corp. v. United States (GPX I)*, 587 F. Supp. 2d 1278, 1283 (Ct. Int’l Trade 2008) (rejecting Commerce’s position that the court could not impose injunctive remedies with respect to the AD and CVD investigations).

23. See *GPX II*, 645 F. Supp. 2d 1231, 1234–35 (Ct. Int’l Trade 2009) (summarizing the court’s conclusions with respect to the applicability of AD methodology in a CVD investigation, the primary issue in *GPX*), *aff’d*, 666 F.3d 732 (Fed. Cir. 2011), *reh’g*, 678 F.3d 1308 (Fed. Cir. 2012), *remanded to* 2013 WL 64465 (Ct. Int’l Trade Jan. 7, 2013).

24. See Lauren W. Clarke, Note, *The Market-Oriented Enterprise Approach: The Best Response to the Questionable United States Trade Practices Scrutinized in GPX International Tire Corp. v. United States*, 60 CATH. U. L. REV. 809, 815 (2011) (noting that

arising from an NME was addressed by the special NME methodology in AD cases.²⁵

The parties and the CIT in *GPX* focused on issues raised by the simultaneous AD and CVD investigations into imports of the same merchandise from NMEs.²⁶ The central principle of the CAFC's 1986 landmark decision in *Georgetown Steel Corp. v. United States*²⁷ had prohibited CVD investigations into merchandise from NMEs regardless of whether there was an AD investigation into the same merchandise at the same time.²⁸ The parties in *GPX* had accepted that this decision had been overturned.²⁹

On appeal, the CAFC did not accept the interpretations of *Georgetown Steel* as adopted by Chief Judge Jane Restani of the CIT in *GPX II*.³⁰ The CAFC did not accept the U.S. Government's argument that the court in *Georgetown Steel* was merely deferring to Commerce's authoritative interpretation of the law on a case-by-case basis, a

Commerce determined that CVDs were inapplicable to NMEs, and thus there could be no methodology to calculate any duties).

25. See *GPX II*, 645 F. Supp. 2d at 1239 ("Commerce's past interpretation of the statutes had only been along clear lines—either a country was an NME country and CVDs were not imposed, or it was an ME country and CVDs could be imposed."); Clarke, *supra* note 24, at 812 (stating that for twenty years, the sole remedy levied against an NME for an unfair trading practice were in the form of ADs).

26. See, e.g., *GPX II*, 645 F. Supp. 2d at 1240 (explaining how the court must determine the reasonableness of Commerce's joint application of AD and CVD law).

27. 801 F.2d 1308 (Fed. Cir. 1986).

28. See *Georgetown Steel*, 801 F.2d at 1314 (concluding that Congress did not intend to apply CVD law to NME's because of the structural nature of the economy in an NME).

29. The rationale in the change from *Georgetown Steel* was Commerce's determination that the PRC economy had undergone sufficient economic reforms that it was now possible to track a specific financial benefit conveyed by the Chinese government to a producer. See, e.g., *id.* at 1237 (chronicling Commerce's revision in policy from not applying CVD law to NMEs, which was premised on *Georgetown Steel*, to applying CVD law subsequently to the PRC, after 2006); Memorandum from Shauna Lee-Alaia and Lawrence Norton, Office of Policy, Import Admin., to David M. Spooner, Assistant Sec'y for Import Admin. 2 (Mar. 29, 2007) [hereinafter *Georgetown Steel* Memorandum], available at <http://ia.ita.doc.gov/download/prc-fsp/CFS%20China.Georgetown%20applicability.pdf> (concluding that the *Georgetown Steel* decision "does not bar the application of CVD law to imports from China"); see also *GPX II*, 645 F. Supp. 2d at 1237 (characterizing *Georgetown Steel* as limited to its facts).

30. See *GPX V*, 666 F.3d 732, 734 (Fed. Cir. 2011) ("The Trade Court held that Commerce's 2007 interpretation of countervailing duty law as permitting the imposition of such duties was 'unreasonable' because of the high likelihood of 'double counting' when both countervailing duties and antidumping duties are assessed against goods from NME countries. We affirm, but on a different ground: . . . government payments cannot be characterized as 'subsidies' in a non-market economy context, and thus . . . countervailing duty law does not apply to NME countries." (citations omitted)), superseded by statute, Pub. L. No. 112-99, 126 Stat. 265 (2012), as recognized in *GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1311 (Fed. Cir. 2012).

decision that would have been defined by the facts and not the law.³¹ By interpreting the *Georgetown Steel* decision as one dependent on facts, Commerce could claim that the facts pertaining to China in 2006 were sufficiently different from the facts pertaining to “Soviet style” or “Stalinist” economies in 1986 so as to authorize Commerce to treat them differently.³² The CAFC, however, asserted that its 1986 decision was based on the law, and therefore was not to be overturned by a change in facts.³³

The CAFC disagreed with the CIT when it returned to the first principle—whether it was legal for Commerce to investigate subsidies in an NME.³⁴ After congressional intervention, however, the issues on which the CIT had focused in *GPX*—whether simultaneous CVD and AD investigations into the same merchandise from an NME were legal and, if they were, how they were to be conducted³⁵—again became relevant on remand to the CIT, due to the way in which the constitutional challenges to the new law were framed.³⁶

The parties also challenged Commerce’s CVD and AD determinations with respect to other issues, mostly involving “routine” international trade disputes over how to measure unfair trade effects.³⁷ The CIT easily disposed of the other AD issues

31. See *id.* at 744 (rejecting Commerce’s contention that *Georgetown Steel* applied only when “it is impossible to identify subsidies within the NME” (internal quotation marks omitted)).

32. See *Georgetown Steel* Memorandum, *supra* note 29, at 4 (noting that the present PRC economy does not lack the presence of market forces).

33. See *GPX V*, 666 F.3d at 738–39 (affirming *Georgetown Steel*’s applicability to current law).

34. See *id.* at 745 (finding that the legislative amendments adopted by Congress prevented the application of CVD law to NME countries); Spak et al., *supra* note 6, at 1126 (reiterating the court’s conclusion that Congress “legislatively ratified” the inapplicability of CVD laws to NME countries).

35. See, e.g., *GPX II*, 645 F. Supp. 2d 1231, 1234 (Ct. Int’l Trade 2009), *aff’d*, 666 F.3d 732 (Fed. Cir. 2011) (stating the court’s conclusion that Commerce can impose simultaneous CVD and AD duties but requiring it to develop additional methodologies to do so), *reh’g*, 678 F.3d 1308 (Fed. Cir. 2012), *remanded to 2013 WL 64465* (Ct. Int’l Trade Jan. 7, 2013).

36. See *GPX Int’l Tire Corp. v. United States (GPX VII)*, No. 08-00285, 2013 WL 64465, at *14 (Ct. Int’l Trade Jan. 7, 2013) (concluding that the new law retroactively providing for CVDs to apply to an NME, while only prospectively providing for the double counting problem, is constitutional).

37. Following remand to Commerce, the court upheld Commerce’s following determinations: (1) Hebei Starbright Tire Co., Ltd. (Starbright) did not warrant “market oriented enterprise” status, *GPX International Trade Corp. v. United States (GPX III)*, 715 F. Supp. 2d 1337, 1347 (Ct. Int’l Trade 2010); (2) Commerce’s decision not to allow an offset in the AD calculations for indirect selling expenses despite using similar adjustments in the calculation of Starbright’s export prices, *id.* at 1348–49; (3) Commerce’s failure to exclude unrefunded value added taxes from its calculation of the respondents’ normal value, *id.* at 1350–51; (4) the exclusion of certain overhead items from the factors of production used in the normal value calculations, *id.* at 1351; and (5) the decision not to use “zeroing” in its AD

without delaying the case,³⁸ and the remaining CVD issues became moot as a result of the CIT's 2010 decision to require Commerce to revoke the CVD order.³⁹ Now that the law has revived the CVD case, Judge Restani, after finding the new law constitutional, addressed the remaining CVD issues, finding that the plaintiffs waived one issue, upholding Commerce on another, and remanding the three remaining CVD issues to Commerce for a new determination due on April 16, 2013.⁴⁰

C. NME Subsidy Allegations and China

The central issue, as interpreted by the CIT and as recreated by Congress following the CAFC's decision, is whether Commerce can entertain CVD and AD petitions together when the subject merchandise is exported from an NME. This issue, like the one Congress intervened to "fix," may be largely moot by 2016 when the WTO Accession Protocol for China mandates recognition of China as a market economy.⁴¹ However, NME status will still apply to Vietnam, and likely to Cuba and North Korea, should the embargo of Cuba be

calculations due to its change in policy on zeroing in original investigations following adverse WTO rulings, *id.* at 1353–54. See also *id.* at 1342 n.1 (describing these issues as "fine-tuning adjustments" to the AD methodology).

38. The court did, however, grant Commerce a voluntary remand to explain better its reasoning with respect to whether Commerce should use surrogate value information from India on steel wire or steel rod. *Id.* at 1349–50.

39. See *id.* at 1344 n.4 (explaining that it was unnecessary to discuss other CVD calculation issues because the court determined CVD remedies could not be imposed).

40. Judge Restani found that the plaintiffs waived their challenge to Commerce's cut-off date before which it would not include any alleged subsidies in its calculation of a respondent's CVD rate. *GPX VII*, 2013 WL 64465, at *15. Commerce went back to 2001, whereas the plaintiffs had argued Commerce could not go back before 2006. *Id.* at *4. Judge Restani upheld Commerce's decision to assign to the respondent only part of the value of debt forgiveness to a third party that the respondent and other companies had guaranteed. *Id.* at *23. She remanded to Commerce to reweigh the evidence that Commerce used to determine that old subsidies had not been extinguished when Starbright was privatized. *Id.* at *23–24. She agreed with Commerce's privatization methodology, but found Commerce had failed to consider properly all of the evidence in applying that methodology. *Id.* at *24. She also found Commerce was unreasonable in claiming it could not find benchmarks to use in determining to what extent the privatization purchase price offset prior subsidies, when it could create a surrogate benchmark for all other subsidies. *Id.* at *22. Finally, she remanded for Commerce to explain better its inflation rate adjustment for its surrogate benchmark for valuing loans. *Id.* at *23–24. On February 21, 2013 Judge Restani granted an extension for Commerce to file the remand determination taking place in late May 2013. *GPX Int'l Tire Corp. v. United States*, No 08-00285 (Ct. Int'l Trade Feb 21, 2013).

41. See *Protocol on the Accession of the People's Republic of China*, *supra* note 3, at pt. I.15(d) (providing that the PRC will be recognized as a market economy fifteen years following accession into the WTO).

lifted or commercially significant imports from North Korea occur.⁴² These decisions, and the new law, thus will remain relevant as they apply to those countries.

China has sought recognition as a market economy for several years.⁴³ For international trade purposes, some eighty countries have recognized China as a market economy, but not the United States, Canada, Japan, the European Union, or Australia, which are China's most important trade partners.⁴⁴ U.S. trade law provides for recognition of "market-oriented" enterprises or industries (or sectors), but Commerce has never identified anything "market-oriented" in China.⁴⁵

There are two broad consequences of treatment as an NME. First, because it is assumed that prices within an NME do not reflect market principles,⁴⁶ the AD calculation cannot be based on a company's home market prices or its home market costs.⁴⁷ Instead, Commerce

42. Exec. Order No. 13,570, 3 C.F.R. 233 (2012) (prohibiting transactions with North Korea); Exec. Order No. 13,466, 3 C.F.R. 195 (2009) (same); Exec. Order No. 13,551, 3 C.F.R. 242 (2011) (same); *Cuban Assets Control Regulations*, 31 C.F.R. pt. 515 (2012).

43. For example, in a speech before the World Economic Forum, Chinese Premier Wen Jiabao called upon European leaders to "recognize China's full market economy status" prior to the 2016 WTO deadline. *Wen Says World Must Get 'Houses in Order,' Not Rely on China*, BLOOMBERG NEWS (Sept. 14, 2011 5:52 AM), <http://www.bloomberg.com/news/2011-09-14/china-s-wen-says-world-must-cut-debt-and-deficits-increase-jobs.html>.

44. No one, including the Chinese Government, maintains a list. One estimate of "[m]ore than 80" was reported by Fu Jing & Ding Qingfen, *Experts: EU Statement Opens Door to Status*, CHINA DAILY (Feb. 16, 2012 7:57 AM), http://europe.chinadaily.com.cn/europe/2012-02/16/content_14622790.htm; see also Lynam, *supra* note 7, at 749 & n.50 (citing to an article that claimed ninety-seven countries recognized the PRC as a market economy).

45. In 1992, the last time Commerce entertained CVD allegations against China before 2006, it concluded in a negative final determination "that the PRC fans industry is not a [market-oriented industry]. As a result, we determine that the CVD law cannot be applied to the PRC fan industry." *Oscillating and Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24,018, 24,019 (Dep't of Commerce June 5, 1992) (final negative CVD determination). In *GPX III*, Commerce has said it has no methodology to determine whether a sector or an enterprise in China is market-oriented. See *GPX II*, 645 F. Supp. 2d 1231, 1243 (Ct. Int'l Trade 2009) (explaining Commerce's position for declining GPX's request for market-oriented enterprise treatment because it had "no policies, procedures or standards for evaluating the MOE status of a company at this time"). Notwithstanding these conclusions, Commerce reasoned that the Chinese economy itself was sufficiently market-based to permit subsidies investigations. See *id.* at 1237 (noting Commerce's determination that the PRC had implemented sufficient economic reforms that it could now identify a subsidy).

46. See 19 U.S.C. § 1677(18)(A) (2006) (defining "nonmarket economy country" to mean any foreign country that does not operate on market principles of cost or pricing structure, such that the "sales of merchandise in such country do not reflect the fair value of the merchandise").

47. *Id.* § 1677b(c) (stating that when the subject merchandise is exported from a NME country, the administering authority relies on the "value of the factors of

requires the company to report the quantities of each item used in making the subject merchandise (including labor, materials, and energy), and it uses that information to calculate a cost of production by multiplying the quantities of each reported "factor of production" by "surrogate values" for those factors obtained from market economies.⁴⁸ Second, because actionable subsidies must be market-distorting, the *Georgetown Steel* doctrine effectively barred CVD cases for merchandise from NMEs⁴⁹ (the term "nonmarket economy" is defined in the statute to mean a country that "does not operate on market principles;"⁵⁰ consequently, when a country is an NME, there is no market to distort).

Commerce decided in 2006 that it could investigate alleged subsidies in China after all, without treating China as a market economy and without having ever recognized any industry or sector of the Chinese economy as "market oriented."⁵¹ A 2006 internal Memorandum written for the *Lined Paper* antidumping investigation set out the premises for this conclusion by finding the Chinese economy "evolving" away from central control.⁵² The mid-term

production utilized in producing the merchandise" to generate a "normal value," rather than the price at which the product is sold in the exporting country).

48. *Id.*; see also Sanghan Wang, *U.S. Trade Laws Concerning Nonmarket Economies Revisited for Fairness and Consistency*, 10 EMORY INT'L L. REV. 593, 616 (1996) (describing the fair value determination using the two-step factors of production methodology).

49. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986).

50. 19 USC § 1677(18)(A).

51. Commerce had found in 1992 that the fan industry in China was not "market oriented." *Oscillating and Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24,018, 24,019 (Dep't of Commerce June 5, 1992) (final negative CVD determination). In its final decision memorandum in *Coated Free Sheet Paper*, Commerce conceded that it could not even consider whether an enterprise could qualify for such consideration: "The Department has not yet determined whether it would be appropriate to introduce a market oriented enterprise process, nor has it determined what elements should be considered in any such test." Memorandum from Stephen J. Claeys, Deputy Assistant Sec'y for Imp. Admin., to David M. Spooner, Assistant Sec'y for Imp. Admin. 9 (Oct. 17, 2007), available at <http://ia.ita.doc.gov/frn/summary/PRC/E7-21041-1.pdf>. After rejecting the contention that Starbright was operating in a market economy, Commerce denied consideration of Starbright as a "market oriented enterprise" on the grounds that its request for such consideration was untimely, notwithstanding that Commerce still had not developed any method for making such a determination. *GPX II*, 645 F. Supp. 2d 1231, 1244 (Ct. Int'l Trade 2009) (disagreeing with Commerce's denial of Starbright's request as untimely, stating that Commerce "cannot now rely on any claim of untimeliness because that was not its avowed reason for the rejection of the request").

52. Memorandum from Shauna Lee-Alaia et al., Office of Policy, Imp. Admin., to David M. Spooner, Assistant Sec'y for Imp. Admin. 1-4 (Aug. 30, 2006), available at <http://ia.ita.doc.gov/download/prc-nme-status/prc-lined-paper-memo-08302006.pdf> (concluding that China's economy had evolved and was no longer Stalinist in its central control, but not open enough to permit market economy methodology in AD investigations).

election of a Democratic Congress pressing to penalize China as a currency manipulator likely encouraged the subsequent conclusion that subsidy allegations could be investigated while still treating China as an NME.⁵³

Addressing a motion from the PRC for injunctive relief and a restraining order to halt the Commerce CVD investigation in *Coated Free Sheet Paper from the People's Republic of China*,⁵⁴ the CIT opined that *Georgetown Steel* did not bar CVD investigations of NMEs.⁵⁵ Counsel for the PRC introduced the NME question on a procedural motion,⁵⁶ notwithstanding recent precedent that the CIT does not look favorably upon a motion to stop an investigation due to expense and inconvenience.⁵⁷ The high standards for equitable relief required a probability of success on the merits and, in this instance, the PRC needed a finding that the Commerce initiation was *ultra vires*.⁵⁸ Even though Judge Carman dismissed the motion on jurisdictional grounds, he commented: “[w]hile a later court may determine that the statute favors Plaintiffs’ interpretation that CVD law does not apply to NMEs, it is not clear at this point that Commerce’s initiation of the CVD investigation was ‘patently *ultra vires*.’”⁵⁹ On appeal to the CAFC, Commerce insisted that the CVD statute, by referring generally to countries and making no exception for NMEs, required Commerce to apply the CVD statute to China.⁶⁰

Commerce made its right to proceed simultaneously in AD and CVD investigations of an NME its secondary argument, even though it was the only live issue for appeal.⁶¹ Commerce’s first argument then required the respondent parties to argue that the statute not

53. Nonetheless, Commerce persistently resisted treating currency exchange itself as a countervailable subsidy and refused to investigate allegations about it. Both Presidents Bush and Obama denied the currency manipulation label, and Commerce’s policy remained aligned with the Presidents. Annie Lowry, *A Tightrope on China’s Currency*, N.Y. TIMES (Oct. 22, 2012), http://www.nytimes.com/2012/10/23/us/politics/romney-pledge-to-call-china-a-currency-manipulator-poses-risks-experts-say.html?_r=0.

54. *Gov’t of the People’s Republic of China v. United States (Coated Free Sheet Paper)*, 483 F. Supp. 2d 1274 (Ct. Int’l Trade 2007).

55. *Id.* at 1275, 1282.

56. *Id.* at 1277–78.

57. *Abitibi-Consol. Inc. v. United States*, 437 F. Supp. 2d 1352, 1360–62 (Ct. Int’l Trade 2006).

58. *Coated Free Sheet Paper*, 483 F. Supp. 2d at 1278, 1282–83.

59. *Id.* at 1282.

60. *GPX V*, 666 F.3d 732, 737–38 (Fed. Cir. 2011) (arguing that “the plain statutory language mandat[es] that a countervailing duty shall be imposed . . . even in an NME country” (internal quotation marks omitted)), *superseded by statute*, Pub. L. No. 112-99, 126 Stat. 265 (2012), *as recognized in*, *GPX Int’l Tire Corp. v. United States*, 678 F.3d 1308, 1311 (Fed. Cir. 2012).

61. *Id.* at 744.

only did not mandate application of the CVD law to NMEs, but that the CAFC had forbidden doing so in *Georgetown Steel*.⁶² Commerce, thus, was challenging the CAFC to accept its argument that the CAFC in *Georgetown Steel* had merely endorsed its interpretation of the statute based on facts and not on law.⁶³

In rejecting Commerce's argument, the CAFC effectively overturned Judge Carman and Judge Restani, who had accepted the CVD investigation itself but not its simultaneous pursuit with the AD investigation. The fact that the motion before Judge Carman was brought by the PRC, and was so captioned, was particularly important. Hence, the PRC put at risk the issue of whether it was susceptible, as an NME, to CVD investigations, on a procedural motion it stood little, if any chance, of winning. Only because Commerce elected to reopen the issue was the PRC able to obtain an appellate court review of NME susceptibility to CVD investigations.

On March 29, 2007, Commerce completed a second internal memorandum, in which it concluded that *Georgetown Steel* referred to Commerce's discretionary assessment of foreign economies, not to a statutory bar.⁶⁴ Suddenly, trade remedy petitions against Chinese merchandise routinely contained subsidy allegations, and Commerce was investigating simultaneously AD and CVD allegations in a half-dozen cases.⁶⁵

The PRC limited its participation in these cases to Commerce, where it was obliged to answer questionnaires about government programs and practices, without having to make any appearances at the ITC.⁶⁶ But the PRC had already gone to court once in *Coated Free*

62. *Id.* at 738.

63. *Id.* at 739.

64. *Georgetown Steel* Memorandum, *supra* note 29, at 2, 4 (concluding that the analytical elements of the *Georgetown Steel* opinion were framed "according to the traditional, Soviet-style economies of the 1980s," and that the "Department's policy that gave rise to the *Georgetown Steel* litigation is inapposite to the current investigation and does not bar application of the CVD law to imports from China").

65. See, e.g., Lightweight Thermal Paper from the People's Republic of China, 72 Fed. Reg. 62,209 (Dep't of Commerce Nov. 2, 2007) (initiation); Raw Flexible Magnets from the People's Republic of China, 72 Fed. Reg. 59,076 (Dep't of Commerce Oct. 18, 2007) (initiation); Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, 72 Fed. Reg. 44,122 (Aug. 7, 2007) (initiation); Laminated Woven Sacks from the People's Republic of China, 72 Fed. Reg. 40,839 (Dep't of Commerce July 25, 2007) (initiation); Light-Walled Rectangular Pipe and Tube from the People's Republic of China, 72 Fed. Reg. 40,281 (Dep't of Commerce July 24, 2007) (initiation); Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, 72 Fed. Reg. 36,668 (Dep't of Commerce July 5, 2007) (initiation).

66. Compare Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, 73 Fed. Reg. 40,480, 40,481 n.2 (Dep't of Commerce July 15, 2008) (final affirmative CVD determination) (listing the PRC as a respondent), *with*

Sheet Paper with disastrous results—the CIT rejected the PRC's motion and decided that neither *Georgetown Steel* nor any Commerce practices or policies necessarily impeded investigating alleged Chinese subsidies while treating China as an NME.⁶⁷

Once Commerce found both dumping and subsidies in all of the new cases, and the ITC found injury in all of them, the Chinese Government opted to appeal them together to the WTO.⁶⁸ It did not join in any appeals to the CIT, but the American counsel who had filed for the PRC in *Coated Free Sheet Paper* on behalf of the PRC replaced the American counsel representing GPX and Starbright in the OTR Tires (*GPX*) investigation, in the appeal to the CIT.⁶⁹

The new GPX (and Starbright) counsel, the same counsel who had ignored precedent in the risky motion trying to stop the *Coated Free Sheet Paper* investigation, now moved the CIT to enjoin the collection of cash duty deposits at the rates Commerce had determined, claiming the rates would cause irreparable harm to the Chinese company.⁷⁰ This motion, almost inevitably, was denied,⁷¹ and then in an extraordinary procedural step the new counsel moved the CIT to reconsider its decision, which also was denied.⁷² After the second denial, the same counsel moved for the intervention of the PRC as a party to the litigation, on the grounds that the private parties (GPX, an American company, and Starbright, a Chinese company) could not afford to continue the litigation following the adverse decisions on duty deposits.⁷³ This appearance for the PRC in U.S. court was

Off-the-Road Tires from China. Amended Administrative Protective Order Service List, Inv. Nos. 701-TA-448, 731-TA-1117 (Jan. 30, 2009) (Final), available at http://www.usitc.gov/secretary/fed_reg_notices/service_lists/documents/701-TA-448_POF_.pdf.

67. Gov't of the People's Republic of China v. United States (*Coated Free Sheet Paper*), 483 F. Supp. 2d 1274, 1282 & n.11 (Ct. Int'l Trade 2007) (finding that Commerce has broad discretion to determine whether application of CVD law to NMEs is appropriate and, regardless of whether Commerce chooses to apply CVD law, the PRC is still obligated to participate in the CVD investigation).

68. Request for the Establishment of a Panel by China, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/2 (Dec. 12, 2008).

69. See, e.g., *GPX II*, 645 F. Supp. 2d 1231, 1234 (Ct. Int'l Trade 2009); *Coated Free Sheet Paper*, 483 F. Supp. 2d at 1274.

70. *GPX I*, 587 F. Supp. 2d 1278, 1282 (Ct. Int'l Trade 2008).

71. *Id.* at 1287, 1289, 1291–92 (denying GPX's motion for a preliminary injunction because GPX failed to show a likelihood of success on the merits and irreparable harm).

72. *GPX Int'l Tire Corp. v. United States*, 593 F. Supp. 2d 1389, 1390, 1393 (Ct. Int'l Trade 2008).

73. *GPX Int'l Tire Corp. v. United States*, No. 08-00285, 2009 WL 362136, at *1 (Ct. Int'l Trade Feb. 12, 2009).

too late, and the court denied the motion to intervene.⁷⁴ Counsel then continued to represent the private parties.

In the proceedings before Commerce, Counsel for GPX and Starbright had contested whether Commerce could investigate subsidy allegations at all.⁷⁵ Their contention supported China's political representations that it should be recognized as a market economy or, in the alternative, that if not so recognized it could not be treated as a market economy for purposes of the CVD law but as an NME under the AD law.⁷⁶

On appeal, new counsel (the same that had represented the PRC in *Coated Free Sheet Paper*) conceded Commerce's authority to investigate subsidy allegations in an NME and narrowed the contest to whether AD and CVD investigations could proceed simultaneously.⁷⁷ Commerce had rationalized that China had

74. *Id.* Appeals were filed and pursued by the private parties on September 9, 2008. *Id.* After the CIT denied motions for preliminary injunction and a temporary restraining order on the imposition of cash deposit collections based on Commerce's combined AD and CVD margins (on November 12, 2008), and denied a motion for reconsideration (on December 30, 2008), the private Chinese parties moved to amend their Complaint (on January 5, 2009) yet apparently concluded (or so they reported to the court) that they could not afford to continue with the judicial proceedings and the Government of China moved to intervene, effectively replacing them (on January 13, 2009). *Id.* Petitioners and the U.S. Government opposed this late appearance, which China defended as the result of "excusable neglect." *Id.* at *2. After Judge Restani denied the motion for intervention, rejecting the claim of "good cause," counsel continued on behalf of "respondents," "plaintiffs" (on appeals), and "plaintiffs-respondent," without further naming the Chinese (or American) parties on their pleadings. *Id.* at *3. See generally *GPX II*, 645 F. Supp. 2d 1231, 1231 (Ct. Int'l Trade 2009). Thus, having sworn to the court that they could not go on, the private parties went on. The counsel who proposed to represent the Chinese Government continued to represent them. And, to make the relationship between the private parties and the Chinese Government more conspicuous, the same counsel suddenly had sufficient resources representing private parties. A central dispute in the CVD case concerned whether the government continued in any way to influence the affairs of the privatized company. It could not have helped the Chinese position, if only by appearance, that Starbright, claiming to be a private enterprise free of all government involvement or influence, filed an amended complaint (on January 5), and then had its own counsel seek to represent the Chinese Government eight days later. Now that the CIT has upheld the constitutionality of the new law and remanded the privatization issues to Commerce, counsel and legal bills could become evidence of a relationship between the government and the private parties.

75. See Memorandum from Stephen J. Claeys, Deputy Assistant Sec'y for Imp. Admin, to David M. Spooner, Assistant Sec'y for Imp. Admin. 11 (July 7, 2008) [hereinafter OTR Tire Memorandum], available at <http://ia.ita.doc.gov/fm/summary/PRC/E8-16154-1.pdf>.

76. *GPX I*, 645 F. Supp. 2d at 1241-42.

77. See Respondent Plaintiffs' Reply Brief Concerning the CVD/NME AD Coordination Issue at 1, *GPX II*, 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009) (No. 08-00285), ECF No. 219 ("Defendant [United States] and Defendant-Intervenors [Bridgestone Americas Inc. et al.] continue to misstate the pertinent issue before the Court, portraying the issue as whether the CVD law can be applied to a nonmarket economy country, in general, and insisting the plain language of the statute requires the law's application to any 'country.' Contrary to their claim, however, the

become enough of a market economy to justify treating it differently from the NMEs addressed by *Georgetown Steel*, but not enough to be treated like other market economies.⁷⁸

The solution was to borrow methodology from the AD regime: just as the cost of inputs were measured for dumping with surrogate values in market economies,⁷⁹ so the value of government subsidies would be measured with surrogate values. For example, the value of land or rent would not be determined from rents or land sales in China; instead, values would be taken from Thailand, and more specifically from Bangkok.⁸⁰ Commerce used as its benchmark, for the price a Chinese company was paying for land in rural Shandong Province, the price a private enterprise was paying for a comparably sized piece of land in Bangkok.⁸¹ Commerce paid no attention to the expert opinion of a western land use economist that such comparisons were absurd.⁸²

pertinent issue before the Court is whether Commerce is permitted under the statutory framework to apply the CVD law to China *while simultaneously* imposing AD duties using its NME AD methodology.”)

78. *Georgetown Steel* Memorandum, *supra* note 29, at 10–11. See *GPX II*, 645 F. Supp. 2d at 1237 (“Commerce noted that the PRC’s present-day economy ‘features both a certain degree of private initiative as well as significant government intervention, combining market processes with continued state guidance.’ Despite these findings, Commerce continues to treat the PRC as an NME country due to remaining government constraints, such as 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.” (internal citations omitted)).

79. *GPX V*, 666 F.3d 732, 734–35 (Fed. Cir. 2011) (“In a ‘nonmarket economy country,’ however, local prices cannot be used to calculate the normal value because, by definition, ‘sales of merchandise in such country do not reflect the fair value of the merchandise.’ Instead, Commerce may estimate the normal value based on data from ‘appropriate’ market economy countries. Because normal values calculated from surrogate countries do not reflect domestic subsidies, the result potentially is that the normal value calculation may be higher than the actual sale price in the NME country.” (internal citations omitted)), *superseded by statute*, Pub. L. No. 112-99, 126 Stat. 265 (2012), *as recognized in* *GPX Int’l Tire Corp. v. United States*, 678 F.3d 1308, 1311 (Fed. Cir. 2012).

80. Laminated Woven Sacks from the People’s Republic of China, 72 Fed. Reg. 67,893, 67,909 (Dep’t of Commerce Dec. 3, 2007) (preliminary affirmative CVD determination) (stating that the best means for determining land value in China is by “comparing prices for land-use rights in China with comparable market-based prices for land purchases in a country at a comparable level of economic development that is in a reasonably proximate region outside of China,” namely Thailand). The authors were counsel to the PRC for the CVD investigation at Commerce in this case.

81. *Id.*

82. Memorandum from Stephen J. Claeys, Deputy Assistant Sec’y for Imp. Admin, to David M. Spooner, Assistant Sec’y for Imp. Admin. 60–66 (June 16, 2008), available at <http://ia.ita.doc.gov/frn/summary/prc/E8-14256-1.pdf> (“[T]he GOC argues that the Department’s selection of land values near Bangkok . . . is irrational as an economic proposition and contrary to law because it ignores domestic

II. PROBLEMS WITH ACTIONABLE SUBSIDIES IN NON-MARKET ECONOMIES

A. *Identifying and Measuring Subsidies*

The trade remedy laws, implemented from international agreements framed by the WTO, generally assume that goods are produced all over the world in market economies.⁸³ Prices are determined by the cost of production and then by the meetings of willing sellers and willing buyers.⁸⁴ Competition is expected; fair competition assumes that the market, and only the market, affects price.⁸⁵

World trading partners have long understood that not all economies operate on market principles. Some are centrally-controlled and directed, and as the government of controlled economies may determine what is manufactured and in what quantities, it may also determine price, whether setting it directly, or permitting it to be the result of many different government actions.⁸⁶ Government may control warehouse rents, for example, and manipulate them to reduce the rent of a company, thereby subsidizing its production by lowering its costs. It may set the price for electricity. The enterprise itself may be state-owned, dictating the price at which its goods may be sold. NMEs, thus, require a different set of trade rules because the participants in such economies do not necessarily play by capitalist rules: warehouse rents, for example, may not be set by a market for housing or real estate; electricity rates may be set for social purposes without reference to the cost of producing

benchmarks in favor of out-of country benchmarks effectively forbidden by the WTO and U.S. law. . . . [T]he value of land in Thailand is unique to the land's productive use in Thailand such as its proximity to suppliers; transportation costs of inputs and for workers and customers within Thailand; availability and costs of utility services; and application of local regulations and taxes. As such, . . . none of these market conditions in Thailand could be the prevailing market conditions in China. . . . [T]he Department, [nevertheless] considers the price information for land in Thailand to be the best and most appropriate information on the record of this investigation.").

83. See Clarke, *supra* note 24 (discussing that trade remedies, such as CVDs, were inapplicable to NMEs).

84. 19 U.S.C. § 1677b(a), (e) (2006) (explaining the details of determining whether merchandise is sold at "less than fair value" and how to determine the constructed value of imported merchandise").

85. Diane P. Wood, "Unfair" Trade Injury: A Competition-Based Approach, 41 STAN. L. REV. 1153, 1167 (1989) (demonstrating that the free trade model works only if all countries operate under a market economy with competitive conditions).

86. See Ansel, *supra* note 4, at 890-91 & n.53 (listing the statutory factors Commerce will consider in determining whether the country is market-oriented, including the extent of government control over production, allocation of resources, price, and output decisions).

and delivering electricity. When the provision of electricity is a monopoly, there is no private or competitive domestic benchmark to identify a market price.

The international trade rules authorize distinct analysis and treatment for NMEs.⁸⁷ Because prices of what is bought and sold in an NME are not determined in market transactions, market economy analysis cannot reveal whether a good has been fairly traded or is dumped.⁸⁸ In the absence of a market, the market value and cost of inputs cannot be determined. So, analysts use “surrogate values” for the identical or nearly identical inputs from a market economy comparable in its stage of development to the NME, theorizing what the inputs would have cost in the same country had it been a market economy.⁸⁹ Those surrogate values are used to calculate a constructed cost to produce the exported good, which is then compared to the price charged for the exported good to determine whether that good is dumped.⁹⁰

The determination of a subsidy from an NME presents a much more difficult problem than the calculation for alleged dumping. The WTO defines an actionable (or, forbidden) “subsidy” as a government’s financial contribution that distorts the market.⁹¹ The

87. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 4, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 145 (providing for determination of dumping even absent domestic sales).

88. Wang, *supra* note 48, at 602 (establishing that quantifying dumping and corresponding subsidies is difficult for nonmarket economies because decisions are made centrally and no “independent financial condition of the enterprise” can be determined).

89. *See supra* note 48 and accompanying text; *see also* *GPX III*, 715 F. Supp. 2d 1337, 1349 (Ct. Int’l Trade 2010) (“As the court has stated previously, Commerce has established a practice of calculating surrogate values based on broad information from public documents.”), *aff’d*, 666 F.3d 732 (Fed. Cir. 2011); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People’s Republic of China*, 75 Fed. Reg. 24,892, 24,897 (Dep’t of Commerce May 6, 2010) (notice) (“Accordingly, the normal value (‘NV’) of the product is appropriately based on factors of production (‘FOP’) valued in a surrogate ME country . . .”).

90. The selection of surrogate values is always controversial, in part because of disagreement over the levels of economic development in different countries. The land use expert in *Laminated Woven Sacks* believed the comparison of urban land in Bangkok to rural land in Shandong Province was malapropos. *See* Michael Goldberg, *Critical Issues in Valuing Land as Related to Laminated Woven Sacks from the People’s Republic of China*, C-570-917 (Jan 10, 2008) (stating that comparison sites must be in the same urban area, and “functionally and locationally analogous” to prove a fruitful estimation of property value, but that “[i]n no circumstances can sites be used from other countries or even other urban areas in the same country”). Commerce has variously used prices in Bangladesh, Indonesia, India and elsewhere as surrogate values for China. *See supra* note 80.

91. Agreement on Subsidies and Countervailing Measures art. 1.1(a)(1), Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 229.

premise, therefore, for a subsidy to be actionable is that it must be market-distorting. The premise for an NME, however, is that there is no market to distort.

This principle, that actionable subsidies are not possible in NMEs because there are no markets to distort, underscores the reasoning of the CAFC in *Georgetown Steel*.⁹² The CAFC, affirming Commerce's decision, seemed to establish the rule that CVD petitions could not be filed against NMEs.⁹³ Commerce did initiate an investigation into alleged subsidies in China in 1991 in *Oscillating Fans*, but only to confirm that if the sector were not "market oriented," a CVD case could not be pursued.⁹⁴ That rule applied until 2006,⁹⁵ and neither the courts, Congress, nor Commerce took any steps during that period to upset the status quo.

B. *The GPX Issue: The Double Remedy as a Commerce Practice*

The methodology that Commerce uses to calculate ADs in NME cases disregards actual selling prices and production costs within the NME and replaces them with a cost calculation that uses prices from a third country to value all of the factors of production (e.g., land, labor, capital, energy and materials) for the product.⁹⁶ Commerce, thus, automatically offsets the benefit of any subsidy that the NME producer might have received on the production of that product.⁹⁷ Consequently, were Commerce to offset those production subsidies with a CVD order on the same merchandise, it necessarily would be imposing a double remedy for any such subsidies.⁹⁸

92. 801 F.2d 1308, 1310, 1315 (Fed. Cir. 1986).

93. *Id.* at 1313–16 (concluding the economic incentive and benefits the Soviet Union and the German Democratic Republic granted were neither a "bounty" nor a "grant" within the meaning of the Tariff Act of 1930; thus, they did not create the kind of unfair advantage the CVD laws were intended to remedy; and Congress specifically addressed NME problems under AD laws, without intending CVD laws to apply in a similar way).

94. *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 57,616 (Dep't of Commerce Nov. 13, 1991) (initiation).

95. *Coated Free Sheet Paper from the People's Republic of China, Indonesia, and the Republic of Korea*, 71 Fed. Reg. 68,546, 68,549 (Dep't of Commerce Nov. 27, 2006) (initiation) (stating that "sufficient argument and subsidy allegations . . . to meet the statutory criteria for initiating a countervailing duty investigation of CFS paper from the PRC" were submitted by the petitioner).

96. See 19 U.S.C. § 1677b(c) (2006) (detailing how "normal value" is calculated in determining AD and CVD orders in NME cases).

97. See Dukgeun Ahn & Jieun Lee, *Countervailing Duty Against China: Opening a Pandora's Box in the WTO System?*, J. INT'L ECON. L. 329, 353–55 (2011) (detailing how using a constructed normal value—by using surrogate values—in NME AD determinations already accounts for the subsidies that CVDs are meant to correct).

98. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-474, U.S.-CHINA TRADE: COMMERCE FACES PRACTICAL AND LEGAL CHALLENGES IN APPLYING COUNTERVAILING DUTIES 28 (2005).

This double remedy is most obvious when Commerce considers alleged subsidies on the purchase of manufacturing inputs from state-owned enterprises, a common allegation in CVD investigations into NME merchandise. NME antidumping methodology already addressed any subsidies on the cost of inputs, determining that actual prices for inputs obtained from within an NME could not be used because they were not market prices, and therefore required substitution with surrogate values for the same inputs as priced in market economies.⁹⁹ Similarly, when CVD petitions allege that the Chinese domestic price of the same input as purchased from a state-owned enterprise is subsidized, Commerce calculates the amount of that subsidy as the difference between the actual domestic price paid for the input and the surrogate value for that same input purchased in a third country.¹⁰⁰ The input for dumping purposes and the subsidy for CVD purposes were counting the same thing twice, and because AD and CVD margins are additive, the remedies—offsetting the price of the inputs and the value of the subsidies—were being doubled.¹⁰¹

Judge Restani agreed with the plaintiffs in the *GPX* case that simultaneous AD and CVD investigations in an NME presented a problem of a double remedy and sent the matter back to Commerce to find a way to solve the double counting problem.¹⁰² She found that Commerce had discretion to impose CVDs on Chinese merchandise while still considering China to be an NME (what counsel for the Chinese parties agreed before the CIT was no longer the central issue in dispute, it having been decided in *Coated Free Sheet Paper*) but, she said, Commerce had to avoid double counting of subsidies when it applied the CVD law and the AD NME methodology to the same products at the same time.¹⁰³

Double counting of subsidies does not occur with Commerce's market economy AD methodologies because, in those cases, normal value is calculated based on actual prices in the foreign market and

99. *See id.* at 19–21.

100. *See, e.g.,* Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, 72 Fed. Reg. 71,360, 71,364–65 (Dep't of Commerce Dec. 17, 2007) (preliminary affirmative CVD determination) (calculating a loan subsidy by reference to an external benchmark because "there is not a functioning market for loans within the PRC").

101. Respondent Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Judgment on the Agency Records at 32, *GPX II*, 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009) (No. 08-00285), ECF No. 180-2.

102. *GPX II*, 645 F. Supp. 2d at 1234–35. Judge Restani's first decision in the *GPX* case denied the plaintiffs' motion for a temporary restraining order and preliminary injunction. *GPX I*, 587 F. Supp. 2d 1278, 1292 (Ct. Int'l Trade 2008).

103. *GPX II*, 645 F. Supp. 2d at 1240–43.

actual costs incurred in that same market.¹⁰⁴ Thus, if there were any subsidies imbedded in those prices or costs, they would not be offset by the AD methodology and would need to be addressed separately in a CVD investigation.

Commerce interpreted Judge Restani's *GPX III* decision as giving it three options, to: (1) not apply the CVD law; (2) apply the market economy AD methodology in the *GPX* case; or (3) lower the cash deposits imposed in the AD case by the amount of cash deposits imposed in the CVD case.¹⁰⁵ Commerce chose the third option, to lower the AD deposits by the amount of the CVD deposits.¹⁰⁶

In *GPX International Tire Corp. v. United States*¹⁰⁷ (*GPX III*), Judge Restani found that Commerce's preferred option on remand was contrary to U.S. law because there was no provision in the AD statute to lower duties by the amount of CVDs, and because that option would unreasonably require the parties to go through the expense of CVD proceedings that would be essentially useless.¹⁰⁸ On August 4, 2010, she ordered Commerce to forgo the imposition of CVDs on OTR Tires from the PRC,¹⁰⁹ based on her ruling that U.S. law prohibited Commerce from imposing duties higher than the amount needed to offset subsidies on imported products.¹¹⁰

In ordering Commerce to forgo imposing CVDs, Judge Restani found that Commerce did not have the ability to determine the degree to which double counting was occurring and therefore could not offset it directly within its NME methodology.¹¹¹ Thus, the CIT left open the option in future cases for Commerce to try new methodologies to eliminate the double counting.¹¹² Commerce continued to have the option of imposing CVDs on products from China when there would be no companion AD case on the same products, and in cases in which Commerce might exercise its discretion to recognize a market oriented industry. Recognition of

104. See generally 19 C.F.R. §§ 351.401–407 (2012) (specifying how normal value is calculated in market economies).

105. *GPX III*, 715 F. Supp. 2d 1337, 1344 (Ct. Int'l Trade 2010).

106. *Id.* (noting that Commerce reasoned that the offset was the "least confusing option").

107. 715 F. Supp. 2d 1337 (Ct. Int'l Trade 2010).

108. *Id.* at 1344–46.

109. *Id.* at 1354–55.

110. The WTO applied the same reasoning in addressing the double counting issue. Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 611(d), WT/DS379/AB/R (Mar. 11, 2011) [hereinafter WTO Appellate Body AD and CVD Ruling].

111. *GPX III*, 715 F. Supp. 2d at 1346.

112. See *id.* at 1345–46 (disallowing CVDs in conjunction with ADs if Commerce has no methodology to solve the high risk of double counting).

an MOI would not require recognizing China as a market economy.¹¹³

Commerce appealed the CIT's decision to the CAFC.¹¹⁴ On December 19, 2011, the CAFC upheld the CIT's decision to terminate the CVD investigation and rescind the CVD order, but for different reasons than those offered by Judge Restani.¹¹⁵

C. *The Double Remedy as a Statutory Problem*

In its 2011 decision, the CAFC held in *GPX V* that the U.S. CVD statute, independent of assessments of *Georgetown Steel*, prohibits applying CVDs to NMEs.¹¹⁶ It found "that when amending and reenacting [the] countervailing duty law in 1988 and 1994, Congress legislatively ratified earlier consistent administrative and judicial interpretations that government payments cannot be characterized as 'subsidies' in an NME context, and thus that countervailing duty law does not apply to NME countries."¹¹⁷

In the preceding investigation, the PRC and the affected companies had argued that the CAFC in *Georgetown Steel* had barred CVD investigations in NMEs and that Congress had forgone subsequent opportunities to overrule the CAFC, thereby assenting to the CAFC's conclusions.¹¹⁸ Commerce had argued that *Georgetown Steel* had merely upheld Commerce's discretion, and that conditions had changed sufficiently in China to justify subsidy investigations notwithstanding NME status.¹¹⁹ Judge Carman accepted this view when ruling on the PRC motion for an injunction in *Coated Free Sheet Paper*,¹²⁰ and subsequent CIT rulings had reached the same conclusion, including Judge Restani's in *GPX II*.¹²¹

113. See 19 U.S.C. § 1677b(c)(1) (2006) (allowing normal value in NMEs to be determined by the same process as market economies). Despite all of these options and Commerce's determination to treat China for CVD purposes as more of a market economy than the Soviet Union, Commerce still denies China market economy recognition, still has no methodology for establishing MOI status for a sector or MOE status for a particular enterprise, and still has not recognized either a sector or any enterprise in China as market oriented.

114. *GPX V*, 666 F.3d 732, 737 (Fed. Cir. 2011), *superseded by statute*, Pub. L. No. 112-99, 126 Stat. 265 (2012), *as recognized in* *GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1311 (Fed. Cir. 2012).

115. *Id.* at 737-45 (finding that Congress had legislatively ratified the holding in *Georgetown Steel* that prohibited CVD investigations against NMEs).

116. *Id.* at 734.

117. *Id.*

118. OTR Tire Memorandum, *supra* note 75, at 28.

119. *Id.* at 38 (stating the position of Commerce).

120. *Coated Free Sheet Paper*, 483 F. Supp. 1274, 1282 (Ct. Int'l Trade 2008).

121. *GPX II*, 645 F. Supp. 2d 1231, 1238, 1243 (Ct. Int'l Trade 2009).

Here, in *GPX V*, the CAFC rejected this interpretation of *Georgetown Steel* and ruled broadly that Commerce, as a matter of U.S. law, was definitively prohibited from applying CVDs to NMEs in all cases, even in cases without a companion AD investigation where there is no risk of double counting.¹²² The decision overruled the option Judge Restani had given Commerce, which was to allow CVDs as companions to ADs if Commerce could sort out a methodology that solved the double counting problem.¹²³ Appealing to the CAFC put Commerce in a worse position in dealing with China than it had been at any time since 2006.

The CAFC ruling in *GPX V* had a much broader impact than the CIT decision that Commerce had appealed because the CIT would have permitted CVD investigations and orders in NMEs and only denied CVD investigations and orders that were simultaneous and on the same goods as AD orders.¹²⁴ The CIT also left open to Commerce the possibility of solving the double counting problem, which would have permitted it to maintain simultaneous AD and CVD investigations.¹²⁵ The CAFC ruling had a much broader impact than the WTO ruling in China's favor concerning the application of CVDs in NME cases because the WTO challenge was based exclusively on the issue of double counting.¹²⁶

In *GPX V*, the CAFC reviewed the legislative history regarding CVD application to NMEs and concluded that Congress was well aware that Commerce and the courts were interpreting the CVD law as being inapplicable to NMEs when Congress amended the CVD law in 1984, 1988, and again in 1994.¹²⁷ The CAFC held that congressional awareness of this interpretation, when it amended the statute, constitutes legislative ratification of that interpretation.¹²⁸

122. *GPX V*, 666 F.3d at 734.

123. *GPX II*, 645 F. Supp. 2d at 1234–35.

124. Compare *GPX V*, 666 F.3d at 734 (holding that “countervailing duty law does not apply to NME countries” because “Congress legislatively ratified earlier consistent administrative and judicial interpretations that government payments cannot be characterized as ‘subsidies’ in a non-market economy context”), with *GPX III*, 715 F. Supp. 2d 1337, 1341–42 (Ct. Int’l Trade 2010) (holding that “Commerce must forego the imposition of the [CVD] law on the [NME] products” due to Commerce’s “inability . . . to determine whether, and to what degree double counting occurs when NME antidumping remedies are imposed on the same good” as CVDs).

125. *GPX II*, 645 F. Supp. 2d at 1243.

126. WTO Appellate Body AD and CVD Ruling, *supra* note 110, ¶ 611(d)(i–iii) (concluding that “imposition of anti-dumping duties calculated on the basis of an NME methodology, concurrently with the imposition of countervailing duties on the same products, without having assessed whether double remedies arose from such concurrent duties” violates the SCM Agreement).

127. *GPX V*, 666 F.3d at 741–43.

128. *Id.* at 734.

The CAFC reasoned that, in light of legislative ratification of Commerce's previous determination that the CVD laws do not apply to NMEs, Commerce was no longer free to change its mind:

Although Commerce has wide discretion in administering countervailing duty and antidumping law, it cannot exercise this discretion contrary to congressional intent. We affirm the holding of the Trade Court that countervailing duties cannot be applied to goods from NME countries. As we concluded in *Georgetown Steel*, if Commerce believes that the law should be changed, the appropriate approach is to seek legislative change.¹²⁹

Judge Restani's decision bound Commerce only in the specific case that she decided. Commerce was free to continue to apply CVDs in other NME cases because the CIT does not set precedent and its decisions govern only specific cases (the CIT is the equivalent of a U.S. district court).¹³⁰ The deference accorded to Judge Carman's commentary, notwithstanding his own caveat that later judgments could disagree,¹³¹ was based on perceptions of the decision's persuasiveness and reinforced by Commerce's analytical memoranda.¹³² By contrast, the CAFC's decision was precedent that bound the lower courts and Commerce, not only in the specific case before the court; but in all future cases unless Congress were to change the statute.

III. LEGISLATION AND NEW LEGAL CHALLENGES

A. *Hasty Passage of a Law Permitting CVD Investigations in NMEs*

The CAFC's decision altered the judicial and legislative agendas. Over a period of five years, CIT decisions and Commerce determinations subjected Chinese exports to the United States to a dozen CVD cases.¹³³ Because of a CIT ruling on a motion for

129. *Id.* at 745.

130. See *Algamma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989) (noting that CIT is a trial court and approving of a CIT judge arriving at a decision different from another trial court judge).

131. Gov't of the People's Republic of China v. United States (*Coated Free Sheet Paper*), 483 F. Supp. 2d 1274, 1282 (Ct. Int'l Trade 2007) ("While a later court may determine that the statute favors Plaintiffs' interpretation that countervailing duty law does not apply to NMEs, it is not clear at this point that Commerce's initiation of the countervailing duty investigation was 'patently *ultra vires*.'").

132. See, e.g., OTR Tire Memorandum, *supra* note 75, at 37-42 (arguing that *Georgetown Steel* recognized Commerce's broad discretion in applying CVDs to NMEs and did not hold that Commerce could never apply CVDs against NMEs).

133. See, e.g., *Bridgestone Ams., Inc. v. United States*, 636 F. Supp. 2d 1347, 1356-57 (Ct. Int'l Trade 2009) (determining that China was an NME and calculating price based on a surrogate ME country); *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 73 Fed. Reg. 40,480, 40,480-83 (Dep't of Commerce

injunctive relief in 2007,¹³⁴ whether Commerce could investigate subsidy allegations against merchandise from NMEs was no longer being adjudicated; rather, the questions that came before the CAFC involved double counting and double remedies.¹³⁵ Prior to the *GPX* case reaching the CAFC, all parties assumed (or accepted) that China could not reasonably argue that, as an NME, it was not susceptible to CVDs.¹³⁶ The legal disputes instead revolved around calculating methodologies and technicalities. The CAFC ended these disputes, which only Congress could revive.

The CAFC decision in December 2011 started a clock because without a successful request for rehearing en banc or a successful writ of certiorari to the Supreme Court—both improbable—all of the pending and prior CVD determinations against Chinese merchandise would be stopped or reversed. Only Congress could prevent a chaotic turnabout.

Congress reveled in the opportunity to overturn the judiciary with legislation punishing China. The House of Representatives Ways and Means Committee referred corrective legislation to the full House on the same day it had been introduced to the Committee, February 29, 2012.¹³⁷ Less than a week later, on March 6, 2012, the Committee's Chair moved to suspend the rules in order to expedite passage of the

(July 15, 2008) (final affirmative CVD determination) (determining that countervailable subsidies are provided to Chinese exporters of tires and imposing rates).

134. See *Coated Free Sheet Paper*, 483 F. Supp. 2d at 1283–84 (rejecting the PRC's argument that Commerce is not authorized to apply CVD law to products from NMEs and thus should be enjoined from continuing its CVD investigation and ruling instead that the Court lacked jurisdiction).

135. See *GPX V*, 666 F.3d 732, 734 (Fed. Cir. 2011); *GPX II*, 645 F. Supp. 2d 1231, 1240–41 (Ct. Int'l Trade 2009) (determining that the dual imposition of ADs and CVDs in NME countries has a high potential for double remedies).

136. See Corrected Brief of Defendant-Appellant United States at 8–9, 18–27, *GPX V*, 666 F.3d 732 (Fed. Cir. 2011) (Nos. 2011-1107, 2011-1108, 2011-1109), 2011 WL 860398, at *8–9, *18–27 (proposing that not only does the plain language of the Tariff Act of 1930 demonstrate that Commerce shall impose CVDs on any country—including an NME—but further noting that *GPX* did not contest the issue when Commerce published the CVD order).

137. See *Hearing on President Obama's Trade Policy Agenda with U.S. Trade Representative Ron Kirk and Second Panel on the Future of U.S. Trade Negotiations: Hearing Before the H. Comm. on Ways & Means*, 112th Cong. 2 (2012) (statement of Rep. Dave Camp, Chairman, H. Comm. on Ways & Means) [hereinafter *Trade Policy Hearing*] (“Ranking Member Levin, Chairman Brady, Ranking Member McDermott and I are introducing targeted legislation today to make sure that we have the tools we need to address unfair Chinese subsidies through our countervailing duty law in a WTO consistent manner.”). See generally Elliot J. Feldman, *Nothing Unites the United States Congress Like China (And Not in a Good Way): Treating China Like Canada (Maybe Even Worse)*, CHINA-US TRADE L., (Mar. 20, 2012), <http://www.chinaustradelawblog.com/2012/03/articles/cvd/nothing-unites-the-united-states-congress-like-china-and-not-in-a-good-way-treating-china-like-canada-maybe-even-worse> (recounting the history of the bill's passage).

bill.¹³⁸ All on that same day, the House suspended the rules, debated the bill, proceeded through various rule technicalities and passed the bill itself by a margin of 370 to 39.¹³⁹ On March 7, 2012, the very next day, it went to the Senate, which read the bill twice, considered it, read it a third time, and passed it without amendment by unanimous consent.¹⁴⁰ It was sent to the White House one day later, and was signed by the President on March 13, 2012.¹⁴¹

B. *Dealing with Double Counting*

Until the CAFC's decision, the subject at the CIT and before Commerce was double counting, not whether Commerce could investigate subsidy allegations in NMEs.¹⁴² When Congress rushed to preserve the collection of affirmative CVD determinations otherwise overturned by the CAFC, it concentrated on overturning *Georgetown Steel* and *GPX V*, not on double counting.¹⁴³

House Ways and Means Committee Chairman Dave Camp (R-Michigan) articulated Republican reservations about the bill, specifically that it was not curing the double counting problem that had been the focus of Judge Restani's remands to Commerce.¹⁴⁴ The bill, therefore, contains a second section, "Adjustment of Antidumping Duty in Certain Proceedings Relating to Imports from Nonmarket Economy Countries."¹⁴⁵ Chairman Camp was concerned that the legislation could violate WTO obligations enunciated in a March 2011 Appellate Body decision warning against double

138. *Id.*; see also 158 CONG. REC. H1166 (daily ed. Mar. 6, 2012) (statement of Rep. Dave Camp).

139. 158 CONG. REC. H1178 (daily ed. Mar. 6, 2012).

140. See 158 CONG. REC. S1441 (daily ed. Mar. 7, 2012).

141. Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, 126 Stat. 265 (2012) (to be codified at 19 U.S.C. §§ 1671, 1677f-1); Remarks on Trade, 2012 Daily Comp. Pres. Doc. 1, 2 (Mar. 13, 2012).

142. See Spak et al., *supra* note 6, at 1126 (discussing that CIT and Commerce determinations focused on double counting until the case reached the CAFC, at which time the court rendered a judgment on "a different and much broader ground").

143. See *GPX Int'l Tire Corp. v. United States (GPX VI)*, 678 F.3d 1308, 1311 (Fed. Cir. 2012) (noting that it is clear that Congress sought to overrule *GPX V* considering both the language of the new legislation and the lengthy discussion of the case during the floor debate); see also 158 CONG. REC. H1167 (daily ed. Mar. 6, 2012) (statement of Rep. Dave Camp) (stating that the bill overturns an erroneous decision by the Federal Circuit); 158 CONG. REC. H1170-72 (daily ed. Mar. 6, 2012) (statement of Rep. Jackson Lee) (discussing at length *Georgetown Steel* and *GPX V*).

144. See *Trade Policy Hearing*, *supra* note 137, at 2 (statement of Rep. Dave Camp, Chairman, H. Comm. on Ways & Means) (stating the importance of the new legislation comporting with the WTO).

145. Application of Countervailing Duty Provisions to Nonmarket Economy Countries sec. 2, § 777A(f).

counting.¹⁴⁶ President Obama, supporting the legislation, insisted it must not violate WTO obligations, but only Chairman Camp acted, albeit unsuccessfully, to meet this requirement.

The CIT had ordered Commerce to figure out a solution to the double counting problem before finding subsidies.¹⁴⁷ The new legislation orders Commerce to find subsidies and then figure out a solution.¹⁴⁸ Commerce applied the new law in its section 129 determinations,¹⁴⁹ purportedly bringing OTR Tires and several other cases into conformity with adverse WTO rulings on the double counting issue.¹⁵⁰ In those cases it made a small downward adjustment to the antidumping rates for the amount it calculated was being double counted in the CVD rates.¹⁵¹ Judge Restani already found this solution contrary to law, so the jury is still out as to whether Commerce's attempted solution to the double counting problem—repeating an old one—will find approval at the CAFC.

Even if Commerce were unsuccessful in solving the double counting problem, it still would have to impose CVD duties, based on the new law. Companies in NMEs will be required to contest the illegal double counting on a case-by-case basis,¹⁵² yet without the Camp intervention the legislation may not have addressed double counting at all.

The new law, Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Public Law Number 112-99 (Pub. L. 112-99), provides that "the merchandise on which countervailing duties shall be imposed . . . includes a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the

146. See *Trade Policy Hearing*, *supra* note 137, at 2 (statement of Rep. Dave Camp, Chairman, H. Comm. on Ways & Means) (stressing the importance of "address[ing] unfair Chinese subsidies through our countervailing duty law in a WTO consistent manner").

147. *GPX II*, 645 F. Supp. 2d 1231, 1243 (Ct. Int'l Trade 2009) ("If there is a substantial potential for double counting, and it is too difficult for Commerce to determine whether, and to what degree double counting is occurring, Commerce should refrain from imposing CVDs on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools."), *aff'd*, 715 F. Supp. 2d 1337, 1345 (Ct. Int'l Trade 2010).

148. Pub. L. No. 112-99 sec. 2(a), § 777A(f).

149. Section 129 of the Uruguay Round Agreements Act, 19 U.S.C. § 3538 (2006), provides the statutory process for bringing agency determinations ruled inconsistent with the U.S. government's WTO obligations into conformity.

150. Memorandum from Christian Marsh, Deputy Assistant Sec'y for Antidumping & Countervailing Duty Operations, to Paul Piquado, Assistant Sec'y for Imp. Admin. 16 (July 31, 2012), available at <http://ia.ita.doc.gov/download/section129/prc-otr-tires-Final-129-Determination-20120830.pdf>.

151. *Id.* at 16.

152. Pub. L. No. 112-99 sec. 2(a), § 777A(f).

United States from a nonmarket economy country.”¹⁵³ It provides in a separate section that Commerce shall “reduce the antidumping duty by the amount of the increase in the weighted average dumping margin estimated by the administering authority [i.e., Commerce]”¹⁵⁴ This reduction depends, however, upon Commerce’s ability to “reasonably estimate the extent to which the countervailable subsidy . . . in combination with the use of normal value [from the antidumping calculation] has increased the weighted average dumping margin for the class or kind of merchandise.”¹⁵⁵ When Commerce cannot make that estimate, it cannot make the adjustment, but by statute it must still assess CVDs.¹⁵⁶ The first provision, that CVDs should be applied to merchandise from NMEs, was made retroactive to November 20, 2006;¹⁵⁷ however, the second provision, to avoid double counting, applies only to new cases initiated on or after March 13, 2012.¹⁵⁸

C. *Back in Court*

While Congress was busy passing Public Law 112-99, the *GPX* case remained pending at the CAFC as a result of the U.S. Government’s filing of a petition for rehearing en banc.¹⁵⁹ Congress beat the judicial deadline, but consequently left the judicial proceeding apparently open. Following congressional enactment of this bill, the CAFC requested the parties to submit further briefing on the impact of the new legislation on future proceedings in the *GPX* case.¹⁶⁰ The intention of the legislation, after all, was to settle the legal dispute.¹⁶¹

153. *Id.* sec. 1(a), § 701(f)(1).

154. *Id.* sec. 2(a), § 777A(f)(1)(C).

155. *Id.*

156. *Id.* secs. 1(a), 2(a).

157. *Id.* sec. 1(b)(1).

158. *Id.* sec. 2(b)(1).

159. Corrected Petition for Rehearing En Banc of Defendant-Appellant United States, *GPX Int’l Tire Corp. v. United States*, *GPX VI*, 678 F.3d 1308 (Fed. Cir. 2012) (Nos. 2011-1107, 2011-1108, 2011-1109), 2012 WL 1029323).

160. For a more complete discussion of the CAFC’s response to the new legislation, see John J. Burke, *The American Government Still Has Three Branches: The Court of Appeals Tells Congress It May Have Acted in Haste*, CHINA-U.S. TRADE L. (June 9, 2012), <http://www.chinaustradelawblog.com/2012/06/articles/cvd/the-american-government-still-has-three-branches-the-court-of-appeals-tells-congress-it-may-have-acted-in-haste>.

161. See *supra* note 144 and accompanying text (discussing the statute’s purpose to correct the improperly decided *GPX V*); see also 158 CONG. REC. 1171-72 (daily ed. Mar. 6, 2012) (statement of Rep. Jackson Lee) (“H.R. 4105[] overturns the decision of the Court of Appeals for the Federal Circuit and preserves the validity of the countervailing duty proceedings against imports from China and Vietnam, beginning in 2006. . . . The problems raised by [*GPX V*] has [sic] been addressed by this legislation.”).

GPX argued in its brief that Public Law 112-99 is unconstitutional for two reasons. First, the retroactive effect of the first section would change the outcome of the *GPX V* case after the CAFC already had rendered its decision in favor of GPX in December 2011, based on the law as it was when GPX had been investigated.¹⁶² Second, the new law would create improperly a special rule applicable only to *GPX* and to a few other cases in which Commerce may impose both CVDs and ADs on the same merchandise from an NME without attempting to avoid double counting.¹⁶³

GPX argued that the different treatment it and a few other companies, whose cases were initiated between the two effective dates, would receive as compared to companies for which investigations would be initiated after March 13, 2012, violated the Equal Protection Clause of the U.S. Constitution because GPX and those other companies would be treated differently for no reason.¹⁶⁴ Companies subject to investigation prior to the legislation would be exposed to double remedies; companies investigated after the legislation would not be, although only in theory because of the flaw in the new statute's language that still leaves to Commerce discretion on methodology without discretion as to imposing CVDs.¹⁶⁵

The CAFC quickly rejected the first argument, that the CAFC decision was already a decided case before Congress changed the law, because the CAFC had not yet issued its mandate in the *GPX* case when Congress enacted Public Law 112-99 and, therefore, Congress did not change the outcome of a decided court case.¹⁶⁶ The CAFC appeared more sympathetic to the second argument, however, because it sent the case back to the CIT on May 9, 2012 with instructions to the lower court to make "a determination of the constitutionality of the new legislation and for other appropriate proceedings."¹⁶⁷ Congress had not succeeded in ending the legal controversy.

The *GPX* case is now back at the CIT, which on January 7, 2013 in *GPX VII*¹⁶⁸ upheld the constitutionality of the new law.¹⁶⁹ Once the

162. *GPX VI*, 678 F.3d 1308, 1312 (Fed. Cir. 2012).

163. *Id.*

164. *Infra* note 171 and accompanying text (contending that the discriminatory effect violates Equal Protection).

165. *GPX VI*, 678 F.3d at 1312; *see also supra* notes 157–59 and accompanying text (discussing the different dates in the legislation and the possibility for confusion).

166. *GPX VI*, 678 F.3d at 1312.

167. *Id.* at 1313 ("The second issue, however, is a matter of first impression as to which we have received only cursory briefing. . . . [T]his issue should be considered by the Trade Court in the first instance.")

168. No. 08-00285, 2013 WL 64465 (Ct. Int'l Trade Jan. 7, 2013).

remands to address CVD calculation issues are completed, GPX and Starbright can be expected to appeal that decision back to the CAFC. Even if the CAFC were to overturn the CIT and find that the new law is unconstitutional, that decision would apply only to the GPX case and the few other cases in which Commerce applied both CVDs and ADs to the same merchandise from NMEs because of the limited application of the decision to investigations between November 20, 2006 and March 13, 2012.¹⁷⁰

D. *The Pending Constitutional Issues*

GPX and Starbright filed briefs at the CIT on August 17, 2012, arguing that Public Law 112-99 violates the Equal Protection Clause because the law treats companies differently, depending upon when petitions were filed against them.¹⁷¹ They also argued that the law is unconstitutional because it is *ex post facto*, in that the retroactivity provision applies penalties for alleged offenses before the law permitted such penalties.¹⁷²

A second Chinese company, Tianjin United Tire & Rubber International Co. (TUTRIC), which had participated at Commerce but had not previously filed in the appeals, submitted a separate brief making essentially the same argument.¹⁷³ A third Chinese company, Beijing Tianhai Industry Co., also made this argument in its complaint filed on August 20, 2012, challenging Commerce's final affirmative determinations in the AD and CVD investigations of *High Pressure Steel Cylinders from China*.¹⁷⁴ Tianhai challenged the constitutionality of Public Law 112-99 in the AD case as well as in the CVD case because Public Law 112-99 calls for Commerce to make

169. *See id.* at *1, *6-7, *12-14 (assuming *arguendo* that the new law effected a retroactive change in the law and then holding that the new law did not rise to the level of retroactive penal legislation within the scope of the Ex Post Facto Clause and rejecting plaintiff's due process and equal protection arguments).

170. *See GPX VI*, 678 F.3d at 1312 (noting the potential validity of appellees' argument that the new law "improperly creates a special rule applicable only to this case (or perhaps a few others) due to the different effective dates in the two provisions").

171. Respondent Plaintiffs' Supplemental Memorandum of Points and Authorities in Support of Their Motion for Judgment on the Agency Records at 28-29, *GPX VII*, No. 08-00285, ECF No. 366-1.

172. *Id.* at 9-13.

173. Brief on Constitutional Issues of Co-Plaintiff Tianjin United Tire and Rubber International Co. at 8-14, *GPX VII*, No. 08-00285, ECF No. 367-1 (proposing that there is no legitimate government purpose for the discriminatory classification).

174. Complaint, Beijing Tianhai Industry Co. v. United States, No. 12-00203 (Ct. Int'l Trade filed Aug. 20, 2012), ECF No. 9.

adjustments for double counting in the companion AD case, rather than in the CVD case.¹⁷⁵

All four companies—GPX, Starbright, TUTRIC, and Tianhai—argued that the new law violates the Ex Post Facto, Due Process, and Equal Protection Clauses of the U.S. Constitution because the provision applying the CVD law to NMEs was made retroactive to 2006, whereas the provision requiring Commerce to try to avoid double counting when ADs and CVDs are imposed on the same merchandise applies prospectively only.¹⁷⁶ The law, thus, discriminates against companies subject to cases initiated before March 13, 2012, exposing them to both ADs and CVDs without any provision to avoid double counting.¹⁷⁷ By contrast, Commerce must at least make an attempt to avoid double counting in cases filed after March 13, 2012.¹⁷⁸

The U.S. Department of Justice (DOJ) filed its response brief in the GPX case on October 16, 2012. DOJ's primary argument was that the difference in effective dates of the two provisions of Public Law 112-99 is constitutional because the provision applying the CVD law to NMEs, effective November 20, 2006, is not a retroactive change in the law.¹⁷⁹ Instead, DOJ argued, it is merely a "clarification" correcting the CAFC's "erroneous" interpretation of prior law.¹⁸⁰ By contrast, DOJ argued that the provision requiring Commerce to attempt to solve the double counting problem is a change from prior law to accommodate an adverse WTO finding, which requires only prospective effect.¹⁸¹ Because, according to DOJ, there is no retroactive change in the law, there is no ex post facto change that could violate the constitutional prohibition on ex post facto penalties.¹⁸² Similarly, because the only change in the law is the

175. *Id.* at 4–5.

176. *See supra* notes 169–75 and accompanying text (describing the parties' opposition to the legislation).

177. *See supra* notes 162–66 and accompanying text (discussing the argument that Pub. L. No. 112–99 is unconstitutional on equal protection grounds due to the different effective dates in the two provisions).

178. Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112–99, sec. 2, § 777A(f), 126 Stat. 265, 265–66 (2012) (calling for a reduction in the AD by the amount of the increase in the weighted average dumping margin estimated by the administering authority to offset subsidies in actions after March 13, 2012).

179. Defendant's Response to Plaintiffs' Supplemental Briefs Regarding the Constitutionality of the New Legislation at 4, GPX VII, No. 08-00285 (Ct. Int'l Trade Jan. 7, 2013), ECF No. 374 [hereinafter Defendant's Response].

180. *Id.* at 3–5, 7. The argument is odd, among other reasons, because it asserts that the CAFC had been advancing an erroneous interpretation of its own ruling.

181. *Id.* at 8–9. Congressman Camp had insisted on this provision in the law because of concern about compliance with the WTO.

182. *Id.* at 9.

double counting provision, and that provision applies to all cases going forward, there is no disparate treatment that could violate the Equal Protection Clause.¹⁸³

The DOJ arguments would require the CIT, and ultimately the CAFC, to agree that the new statutory provision requiring Commerce to apply CVD law to NMEs makes no change to existing law. Yet, the CAFC in *GPX V* interpreted the pre-existing law as prohibiting the application of the CVD law to NMEs and, under the constitutional separation of powers, the courts, not the legislature, interpret existing law.¹⁸⁴

DOJ attempted to side-step the separation of powers problem by arguing that, because Congress passed and the President signed Public Law 112-99 before the CAFC's decision in *GPX V* could become final, *GPX V* was not a binding judicial decision.¹⁸⁵ According to this argument, there was no binding judicial decision that the law on applying CVDs to NMEs was any different than the law as "clarified" by Congress in Public Law 112-99.¹⁸⁶ Of course, if DOJ were correct, the CAFC decision would not have been "erroneous," because effectively there would have been no decision.

DOJ argued, in the alternative, that even if the first provision of Public Law 112-99 were retroactive, it would not violate the Equal Protection Clause because Congress had a rational basis for the distinction in the effective dates of the two provisions.¹⁸⁷ DOJ advanced the argument that making the first provision retroactive to 2006 merely reestablished the status quo prior to the CAFC's misinterpretation of congressional intent and, thus, was rational.¹⁸⁸ Congress's decision not to apply the second provision retroactively also was rational, according to DOJ, because it would be a significant burden on Commerce and undermine the interests of administrative finality and efficiency were Commerce required to redo more than five years of administrative proceedings in order to apply the double counting provision retroactively.¹⁸⁹

183. *Id.* at 11.

184. *GPX V*, 666 F.3d 732, 734 (Fed. Cir. 2011), *superseded by statute*, Pub. L. No. 112-99, 126 Stat. 265 (2012), *as recognized in* *GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1311 (Fed. Cir. 2012).

185. Defendant's Response, *supra* note 179, at 10.

186. *Id.* at 3.

187. *Id.* at 17.

188. *Id.*

189. *Id.* The CIT has ruled repeatedly that it is not too burdensome on respondent parties to participate in a full investigation and post cash deposits on prospective duties before resolving whether there was anything legal about the investigation in the first instance. Here, DOJ contended that it would be too burdensome on the very same administrative agency requiring respondent

Plaintiffs replied to the DOJ arguments on November 6, 2012.¹⁹⁰ They started by refuting DOJ's argument that the provision of Public Law 112-99 applying the CVD law to NMEs was a mere clarification of existing law and, therefore, not retroactive.¹⁹¹ Plaintiffs pointed out that the provision could be a clarification only if the pre-existing law were ambiguous.¹⁹² Because the CAFC in *GPX V* did not apply *Chevron* deference to Commerce's post-2006 interpretation of the CVD law,¹⁹³ which it would have been required to do had it found the statute to be ambiguous, the CAFC found that the pre-existing law was clear on its face and, consequently, Public Law 122-99 could not be a mere clarification of pre-existing law.¹⁹⁴

Plaintiffs refuted DOJ's argument that *GPX V* has no validity by noting that the CAFC had denied DOJ's request to vacate it.¹⁹⁵ Were the decision invalid, having not achieved finality prior to the legislative "clarification," it would not have required vacation:

The CAFC understood that the new CVD legislation was a fundamental change, and not a mere clarification. Therefore, because the CAFC's December 2011 decision addressed only the prior law, there was no need to vacate that decision. As an *interpretation of prior CVD law*, that CAFC December 2011 decision still stands.¹⁹⁶

participation for it to correct findings in prior cases, even though that agency is required to make such changes every time the same CIT remands cases on appeal.

190. Respondent Plaintiffs' Reply to Response Briefs of Defendant and Defendant-Intervenors Concerning Constitutional Issues, *GPX VII*, No. 08-00285 (Ct. Int'l Trade Jan. 7, 2013), ECF No. 375 [hereinafter Plaintiff's Reply].

191. *Id.* at 2.

192. *Id.*

193. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court explained that:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted).

194. Plaintiff's Reply, *supra* note 190, at 3. They also pointed out that the new law will be codified as a new section to the U.S. Code, 19 U.S.C. § 1671(f), rather than a clarification added to an old section, 19 U.S.C. § 1671(a). Plaintiff's Reply, *supra* note 190, at 4.

195. Plaintiff's Reply, *supra* note 190, at 3 n.2.

196. *Id.* at 15.

Plaintiffs also argued that the retroactive change in the law is unconstitutional as an *ex post facto* penalty, rather than a proportional remedy:

A new law cannot be remedial if it is sanctioning conduct—and imposing an additional remedy—that has already been remedied. The premise of several decades of trade policy toward NMEs, repeatedly confirmed by the courts, has been that the special NME AD rules remedy this problem Whether the fix is on the CVD side or the AD does not matter. Under the retroactive application of the new law, there is no fix at all. Rather, the remedies are duplicative, punishing the same “problem” of imports from an NME country twice.¹⁹⁷

Additionally, plaintiffs argued that the retroactive change in the law violates due process because it is a retroactive tax with harsh and oppressive effects, distinguishing the cases cited in DOJ’s brief on due process:

The new statute thus did not restore the *status quo ante* . . . but rather imposed an interpretation of the statute that even Commerce did not advance until 2007. Congress is entitled to change a law if it no longer agrees with it; but where that change enacts a new tax, it must make the change prospective only.¹⁹⁸

Finally, plaintiffs argued that Public Law 112-99 violates the Equal Protection Clause because there is no rational basis for treating importers whose goods were subject to a CVD investigation prior to the passage of the new law more harshly than importers whose goods were subject to such an investigation after the passage of the new law.¹⁹⁹ A legal change could have that effect, but the law, they contended, cannot direct it. They refuted DOJ’s claims that the distinction has a rational basis (treating both groups equally would create “administrative costs” on Commerce and “defeat the purpose” of the new law) by noting that: (1) forgoing CVDs in cases filed before the passage of the new law would not impose any administrative burden on Commerce; and (2) it would not defeat the purpose of the new law, which was designed, in significant part, to solve the double counting problem when CVDs are applied to the same merchandise to which Commerce is applying its NME AD methodology.²⁰⁰

DOJ and plaintiffs analyzed “equal protection” in Public Law 112-99 differently because they focused on different provisions of the new

197. *Id.* at 7–8.

198. *Id.* at 12.

199. *Id.* at 13.

200. *Id.* at 14.

law.²⁰¹ For purposes of administrative burden, DOJ assumed that the only way to equalize the treatment of the two groups would be to apply the double counting provision retroactively to the older investigations, which would create a significant administrative burden.²⁰² Plaintiffs pointed out that the problem could be solved without administrative burden by making both provisions prospective.²⁰³ When discussing the purpose of the law, DOJ focused on the purpose of the first provision, which is to assure the application of the CVD laws to NMEs,²⁰⁴ while plaintiffs focused on the purpose of the second provision, which is to fix the double counting problem when applying the CVD laws to NMEs.²⁰⁵

Chief Judge Restani issued her decision on these constitutional challenges to Public Law 112-99 in her *GPX VII* decision, dated January 7, 2013.²⁰⁶ She took several pages to debunk the DOJ's argument that Section 1 of the new law merely clarified pre-existing law and, therefore, was not a retroactive change in the law. However, she did not make a finding on whether that provision is retroactive; instead, she assumed it was for reasons of judicial economy.²⁰⁷ She then found it did not violate the Ex Post Facto Clause of the Constitution because GPX failed to meet its burden to show that Section 1 of Public Law 112-99 was punitive, rather than remedial, and remedial laws may be retroactive without violating the ex post facto prohibition.²⁰⁸

Judge Restani found that Public Law 112-99 did not violate due process.²⁰⁹ Because the new law is economic legislation, she applied the "rationally based on legitimate government interests" test for determining due process.²¹⁰ She concluded that GPX failed to meet its burden to show that Congress did not have a rational basis for passing the new legislation or that GPX had a vested interest in not having the CVD law applied to its imports.²¹¹

Judge Restani found that making Section 1 of Public Law 112-99 retroactive was rationally based on legitimate government interests in

201. Compare Defendant's Response, *supra* note 179, at 11 (addressing section 2 of Public Law 112-99), with Plaintiff's Reply, *supra* note 190, at 12-13 (focusing on section 1 of Public Law 112-99).

202. See Defendant's Response, *supra* note 179, at 13.

203. Plaintiff's Reply, *supra* note 190, at 12.

204. Defendant's Response, *supra* note 179, at 15.

205. Plaintiff's Reply, *supra* note 190, at 14.

206. *GPX VII*, No. 08-00285, 2013 WL 64465 (Ct. Int'l Trade Jan. 7, 2013).

207. *Id.* at *6.

208. *Id.* at *6-7.

209. *Id.* at *8-12.

210. *Id.* at *8.

211. *Id.* at *11-12.

finality in the prior cases, and in not imposing an administrative burden on Commerce.²¹² She also observed that GPX had notice from Commerce's preliminary determination that its imports from that day forward could be subject to CVDs and, thus, GPX had no vested interest in the CAFC's interpretation of prior law.²¹³

Judge Restani similarly dismissed GPX's arguments that Public Law 112-99 violated the Equal Protection Clause of the Constitution. She found the legislation did not target a suspect class or implicate a fundamental right and, therefore, the difference in treatment between companies subject to CVD investigations initiated before and after March 13, 2012 would be upheld as "long as it bears a rational relation to some legitimate end."²¹⁴ She found that it was rational for Section 2 of the law to be prospective because its purpose was to remedy a WTO problem, and such fixes normally are done only prospectively.²¹⁵ Judge Restani found that Section 1's retroactive application was rationally related to a legitimate end of finality in the older cases and to avoid imposing an administrative burden on Commerce.²¹⁶

IV. WHAT IS COMING NEXT, AND WHAT REMAINS

The *GPX* case is likely to remain pending before the CIT during the Spring of 2013 while the parties are addressing Commerce's remand determination on the remaining CVD calculations issues. Assuming Judge Restani is able to resolve those challenges in short order and without further remand to Commerce, the constitutional challenges to Public Law 112-99 are likely to be back on appeal before the CAFC by the Summer of 2013.

Even were the CAFC to overturn the CIT and hold that the new law is unconstitutional, that decision might apply only to the *GPX* case, the *Beijing Tianhai* case, and the few other cases in which Commerce applied both CVDs and ADs to the same merchandise from NMEs between November 20, 2006, and March 13, 2012.²¹⁷ The argument presented in court has been limited to the unequal treatment afforded to the companies whose investigations were initiated between the two effective dates.²¹⁸ A favorable ruling would benefit only those companies.

212. *Id.*

213. *Id.*

214. *Id.* at *13 (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

215. *Id.*

216. *Id.* at *14.

217. See *supra* notes 162–66 and accompanying text.

218. See Plaintiff's Reply, *supra* note 190, at 13.

The constitutional, statutory, and regulatory issues involved in *GPX* are entering their sixth year of administrative and legal dispute. Because of the congressional intervention, none is fully resolved. President Obama and Congressman Camp wanted to be sure the new law would conform to WTO obligations.²¹⁹ It almost certainly does not,²²⁰ and in the hasty effort to make it comply, constitutional questions about retroactivity and ex post facto legislation were introduced, not only for *GPX*, but for at least another dozen cases as well.²²¹

Judge Restani finally reached the CVD issues, including privatization and pass-through, in her *GPX VII* decision. Those issues are now back at Commerce on remand, but are subject to further judicial review, by Judge Restani and ultimately the CAFC should any party choose to appeal those issues. The respondent parties are in a sixth year of burdensome and costly administrative reviews. Because of the congressional intervention, the orders may be legal (assuming the law that authorizes the CVD order is constitutional), but the measurements in them remain in dispute.

The final congressional word, more punitive toward China than analytical about differences between market and non-market economies, has eliminated questions from the discourse without answers. Commerce, as a matter of law, now not only can investigate subsidies allegations in NMEs,²²² but must impose CVDs when it finds countervailable subsidies.²²³ Commerce, as a matter of law, must try to avoid double counting, but were Commerce not to succeed in this difficult task, the CVD order must remain regardless of any double counting. Congress did not examine how subsidies can be found in an NME; it simply ordered that they be found.²²⁴

A common refrain in American discourse is that courts should not try to legislate. *GPX* may now stand for the proposition that Congress should not try to adjudicate. The CAFC was interpreting congressional intent, and it was appropriate for Congress to express

219. *Supra* note 146 and accompanying text.

220. *Cf.* WTO Appellate Body AD and CVD Ruling, *supra* note 110, ¶ 541 (discussing the distinction between prohibited and acceptable "double counting").

221. *See, e.g.*, Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, 75 Fed. Reg. 49,459 (Dep't of Commerce Aug. 13, 2010) (notice of amended final determination); Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, 73 Fed. Reg. 40,480, 40,481 (Dep't of Commerce July 15, 2008) (final affirmative CVD determination).

222. Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, sec. 1(a), § 701(a), 126 Stat. 265, 265 (2012).

223. *Id.*

224. *Id.*

its intent. But Congress was reactive, not deliberative, and in the process rushed legislation that created more problems, and generated more questions, than it solved or answered.

Commerce continues to dodge the problem of developing a test for market-oriented sectors or enterprises. Consequently, after all of this litigation, there remains no serious attempt to address the paradox of treating China as an NME while investigating subsidies that must be, by definition, market-distorting.

On September 17, 2012, the PRC requested consultations concerning whether the new law violates WTO rules, particularly Articles IV and X of the WTO's General Agreement on Tariffs and Trade (GATT) and the Subsidies and Countervailing Measures Agreement (SCM Agreement).²²⁵ The United States parried China's subsequent request for a WTO dispute panel, but the WTO's Dispute Settlement Body granted China's request on December 17, 2012.²²⁶ The Director-General composed the panel on March 4, 2013, and the WTO must now examine the compatibility of Congress' hasty legislation with WTO obligations.²²⁷

Potentially years remain in these legal proceedings, in U.S. courts and at the WTO. The affected companies will continue to pay duties calculated with the methodology applied to NMEs, and will continue to be subject to annual administrative reviews. The double counting problem, notwithstanding the new statute, likely will be resolved for none of them. The "old" cases involved double counting that the new statute would not correct, but the new statute will not prevent double counting in the new cases, either. Instead, they will be susceptible to legal contests over Commerce's likely failure to solve the double counting problem while they pay the duties and undergo annual administrative reviews.

Eventually, the CAFC will sort out the constitutionality of the new statute, but the proceedings have become an expensive sideshow for all but the companies involved in the "old" cases. Congress did settle the most important question, authorizing CVD investigations in NMEs,²²⁸ but failed to provide guidance on how this mandate is to be carried out. The inherent contradictions in the attempt to treat China as an NME for AD, sufficiently a market economy for CVD, but

225. See China WTO Request for Consultations, *supra* note 11.

226. See Constitution of the Panel Established at the Request of China, *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/3 (Mar. 5, 2013).

227. *Id.*

228. Application of Countervailing Duty Provisions to Nonmarket Economy Countries, sec. 1, § 701(f).

not market enough to apply market methodologies in the AD investigation, are neither likely to be solved by Commerce nor condoned by the WTO.

Were GPX to prevail on appeal to the CAFC, acting virtually on behalf of the companies against whom Commerce acted in the 2006–2012 window, those companies could recover substantial duties covering many years, but more likely they will be entangled in procedural and administrative jousting over whether, assuming they win, the AD duties can stand and even be recalculated to account for the elimination of the CVD duties. Hence, in winning, they may not win much. Meanwhile, the statute mandates CVDs in the new cases, assuming it is not found unconstitutional, or the unconstitutional parts somehow are severed.

For the PRC, graduation from NME status will bring an end to the debate. The WTO likely will not reach a conclusion before the end of 2015 and then can rule only prospectively. Therefore, as a practical matter, there is little for the PRC to gain at the WTO beyond embarrassment for the United States.

The GPX cases have been grappling with the most important issues in trade law in the new millennium, at least since the majority of trade remedy disputes have involved Chinese merchandise. That the courts and agencies involved have been unable to resolve much, and that Congressional intervention solved little, reflects the more general paralysis in the governing institutions of the United States. International trade, vital to economic recovery, has not benefited from the institutions created to guarantee the rule of law. These institutions have channeled the most important issues to the sidelines, or resolved them with the least concentrated attention. The law in these cases, and the lawmakers so far, have failed, and international trade and trade law are the worse for it.

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