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U.S. COUNTERVAILING DUTY LAW AGAINST NONMARKET ECONOMIES: LEGAL ANALYSIS AND CASE STUDIES OF VIETNAM

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"U.S. COUNTERVAILING DUTY LAW AGAINST NONMARKET ECONOMIES: LEGAL ANALYSIS AND CASE STUDIES OF VIETNAM"

BY

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Abstract

Since 2006, the United States has imposed countervailing duty, in addition to antidumping duty, on imports from Vietnam. This application of countervailing duty has been paradoxical: in order to apply the duty, the U.S. Department of Commerce must recognize that market forces exist in Vietnam, which are distorted by government intervention; at the same time, however, the Department of Commerce ("Commerce") uses a "nonmarket economy" ("NME") methodology to calculate the amount of countervailing duty. This NME methodology looks to surrogate country prices to approximate the extent of government distortion of market forces, and thus the amount of countervailable subsidies, in Vietnam.

The NME methodology poses problems for Vietnamese enterprises, the Government of Vietnam, and global trade more generally. First, the methodology provides discretion for Commerce to impose unpredictable duty rates. Second, Commerce has taken an all-or-nothing approach to recognizing market-oriented industries within Vietnam; as it stands, unless all significant inputs within an industry are subject to market-driven prices, Commerce looks to surrogate-country prices as benchmarks to calculate countervailable subsidies. This paper analyzes a series of countervailing duty cases against Vietnam to determine which government programs are most frequently treated as providing countervailable subsidies, to make recommendations for Vietnamese enterprises and the Government of Vietnam, and to analyze trends in the development of Commerce's practice of imposing countervailing

duty against Vietnam as a nonmarket economy country. The author recommends that Commerce adopt a "mix and match," or "bubbles of capitalism" approach to calculating countervailing duty that makes greater use of in-country benchmarks to impose countervailing duty more justly and predictably.

Acknowledgements

The idea of researching this topic arose when I was on a business trip with an international trade attorney from Washington, DC, who represented a mandatory respondent in the U.S. countervailing duty investigation against Steel Pipe from Vietnam. I had a special opportunity to participate in this case as Vietnamese counsel from the initial investigation until the final stage of investigation. This topic, later, was interesting to and supported by my professors and academic supervisors at Golden Gate University School of Law. Nevertheless, the path that I took to complete this thesis has spanned many years, for it was not as simple as I initially thought.

I have spent many years conducting the legal research and completing this thesis. Without the dedicated support and special attention of Professor Christian Nwachukwu Okeke, Director of the LLM and SJD International Legal Studies Programs, I would not have been able to complete the SJD program and this thesis. I sincerely thank Professor Okeke for having encouraged and guided me in the process of writing this thesis.

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Lastly, I dedicate this thesis to my late father, my mother, my elder brother in Vietnam, and especially to my wife, my daughter, and my son. They all supported me endlessly and were as selfless as they could be. They have encouraged my work every day, and they have selflessly sacrificed their time to help me complete this thesis.

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Chapter 1. Introduction

1.1. Background

In the years since 1990, Vietnam has undergone a remarkable economic transformation: foreign investment and private enterprise have proliferated, and even the formerly state-run banking system has opened to private commercial operators. As a result of these and other market-driven reforms, Vietnam entered global trade regime: in the early 1990s, the IMF and World Bank resumed lending to Vietnam, and the United States lifted its Vietnam War-era trade embargo.[1] And after a decade of normalized trade relations, Vietnam formally became a member of the WTO in January 2007. Since then, Vietnam's economy has skyrocketed, as has its role in global trade: by 2019, Vietnam-U.S. trade flows had grown to $77.6 billion, making Vietnam the seventh-largest source of U.S. imports and 27th-largest destination for U.S. exports.[2]

Along with this historic trade growth has come a series of trade disputes between American and Vietnamese producers, chiefly regarding the imposition of the antidumping duty ("ADD") and countervailing duty ("CVD") laws by the United States against Vietnamese exports. Historically (prior to 2006), the CVD law did not apply to Vietnam: CVD is meant to offset distortions to the market caused by government intervention in the form of grants or subsidies to producers, and thus the CVD law was not used against "nonmarket economy" countries where the prevailing view was that there was no private market for the government to distort. Rather, against such countries, the United States focused on dumping and other trade remedies. As of 2006, however, the U.S. Department of Commerce ("Commerce") changed course and determined that sufficient market forces were at play even in nonmarket economies to

[1] *See infra,* notes 957-958.
[2] *See infra,* note 980.

permit the identification and measurement of government distortion and thus to permit the imposition of the CVD law.[3] Against that background, the author conducted research into problems and their potential solutions concerning the imposition of the CVD law against Vietnamese producers.

1.2. Specific Scope and Questions of Research

Applying the CVD law to nonmarket economy countries has caused several conflicts in the international trade regime. One problem, for instance, is double-counting, or the idea that ADD and CVD will be duplicative of each other and thus unfairly harm the foreign producer of American imports; this paper discusses that concept somewhat as it pertains to the imposition of the CVD law in Vietnam.[4] But a far greater problem has been the method of calculating the CVD itself. When the U.S. applies the CVD law to a market economy country, it is fairly easy in most cases to measure the countervailable subsidy: for instance, if a foreign producer is able to purchase raw materials at a reduced price due to a government subsidy on those materials, one can ordinarily compare the price paid by the producer to the market price of those materials in the country to determine the benefit of the subsidy (and thus the amount of CVD that the United States would impose). But when it comes to a nonmarket economy country, Commerce takes a different approach: because it does not trust that the prevailing prices in such a country are actually market-driven prices to begin with, Commerce uses benchmark prices from surrogate countries as the prices against which to measure the subsidies received by the foreign producer.[5] This

[3] *See infra,* Section 4.3.2.4.3.
[4] *See infra,* Section 4.3.2.5.
[5] *See infra,* Sections 3.2.1.2.3 and 5.4.1.4. In some cases, even when imposing CVD against a market economy country, Commerce uses surrogate country benchmarks, but this practice is generally limited to cases in which there is no domestic market within the foreign producer's country for the good or service being measured.

methodology has prompted criticism that it is applied unfairly, inconsistently, or arbitrarily—and invariably to the detriment of the foreign producer.[6]

This dissertation analyzes the imposition of the U.S. CVD law against Vietnam, with a particular focus on the implications of Vietnam's status as a nonmarket economy country. Much has been said about the nonmarket economy method for determining *antidumping* duty rates, but this paper focuses on the methodology for calculating the CVD. This paper analyzes three problems that particularly afflict Vietnamese producers: (1) Commerce's discretion in determining when a government program does or does not count as a countervailable subsidy; (2) the International Trade Commission's discretion in determining when a subsidy does or does not cause actual or threatened injury to American industry; and (3) most of all, Commerce's decision to treat Vietnam categorically as a nonmarket economy country despite the great increase in the prevalence of market-driven prices in many industries in recent decades.

This third problem is this paper's primary focus: Vietnam has been treated as having a nonmarket economy since that label was first imposed against it in 2002 in an antidumping investigation.[7] But this paper will argue that Vietnam should take steps—including the development of diplomatic ties with the United States and permitting greater proliferation of market-driven prices—that will lead to revocation of the nonmarket-economy label.[8] As this paper will discuss, even countries like Russia and Ukraine have gained market economy treatment despite the prevalence of non-market-driven prices in many arenas in those countries;[9] it is possible that Vietnam could do likewise. Further, even if Vietnam cannot categorically be treated as having a market economy, this paper contends that it (and Vietnamese producers) should argue in trade proceedings that certain industries within Vietnam are "market-oriented industries" or, at a minimum, operate as "bubbles of capitalism" within which the market economy methodology should fairly be applied rather than the unfavorable nonmarket economy

[6] *See, e.g., infra,* Section 5.4.6.3 (discussing the risk of inaccuracy when Commerce compares province-wide prices in Vietnam to city-wide benchmarks in dissimilar Indian cities).
[7] *See infra,* Section 5.2.2.
[8] *See infra,* Section 6.2.
[9] *See infra,* Section 5.3.

methodology.[10] Moreover, in the interim, this paper argues that Commerce should decrease its use of third-country surrogate benchmark prices when measuring countervailable subsidies.[11] Finally, this paper offers recommendations for Vietnamese entities facing a U.S. ADD or CVD investigation.[12]

To some extent, Vietnam has assented to its misfortune in being treated as a nonmarket economy; after all, when it acceded to the WTO, it agreed to permit application of the nonmarket economy formulations through 2018 or until it demonstrated adoption of a market economy.[13] Vietnam, however, has not yet sought review to challenge Commerce's treatment of it as a nonmarket economy country. It is with that in mind that this paper sets forth recommendations for the Government of Vietnam and for Vietnamese producers as they continue to contend with the imposition of the nonmarket economy methodology.

1.3. Structure of Research

This paper proceeds in five subsequent chapters. In Chapter 2, this paper will discuss the history of the statutory language that underlies the U.S. trade regime. The purpose of the CVD law has been to offset subsidies granted by a foreign government to that country's exporters, but identifying when government intervention counts as a "subsidy" has proved to be a complex undertaking. Understanding the history of the statutory language—and the longstanding ambiguities and lack of clear definitions for interpreting that language—is integral to understanding the trade disputes that continue to arise. In Chapter 3, this paper explores the elements of a subsidy with a focus on the distinction between permissible country-wide government benefits and countervailable industry-specific subsidies and on some of the difficulties in determining when a particular government intervention actually produces a market distortion that should be

[10] *See infra,* Section 6.3.
[11] *See infra,* Section 6.4.
[12] *See infra,* Section 6.5.
[13] *See infra,* Section 5.2.1.

treated as a countervailable subsidy. Chapter 3 also discusses briefly the change wrought by the decision to apply the U.S. CVD law to nonmarket economy countries, which was permitted by a statute that Congress passed in 2012 and made retroactive to 2006. In Chapter 4, this paper further analyzes the treatment of nonmarket economy countries in CVD proceedings, together with relevant U.S. and WTO litigation. In Chapter 5, this paper analyzes a series of cases involving Vietnam. These case studies will reveal which kinds of government programs are more or less likely to be treated as countervailable subsidies for the purpose of the CVD law, and they provide great lessons to Vietnamese producers in determining how to prepare for future CVD investigations. These case studies also provide insight into steps that the Vietnamese government and producers may take in order to minimize the risk of unfavorable outcomes in CVD investigations. Finally, in Chapter 6, the author makes several recommendations for the Government of Vietnam, for Vietnamese producers, and for the U.S. Department of Commerce. Even if Vietnam is not presently in a position to be treated as a market economy, the author contends that the U.S. Department of Commerce should apply the market economy methodology for calculating CVD against products made in a market-oriented industry or a "bubble of capitalism" within Vietnam. Likewise, the author recommends that the Government of Vietnam and Vietnamese producers take steps to increase the prevalence of such industries, as Vietnam continues its long but successful transition away from having a state-controlled economy.

1.4. Methodology

This paper employs a historical research methodology to analyze the legislative evolution of the countervailing duty laws. Based on the same methodology, the author also analyzes the origin and development of nonmarket economy treatment within the world trading system, particularly as the United States employs that treatment against nonmarket economy countries like Vietnam. The author's methodology involved

analysis of primary source documents such as analysis of filings and arguments made during trade disputes, documents concerning the accessions of various countries to trade organizations such as the WTO, and official documents imposing or challenging trade remedies. The purpose of this historical research is to clarify how Commerce practically utilizes the countervailing duty law in identifying and measuring subsidies in nonmarket economy countries, and how that utilization has developed contemporaneously with the relevant legislation.

The author also employs a comparative analysis between administrative decisions and judicial decisions to clarify the interpretation and application of the countervailing duty law by relevant authorities. Finally, the author uses case study analysis of Chinese cases as a basis for further case study analysis of Vietnamese cases, which comprises a core component of this paper. The chronological presentation of case studies is intended to present the development of Commerce's CVD methodology in a systematic manner that permits analysis of which features from each case were likely to contribute to a favorable or unfavorable resolution for the Vietnamese producer under investigation. This research aims to clarify issues of great practical importance for industry in Vietnam and for global trade more generally, particularly for businesses that have not yet faced a CVD proceeding and for their respective governments. The author's recommendations aim to aid those entities in better understanding and navigating such a proceeding, and in taking the risks and consequences of such a proceeding into account when engaging in trade with the U.S. market.

1.5. Originality and Value of Research

This dissertation will, for the first time, analyze the legislative development of the U.S. CVD law, the origins of the disfavored treatment of nonmarket economy countries in CVD proceedings, and the application of the CVD law to Vietnam as a nonmarket economy country. This dissertation is also the first to present systematically

all relevant CVD cases involving Vietnam. The aim of the research is to contribute to a clearer and more robust legal scholarship regarding the application of the CVD law to Vietnam.

Chapter 2. Key Statutory Language

This brief chapter discusses some of the important terminology that has been used in American trade regulations since the late 1800s. As later chapters will reveal, one of the persistent problems for foreign producers navigating American trade regulation has been the uncertainty of whether and when the United States will deem that an exporting country's government has subsidized the production of exported goods. Integral to this uncertainty are both the lack of clear definitions in the governing statutes and the lack of clear guidance for the Department of Commerce in executing the governing statutes. Understanding the history of these statutes and the key language on which they rely is thus useful towards understanding current and future problems that arise as the United States applies antidumping or countervailing duties in previously unforeseen ways.

The United States enacted the first "countervailing duty" provision as early as 1890, but the core countervailing duty law was developed more extensively in 1930 in the Tariff Act of 1930, which was then amended in the following years. The concept of "countervailing duty" was originally established in 1890 to counteract "bounty" granted by European countries to exporters of beet sugar. Since enacting the Tariff Act of 1930, the U.S. government has been authorized to impose "countervailing duties" more generally on imported goods that had received some "bounty" or "grant" paid or bestowed by the government of an exporting country. Throughout the historical development of the U.S. trade remedy laws, the Tariff Act of 1930 has been amended several times to address issues pertaining to "subsidies," especially "subsidies" from "nonmarket economy" countries. Under the U.S. countervailing duty law, countervailing duties are imposed on imported merchandise when its production or exportation benefits from government subsidies if such imports cause or threaten to

cause economic injuries to domestic U.S. industry.[14] Some of the key terms to understand in relation to the countervailing duty law are "bounty or grant," "countervailing duty," "subsidy," "market economy," and "nonmarket economy." Clarifying the definitions of such key terms in the context of the historical development of the countervailing duty laws will thus aid an understanding of how the countervailing duty law is interpreted and applied in specific investigations by U.S. government agencies.

2.1. "Bounty" or "Grant"

Black's Law Dictionary defines "bounty" as "a premium or benefit offered or given, especially by a government, to induce someone to take action or perform a service."[15] As for the term "grant," the Oxford Advanced Learner's Dictionary defines "grant" as "a sum of money that is given by government or by another organization to be used for a particular purpose."[16] In practice, the term "bounty" was used more frequently than the term "grant" during the legislative development of the U.S. countervailing duty laws in the 1930s.

Historically, the term "bounty" was used for the first time in the Tariff Act of 1890, which was a very basic countervailing duty law. Under this Act, the United States provided a bounty of 1.75 to two cents per pound for certain American sugar producers who satisfied various legal requirements.[17] Importers of refined sugars, however, did not receive these benefits.[18] On the other hand, an additional duty (above the ordinary duty) of one-tenth of one cent per pound applied to certain sugars that were imported from countries that paid bounties, directly or indirectly, on the export of such sugars, the idea being that the additional duty would at least partially offset the benefit of the

[14] 19 U.S.C. § 1671(a).
[15] *Bounty*, *Black's Law Dictionary* (8th ed. 2004).
[16] *Grant, Oxford Advanced Learner's Dictionary* (8th ed. 2015).
[17] Tariff Act of 1890, para. 231, sched. E, 26 Stat. 567, 583 (1890). These bounties were provided to protect the domestic producers of refined sugars from imported sugars.
[18] *Id.*

bounty.[19] Thus, the concept of "bounty" has been used for over 130 years, both to describe payments for American producers to promote domestic production and to describe payments made by foreign countries to support their sugar production and exportation (*e.g.*, from Russia) that were then subject to an additional duty when importing into the American market.

The Tariff Act of 1897, which is commonly recognized as the first general countervailing duty law, added the term "grant" and used it interchangeably with the term "bounty."[20] Although these two terms, "bounty" and "grant," are very important in determining the levy to be imposed on imported merchandise, the U.S. Congress did not define what either term meant and offered little guidance on its intended scope or meaning, leaving the interpretation of the term and its scope to the enforcement authorities and to federal courts.[21]

In a landmark 1903 case, *Downs v. United States*,[22] the U.S. Supreme Court analyzed the definition of "bounty" to determine whether Russia's remission of excise taxes upon exported sugar was a bounty. Justice Brown relied on one dictionary definition that a "bounty" was as "a premium offered or given to induce men to enlist into the public service; or to encourage any branch of industry, as husbandry or manufactures."[23] Another dictionary defined it as "an additional benefit conferred upon or a compensation paid to a class of persons."[24] All nine Justices agreed with the

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[19] Peter D. Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44 (1958), at 52.

[20] Tariff Act of 1897, sec. 5, 30 Stat. 151, July 24, 1897. Section 5 of the Act provides:
"That whenever any country … shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, … then upon the importation of any such article or merchandise into the United States, … there shall be levied and paid […] an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

[21] PERCY W. BIDWELL, THE INVISIBLE TARIFF, Council of Foreign Relations 87 (1939).

[22] *Downs v. United States*, 187 U.S. 496 (1903) (The Court held that an export "bounty" had been conferred by a complicated Russian scheme for the regulation of sugar production and sale involving remission of excise taxes in the event of export and involving the issuance of a transferable export certificate; the value of this certificate was based on the difference between the domestic and foreign market prices of sugar at the time of export. The Court reviewed the Russian export scheme, which, while imposing a tax on all sugar produced, remitted the tax on all sugar exported.). *See also* Eric Garfinkel, *Export Subsidies: Countervailing Duties*, 11 CASE W. RES. J. INT'L L. 187 (1979).

[23] *Id.* at 501.

[24] *Id.*

holding that the government of Russia had in fact conveyed a bounty when it secured to the exporter "a money reward or gratuity whenever [the exporter] exports sugar from Russia."[25]

In *Carlisle Tire and Rubber Co. v. United States*,[26] the Court of International Trade ("CIT") noted, in evaluating the reasonableness of an estimated bounty or grant, that "nowhere in the legislative history of section 303 [of the Tariff Act of 1930] is there a definition of 'bounty' or 'grant'."[27] The CIT opined that Congress refrained from "spelling out" the standards for determining what constitutes a bounty or grant because Congress intended for that term to be interpreted "judicially and through administrative practice."[28] In this case, the court agreed with an interpretation by the Department of Commerce ("Commerce") that "bounty or grant" connotes "some special or comparative advantage conferred upon an industry or group of industries" and that is "not available to all manufacturers and producers within a given country." Commerce also believed that there can be no bounty or grant if there is no industry-specific or regional preference: that is, the provision of generally applicable government services or policies that are available to *all* industries could not on its own be treated as a bounty or grant.[29]

During more recent legislative development of the countervailing duty law since 1974, the terms bounty and grant were replaced with the term "subsidy," which has been used more commonly throughout trade regulations.

2.2. "Subsidy"

[25] *Id.* at 516.
[26] *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834 (Ct. Int'l Trade 1983).
[27] *Id.* at 838.
[28] *Id.* Under § 303(a) of the Tariff Act of 1930, 46 Stat. 687, as amended, 19 U.S.C. § 1303(a) (1976 ed.), whenever a foreign country pays a "bounty or grant" upon the exportation of a product from that country, the Secretary of the Treasury is required to levy a countervailing duty, "equal to the net amount of such bounty or grant," upon importation of the product into the United States. *See Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978).
[29] *Id.*

Black's Law Dictionary defines a "subsidy" as:

> [A] grant, usually made by the government, to any enterprise whose promotion is considered to be in the public interest. Although governments sometimes make direct payment (such as cash grants), subsidies are usually indirect. They may take the form of research-and-development support, tax breaks, provision of raw materials at below market prices, or low-interest loans or low-interest export credits guaranteed by a government agency.[30]

In the Trade Act of 1974,[31] the term "subsidy" appeared for the first time in the statutory language, but, unsurprisingly, the Act did not define what "subsidy" meant. In a landmark administrative case, *Carbon Steel Wire Rod from Poland*,[32] Commerce defined it as follows: "a *subsidy* (or bounty or grant) is any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth."

Notably, the Trade Act of 1974 marked a turning point that called for the President to seek "any revisions necessary to define the forms of subsidy to industries producing products for export and the forms of subsidy to attract foreign investment which are consistent with an open, nondiscriminatory, and fair system of international trade."[33] This provision paved the way for the term "subsidy" to be defined, and its definitions further refined in the international trade regime.

When Congress enacted the Trade Agreements Act of 1979[34] to conform the U.S. countervailing duty law to the GATT Subsidies Code,[35] the term "subsidy" was defined as having the same meaning as the term "bounty or grant."[36] In essence, the

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[30] *Subsidy*, *Black's Law Dictionary, supra* note 15.
[31] Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978.
[32] Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 1984).
[33] 19 U.S.C. § 2131(a)(11).
[34] The Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979).
[35] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, concluded on April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, 1186 U.N.T.S. 204 [hereinafter Subsidies Code].
[36] Trade Act of 1974, *supra* note 31, at Sec. 771(5).

term "subsidy" was seen to be very broad, such that it may include both bounties and grants. Although the Subsidies Code had not defined "subsidy," it did provide a list of prohibited export subsidies in an illustrative Annex to the Subsidies Code.[37]

Since the Subsidies Code lacked a definition of "subsidy," theoretically, all kinds of government interventions that potentially distorted trade could be countervailable, as was the case under the U.S. law.[38] As successfully urged by many developed countries, a definition of "subsidy" was finally included in the 1994 WTO Subsidies Agreement.[39] Unlike the GATT Subsidies Code, the Subsidies Agreement made considerable improvements in defining certain key terms, and notably it provides an "internationally agreed-upon definition" of the term "subsidy."[40] Its definition appears to apply throughout the agreement, including the provisions of the countervailing duties as well.[41] Right from the beginning article of the Subsidies Agreement, the term "subsidy" is defined as "a financial contribution by a government or any public body," which can occur with various practices such as direct funds transfer, foregone revenue, or the provision of goods or services other than general infrastructure.[42]

To be consistent with the Subsidies Agreement, the U.S. Congress amended the related countervailing duty provisions by passing the Uruguay Round Agreements Act

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[37] There are twelve categories of prohibited export subsidies listed in the Annex, Illustrative List of Export Subsidies, to the Subsidies Code. These include, for example, direct subsidies by a government to a firm or an industry contingent upon export performance; currency retention schemes that involve a bonus or exports, etc.

[38] DOMINIC COPPENS, WTO DISCIPLINES ON SUBSIDIES AND COUNTERVAILING MEASURES: BALANCING POLICY SPACE AND LEGAL CONSTRAINTS 33 (Cambridge: Cambridge University Press 2014).

[39] Agreement on Subsidies and Countervailing Measures, Annex 1A, Agreement Establishing the World Trade Organization, April 15, 1994, reprinted in H.R. Doc. No. 316, 103d Cong., 2d Sess. 1533 (1994) [hereinafter Subsidies Agreement or SCM Agreement].

[40] GARY N. HORLICK, WORLD TRADE ORGANIZATION AND INTERNATIONAL LAW: ANTIDUMPING, SUBSIDIES AND TRADE AGREEMENTS 203 (World Scientific Publishing Co. Pte. Ltd. 2014).

[41] JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 291 (2nd ed., MIT 1997).

[42] Subsidies Agreement, *supra* note 39, at Article 1.

of 1994.[43] Similarly, that law provides that a "subsidy" occurs when an "authority"[44] provides a "financial contribution"[45] or "any form of income or price support within the meaning of Article XVI of the GATT 1994." Importantly, a subsidy exists only where "a benefit is thereby conferred."[46] In other words, the definition of "subsidy" is limited only to those benefits conferred by a government or a public entity.[47] In the case studies discussed in Chapter 5, this concept will play out in the trade battles between Vietnamese exporters and the U.S. Department of Commerce: over and over again, the question arises whether the Government of Vietnam's participation in markets for raw materials, its influence upon land rents, or its tax policies, for instance, count as a countervailable "subsidy."

As compared with the Subsidies Agreement, the U.S. law provides a narrower definition in terms of focusing only on identifying countervailable subsidies, while the Subsidies Agreement provides not only what constitutes a countervailable subsidy, but also how to measure a benefit more generally.[48]

2.3. "Countervailing Duty"

Black's Law Dictionary defines the term "countervailing duty" as "a tax imposed on manufacturers of imported goods to protect domestic industry by offsetting subsidies given by foreign governments to those manufacturers."[49] This definition is

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[43] The Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 (1994) [hereinafter URAA].
[44] 19 U.S.C. § 1677 (5)(B) (The term "authority" means a government of a country or any public entity within the territory of the country).
[45] 19 U.S.C. § 1677 (5)(B)(i) and (D) (The term "financial contribution" means: (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees; (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income; (iii) providing goods or services, other than general infrastructure; or (iv) purchasing goods).
[46] 19 U.S.C. § 1677 (5)(B).
[47] Sanghan Wang, *U.S. Trade Laws Concerning Nonmarket Economies Revisited for Fairness and Consistency*, 10 EMORY INT'L L. REV. 593 (1996), at 594.
[48] HORLICK (2014), *supra* note 40, at 204.
[49] *Countervailing duty*, *Black's Law Dictionary, supra* note 15.

very close to how the countervailing duty is employed under applicable U.S. countervailing duty law.

In the past, a countervailing duty was used as a kind of surtax, imposed in addition to normal customs duties, upon those imports whose exportation had been subsidized by bounties or grants or similar assistance in the exporting country.[50] Such additional duty was believed to be used intentionally to help neutralize foreign subsidies, and therefore to prevent injury to the American producers of comparable products who operate without the benefit of such subsidies.[51]

Historically, there were two types of countervailing duties: (i) countervailing duties imposed upon imports receiving a bounty for manufacture, production, or export, and (ii) countervailing duties imposed upon imports from a country imposing higher rates on products from the United States.[52] The term "countervailing duties" was originally applied to denote not only duties designed to offset bounties, but also "contingent" duties, *i.e.*, duties contingent upon the rate of duty assessed by foreign governments upon certain American products.[53] The concept of using countervailing duties was assumed to make the American protective system "watertight" or insulated (*i.e.*, to prevent foreign governments or foreign business associations from offsetting through bounties the import duties of the United States).[54] Throughout the evolution of U.S. legislation together with its integration into the global trade system, countervailing duty has been limited to being imposed only on a subsidized product, and the amount of duty must be equal to the amount of net subsidy.[55] In other words, a countervailing duty is basically a duty equal to a grant or bounty extended or paid to an exporter by

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[50] Ehrenhaft (1958), *supra* note 19, at 54.
[51] *Id.*
[52] Tariff Act of 1922, Ch. 356, 42 Stat. 858 (1922), at 909, 925, and 935 (or § 303).
[53] BIDWELL (1939), *supra* note 21, at 86. (The author also provides an example that under the original Tariff Act of 1930, bicycles were dutiable at 30 percent *ad valorem*, but if any country taxed American bicycles at more than 30 percent, then the American duty on bicycles from that country was increased to equal to the foreign duty, but in no case above 50 percent. This provision and similar provisions for duties on automotive products, paper board, etc. were generally considered to violate MFN commitments in American treaties and commercial agreements and on that account were repealed by the Reciprocal Trade Agreements Act of 1934).
[54] *Id.* at 87.
[55] 19 U.S.C. § 1671(a)(2).

its home country to encourage exportation, or to aid the exporters and manufacturers in confronting fierce competition.[56] Thus, countervailing duties are intended to eliminate the competitive advantage sought to be gained by government subsidization of its own exporters.[57]

Under the WTO regime, the term "countervailing duty" meant "a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of merchandise," and that regime likewise limits the amount of countervailing duty being imposed to "an amount equal to the estimated bounty or subsidy determined to have been granted."[58]

2.4. "Market Economy" v. "Nonmarket Economy"

Drawing a bright line between "market" and "nonmarket" economies is always a controversial endeavor because, to some extent, all world economies are mixed.[59] It may seem that the concept of a "nonmarket economy" is simply the opposite of a "market economy."[60] However, the reality of defining these terms is more complicated because each economic system has had many variants during the evolution of modern economic reforms as well as on account of the development of nations' laws and principles to meet market demands. Hence, it is a gross oversimplification to say that a "nonmarket economy" is simply the opposite of a "market economy."[61]

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[56] *See generally* Paul W. Jameson, *The Administration of the U.S. Countervailing Duty Laws with Regard to Domestic Subsidies: Where It's Been, Where It Is, Where It May Go*, 12 SYRACUSE J. INT'L L. & COM. 59 (1985); Craig M. Brown, *Bounty or Grant: A Call for Redefinition in Light of the Zenith Decision*, 9 LAW & POL'Y INT'L BUS. 1229 (1977).
[57] *See* Brown (1977), *supra* note 56, at 1252.
[58] The definition of "countervailing duties" in footnote 36 to Article 10 of the SCM Agreement echoes the definition of that term in Article VI:3 of the GATT 1994. *See* SCM Agreement, *supra* note 39, at Article 10 (footnote 36); General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994], at Article VI:3.
[59] Gary N. Horlick & Shannon S. Shuman, *Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws*, 18 INT'L LAW. 807, 830 (1984).
[60] Francis Snyder, *The Origins of the Nonmarket Economy: Ideas, Pluralism and Power in EC Anti-Dumping Law about China*, 7 EUR L.J. 369, 373 (2001).
[61] *Id.*

And yet, the international trade regime has continually sought to draw such a bright line between market and nonmarket economies, for reasons not particularly well articulated, let alone justified, by anyone. Neither GATT nor the U.S. antidumping and countervailing duty laws specify why the distinction has persisted, but as a result of the distinction, only the costs and prices in market economy countries are treated as legitimate.[62] Although developed countries such as the United Kingdom and the United States - important drafters and founders of GATT - understand their own economic systems and the market or nonmarket features of other economic systems,[63] they have not provided clear definitions to distinguish a market economy from a nonmarket economy for the purpose of applying multilateral trade agreements or even in applying their own domestic laws. This glaring omission has worked to the detriment of such countries as Vietnam, which is broadly categorized as a nonmarket economy and which can only escape the negative consequences of that categorization if other countries, in their generally unfettered discretion, see fit to recognize Vietnam's economic reforms as sufficiently market-oriented to make it a market economy. Perhaps a statutory criterion defining "market economy" or "nonmarket economy" would be "too brief to be truly meaningful."[64] In practice, some of Commerce's investigators used to say: "You know it if you see it."[65] And so, it remains the case that nebulous standards govern whether a country is considered by other governments to engage primarily in market or nonmarket behaviors.[66]

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[62] William P. Alford, *When is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other "Nonmarket Economy" Nations*, 61 S. CAL. L. REV. 79 (1987), at 114.

[63] *See* PAUL R. GREGORY AND ROBERT C. STUART, COMPARING ECONOMIC SYSTEMS IN THE TWENTY-FIRST CENTURY 19 (Seventh Ed., Houghton Mifflin Company 2004), (discussing and comparing various economic systems. According to Gregory and Stuart, "an economic system is a set of institutions for decision making and for the implementation of decisions concerning production, income, and consumption within a given geographic area. According to this definition, the economic system consists of mechanisms, organizational arrangements, and decision-making rules.").

[64] Horlick & Shuman (1984), *supra* note 59, at 833-34.

[65] *Id.*

[66] *Id.*

2.4.1. "Market economy"

As is commonly understood, a market is a place of commercial activity in which goods and services are bought and sold,[67] and an economy is the management or administration of the wealth and resources of a state or a country.[68] As defined by the Corporate Finance Institute, a "market economy" is an economy where the production and provision of goods and services operate in accordance with the laws of supply and demand in the general market; the market players—individuals and corporations, instead of governments—take a key role in directing that market.[69] In reality, the definition of "market economy" is highly complex because each country has its own economic system with different levels of market orientation in their laws and principles. There are, however, countries that are either "market-driven" or "government-driven" to varying degrees.[70]

2.4.2. "Nonmarket Economy"

Generally, the term "nonmarket economy" is understood to be an economy in which the allocation of goods and resources is planned by the government rather than by prices set in a market in a free manner.[71] Such operation is contrary to the rules of supply and demand commonly utilized in a market economy. In fact, however, the role of the government is present in the operations of most economies, even in classic market economies. But depending on the extent of the government's involvement, its economic form may be classified as a "state-trading", or a "state-controlled economy,"

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[67] *Market*, *Black's Law Dictionary, supra* note 15.
[68] *Economy*, *Black's Law Dictionary, supra* note 15.
[69] *See* Corporate Finance Institute, *What is a Market Economy?,* available at https://corporatefinanceinstitute.com/resources/knowledge/economics/definition-market-economy/, accessed on March 29, 2019.
[70] DOMINIQUE DE RAMBURES, WHAT IS THE SOCIALIST MARKET ECONOMY? THE CHINA DEVELOPMENT MODEL BETWEEN THE STATE AND THE MARKET 9-10 (Palgrave Macmillan UK 2015).
[71] JOHN H. JACKSON AND WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 1174 (2nd ed., West 1986).

"centrally-planned economy," or "transition economy." All of these economic forms are generally classified within the set of nonmarket economy ("NME").

One scholar opines that in an NME country, the government usually claims ownership of most means of production and makes decisions as to what is produced and how it is distributed within the society in question.[72] Therefore, there is no price mechanism wherein the supply and demand interact to allocate resources or incentivize or disincentivize various production decisions.[73] It has also been claimed that in an NME country, the government "heavily intervenes in the setting of relative prices" and, as a result, "the ultimate prices and costs" usually "reflect[] political, economic or bureaucratic factors rather than local supply and demand."[74] Such an assessment is closer to a description of the operations of a so-called "centrally-planned economy." In a centrally planned economy country, every trading activity is planned. The flow of trade or the flow of export–import is planned according to the government's economic plan. Such economic plans may be set for five years at a time, as was in the case in the former Soviet Union, China, and Vietnam, for the purposes of economic development.

According to Edmond M. Ianni, a centrally-planned economy or a nonmarket economy has four features: (1) a national economic plan of the state that determines resource allocation; (2) the determination of imports and exports by national economic planning; (3) the state's fixing of domestic prices, which, therefore, do not fluctuate freely in response to supply and demand; and (4) nonconvertible currencies, which may be neither transferred outside the country nor freely converted into any Western currency.[75]

Importantly, the global trade economy has operated in a mix of countries with different economic mechanisms including market economies, nonmarket economies or

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[72] David James Cichanowicz, *Countervailing Duties and Non-Market Economies: The Case of the Peoples Republic of China*, 10 SYRACUSE J. INT'L L. & COM. 405 (1983).
[73] *Id.* (citing footnote 2; the author also stated that nonmarket economy countries are simply those in the former Communist and Eastern Bloc.).
[74] Horlick & Shuman (1984), *supra* note 59, at 818.
[75] Edmond M. Ianni, *State Trading: Its Nature and International Treatment*, 5 NW. J. INT'L L. & BUS. 46, 49 (1983). (Cited in footnote 19, citing K. DAM, THE GATT-LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 318 (1970)).

mixed economies. Further, there are other more nuanced descriptors, such as state-trading economy, state controlled (or centrally planned) economy, transition economy, etc.[76] Since a national economy is complex, labeling a country simply as having a nonmarket economy or market economy will not always be accurate.[77] Furthermore, it is difficult and complicated to draw a clear line between a nonmarket economy and a market economy, especially in the case of a mixed economy (*i.e.*, a planned economy that incorporates features of a market economy)[78] or a transition economy (*i.e.*, an economy that is transforming from a planned economy to a market-oriented economy in order to adapt to the requirements of international trade commitments) operating based on market-oriented principles. And, of course, even in the most developed market economy there are some resources owned or controlled by the government.[79] In a socialist country with public ownership, if a government is too involved or interferes too much in its economic operations, that country is deemed to be "more non-market" than other countries.

Therefore, defining a country as having a nonmarket economy is only meaningful and helpful to the extent that it helps one country use that distinction to enforce its antidumping and countervailing duty laws advantageously against countries that it defines as having nonmarket economies, in order to protect domestic industry from injuries caused by dumped or subsidized exports from a purportedly nonmarket economy country.

In the case of the United States, its trade law defines a "nonmarket economy" country as a country that the Department of Commerce determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such

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[76] *See* Alexander Polouektov, *Non-Market Economy, Issues in the WTO Anti-Dumping Law and Accession Negotiations: Revival of a Two-tier Membership?*, 36(I) J. WORLD TRADE 1, 1-37 (2002) (describing a group of countries such as the Soviet Union and Central and Eastern European countries that adopted a centrally planned economic system rather than a market mechanism for economic activities).
[77] Horlick & Shuman (1984), *supra* note 59, at 819.
[78] Ianni (1983), *supra* note 75, at 62.
[79] BIN ZHANG, THE EVOLUTION OF THE NON-MARKET ECONOMY TREATMENT IN THE MULTILATERAL TRADING SYSTEM 3 (Springer, Singapore 2018).

a country do not reflect the fair value of the merchandise."[80] This amorphous definition was used against purported nonmarket economies only in antidumping cases, and it was used regardless of whether the target of the antidumping case had a mixed or transition economy, until Congress changed the law in 2012 to apply the countervailing duty law to target purported nonmarket economies as well. The Department of Commerce has designated the following eleven countries as NMEs: Armenia, Azerbaijan, Belarus, China, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Uzbekistan, and Vietnam.[81] As this paper will argue, Vietnam should take steps to be recategorized as a market rather than a nonmarket economy—and Commerce should exercise its discretion to recognize Vietnam as such—in order to avoid the negative trade consequences that attend nonmarket economy status.

2.5. "Double Counting"

Although this paper focuses primarily on countervailing duty laws, many of the countervailing duty cases operate alongside parallel antidumping investigations, in which case an allegation of "double counting" may arise. The term "double counting," also known as "double remedy," refers to the simultaneous imposition of both countervailing duties and antidumping duties upon the same imported merchandise at issue. In some cases, the targets of the investigation have argued that imposing both duties is duplicative because it offsets the same subsidization twice.[82]

[80] 19 U.S.C. § 1677(18)(A).
[81] U.S. Department of Commerce, International Trade Administration, *NME Country List*, available at https://www.trade.gov/nme-countries-list, accessed on April 30, 2019.
[82] WT/DS379/AB/R of 11 March 2011, US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, para. 541.

Chapter 3. U.S. Countervailing Duty Legislation

It can be said that the U.S. countervailing duty laws were initially aimed at protecting fairness in international trade. Likewise, the antidumping laws aim to prevent imported merchandise from being sold in the United States at less than its fair value. Unlike antidumping duties, countervailing duties are used to countervail or offset bounties, grants, or subsidies provided by a foreign government to its exporters and producers by imposing countervailing duties to the imported goods. Indeed, the playing field is not fair when a country is using public funds to grant advantages to private exporters and producers.

In this Chapter, the author will first delve into enactments and developments of the U.S. countervailing duty laws. Then, the author analyzes the provisions of the countervailing duty law in the application of countervailing duties to subsidized imports.

3.1. Historical Background and Legislative Evolution

3.1.1. Pre-1930 Laws

The goal of protecting American manufacturers from foreign competing imports, while simultaneously encouraging or aiding them to gain more advantages in domestic home market has long been a concern of the United States, present even in 1791.[83] In 1791, Alexander Hamilton proposed that a special duty be imposed on

[83] Alexander Hamilton's Final Version of the Subject of Manufactures (December 5, 1791, available online at https://founders.archives.gov/?q=countervailing%20AND%20duty&s=1511311111&r=6#ARHN-01-10-02-0001-0007-fn-0125, accessed on March 13, 2018. *See also* Peter Buck Feller, *Mutiny against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 LAW & POL'Y INT'L BUS. 17, 19 (1969).

certain subsidized foreign commodities imported into the United States and that the received revenue be used in turn to provide bounties for the domestic production (including production for export) of such commodities.[84] Hamilton's rationale was based on an assumption that "certain nations grant bounties on the exportation of particular commodities to enable their own workmen to undersell and supplant all competitors, in the countries to which those commodities are sent."[85]

However, Hamilton's concept for imposition of a kind of countervailing duty had to wait for a century to be adopted in the Tariff Act of 1890.[86] It was an important historical milestone for the beginning of using countervailing duties against subsidized imports. At that time, the countervailing duty provision was very simple. The Act was enacted simply to protect American sugar producers from unfair foreign competition.[87] The purpose of the Act was to provide for a fixed countervailing duty (*i.e.*, a fixed amount per pound) on refined sugar imported from the nations that "pay, directly or indirectly, a [greater] bounty on the exportation of" refined sugar than on raw sugar.[88]

In 1894, the first countervailing duty provision under the Tariff Act of 1890 was reenacted, but this time it was extended to all imported sugar, raw as well as refined sugar.[89] Thus, under the 1894 Act, all sugars imported from any country that "pays, directly or indirectly, a bounty on the export thereof" would be subject to a fixed duty.[90]

Both Tariff Acts of 1890 and 1894 imposed countervailing duties only to sugar as a bountied product. In 1897 came the first time that a generally applicable countervailing duty law was passed, in Section 5 of the Tariff Act of 1897.[91] The 1897 Act expanded its scope of application to all dutiable products receiving bounties or

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[84] Alexander Hamilton (1791), *supra* note 83. (Hamilton proposed that "one per cent duty on the foreign article converted into a bounty on the domestic, will have an equal effect with a duty of two per cent, exclusive of such bounty; and the price of the foreign commodity is liable to be raised.".
[85] *Id.*
[86] Tariff Act of 1890, para. 237, sched. E, 26 Stat. 567, 583 (1890).
[87] *Id.*
[88] *Zenith Radio Corporation v. United States*, 437 U.S. 443, 451-52 (1978).
[89] *Id.*
[90] Tariff Act of 1894, para. 182, sched. E, 28 Stat. 521 (1894).
[91] Tariff Act of 1897, para 205, § 5, 30 Stat. 151, 205 (1897).

grants upon exportation.[92] Under this Act, "countervailing duty" was clearly defined as "an additional duty equal to the net amount of such bounty or grant" to be imposed, in addition to all other levied duties, upon countries that "pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country."[93] That means that the amount of countervailing duty to be imposed would be equal to the net amount of any bounty or grant paid directly or indirectly on exportation.[94] Also, by this Act, Congress authorized the Secretary of Treasury to administer and determine the amount of countervailing duty. Remarkably, there was no requirement for finding an injury caused to a domestic producer or an industry, and imposition of countervailing duties was mandatory.[95] The Secretary of Treasury and the President had no authority to waive the mandatory duties.[96]

Subsequently, the countervailing duty on imports contained in the 1897 Act was reenacted without any changes in the Tariff Acts of 1909 and 1913.[97]

In 1922, Congress amended the countervailing duty law to cover both export and domestic subsidies.[98] In particular, section 5 of the 1922 Act extended the imposition of countervailing duties to those bounties or grants that were bestowed upon the manufacture or production of goods and on their exportation.[99] According to Barceló, export subsidies are defined as those grants paid by the foreign government upon export.[100] On the other hand, manufacture or production bounties are domestic subsidies paid by the foreign government without respect to the ultimate destination of

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[92] *Id.*
[93] *Id.*
[94] *Zenith Radio Corporation v. United States*, *supra* note 88, at 452-53.
[95] D.B. King, *Countervailing Duties - An Old Remedy with New Appeal*, 24 BUS. LAW. 1179 (1969).
[96] John J. Barceló III, *A History of GATT Unfair Trade Remedy Law - Confusion of Purposes*, CORNELL LAW FACULTY PUBLICATIONS, Paper 517 (1991).
[97] Tariff Act of 1909, § 6, ch.6, 36 Stat. 11 (1909) and Tariff Act of 1913, para. E, § IV, 38 Stat. 114 (1913).
[98] Tariff Act of 1922, *supra* note 52.
[99] *Id.*
[100] John J. Barceló III, *Subsidies, Countervailing Duties and Antidumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257, 261 (1980).

the end product.[101] The Act also applied to bounties or grants bestowed by a private source such as "person, partnership, association, cartel, or corporation."[102] Besides such changes, all other concepts inherited from the 1897 Act still remained.

3.1.2. The Tariff Act of 1930

In 1930, Congress reenacted the Tariff Act of 1922 and incorporated it into Section 303 of the Tariff Act of 1930.[103] The purpose of the Act was to provide revenue, to regulate trade with foreign countries, to promote domestic industries, and to protect American jobs.[104] Notably, the Tariff Act of 1930, also known as the Smoot-Hawley Act, was blamed for being the most highly protectionist act.[105] In reality, the Act, however, offered many significant contributions to U.S. trade laws. It provided an important basis for the current tariff system, for example, by establishing a uniform U.S. tariff schedule.[106]

More importantly, Section 303 of the Act has become the principal provisions for countervailing duties imposed against foreign subsidies, and it is also the legislative foundation for trade remedy laws in effect today. The imposition of countervailing duties is applied to all dutiable goods that have received export bounties or grants, whether that source of subsidy be public or private, collective or individual.[107] The Act allows the Secretary of the Treasury, with broad discretion, to "ascertain and determine, or estimate" the net amount of the bounty or grant.[108] Then the Secretary of Treasury

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[101] John J. Barceló III, *Subsidies and Countervailing Duties - Analysis and a Proposal*, 9 LAW & POL'Y INT'L BUS. 779, 780-81 (1977). (citing JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 365-66 (1969)).
[102] John J. Barceló III (1977), *supra* note 101, at 936.
[103] Tariff Act of 1930, 46 Stat. 590 (1930).
[104] *Id*. at preamble.
[105] JAE WAN CHUNG, THE POLITICAL ECONOMY OF INTERNATIONAL TRADE: U.S. TRADE LAW, POLICY, AND SOCIAL COST 15 (Lexington Books 2006). (According to Chung, the Act raised the average tariff rate from 38.2 percent in 1930 to 55.3 percent in 1931).
[106] *Id.*
[107] Tariff Act of 1930, *supra* note 103, at § 303. *See* Ehrenhaft (1958), *supra* note 19, at 55.
[108] Tariff Act of 1930, *supra* note 107.

will declare its findings and assess a duty equal to the net amount.[109] The Secretary of the Treasury also has power to make all regulations necessary for finding the bountied products and for assessing and collecting the additional duties.[110]

Importantly, there were efforts to add an injury test and other amendments to the countervailing duty law, but these proposed amendments died in Congress in 1951, 1952, and 1953.[111]

3.1.3. The Trade Act of 1974

From 1967 to 1974, with the effects of multilateral trade negotiations (*i.e.*, the Tokyo Round of Multilateral Trade Negotiations) leading to the creation of the General Agreement on Tariffs and Trade (GATT) in 1947, there were efforts in the United States to extend the President's authority in trade negotiations and, concurrently, "potent forces'' from developing countries in calling for changes from tariff barriers to non-tariff trade barriers.[112] As a result, the Trade Act of 1974 was enacted, and it substantially extended the scope of the countervailing duty law under Section 303 of the Tariff Act of 1930.[113]

First, the Act authorizes the President to enter into trade agreements with foreign countries and also grants the power to proclaim any modification or continuance of any existing duty-free policy or to impose additional duties if the President determines such to be required or appropriate to carry out any trade agreement.[114] Second, to impose the countervailing duties upon any imported product that falls into the list of duty-free merchandise, the International Trade Commission ("ITC")[115] is required to investigate and then determine whether the American industry

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[109] *Id.*
[110] *Id.*
[111] Feller (1969), *supra* note 83, at 26.
[112] Mark H. Barth & Barry H. Nemmers, *A Roadmap to the Trade Act*, 8 LAW & POL'Y INT'L BUS. 125 (1976).
[113] Trade Act of 1974, *supra* note 31.
[114] *Id.* § 101(a) (1) and (2), at 1982.
[115] *Id.* § 171(a), at 2009. Under this Act, the U.S. Tariff Commission was renamed as the U.S. International Trade Commission.

in question "is being or is likely to be injured or is prevented from being established."[116] Accordingly, an injury test clause was for the first time established under this Act, but it applied only to duty-free merchandise, and all dutiable imports were still not subject to the injury test.[117] Before 1974, there was no injury test to any dutiable items because Section 303's application predated the GATT and, as such, fell within its "grandfather clause" exemption; however, an extension of such coverage to duty-free goods was not covered by the exemption.[118]

Notably, the Act had no specific provisions on the application of Section 303 of the Tariff Act of 1930 to nonmarket economy countries. However, it provided separate provisions on "market disruption" to tackle imports from Communist countries.[119] Such action was considered an alternative trade remedy to protect the American industry from market disruption caused by imports from Communist countries. Besides these major changes, the definition of countervailing duties under Section 303 of the 1930 Act remained the same and was incorporated into Section 331 of the Act.[120]

A remarkable change of the Act was the requirement that the Secretary of Treasury publish a notice of initiation and the investigation determination (whether affirmative or negative) in the Federal Register.[121] Prior to this procedural change, the Treasury Department merely released a very simple determination and did not include the findings of fact and law in its determinations.[122]

3.1.4. The Trade Agreements Act of 1979

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[116] *Id.* § 331 (a) (2), at 2049.
[117] Robert David Arkin, *Countervailing Duty Law after Zenith: Unanimity Can be Beguiling, The*, 18 VA J. INT'L L. 245 (1978).
[118] Philip D. Jr. O'Neill, *United States Countervailing Duty Law: Renewed, Revamped and Revisited--Trade Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 832, 856 (1976).
[119] Trade Act of 1974, *supra* note 31, at Section 406 (a)(1) (codified at 19 U.S.C.§ 2436).
[120] *Id. at* § 331(a), at 2049.
[121] 19 U.S.C. § 1303(a)(6).
[122] Jameson (1985), *supra* note 56, at 64.

In 1979, to approve and implement the trade agreements negotiated under the Trade Act of 1974, U.S. Congress enacted the Trade Agreements Act (TAA) of 1979.[123] Specifically, the TAA of 1979 was enacted to implement the GATT Subsidies Code under U.S. law.[124] The TAA of 1979 substantially amended the countervailing duty law and created procedures, much like those applicable to antidumping proceedings, to implement the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT, commonly called the Subsidies Code.[125] In particular, the TAA of 1979 added a completely new title (Title VII - Countervailing and Antidumping Duties) to the Tariff Act of 1930. The TAA of 1979 also requires an injury determination in all cases involving nondutiable goods. In cases involving dutiable goods, the TAA of 1979 requires an injury determination if the goods are from a signatory to the Subsidies Code or from a country that has a reciprocal obligation with the United States similar to that under the GATT, or from a country accorded most favored nation status.[126] Imports from a country that does not fall into one of the above conditions are regulated by the Tariff Act of 1930 (as amended), and an injury test is not required.[127] When conducting an injury test, the ITC was responsible for determining whether an American industry was "materially injured" or "threatened with material injury," or whether the establishment of the American industry was "materially retarded."[128]

It is important to note that the TAA of 1979 also provided some much-needed clarification on which subsidies were countervailable.[129] In compliance with the GATT's treatment of export subsidies, the TAA of 1979 provided that all such subsidies would be countervailable.[130] Importantly, a "specificity test" was introduced

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[123] The Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979).
[124] JOHN H. JACKSON, WILLIAM J. DAVEY, AND ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 923 (5th ed., West 2008).
[125] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT, April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 [hereinafter the Subsidies Code]. *See* Judith Hippler Bello, *Current Subsidy and Antidumping Issues after the Trade and Tariff Act of 1984*, 21 STAN. J. INT'L L. 299, 303 (1985); Jackson el al. (2008), *supra* note 124, at 923.
[126] Subsidies Code, *supra* note 125, at Section 701(2)(A)(B) (codified at 19 U.S.C. § 1671(c)).
[127] *Id.* at Section 701(c) (codified at 19 U.S.C. § 1303).
[128] *Id.*
[129] JACKSON et al. (2008), *supra* note 124, at 923.
[130] *Id.*

explicitly in the TAA of 1979, but it was actually not required by the Subsidies Code and such a test is probably not found in the laws of other nations.[131] In particular, the "specificity test" requires that a countervailable subsidy would be found in cases where a foreign government program provided benefits to a "specific enterprise or group of enterprises."[132] The Act also included a non-exhaustive list of subsidy programs in case of specificity, such as direct payments, the forgiveness of debts, or the provision of services in terms inconsistent with commercial considerations.[133]

Following this Act, effective from January 2, 1980, the administration of the antidumping and countervailing duty laws was transferred from Treasury to Commerce, Exec. Order No. 12,188, 3 C.F.R. 131 (1980).[134] However, the U.S. Congress did not enact any specific provisions concerning the treatment of nonmarket economy countries when it made this amendment.

3.1.5. The Omnibus Trade and Competitiveness Act of 1988

In 1988, Congress enacted a comprehensive trade act called the Omnibus Trade and Competitiveness Act.[135] The 1988 OTCA is a major revision to U.S. trade law since the amendment in 1974. The primary purpose of the 1988 OTCA is to enhance the competitiveness of the domestic industry.[136] Importantly, the Act altered the method of calculating the dumping margins of NME imports in antidumping proceedings.[137] However, the Act was still silent on subsidies from NME countries. For many decades since the first countervailing duty laws originated, there was no clear statutory provision on the applicability of the countervailing duty law to NME countries.

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[131] JACKSON (1997), *supra* note 41, at 926.
[132] *Id.*
[133] *Id.*
[134] *Koyo Seiko Co. v. United States*, 796 F. Supp. 517 (Ct. Int'l Trade 1992).
[135] The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) [hereinafter 1988 OTCA].
[136] *Id.* at preamble.
[137] McKay M. Pearson, *Antidumping and Countervailing Duty Laws: The Quest to Control Nonmarket Economy Countries*, 1989 BYU L. REV. 717, 720-21 (1989).

Although there have been several cases brought to competent courts, there were cases that firmly answered the question of the applicability of the countervailing duty law to NME countries until 2012 when Congress enacted a law implementing such applicability. Because the 1988 OTCA and prior acts did not support the proposition that countervailing duties were to be applied against NME countries, there were two alternative remedies to deal with subsidies by NME countries: section 406 of the Trade Act of 1974, and the antidumping law.[138]

3.1.6. The Uruguay Round Agreements Act of 1994

Following the conclusion of GATT/WTO's trade agreements (WTO Agreement), the United States agreed to change its legislation to conform with the WTO Agreement. In December 1994, U.S. Congress enacted the Uruguay Round Agreements Act ("URAA") for the primary purpose of implementing the trade agreements concluded in the Uruguay Round.[139] Since then, the URAA has established a relationship between U.S. law and the WTO Agreement. However, it is important to note that the URAA confirms that U.S. federal law prevails over a Uruguay Round agreement in case of a conflict.[140] The U.S. courts have also made it clear that the GATT/WTO or panel determinations do not have a precedential effect in American jurisprudence and, therefore, are not binding upon U.S. courts.[141]

One of the advanced points of the WTO's Subsidies Agreement in 1994, as compared to the prior Subsidies Code in 1979, is that the former provided multilateral standards for subsidy discipline, while the latter focuses on unilateral application of

[138] *Id.* at 725-26. Under the 1988 OTCA, section 406 was strengthened to provide protection against unfair trade by Communist countries. The provisions of section 406 were viewed as a better device to employ, rather than trying to initiate a new countervailing duty law against NMEs.
[139] The Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 (1994).
[140] *Id.* Section 102(a)(1), Subtitle A, Title I (codified as 19 U.S.C. § 3512). This section provides: "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."
[141] JOSEPH E. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS 34 (2016 Edition, Thomson Reuters 2016).

national remedies against subsidized imports.[142] The Subsidies Agreement provided a broader definition of actionable subsidies, relying on standards of "specificity" previously developed in U.S. law.[143]

The URAA, as consistent with the Subsidies Agreement, repealed Section 303 of the Tariff Act of 1930. Although Section 303 was repealed, the URAA provides that countries that did not sign the Subsidies Agreement are not entitled to an injury test.[144] For countervailing duty investigations involving imports from a country that is not a WTO Member, a material injury test is not required.[145] Therefore, until the passage of the URAA, the United States maintained two sets of statutory provisions for administering the countervailing duty law, including section 303 of the Tariff Act of 1930, codified in 19 U.S.C. § 1303; the second statutory provision was codified at 19 U.S.C. § 1677.

3.1.7. The Nonmarket Economies Act of 2012

In 2012, in response to the ruling of the United States Court of Appeals for the Federal Circuit (CAFC) in the GPX Case,[146] U.S. Congress enacted Public Law 112-99 ("NME Act"). This NME Act amended the Tariff Act of 1930 to authorize Commerce to impose countervailing duties on identified subsidies from nonmarket economy countries.[147] Section 1 of this Act does provide an exception to this requirement when [Commerce] is unable to identify and measure subsidies provided by the government of the NME country or a public entity within the NME country because the economy of that country is essentially comprised of a single entity.

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[142] *Id.* at 33.
[143] *Id.*
[144] 19 U.S.C. § 1671(b).
[145] 19 U.S.C. § 1671(c).
[146] *GPX Int'l Tire Corp. v. United States*, 780 F.3d 1136; 2015 U.S. App. LEXIS 3940; 36 Int'l Trade Rep. (BNA) 1433.
[147] The Nonmarket Economies Act of 2012, Public Law 112-99, 112 Congress. 126 Stat. 265 (2012) [hereinafter NME Act or P.L. 112-99].

Notably, the NME Act also requires Commerce to account for potential overlapping remedies by reducing the antidumping ("AD") rate to the extent that Commerce is able to reasonably estimate the amount that the countervailable subsidy has increased the "normal value" used in the NME AD methodology.[148] The purpose of this provision is to resolve the problem of double counting arising from Commerce's simultaneous application of both countervailing duties and antidumping duties on the same merchandise imported from NME countries. The U.S. Congress agreed to pass this provision to mitigate the double counting risks that had been claimed by NME countries under previous investigations, especially from China, and as was also recommended by the WTO's dispute settlement body.

A notable controversy was that the NME Act applies retroactively to all proceedings initiated on or after November 20, 2006,[149] although this Act was enacted in 2012. This controversy shall be discussed in more detail in section 4.3.2.6 of this dissertation.

In conclusion, from the inception of the countervailing duty law, which was a simple provision merely protecting the domestic sugar industry in the early 1890s, the U.S. trade laws including the countervailing duty law have evolved as influenced by both domestic industry forces and the international trade community. Each revision of the countervailing duty law has been an "*ad hoc* series of amendments" derived from specific proposals from domestic industries "involved in recent or anticipated cases."[150] Hence, each major revision in U.S. trade laws, notably beginning from 1974, has seen amendments to both antidumping and countervailing duty laws to make it easier for domestic industry to obtain relief against imports.[151] A cycle of change was born: the easier it became to get relief, the more cases were brought, generating more interest in the use of these laws, and so on.[152] The most recent change in the countervailing duty law in 2012 to apply it to nonmarket economies has been perhaps the most controversial

[148] *Id.*
[149] *Id.* sec. 1(b)(1).
[150] HORLICK (2014), *supra* note 40, at 151.
[151] *Id.*
[152] *Id.*

issue in the history of U.S. trade laws. Of course, it may be the result of a natural legislative process that any law may be changed to adapt to American interests and especially for the protection of American industry as part of the nation's economic development. But the imposition of countervailing duties upon countries that have been categorized as NME countries has had a multibillion-dollar impact, and producers and NME governments must be prepared to navigate the challenges that have resulted. In Chapter 4, the author will discuss in more detail on the applicability of the countervailing duty law to nonmarket economy countries by analyzing its practical application and related cases at executive and judicial levels. And in Chapter 5, the author will highlight several cases in which the countervailing duty law has been applied to Vietnam in a manner that has disfavored Vietnam's producers on account of the duty-calculation methodology that applies particularly to NME countries.

In summary, the contemporary imposition of countervailing duties under U.S. trade law is currently stipulated by Title VII of the Tariff Act of 1930, added by Title I of the Trade Agreements Act of 1979, as amended by the Uruguay Round Agreements Act of 1994 and the 2012 NME Act.

3.2. Imposition of Countervailable Subsidies

The U.S. countervailing duty law, among other trade remedy laws such as those related to antidumping and safeguards, has been developed as a critical component of the U.S. trade laws to mitigate against unfair foreign competition. As explained in section 3.1 above, the imposition of countervailing duties under U.S. law is specifically stipulated under Title VII of the Tariff Act of 1930, added by Title I of the Trade Agreement Act of 1979, as amended by the Uruguay Round Agreements Act of 1994, and the NME Act of 2012. In general, countervailing duties will be imposed on imported merchandise when its manufacture, production or exportation receives benefits from foreign government subsidies and such imports cause or threaten to cause injuries to a U.S. domestic industry. The fundamental goal of imposing countervailing

duties is to level the playing field in international trade by counteracting or offsetting the unfair trade advantage that a foreign manufacturer or producer or exporter receives from its government subsidies.

In fact, throughout the historical evolution of the U.S. trade laws, the Tariff Act of 1930, as amended, is currently the principal Act that governs the imposition of countervailing duties.[153] From a U.S. government agency's perspective, foreign government subsidies distort the free flow of goods and adversely affect American business in the global marketplace.[154] The U.S. Department of Commerce ("Commerce"), the administering authority for both U.S. antidumping and countervailing duty laws, among many other things, is responsible for protecting U.S. domestic producers from unfair competition within the U.S. that results from unfair government subsidies granted to exporting companies.[155]

Therefore, as a tool to protect the American industry from foreign subsidies, a countervailing duty is imposed to offset the foreign government subsidies that exist under many forms, such as export or production subsidies that do not reflect market conditions.

Like the antidumping law, the countervailing duty law employs a bifurcated system. In a countervailing duty proceeding, Commerce and ITC are concurrently required to be involved. Specifically, Commerce's mission is to determine when an unfair subsidy has been conferred and then measure or calculate the amount of subsidy that the foreign producer has received from its government, establishing a basis for the subsidy rate by which the subsidy is offset, or "countervailed," through higher import duties, which are known as countervailing duties.[156]

3.2.1. Elements of a Subsidy

[153] Tariff Act of 1930, as amended, § 701-709 and § 751-753 (19 U.S.C. §1671 et seq.).
[154] U.S. Department of Commerce, Enforcement and Compliance, "An Introduction to U.S. Trade Remedies," available at https://enforcement.trade.gov/intro/index.html, accessed on March 29, 2020.
[155] *Id.*
[156] *Id.*

Under the U.S. countervailing duty law, a subsidy is countervailable if it meets the three following elements:

Element 1: There must be a "financial contribution."

Element 2: That financial contribution must confer a "benefit."

Element 3: A subsidy must be "specific."

Specifically, the statute provides that a subsidy is one in which an "authority":

(i) provides a "financial contribution",

(ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or

(iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments,

to a person and a benefit is thereby conferred.[157]

The first two items, (i) and (ii), are considered to be direct subsidies when the government provides funding directly to producers or exporters of the goods upon their export.[158] The last item (iii) is a form of indirect subsidy, in which the government provides financial contribution through a funding mechanism or "entrusts or directs"[159] a "private entity" to make such financial contribution to the producers or exporters of the subject merchandise.[160] The term "private entity" is not necessarily limited to a single entity but it can include a group of entities or persons.[161]

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[157] 19 U.S.C. § 1677(5)(B).

[158] *See also* Subsidies Agreement, *supra* note 39, at Article 1.1(a)(1)(i-iii).

[159] As directed by Congress, Commerce has its own discretion to broadly interpret "entrusts or directs." *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc No. 103-316 (1994) ("SAA"), at 926.

[160] This provision is similar to Article 1.1(a)(1)(iv) of the Subsidies Agreement, *supra* note 39.

[161] SAA, *supra* note 159 The SAA is the Statement of Administrative Action. When the U.S. Congress enacted the Uruguay Round Agreements Act, it also approved an accompanying Statement of Administrative Action (SAA) and it serves as "an authoritative expression by the United States concerning the interpretation and application of the URAA… in any judicial proceeding in which a question arises concerning such interpretation or application".

The statute further explains that the determination of whether a subsidy exists shall be made without regard to whether the recipient of the subsidy is publicly or privately owned and without regard to whether the subsidy is provided directly or indirectly on the manufacture, production, or export of merchandise.[162] Furthermore, Commerce is not required to consider the effect of the subsidy in determining whether a subsidy exists.[163] On the other hand, the ITC is responsible for finding the effect of the subsidy by conducting an injury test separately.

The countervailing duty law defines an "authority" as a government of a country or any public entity.[164] During its longstanding practice, Commerce has treated "most government-owned corporations as the government itself."[165] To consider whether an entity is a "public entity," Commerce has in the past considered the following factors: (1) government ownership; (2) the government's presence on the entity's board of directors; (3) the government's control over the entity's activities; (4) the entity's pursuit of governmental policies or interests; and (5) whether the entity was created by statute.[166] In *Corrosion-Resistant Carbon Steel Flat Products from Korea*, when Commerce considered whether a government-owned bank was a public entity or authority, it examined the issues of government ownership and control only and concluded "a government-owned or controlled bank, be it a commercial bank or a policy bank is considered a public entity or authority."[167]

3.2.1.1. Element 1: Financial Contribution

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[162] 19 U.S.C. § 1677(5)(C).
[163] *Id.*
[164] 19 U.S.C. § 1677(5)(B).
[165] 19 C.F.R. Part 351, Countervailing Duties; Final Rule, 63 FR 65348.
[166] Preliminary Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 16766 (April 7, 2003), at 16771. (citing, *e.g.*, Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada, 57 FR 30946, 30954 (July 13, 1992); Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers from the Netherlands, 52 FR 3301, 3302, 3310 (February 3, 1987); and Sheet and Strip, 64 FR 30642-43).
[167] Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 73 FR 52315 (September 9, 2008), at 52321.

Element 1: There must be a "financial contribution."

The first key element in determining whether there is a subsidy is whether there is a "financial contribution," which means:

(i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,

(ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,

(iii) providing goods or services, other than general infrastructure, or

(iv) purchasing goods.[168]

Thus, the above provision lists the four generic categories of government practices that constitute a "financial contribution." The list is set out as a guideline for Commerce in its subsidy findings. Congress has not indicated an intent for the examples of particular types of practices falling under each category to be exhaustive.[169]

For the first category, in practice, loans from a government policy bank or a commercial bank controlled or owned by the government are considered as a direct financial contribution and, therefore, are countervailable.

Another category of financial contribution, as usually considered in countervailing duty cases, is the foregoing of revenue by the government such as by the exemption of duties or by the reduction or exemption of income taxes. For instance, in *Certain Oil Country Tubular Goods "OCTG" from China*,[170] Commerce concluded that the exemption or reduction of the income tax paid by productive foreign-invested enterprises confers a countervailable subsidy. In fact, the exemption/reduction is a financial contribution in the form of revenue foregone by the government of China ("GOC") and it provides a benefit to the recipient in the amount of tax savings.[171]

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[168] 19 U.S.C. § 1677(5)(D)(i-iv).
[169] SAA, *supra* note 159, at 927.
[170] Certain Oil Country Tubular Goods from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination, 74 FR 64045 (December 7, 2009).
[171] *Id.*

In addition, another controversial issue that has percolated for many years is whether the provision of land is a financial contribution and thus countervailable. For example, in *Laminated Woven Sacks (LWS) from China*[172], GOC claimed that the sale of land-use rights is not a "financial contribution" because it does not fall into any of the four categories of "financial contribution" as defined by the U.S. countervailing duty law.[173] However, Commerce identified the nature of the financial contribution for the provision of land-use rights as a "good or service" based on the past practice in many cases and its regulations.[174] Commerce also noted that the statutory definition of a financial contribution is written broadly, recognizing that governments have a variety of mechanisms at their disposal to confer a financial advantage on specific domestic enterprises or industries.[175] According to Commerce, the SAA[176] confirms that the sweep of the statute is intended to be broad to ensure that such mechanisms are subject to the countervailing duty law.[177] Thus, as supported by Congress, Commerce has broad authority to define what a financial contribution is based on its practice and its interpretation beyond the above four generic categories of government practices. The case below will show how Commerce has employed its broad interpretative authority in determining whether a provision of goods or service other than general infrastructure constituted a financial contribution.

In *Royal Thai Gov't v. United States*,[178] the Royal Thai Government ("RTG") challenged Commerce's final affirmative countervailing duty ("CVD") determination that RTG's provision of electricity constituted a financial contribution. RTG appealed on the grounds that Commerce had erred in its finding that the provision of electricity

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[172] Laminated Woven Sacks from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 FR 35639 (June 24, 2008).
[173] *Id.* at Comment 8.
[174] *Id.*
[175] *Id.*
[176] *See* SAA, *supra* note 159, for explaining the SAA's functions.
[177] *Id.* at 927. It is also stated Commerce believes that these generic categories are sufficiently broad so as to encompass the types of subsidy programs generally countervailed by Commerce in the past, although determinations with respect to particular programs will have to be made on a case-by-case basis.
[178] *Royal Thai Gov't v. United States*, 30 C.I.T. 1072 (2006).

to a Thai steel exporter (*i.e.*, SSI, a mandatory respondent in the related CVD case) constituted a financial contribution. RTG argued that the governmental provision of electricity to SSI "properly should have been considered 'general infrastructure,'" and was therefore exempt from the U.S. CVD law.[179] The Court rejected RTG's position and found that Commerce reasonably determined that RTG's provision of electricity to SSI was a potentially countervailable financial contribution and not merely the provision of general infrastructure.[180] The Court explained that "general infrastructure" is "a term of art in U.S. countervailing duty law."[181] The Court stated that the CVD law "directs that goods or services which constitute general infrastructure may not be countervailed."[182] However, Commerce has interpreted this statutory language to encompass "infrastructure that is created for the broad societal welfare of a country, region, state or municipality."[183] Further, Commerce already elaborated on this interpretation by noting that "the type of infrastructure *per se* is not dispositive of whether the government provision constitutes 'general infrastructure.'" Rather, the key issue is whether the infrastructure is developed for the benefit of society as a whole.[184] Accordingly, Commerce referred to this analysis as the "public welfare concept."[185] For such reasons, the Court upheld Commerce's determination that RTG's provision of electricity to SSI was not for the general welfare where the subsidies were intended to serve three purposes: "(1) provide electricity to low-income consumers; (2) ensure rural electrification; and (3) promote economic activity outside of the congested Bangkok metropolitan area."[186] As a result, the Court concluded that while the Thai energy subsidy program had "broad social goals," it primarily benefited only a portion of Thai society.[187]

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[179] *Id.* at 1355.
[180] *Id.* at 1356.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.* (citing CVD Preample, 63 FR 65378).
[185] *Id.*
[186] *Id.* at 1356 (citing Decision Memo at 36-37).
[187] *Id.* at 1351.

3.2.1.2. Element 2: Benefit

Element 2: The financial contribution must confer a "benefit."

After finding a financial contribution, the second element in determining the existence of a subsidy is "benefit" (*i.e.*, whether one of the defined and identified financial contributions conferred an actual benefit). The U.S. countervailing duty law and the Subsidies Agreement both call for a "benefit-to-recipient" standard.[188] Simply put, for a government subsidy to be countervailable, it must provide a benefit to the recipient of that subsidy, and the U.S. statute provides that a "benefit" shall "normally be treated as conferred where there is a benefit to the recipient."[189]

Together with "financial contribution" and "specificity," the concept of "benefit" is obviously central to the administration of countervailing duty law.[190] Adopting a more technical (and less circular) definition, Commerce has described "a benefit to be conferred where a firm pays less for its input (*e.g.*, money, a good, or a service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn."[191] In other words, a benefit exists to the extent that the subsidy recipient gets a financial contribution or in-kind assistance on terms more favorable than those that would otherwise be available on the market. As a benefit is a critical element in identifying a subsidy, the statute lays out specific

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[188] LAW AND PRACTICE OF UNITED STATES REGULATION OF INTERNATIONAL TRADE 1-382 (Volume I, Thomson Reuters 2016).
[189] 19 U.S.C. § 1677(5)(E).
[190] 19 C.F.R. Part 351, §351.503.
[191] *Id.* Commerce further explains: "We have adopted this definition because it captures an underlying theme behind the definition of benefit contained in section 771(5)(E) of the Act and, in our estimation, reflects the fundamental principles that we have articulated over the years with respect to programs and practices that we have determined confer either direct or indirect countervailable subsidies. One common element the four illustrative examples set forth in the statute share is that, in the overwhelming majority of cases, the recipient of a government financial contribution, income or price support, or indirect subsidy, enjoys a reduction in input costs or revenue enhancement that it would not otherwise have enjoyed absent the government action. As explained below, we are using the terms 'input' and 'cost' broadly."

rules for how benefits from certain categories of financial contribution would normally be identified; specifically, a benefit is conferred:

(1) in the case of an equity infusion, if the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made;[192]

(2) in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market;[193]

(3) in the case of a loan guarantee, if there is a difference, after adjusting for any difference in guarantee fees, between the amount the recipient of the guarantee pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no guarantee by the authority;[194] and

(4) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.[195]

Consistent with the Subsidies Agreement, the U.S. countervailing duty law defines a "benefit" as something better than the recipient could otherwise obtain in the market. For instance, a government equity infusion confers a benefit "if the investment decision is inconsistent with the usual investment practice of private investors … in the country in which the equity infusion is made."[196] Similarly, a government loan provides a benefit "if there is a difference between the amount the recipient pays" on the government loan "and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market."[197] Accordingly, "less than adequate remuneration" means a government price for goods or services that is better

[192] 19 U.S.C. § 1677(5)(E)(i).
[193] 19 U.S.C. § 1677(5)(E)(ii).
[194] 19 U.S.C. § 1677(5)(E)(iii).
[195] 19 U.S.C. § 1677(5)(E)(iv).
[196] Certain Softwood Lumber Products from Canada (Lumber IV), 67 FR 15545 (April 2, 2002).
[197] *Id.*

than the purchaser could otherwise obtain in the market place.[198] These concepts are described in more detail in the sections that follow.

3.2.1.2.1. Equity Infusions

Equity infusions can present very complicated problems in a CVD investigation. In cases where the government purchases equity or newly issued shares (*i.e.*, equity infusion) in a company, that investment may be considered as a countervailable subsidy if it is inconsistent with "the usual investment practice of private investors."[199] According to Commerce's interpretation based on its practice, an equity infusion is considered inconsistent if the price paid by the government for newly issued shares is greater than the price paid by private investors for the same (or similar form of) newly issued shares.[200]

In order to determine whether the government's investment as an equity infusion is consistent with usual investment practice, the equity infusion is compared to actual purchases by private investors of similar newly issued shares.[201] In selecting a private investor price to make comparison, Commerce will rely on sales of newly issued shares made reasonably concurrently with the newly issued shares purchased by the government.[202] Commerce does not use private investor prices if the private investor purchases of newly issued shares are not significant.[203] If the actual private investor prices do not exist, Commerce will determine whether the company funded by the government-provided equity was "equityworthy"[204] or "unequityworthy" at the

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[198] *Id.*
[199] 19 U.S.C. § 1677(5)(E)(i).
[200] 19 C.F.R. § 351.507(a)(2)(i).
[201] GREGORY W. BOWMAN, NICK COVELLI, DAVID A. GANTZ, AND IHN HO UHM, TRADE REMEDIES IN NORTH AMERICA 122 (Global Trade Law Series, Volume 27, Kluwer Law International 2010).
[202] 19 C.F.R. § 351.507(a)(2)(ii).
[203] 19 C.F.R. § 351.507(a)(2)(iii).
[204] 19 C.F.R. § 351.507(a)(4)(i) (The company is considered to be "equityworthy" if, from the perspective of a reasonable private investor examining the firm at the time the government-provided equity infusion was made, the firm showed an ability to generate a reasonable rate of return within a reasonable period of time. The Commerce will examine factors such as an objective analysis of future financial prospects, current and past indicators of the recipient's firm's financial health calculated from

time of the equity infusion.[205] For the purposes of making an equityworthiness determination, Commerce will request that the respondents provide information and analysis completed prior to the infusion, upon which the government bases its decision to provide the equity infusion.[206] Absent the existence or provision of an objective analysis, containing information typically examined by potential private investors considering an equity investment, Commerce will normally determine that the equity infusion received provides a countervailable benefit.[207] In other words, if the company is determined to be unequityworthy, a benefit to the company exists in the amount of the equity infusion.[208] On the other hand, if the company is concluded to be equityworthy, there are two possible outcomes. Commerce will examine the terms and the nature of the equity purchased to determine whether the investment practice is consistent with the usual business practice of private sectors. If it is consistent, there is no benefit conferred and as a result that equity infusion is not countervailable. If it is inconsistent, Commerce will determine the amount of the benefit conferred on a case-by-case basis.[209]

In *Stainless Steel Plate in Coils from Belgium*,[210] Commerce examined three government equity infusions of the companies under review. The respondent, ALZ, and the government of Belgium (GOB) argued that Commerce did not properly address the issue of whether a benefit was conferred on the recipients of the GOB equity infusions.[211] ALZ and GOB contended that, according to U.S. law and the Subsidies Agreement, a benefit exists when a recipient is better off than it would have been in the commercial marketplace.[212] Thus, ALZ and GOB argued that in order to determine

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the firm's statements and accounts, rates of return on equity in the three years prior to the government equity infusion, and equity investment in the firm by private investors).

[205] 19 C.F.R. § 351.507(a)(3)(i).

[206] 19 C.F.R. § 351.507(a)(4)(ii).

[207] *Id.*

[208] 19 C.F.R. § 351.507(a)(6).

[209] 19 C.F.R. § 351.507(a)(5).

[210] Stainless Steel Plate in Coils from Belgium: Final Results of Countervailing Duty Administrative Review, 66 FR 45007 (August 27, 2001).

[211] *Id.* at Comment 1.

[212] *Id.*

whether a benefit exists, a comparison must be made to the marketplace to determine if the recipient is better off financially than it would have been absent the government financial contribution.[213] ALZ and GOB also contended that Commerce did not conduct such a comparison in its analysis.[214]

In response to ALZ and the GOB, Commerce disagreed and relied on regulation that provides, "Absent the existence . . . of an objective analysis, containing information typically examined by potential private investors considering an equity investment, the Secretary will normally determine that the equity infusion received provides a countervailable benefit within the meaning of paragraph (a)(1) of this section."[215] Thus, in the absence of such an objective analysis, Commerce will determine that the company receiving the government's equity infusion is receiving a benefit in the amount of the infusion.[216] According to Commerce, where a reasonable private investor is purchasing equity, the investor would seek information about expected returns and evaluate that information before making the decision to invest.[217] Therefore, where there was no evidence that a government had sought such information prior to deciding to invest, Commerce concluded that the government was not acting in accordance with "the usual investment practice of private investors."[218]

3.2.1.2.2. Grants, Loans, and Loan Guarantees

"Financial contribution" is first defined as the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees.[219]

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[213] *Id.*
[214] *Id.*
[215] *Id.* at 19 C.F.R. § 351.507(4)(2).
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] 19 U.S.C. § 1677(5)(D)(i).

The term "grant" has been used interchangeably with "bounty" as a form of benefit or subsidy. Typically, grants are considered provide a benefit per se.[220] In the case of a grant, Commerce normally considers a benefit as having been received on the date on which the company received the grant.[221]

With respect to "loans," in determining whether a benefit is conferred from a loan, the statute provides that a benefit exists "if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market."[222]

Thus, the benefit is typically the difference between the amount of a government-provided loan that the company received and the amount of a "comparable commercial loan" that the company "could actually obtain on the market".[223]

In selecting a loan that is "comparable" to the government-provided loan, Commerce will normally place primary emphasis on similarities between the structure of the loans (*e.g.*, fixed interest rate versus variable interest rate), the maturity of the loans (*e.g.*, short-term versus long-term), and the currency in which the loans are denominated.[224] Further, in selecting a "commercial" loan, Commerce will use a loan taken out by the company from a commercial lending institution or a debt instrument issued by the company in a commercial market.[225]

Also, Commerce will treat a loan from a government-owned bank as a commercial loan, unless there is evidence that the loan from a government-owned bank was provided on noncommercial terms or at the direction of the government.[226] However, Commerce will not consider a loan provided under a government program,

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[220] 19 C.F.R. § 351.504(a). *See also* BOWMAN et al. (2010), *supra* note 201, at 121.
[221] 19 C.F.R. § 351.504(b).
[222] 19 U.S.C. § 1677(5)(E)(ii).
[223] 19 C.F.R. § 351.505(a)(1).
[224] 19 C.F.R. § 351.505(a)(2)(i).
[225] 19 C.F.R. § 351.505(a)(2)(ii).
[226] *Id.*

or a loan provided by a government-owned special purpose bank, to be a commercial loan for purposes of selecting a loan to compare with a government-provided loan.[227]

A key component of identifying a benefit received from a loan is the creditworthiness determination. Commerce initiates an investigation into a company's creditworthiness only when there is a specific allegation by the petitioner, supported by information establishing a reasonable basis to believe or suspect that the company is uncreditworthy.[228] In its investigation, Commerce will consider a firm to be uncreditworthy if, based on information available at the time of the government-provided loan, the company could not have obtained long-term loans from conventional commercial sources.[229] In the event that Commerce finds that a company that received a government-provided long-term loan was uncreditworthy, Commerce will use a "benchmark" interest rate in its benefit calculation formula.[230]

In summary, Commerce will follow three steps in identifying and calculating a loan benefit. Step 1 is to select a comparable commercial loan that the recipient "could actually obtain on the market," that is a commercial loan with market-based interest. When it is difficult to access the banking systems and private companies in the country under investigation, Commerce has to rely on the "actual experience of the firm in question in obtaining comparable commercial loans."[231] Step 2 will be conducted if the

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[227] *Id.*

[228] 19 C.F.R. § 351.505(a)(6)(i).

[229] 19 C.F.R. § 351.505(a)(4)(i) (In making a creditworthiness determination, Commerce may examine, among other factors, the following:
"(A) The receipt by the firm of comparable commercial long-term loans;
(B) The present and past financial health of the firm, as reflected in various financial indicators calculated from the firm's financial statements and accounts;
(C) The firm's recent past and present ability to meet its costs and fixed financial obligations with its cash flow; and
(D) Evidence of the firm's future financial position, such as market studies, country and industry economic forecasts, and project and loan appraisals prepared prior to the agreement between the lender and the firm on the terms of the loan.").

[230] 19 C.F.R. § 351.505(a)(3)(iii).

[231] 19 C.F.R. § 351.505(a)(3)(i) (In a CVD case, Commerce will issue questionnaires to both the government and the companies of the country in question to request the provision of information regarding all alleged programs and the policy, laws and regulations that administer the programs. With respect to the loans, Commerce will ask the companies to provide information on grant programs, loans and credit, etc.).

company does not have any comparable commercial loans. In such situation, Commerce will use a national average interest rate to make a comparison. Step 3 is to construct a benchmark interest rate for a long-term loan if the company is determined to be uncreditworthy or the lender of the loan is a government-controlled bank. This benchmark approach is also used for loan guarantees in the case of uncreditworthiness.

For loan guarantees, the benefit is typically the difference, after adjusting for any difference in guarantee fees, between the amount the recipient of the guarantee pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no guarantee by the authority.[232] Under Commerce's regulations, the benefit conferred is the difference between the amount of interest and any administrative fees paid and those that the company would have had to pay for a comparable loan without the guaranty.[233] In the event that a company, owned by a government, receives a government loan guarantee, that guarantee does not confer a benefit if the respondent provides evidence demonstrating that it is normal commercial practice in the country in question for shareholders to provide guarantees to their firms under similar circumstances and on comparable terms.[234]

3.2.1.2.3. Provision of Goods or Services at Less Than Adequate Remuneration

A benefit exists in the case where goods or services are provided to the recipient for less than "adequate remuneration" (or, in the case of government *procurement* of goods, for *more* than adequate remuneration).[235] What counts as "adequate remuneration" is not directly defined, but it is determined in relation to "prevailing market conditions"[236] These prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.[237]

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[232] 19 U.S.C. § 1677(5)(E)(iii).
[233] 19 C.F.R. § 351.506(a)(1).
[234] 19 C.F.R. § 351.506(a)(2).
[235] 19 U.S.C. § 1677(5)(E)(iv).
[236] 19 U.S.C. § 1677(5)(E).
[237] *Id.*

This statutory provision is believed to have opened a new model for using a market benchmark in identifying and measuring subsidies in the provision of goods or services.[238]

Therefore, the first factor ("adequate remuneration") must be analyzed in relation to the second factor ("prevailing market conditions"). In its practice, Commerce has normally used a three-tiered hierarchy of market benchmarks to determine whether goods or services are provided less than adequate remuneration.[239] Specifically, Commerce's regulations provide that the benchmarks for assessing whether goods or services have been provided by a government for "less than adequate remuneration" should be based on market prices (this is a so-called Tier-1 Benchmark).[240] When actual prices in the market of the country under investigation cannot be used, a world market price may be used "where it is reasonable to conclude that such price would be available to purchasers in the country in question." (this is a so-called Tier-2 Benchmark).[241] If there is no world market price available to purchasers in the country under investigation, Commerce will assess whether the government price is consistent with market principles (a Tier-3 Benchmark).[242] In the cases of actual market-determined prices and the world market prices, if the company imported the product, Commerce will then adjust the comparison price to reflect the price that the company actually paid or would pay.[243]

A notorious case that demonstrates how Commerce may exercise its discretion in looking to out-of-country (Tier-2) benchmarks in measuring the benefit received from a government's provision of goods or services in a market economy is the Canadian softwood lumber case. In *Certain Softwood Lumber Products from Canada*

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[238] *See* Wentong Zheng, *The Pitfalls of the (Perfect) Market Benchmark: The Case of Countervailing Duty Law*, 19(1) MINN. J. INT'L L. 1 (2010).
[239] *Id.* at 19.
[240] 19 C.F.R. § 351.511(a)(2)(i).
[241] 19 C.F.R. § 351.511(a)(2)(ii).
[242] 19 C.F.R. § 351.511(a)(2)(iii).
[243] 19 C.F.R. § 351.511(a)(2)(i-iii). The adjustment will include delivery charges and import duties.

(Lumber IV),[244] the U.S. petitioners (the Coalition for Fair Lumber Imports Executive Committee, representing thirteen domestic producers (collectively, Petitioner)),[245] filed a petition on April 2, 2001 and alleged that Canadian producers of softwood lumber products received countervailable subsidies and that such imports materially injured an industry in the United States.[246] The major subsidy allegations in this case concerned the timber management systems maintained by the provinces of Canada. Specifically, the Petitioner alleged that, through the provincially administered stumpage systems, the provinces provided softwood lumber producers with wood fiber for less than adequate remuneration through the selling of rights to harvest timber on government-owned (or Crown) forest lands.[247] The Canadian respondents contended that stumpage was not a countervailable subsidy because it did not fall within a statutory definition of financial contribution.[248]

Further, the Canadian respondents explained that stumpage does not constitute the provision of a good; rather, stumpage is simply a "conferral of a right of access to exploit an natural resource."[249] In other words, stumpage is similar to licensing of quotas to harvest fish, or leasing of the right to extract oil or minerals from public lands.[250] In its final determination, Commerce did not agree with the Canadian respondents' arguments and determined that the provincial governments of Canada

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[244] Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada (Lumber IV), 67 FR 15545 (Apr. 2, 2002).
[245] Four more companies participated and joined in the petition on April 20, 2001. See Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Softwood Lumber Products from Canada, 66 FR 43186 (Aug. 17, 2001) (Lumber IV Prelim).
[246] Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 66 FR 21332 (Apr. 30, 2001).
[247] Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada (Lumber IV), 67 FR 15545 (Apr. 2, 2002).
[248] *Id.* at 15548.
[249] *Id.*
[250] *Id.*

provided a good (timber) to lumber producers, constituting a countervailable subsidy.[251]

In measuring the stumpage subsidies, surprisingly given that Canada is a market economy country, Commerce found that there were non market-based internal Canadian benchmarks due to the dominance of Canadian government timbers sales in the various provincial markets.[252] In such a situation, Commerce concluded that "true market prices may not exist in the country, or it may be difficult to find a market price that is independent of the distortions caused by the government's actions."[253] As a result, Commerce decided to use U.S. stumpage (*i.e.*, the American selling price for standing timber) as a reasonable Tier-2 benchmark.[254] For its benchmark selection, Commerce reasoned that U.S. stumpage is also available to Canadian producers, and that U.S. timber stands were comparable to Canadian timber stands.[255] This concept will resurge in Chapter 5 in the discussion of the CVD cases against Vietnam; Commerce has exercised wide latitude in deciding when to apply Tier-2 or Tier-3 benchmarks, and in choosing which countries to use as surrogates for the purpose of determining the amount of a countervailable benefit received by a Vietnamese exporter.

3.2.1.3. Element 3: Specificity

Element 3: A subsidy must be "specific."

The third element, which was originally developed in the U.S. administrative and statutory implementation of its countervailing duty law, is the concept of "specificity." The specificity test is a critical step in CVD investigations in determining whether a benefit is a countervailable subsidy. The specificity test is used to check

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[251] *Id.*
[252] Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada, 67 ITADOC 15545 (April 2, 2002) [hereinafter Lumber IV Decision Memo].
[253] *Id.* (citing Dr. Robert Stoner and Dr. Matthew Mercurio, "Economic Analysis of Price Distortions in a Dominant–Firm/Fringe Market" (January 4, 2002), Exhibit 4 of Letter from Dewey Ballantine to Department of Commerce (February 14, 2002)).
[254] *Id.*
[255] *Id.*

whether a subsidy is provided only to certain exporters or producers under investigation.

Under U.S. law, the following are considered "specific" subsidies: (1) a subsidy contingent on export performance; (2) an import substitution subsidy contingent on the use of domestic goods rather than imported goods; and (3) a domestic subsidy that is limited to an enterprise or industry within the jurisdiction of the authority providing the subsidy.[256] From a U.S. government agency's perspective, the purpose of the specificity test is to "function as an initial screening mechanism to winnow out only those foreign subsidies which are truly broadly available and widely used throughout an economy."[257] Accordingly, to be a countervailable subsidy, a benefit must be granted to a specific enterprise or industry, or group of enterprises or industries. Subsidy benefits generally available may or may not be countervailable. In fact, not every subsidy is or should be countervailable because governments have a legitimate interest in supporting certain activities, such as national defense, education, and infrastructure development.[258] Further, for example, government assistance is not countervailable if that program is generally available and widely and evenly distributed throughout the jurisdiction of the subsidizing authority.[259] Simply put, the specificity test exists is to ensure that subsidies distributed generally and widely throughout an economy are noncountervailable subsidies. For that reason, a subsidy is countervailed only if it is provided to a specific enterprise or industry, or group of enterprises or industries.[260] In particular, the entire Section 771(5A) of the Tariff Act of 1930, as amended, provides explicit guidelines for the specificity test. Section 771(5A) implements the provisions of Article 2 of the Subsidies Agreement dealing with specificity.

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[256] 19 U.S.C. § 1677(5A).
[257] SAA, *supra* note 159, at 929.
[258] BHALA RAJ, INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK, VOLUME 3, REMEDIES 383 (Fifth Edition, Durham, North Carolina: Carolina Academic Press 2019).
[259] *Id.*
[260] Section 771(5A), Tariff Act of 1930, as amended (codified at 19 U.S.C. § 1677 (5A)(D)(i)).

The first time that Commerce used the specificity test was in *Certain Steel Products from Belgium*[261] in 1982. In this CVD case, Commerce used the specificity test to determine that several generally applicable subsidies were non-countervailable subsidies. Commerce viewed the word "specific" in the statutory definition as "necessarily modifying both 'enterprise or industry' and 'enterprises or industries.'"[262] Commerce stated that "this criterion is necessary to distinguish between government programs designed to benefit a specific sector and programs designed to implement broader goals, such as a lower inflation rate or improved health care."[263]

3.2.1.3.1. Export Subsidies and Import Substitution Subsidies

"Export subsidies" means the subsidies conditioned on export of the products or on export performance.[264] In other words, subsidies used to pay for an industry only on products when they are exported are classified as export subsidies. Under the U.S. countervailing duty law, "export subsidies" are defined as those subsidies that are, in law or in fact, whether solely or as one of several other conditions, contingent upon export performance.[265] This definition is more expansive than it was in the preceding law and practice.[266]

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[261] Final Affirmative Countervailing Duty Determinations; Certain Steel Products from Belgium, 47 FR 39304 (September 7, 1982).
[262] *Id.* at comment 1.
[263] Jay L. Panzarella, *Is the Specificity Test Generally Applicable*, 18 LAW & POL'Y INT'L BUS. 417, 422 (1986). (citing U.S. Department of Commerce, Study of Foreign Government Targeting Practices and the Remedies Available under the Countervailing Duty and Anti-dumping Duty Laws 8 (July 1985) (on file at Commerce, Import Administration, Room 3716, Washington, D.C. 20230).
[264] Barceló III (1980), *supra* note 100.
[265] 19 U.S.C. § 1677(5A),(B) and SAA, *supra* note 159, at 259.
[266] SAA, *supra* note 159, at 259. The Subsidies Code did not define "export subsidies", but it incorporated an annex that listed all types of practices entitled "Illustrative List of Export Subsidies" into the statute; the new § 1677(5A) does not. However, the U.S. Congress intended that Commerce would continue to adhere to the "Illustrative List," except where it may be inconsistent with the statute. *See also* Jackson (1997), *supra* note 41, at 1-398.

"Import institution subsidies" are defined as those subsidies that are contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.[267]

The specificity test is not required in the case of export subsidies and import institution subsidies because these two forms of subsidies are "deemed to be specific" under both WTO legal framework and the U.S. law.[268] These two subsidies are also classified as prohibited (or red light) subsidies under the Subsidies Agreement.[269]

Commerce has set out specific rules to identify export subsidies from Section 351.514 to 351.520, which incorporate the appropriate standards from the Illustrative List contained in the Subsidies Agreement.[270] In particular, Commerce considers a subsidy to be contingent upon export performance if the provision of the subsidy is, in law or in fact, tied to actual or anticipated exportation or export earnings, alone or as one of two or more conditions.[271] Exceptionally, a benefit does not exist in export promotion activities that consist of general informational activities that do not promote particular products over others.[272] In its regulations, Commerce has regulated specific criteria for identification and calculation of benefits conferred from the following type of subsidies: (i) internal transport and freight charges for export shipments; (ii) price preferences for inputs used in the production of goods for export; (iii) exemption or remission upon export of indirect taxes (*e.g.,* sales taxes and valued added taxes); (iv) exemption, remission, or deferral upon export of prior-stage cumulative indirect taxes; (v) remission or drawback of import charges upon export; and (vi) export insurance.[273]

The category of import substitution subsidy is a new type of subsidy that did not exist in the preceding laws (*i.e.*, the Subsidies Code and the 1979 TAA). Import substitution subsidies are added under the Subsidies Agreement and the URAA, and

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[267] 19 U.S.C. § 1677(5A)(C) and SAA, *supra* note 159, at 259.
[268] Subsidies Agreement, *supra* note 39, at Article 2.3; and 19 U.S.C. § 1677(5A)(A).
[269] Subsidies Agreement, *supra* note 39, at Article 3.
[270] 19 C.F.R. Part 351.
[271] 19 C.F.R. Part 351, § 351.514(a).
[272] 19 C.F.R. Part 351, § 351.514(b).
[273] 19 C.F.R. Part 351, § 351.515 for (i); § 351.516 for (ii); § 351.517 for (iii); § 351.518 for (iv); § 351.519 for (v); and § 351.520 for (vi).

they are automatically considered to be specific. The purpose of the import substitution subsidies is generally to "protect domestic input producers by imposing requirements or providing incentives for companies to use these inputs"[274]. Since this type of subsidy is new, Commerce preserved its definition as exactly provided under the statute and did not issue additional related regulations due to its lack of experience in dealing with this new subsidy.[275] However, Commerce promised that it will develop practice regarding this type of subsidy on a case-by-case basis.[276]

In *Certain Passenger Vehicle and Light Truck Tires from China,*[277] Commerce found that GITI Anhui Radial, a respondent, received export seller's credits from the China Exim Bank that constituted a financial contribution, and the loans were specific because they were tied to actual or anticipated exportation or export earnings.[278] In addition, the petitioner alleged that the tire producers also benefited from subsidized export credit insurance provided by China Export & Credit Insurance Corporation, a government-owned insurance company.[279] Specifically, the petitioner claimed that export credit insurance for Chinese tire producers and exporters provided a countervailable subsidy under U.S. law where the premium rates charged by the programs were inadequate for covering the programs' long-term costs and losses, and that these subsidies were specific because the provision of insurance was contingent upon export performance.[280] However, during the Commerce's verification, it was found that this program was actually a grant provided by the local government to reimburse the company for the cost of its export insurance premiums.[281] Then, Commerce decided simply to countervail the benefit as a grant because it constituted a

[274] 19 C.F.R. Part 351, § 521 (Nov. 25, 1998).
[275] *Id.* at preamble, at 65385.
[276] *Id.*
[277] Countervailing Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part, 80 FR. 34888 (June 18, 2015).
[278] Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China (PVLT Tires IDM) (June 11, 2015), at comment 13.
[279] *Id.* at 23.
[280] *Id.*
[281] *Id.* at 24.

financial contribution in the form of a direct transfer of funds or a potential transfer of funds in accordance with 19 U.S.C. § 1677(5)(D)(i).[282]

3.2.1.3.2. Specificity of Domestic Subsidies

"Domestic subsidies" can be understood as those that are primarily granted to production without respect to output destination.[283] In this situation, the subsidies are granted to a domestic industry on all of its production of a product, regardless of whether that production is exported or not.[284] Like export subsidies, domestic subsidies are believed to have the ability to distort resource allocation by drawing resources into production of a product where production would be economically infeasible but for the subsidy.[285] However, as to the degree of trade distortion to the importing market, domestic subsidies are viewed as less aggressive than the export subsidies that are prohibited under the WTO's legal framework.[286]

Under the U.S. countervailing duty law, domestic subsidies are all subsidies besides export subsidies and import subsidies.[287] The specificity test is used to determine whether a domestic subsidy is a specific one, in law (*de jure*) or in fact (*de facto*), to an enterprise or industry within the jurisdiction of the authority providing the subsidy.[288] This is a simple definition, but it creates a high volume of work and technical analysis for identifying a genuinely specific domestic subsidy. In fact, the specificity test for determining whether the domestic subsidy is specific is divided into two further steps: *de jure* specificity and *de facto* specificity.

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[282] *Id.*
[283] Barceló III (1980), *supra* note 100, at 261.
[284] JACKSON et al. (2008), *supra* note 124, at 848.
[285] *Id.*
[286] Subsidies Agreement, *supra* note 39, at Article 3. Article 3 classifies export subsidies and import substitution subsidies under the title of prohibition.
[287] Bowman et al. (2010), *supra* note 201, at 120.
[288] 19 U.S.C. § 1677(5A)(D).

3.2.1.3.2.1. *De Jure* Specificity

Domestic subsidies are either specific or not, as determined based on an analysis of whether the subsidy is specific as a matter of law (*de jure* specific) or specific as a matter of fact (*de facto* specific).[289] The test of *de jure* specificity is affirmative when the authority providing the subsidy, or the legislation pursuant to which the authority operates, "expressly limits access" to the subsidy to "an enterprise or industry."[290] In a contract, a subsidy is considered not to be *de jure* specific if the eligibility criteria or conditions for the subsidy are objective and transparent, if the eligibility rules are automatic, and if these eligibility rules are clearly stipulated in the existing laws capable of verification and strictly followed.[291] The statute defines the term "objective or conditions" as criteria or conditions that are neutral and that do not favor one enterprise or industry over another.[292] Further, the SAA directs that such criteria or conditions must be economic in nature and horizontal in application, such as stipulating the number of employees or the size of an enterprise.[293]

De jure specificity also exists where a subsidy is limited to designated geographical regions within the jurisdiction of the granting authority.[294] These subsidies are also considered to be regionally specific.

Commerce has found *de jure* specific domestic subsidies in several cases. In *Lightweight Thermal Paper (LTP) from Chin*a,[295] Commerce found that the GOC has a policy in place to encourage and support the growth of the paper industry through

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[289] 19 U.S.C. § 1677(5A)(D)

[290] 19 U.S.C. § 1677(5A)(D)(i). The SAA gives an authoritative interpretation of this provision as follows:
"Although it has long been established that intent to target benefits is not a prerequisite for a countervailable subsidy, the de jure prong of the specificity test recognizes that where a foreign government expressly limits access to a subsidy to a sufficiently small number of enterprises, industries or groups thereof, further inquiry into the actual use of the subsidy is unnecessary."

[291] 19 U.S.C. § 1677(5A)(D)(ii) and SAA, *supra* note 159, at 260. *See also* Bowman et al. (2010), *supra* note 201, at 120.

[292] 19 U.S.C. § 1677(5A)(D).

[293] SAA, *supra* note 159, at 260.

[294] 19 U.S.C. § 1677(5A)(D)(iv).

[295] Lightweight Thermal Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 57323 (October 2, 2008).

preferential financing initiatives, as expressly reflected in the government plans and related documents. Through a *de jure* specificity test, Commerce concluded that the loans from such a program are *de jure* specific because of the GOC's policy, as illustrated in its government plans, to encourage and support the growth and development of the paper industry.[296]

In *Certain New Pneumatic Off-the-Road (OTR) Tires from India,*[297] Commerce found a tax deduction to cover expenses related to in-house R&D for companies "engaged in the business of bio-technology or in any business of manufacture or production of any article or thing …. in the list of the Eleventh Schedule of the Income Tax Act of 1961" was a countervailable subsidy. As this type of subsidy was expressly limited to certain enterprises and industries, it was considered to be *de jure* specific.[298]

3.2.1.3.2.2. *De Facto* Specificity

In practice, Commerce may be suspicious that a subsidy program is apparently provided as generally available to all companies and industries, but that it actually targets only some companies that are in a position to take it; or perhaps, in fact, only a limited group of industries or some specialized companies can fulfill the conditions necessary to receive the subsidy. In such a situation, Commerce has a reason to believe that such a subsidy may be specific as a matter of fact (*de facto* specific). Therefore, Commerce will examine the actual distribution of benefits to determine whether it may be *de facto* specific. Commerce discerns *de facto* specificity from the presence of one or more factors. Factor 1: whether the actual number of recipients is limited; Factor 2: whether an enterprise or industry is a predominant user of the subsidy; Factor 3: whether an enterprise or industry receives a disproportionally large subsidy amount;

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[296] *Id.*
[297] Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires from India: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part, 82 FR 2946 (January 10, 2017).
[298] *Id.*

and Factor 4: whether the authority favored an enterprise or industry in its decision to grant a subsidy.[299]

As a standard rule for examining these four factors, Commerce will examine each factor in sequential order of its appearance. If a single factor warrants a finding of specificity, Commerce will stop there and not undertake further analysis.[300] In analyzing these four *de facto* specificity factors, Commerce is required to take into account (i) the extent of diversification of economic activities within the economy in question; and (ii) the length of time during which the subsidy program in question has been in operation.[301]

In *Pneumatic Off-The-Road (OTR) Tires from China*,[302] the provision of natural and synthetic rubber by state-owned rubber producers to OTR tire producers at less than adequate remuneration was found to be *de facto* specific because the industries are "limited in number."[303] During the preliminary investigation, the government of China provided a list of industries that use natural and synthetic rubbers: "tires, rubber bands and tubes, shoes, machinery components and commodity products."[304] Prior to the final determination, the petitioners argued that at the verification, an official from the Chinese Synthetic Rubber Industry Association ("SRIA") stated that "tire industry is the largest consumer of natural and synthetic rubber in the country" and that the "main consumers of synthetic rubber are: shoemakers, rubber pipe producers, construction companies, and automobile producers."[305] Consequently, Commerce continued to find that industries that use natural and synthetic rubber are "limited in

[299] 19 U.S.C. § 1677(5A)(D)(iii)(I-IV).
[300] 19 C.F.R. Part 351, § 351.502(a).
[301] 19 U.S.C. § 1677(5A)(D)(iii)(I-IV) and SAA, *supra* note 159, at 261.
[302] Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008) ("Final Determination").
[303] Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 72 FR 71360 (Dec. 17, 2007) ("Preliminary Determination").
[304] *Id.*
[305] Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain New Pneumatic Off-The-Road Tires (OTR Tires) from the People's Republic of China, issued accompanying with the Final Determination (IDM).

number;" therefore, such benefit was *de facto* specific.[306] In addition, Commerce noted that the tire industry is the largest consumer of natural and synthetic rubber in the country, and the figures collected from SRIA officials during verification indicated that the tire industry consumes over half of the total rubber consumed in the country during the period of investigation ("POI"), indicating that this program may also be *de facto* specific under the predominant and disproportionate analyses (*i.e.,* Factor 2 and Factor 3). In other previous cases in the past, among many others, for example, *Circular Welded Carbon Quality Steel Pipe (CWP) from China*[307] and *Certain Steel Products from Belgium*,[308] Commerce also found the subsidies were *de facto* specific due to the "limited in number" factor.

3.2.2. Injury Determination

Historically, the provisions of the injury test had their origin in the Antidumping Act of 1921.[309] From 1921 to 1954, the injury determinations in antidumping cases were in the hands of the Department of Treasury. Then, in 1954, the responsibility for finding injury finding was transferred to the Tariff Commission, later renamed the International Trade Commission ("ITC").[310] The countervailing duty law, however, did not contain an injury test for many years, until one was implemented with the enactment

[306] *Id.* at 71.
[307] Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 FR 31966 (June 5, 2008).
[308] Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Belgium, 58 FR 37273, 37276 (July 9, 1993).
[309] The Antidumping Act of 1921 was enacted as part of the Emergency Tariff Act, 42 Stat. 11 § 201(a). Under the Act, the Secretary is responsible for investigating when imports are sold at less than fair value and for finding injury to American industry.
[310] Customs Simplification Act of 1954, ch. 12 & 13, § 302, 68 Stat. 1138 (repealed 1979). See *generally* Bruce A. Ortwine, *Injury Determinations under United States Antidumping Laws before and after the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076, 1079 (1981).

of the Trade Act of 1974.[311] At that time, a basic injury[312] test was added to the countervailing duty law for imports of nondutiable goods only.[313] It was, however, a landmark moment for the beginning of a bifurcated system in countervailing duty proceedings.[314] In 1979, a completely new injury test[315] was added for all imports from signatories to the 1979 Subsidies Code. Since the establishment of the WTO in 1995, the United States has extended the injury test to apply in all countervailing duty cases involving a WTO member.[316] It should be noted that the legal requirements for injury test are fundamentally the same both for dumping and subsidies.[317]

3.2.2.1. Statutory Criteria for the Injury Test

Under Section 701(a) of the Tariff Act of 1930, as amended (codified at 19 U.S.C. § 1671(a)), a two-step system is stipulated, respectively, as follows:

(a) General rule. If—

(1) the administering authority[318] determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

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[311] Trade Act of 1974, *supra* note 31. *See generally* Lloyd Granet, *ITC Injury Determination in Countervailing Duty Investigations*, 15 LAW & POL'Y INT'L BUS. 987, 995 (1983). *See also* Jackson (1997), *supra* note 41, at 267. Jackson explained that because these U.S. laws preceded the GATT, the U.S. benefited from grandfathered rights established in the Protocol of Provisional Application under GATT 1947, with respect to injury test matters.

[312] The law merely specified an "injury" test without the additional word "material." *See* Jackson (1997), *supra* note 41, at 267.

[313] *See* Granet (1983), *supra* note 311, at 988 (footnote 8). Granet explained, "Because U.S. countervailing duty law prior to GATT did not impose a duty on nondutiable goods, the GATT grandfather clause exemption did not apply."

[314] *Id.*

[315] The new injury test, with a full definition of "material injury," added the three varieties of injury, namely material injury, threat of material injury, and material retardation of establishment of industry. *See* Section 701(a)(2), Trade Agreements Act of 1979, 93 Stat. 144.

[316] JACKSON et al. (2008), *supra* note 124, at 815.

[317] JACKSON (1997), *supra* note 41, at 266.

[318] The term "administering authority" means the Secretary of Commerce. *See* 19 U.S.C. § 1677(1).

(2) in the case of merchandise imported from a Subsidies Agreement country, the Commission[319] determines that—

(A) an industry in the United States—

(i) is *materially injured*, or

(ii) is *threatened with material injury*, or

(B) the establishment of an industry in the United States is *materially retarded*,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy.

From the language of the foregoing provisions, to impose a countervailing duty to a subsidized product from a WTO member country, one must satisfy three important elements. These include: (i) an existence of a countervailable subsidy benefiting the exported product; (ii) a material injury to the U.S. domestic industry; and (iii) a causal link between the material injury and the imports, as indicated by the language "by reasons of imports of that merchandise." The last two elements, (ii) and (iii), comprise the two-step injury step, and both elements are necessary for the imposition of a countervailing duty. Therefore, the ITC's injury determination is a decisive component of any countervailing duty investigation. In further detail, the first step of the ITC's injury test provides three options: "material injury," "threat of material injury" to U.S. industry, or "material retardation" of the establishment of U.S. industry. Then, in step two, whichever form of injury exists must be shown to have been caused "by reason of" imports of the products under the countervailing duty investigation.

In addition, as is evident from section 701(a)(2), the ITC only conducts the injury test only when the exporting country of the product under investigation is a "Subsidies Agreement country."[320] Looking back to the legislative history when the

[319] "Commission" means the United States International Trade Commission. *See* 19 U.S.C. § 1677(2).
[320] 19 U.S.C. § 1671(b) defines "Subsidies Agreement country" as "a WTO member country, or a country which the President has determined has assumed obligations with respect to the U.S. which are

U.S. Congress amended the Tariff Act of 1930 in 1979 to add the injury test in conforming with international commitments to implement the Subsidies Code, Section 303[321] of the Act was still retained to cover those cases related to imports from the countries that are not "countries under the Agreement."[322] For instance, if such countries (*e.g.*, non-WTO members) export the subsidized goods into the U.S. market, they are not entitled to an injury finding by the ITC.[323] That means they are back to the one-step system and are more likely to be exposed to the imposition of a countervailing duty if Commerce finds the related subsidies are countervailable, with no findings of any sort required by the ITC. In essence, the bifurcated system is intended to ensure that CVD determinations are not concentrated in only one agency, and the relatively independent nature of the ITC could insulate it from political pressures in its injury determinations.[324] Notably, determinations by both Commerce and the ITC can be subject to judicial reviews.[325] That provides some protection against arbitrary imposition of high duties; notably however, there is no judicial review available for Commerce's determination that a country has a nonmarket economy, and such determination is thus indefinitely binding until revocation or reconsideration by Commerce.[326]

3.2.2.1.1. Material Injury

substantially equivalent to the obligations under the Subsidies Agreement, or a country with respect to which the President determines that there is an agreement in effect between the U.S. and that country."

[321] Section 303 of the Tariff Act of 1930 applied to the following countries: "… any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government."

[322] Catherine DeFilippo, *Antidumping and Countervailing Duty Handbook*, 14th Edition, Pub. 4540, USITC, June 2015, at IV-6. Available online at https://www.usitc.gov/trade_remedy/documents/handbook.pdf, accessed on May 13, 2020.

[323] In Carbon Steel Wire Rod from Czechoslovakia (1984), because both Poland and Czechoslovakia were not signatories to the 1979 Subsidies Code, Commerce conducted the CVD investigation of the alleged subsidization of carbon wire steel rod in accordance with Section 303 of the Tariff Act of 1930.

[324] BOWMAN et al. (2010), *supra* note 201, at 181.

[325] 19 U.S.C. § 1516a.

[326] 19 U.S.C. § 1677(18)(D).

The ITC's focus in any antidumping or countervailing duty case is finding a "material injury" to the domestic industry. The term "material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant."[327] Supporting this technical definition, the law provides the ITC with a list of economic factors to be reviewed; and the ITC is given substantial discretion in its analysis and weighing of such factors.[328] The list includes: (1) the volume of imports of the subject merchandise, (2) the effect of imports of that merchandise on prices in the United States for domestic like products, and (3) the impact of imports of such merchandise on domestic producers of domestic like products in the context of production operations within the United States.[329] In considering whether there is a material injury, the ITC is allowed to consider "such other economic factors as are relevant."[330] This provision has granted the ITC a very broad discretion, and there is some risk that the ITC may abuse its discretion by failing to consider an important factor that is not otherwise listed among the statutory criteria.[331]

Technically, when evaluating the volume of imports, the ITC is directed by law to consider whether the volume of subject imports, or any increase in that volume, either in absolute terms or relative[332] to production or consumption in the United States, is significant.[333] Thus, the ITC has substantial discretion to conclude what constitutes a "significant" increase.[334]

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[327] Tariff Act of 1930, as amended, Section 771(7) (codified at 19 U.S.C. § 1677(7)). This Section is also applied to antidumping investigations. This definition is exactly the same definition as appeared in the legislative history of Trade Acts 1979 and 1974 and it is believed to inherit the definition of injury standard under the Antidumping Act of 1921. *See generally* Ortwine (1982), *supra* note 310, (providing further explanation on the origin of the "material injury" definition).
[328] BOWMAN et al. (2010), *supra* note 201, at 57.
[329] 19 U.S.C. § 1677(7)(B)(i).
[330] 19 U.S.C. § 1677(7)(B)(ii).
[331] PATTISON (2016), *supra* note 141, at 105. (citing *Mittal Steel Point Lisas Ltd. v. U.S.*, 542 F.3d 8667 (Fed. Cir. 2008) and other cases).
[332] *See* BOWMAN et al. (2010), *supra* note 201, at 58 (An increase can be "significant" if it is either an increase in absolute terms (i.e., the actual volume of imports has increased) or if it is an increase in "relative" terms (meaning that the U.S. market share of the imported goods has increased)).
[333] 19 U.S.C. § 1677(7)(C)(i).
[334] BOWMAN et al. (2010), *supra* note 201, at 58.

In its review of the effect of imports on the subject merchandise on prices, the ITC is further instructed to consider two basic aspects of pricing: (1) whether there has been significant price underselling by the imported merchandise as compared with the price of domestic like products in the United States and (2) whether the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.[335]

The third element that is the broadest one requires the ITC to examine the impact of imports on the affected domestic industry.[336] Specifically, the ITC is required to evaluate all relevant economic factors that have a bearing on the state of the industry in the U.S., including, but not limited to [the following five factors]:

(1) actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity;

(2) factors affecting domestic prices;

(3) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment;

(4) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product; and

(5) in dumping proceedings, the magnitude of the margin of dumping.[337]

The purpose of the law is to provide general guidance to the ITC in its material injury considerations, but the ITC still has its broad discretion by a statutory standard for making its determination as provided by the law. The law states that "the presence or absence of any factor which the Commission is required to evaluate shall not necessarily give decisive guidance with respect to the determination by the

[335] 19 U.S.C. § 1677(7)(C)(ii).
[336] PATTISON (2016), *supra* note 141, at 106.
[337] 19 U.S.C. § 1677(7)(C)(iii).

Commission of material injury."[338] One of the most important factors in the ITC's injury determination is causation, that is the causal link between the material injury to the domestic industry and the imports of the subsidized product.[339]

3.2.2.1.2. Threat of Material Injury

There is no specific definition or interpretation of a "threat of material injury" under the countervailing duty law. The concept of "threat of material injury" is more complicated to define than that of "material injury," which is an existing or actual injury that has already occurred. In fact, to evaluate whether the "threat" exists, the ITC has even more leeway than in the case of an existing injury, because the ITC is expected to evaluate trends for the future, which in many cases are not clear.[340]

Thus, in practice, the ITC has not infrequently found a threat of material injury, rather than an actual material injury, as the basis for an injury determination.[341] As a matter of concept, a determination of a "threat of material injury" is similar to that of a "material injury"; however, the prospective nature of determination of a threat of material injury makes them more difficult.[342] As explained by Congress, the purpose of the threat of material injury standard is "to permit import relief under the countervailing duty and antidumping laws before actual injury occurs."[343]

In evaluating the threat of material injury, the ITC is required to consider, among other relevant factors, the following specific criteria:

"(1) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article

[338] 19 U.S.C. § 1677(7)(E)(ii).
[339] In the past, the laws did not include a causation standard because Congress was concerned that a relief for an American industry would be more difficult to obtain if the Commission's discretion was limited in that respect. *See also* Ortwine (1981), *supra* note 310, at 1103.
[340] JACKSON (1997), *supra* note 41, at 270.
[341] PATTISON (2016), *supra* note 141, at 124.
[342] BOWMAN et al. (2010), *supra* note 201, at 58.
[343] PATTISON (2016), *supra* note 141, at 124 (citing S. Rep. No. 249, 96th Cong., 1st Ses. 89 (1979)).

3 or 6.1 of the Subsidies Agreement), and whether imports of the subject merchandise are likely to increase,

(2) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, considering the availability of other export markets to absorb any additional exports,

(3) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,

(4) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,

(5) inventories of the subject merchandise,

(6) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products,

(7) in any investigation under this title which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 705(b)(1) or 735(b)(1) with respect to either the raw agricultural product or the processed agricultural product (but not both),

(8) the actual and potential negative effects on the existing development and

production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(9) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time)."[344]

[344] 19 U.S.C. § 1677(7)(F)(i).

In addition, as instructed by the law, the ITC's determination of a threat of material injury "may not be made on the basis of mere conjecture or supposition;"[345] instead, it must be based on current and historical data that demonstrate that "dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted."[346]

3.2.2.1.3. Material Retardation

Congress does not define "material retardation" in the countervailing duty law. Material retardation is even more difficult to define than a threat of material injury. If a U.S. industry under the ITC's review is not already well-established, there is typically insufficient data to demonstrate actual material retardation.[347] In practice, the ITC rarely chooses to use the "material retardation of an industry" standard as provided in the statute when determining whether there is injury.[348]

In reviewing this issue in past cases, the ITC has started by examining whether the U.S. industry is "established."[349] If American producers have started production and such operations have "stabilized," the industry is considered to be established.[350] In its evaluation, the ITC examines the following factors:

(1) when the U.S. industry began production;

(2) whether the production has been steady or start-and-stop;

(3) the size of domestic production compared to the size of the domestic market as a whole;

(4) whether the U.S. industry has reached a reasonable "breakeven point;" and

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[345] 19 U.S.C. § 1677(7)(F)(ii).
[346] *Id.*
[347] BOWMAN et al. (2010), *supra* note 201, at 59 (citing U.S. International Trade Commission, 'Certain Gene Amplification Thermal Cyclers and Subassemblies Thereof from the United Kingdom' (Investigation No. 731-TA-485, Pub. No. 2412), Federal Register 56 (28 Aug. 1991): 44101).
[348] PATTISON (2016), *supra* note 141, at 124.
[349] Antidumping and Countervailing Duty Handbook, 14th Edition, Publication 4540, USITC, June 2015, at II-33.
[350] *Id.*

(5) whether the activities are truly a new industry or merely a new product line of an established firm.[351]

If the industry is not established, the ITC considers whether the performance of the industry reflects normal start-up difficulties or whether the imports of the subject merchandise have materially retarded the establishment of the industry.[352]

3.2.2.2. Cumulation

One of the long-standing concerns in determining material injury is how to deal with the situation involving the same products that are imported from more than one country. In particular, the main concern in such proceedings is whether all imports from the countries in question should be aggregated or "cumulated" to assess their combined effect on injuries or whether each country's imports should be separated to conduct a separate injury analysis.[353] The cumulative approach may be unfair to the country of which the import volume is at the lowest level, but the cumulation of all imports from all countries in the same CVD proceeding may result to an affirmative injury determination.

As required by U.S. law, cumulation is used in both countervailing duty and antidumping proceedings.[354] When identifying a material injury, the ITC is directed to cumulate subject imports from all countries as to which petitions were filed and/or investigations self-initiated by Commerce on the same day, if such imports compete with each other and with domestic like products in the U.S. market.[355] The law, however, provides exceptions to the application of cumulation in the following circumstances: (1) if Commerce has made a preliminary negative determination with respect to imports from a particular country and does not make a final affirmative

[351] *Id.* (citing Fresh and Chilled Atlantic Salmon from Norway, Inv. No. 701-TA-302 (Preliminary) and Inv. No. 731TA-454 (Preliminary), USITC Pub. 2272 (April 1990) at 15-18).
[352] *Id.* (citing Benzyl Paraben from Japan, Inv. No. 731-TA-462 (Final), USITC Pub. 2355 (February 1991) at 11-12).
[353] PATTISON (2016), *supra* note 141, at 144.
[354] 19 U.S.C. § 1677(7)(G).
[355] 19 U.S.C. § 1677(7)(G)(i).

determination on those imports prior to the ITC's final determination; (2) when the investigation has been terminated for a particular country; (3) for a country designated a beneficiary country under the Caribbean Basin Economic Recovery Act ("CBERA") (except that two or more CBERA beneficiaries must be cumulated with each other); and (4) for imports from Israel.[356]

In practicable circumstances, at its discretion, the ITC may cumulatively assess the volume and effect of imports of the subject merchandise if such imports compete with each other and with domestic like products in the U.S. market.[357]

3.2.2.3. *De Minimis* Countervailable Subsidies

Commerce has applied a long-term practice that if the aggregate of net countervailable subsidies is below a certain *de minimis* level, it will be treated as zero and no countervailing duties will be imposed. Under the applicable CVD law, Commerce is directed to disregard any *de minimis* countervailable subsidy.[358] The standard *de minimis* threshold is set based on a statutory rule that "a countervailable subsidy is de minimis if the administering authority determines that the aggregate of the net countervailable subsidies is less than 1 percent ad valorem or the equivalent specific rate for the subject merchandise."[359] However, there are exceptions for developing countries, including (i) not exceeding 2% for most developing countries[360] and (ii) not exceeding 3% for certain other developing countries.[361]

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[356] *Id. See also* Lawrence J. Bogard, *1 Law and Practice of US Reg. of International Trade § 1:125, Law and Practice of United States Regulation of International Trade,* Publisher's Editorial Staff, Chapter 1. Antidumping and Countervailing Duties, III. Material Injury in Antidumping and Countervailing Duty Cases (Westlaw), accessed on October 20, 2020.

[357] 19 U.S.C. § 1677(7)(H) (The provision on cumulation for determining a threat of material injury uses the phrasing "may cumulatively assess …" (emphasis added).

[358] 19 U.S.C. §1671b(a)(4)(A).

[359] *Id.*

[360] Pursuant to 19 U.S.C. §1671b(a)(4)(B), the 2% *de minimis* rate is applied to country members of the Subsidies Agreement that are designated by USTR as developing countries. However, the 2% *de minimis* rate shall not apply after the date that is eight years after the date the WTO Agreement enters into force. *See* 19 U.S.C. §1671b(a)(4)(D)(i).

[361] Pursuant to 19 U.S.C. §1671b(a)(4)(C), there are two subjects eligible for the 3% *de minimis* threshold. The first subject includes country members of the Subsidies Agreement that are designated

It should be noted that the standards of 1%, 2%, and 3% *de minimis* threshold can be applied only in the original CVD investigation to determine whether the imported goods from a country should be subject to a CVD order. In regular administrative reviews and other determinations other than preliminary or final CVD determination in an original investigation of CVD orders, Commerce uses the standard of less than 0.5 percent ad valorem upon the imported goods from all countries.[362]

Under the U.S. AD and CVD laws, the Trade Representative ("USTR") shall publish in the Federal Register, and update as necessary, a list of (i) developing countries that have eliminated their export subsidies on an expedited basis within the meaning of Article 27.11 of the Subsidies Agreement, and (ii) countries determined by the Trade Representative to be lease developed or developing countries.[363] The first time that the USTR published such a list was on June 2, 1988.[364] The USTR recently revised that list on February 10, 2020.[365] For the purpose of the U.S. CVD law, the USTR considers countries with a share of 0.5 percent or more of world trade to be developed countries.[366] As a result, Vietnam together with other countries such as Brazil, India, Indonesia, Malaysia and Thailand are now ineligible for the 2% *de minimis* standard.[367] The special meaning of this change for Vietnam is that it will no longer receive preferential treatment of the 2% *de minimis* threshold in CVD investigations. In other words, Vietnam will be subject to a lower threshold for

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by USTR as least developed countries. For these countries, the 3% *de minimis* threshold shall expire eight years from the date the WTO Agreement entered into force. The second subject includes developing countries with respect to which USTR has notified Commerce that the country has eliminated its export subsidies on an expedited basis within the meaning of Article 27.1 of the Subsidies Agreement. *See* 19 U.S.C §1671b(a)(4)(D). The purpose of applying the 3% *de minimis* threshold is to encourage such countries to speed up their process for eliminating subsidies. *See* H. Rpt. No. 103-826(1), at 117 (1994); Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809.

[362] 19 C.F.R. § 351.106(c).

[363] 19 U.S.C. § 1677(C).

[364] USTR, Developing and Least-Developed Country Designations under the Countervailing Duty Law, 63 FR 29945-02 (June 2, 1998).

[365] USTR, Designations of Developing and Least-Developed Countries Under the Countervailing Duty Law, 85 FR 7613-03 (February 10, 2020).

[366] *Id.* at 7615.

[367] *Id.*

triggering a CVD investigation into whether exports from Vietnam are unfairly subsidized by the government and cause injuries to U.S. industries.

Chapter 4. Application of U.S. Countervailing Duty Law to Nonmarket Economy Countries

Thus far, in Chapters 2 and 3, this dissertation has traced the development of global and U.S. trade laws, with a focus on two features that have caused controversy in the context of U.S. countervailing duty investigations, namely the discretion allocated to the U.S. Department of Commerce in determining when a subsidy is countervailable, and the discretion allocated to the ITC in making an injury determination. This Chapter highlights another aspect is integral to understanding the cases to be studies in Chapter 5: the treatment of Vietnam as having a nonmarket economy, and the disfavored treatment afforded to nonmarket economies generally by the U.S. trade regime. First, in Section 4.1, this Chapter discusses the historical underpinnings of the disfavored treatment of nonmarket economies. Then, in Section 4.2, this Chapter briefly discusses the U.S. trade laws' treatment of nonmarket economies. Finally, Section 4.3 dives into U.S. countervailing duty investigations against nonmarket economies. Of particular importance are some of the alternative approaches to the traditional bright-line distinction between market and nonmarket economies: for instance, this Chapter highlights the "mix and match" (or "bubbles of capitalism") and "market-oriented industry" theories, either of which could prove promising as nonmarket economies like Vietnam seek to gain more favorable international trade treatment as a response to their market-oriented reforms.

4.1. The Origin of NMEs in the Multilateral Trading System

This section discusses issues related to nonmarket economies under the multilateral trading system, mainly highlighting historical developments of GATT 1947 to WTO regime in relation to nonmarket economies.

4.1.1. GATT 1947

Looking back to the Cold War era after World War II, the world was divided into two spheres of influence: one side, the United States; the other, the Soviet Union (USSR).[368] In this "bipolar world," the Soviet bloc included so-called state-trading or planned-economy countries, then mainly in Central and Eastern Europe.[369] On the other side, the United States emerged as a leader of market economy countries in initiating the success of the first General Agreement on Trade and Tariffs (GATT), which is based mostly on market-oriented rules and principles.

In late 1945, as supported by the U.K., the United States published the Proposals for Expansion of World Trade and Employment and called for multinational negotiations on tariff reductions.[370] As stated by the U.S. Secretary of State in the Proposals, "it is urgently necessary that these policies should be agreed upon, in order that the world may not separate into economic blocs."[371] At about the same time the United Nations was beginning its work, and one of its principal organs, the Economic and Social Council (ECOSOC), was established.[372] In December 1945, the United States invited a small "nuclear" group of fifteen countries (including the Soviet Union and China) to participate.[373] In February 1946, at the first ECOSOC meeting, the United States introduced a resolution, which was adopted, calling for the convening of a "United Nations Conference on Trade and Employment" with the purpose of drafting

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[368] Snyder (2001), *supra* note 60, at 378.
[369] *Id.*
[370] U.S. Department of State, Proposals for Expansion of World Trade and Employment, November 1945 [hereinafter the Proposals]. (Available for access at https://fraser.stlouisfed.org/files/docs/historical/eccles/036_04_0003.pdf). *See also* Irwin, Douglas A., et al., *The Genesis of the GATT*, Feb. 13, 2008, available at https://www.researchgate.net/publication/265001187_The_genesis_of_the_GATT).
[371] The Proposals, *supra* note 370.
[372] JACKSON et al. (2008), *supra* note 124, at 218.
[373] Irwin (2008), *supra* note 370. Fourteen countries had been invited to join: Australia, Belgium, Brazil, Canada, China, Cuba, Czechoslovakia, France, India, Luxembourg, the Netherlands, New Zealand, South Africa, and the United Kingdom. The Soviet Union was invited but never responded. In August, at the request of the United Nations, Chile, Lebanon, and Norway received invitations as well.

a charter for an international trade organization[374] (ITO). In the draft "Suggested Charter for an ITO," which was based mainly on the Proposals, the United States proposed several principles and methods for dealing with state trading monopolies, including "*Equality of treatment,*" "*State monopolies of individual products,*" and "*Complete state monopolies of foreign trade.*"[375]

With an expectation of bringing the Soviet Union countries into the multilateral organization, the U.S. had tried many times to invite the Soviet Union to join in the Preparatory Committee.[376] However, the Soviet Union did not reply to the repeated invitations[377] The Soviet Union also declined to participate in the subsequent conferences in London, Geneva, and Havana.[378] It could be understood that the Soviet Union did not want to participate because the two economic blocs had different economic systems with different political and trade interests to achieve. Indeed, the United States had proposed provisions actually reflecting the principles of free trade, non-discrimination and multilateral negotiations, which were incompatible with the Soviet Union's planned-economic system, economic policy of self-sufficiency, and its target of consolidating the linkage with the newly established socialist countries and control of bilateral trade arrangements with those countries.[379] However, the proposed methodologies to deal with "complete state monopolies of foreign trade"[380] is believed not to be new.[381] The concept of "global purchase arrangement" had already existed in several bilateral trade agreements between the Soviet Union and some nations, for

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[374] *Id.* (citing US State Dept. Press Release, Dec. 16, 1945, reproduced in 13 Dept. State Bull. 970 (1945); 1 U.N. ECOSOC Res. 13, U.N. Doc. E/22 (1946)).
[375] ZHANG (2018), *supra* note 79, at 79-86.
[376] *Id.*
[377] *Id.*
[378] HAROLD KARAN JACOBSON, *THE SOVIET UNION, THE UN AND WORLD TRADE* 673-688 (Volume 11, Issue 3, The Western Political Quarterly 1958).
[379] *Id.* at 86.
[380] The Proposals, *supra* note 370. Section E. State Trading (providing "3. Complete state monopolies of foreign trade. As the counterpart of tariff reductions and other actions to encourage an expansion of multilateral trade by other members, members having a complete state monopoly of foreign trade should undertake to purchase annually from members, on the nondiscriminatory basis referred to in paragraph 1, above, products valued at not less than an aggregate amount to be agreed upon. This global purchase arrangement should be subject to periodic adjustment in consultation with the Organization").
[381] Polouektov (2002), *supra* note 76, at 7.

example, an agreement with Latvia in 1927, with Finland during the 1930s, and in a bilateral trade agreement with the United States in 1935.[382] Therefore, the "global purchase agreement" proposed by the United States was the recognition and multilateralization of this reciprocal trade arrangement between nonmarket economies and market economies.[383] However, because the Soviet Union had shown no interest in participation into the multinational negotiations that led to the conclusion of the GATT in 1947, the provision of "complete state monopolies of foreign trade," as a multilateral trade arrangement between nonmarket economies and market economies, was eventually excluded from the text of the GATT.[384] The other provisions, proposed by the United States, including "Equality of treatment" and "State monopolies of individual products" were integrated into Article XVII, "State Trading Enterprises" of the GATT.[385]

It should be noted that the GATT was drafted as an agreement to embody the results of the tariff negotiations at Geneva conferences from April to October 1947, concurrently with the work on the ITO charter.[386] However, under the Reciprocal Trade Agreement Act extension of 1945, the U.S. President only had the authority to negotiate the tariff agreements (including the GATT), but no authority to accept international organization membership.[387] Also, because the GATT itself was not self-executing without other nations' parliamentary actions to implement many of the GATT's general clauses, and in because while the U.S. President's authority to enter into a trade

[382] *Id.* (The agreement provided that in exchange for MFN treatment, the Soviet Union would accept an obligation to place orders in the United States worth at least $30 million a year. (citing "The Prospect of Soviet-American Trade Relations," Bulletin No. 39 of the Institute of International Finance of New York University, August 27, 1945). In general, this agreement was executed as an agreement to facilitate and increase trade between the U.S. and the Soviet Union, effected by an exchange of notes signed at Moscow on July 13, 1935. It was made for a year and extended by the yearly exchange of notes until it was terminated in 1951, a casualty of the Cold War era and the aggressive Soviet policy towards the West. *See also* Kazimierz Grzybowski, *United States-Soviet Union Trade Agreement of 1972*, 37 LAW & CONTEMP. PROBS. 39 (1972); and Office of the Historian, Foreign Relations of the United States, the Soviet Union, 1933–1939. Available at https://history.state.gov/historicaldocuments/frus1933-39/ch4.
[383] ZHANG (2018), *supra* note 79, at 85.
[384] *Id.*
[385] ZHANG (2018), *supra* note 79, at 84.
[386] JACKSON (1997), *supra* note 41, at 218.
[387] *Id.*

agreement was going to expire in the middle of 1948, as a result, a Protocol of Provisional Application of the GATT was signed in late 1947, which then became effective on January 1, 1948. The ITO charter was finally dead because the U.S. Congress did not approve it.[388]

4.1.2. The WTO Regime

From the outset, the GATT was constructed as an international trading system operating on market-oriented rules and principles. Some commentators considered the GATT as having been designed *by* market economies *for* market economies, or as a rich nations' club of the West's market economy bloc vs. the East's socialist or nonmarket economy bloc.[389] Therefore, the GATT was not effective in dealing with many institutions and economies that do not operate under free-market principles, such as state trading agencies or monopolies, government-owned industries, centrally planned economies, and transition economies, and so on. These circumstances have raised some difficult conceptual problems for the GATT trading system.[390] As an example, GATT's Article XVII requires state trading enterprises to make transactions "solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation…." Thus, theoretically, it does not take into account other motivations, which seems to contradict the "basic tenets of economic planning" in the socialist countries.[391] Another issue is that the GATT is premised on a classical economic model (*i.e.*, private enterprises are stimulated by profit motives and trade goods in response to market forces). On the contrary, nonmarket economies do not follow this classical model; for example, instead of responding to market forces, purchases and sales are largely based on central planning requirements and state trading

[388] *Id.*
[389] Polouektov (2002), *supra* note 76. *See also* Wilczynski, J., *Dumping in Trade between Market and Centrally Planned Economies*, Vol. g, No. 3, Printed in Norway (1966).
[390] JACKSON (1997), *supra* note 41, at 325.
[391] Grzybowski, K., *Socialist Countries in GATT*, 28 AM. J. COMP. L. 539, 548 (1980).

decisions.[392] Therefore, the most critical issue for the GATT was how to manage acceptance by major nonmarket sectors.[393]

Prior to the official establishment of the WTO in 1995, many Eastern European countries desired to transform their economies into a market-oriented economies. The flow of their accession into the GATT has triggered a change of direction in how the multilateral trading system approached nonmarket economies.[394] Instead of adapting GATT rules to integrate nonmarket economies, the main concern was promoting a more efficient transition of these economies.[395] Yugoslavia is a typical example of a country adapting, by way of economic reforms, to the GATT's market-oriented rules and principles.[396] Other Eastern European countries acceded to the GATT during their centrally planned economy stages such as Poland (1967), Romania (1971), Hungary (1973).[397] Hence, the tendency to move from nonmarket economies to market economies reflects the "natural, inevitable and progressive"[398] features in the multilateral trading system under the GATT and WTO regime.

The GATT shirt, however, seems to be unfit for a bigger body of more and more acceding economies. Therefore, at the Uruguay Round negotiations, which started in 1986, there was a demand for creation of an institution with decision-making procedures to meet the needs of all members. After eight years of multinational

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[392] William Butler et al., *The Role of the Nonmarket Economies in the New Round of Trade Negotiations*, 81 AM. SOC'Y INT'L L. PROC. 224 (1987) (discussing on China's participation as an NME to the GATT).
[393] JACKSON (1997), *supra* note 390.
[394] Thorstensen, Vera, Daniel Ramos, Carolina Muller, and Fernanda Bertolaccini. *WTO - Market and Non-Market Economies: The Hybrid Case of China*, 1 (2) LATIN AMERICAN JOURNAL OF INTERNATIONAL TRADE LAW (July 2013).
[395] *Id.*
[396] After breaking from the Soviet bloc in 1948, it was forced to reform its economic system to adapt to a Western's model. Therefore, it decided to accede to the GATT in 1950 when it had just started its reform of market socialism. Yugoslavia took sixteen years with its acceding process together with its economic reforms to reach full membership in 1966. Thus, Yugoslavia is a typical example of a gradual process for accession to the GATT and for its members to accept an NME. It is also an example of how an NME can join the GATT as an ME member through economic transformation. *See also* ZHANG (2018) supra note 79, at 96-100.
[397] WTO, "The 128 countries that had signed GATT by 1994." Available at https://www.wto.org/english/thewto_e/gattmem_e.htm.
[398] Snyder (2001), *supra* note 60, at 423.

negotiations, the WTO was officially created in 1994 and began its life on January 1, 1995.[399]

China, as one of the largest nonmarket economy countries, has spent a complicated long run to be acceded to the WTO. Indeed, China was one of the founders of the GATT in 1947, but after the Communists came to power in 1949, the then-Republic of China withdrew from the GATT in 1950.[400] In 1968, China officially applied to the GATT for resumption of its status as a contracting party; however, the Working Party viewed this process as the same as an accession process.[401] It took China for sixteen years to be officially accepted as the 143rd WTO member on December 11, 2001.[402] However, China has yet to be recognized by the United States as a market economy country since its accession to the WTO.

The former leader of the socialist bloc during the Cold War, Russia, officially became the WTO's 157th-member in 2012.[403] Unlike China, Russia chose a completely cooperative strategy with large market economy countries at the early stage of its economic transition.[404] The fact that Russia was recognized by the United States as a market economy country in 2002 was significant in "nudging Russia toward eventual accession into the World Trade Organization."[405]

4.2. The Origin of NMEs in Relation to the U.S. Trade Laws

As a political reaction to the Cold War in the early 1950s, U.S. Congress enacted a law to direct the President, "as soon as practicable," to withdraw concessions

[399] WTO, Understanding the WTO: Basics, What is the World Trade Organization. Available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm.
[400] After the Communists came to power in 1949, the former government withdrew from the GATT in 1950. *See* Butler (1987), *supra* note 392, at 226.
[401] ZHANG (2018), *supra* note 79, at 200-202.
[402] WTO, China. Available at https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm.
[403] WTO, Russian Federation. Available at https://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm.
[404] ZHANG (2018), *supra* note 79, at 212.
[405] Neil Jr. King, *U.S. Decides to Grant Russia Status of 'Market Economy,* THE WALL STREET JOURNAL, June 7, 2002.

from Communist areas.[406] Specifically, the law prohibited the United States from granting most-favored-nation ("MFN") status to any nation or area dominated or controlled by a foreign government or foreign organization controlling the world's Communist movement.[407] That reaction was strengthened again in 1962 when Congress enacted another law to prevent Communist economic penetration.[408] Congress classified this measure as a national security one to prevent the imports from any country dominated or controlled by Communism.[409] The United States took such actions as trade controls for political purposes rather than for ensuring production of goods essential for defense as required by national security purposes.[410] Simply, during such tension that was emblematic of the Cold War period, a nation may have chosen to refrain from granting MFN status to other nations merely because those countries were viewed as unfriendly or because to grant such status would have been politically unpopular and therefore a risk to the survival of elected officials' positions.[411] Consequently, trade between the Soviet Union and the United States prior to the 1970s was stagnant.[412]

Remarkably, in 1974, Congress changed trade policies by enacting a law to deal with the trade relations between the United States and Communist countries having NME status.[413] In particular, for an NME country to receive MFN benefits, that country must meet the requirements of freedom of emigration.[414] In addition, the Act added a

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[406] Trade Agreement Extension Act of 1951, Public Law No. 50, Chapter 141, H.R. 1612, 48 Stat. 943 (June 16, 1951).
[407] *Id.* at Section 5.
[408] Trade Expansion Act of 1962, Public Law 87-794, H.R. 11970, 76 Stat. 872 (October 11, 1962).
[409] *Id.* at Chapter 4-National Security, Section 231.
[410] JACKSON et al. (2008), *supra* note 124, at 1080.
[411] *Id.*
[412] *See* Kevin M. Cowan, *Cold War Trade Statutes: Is Jackson-Vanik Still Relevant?*, 42 U. KAN. L. REV. 737 (1994) (citing ANDREW J. GOODPASTER ET AL., U.S. POLICY TOWARD THE SOVIET UNION 119 (eds. 1988)).
[413] Trade Act of 1974, *supra* note 31.
[414] *Id.* at Section 402. The Act prohibited the President from entering into any commercial agreement with any NME country if that country: (i) denies its citizens the right or opportunity to emigrate; (ii) imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; or (iii) imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice. *See also* JACKSON (1997), *supra* note 41, at 333. (Jackson explained that a

new section on dealing with "market disruption," which is a special escape-clause[415] channel that applies only to Communist countries.[416] Specifically, the law provides a remedy against the imports of the merchandise from a Communist country that causes a "market disruption" for the merchandise produced by domestic industry.[417] The term "Communist country" was simply defined as any country dominated or controlled by Communism.[418] Congress thought that the provision regarding "market disruption" would cure the fear that Communist countries would engage in storing up goods and then suddenly flooding the American market for the purpose of destroying the market.[419] To a certain extent, the "market disruption" remedy was based on a recognition of the difficulty of applying normal unfair trade laws, such as antidumping and countervailing duty laws, to NME countries.[420] It should be noted that the Act also prohibited granting the GSP benefits to Communist countries unless they received MFN status from the United States and were members of the GATT and the IMF.[421]

In addition to the "market disruption" provision, the Act added a new constructed-value methodology for calculating the dumped imports from a state-controlled economy.[422] However, there were no specific statutory provisions dealing

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[lobbying] movement in the Congress, generated by U.S. citizens interested in promoting the opportunity of emigration (particularly of Jewish persons) from the Soviet Union, led to the Jackson-Vanik Amendment. The enactment of the Jackson-Vanik Amendment as part of the Act was a direct political reaction to the severe restrictions that the Soviet Union had placed in late 1972 on the emigration of its citizens, but was expanded in its scope to apply to all NME countries. *See also* Pregelj, Vladimir N., *The Jackson-Vanik Amendment: A Survey*, CRS Report for Congress, Order Code 98-545, Aug. 1, 2005. Available at https://fas.org/sgp/crs/row/98-545.pdf.

[415] The escape clause is a provision to allow temporary border barriers to imports when imports are increasing and can be shown to "injure" domestic competing industry. *See generally* Jackson (1997), *supra* note 41, at 179 (discussing the history of safeguards measures).

[416] Trade Act of 1974, *supra* note 31, at Section 406. *See also* Jackson (1997), *supra* note 41, at 333.

[417] Trade Act of 1974, *supra* note 31, at Section 406(a). The Act provided that a "market disruption" exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.

[418] *Id.* at Section 406(e)(1).

[419] Horlick and Shuman (1984), *supra* note 59, at 838.

[420] JACKSON (1997), *supra* note 41, at 333-34.

[421] Section 502, Title V-Generalized System of Preferences (GSP).

[422] Section 205 (c) of the Antidumping Act of 1921 (as amended by the Trade Act of 1974). The law provides that "if available information indicates that the economy of the country from which the merchandise is exported is state-controlled to an extent that sales or offers of sales of such or similar merchandise in that country... do not permit a determination of foreign market value, the Secretary shall

with the NMEs' subsidies under the CVD law. It was assumed that the United States would take any possible action against the subsidization from NME countries by the other alternative measures, such as with the antidumping law under the Antidumping Act of 1921, as amended by the Trade Act of 1974, or with the "market disruption" remedy under Section 406, or with import relief (*i.e.*, the highest level of action) under Section 301, by providing import-restriction measures to tackle export subsidies from foreign countries that had the effect of substantially reducing sales of competitive American products.

In 1988, Congress drastically changed the provisions pertaining to NME countries under the antidumping duty law by enacting the Omnibus Trade and Competitiveness Act of 1988[423]. First, the Act added a completely new section entitled "Dumping by nonmarket economy countries."[424] The term "state-controlled economy" disappeared and was replaced by "nonmarket economy" throughout the section. It was the first time that a definition of "nonmarket economy" had been seen; it was defined as "any foreign country that the administering authority determines 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."[425] The withdrawal of the term "state-controlled economy," which was never defined in the previous laws, and which was replaced by the term "nonmarket economy," implies that the two forms of economic systems are the same or similar and can reasonably be used interchangeably. It seems that the language used by the statute when defining the term "nonmarket economy" is technically applicable only to antidumping actions.

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determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either (1) the prices at which such or similar merchandise of a non-state-controlled-economy country is sold for consumption in the home market of that country or to other countries, including the U.S.; or (2) the constructed value of such or similar merchandise in a non-state-controlled-economy country…." The concept of using a constructed value of the non-state-controlled-economy country was previously used since 1968 under the Treasury Department's regulations to deal with the merchandise from controlled economy countries. 19 C.F.R. § 53.5(b) (1969). *See also* Cuneo, Donald L., and Charles B. Manuel, *Roadblock to Trade: The State-Controlled Economy Issue in Antidumping Law Administration*, 5 FORDHAM INT'L L.J. 277 (1981).

[423] Omnibus Trade and Competitiveness Act of 1988, *supra* note 135.

[424] *Id.* at Section 1316.

[425] 19 U.S.C. § 1677(18)(A).

Second, it is important to note that the Act also sets forth the six golden factors for Commerce to take into account when determining whether a country has a nonmarket economy.[426] However, these six factors are not "weighted or ordered" and there is also "no formula" for NME determinations.[427] Instead, such factors work as guidelines for application to each fact-specific NME determination.[428] When such a determination is made, it remains in effect until it is revoked by Commerce.[429] It should be noted that this NME determination is not subject to judicial review.[430] For instance, when Commerce made an NME status determination of Vietnam in its first antidumping case in 2002, Vietnam was unable to make an appeal to the U.S. Court of International Trade or any other judicial body to challenge that decision.

Third, with respect to antidumping investigations, the Act once again strengthened the dumping calculation methodologies. It provides a methodology of "factors of production" to determine the foreign market values for NME countries.[431] This new methodology has replaced the constructed value methodology as provided under the Trade Act of 1974. Again, NME countries are not mentioned in any statutory

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[426] 19 U.S.C. § 1677(18)(B). The six factors must be taken into consideration are as follows:
(i) the extent to which the currency of the foreign country is convertible into the currency of other countries;
(ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
(iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
(iv) the extent of government ownership or control of the means of production;
(v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and
(vi) such other factors as the administering authority considers appropriate.

[427] Bowman et al. (2010), *supra* note 201, at 107.

[428] *Id.*

[429] 19 U.S.C § 1677(18)(C)(i).

[430] 19 U.S.C. § 1677(18)(D).

[431] *Id.* Section 1316(c) provides:
"The factors of production are the input factors used in manufacturing the product, including: (i) hours of labor, (ii) quantities of raw materials used, (iii) amounts of energy and other utilities consumed, and (i) representative capital cost, including depreciation. In valuing the factors of production, the Commerce shall utilize, to the extent possible, the prices or cost of factors of production in one or more market economy countries that are at a stage of economic development comparable to the nonmarket economy country and that are significant producers of comparable merchandise." "The factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the Commerce."

provisions under the sections regulating actionable subsidies and countervailing duty actions.

Noticeably, the Act provides a separate section on "Accession of state trading regimes to the [GATT]."[432] This section requires that, before any major country accedes to the GATT, the President must determine the following: (i) whether that country's state-trading enterprises account for a significant share of that country's exports or goods that compete with imported goods; and (ii) whether the state-trading enterprises of that country unduly burden and restrict, or adversely affect the foreign trade of the United States or the United States economy.[433] If both determinations are affirmative, the President can choose to withhold extension of the application of the GATT between the United States and the acceding country until that country enters into an agreement with the United States undertaking that the state trading enterprises of that country will make purchases of goods and services that are not intended for governmental use, and sales in international trade in accordance with commercial considerations (including price, quality, availability, marketability, and transportation) and that the U.S. firms will have an adequate opportunity, in conformity with customary practice, to compete for such purchases or sales;[434] alternatively, an extension of GATT rules may be approved by Congress under an expedited consideration, or so-called "fast-track" procedures.[435] Section 1106 has been slightly amended by the Uruguay Round Agreements Act of 1994 by changing the "GATT" into "GATT 1947" and inserting the term "WTO Agreement" in order to apply to all acceding WTO members.

In the case of China when it acceded to the WTO in 2001, President George W. Bush determined that the state trading enterprises accounted for a significant share of the exports of China and goods that compete with imports into China. Therefore, the President determined that such state trading enterprises unduly burden and restrict, or

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[432] *Id.* at Section 1106.
[433] *Id.* at Section 1106(a).
[434] *Id.* at Section 1106(b).
[435] *Id.* at Section 1106(b)(2)(B). *See also* JACKSON (1997), *supra* note 41, at 334.

adversely affect, the foreign trade of the United States or the United States economy. Since China was seeking to become a WTO member, it was affirmed that China must make commitments that it will ensure that all state-owned and state-invested enterprises will make purchases and sales based solely on commercial considerations and the U.S. business firms will have an adequate opportunity to compete for sales to and purchases from these enterprises on nondiscriminatory terms and conditions. Furthermore, the President required that China not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises. As the obligations that China assumed under the WTO Agreement, including China's protocol of accession, meet the requirements of section 1106(b)(2)(A), the President's determination under section 1106(a) therefore does not require invocation of the nonapplication provisions of the WTO Agreement.[436]

4.3. Application of CVD Law to Nonmarket Economies

The issue of whether the CVD law should be applied to NME countries is perhaps the most notable and hotly debated topic in the history of U.S. trade remedy laws for many decades prior to 2012.[437]

Before 2007, the longstanding position of Commerce was that the CVD law did not apply to NME countries. A series of cases such as *Textiles and apparel from China*,[438] *Carbon Steel Wire Rods (CSWR) from Czechoslovakia*[439] and *Poland*[440] were typical cases that Commerce initiated against NMEs in 1983. Although the China

[436] The President Determinations Under Section 1106(a) of the Omnibus Trade and Competitiveness Act of 1988—People's Republic of China, Memorandum of November 9, 2001, 66 FR 57357, Nov. 15, 2001.
[437] In 2012, the U.S. Congress changed the CVD law to confirm its application to NMEs. *See* Nonmarket Economies Act of 2012, *supra* note 147.
[438] Initiation of Countervailing Duty Investigations; Textiles, Apparel, and Related Products from the People's Republic of China, 48 FR 46600-01 (October 13, 1983) [hereinafter China Textile Case Initiation].
[439] Carbon Steel Wire Rod from Czechoslovakia; Initiation of Countervailing Duty Investigation, 48 FR 56419 (December 21, 1983) [hereinafter Initiation of CSWR from Czechoslovakia].
[440] *Id.*

Textile Case was terminated before a preliminary determination,[441] the CSWR cases from Czechoslovakia and Poland resulted in determinations by Commerce that the bounties or grants (or subsidies) could not be found in NME countries.[442] Commerce's rejection of the applicability of CVD law to NMEs was later appealed and resolved by two levels of courts. These cases have been noticed by many academic scholars, practitioners, administrators, and legislators. The impact of the cases has been one of the catalyst of the historic amendment of the CVD law in 2012 to apply it to NME countries.

In 2007, Commerce, with its broad discretionary power for administering the CVD law, changed its longstanding position and accepted a petition, filed on October 31, 2006, by NewPage Corporation, against the paper produced and exported from China (*i.e.*, NME country), Indonesia and Korea (*i.e.*, ME countries).[443] This case was the first time that Commerce went through all steps from initiation to a final affirmative determination that the CVD law could be applied to NME countries, in the case of China.

The complexity of the trade remedy laws, and especially the absence of clear statutory provisions on NMEs in the CVD law, had led to significant inconsistencies in Commerce's application of the CVD law to NMEs.

The sections that follow focus on analysis of the foregoing NME cases to unpack the inconsistencies and controversial features of the decision of Commerce and the competent judicial courts in determining the applicability of CVD law to NMEs. These cases are presented in a chronological order as the relevant legal proceedings transpired.

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[441] Textiles, Apparel, and Related Products from the People's Republic of China; Termination of Countervailing Duty Investigations, 48 FR 55492-03 (December 13, 1983) [hereinafter China Textile Case Termination].

[442] Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 FR 19370-01 (May 7, 1984); Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374-01 (May 7, 1984).

[443] Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper from the People's Republic of China, Indonesia, and the Republic of Korea, 71 FR 68546-01 (November 27, 2006) [hereinafter CFS Paper Case Initiation].

4.3.1. Nonapplicability of CVD Law to Nonmarket Economies

4.3.1.1. Theoretical Debates

Initially, the CVD law was devised in the early 1890s when there was no clear division between the economic systems of the targeting countries. Throughout its historical evolution, the spirit of the law has been maintained as countervailing or offsetting the foreign government's bounties or grants provided to the exported products. Such bounties or grants are, of course, considered as unfair trade competition to the American industry. In reality, it appears that the applicability of the CVD law to NME countries has been uncertain for a long time. Remarkably, U.S. legislators, as required by internal forces and international commitments, implemented several critical amendments to the trade laws such as the Tariff Act of 1930, the Trade Act of 1974, the Trade Agreements Act of 1979, and then the URAA of 1994. But they did not provide any specific statutory provisions or guidelines for dealing with NMEs under the CVD law. Perhaps they believed that issues related to NMEs could be resolved more effectively with the alternative tools of the antidumping law, the market disruption remedy, or safeguard measures.

In 1981, the Comptroller General of General Accounting Office (GAO),[444] a nonpartisan federal watchdog agency, released a report to the U.S. Congress to address the concerns on how to improve the trade remedy laws (including the CVD law) in a more effective way to protect the American industries.[445] It should be noted that the GAO's concerns came from its studies of East-West trade issues and the emergence of NME countries such as China, which had been increasingly expanding their exports to

[444] GAO is headed by the Comptroller General, who is appointed by the President of the United States for a term of 15 years. GAO supports Congress in meeting its constitutional responsibilities and in helping to improve the performance and ensure the accountability of the federal government for the benefit of the American people. *See* Role of the Comptroller General, available at https://www.gao.gov/about/comptroller-general/, accessed on March 20, 2020.
[445] U.S. Laws and Regulations Applicable to Imports from Non-market Economies Could Be Improved, GAO Report to Congress, ID-81-35, September 3, 1981 [hereinafter GAO NME Report].

the United States.[446] From the beginning of its report, the GAO admitted the most perplexing aspect of import trade administration vis-a-vis the NME countries involves questions of subsidies and countervailing duties.[447] In essence, in any CVD investigation, it is very difficult to identify and quantify the bounties or grants of the subsidized goods. When NMEs involved in such a proceeding, the difficulty is greater.[448] For instance, in any CVD proceeding, it is required to identify the subsidies and then quantify the amount thereof. However, this work involves a lot of significant obstacles such as the complex intertwining of subsidies and taxes; access to information concerning the subsidies granted; and the nonexistence of a suitable exchange rate for converting subsidy amounts from NME currencies into the U.S. dollars.[449] Unfortunately, the GAO had no recommendations on how to apply the CVD law to NME countries, but it concluded that the practical effect of the problems is that "actually identifying and quantifying subsidies remains only remotely possible."[450]

In a response to the GAO, the Department of Justice was unsure whether CVD proceedings against NME countries were at all appropriate because it believed that the concept of subsidies may not have meaning in the NME context.[451] The application of CVD law to NME countries should be permitted, it was thought, only if actual subsidies could be identified and quantified by the petitioner in the original countervailing duty petition.[452] Therefore, according to the GAO, such a difficult job discouraged U.S. industries from making requests for CVD investigations of foreign subsidy practices.[453]

It seems that the theoretical question on the applicability of the CVD law to NMEs left an unresolved debate for the legislative and executive branches. In a more academic sense, there appear to be two opposing "schools of thought" as to whether a

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[446] GAO NME Report, *supra* note 445, at 9.
[447] *Id.*
[448] *Id. at 31.*
[449] *Id. See also* Gregory J. Spak, *Georgetown Steel Corp. v. United States: Applying the Countervailing Duty Law to Imports from Nonmarket Economy Countries*, 18 LAW & POL'Y INT'L BUS. 313, 328 (1986).
[450] *Id.* at 32-33.
[451] *Id.* Appendix VII, U.S. Department of Justice Letter to GAO, May 28, 1981.
[452] *Id.*
[453] GAO NME Report, *supra* note 445, at 27.

government having an NME system can disburse a bounty, grant, or subsidy.[454] The first school of thought argues that no subsidy can exist in an NME because the entire economy is controlled by government intervention.[455] The purpose of the CVD law is to correct market distortions caused by government interventions. However, when the public sector and private sector are essentially one in an NME setting, such correction seems to be impossible.[456] To be sure, the supporters of this theory acknowledge that government action distorts the allocation of resources within NME settings.[457] In addition, in order to calculate a CVD duty when a subsidy exists, it is necessary to rely on commercial benchmarks.[458] Yet there are no available commercial benchmarks (or commercial standards) against which to measure the government distortion.[459] Consequently, lacking such a market-based norm, it is impossible to determine whether there is a subsidy and how to quantify it, if it actually exists.[460]

On the other hand, the second school of thought defines a subsidy based on the concept of "preferentiality;" for example, if the government grants a special treatment to a group, a subsidy is conveyed and existing.[461] Based on this "preferential treatment" approach, the government's preference that one group or industry receives is already a countervailable subsidy. In order to apply this approach, the administrating authority is required to establish the normal or average price levels within a country, and then determine whether the group or industry under investigation received any preferential treatment.[462] The proponents of this second school of thought concluded that this approach could be used to measure the degree of preferential treatment provided to one

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[454] Horlick & Shuman (1984), *supra* note 59, at 829 (describing the two approaches to granting countervailing duties in NMEs).
[455] *Id.*
[456] *Id.*
[457] 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 (1995).
[458] *Id.* (A countervailable subsidy exists when a government behaves in a way that is more beneficial to the recipient than the same commercial action would be based upon unrestrained market forces.).
[459] *Id.* There are no commercial benchmarks because the government owns and controls the means of production.
[460] *Id.*
[461] *Id. at 830.*
[462] *Id.* at 1022.

group or industry in either an ME or NME.[463] According to Robert H. Lantz, this approach seems to be difficult to employ in dealing with subsidies embedded in an NME's normal or average price levels. A group or industry could be the beneficiary of government involvement in setting the economy's normal or average price levels without incurring CVD liability. In order that the administering authority is able to identify a countervailable subsidy, it would have to find a second level of government preference for that group or industry beyond that normally found throughout the economy. As a result, under this approach, a great deal of government subsidies would not be countervailable.[464]

The following sections shall unpack and apply the above theoretical views as well as the two schools of thought applied in practice by Commerce in CVD proceedings against China, Czechoslovakia, and Poland. From the studies of these cases and their subsequent appeals, these theoretical debates have revealed great practical consequences as reflected by both administrative and judicial decisions.

4.3.1.2. Administrative Decisions by the Department of Commerce

4.3.1.1.1. Textile and Apparel Case Against China

Considering whether the CVD law could be utilized to deal with unfair trade competition from NME countries was a "novel issue" from Commerce's perspective. The first time that Commerce confronted the issue of applying the CVD law to NMEs was in 1983, when the American Apparel Manufacturers Association representing the U.S. textile industry ("Petitioners") filed a petition on September 12, 1983.[465] The Petitioners alleged that textile producers, manufacturers, or exporters in the People's

[463] *Id.*
[464] *Id.*
[465] China Textile Case Initiation, *supra* note 438. It should be noted that since China was not a signatory to the Subsidies Code at that time, Section 303 of the Tariff Act of 1930, as amended in 1974, was applicable in this investigation.

Republic of China ("China") received bounties or grants within the meaning of the applicable law.[466]

Prior to this petition, all countervailing duty cases involved imports from ME countries. Having recognized the importance of this new issue, Commerce held a "novel issue" public conference to seek for opinions from interested parties on whether bounties or grants may be found in an NME country.[467] At the conference, there were different views presented by two groups of interests (*i.e.*, the petitioners' group and importers' group). To certain extent, these views had useful contribution to Commerce's determination in its preliminary results and other subsequent cases.[468] The first group relied on the "plain language" of the CVD law to interpret that the law can be applied to imports from "any country, dependency, colony, province, or other political subdivision of government."[469] This group argued that the CVD law applies to all countries, regardless of the ME/NME distinction, and makes no exceptions based on economic preconditions or form of government.[470] They also reiterated that the equal application of the CVD law to both NMEs and MEs is fully consistent with the intended purposes of the statute, *i.e.*, to prevent domestic producers from being placed in "jeopardy" by the "unfair competitive advantages" that foreign governments use to subsidize their exporters.[471] On the contrary, the second group, mainly importers, interpreted the "plain language" in a different way to fight against the first group. The second group argued that the phrase "any country" must be interpreted in dependency with the next phrase of the provision that "shall pay or bestow … any bounty or grant;"

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[466] *Id.*
[467] Notice of conference on novel issues, 48 FR 46092 (October 11, 1983). Commerce's notice of conference was announced two days prior to the notice of investigation initiation was released.
[468] Cichanowicz (1983), *supra* note 72, at 408-12.
[469] 19 U.S.C. § 1303(a)(1) (1980). *Id.* (citing Submission on Behalf of the ACTWU, the ILGWU and the AAMA, Oct. 28, 1983, at 1-10. DOC DKT No. C570-005).
[470] *Id.* Section 303(a)(1) (codified at 19 U.S.C. § 1303(a)(1)) applies: "[w]henever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government."
[471] Cichanowicz (1983), *supra* note 468. (citing H.R. Rep. No. 317, 96th Cong., 1st Sess. 45-46 (1979)).

and the "grants" are actually not found in NME countries.[472] In addition, the second group further argued that the grants are nonexistent and cannot be measured in NMEs because of the government intervention in determining the allocation of resources for manufacturers, producers or exporters, as compared to MEs, where such allocation is made based on market forces.[473] With respect to legislative purpose, the second group argued that there is explicit methodology for dealing with NME countries set forth in the antidumping law and Section 406 of the Trade Act of 1974.[474] Specifically, Congress's concerns regarding lower priced NME exports flooding U.S. markets are addressed through antidumping and Section 406 procedures.[475] Therefore, CVD law is simply "inappropriate" for use against imports from NME countries.[476] Arguments by both sides at the conference did not come to any specific resolution on whether the CVD law should be applied to NMEs, but they did "break the ice" for the subsequent cases.[477]

It is interesting that the China Textile Case was terminated at the due date of the preliminary determination on December 6, 1983, due to a withdrawal request by the petitioners.[478] It seems to be a purely legal action, but the reason behind this termination is very interesting. The U.S. textile industry agreed to withdraw the petition as recommended by the Secretary of Department of Commerce in favor of tighter controls over textile imports to be announced by President Reagan in that same month.[479] Finally, the American Apparel Manufacturers Association issued a statement

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[472] *Id.*
[473] *Id.*
[474] *Id.*
[475] *Id.* (citing Post-Conference Brief on Behalf of Kmart Corporation, Nov. 3, 1983, DOC DKT No. C5700-005).
[476] *Id.*
[477] Judith H. Bello, Alan F. Holmer, and Jeremy O. Preiss, *Searching for Bubbles of Capitalism: Application of the U.S. Antidumping and Countervailing Duty Laws to Reforming Nonmarket Economies*, 25 GEO. WASH. J. INT'L L. & ECON. 665, 709 (1992).
[478] Textiles, Apparel, and Related Products from the People's Republic of China; Termination of Countervailing Duty Investigations, 48 FR 55492 (December 13, 1983) [hereinafter China Textile Case, Termination]. *See also* Bello et al. (1992), supra note 477, at 708.
[479] *See* Cichanowicz (1983), *supra* note 72, 408-12. *See also* Bello et al. (1992), *supra* note 477 (cited at footnote 236: At approximately the same time, the Reagan administration announced measures that would effectively curb textile imports from China and other countries. (citing Stuart Auerbach & Juan Williams, *Reagan Sets Import Rules on Textiles*, Wash. Post, December 17, 1983, at E8; Clyde H.

to welcome the President's decision as "a step forward in dealing with the problem of disruption of the American textile and apparel market by imports" and confirmed not to refile their petition against Chinese imports in the CVD case.[480] The American textile makers were pleased with the President's action because a stricter control of textile imports (*e.g.*, import quotas) would definitely benefit them in the long run moreso than merely offsetting the bounties or grants provided to the exported textiles by an affirmative CVD decision. This shows that the American textile industry effectively used the CVD petition as a tool in its negotiations with its own government to "clamp down" on imports, especially those from China.[481]

4.3.1.1.2. Carbon Steel Wire Rods Against Czechoslovakia and Poland

Just a week after the termination of the China Textile Case, Commerce initiated two separate CVD investigations against the products of carbon steel wire rods imported from Czechoslovakia and Poland.[482] The two petitions were separately filed by four American steel producers[483] who alleged that manufacturers and exporters in Czechoslovakia and Poland received benefits conferring bounties or grants. These two cases raised the same issue that had yet to be determined: whether the CVD law could be applied to NME countries.

Farnsworth, Reagan Decides to Tighten Controls on Textile Imports, N.Y. TIMES, December 17, 1983). Thus, the domestic textile industry succeeded in limiting imports by, among other things, wielding a countervailing duty petition.).

[480] Clyde H. Farnsworth, *Reagan Decides to Tighten Controls on Textile Imports*, N.Y. TIMES, Dec. 17, 1983.

[481] Alan F. Holmer & Judith Hippler Bello, *U.S. Trade Law and Policy Series #7: The Countervailing Duty Law's Applicability to Nonmarket Economies*, 20 INT'L LAW. 319, 322 (1986). (citing Pine, How President Came to Favor Concessions for U.S. Textile Makers, Wall St. J., January 6, 1984, at 1. col. 6; Madison, Chinese Textile Dispute Entangled in Sensitive National Security Issues, NAT'L J. December 3, 1983, at 2526).

[482] Initiation of CSWR from Czechoslovakia, *supra* note 439. The CSWR petitions were filed two months after the petition filed on China Textile Case.

[483] *Id.* The petitioners were Atlantic Steel Company, Continental Steel Company, Georgetown Steel Corporation, and Raritan Steel Company.

In its preliminary decisions for both countries, Commerce stated that the Congress had not exempted NME countries from the CVD law.[484] The reasoning was that section 303 of the Tariff Act of 1930, as amended can be applied to "any country, dependency, colony, province, or other political subdivision of government." This interpretation of the law by its literal terms was more or less influenced by the petitioners' arguments voiced at the "novel issue" conference held in the China Textile Case. However, in this preliminary investigation, Commerce found no benefits that constituted bounties or grants to producers in either country.[485]

Three months later, Commerce reversed its preliminary determination and ruled that bounties or grants could not be found in NMEs.[486] In reaching this surprising determination, Commerce did shift its focus from a narrow reading of section 303 to include an additional jurisdictional question on whether government activities in an NME confer bounties or grants.[487]

To come to the crucial conclusion that bounties or grants could not be found in NMEs, Commerce conducted comprehensive research and analysis on four aspects: (i) the subsidy concepts as applied and compared in both MEs and NMEs; (ii) reexamination of the legislative history of the countervailing duty laws from 1890s to 1979 and following developments; (iii) consensus of opinion from academic literature delivered by prestige law professors and practitioners; and (iv) broad discretion in subsidy determination.

First, Commerce defined a subsidy as any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient

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[484] Carbon Steel Wire Rod from Czechoslovakia; Preliminary Negative Countervailing Duty Determination, 49 FR 6773, February 23, 1984 [Czechoslovakia Prelim Determination]; Carbon Steel Wire Rod from Poland; Preliminary Negative Countervailing Duty Determination, 49 FR 6768, February 23, 1984 [Poland Prelim Determination].

[485] *Id.*

[486] Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination, 49 FR 19370, May 7, 1984 [Czechoslovakia Final Determination]; Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374, May 7, 1984 [Poland Final Determination].

[487] *Id. See also* Karen A. O'Brien, *The Applicability of the United States Countervailing Duty Law to Imports from Nonmarket Economy Countries*, 9 FORDHAM INT'L L.J. 596, 614 (1985).

production and lessening world wealth.[488] According to Commerce, in an ME, scarce resources are channeled to their most profitable and efficient uses by the market forces of supply and demand.[489] In contrast, in NMEs there are no such market process to distort or subvert.[490] In particular, the government's central planning, rather than the market forces of supply and demand, determines the allocation of resources and therefore distorts the costs, prices and profits. It was also noted that because the notion of a subsidy is a market phenomenon, it does not apply in a nonmarket setting.[491] That means if a subsidy is a distortion from a market norm, it can exist only in a market context. Hence, to impose that concept where it has no meaning would force Commerce to identify every government action as a subsidy.[492] Then, Commerce confirmed that it was not prepared to do this job, *i.e.*, it could not impose the market-based concept of a subsidy on a system where it had no meaning and could not be identified or fairly quantified.[493]

Second, through the enactment of the first U.S. CVD law in 1890 and its subsequent amendments in 1974 and 1979, Congress chose two other vehicles for dealing with unfair trade practices from NME countries.[494] For that reason, Congress has remained silent on the question of whether the CVD law applies to NME countries.[495] When reviewing the development of the CVD law after 1979, Commerce

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[488] Poland Final Determination, *supra* note 486.
[489] *Id.*
[490] *Id.*
[491] *Id.*
[492] *Id.*
[493] *Id.*
[494] *Id.* In the Trade Act of 1974, Congress amended section 205 of the Antidumping Act, 1921 to set forth rules for dealing with unfair competition from NME countries. In the same Act, Congress also enacted section 406 to protect U.S. industries from trade disruption caused by imports from Communist countries. Likewise, in the Trade Agreements Act of 1979 (TAA), in which Congress thoroughly restructured the countervailing duty law, Congress did not enact any countervailing duty provision even referring to NMEs. Also, there is nothing in the legislative history of the TAA even suggesting that the countervailing duty law should apply to NMEs, nor is there any advice on how the administering authority should apply the market-oriented concept of "bounty or grant" to an NME. Instead, Congress reenacted the special provision of the antidumping law dealing with imports from controlled economy countries.
[495] *Id.*

took the view of the GAO NME Report in 1981 that it is only "remotely possible" to identify and quantify subsidies in NMEs.[496]

Third, the consensus appeared to be that the CVD law simply cannot be applied to NME countries.[497] For instance, according to Professor John H. Barceló, III:

> If an NME exporting country is involved, most of the analysis used thus far for both export and domestic subsidies, is entirely inapplicable. One cannot speak of market imperfections and nondistortive actions or even the distinction between export and domestic subsidies if an economy as a whole is not governed by the market principle. Theoretically, any given sale may be subsidized or not, but since there is no market reference point, it is idle to speak in such terms.[498]

In addition, Professor Robert E. Hudec supported Commerce's view that under both the 1974 and 1979 trade legislation, "state-controlled-economy" trade is treated as a problem under the antidumping laws, and nothing at all is said about this subject in the law pertaining to subsidies.[499]

Fourth, by citing *United States v. Zenith Radio Corp.,*[500] Commerce reasoned that it has broad discretion in determining the existence or nonexistence of "bounty or grant" or subsidies.[501]

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[496] *Id.*
[497] *Id.*
[498] *Id. See also* John J. III. Barceló, *Subsidies and Countervailing Duties - Analysis and a Proposal*, 9 LAW & POL'Y INT'L BUS. 779, 850 (1977).
[499] Poland Final Determination, *supra* note 486. (citing D. WALLACE, JR. AND D.A. FLORES, INTERFACE TWO (eds. 1982), at 23).
[500] *United States v. Zenith Radio Corp.*, 562 F.2d 1209 (C.C.P.A. 1977), aff'd, 437 U.S. 443, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978). (The Chief Judge of the Court of Customs and Patent Appeals opined that "Congressional intent to provide a wide latitude within which the Secretary of the Treasury may determine existence of a bounty or a grant authorizing levy of countervailing duties is clear from the statute itself and from congressional refusal to define the words 'bounty,' 'grant,' or 'net amount,' in the statute or anywhere else for almost 80 years."
[501] Poland Final Determination, *supra* note 486.

Based on the above analyses and records in the investigations, Commerce finally ruled that both Poland and Czechoslovakia satisfied the test to be NME countries and for that reason it was impossible for Commerce to identify or determine subsidies in such economies.[502] As a result, the manufacturers, producers, or exporters in both countries did not receive bounties or grants, and therefore, all allegations of the petitioners were denied.

In the same year, there were two other petitions filed by American chemical companies against potassium chloride products imported from the German Democratic Republic and the Soviet Union, but Commerce dismissed all petitions and rescinded the initiations of the related CVD proceedings against these NME countries based on the same reasoning.[503]

4.3.1.3. Judicial Decisions

4.3.1.3.1. *Continental Steel Corp. v. United States*

The inconsistency of Commerce between its preliminary and final decisions in determining the inapplicability of CVD law to NMEs has fed some entities' hope to reverse the outcome by resort to the courts. Petitioners in both the CSWR and potash cases appealed to the Court of International Trade ("CIT") for reversal of Commerce's NME determination.[504]

On July 30, 1985, the CIT reversed Commerce's decisions and held that the CVD law covers countries with NMEs and that subsidies, which are target of the law,

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[502] Czechoslovakia Final Determination and Poland Final Determination, *supra* note 486.

[503] Potassium Chloride from the German Democratic Republic; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition, 49 FR 23428 (June 6, 1984); Potassium Chloride from the Soviet Union; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition, 49 FR 23428 (June 6, 1984) [hereinafter Potash cases].

[504] *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985) [hereinafter Continental Steel Case].
The plaintiffs, including American steel and chemical companies, brought the suits to CIT separately, but all the cases were consolidated by the court on the grounds they involved a common issue of law. For a summary of this case, *see also* Monroe Leigh, *Countervailing Duty Law-Applicability to Nonmarket Economy Countries*, 80 AM. J. INT'L. L. 359 (1986).

may be found in NMEs as well as in MEs.[505] First, the CIT noted that the basic principle for determining the scope of a statute is to look first at its language.[506] Then, based on its interpretation of section 303 of the Tariff Act of 1930, as amended, the CIT opined that the language of the law is "perfectly indifferent to forms of economy."[507] Indeed, it ruled, the law was written to apply to all countries, including both MEs and NMEs.[508] However, in its judicial interpretation of the law, Commerce was self-contradictory from its inception.[509] Commerce preliminarily recognized that the law covers "any country" and did not allow *per se* exemptions from the law for any political entity.[510] Nevertheless, in its final determinations, Commerce looked at different criteria, called an "additional jurisdictional question," *i.e.*, whether government activities in an NME can confer a "bounty or grant" within the meaning of the law.[511] According to the CIT, if this was truly a "jurisdictional" question, a failure to meet the jurisdictional criteria of the law would indeed deprive Commerce of its authority to enforce the law beyond the determination of that point. That *would* amount to a *per se* exemption from the law and would conflict with the plain statement that the law covers *any* country.[512]

Second, the CIT ruled that it was a fundamental error to conclude that a subsidy can exist only in a market economy.[513] The CIT also disagreed with Commerce's definition of a subsidy as one "results in a misallocation of resources, encouraging inefficient production and lessening world wealth."[514] According to the CIT, a subsidy in its purest form is the encouragement of exportation by means of some type of special

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[505] Continental Steel Case, *supra* note 504.
[506] *Id.* at 551 (citing *North Dakota v. United States,* 460 U.S. 300, 312, 103 S.Ct. 1095, 1102, 75 L.Ed.2d 99 (1983)).
[507] Continental Steel Case, *supra* note 504, at 551.
[508] *Id.* at 552.
[509] Id. at 550.
[510] *Id.*
[511] *Id.*
[512] *Id.*
[513] *Id.* at 550
[514] *Id.* at 554. The CIT expressly stated: "There is not the slightest indication in the law or the legislative history to show that the allocation of resources, the efficiency of production or the diminution of world wealth is a concern of the countervailing duty law. Commerce's definition sounds as if the CVD law is being viewed as a means for influencing the way the wealth of the world is developed or the way other countries choose to allocate resources or organize production. This would be totally improper and would be a dangerous distortion of the law. The countervailing duty law is not a tool of foreign policy."

preference.[515] The CIT concluded that subsidies can exist in NMEs, and that Commerce should find a method to identify and quantify them.[516]

Third, the CIT also rejected Commerce's reasoning that Congress aimed to use the antidumping law and section 406 as alternative trade remedies to deal with unfair imports from NME countries. The CIT observed that the potent specialized nature of the countervailing duty law is not affected by the existence of possible alternative remedies.[517]

Finally, the CIT ruled that Commerce's determinations were arbitrary and not in accordance with the law. Therefore, the final determinations in the CSWR cases were reversed and the matters were remanded for a determination consistent with CIT's opinions.[518] The CIT also ordered the resumption of the potassium investigations in the potash cases.

The CIT's decision was a big victory for the American steel industry in particular and for other domestic industries in general, which need a legal security in their competition against products imported from NME countries. In addition, this decision stood to stimulate a significant increase in CVD petitions filed against NME imports.[519] However, one of the trade policy concerns was that if Commerce found significant subsidies, import trade with NMEs could be drastically reduced.[520] Further, it was believed that the imposition of countervailing duties on NME imports could contravene the efforts of the United States to encourage East-West trade over the preceding several years.[521] It also could have a certain impact on imports from China. Therefore, the CIT's decision also left Commerce with a dilemma of how to reconcile U.S. trade interests and its efforts to identify and quantify the subsidies in NME

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[515] *Id.* at 553.
[516] *Id.* at 554. (Commerce has the authority and ability to detect patterns of regularity and investigate beneficial deviations from those patterns - and it must do so regardless of the form of the economy). *See also* Robert Franklin Hoyt, *Comment: Implementation and Policy: Problems in the Application of Countervailing Duty Laws to Nonmarket Economy Countries*, 136 U. PA. L. REV. 1647 (1988).
[517] Continental Steel Case, *supra* note 504, at 556.
[518] *Id.* at 557.
[519] Holmer & Bello (1986), *supra* note 481, at 324.
[520] *Id.*
[521] Leigh (1986), *supra* note 504, at 362.

countries, where all trading factors are distorted by government intervention and where all public market-based information and data such as costs and prices are hard to collect. That seemed to be an impossible mission to Commerce. On September 17, 1985, the government filed its notice of appeal with the court[522], which opened another chance for the NME issue to be reviewed by a higher court (*i.e.*, the U.S. Court of Appeals for Federal Circuit).

4.3.1.3.2. *Georgetown Steel Corp. v. United States*

The appeal of Commerce at the Court of Appeals for the Federal Circuit ("CAFC") and its outcomes were landmark litigation on the applicability of CVD law to NME countries. On September 18, 1986, the CAFC reversed the CIT's ruling and upheld Commerce's position that the CVD law did not apply to NME countries.[523]

Initially, based on procedural grounds, the CAFC determined that the CIT had no jurisdiction over the CSWR cases because Georgetown Steel Corporation, Raritan River Steel Company, and Atlantic Steel Company (collectively, "Georgetown Steel") did not file the summons at the CIT on time.[524] For that reason, the CAFC remanded those cases to the CIT to dismiss Georgetown Steel's complaint for lack of jurisdiction.[525] As a result, the CAFC reviewed the merits only of the CIT's reversal of

[522] Holmer & Bello (1986), *supra* note 481, at 324.
[523] *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1313 (Fed. Cir. 1986).
[524] *Id.* at 1311. Continental Steel did not appear as a party in the CIT's litigation. With respect to the filing procedures, section 516A of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1516a(a)(2)(A), provides "Within thirty days after the date of publication in the Federal Register of notice of … a final negative determination by the Secretary, the administering authority …, an interested party who is a party to the proceeding in connection with the matter arises may commence an action in the court by filing a summons, and within thirty days thereafter a complaint." Georgetown Steel timely filed the summons by mailing it to the clerk of the court on May 24, 1984, which was within 30 days of the publication in the Federal Register of the negative countervailing duty determination. Thereafter, Georgetown Steel mailed the complaint to the court's clerk by certified mail on June 22, 1984, which was within 30 days of the filing of the summons. The Postal Service, however, returned the complaint on July 6, 1984, because of insufficient postage. That same day, Georgetown Steel remailed the complaint, accompanied by a motion for leave to file the complaint out of time. The government opposed that motion, but the CIT granted it. *Id.* However, the CAFC agreed with the government's challenges and concluded that the complaint was not timely filed "with the proper postage affixed" until 43 days after the summons were filed on May 24, 1984. *Id.* at 1312.
[525] *Id.* at 1313.

Commerce's determination in the potassium cases.[526] This decision did not affect the analysis of NME applicability because Commerce had determined both the CSWR and the potassium cases based on virtually identical facts and on the same reasonings.[527]

With respect to the application of CVD law to NME countries, the CAFC reversed the CIT's ruling and supported the position of Commerce that the CVD law does not apply to NMEs. The CAFC's ruling was based mainly on the following grounds: (i) the purpose of the CVD law is to prevent unfair competitive advantages, and such advantages do not result from the imports from NMEs;[528] (ii) the nature of NMEs excludes the existence of subsidies provided by the governments since they would in effect be subsidizing themselves;[529] and (iii) Congress' choice of the antidumping duty law to deal with unfair trade practices from NMEs, while remaining silent on the NME issue in the CVD law.[530]

First, the CAFC emphasized that the purpose of the CVD law was to "offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments."[531] The CAFC was also convinced by Commerce that "a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth."[532] Basically, the purpose of the CVD law was to protect American firms from such kind of unfair competition (or so-called trade distortion) resulting from subsidies to foreign producers that gave them a comparative advantage they otherwise would not have enjoyed.[533]

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[526] *Id.*
[527] Richard N. Eid, *The Effect of Georgetown Steel Corp. v. United States on Nonmarket Economy Imports*, 3 AM. U. J. INT'L L. & POL'Y 65, 73 (1988).
[528] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523, at 1315.
[529] *Id.* at 1316.
[530] *Id.* at 1317-18. *See also* Frank DeArmon Whitney, *Georgetown Steel Corp. v. United States: The Federal Circuit Addresses Countervailing Duties against Nonmarket Economy Imports*, 12 N.C.J. INT'L L. & COM. REG. 303, 306 (1987).
[531] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523, at 1315 (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 1978)).
[532] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523, (citing Poland Final Determination, 49 FR 19374, 19375 (1984)).
[533] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523, at 1315.

Second, the CAFC echoed Commerce's view that in an NME, the government controls everything from the sales to the pricing determinations and even the terms.[534] The CAFC was also in accord with Commerce's description of the nature of an NME with the following features: "an environment is riddled with distortions; prices are set by central planners; losses suffered by production and foreign trade enterprises are routinely covered by government transfer; investment decisions are controlled by the state; money and credit are allocated by the central planners; the wage bill is set by the government; access to foreign currency is restricted; and private ownership is limited to consumer goods."[535] Hence, the CAFC concluded that the NME government technically cannot subsidize an entity because this action is actually a "subsidy of itself."[536] In other words, the purpose of the countervailing duty law (*i.e.*, countervailing the trade distortion in a market) is inconsistent with the nature of an NME (*i.e.*, no market due to the state control of all market forces). The CAFC affirmed Commerce's holding that a subsidy has a function of a trade distortion to the market and, therefore, if no market exists, no subsidy can exist.[537]

Third, the CAFC observed that section 303, regarding countervailing duty actions, had remained unchanged since the time of its enactment in 1897.[538] The CAFC observed that at the time of the enactment of the first general countervailing duty statute, there were no NMEs; therefore, Congress had no occasion to address the NME issue.[539] Since 1897, Congress had reenacted section 303 six times, without making any significant changes to the NME issue.[540] Further, the CAFC reasoned that Congress's actions in dealing with the problem of NME imports were embodied in

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[534] *Id.*
[535] *Id.* at 1316
[536] *Id.*
[537] *Id.* at 1318. *See* Eid (1988), *supra* note 527, at 75.
[538] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523, at 1314-15
[539] *Id.*
[540] *Id.* at 1314. The version of § 303 in existence at the time of ruling represents the sixth re-enactment of the 1897 provision without any changes that are relevant here. Tariff Act of 1909, § 6, 36 Stat. 85; Tariff Act of 1913, § IV(E), 38 Stat. 193; Tariff Act of 1922, § 303, 42 Stat. 935; Tariff Act of 1930, § 303, 46 Stat. 687; Trade Act of 1974, § 331(a), 88 Stat. 2049; The Trade Agreements Act of 1979, § 103, 105(a), 93 Stat. 190, 193. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 448 (1978), at n.8.

other statutory provisions. In particular, the CAFC noted that Congress amended the antidumping law by enactment of the Trade Act of 1974 to deal specifically with imports from NMEs[541] and especially by approving for a special "surrogate country" method for determining whether NME imports were being "dumped" in the United States.[542] Nevertheless, when amending the CVD law under section 331 of the Tariff Act of 1974, Congress did not change its scope to cover NME countries.[543] Again, in the enactment of the Trade Agreements Act of 1979 ("1979 TAA"), Congress reenacted the special surrogate country method in antidumping investigations against state-controlled economies, but Congress continued its silence on the NME applicability issue in the CVD law.[544] In addition, the purpose of enactment of the 1979 TAA was to implement the GATT Subsidies Code,[545] which permitted signatory countries to levy either antidumping duty or countervailing duty against an NME by using "surrogate country" pricing.[546] While the CIT's rationale was that Congress's approval of the Subsidies Code evidenced an intent that the CVD law apply to state-controlled economies,[547] the CAFC rejected such a conclusion, stating that it was a *non*

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[541] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523, at 1316. Under the antidumping law, when "foreign merchandise [that] is being, or is likely to be, sold in the United States at less than its fair value" threatens to cause or causes actual material injury to a domestic industry or to the establishment of a domestic industry, duties are imposed on that merchandise. *See* U.S.C. § 1673 (1982).
[542] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523 (citing 19 U.S.C. § 164(c) (1976) (repealed 1979)). Section 164(c) provides as follows:
"(c) If available information indicates to the Secretary that the economy of the country from which the merchandise is exported is state-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a), the Secretary shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either-
(1) the prices, determined in accordance with subsection (a) and section 202, at which such or similar merchandise of a non-state-controlled-economy country or countries is sold either (A) for consumption in the home market of that country or countries, or (B) to other countries, including the United States: or
(2) the constructed value of such or similar merchandise in a non-state-controlled-economy country or countries as determined under section 206."
[543] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523, at 1316.
[544] *Id.* at 1317.
[545] Subsidies Code, *supra* note 125
[546] *Id.* Article 15 and Interpretative Note *Ad* Article VI from Annex I, paragraph 1 (1, 2); Georgetown Steel Case at 1317; *See* Whitney (1987), *supra* note 530, at 307-08.
[547] Continental Steel Case, *supra* note 504, at 557.

sequitur.[548] The CAFC reasoned that the Subsidies Code merely provides the method for determining the existence of a subsidy, and leaves it to each country to determine the particular method it would use to deal with the NME problem through either antidumping duty or countervailing duty legislation. Therefore, the CAFC held that in the United States, Congress chose to deal with that problem under the antidumping law and not under the CVD law.[549] Based on such reasoning, the CAFC found that the inaction and silence of Congress was clear evidence that the CVD law did not apply to state-controlled economies or nonmarket economies.[550]

In addition to the above rationale, it is important to note that the CAFC followed the holding of the Court of Customs and Patent Appeals in *United States v. Zenith Radio Corp.,*[551] which was that Commerce has broad discretion in determining the existence of a "bounty" or "grant" under the CVD law. The CAFC also reaffirmed that Commerce's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants was reasonable, in accordance with the law, and not an abuse of discretion.[552] Another critical point should be noted from the CAFC's opinion: Congress designed the antidumping law to protect the American industry from injury resulting from the sale in the United States of foreign merchandise that is priced below its fair value, and Congress provided the related remedy. However, if that remedy was inadequate to protect American industry from such foreign competition, then it is up to Congress to provide any additional remedies it deems appropriate.[553] This comment reminded the government that the CVD law could be changed to combat imports from NME countries.

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[548] "*Non sequitur*" means an inference or conclusion that does not logically follow from its premise. *See* Black's Law Dictionary, (8th ed. 2004); Georgetown Steel Case, at 1318; *see also* Whitney (1987), *supra* note 530, at 308; Leigh (1987), *supra* note 504, at 214.
[549] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523 at 1318.
[550] *See* O'Brien (1985), *supra* note 487, at 620.
[551] 562 F.2d 1209 (C.C.P.A. 1977), aff'd, 437 U.S. 443 (1978).
[552] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523, at 1318.
[553] *Id.*

4.3.2. Applicability of CVD Law to Nonmarket Economies

4.3.2.1. Impact of the Georgetown Steel Case

The 1986 decision of the Court of Appeals for the Federal Circuit affirmed Commerce's discretion not to apply CVD law to NME countries. That decision supports the first school of thought that subsidies cannot be found in NMEs due to the market distortions caused by the government control. It clearly upholds the theory that government intervention in an NME is so pervasive that meaningful comparisons between subsidized and market-determined prices are impossible. Technically, the outcome of Georgetown Steel Case did confirm that subsidies can be found and measured only in ME countries, where commercial standards exist for Commerce to rely on to calculate the countervailing duties. Nevertheless, these conceptual opinions are still controversial and completely contrary to the second school of thought that CVD actions can be taken against both ME and NME countries. Specifically, the CIT supported the American industries' view that the difficulties of the CVD law are not those of meaning, but rather the problems of measurement, and it is the responsibility of Commerce to detect and calculate the subsidies regardless of the form of the economy.

From the perspective of the American industry, the Georgetown Steel Case was not an end to their fight against unfair trade practices such as subsidies from NME countries. In the long run, it could not stop the American industries from seeking an effective methodology in the CVD law to mitigate against the subsidies implicit in the products entering the United States market. That is also the purpose of the CVD law, that such unfair benefits must be countervailed to level the playing field between the domestic and foreign producers. Congress had bolstered the antidumping law, which is equipped with special methodologies to protect American industries from sale below fair value of the goods imported from NME countries. The CAFC opinion signaled that if the American industries felt they were not fully protected by the antidumping law,

they needed to seek support in Congress to change the CVD law to apply it to NME countries.

From the perspective of the administrative authorities or practitioners, the CAFC's decision should be read in a narrower context. It was assumed that the CAFC did not clearly hold that countervailing duties are *never* applicable to NME products.[554] Instead, that decision may be read in the context of the particular subsidies that the CAFC analyzed in the potash cases.[555] This assumption could also help the American industries and Commerce in distinguishing between the Georgetown Steel Case and other alleged subsidies on subsequent NME products entering the domestic market. Further, from the CAFC's decision, it could be understood that the trade policy is a discretionary process. That process is subject to the intent of the legislators and the executive administration to structure it in an effective way to best protect the American industries. As a matter of fact, the Georgetown Steel Case sent an important message to the United States Congress that the trade laws applicable to NMEs should be modified or changed to adapt with the continuously changing realities. As a result, the CAFC's decision triggered a lot of congressional actions to amend the CVD law to apply it to imports from NME countries. In 1987, several bills were introduced in Congress to invalidate Georgetown Steel Case and apply the CVD law against NME countries.[556] One of the remarkable efforts in this year was section 157 of the 1987 Trade Bill.[557] Section 157 provided for the application of the CVD law to NME

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[554] *See* Whitney (1987), *supra* note 530, at 313.

[555] *Id.* The CAFC held that:

"There is no reason to believe that if the Soviet Union or the German Democratic Republic had sold the potash directly rather than through a government instrumentality, the product would have been sold in the United States at higher prices or on different terms. Unlike the situation in a competitive market economy, the economic incentives the state provided to the exporting entities did not enable those entities to make sales in the United States that they otherwise might not have made. Even if one were to label these incentives as a 'subsidy,' in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves. Those governments are not providing the exporters of potash to the United States with the kind of 'bounty' or 'grant' for which Congress in section 303 prescribed the imposition of countervailing duties."; *See Georgetown Steel Corp. v. United States* (1986), *supra* note 523, at 1316.

[556] Hoyt (1988), *supra* note 516, at 1665.

[557] Trade and International Economic Policy Reform Act of 1987, H.R. 3 § 157, 100th Cong. 1st Sess. (1987) [hereinafter 1987 Trade Bill].

countries to the extent that a subsidy can reasonably be identified and measured by Commerce.[558] Although this provision was passed by the House, it was not included in the Senate version in the final stages of the conference committee.[559] In the same year, there were other efforts to apply CVD law to imports from state-controlled economies, but all were unsuccessful.[560] Thereafter, there were many attempts to address the application of CVD law to NMEs since 1993 to 2005, but all proposed bills were again unsuccessful.[561]

In 2007, there was a large number of bills that were introduced in the 110th Congress that sought to apply the CVD law to NME countries.[562] Some of the bills were proposed to direct the administrative authorities to apply CVD laws to NMEs; some aggressively proposed a China-specific alternative methodology for determining the amount of subsidy if special difficulties were found.[563] These law-making efforts were influenced not only by the Georgetown Steel Case, but also by a surge of imports from emerging NME countries such as China, as motivated by its global integration and economic reforms. Especially after its WTO accession in 2001, China had rapidly

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[558] *Id.* 1987 Trade Bill. *See also* Hoyt (1988), *supra* note 516, at 1665.

[559] Hoyt (1988), *supra* note 516, (noting that the Senate, abandoning its own trade proposals, passed a bill laying out proposed amendments to H.R.3. The Senate version did not address the issue of applying the countervailing duty laws to NME countries, tacitly accepting the House proposal). *See* Omnibus Trade and Competitiveness Act of 1988, *supra* note 135.

[560] Vivian C. Jones, *Trade Remedy Legislation: Applying Countervailing Action to Nonmarket Economy Countries*, CRS Report for Congress, Order Code RL33550, December 6, 2007 [hereinafter CRS Report 2007], at CRS-12.

[561] *Id.* at CRS-13-14.

[562] *Id.* (The bills included S. 364 (Rockefeller, introduced January 23, 2007); H.R. 571 (Tancredo, introduced January 18, 2007); H.R. 708 (English, introduced January 29, 2007); H.R. 782 (Ryan/Hunter, introduced January 31, 2007), H.R. 2942 (Ryan/Hunter, introduced June 28, 2007), and related bill S. 796 (Bunning/Stabenow, introduced March 7, 2007); H.R. 1229 (Davis/English, introduced February 28, 2007) and related bill S. 974 (Collins/Bayh, introduced March 22, 2007); and S. 1919 (Baucus, introduced August 1, 2007)).

[563] *Id.* Pursuant to H.R. 1229 and S. 974, whether China is designated as a nonmarket economy country, administrative authorities would be directed to use "methodologies that take into account the possibility that terms and conditions prevailing in China may not be applicable as appropriate benchmarks." In these situations, authorities would be directed to adjust the terms and conditions prevailing in China before using those prevailing outside of China. However, if authorities have determined that China is an NME country, they would be directed to "presume" that special difficulties do exist, that it is not practicable to consider and adjust for Chinese terms and conditions, and that "terms and conditions prevailing outside of China" (*e.g.*, those from a surrogate market economy country or world market data) should be used to calculate the amount of subsidy.

boosted its trade relationship with the United States. Among other bills, H.R. 1229, the Nonmarket Economy Trade Remedy Act of 2007, was introduced by Artur Davis and Phil English on February 28, 2007, trying to change the CVD law to apply to NME countries, especially targeting China.[564] According to the sponsors of H.R. 1229, China was the most commercially significant NME country.[565] In 2006, the United States trade deficit with China was $232 billions, reflecting a 177% increase since 2000; meanwhile, the worldwide trade surplus of China also rapidly increased.[566] According to the Congressional Research Service (CRS), the United States and China's total trade, which was only $5 billion in 1980, rose to $387 billion in 2007.[567] The second reason that triggered the legislators' alert on China was its long-overdue notification to the WTO of 70 subsidy programs, which it made in 2006 after much urging by the United States.[568] Thus, the impact of the Georgetown Steel Case and the subsequent actions by congressmen greatly contributed to Commerce's decision to change of its longstanding policy of not applying CVD rules to NME countries. In 2006, Commerce officially initiated a CVD case against China as an NME country and continued with other investigations in subsequent years. This change of direction was also influenced by Commerce's awareness of the economic transformation in NME countries.

Before analyzing these related countervailing duty cases against China, it is important to explore the nature of transition economies and their impact upon Commerce's recognition in applying the CVD law to these nations.

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[564] H.R. 1229, the Nonmarket Economy Trade Remedy Act of 2007: Hearing before the Subcommittee on Trade of the Committee on Ways and Means, U.S. House of Representatives, One Hundred Tenth Congress, First Session, Serial No. 110-24, March 17, 2007 [hereinafter H.R. 1129].
[565] *Id.*
[566] *Id. at 4* (Opening Remarks by the Chairman).
[567] Wayne M. Morrison, *China-U.S. Trade Issues*, CRS Report for Congress, Order Code RL33536, March 7, 2008 [hereinafter CRS Report 2008].
[568] H.R. 1129, at 3. China acceded to WTO in 2001, and, as part of its accession, China agreed to notify the WTO of its subsidies and agreed to terminate its prohibited subsidies upon accession. However, China notified the WTO of its subsidy programs in 2006, several years after the due date. According to USTR, China's report is incomplete because it failed to notify the WTO about any subsidies provided by China's state-owned banks or by provincial and local government authorities. In addition, while China gave notice of several subsidies that appear to be prohibited, it did so without making any commitment to withdraw them, and it failed to give notice about other subsidies that appear to be prohibited. *See* United States Trade Representative (USTR), 2006 Report to Congress on China's WTO Compliance, December 11, 2006 [hereinafter USTR Report 2006], at 42.

4.3.2.2. Impact of Transition Economies

The aspiration to grow and integrate into the global trading system has motivated nonmarket economy countries to transform their economic systems to become market economy countries or at least to operate on market principles. However, the transformation of an existing nonmarket economy to a market economy or a market-oriented economy takes many years or even decades. Furthermore, the degree and feasibility of economic reform in each country is also subject to the political system it is pursuing. Such economic transformation was broadly implemented after the dissolution of the former Soviet Union in the late 1980s.[569] The reunification of East and West Germany after the fall of the Berlin Wall in November 1989 was also a fundamental motivation for a wave of economic reforms in Eastern Europe.[570] During 1989 and 1990, NME countries such as Poland, Yugoslavia, Czechoslovakia, and Hungary started to accelerate their economic reform efforts.[571] As a leading representative for NME countries in Asia, China initiated a comprehensive reshaping of its economy beginning in 1978.[572] However, it was not until 1992 that China made it clear that it was to pursue a socialist market economy.[573] Vietnam initiated its economic renovation in 1986 with the objective of transition to a socialist market-oriented economy. Since then, transition to a market economy has been considered as a main target and basic feature for almost all centrally planned economies, including independent states from the former Soviet Union, Eastern European, and Asian socialist countries.[574]

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[569] ZHANG (2018), *supra* note 79, at 5.
[570] Economic Report of the President, Transmitted to the Congress together with the Annual Report of the Council of Economic Advisors, February 1991 [Economic Report of the President 1991], at 195.
[571] *Id.*
[572] *Id.* at 199.
[573] *Id.*
[574] *Id.*

Although the United States has supported transitions to market economies,[575] one of the critical concerns of Congress and the administrative authorities is how to deal with imports from these transition economies effectively under the domestic trade laws such as antidumping and countervailing duty laws. As discussed in section 4.2 of this Chapter, Congress did amend the antidumping law to incorporate new provisions for NME countries within the 1988 OTCA.[576] This Act defined the term "nonmarket economy" and set forth the standards to determine whether a country has a nonmarket economy for the application of the antidumping law.[577] However, since this Act's enactment, Commerce has encountered difficulties in dealing with the market reforms in NME countries. One of the difficulties is that each NME country, subject to its particular social, political, and economic situation, may pursue market reforms with varying degrees and toward various forms of market economies.[578] Hence, it is a great challenge for Commerce to cope with NMEs in transition by application of the outdated NME provisions of the 1988 OTCA.[579] On the other hand, the countervailing duty law could not help to resolve such challenges itself because it was determined not to be applicable to NME countries in the Georgetown Steel Case. As discussed in Georgetown Steel Case, the determination of the CVD law's inapplicability to NMEs is based on the logic that subsidies have no meaning outside the context of market-based economic systems. However, when a reforming NME begins to exhibit elements

[575] *Id.* Hearings before the Joint Economic Committee Congress of the United States, S.Hrg. 102-181, 102nd Congress, 1st. Session, Jan. 4, Feb. 12, and March 6, 8, 13 and 14, 1991, at 85-86. (In Chapter 6: Economies in Transition Around the World, it is summarized that "[t]he report concludes with a discussion of the role the United States can best play in supporting transitions to democratic societies and free-market economies: how we can best help these countries help themselves. In both regions this role involves technical and financial support aimed at assisting reform, not providing an excuse to delay it, and reduction of barriers to trade and investment. In addition, the United States has encouraged and will continue to encourage multilateral institutions and other governments to support the transformation process.").
[576] 1988 OTCA, *supra* note 135.
[577] *Id.*
[578] Lantz (1995), *supra* note 457, at 1008.
[579] *Id.*

of both market and nonmarket economies, it becomes more difficult to justify that inapplicability policy.[580]

4.3.2.3. U.S. Trade with Transition Economies

In 1980, two significant commercial developments affected economic relations between the United States and the NME countries: the imposition of trade sanctions against the U.S.S.R. and the normalization of commercial relations with China.[581] Both contributed greatly to changes in the pattern of U.S. trade with the NMEs. In that year, the level of trade between the United States and NME countries rose very slightly. Noticeably, China replaced the U.S.S.R. both as the most important NME buyer of U.S. exports and as the principal NME supplier of U.S. imports.[582] However, trade between the United States and NMEs during that year slowed down because of the U.S.S.R. sanctions. In particular, U.S. exports to NMEs increased by only 2.5 percent, from $8.2 billion in 1979 to $8.4 billion in 1980.[583] On the other hand, U.S. imports from NMEs increased by only 2.8 percent.[584] However, imports from China occupied over a third of total U.S. imports from NMEs.[585]

In the following years, China continued to dominate trends in U.S. and NME trade. Specifically, in 1984, the two-way trade increased 43.3 percent, from $8.6 billion in 1983 to $12.4 billion in 1984.[586] U.S. exports to NMEs increased by 41.8 percent,

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[580] James A. Meszaros, *Application of the United States' Law of Countervailing Duties to Nonmarket Imports: Effects of the Recent Foreign Reforms*, 2 ILSA J. INT'L & COMP. L. 463, 471 (1996).
[581] United States International Trade Commission, Publication 1136, 25th Quarterly Report to Congress and the Trade Policy Committee on Trade Between the United States and the Nonmarket Economy Countries During 1980, March 1981 [hereinafter 25th ITC Report], at 3.
[582] *Id.* In 1979, the United States and China signed a comprehensive trade agreement, which was effective in February 1980. The agreement included the extension of most-favored-nation (MFN) tariff treatment to imports from China. Since granting MFN status, two-way trade with China has more than doubled.
[583] *Id.* at 5.
[584] *Id.*
[585] *Id.* at 20.
[586] United States International Trade Commission, Publication 1662, 41st Quarterly Report to Congress and the Trade Policy Committee on Trade Between the United States and the Nonmarket Economy Countries During 1984, March 1985 [hereinafter 41st ITC Report], at 5.

from $5.1 billion in 1983 to $7.2 billion in 1984.[587] U.S. imports from NMEs also increased by 45.4 percent from $3.6 billion in 1983 to $5.2 billion in 1984.[588]

During the 1990s, the movement of market reforms in NME countries and their deeper integration with the world's economy significantly boosted two-way trade. Remarkably, U.S. trade with NME countries more than doubled, setting a record level of $26.3 billion by 1990.[589] However, the trade balance between the United States and NMEs reversed course. Although U.S. exports to NMEs declined by 18.6 percent, U.S. imports from these countries grew by 25.0 percent, marking their eighth consecutive year of expansion.[590] As a result, the U.S. deficit in trade with NMEs nearly tripled from $2.8 billion during 1989, the previous annual record, to $8.3 billion during 1990.[591]

Based on the data, it was claimed that trade with China was largely responsible for the U.S. trade deficit with NMEs.[592] In particular, U.S. imports from China expanded by 27.5 percent, from $11.9 billion during 1989 to $15.1 billion during 1990.[593] In contrast, U.S. exports to China decreased by 17.3 percent, from $5.8 billion during 1989 to $4.8 billion during 1990.[594] As a result, the U.S. deficit in trade with China increased by 70 percent to $10.3 billion, reaching a new record level for the sixth consecutive year.[595] The U.S. deficit in trade with China continued to rise in the

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[587] *Id.*
[588] *Id.*
[589] United States International Trade Commission, Publication 2375, Trade Between the United States and the Nonmarket Economy During 1990, 65th Quarterly Report, April 1991 [hereinafter 65th ITC Report], at 2. The report focuses on U.S. trade with Bulgaria, China, Czechoslovakia, East Germany (through September 1990), Hungary, Poland, Romania, and the U.S.S.R., whose current levels of trade with the United States have the potential to affect a domestic industry. Although U.S. trade with Afghanistan, Albania, Cambodia, Cuba, Laos, Mongolia, North Korea, and Vietnam was negligible, exports to and imports from each of these are shown and included in the totals for "All NMEs" in these reports.
[590] *Id.*
[591] *Id.* The U.S. trade balance with China turned from a surplus to a deficit in 1983, but the deficit declined slightly in 1984. It then increased from $51.9 million in 1984 to $67.2 million in l985, $1.6 billion in 1986, $2.8 billion in 1987, $3.4 billion in 1988, and $6.1 billion in 1989.
[592] Bello et al. (1992), *supra* note 477, at 669.
[593] 65th ITC Report, *supra* note 589, at 10.
[594] *Id. at 8.*
[595] *Id.*

following years, to $12.6 billion in 1991,[596] $18.2 billion in 1992[597], and $22.8 billion in 1993.[598] More importantly, China's share of total NME exports to the United States rapidly jumped from 87.2% in 1990[599] to 95.3% in 1991, 96% in 1992, and 93.1% in 1993.[600]

The above analysis of the trade data shows the undeniable role of transition economies in trade development with the United States. Both sides need mutual trade cooperation to reach their own goals for economic development and global trade integration. In principle, promoting trade exports is essential, but the mission of protecting each side's domestic industries must be always ensured. Needless to say, when the U.S. trade deficit with China started to rise rapidly from early 1990s, as reported by the ITC, imports from China were noticed more, and then U.S. trade laws were primed for two objectives: to protect the American industry and to balance the level of trade deficit between the two countries.

The impact of Georgetown Steel Case, the economic transformation of NME countries, and their rapidly increasing imports into the United States market have forced Commerce to develop new approaches in antidumping investigations and to try to test such approaches in CVD proceedings applied to NMEs in transition. Since Congress did not provide any statutory guidance on dealing with transition economies during this timeline, Commerce has made use of its broad discretionary power to develop such approaches for administering the antidumping and countervailing duty laws in a series of cases involving dumped and subsidized imports from China.[601] The next sections will examine several AD and CVD cases to elaborate on how Commerce

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[596] United States International Trade Commission, Publication 2503, Trade Between the United States and China, the Former Soviet Union, Central and Eastern Europe, the Baltic Nations, and Other Selected Countries During 1991, 69th Quarterly Report, April 1992 [hereinafter 69th ITC Report], at 3.
[597] United States International Trade Commission, Publication 2634, Trade Between the United States and China, the Former Soviet Union, Central and Eastern Europe, the Baltic Nations, and Other Selected Countries During 1992, 73d Quarterly Report, May 1993 [hereinafter 73d ITC Report], at 5.
[598] United States International Trade Commission, Publication 2770, Trade Between the United States and China, the Successor States to the Former Soviet Union, and Other Title IV Countries During 1993, 77th Quarterly Report, April 1994 [hereinafter 77th ITC Report], at 7.
[599] 65th ITC Report, *supra* note 589, Table 3, at 7.
[600] 77th ITC Report, *supra* note 598, Table 1.3, at 6.
[601] Lantz (1995), *supra* note 457, at 1031.

applies the antidumping and countervailing duty laws to cope with the challenges posed by China as an NME in transition.

4.3.2.4. Changes to the Department of Commerce's Approach to NMEs

4.3.2.4.1. Changes in Antidumping Investigations

Like the CVD law, the antidumping duty law is a remedial measure that provides relief to American industries harmed by unfair trade practices (*i.e.*, dumping and subsidization). The antidumping duties are imposed if the two following conditions are met: (1) Commerce determines that the foreign goods are sold in the United States at "less than fair value" (LTFV) and (2) the International Trade Commission concludes that American industries are either injured or threatened to be injured by reason of imports of such foreign goods.[602] This bifurcated statutory process has been unchanged since the amendment of the Tariff Act of 1930 in 1974 up to now. In an antidumping investigation, to determine whether the foreign goods are sold at LTFV, Commerce is required to compare the U.S. price of the merchandise under investigation (or the subject merchandise) with its "foreign market value" (FMV). After such comparison, if the FMV exceeds the U.S. price (*i.e.*, there is a positive dumping margin), Commerce will determine the antidumping duty to be an amount equal to that positive dumping margin. Otherwise, if the dumping margin is negative, it means there is no LTFV sale

[602] Section 731 of the Tariff Act of 1930, as amended in 1979 (codified at 19 U.S.C. § 1673). Section 731 provides:
"If—
(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
(2) the Commission determines that—
(A) an industry in the United States—
(i) is materially injured, or
(ii) is threatened with material injury, or
(B) the establishment of an industry in the United States is materially retarded,
by reason of imports of that merchandise,
then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise."

or no occurrence of dumping. However, it is complicated to determine the FMV of the subject merchandise in an NME country. The methodology used to calculate the FMV in a standard case (*i.e.*, in a market economy) is different from that of an NME case. In an ME case, in order to calculate the FMV, Commerce simply uses the prices in the producer's home market or in third countries (if there were no home-market sales) or uses constructed values (where there were no sales in the home market and no sales to third countries).[603] However, if Commerce finds that the exporting country of the subject merchandise is a state-controlled economy (SCE)[604] or NME, it will use a radically different methodology to calculate the FMV. This NME methodology would be used because the sales prices or costs in the home (exporting) market of an NME country are unreliable due to government controls. Alternatively, Commerce would use the prices or costs collected from producers in a non-SCE or ME to calculate the FMV.[605] The reasons that Commerce does not trust the home-market prices or costs in an NME are understandable. At least in a pure state-controlled or command economy, inputs and outputs are centrally planned and prices are distorted and not determined by supply and demand.[606] Basically, such prices do not support a comparison between the U.S. price and the NME's sales price.[607] Further, the NME's nonconvertible currency makes it difficult for Commerce to calculate the dumping margin on a U.S. dollar basis.[608] Therefore, to cope with such difficulties in an NME case, Commerce normally uses the NME methodologies including a surrogate ME country, constructed value, and factors of production to calculate the FMV.[609]

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[603] Section 773(a)(1), Tariff Act of 1930, as amended in 1979 (codified at 19 U.S.C. 1677b(a)).
[604] The term "state-controlled economy" or SCE was used prior to the enactment of the 1988 OTCA. Since 1988, SCEs have been referred to as "nonmarket economies" or NMEs.
[605] Section 773(c), Tariff Act of 1930, as amended in 1979 (codified at 19 U.S.C. § 1677b(c)).
[606] Jeffrey S. Neeley, *Nonmarket Economy Import Regulation from Bad to Worse*, 20 LAW & POL'Y INT'L BUS. 529, 532 (1989).
[607] Pearson (1989), *supra* note 137, at 721.
[608] *Id.*
[609] 19 U.S.C. § 1677b(c); Antidumping Investigation Procedures Under Antidumping Act, 1921, 43 Fed. Reg. 35262 (Final Rule, August 9, 1978) [hereinafter The Treasury Department's 1978 Regulation] (codified at 19 C.F.R. § 153.7 (1979)).

In *Electric Golf Cars from Poland*[610], imported golf cars manufactured in Poland were determined to be sold at LTFV. During this time period, Poland was regarded as an SCE, and the Treasury Department[611] used the NME methodology to calculate the fair price of the Polish golf cars. Specifically, it was found that golf cars were manufactured in Poland solely for export to the United States market.[612] During that time, there were neither home market sales nor sales to other foreign countries.[613] In its fair value investigation, the Treasury Department initially calculated the FMV of the Polish golf cars based on the home-market prices of an obscure Canadian producer which sold small quantities of similar factory-use cars.[614] Later, the Canadian producer went out of business in 1975, leaving the United States as the only other major producer of golf cars.[615] Given a lack of pricing data from any other foreign manufacturers, the Treasury Department announced its intention to use the domestic prices of United States manufacturers to calculate the FMV of the Polish golf cars.[616] However, the unfairness of such an approach plus oppositions from both Polish trade representatives and from domestic industry "catalyzed a rethinking" within the Treasury Department.[617] In late 1977, in order to avoid using the U.S. prices or costs for its fair-value investigation, the Treasury Department developed a "constructed value" methodology to calculate the Polish cars' FMV.[618] This novel methodology constructed a fair value that was based on the Polish producers' factors of production (inputs such as labor, raw materials, administrative and selling expenses, etc.) valued at prices found

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[610] Electric Golf Cars from Poland; Antidumping: Determination of Sales at Less Than Fair Value, 40 FR 25497 (June 16, 1975) [hereinafter Polish Golf Cars].
[611] The Treasury Department was responsible for the administration of antidumping and countervailing duty statutes during this timeline until 1980 when such responsibilities were transferred to Commerce. *See* Reorganization Plan No. 3 of 1979, 93 Stat. 1381, September 25, 1979.
[612] Horlick & Shuman (1984), supra note 59, at 811.
[613] *Id.*
[614] Polish Golf Cars, *supra* note 610. *See* Horlick & Shuman (1984), *supra* note 59; Michael Kabik, *The Dilemma of Dumping from Nonmarket Economy Countries*, 6 EMORY INT'L REV. 339, 361 (1992).
[615] Polish Golf Cars, *supra* note 610. *See also* Horlick & Shuman (1984), *supra* note 59; *Comment, Dumping by State-Controlled-Economy Countries: The Polish Golf Cart Case and the New Treasury Regulations*, 128 U. PA. L. REV. 217, 220 (1979) [hereinafter Comment]; Bello et al. (1992), *supra* note 477, at 675.
[616] Comment, *supra* note 615, 220.
[617] *Id.*
[618] Horlick & Shuman (1984), *supra* note at 59, 812.

in Spain, which was a non-SCE country comparable to Poland in its level of economic development.[619] The Treasury Department formally proposed this approach as a regulation in 1978.[620] Despite critical comments and opposition from many interested parties, this proposed regulation was ultimately adopted in the Treasury Department's Final Rule in 1978.[621] It should be noted that the approach of "factors of production" was used to supplement, not supplant, the surrogate country methodology.[622] It provided for a means to establish fair value in cases where the like product for the NME merchandise under investigation was not manufactured in a market economy other than the United States.[623] However, because of congressional skepticism of the Treasury Department's 1978 Regulation, when Congress enacted the Trade Agreements Act of 1979, the newly adopted factors of production approach was not incorporated in the amended antidumping law.[624] This NME approach was, however, utilized in the majority of antidumping investigations against NME countries after Commerce assumed responsibility from the Treasury Department in 1980.[625]

In *Natural Menthol from the People's Republic of China in 1981*, Commerce continued to use the above-mentioned NME methodology and, for the first time, declared that China was an SCE.[626] The overriding issue in the preliminary stage of the case was that Commerce had to determine whether China was state-controlled "to an extent that sales or offers of sales of [menthol in PRC] or to countries other than the United States do not permit a determination of foreign market value"[627] by normal standards. Since this case was investigated within the legal framework of the Tariff Act

[619] Bello et al. (1992), *supra* note 477, at 675.
[620] Antidumping: Proposed Amendments Pertaining to Merchandise from State-Controlled-Economy Countries, 43 FR 1356 (January 9, 1978).
[621] The Treasury Department's 1978 Regulation, *supra* note 609.
[622] Bello et al. (1992), *supra* note 477, at 676.
[623] *Id.*
[624] The Trade Agreements Act of 1979, *supra* note 123; *See* Horlick & Shuman (1984), *supra* note at 59, at 813.
[625] Kabik (1992), *supra* note 614, at 362.
[626] Natural Menthol from the People's Republic of China; Antidumping: Preliminary Determination of Sales at Less Than Fair Value and Suspension of Liquidation, 46 FR 3258 (January 14, 1981) [hereinafter Natural Menthol Prelim].
[627] Section 773(c), Tariff Act of 1930, as amended in 1979 (codified at 19 U.S.C. 1677b(c)).

of 1930, as amended in 1979, Commerce had yet no statutory criteria to define a nonmarket economy. Commerce realized this case was "extraordinarily complicated because it presents the novel issue of the extent of state controls in PRC."[628] To come to its conclusion, Commerce examined the degree of control exercised by the state over China's economy generally and the impact of state control on the production and sale of menthol.[629] Commerce found considerable control by the Chinese government over the composition of inputs and the distribution of outputs.[630] Further, it was found that the pervasiveness of state planning and control of major agricultural products substantially limited the autonomy of production units and distorted the incentives that would be developed by a freely operating market.[631] Commerce came to such findings based on the operating principles of a market economy where there is free from government planning and the production and sale is directed by the supply and demand. In the final determination, Commerce sustained the preliminary conclusion that China's economy is state-controlled both generally and in the agricultural sector.[632] Since China was determined to be an SCE, Commerce did not use the home market and export prices of menthol in China to calculate the FMV. Instead, Commerce selected Paraguay as a non-SCE surrogate country to calculate the FMV.[633] In this case, it should be noted that Commerce started to pay attention to certain economic reforms in China. In particular, Commerce indicated that a number of reforms had been introduced to give greater play to market forces, but at the time of investigation believed that such reforms "seem[ed] to us as too new and too limited to have altered the fundamental nature of the PRC's economy and its effects on the production of

[628] Natural Menthol Prelim, *supra* note 626.
[629] *Id.*
[630] *Id.* Commerce found that the State Planning Committee sets output targets and prices, allocates commodities and production, and establishes overall guidelines for the economy.
[631] *Id.*
[632] Natural Menthol from the People's Republic of China; Antidumping: Final Determination of Sales at Less Than Fair Value, 46 FR 24614 (May 1, 1981) [hereinafter Natural Menthol Final].
[633] *Id.* Having considered country-wide and sectoral criteria, Commerce determined that the level of economic development of Paraguay is closer to that of the PRC than it is to that of other major producers of menthol. According to Commerce, Paraguay is the only major free market producer of natural menthol that also produces all of its own raw material (peppermint).

menthol."[634] This remark shows Commerce's potential for reconsideration of the application of its NME approach to transitional economies. It also implies that if certain industries within an SCE or NME were able to operate on market forces or had autonomy in pricing and production making decisions, such industries might be entitled to a normal dumping methodology. This is particularly notable because countries that are currently plagued by the negative effects of an NME determination could consider proposing that Commerce adopt such a tailored approach in a countervailing duty case, assuming Commerce remained unwilling to revoke the NME determination entirely.

4.3.2.4.1.1. "Mix and Match" or "Bubbles of Capitalism" Approach

Following the Natural Menthol case, from 1982 to 1990, the Department of Commerce initiated 23 antidumping investigations against China.[635] For most of the cases, in analyzing whether China's economy was state-controlled, Commerce examined key factors such as government control over the ownership of the means of production, allocation of resources or inputs and outputs; government control over trade; and the foreign currency's convertibility.[636] Although significant economic reforms in China were noticed during this period, Commerce still viewed China as an SCE because of the fact that the Chinese government still controlled the business sectors' prices and levels of production at both local and provincial levels, and because the Chinese government still owned most of the assets in the economy[637].

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[634] Natural Menthol Prelim, *supra* note 626.
[635] AD/CVD Investigations (Federal Register History), (01/01/1980 - 12/31/1999), Antidumping and Countervailing Duty Case Information, Enforcement and Compliance, available at https://enforcement.trade.gov/stats/iastats1.html, accessed on August 10, 2020.
[636] Petroleum Wax Candles from the People's Republic of China; Final Determination of Sales at Less Than Fair Value, 51 FR 25085 (July 10, 1986) [hereinafter Candles case]; Certain Headwear from the People's Republic of China; Final Determination of Sales at Less Than Fair Value, 54 FR 11983 (March 23, 1989) [hereinafter Headwear case].
[637] Tapered Roller Bearings from the People's Republic of China; Final Determination of Sales at Less Than Fair Value, 52 FR 19748 (May 27, 1987); Id. Headwear case; Sparklers from the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value, 55 FR 51743 (December 17, 1990) [hereinafter Sparklers Prelim].

More notably, in a series of antidumping cases initiated in the 1990s, Commerce attempted to adopt new NME methodologies to cope with the reality of the economic reforms in China.

First, in *Sparklers from China,* initiated in July 1990,[638] Commerce used the "factors of production" (FOP) methodology, which was formally supplemented in the antidumping statute by the 1988 OTCA.[639] The statute requires Commerce to determine the FMV based on the market valuation of the factors of production utilized in producing the subject merchandise (unless Commerce determines the available information on factor prices in market economies to be inadequate).[640] Furthermore, Commerce was permitted to value the FOP in one or more ME countries that are at a level of economic development comparable to that of the NME and that are significant producers of comparable merchandise.[641] In this investigation, China's economy was continually regarded as a nonmarket economy. However, in its FMV calculation, Commerce accepted the value for one factor on the actual price paid by a Chinese producer for an input that was imported from a country with a market economy.[642]

Second, in the other two landmark antidumping investigations initiated in the same year, Commerce showed progressive signs of flexibility in its adoption of NME methodologies by developing a new approach known as "mix and match" or "bubbles of capitalism." Specifically, in *Oscillating Fans and Ceiling Fans (Fans) from China*, initiated in November 1990,[643] a large number of Chinese producers raised a variety of novel methodological issues for Commerce to take into serious consideration. The

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[638] Sparklers from the People's Republic of China; Initiation of Antidumping Duty Investigation, 55 FR 31088 (July 31, 1990).
[639] 1988 OCTA, *supra* note 135, § 1316. Section 1316 amended section 773(c) of the Tariff Act of 1930 (as amended in 1979) to add the factors of production methodology and to provide a definition of NME (codified at 19 U.S.C. § 1677b).
[640] 19 U.S.C. § 1677b(c)(1) (1988). *See* Sparklers from the People's Republic of China; Final Determination of Sales at Less Than Fair Value, 56 FR 20588 (May 6, 1991) [hereinafter Sparklers Final].
[641] *Id.* Sparklers Final. The Department of Commerce decided to select India, Pakistan and the Philippines as ME surrogate countries to value Chinese producers' factors of production.
[642] *Id.* at 20589.
[643] Oscillating Fans and Ceiling Fans from the People's Republic of China; Initiation of Antidumping Duty Investigations, 55 FR 49320 (November 27, 1990).

respondents in this case asserted that although the Fans sector was operating within an NME country, it was sufficiently free of state control to allow calculation of FMV based on ME methodologies.[644] In *Chrome-plated Lug Nuts (Lug Nuts) from China*,[645] initiated two days after the Fans case, the Chinese manufacturers similarly claimed that the chrome-plated nut industry was sufficiently market-oriented to permit Commerce to determine FMV based on ME methodologies.[646] In both cases, the Chinese producers did not challenge the designation of China's economy as an NME from a macroeconomic perspective, but they requested use of the ME methodologies to calculate the FMV of the subject merchandise. Such assertions caused Commerce to seriously consider changing its NME methodologies. However, the applicable antidumping law at the time did not give Commerce any clear interpretation or guidance in applying the law to NMEs in transition. In fact, when enacting the 1988 OTCA, Congress gave no specific statutory instructions on how to determine when the exporting country's prices were market oriented and sufficiently free from the value distortions caused by central planning.[647] To overcome this obstacle, according to Commerce, its task was to determine dispositive congressional intent by projecting (as well as it could) how Congress would have dealt with this particular situation if Congress had spoken.[648] Consequently, in the Prelim Fans, Commerce developed a "mix and match" methodology that was more flexible than the antidumping law required.

In the preliminary investigation stage, in consideration of the Chinese producers' claims, Commerce started to examine how any industrial sector or commercial entity in an NME could be said to be operating on market principles such

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[644] Oscillating Fans and Ceiling Fans from the People's Republic of China; Preliminary Determinations of Sales at Less Than Fair Value, 56 FR 25664 (June 5, 1991) [hereinafter Fans AD Prelim] (The Chinese producers asked Commerce to use their own prices or costs of production to calculate the FMV).
[645] Chrome-Plated Lug Nuts from the People's Republic of China; Initiation of Antidumping Duty Investigation, 55 FR 49548 (November 29, 1990).
[646] Chrome-plated Lug Nuts from the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value, 56 FR 15857 (April 18, 1991) [hereinafter Lug Nuts AD Prelim].
[647] *See* Meszaros (1996), *supra* note 580, at 463-473.
[648] *Id.* (citing *Georgetown Steel Corporation v. United States*, 801 F.2d 1308, 1314 (Fed. Cir. 1986)).

that costs and prices were acceptable, reliable measures of FMV.[649] After its examination, Commerce concluded that absent a showing that all costs and prices were market-oriented, FMV in an NME must be based on the FOP methodology, using appropriate surrogate values to provide prices for factor input costs that were not market-determined.[650] That means in order to be eligible for the complete ME methodology (*i.e.*, using market values instead of surrogate values for factors of production in FMV calculations), it is required that 100 percent of the producers' costs and prices for all inputs be purchased at market-determined prices.[651] Nevertheless, Commerce provided that if a company in an NME is able to establish that inputs are purchased at market-oriented prices or from market economies, such prices are accepted for the purpose of an FOP analysis.[652] In addition, Commerce promised that if the cost of inputs sourced in China, including materials, labor, water, electricity, and rent, are valued on the basis of market principles, Commerce may substitute those market values for surrogate country values in individual firm calculations.[653]

In Lug Nuts AD Prelim, which was issued before Fans AD Prelim, in response to the Chinese producers' request to use the ME methodologies to calculate the FMV, Commerce stated that it did not have sufficient information to determine whether the steel and chemical producers operated in a market environment.[654] Thus, Commerce did not base the FMV on input prices in China, but based on the surrogate values from Pakistan as n surrogate ME country.[655] Consequently, the dumping margin was preliminarily calculated at 66.49%.[656] Thereafter, based on analysis drawn from the Fans AD Prelim, Commerce dropped the dumping margin from 66.49% to 4.24%.[657] This huge drop is resulted from Commerce's flexibility in adoption of the "mix and

[649] Fans AD Prelim, *supra* note 654, at 25667.
[650] *Id.*
[651] *Id.*
[652] *Id.*
[653] *Id.*
[654] Lug Nuts AD Prelim, *supra* note 647, at 15859.
[655] *Id. at* 15859-60.
[656] *Id.*
[657] Chrome-Plated Lug Nuts from the People's Republic of China; Final Determination of Sales at Less Than Fair Value, 56 FR 46153 (September 10, 1991) [hereinafter Lug Nuts AD Final].

match" or "bubbles of capitalism" approach.[658] Initially, Commerce acknowledged the existence of a "bubble of capitalism" in an otherwise NME country, but it expressed skepticism whether such a "bubble of capitalism" actually does or is likely to exist.[659] Commerce explained that to find a "bubble of capitalism" and to treat the NME producer as if it were an ME producer despite the fact that the economy in which it operates is nonmarket, it must be persuaded that all prices and costs faced by the individual producer are market determined.[660] This means the "bubbles of capitalism" test is passed only where the prices or costs of 100% inputs into the production of the subject merchandise are market-driven. In such a situation, Commerce is willing to use the reported NME input prices rather than surrogate ME values in determining the FMV of the subject merchandise.[661] However, this test does not work in practice because even if almost all of the factors of production were found to be market driven, it is impossible to find an industry *completely* insulated from nonmarket influences.[662] Although Commerce could not find that all input costs were market-driven, it recognized that "for certain inputs into the production process, market forces may be at work."[663] In those situations where inputs are imported from ME suppliers and where locally sourced goods are based on market forces, the prices of such inputs are actually market-driven prices and they reflect the producer's actual experience.[664] Therefore, Commerce believed that "it is appropriate to use those prices in lieu of values of a surrogate, market-economy producer."[665] Eventually, although Commerce declined to

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[658] Commerce used the term "bubbles of capitalism" in its study of China's new market orientation in 1989. *See* U.S. Department of Commerce, Study of China's New Market Orientation and U.S. Trade Laws (1989) (cited by Bello and Holmer (1992), at 693 n.143).
[659] Lug Nuts AD Final, *supra* note 658. *See* Wang (1996), supra note 47, at 644 (1996).
[660] Lug Nuts AD Final, *supra* note 658, at 46154-55.
[661] *See* Meszaros (1996), *supra* note 580, at 474 (citing David W. Richardson & Robert E. Nielsen, *Recent Developments in the Treatment of Nonmarket Economies Under the AD/CVD Laws, in THE COMMERCE DEPARTMENT SPEAKS 1995*, PLI CORP. L. & PROC. Course Handbook Series No. B-789).
[662] Luke P. Bellocchi, *The Effects of and Trends in Executive Policy and Court of International Trade (CIT) Decisions Concerning Antidumping and the Nonmarket Economy (NME) of the People's Republic of China*, 10 N.Y. INT'L L. REV. 177, 208 (1997).
[663] Lug Nuts AD Final, *supra* note 658, at 46155.
[664] *Id.*
[665] *Id.*

find that the entire industry was 100% market oriented for using the complete ME methodology, it started to realize that this "all-or-nothing" test was not appropriate for evaluating the market orientations for reforming NME producers.[666] Then, it added a second "mini-bubble" test (also known as a "mix and match" approach), under which the factor inputs sourced within an NME were considered market-driven if they were shown to be free of direct or overt central government influence.[667] Using this new methodology, Commerce found that the prices paid for steel and chemicals used as factor inputs in the production of chrome-plated lug nuts were market-driven.[668] Consequently, Commerce decided to include the actual prices of these market-based inputs in the FOP analysis.[669] The intent of Commerce was to enhance "accuracy, fairness, and predictability" in the circumstances where an NME producer's factor input prices are market determined.[670] At the time of this landmark decision, Lug Nuts appeared to be the only case where the factor inputs sourced within an NME country could be used to calculate the FMV under the FOP approach.[671]

Following the Lug Nuts AD Final, a month later Commerce made its final determination on the Fans case.[672] However, the respondents in this case did not provide sufficient information to prove that the prices of locally sourced inputs were market-driven.[673] Therefore, in its FMV calculation of such factor inputs, Commerce valued each individual producer's reported FOP using surrogate values from Pakistan (as the most comparable surrogate) and India (as an acceptable alternative).[674] With respect to the factor inputs that were purchased from ME countries such as Japan, the United States, Hong Kong, and Taiwan, Commerce used these actual market-based

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[666] *See* Meszaros (1996), *supra* note 580, at 476.
[667] *Id.*
[668] Lug Nuts AD Final, *supra* note 658, at 46155.
[669] *Id.*
[670] *Id.*
[671] Lantz (1995), *supra* note 457, at 1040; Bello et al. (1992), *supra* note 477, at 697.
[672] Oscillating Fans and Ceiling Fans from the People's Republic of China; Final Determinations of Sales at Less Than Fair Value, 56 FR 55271 (October 25, 1991) [hereinafter Fans AD Final].
[673] *Id.*
[674] *Id.* at 55273

prices to calculate the FMV.[675] Accordingly, instead of relying solely on surrogate country values from Pakistan and India, by using the "mix and match" methodology, Commerce also based its calculations on prices paid by Chinese manufacturers for those raw materials imported from ME countries.[676] As a result, the final dumping margins were calculated at zero to 0.79 percent for oscillating fans and zero to 2.47 percent for ceiling fans.[677]

Not long after the release of Lug Nuts AD Final, the Lug Nuts petitioner, Consolidated International Automotive, Inc. (Consolidated), initiated a civil action challenging Commerce's "bubbles of capitalism" methodology.[678] The Fans petitioner, Lasko Metal Products, Inc. (Lasko), also appealed the "mix and match" methodology to the CIT.[679] On the other hand, having recognized the possibility of treating an industry as a "bubbles of capitalism," both petitioners also filed countervailing duty petitions.[680] In fact, once Commerce opened the door to determining that the industries of fans and lug nuts are market-oriented industries, the petitioners shifted their position taken in the antidumping proceedings to argue that these industries were market-oriented, and therefore, should be investigated under the CVD law.[681] Unexpectedly, Commerce's initial good faith in adding "accuracy, fairness, and predictability" to the

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[675] *Id.* at 55275.
[676] *Id.* at 55273.
[677] Antidumping Duty Orders and Amendments to Final Determinations of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans from the People's Republic of China, 56 FR 64240 (December 9, 1991).
[678] *Consol. Int'l Auto., Inc. v. United States*, 797 F. Supp. 1007, 1009 (Ct. Int'l Trade 1992 [hereinafter Consolidated v. United States].
[679] *Lasko Metal Prod., Inc. v. United States,* 810 F. Supp. 314 (Ct. Int'l Trade 1992), aff'd, 43 F.3d 1442 (Fed. Cir. 1994) [hereinafter Lasko v. United States].
[680] Initiation of Countervailing Duty Investigations: Oscillating Fans and Ceiling Fans from the People's Republic of China ("PRC"), 56 FR 57616 (November 13, 1991) [hereinafter Fans CVD Initiation]; Initiation of Countervailing Duty Investigation: Chrome-Plated Lug Nuts and Wheel Locks from the People's Republic of China ("PRC"), 57 FR 877 (January 9, 1992) [hereinafter Lug Nuts CVD Initiation]. The petitioners argued that regardless of the nature of the PRC economy, the PRC fans and lug nuts sectors operated on the market principles, so the CVD law is now applicable.
[681] Jeffrey P. Bialos, Randolph W. Tritell, and Martin S. Applebaum, *Trading with Central and Eastern Europe: The Application of the U.S. Unfair Trade Laws to Economies in Transition*, 7-AUT INT'L L. PRACTICUM 69, 73 (1994).

NME methodologies created unintended outcomes that the market-driven industries in an NME in transition are now "potentially vulnerable to attack" under the CVD law.[682]

Facing such a dilemma, on January 4, 1992, the government filed a motion to remand the civil action by Consolidated so that Commerce could reconsider its new methodologies in Final Lug Nuts.[683] In its reexamination of the "bubbles of capitalism" and "mix and match" methodologies, Commerce admitted that its prior "scope of inquiry was too narrow" and that "the absence of explicit government involvement in these transactions is not sufficient to warrant the conclusion that the prices for these inputs are market-driven."[684] Instead of focusing on individual transaction prices, Commerce turned to a broader examination of economic conditions in each industry that supplied raw materials as inputs into the production of lug nuts.[685] This method of analysis was called "market-oriented industry" (MOI) test, which had been developed during the antidumping proceeding of the Sulfanilic Acid case.[686]

Two days after the publication of Prelim Sulfanilic Acid, on March 20, 1992, Commerce filed the remand determination with the CIT.[687] By using the new MOI test, Commerce reversed its position and declined to apply the "mix and match" methodology for raw materials locally sourced within an NME in the Lug Nuts AD Final. Accordingly, Commerce found that the prices paid for a significant input (*i.e.*, steel) were not market-determined prices because of the extent of state-required production of that input.[688] Consequently, Commerce revalued the steel and chemical inputs used in the production of the subject merchandise based on surrogate values in

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[682] *Id.*
[683] Consolidated v. United States, *supra* note 679, at 1009.
[684] Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts from the People's Republic of China; 57 FR 15052 (April 24, 1992) [hereinafter Amended Lug Nuts AD Final].
[685] *Id.*
[686] Preliminary Determination of Sales at Less Than Fair Value: Sulfanilic Acid from the People's Republic of China, 57 FR 9409 (March 18, 1992) [hereinafter Sulfanilic Acid Prelim].
[687] Consolidated v. United States, *supra* note 679, at 1009.
[688] Amended Lug Nuts AD Final, *supra* note 685, at 15054. Commerce stated that since steel prices in China are not market-driven, it was not necessary to reach a similar determination with respect to any other significant inputs.

Pakistan.[689] With this method of analysis, the antidumping duty rate was substantially increased from 4.24% in the Lug Nuts AD Final to 42.42%.[690]

4.3.2.4.1.2. "Market-Oriented Industry" Approach

The "mix and match" approach had been tested for a couple of months and then it was abandoned and replaced by the "market-oriented industry" ("MOI") approach. In *Sulfanilic Acid*, despite the fact that China was still treated as an NME, the Chinese respondents claimed that certain inputs in the production of sulfanilic acid were market driven.[691] This case was a chance for Commerce to reconsider the appropriateness of the specific approach established in Lug Nuts and Fans antidumping cases. As a result of this reconsideration, Commerce developed stricter criteria for determining whether an NME producer operates within an MOI in the NME. Specifically, to be qualified as an MOI, the following three criteria must be met:

(1) There must be virtually no government involvement in setting prices.

(2) The industry should be characterized by private or collective ownership and a lack of substantial state ownership.

(3) Market-determined prices must be paid for all significant inputs (whether material or non-material).[692]

Under this strict MOI test, if any of the above criteria are not met, the producers of the subject merchandise will be treated as NME producers, and then the FMV will be calculated by using prices and costs from a surrogate country.[693] In other words, if this MOI test is failed, Commerce does not accept to evaluate whether individual inputs used by the producer were sourced from within the NME based on the market

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[689] *Id.*
[690] *Id.* at 15058. Before the publication of the Amended Lug Nuts AD Final, since the Department of Commerce had submitted its remand determination describing the MOI test and its revised calculation, the CIT dismissed Consolidated's appeal on April 8, 1992. *See Consolidated v. United States*, *supra* note 679, at 1009.
[691] Sulfanilic Acid Prelim, *supra* note 687.
[692] *Id.* at 9411.
[693] *Id.*

principles. In essence, it is unlikely that 100% of the inputs sourced in an NME are entirely driven by the market principles, unless all inputs used for the production of the subject merchandise are imported from ME countries.[694] In Sulfanilic Acid Prelim, Commerce determined that there was insufficient "documentary evidence" to overcome the presumption that the inputs used by the sulfanilic acid producers that were sourced in China had not been purchased at market prices.[695] Therefore, Commerce determined the FMV on the basis of factors of production utilized in producing sulfanilic acid, as valued in a surrogate country.[696] However, the Chinese producers in this investigation claimed that all of the manufacturers' material and non-material inputs used to produce sulfanilic acid were purchased at market-driven prices.[697] In Sulfanilic Acid Final, Commerce found that aniline, which is a significant material input used to produce sulfanilic acid, is subject to state-required production.[698] At the verification stage, Commerce requested but did not receive quantifiable data from the Chinese government to evaluate the extent of state-required production of the aniline input.[699] Therefore, Commerce did not have sufficient information to evaluate whether or not aniline prices were market-determined in China.[700] Consequently, applying the strict MOI test, Commerce concluded that once a significant material input may not be purchased at market-determined prices, it does not need to consider (1) whether the prices of other material or non-material inputs are market-determined; (2) whether there is state-required production of the subject merchandise; or (3) whether there is substantial state ownership in the sulfanilic acid industry.[701] When Commerce used this "all-or-nothing" approach to replace the "mix and match" approach

[694] Wang (1996), *supra* note 47, at 645.
[695] Sulfanilic Acid Prelim, *supra* note 687.
[696] *Id.* at 9412.
[697] Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from the People's Republic of China, 57 FR 29705 (July 6, 1992) [hereinafter Sulfanilic Acid Final].
[698] *Id.* at 29707.
[699] *Id.*
[700] *Id.*
[701] *Id.*

previously used in the Fans and Lug Nut cases, it was unlikely that any producers within an NME would pass the 100% MOI test.

This new MOIT test has been also used as a basis for determining whether it could apply CVD law to the Chinese producers in Fans CVD case. This CVD case will be discussed in detail in the next section.

4.3.2.4.2. Testing of MOI Approach in the Fans CVD Case

As discussed above, the likely existence of a "bubble of capitalism" within the NME had seeded a glimmer of hope in the United States industries to overturn Commerce's longstanding position of not applying the CVD law to NME countries following the Georgetown Steel case. In the CVD petition filed by the United States industry producing oscillating fans and ceiling fans (collectively, "Fans") on October 17, 1991, the Petitioner alleged that manufacturers, producers or exporters (collectively, "Respondents") in China received bounties or grants within the meaning of section 303 of the CVD law.[702] The Petitioner further alleged that regardless of China's NME status, the Fans industry operated substantially pursuant to market principles and that the CVD law should apply.[703] Therefore, Commerce was required to determine (1) whether the Fans industry does, in fact, operate in a market setting; and (2) if so, whether the CVD law could be applied to that industry.[704]

It was the first time since the Georgetown Steel case in 1986 that the applicability of the CVD law was raised in a proceeding. At this time, however, the issue in consideration was to determine whether the CVD law could be applied to market-oriented industries within an NME country. In other words, Commerce needed to decide whether an individual industry could actually operate in the marketplace free from government control and whether all of the producers' prices and costs of production in that industry were based purely on principles of supply and demand

[702] Fans CVD Initiation, *supra* note 681.
[703] *Id.*
[704] *Id.*

determined by the market. That mission required Commerce to adopt the MOI test that was developed in the Sulfanilic Acid antidumping case. In its CVD preliminary investigation, Commerce reaffirmed that, by adopting the MOI test, if the Fans industry in China was found to be an MOI, the prices and costs to the Chinese producers would be considered accurate measures of value.[705] In particular, Commerce stated that the concerns of Georgetown Steel case did not arise if NME prices and costs were market-determined and not significantly influenced or distorted by central government planning.[706] In such a situation, Commerce is free to apply the CVD law to an MOI located within an NME.[707]

After using the MOI test, Commerce preliminarily concluded that (1) the price of at least one significant input (*i.e.*, steel) was not market-determined, (2) the record did not support a finding that the prices of other significant inputs were market-determined, and (3) the record did not support a finding that market-determined prices were paid for all but an insignificant proportion of all the inputs accounting for the total value of the subject merchandise.[708] Therefore, Commerce preliminarily determined that the CVD law could not be applied to the Chinese Fans producers.[709] Finally, after verification of the data and records submitted by the Respondents, Commerce determined that the Fans industry in China does not meet the third criterion of the MOI test[710] (*i.e.*, market-determined prices must be paid for <u>all</u> significant material and non-material inputs).[711] Since the Respondents failed this "all-or-nothing" test, it was concluded that the Fans industry was not an MOI; as a result, the CVD law could not be applied to the Fans industry.[712] In a similar Lug Nuts CVD case, when using the MOI test to examine the lug nuts industry in China, Commerce also found that a

[705] Preliminary Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans from the People's Republic of China, 57 FR 10011 (March 23, 1992) [hereinafter Fans CVD Prelim].
[706] *Id.* at 10012.
[707] *Id.*
[708] *Id.* at 10013.
[709] *Id.*
[710] Prelim Sulfanilic Acid, *supra* note 687, at 9411 (listing the three-criteria in the MOIT test).
[711] Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans from the People's Republic of China, 57 FR 24018 (June 5, 1992) [hereinafter Fans CVD Final].
[712] *Id.* at 24019.

significant input (*i.e.*, steel) was not purchased at a market-determined price because of the extent of state-required production of that input.[713] In that case, the third of the MOI criteria was also not satisfied; and consequently, consistent with its redetermination in the Amended Lug Nuts AD Final, Commerce rescinded the Lug Nuts CVD Initiation without further investigations.[714]

The MOI approach, which is much more restrictive than the "bubbles of capitalism" approach, has been criticized by many commentators. Some commentators opposed the MOI approach because under this strict test, especially the third criterion, almost no MOI could be found within an NME country.[715] Some others criticized that the requirement that "significantly all" inputs must be purchased in market-determined prices is ambiguous and would lead to arbitrary results.[716] Indeed, the term "significant," which is not clearly defined, has caused considerable uncertainty in the application of the MOI test.[717] More importantly, this MOI approach could allow many industries that are partly market-oriented in NME countries to avoid potential CVD investigations, while retaining the benefits of injury determinations under the United States antidumping law.[718] Therefore, accepting the MOI approach has been a double-edged sword for manufacturers and exporters from NME countries.[719] However, the MOI approach was used for testing only a few CVD and AD cases in the early 1990s. Since then, there has been no designation of an MOI within the NME under this strict approach.

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[713] Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks from the People's Republic of China, 57 FR 10459 (March 26, 1992).
[714] *Id.*
[715] Lantz (1995), *supra* note 457, at 1045 (1995) (citing Lawrence J. Bogard & Linda C. Menghetti, *The Treatment of Non-Market Economies Under U.S. Antidumping and Countervailing Duty Law: A Petitioner's Perspective, in Commerce Speaks* 1992: Developments in Import Administration; Export and Investment Abroad, at 6-7 (PLI Corp. Law and Practice Course Handbook Series No. 789, 1992); James K. Kearney & Jim Wang, *Commerce's Market-Oriented Industry Methodology for Nonmarket Economies in Antidumping Investigations: The Responding Party's Perspective, in The Commerce Department Speaks* 1992: Developments in Import Administration; Export and Investment Abroad, at 255, 266-67 (PLI Corp. Law & Practice Handbook Series No. 789, 1992)).
[716] *Id.*
[717] Bialos et al. (1994), *supra* note 682, at 73.
[718] Lantz (1995), *supra* note 457, at 1045.
[719] Bialos et al. (1994), *supra* note 682, at 74.

4.3.2.4.3. Application of CVD Law to Nonmarket Economies

For over twenty years, Commerce has held its belief from 1984,[720] later supported by the ruling of Georgetown Steel in 1986,[721] that the CVD law could not be applied to NME countries because it could not identify and measure the effects of government subsidies within an NME. Although Commerce had attempted to apply the CVD law to market-oriented industries within an NME in 1991, the NME countries were still untouched under the CVD law until 2006. It was a landmark moment when, on November 20, 2006, Commerce decided to initiate a CVD investigation on imports of coated free sheet paper from China ("CFS Paper CVD").[722] This CVD investigation was initiated in parallel to an initiation of AD investigation against the same CFS paper product on the same day.[723] To understand Commerce's change of policy in application of the CVD law, this section focuses on analyzing the CVD case only. In its CVD petition, NewPage Corporation ("Petitioner") argued that there was no statutory restriction to applying countervailing duties to imports from China or any other NME country.[724] The Petitioner asserted that the court of Georgetown Steel deferred to Commerce's discretion that it did not have the authority to conduct a CVD investigation, but the court's ruling did not affirm the notion that the statute prohibits Commerce from applying countervailing duties to NME countries.[725] More importantly, the Petitioner argued that the modern economy of China was entirely

[720] *See* Czechoslovakia Final Determination and Poland Final Determination, *supra* note 486.
[721] *Georgetown Steel Corp. v. United States* (1986), *supra* note 523.
[722] Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper from the People's Republic of China, Indonesia, and the Republic of Korea, 71 FR 68546 (November 27, 2006) [hereinafter CFS Paper CVD Initiation].
[723] Initiation of Antidumping Duty Investigations: Coated Free Sheet Paper from Indonesia, the People's Republic of China, and the Republic of Korea, 71 FR 68537 (November 27, 2006) [hereinafter CFS Paper AD Initiation].
[724] CFS Paper CVD Initiation, *supra* note 723.
[725] *Id.* The Petitioner also argued that the Georgetown Steel case was not applicable because the CVD law (section 303 of the Tariff Act of 1930) involved in the CAFC's decision has since been repealed and the statute has been amended to provide an explicit definition of a subsidy. (*See* 19 U.S.C. § 1677 (5)(B) for definition of subsidy.)

different from the Soviet-era economies investigated in Georgetown Steel, and therefore, Commerce should be able to identify and measure the subsidies provided by Chinese government.[726]

Having recognized the complex legal and policy issues involved in this CFS Paper CVD case, Commerce requested public comment on the issue of whether the CVD law should be applied to NMEs.[727] It could be understood that Commerce took a cautious course of action in this proceeding because, if Commerce decided that the CVD law could be applied to NMEs, and if the courts later upheld that decision, this case would serve as an important precedent for more and more CVD petitions filed against China and other NME countries. Commerce was careful because it also realized the significant economic transformations in China. In fact, upon accession to the WTO in late 2001, China made a lot of progress in its economic reforms, and its economy in the 2000s was quite distinguished from those economies involved in the context of Georgetown Steel case. However, from Commerce's point of view, China's economic reforms were insufficient to be completely recognized as a market economy under the United States trade remedy framework. Specifically, in the most recent determination prior to the CFS Paper CVD case, in response to the Chinese respondents' request for reevaluation of China's NME status, Commerce conducted a thorough review of China's economy as a whole to determine whether China was an NME country.[728] Initially, Commerce noted that although China had implemented economic reforms, generally recognized, fundamental reforms in certain areas were still incomplete.[729] In particular, Commerce found the level of government intervention in certain key sectors of China's economy remained significant, as did deeply rooted institutional problems,

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[726] *Id.*

[727] Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment, 71 FR 75507 (December 15, 2006).

[728] Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, in Part: Certain Lined Paper Products from the People's Republic of China, 71 FR 53079 (September 8, 2006).

[729] Shauna Lee-Alaia, et al., Import Administration, Antidumping Investigation No. A-570-901, The People's Republic of China (PRC) Status as a Non-Market Economy (ME) (May 15, 2006); https://enforcement.trade.gov/download/prc-nme-status/prc-nme-status-memo.pdf. [hereinafter May 15th Memorandum].

e.g., with respect to the banking sector, land ownership and property rights, and the rule of law.[730] To consolidate its initial analysis, Commerce conducted a more comprehensive analysis of the six statutory factors that govern NME country designation.[731] Then, Commerce finally affirmed that while China had enacted significant and sustained economic reforms, market forces in China were not yet sufficiently developed to permit the use of prices and costs in China for purposes of the dumping calculation.[732] Therefore, Commerce continued to treat China as an NME in antidumping investigations.

Back to the CFS Paper CVD case, after receiving comments from all interested parties and assessment of the distinguishing features between the Georgetown Steel opinion and China's present-day economy, on March 29, 2007, Commerce released an important memorandum of analysis (known as the Georgetown Memo), providing its legal justification for applying the CVD law to China.[733] On the same day, the United States Court of International Trade also decided to dismiss a lawsuit brought by the Government of China and Chinese paper producers that had sought to enjoin Commerce from conducting its CVD investigation.[734] The CIT held that it could not exercise jurisdiction prior to conclusion of investigation and final CVD determination.[735] In its decision, the CIT stated that:

"Although Plaintiffs allege that 'the CAFC has definitively ruled that the CVD law was not intended to be applied against NMEs,' the Georgetown Steel court did not

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[730] *Id.*

[731] Shauna Lee-Alaia et al., Import Administration, Antidumping Investigation No. A-570-901, Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ("China")- China's status as a non-market economy ("NME") (August 30, 2006); https://enforcement.trade.gov/download/prc-nme-status/prc-lined-paper-memo-08302006.pdf. [hereinafter August 30th Memorandum]. The six statutory factors are stipulated under section 771(18)(B) of the Tariff Act of 1930, as amended by the 1988 OTCA (codified at 19 U.S.C. § 1677(18)(B). *See* Section 4.2 herein, *supra* note 426 (discussing on the six golden factors for determining whether a country is an NME country).

[732] *Id.*

[733] Shauna Lee-Alaia and Lawrence Norton, Import Administration, Investigation No. C-570-907, Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China - Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy (March 29, 2007) [hereinafter Georgetown Memo].

[734] *Gov't of People's Republic of China v. United States*, 483 F. Supp. 2d. 1274 (Ct. Int'l Trade 2007).

[735] *Id.*

go as far as Plaintiffs claim and find that the countervailing duty law is not applicable to NMEs. Rather, the Georgetown Steel court only affirmed Commerce's decision not to apply countervailing duty law to the NMEs in question in that particular case and recognized the continuing 'broad discretion' of the agency to determine whether to apply countervailing duty law to NMEs."

It appeared that the CIT also supported the authority of Commerce to change its policy in administering the CVD law. Such broad discretion is reflected in Commerce's comparative analysis of China's economy at the time and the 'Soviet-style economies of 1980s' illustrated in the Georgetown Steel case. Specifically, Commerce noted that China's economy presented a significantly different picture than the traditional communist economic system of the early 1980s, *i.e.*, the so-called "Soviet-style economies" such as the economies at issue in Georgetown Steel.[736] Commerce stated that the traditional communist economies during the time of Georgetown Steel had no market forces, in which:

> (p)rices are set by central planners. 'Losses' suffered by production and foreign trade enterprises are routinely covered by government transfers. Investment decisions are controlled by the state. Money and credit are allocated by the central planners. The wage bill is set by the government. Access to foreign currency is restricted. Private ownership is limited to consumer goods.[737]

According to Commerce, the then-traditional communist economies were significantly different from China's non-market economy of today.[738] Although China's economy was still riddled with the distortions attendant to the extensive intervention of the government, it was more flexible than the Soviet-style economies

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[736] Georgetown Memo, *supra* note 734, at 4.
[737] *Id.* (citing *Georgetown Steel Corp. v. United States*, 801 F.2d at 1315 (quoting Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19375, 19376 (May 7, 1984))).
[738] Georgetown Memo, *supra* note 734, at 4.

of the period of Georgetown Steel.[739] For instance, regarding wages and prices, Chinese enterprises were free to set wages, and the majority of prices were market-based.[740] Although currency convertibility remains limited to a certain extent, enterprises and citizens in China generally have access to foreign currency for trade purposes (in contrast with the Soviet-style economies).[741] With respect to the obstacles of identifying and measuring "bounties or grants" in Soviet-style economies, the current nature of China's economy does not create such obstacles to applying the CVD law due to significant developments in privatization, foreign trading rights, and diminution of the role of central planners.[742]

By recognition of China's economic developments, Commerce concluded that "it is possible to determine whether the PRC Government has bestowed a benefit upon a Chinese producer and whether any such benefit is specific."[743] In other words, Commerce believed that China's economy had developed to the extent that the effects of its government subsidies could be identified and measured. Hence, based on the conclusion of the Georgetown Memo, Commerce continued its CVD investigation and preliminarily determined that the CVD law could be applied to imports from China.[744] It is important to note that the Georgetown Memo and the CFS Paper Prelim's analysis inquired into the possibility of applying the CVD law to China as an NME, but not into trying to change China's NME status as it had previously been designated for the purposes of the antidumping law. At the final stage of the investigation, Commerce affirmed the application of CVD law to China.[745] Commerce determined that countervailable subsidies had been provided to producers and exporters of CFS paper

[739] *Id.*
[740] *Id.*
[741] *Id.*
[742] *Id.*
[743] *Id.*
[744] Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 FR 17484 (April 9, 2007) [hereinafter CFS Paper Prelim].
[745] Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007) [hereinafter CFS Paper Final].

from China, and then calculated CVD rates ranging from 7.40% to 44.25%.[746] However, the International Trade Commission ultimately concluded that there was no material injury to the United States domestic industry, thus meaning there was no CVD order imposed upon Chinese producers and exporters of CFS paper.[747] Although this case was not successful imposing a CVD order upon the Chinese CFS paper producers and exporters thanks to the ITC's negative determination, it triggered a lot of CVD petitions filed by the United States industries in the following years.

One may observe that Commerce's trade remedy policy toward NMEs such as China is, to some extent, internally contradictory. While Commerce considered the market forces in China exist to the point that subsidies could be identified and measured, it conversely viewed the market forces are insufficient for the prices or costs in China to be used as the basis for dumping margin calculations under the ME methodologies.[748] Commerce, however, has rejected such criticism. It explained that the analysis underlying the question of "whether prices and costs in China can be used for purposes of antidumping law" and the question of "whether it is possible to determine that the government of China has bestowed a countervailable subsidy upon a Chinese producer" are fundamentally different.[749] Regardless of which side is correct, by a parallel using of both antidumping duty and countervailing duty laws against NMEs such as China, it seems that Commerce has attempted to employ all of the strictest possible trade measures to protect United States domestic industries. For that

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[746] *Id.* The countervailable subsidies which were found by Commerce include: a government policy lending program; a "two free/three half" program; reduced income tax rates for FIEs based on location; a loan income tax exemption and reduction program for "productive" FIEs; VAT rebates on purchases of domestically produced equipment; VAT and tariff exemptions on imported equipment; and domestic VAT refunds. *See* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China, Import Administration, Investigation No. C-570-907 (October 17, 2007) [hereinafter CFS Paper Final IDM]; available at https://enforcement.trade.gov/frn/summary/prc/E7-21046-1.pdf.

[747] Notices of International Trade Commission, Investigation Nos. 701-TA-444-446 (Final) and 731-TA-1107-1109 (Final), Coated Free Sheet Paper from China, Indonesia, and Korea, 72 FR 70892 (December 13, 2007). (The ITC determined that no industry in the United States was materially injured or threatened with material injury, and the establishment of an industry in the United States was not materially retarded by reason of imports from China, Indonesia, and Korea of coated free sheet paper.)

[748] Wentong Zheng, *Trade Law's Responses to the Rise of China*, 34 BERKELEY J. INT'L L. 109, 133 (2016).

[749] CFS Paper Final IDM, *supra* note 747.

reason, it is likely that Commerce may continue to use its "broad discretion" in developing new methodologies or even changing its longstanding policy to adapt with the radical changes of economic settings in NME countries. It should be noted that at the time of this policy shift, only eleven countries still had NME status.[750] And the list is unchanged today.[751] Among these NME countries, China has been emerging as the largest trading partner with the United States; Vietnam has gradually increased its significance as a U.S. trading partner. Therefore, it could be argued that Commerce's change of CVD policy was to target China as the largest NME exporter; and, seemingly inevitably, Vietnam then became the second target after China for simultaneous application of antidumping and countervailing duty laws.

4.3.2.5. The Problem of Double Remedies

Since 2007, when Commerce reversed its two-decade interpretation of the U.S. CVD law to apply it to China, more and more CVD petitions have been filed in conjunction with AD petitions against China. It is as if "the floodgates had opened" with Commerce's new policy, to a wave of numerous CVD petitions filed by the U.S. domestic industries.[752] In fact, in the four years 2008 through 2011, there were 23 CVD orders imposed upon goods from China and one CVD order upon Vietnam.[753] In nearly

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[750] These countries are Armenia, Azerbaijan, Belarus, China, Georgia, Kyrgyz Republic, Moldova, Tajikistan, Uzbekistan, and Vietnam. *See* Vivian C. Jones, Trade Remedy Legislation: Applying Countervailing Action to Nonmarket Economy Countries, CRS Report for Congress, updated April 19, 2007. Many former Soviet Union and Eastern European countries were classified as market economy countries such as Latvia (2001), Kazakhstan (2002), Russia (2002), Lithuania (2003), Estonia (2003), Poland (1993), Slovakia (1999), Czech Republic (2000), Hungary (2000), Romania (2003), and Ukraine (2006). *See* GAO, Report to Congressional Committees, U.S.-CHINA TRADE: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties, June 2005 [hereinafter 2015 GAO Report]. *See* ITA, Department of Commerce's Notices: Final Results of Inquiry into Ukraine's Status as a Non-Market Economy Country., 71 FR 9520 (February 24, 2006).

[751] U.S. Antidumping & Countervailing Duties, Information and Resources for U.S. Trade Remedy Laws and Ongoing Proceedings, COUNTRIES CURRENTLY DESIGNATED BY COMMERCE AS NON-MARKET ECONOMY COUNTRIES, available at https://www.trade.gov/nme-countries-list.

[752] James P. Durling, *Encountering Rocky Shoals: Application of the CVD Law to China*, 2010 WL 956090, *4 (2010).

[753] Jeanne J. Grimmett, *U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview*, Congressional Research Service (March 9, 2012), at 12 (citing U.S. Int'l Trade Comm'n, Antidumping and Countervailing Duty Orders in Place as of October 11, 2011, by Date of Order, at

all of these cases, the U.S. petitioners simultaneously filed AD and CVD petitions, seeking orders to impose both antidumping duties and countervailing duties on the same imports. Thus, in these cases Commerce regularly initiated parallel AD and CVD investigations; consequently, in every case, a CVD order was usually issued in conjunction with an AD order on the same alleged product.[754] Such actions have marked a dramatic change in the U.S. policy to applying double trade remedies to China and Vietnam.

In reality, the concurrent imposition of antidumping duties (ADDs) and countervailing duties (CVDs) over the same alleged product from an NME country inevitably causes a problem of duplicative remedy or "double remedies" (sometimes referred to as "double counting"). "Double remedy" refers to a circumstance where the simultaneous imposition of ADDs and CVDs results in the same instance of subsidization being offset twice.[755] In theory, the same injury or harm should be subject to one remedy; however, the use of double remedies to compensate for the same injury caused to the U.S. domestic industry is likely unfair. This unfair policy that is used to recover injuries from unfair trade practice seems to be a "tit for tat" to combat the dumping and subsidization from NME countries.

Needless to say, Commerce's double-remedy practice has been controversial and has been claimed to be potentially inconsistent with WTO rules.[756] Indeed, in *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China ("OTR Tires")*,[757] the Government of China ("GOC") fiercely opposed and challenged Commerce's simultaneous application of CVD law and the NME methodology in its

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http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/active/index.htm (click on "AD/CVD Orders") [hereinafter, List of Current U.S. AD/CVD Orders]; Multilayered Wood Flooring From the People's Republic of China: Countervailing Duty Order, 76 Federal Register 76693 (December 8, 2011)).

[754] *Id.*

[755] Thomas J. Prusa, *NMEs and the Double Remedy Problem*, 16 WORLD TRADE REVIEW 619, 622 (2017).

[756] *Id.*

[757] Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 FR 40480 (July 15, 2008) [hereinafter OTR Tires CVD Final].

parallel antidumping investigation against the Chinese producers. In this case, the GOC argued that Commerce's reliance on normal values sourced from subsidy-free surrogate values to calculate NME dumping margins produces an unjust antidumping price comparison that penalizes Chinese producers twice for the same allegedly unfair trade practice (*i.e.*, the first time when the CVDs are applied to compensate for the alleged subsidy, and then the second time when the allegedly subsidized export price is compared with the non-subsidized constructed normal value).[758] The GOC and Chinese respondents further argued that the double counting occurs when ADDs and CVDs are concurrently applied to NME producers because Commerce simultaneously measures the alleged subsidy benefit (relying on ME benchmarks) and dumping (using its FOP analysis based on surrogate prices) for many of the same inputs (*e.g.*, interest expenses, rubber, electricity, water).[759] Then, the GOC urged Commerce to take measures to prevent double remedies for a single alleged unfair trade practice, either by ending its CVD investigation or by adjusting its AD calculations in the parallel AD investigation to account for both the amount of any export subsidies and any domestic subsidies.[760] In response to such arguments, Commerce stated that there was no statutory authority to allow it to terminate the CVD investigation to avoid double counting, and that, if Commerce finds any possible adjustment to avoid a double remedy, it would do so in the context of an antidumping investigation.[761] In the parallel OTR Tires AD case,[762] the GOC and other respondents argued that Commerce must adjust any calculated AD rate by the amount of both export and domestic subsidies determined in the companion CVD investigation.[763] In particular, all respondents argued that the NME AD

[758] Stephen J. Claeys, Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain New Pneumatic Off-the-Road Tires (OTR Tires) from the People's Republic of China (July 7, 2008); available at https://enforcement.trade.gov/frn/summary/prc/E8-16154-1.pdf. [hereinafter OTR Tires CVD Final IDM], at comment A.3.
[759] *Id.*
[760] *Id.*
[761] *Id.*
[762] Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008) [hereinafter OTR Tires AD Final].
[763] Stephen J. Claeys, Issues and Decision Memorandum for the Antidumping Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China (July 7, 2008); available at

methodology does not use actual prices or costs from the NME country, but rather uses subsidy-free data from a surrogate ME country that corrects the market-distorting behavior.[764] Accordingly, the respondents concluded that when subsidy allegations are addressed in corresponding CVD investigations, the result is correction of the market-distorting behavior in both trade remedies (*i.e.*, double remedies).[765] For example, the Chinese respondents showed the existence of double remedies as to the rubber input in these AD and CVD investigations.[766] The Chinese producers argued that the same unfair advantage (the ability to purchase rubber at low prices) is directly addressed in both the AD (as a raw material cost) and the CVD investigations (through application of a world benchmark price).[767] Then, the respondents further argued that by countervailing the subsidies in the CVD investigation (where Commerce found that rubber was subsidized) but by also using a surrogate value for rubber (thereby eliminating the effect of subsidization) in the AD investigation, Commerce is unfairly penalizing the Chinese producers in NME investigations twice.[768] More importantly, the Chinese respondents also argued that U.S. law and the WTO rules prohibit the imposition of two duties for the same unfair trade practice.[769] Actually, both WTO rules and U.S. laws require adjustments in combined duty rates to avoid double counting of export subsidies. Article VI:5 of the GATT 1947 provides that "[n]o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both AD and CVD duties to compensate for the same situation of dumping or export subsidization."[770] This provision, however, is not clear as to

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https://enforcement.trade.gov/frn/summary/prc/E8-16156-1.pdf. [hereinafter OTR Tires AD Final IDM], at comment 2.

[764] *Id.*

[765] *Id.*

[766] *Id.*

[767] *Id.*

[768] *Id.*

[769] *Id.*

[770] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

whether a domestic subsidy can be double counted.[771] The U.S. law echoes Article VI:5 by requiring adjustments in ADDs in the event that CVDs are applied simultaneously to countervail export subsidies on the same products.[772] The reason for this adjustment is that export subsidies are presumed to lower the export price of the subject merchandise, *pro rata,* increasing dumping margins correspondingly. This requirement, however, is limited to offsetting export subsidies rather than domestic subsidies. Hence, Commerce found that silence in the provision "about the plainly related issue of CVDs to offset domestic subsidies, is not complete silence - it implies that no adjustment is appropriate."[773] In response to the Chinese respondents' legality claims, Commerce concluded that, "absent a statutory directive for an adjustment and underlying assumption similar to that regarding CVDs imposed to offset export subsidies, or evidence that domestic subsidies have lowered U.S. prices in a given case, any adjustment for an assumed or undetermined effect would be inappropriate."[774] As a result, Commerce declined to make any adjustments to avoid the double counting as claimed by the Chinese producers in the OTR Tires AD case. Consequently, Starbright, who was the main respondent in OTR Tires, was subject to an AD rate of 29.93%[775] and a CVD rate of 14%.[776] With a combined cash deposit rate of 44%, it is unlikely that Starbright could continue to export to the U.S. market. Undoubtedly, Commerce's

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[771] Longyue Zhao & Yan Wangr, *Trade Remedies and Non-Market Economies: Economic Implications of the First U.S. Countervailing Duty Case on China* 12 (World Bank, Policy Research Working Paper No. 4560, 2008), at 34.

[772] 19 U.S.C. § 1677a(c)(1)(C). This provision requires an increase in the export price in the amount of any CVD when calculating ADDs, the resulting effect being a decrease in ADDs, with the intention of offsetting any export subsidy, though there is no mention of an intention to offset domestic subsidies. *See* Christopher Blake McDaniel, *Sailing the Seas of Protectionism: The Simultaneous Application of Antidumping and Countervailing Duties to Nonmarket Economies - An Affront to Domestic and International Laws*, 38 GA. J. INT'L & COMP. L. 741, 764 (2010); *See also* GAO Report on U.S.-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties (2005), at 27.

[773] OTR Tires AD Final IDM, *supra* note 764, at 14.

[774] *Id.* at 15-16.

[775] Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 73 FR 51624 (September 4, 2008). Starbright's rate, which was previously calculated at 19.15%, was amended and increased to 29.93% due to correction for ministerial errors. *See* OTR Tires AD Final, *supra* note 763.

[776] OTR Tires CVD Final, *supra* note 758.

rejection of the double counting argument has opened a series of battles between China and the United States at the legal battlefields of the U.S. courts and at WTO's dispute settlement body.

4.3.2.6. First Round of Legal Battles at U.S. Courts and WTO's Dispute Settlement Body

4.3.2.6.1. Legal Battles at U.S. Courts

GPX I: On September 9, 2008, GPX International Tire Corporation ("GPX"), a domestic importer of OTR tires that wholly owns Chinese producer Starbright, filed an action in the U.S. Court of International Trade ("CIT") to contest Commerce's affirmative AD and CVD determinations and ITC's injury determination.[777] GPX also sought for immediate relief from the 44% cash deposit rate, but this motion was denied, on grounds of lack of irreparable harm attributable to the CVD determination.[778] Then, GPX moved for reconsideration or rehearing by the CIT for a temporary restraining order and preliminary injunction, alleging that collection of full AD and CVD deposits would cause irreparable harm, but unfortunately this second attempt was again denied on December 30, 2008.[779] On January 13, 2009, the Government of China moved to intervene in the litigation, but its motion was denied due to untimely submission without any good cause.[780] On January 20, 2009, the CIT consolidated all actions challenging the final AD and CVD determinations and moved forward for judgment.[781] This consolidated decision is hereinafter referred to as GPX I. In GPX I, the two main issues which were challenged by GPX were (i) the applicability of CVD law to China as an NME and (ii) the double counting issue. First, GPX argued that throughout the legislative history of the U.S. trade laws, Congress did not allow application of the

[777] *GPX Int'l Tire Corp. v. United States*, 587 F. Supp. 2d 1278, 32 C.I.T. 1183 (November 12, 2008).
[778] *Id.*
[779] *GPX Int'l Tire Corp. v. United States*, 593 F. Supp. 2d 1389, 32 C.I.T. 1516 (December 30, 2008).
[780] *GPX Int'l Tire Corp. v. United States*, 2009 WL 362136, 33 C.I.T. 114 (February 12, 2009).
[781] *GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 33 C.I.T. 1368 (September 18, 2009) [hereinafter GPX I].

CVD law to NMEs because of its ambiguity; on the other hand, Congress intended that the AD law would be the sole remedy to combat unfair trade practices by NMEs.[782] Second, with respect to the double counting, GPX argued that the concurrent imposition of CVDs and ADDs using the NME methodology results in a double counting of duties, as it "punishes Chinese companies twice for the same allegedly 'unfair' trading practices."[783] The CIT reasoned that Commerce has been granted broad discretion in determining the existence of a subsidy under the CVD law.[784] Therefore, the CIT ruled that Commerce had the authority to apply the CVD law to products from an NME-designated country.[785] The CIT, however, noted that the CVD and NME AD laws are unclear as to how Commerce is to account for the overlap between the statutes when imposing both CVD and AD duties on goods from an NME country.[786] Then, the CIT provided the important insight that "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."[787] Therefore, the CIT remanded the case for Commerce to either forego the imposition of CVDs on the goods at issue; or if Commerce "is to apply CVD remedies where it also utilizes NME AD methodology," it must "adopt additional policies and procedures for its NME AD and CVD methodologies to account for the imposition of the CVD law to products from an NME country and avoid to the extent possible double counting of duties."[788]

On April 26, 2010, in response to the CIT's remand order, Commerce determined to continue to impose CVD remedies on imports of OTR tires, but it

[782] *Id.* at 1374.
[783] *Id.* at 1376.
[784] *Id.* at 1374.
[785] *Id.*
[786] *Id.* at 1375.
[787] *Id.* at 1379.
[788] *Id.* at 1369.

proposed to deduct the amount of the CVD cash deposit rate applied on OTR tires from the AD cash deposit amount in order to avoid the double counting of duties.[789]

To come to this conclusion, Commerce explained that it had evaluated three procedural options to avoid the potential double remedy that the CIT found to exist: (1) do not apply the CVD law to GPX/Starbright's exports; (2) treat either Starbright, in particular, or China, in general, under the ME AD methodology; or (3) offset GPX/Starbright's CVDs against GPX's AD cash deposit rate.[790] In the first two options, according to Commerce, the potential for a double remedy would be eliminated because it would not be concurrently applying the NME AD methodology and the CVD law.[791] In the third option, offsetting the two remedies would prevent the two remedies from overlapping in the slightest degree.[792] Commerce finally selected the third option because it believed that this offset methodology is unobjectionable and would create less confusion than the first two options.[793] Commerce stated that this option complies with the CIT's order either "to forego the imposition of CVDs" or "to adapt its NME AD and CVD methodologies to account for the imposition of CVD remedies," because offsetting the CVDs against ADDs had the same effect as not applying CVD law to Chinese producers' exports.[794]

GPX II: On review of Commerce's Remand Results, which is, hereinafter referred to as, GPX II, the CIT noted that by using the offset methodology, the combination of the CVD margin and the NME AD cash deposit rate would always equal the unaltered NME AD margin.[795] The CIT pointed out that it would be unnecessary to conduct both CVD and AD investigations when Commerce could

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[789] Department of Commerce, Final Results of Redetermination Pursuant to Remand, *GPX Int'l Tire Corp. v. United States*, Consol. Court No. 08-00285 Slip Op. 09-103 (September 18, 2009), available at https://enforcement.trade.gov/remands/09-103.pdf [hereinafter Remand Results].
[790] *Id.* at 8.
[791] *Id.*
[792] *Id.*
[793] *Id.*
[794] *Id.* at 9-10.
[795] *GPX Int'l Tire Corp. v. United States*, 34 C.I.T. 945, 951 (Aug. 4, 2010) [hereinafter GPX II].

obtain the same result by merely conducting an AD investigation.[796] The CIT also noted that the offset methodology used by Commerce was inconsistent with 19 U.S.C. § 1677a, which lists the specific offsets to export price and constructed export price that are permissible.[797] In summary, the CIT held that the offset methodology does not comply with the statute and is also unreasonable due to the expense associated with conducting an additional investigation that is essentially useless.[798] As a result, the CIT ruled that Commerce failed to comply with the first remand instructions; therefore, Commerce had to forego the imposition of CVD law on the NME products.[799] The CIT came to this decision because it believed that Commerce's actions on remand "clearly demonstrate its inability, at this time, to use improved methodologies to determine whether, and to what degree double counting occurs when NME antidumping remedies are imposed on the same good."[800] Although Commerce disagreed with this second remand, it complied under protest and made it clear that it would appeal the CIT's decision.[801]

GPX III: The U.S. government and domestic manufacturers favoring the imposition of CVDs appealed the CIT's decision to the U.S. Court of Appeals for the Federal Circuit ("CAFC").[802] This dispute is referred to as GPX III. According to the CAFC, the CIT's decision to bar the imposition of CVDs due to the high likelihood of double counting was problematic because of the two reasons: (i) the extent to which the statute may prohibit double counting was unclear and (ii) Commerce had determined that it was far from clear that double counting had in fact occurred.[803] As a matter of law, the CAFC concluded that Commerce is barred by the statute from

[796] *Id.* at 951.
[797] *Id.*
[798] *Id.*
[799] *Id.* at 946.
[800] *Id.*
[801] *GPX Int'l Tire Corp. v. United States*, 34 C.I.T. 1307 (Oct. 1, 2010).
[802] *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Dec. 19, 2011) [hereinafter GPX III].
[803] *Id.* at 738.

imposing CVDs on NME goods.[804] The key reasoning of the CAFC is that the legislative history of the CVD law, and particularly Congress's repeated reenactment of CVD law while approving the Georgetown Steel holding, demonstrates that Congress adopted the then-prevailing position that CVDs cannot be imposed on NME exports.[805] Specifically, the CAFC found that in amending and reenacting the trade laws in 1988 and 1994, Congress adopted the position that the CVD law does not apply to NME countries.[806] In the CAFC's view, although Commerce has broad discretion in administering CVD and AD laws, it cannot exercise this discretion contrary to the intent of Congress.[807] Accordingly, the CAFC affirmed the CIT's holding, but on a different and broader ground, that CVDs could not be applied to goods from NME countries.[808] Notably, referring to *Georgetown Steel*, the CAFC stated that if Commerce believes that the CVD law should be changed, the appropriate approach is to seek legislative change.[809] However, it should be noted that the CAFC had not yet issued the mandate in GPX III, which, when it issued, would have the effect of invalidating Commerce's CVD orders previously issued. The CAFC's recommendation was based on the same opinion in Georgetown Steel in 1986, but at this time it would have a more extensive impact upon Commerce. The CAFC's ruling put Commerce in a situation where, when the mandate issued (as it would by operation of rule once the appellate proceedings had come to a final end), Commerce may then have to revoke the 24 CVD orders against goods from NME countries (*i.e.*, 23 orders against China and one order against Vietnam).[810] According to Commerce, those 24 orders cover $4.7 billion in annual imports.[811] Therefore, Commerce was put in a

[804] *Id.*
[805] *Id.*
[806] *Id.* at 745.
[807] *Id.*
[808] *Id.* (The CIT's ruling focused on the narrow ground that CVDs could not be applied to NME goods because of the double-counting problem.)
[809] *Id.*
[810] *Id.*
[811] Claire Rickard Palmer (Miller & Chevalier Chartered), *What Next for Countervailing Duties on Imports from Non-Market Economies in the United States?, North American Free Trade & Investment Report*, Vol. 22, No. 2, Thomson Reuters/World Trade Executive (January 31, 2012).

position where it could not step back to comply immediately with the CAFC's decision. In order to retain these CVD orders, Commerce could have appealed that decision by seeking a rehearing by the CAFC (which would have had the effect of staying the mandate), or seeking reexamination (certiorari) by the Supreme Court. Or, otherwise, Commerce could ask Congress to change the CVD legislation to abrogate the CAFC's decision and to allow Commerce to impose CVDs on imports from NME countries.

In addition to the pressure from the CAFC's decision in GPX III, the legal battles at the WTO against the concurrent application of AD and CVD laws to China also had significant impact on Commerce's efforts to seek a congressional change to the CVD law. The next section shall focus on the legal battles between China and the United States at the WTO regarding the legality of CVD application to China and the issue of double remedies that arose from certain investigations initiated by Commerce.

4.3.2.6.2. Legal Battles at WTO: United States - Definitive Antidumping and Countervailing Duties on Certain Products from China (WT/DS379)

In strong support of the Chinese producers and exporters, the Government of China ("GOC") started another legal battle relying on the multilateral trading mechanism of the WTO. Parallel with the litigation of GPX I in the CIT battle, on September 19, 2008, the GOC concurrently initiated the first step in a dispute settlement proceeding at WTO by requesting an official consultation with the Government of the United States to challenge the imposition of ADDs and CVDs upon several products exported by Chinese producers.[812] While GPX and other Chinese producers and exporters opened a legal battle at the U.S. CIT, the GOC made an effort to fight against the United States by taking advantage of the WTO dispute resolution mechanism. The same issue of double counting was raised in these parallel proceedings. Specifically, the GOC challenged the imposition of concurrent ADDs and

[812] Request for Consultation by China, United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/1 (September 22, 2008) [hereinafter Consultations Request].

CVDs in the following four cases: (1) circular welded carbon-quality steel ("CWP") (July 2008); (2) new pneumatic off-the-road tires ("OTR Tires") (Sept. 2008); (3) light-walled rectangular pipe and tube ("LWRP") (Aug. 2008); and (4) laminated woven sacks ("LWS") (Aug. 2008).[813] GOC claimed that the measures used in these four cases were inconsistent with the obligations of the United States under a series of articles including Articles I and VI of the GATT 1994, Articles 1, 2, 10, 12, 13, 14, 19, and 32 of the Subsidies Agreement, Articles 1, 2, 6, 9, and 18 of the AD Agreement, and Article 15 of the Protocol on the Accession of the People's Republic of China (the Protocol of Accession).[814] These claims were considered as "as applied" challenges; the GOC neglected to include "as such" challenges in its Consultations Request.[815]

On November 14, 2008, consultations between China and the United States were held, but both sides failed to resolve the dispute.[816] Therefore, on December 9, 2008, the GOC requested the establishment of a panel to resolve the dispute.[817] This time, the GOC added the following "as such" challenges:

"In certain of the investigations specified above, the U.S. Department of Commerce stated that U.S. law provides no basis to make any adjustment to either the anti-dumping or countervailing duty calculations to avoid the imposition of a double remedy for the same unfair trade practice, where such a double remedy arises from the use of the U.S. non-market economy (NME) methodology to impose anti-dumping duties simultaneously with the imposition of countervailing duties on the same product. The measures therefore include, **as an omission,** the failure of the United States to

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[813] *Id.* More details on both AD and CVD final determinations and orders of these cases are available at https://enforcement.trade.gov/stats/inv-initiations-2000-current.html.
[814] *Id.* Consultations Request, at 3.
[815] The terms "as applied" and "as such" are usually used in the WTO dispute resolution mechanism. A challenge prior to the application of a measure in violation of the WTO's treaty is termed "as such" challenge and a challenge only after the measure is applied in a manner that purportedly breaches a treaty obligation is termed as an "as applied" challenge. *See also* Alan Skypes, Alan O. Sykes, *An Economic Perspective on As Such/facial Versus as Applied Challenges in the WTO and U.S. Constitutional Systems*, 6 J. LEGAL ANALYSIS 1, 1 (2014).
[816] 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) [hereinafter Panel Request].
[817] *Id.*

provide legal authority for the U.S. Department of Commerce to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to the U.S. NME methodology simultaneously with the imposition of countervailing duties on the same product."[818]

Generally, in its Panel Request, the GOC claimed that the imposition of double remedies was, both "as such" and "as applied,"[819] inconsistent with Articles 10, 12.1, 12.8, 19.3, 19.4, and 32.1 of the Subsidies Agreement and with Articles I:1 and VI of the GATT 1994.[820]

At its meeting on January 20, 2009, the WTO's Dispute Settlement Body ("DSB") agreed to establish a panel to resolve the dispute.[821] However, due to the substantive complexity of the dispute, up until October 22, 2010, the Panel could not issue its Panel Report, which was ultimately in favor of the United States.[822] Most of the "as such" and "as applied" claims of the GOC were rejected by the Panel. Specifically, the Panel found that the "omission"[823] challenged by the GOC as part of its "as such" claims fell outside the Panel's terms of reference, because the GOC had not identified this "as such" challenge in its Consultations Request.[824] Hence, the Panel found that China's "as such" claims under Articles 10, 19.3, 19.4 and 32.1 of the Subsidies Agreement and Articles VI and I:1 of the GATT 1994 equally fell outside the Panel's terms of reference.[825] As a result, the Panel dismissed China's "as applied" claims under Articles 10, 19.3, 19.4, and 32.1 of the Subsidies Agreement and Article

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[818] *Id.* at 3.
[819] Panel Request, *supra* note 817, at 3-8.
[820] *Id.*
[821] WTO, Dispute Settlement Body, Minutes of Meeting, Held in the Centre William Rappard on January 29, 2009, WT/DSB/263 (March 25, 2009), at 14.
[822] WTO, Report of the Panel, United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R (Oct. 22, 2010) [hereinafter DS379-Panel Report].
[823] The GOC argued that the United States' failure to provide sufficient legal authority for the U.S. Department of Commerce to avoid the imposition of double remedies for the same alleged acts of subsidization when it imposes anti-dumping duties determined pursuant to its NME methodology simultaneously with the imposition of countervailing duties on the same product means that U.S. law is, in all such instances, inconsistent "as such" with Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement and with Article VI of the GATT 1994. *See* DS379-Panel Report, *id.* at (x) on page 9.
[824] *Id.* at 14.42, page 219.
[825] *Id.* at 17.1(e)(i), page 282.

VI:3 of the GATT 1994.[826] The Panel, however, reaffirmed the basic notion that the simultaneous imposition of ADDs and CVDs may result in double remedies, but it concurred with the United States' assertion that the existence of double remedies in any given case depends on the facts, specifically whether the subsidy in question results in the reduction of the export price.[827] Then, the Panel decided that none of the provisions of the Subsidies Agreement or the GATT 1994 cited by the GOC prohibited the imposition of both ADDs and CVDs with respect to the domestic subsidies.[828] In addition, the Panel observed that China's Protocol of Accession does not address the issue of "double remedies," but does contemplate the use of CVDs while China remains an NME.[829]

On December 1, 2010, the GOC appealed the Panel findings to the Appellate Body.[830] On March 11, 2011, the Appellate Body reversed the Panel findings and ruled in favor of China.[831] The Appellate Body mainly focused on Article 19.3 of the Subsidies Agreement, which requires that subsidies be levied "in the appropriate amounts in each case."[832] Article 19.3 of the Subsidies Agreement provides:

"When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any

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[826] *Id.* at 17.1(e)(ii), page 282.
[827] *Id.* at 14.70-14.72, page 227-228. *See* Stephanie E. Hartmann, *Putting the Specter of Double Counting to Rest: How Public Law 112-99 Resolves the Issue of Double Counting in Concurrent Countervailing and Non-Market Economy Antidumping Investigations*, 10 BYU INT'L L. & MGMT. REV. 139, 151 (2014).
[828] Hartmann (2014), *supra* note 828, at 152 (citing Panel Report, at 14.112, 14.115, 14.117, 14.130, 14.136, 14.138).
[829] DS379-Panel Report, *supra* note 823, at 14.120.21. *See* Pablo M. Bentes et al., *International Trade Edited by: Joseph A. Laroski, Jr. and Valentin A. Povarchuk*, 45 INT'L LAW. 79, 83 (2011).
[830] WTO, Annex I, Notification of an Appeal by China under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R (March 11, 2011).
[831] WTO, United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R (March 11, 2011) [hereinafter DS379-AB Report].
[832] Hartman (2014), *supra* note 828, at 154. *See also* Raj (2019), *supra* note 258, at 769.

subsidies in question or from which undertakings under the terms of this Agreement have been accepted."[833]

In its findings, the Panel found that "the imposition of ADDs calculated under an NME methodology has no impact on whether the amount of the concurrent countervailing duty collected is 'appropriate' or not,"[834] and that Article 19.3 of the Subsidies Agreement does not address the issue of double remedies.[835] However, the Appellate Body found that the Panel erred in its interpretation of Article 19.3 and failed to give meaning and effect to all the terms of that provision.[836] According to the Appellate Body, the appropriateness of the amount of CVDs cannot be determined without having regard to ADDs imposed on the same product to offset the same subsidization.[837] Hence, the amount of a CVD cannot be "appropriate" in situations where that duty represents the full amount of the subsidy and where ADDs, calculated at least to some extent on the basis of the same subsidization, are imposed concurrently to remove the same injury to the domestic industry.[838] Accordingly, dumping margins established on an NME methodology are likely to include some component that is attributable to subsidization.[839] Consequently, the Appellate Body reversed the Panel's interpretation of Article 19.3 and the findings pursuant to that interpretation, ruling that the imposition of double remedies, that is, the offsetting of the same subsidization twice by the concurrent imposition of ADDs calculated on the basis of an NME methodology and CVDs, is inconsistent with Article 19.3 of the Subsidies Agreement.[840] It should be noted that the Appellate Body was of the opinion that it was not convinced that double remedies *necessarily* result in every instance of a simultaneous application of

[833] Subsidies Agreement, *supra* note 39.
[834] DS379-Panel Report, *supra* note 823, at para. 14.128.
[835] *Id.* para. 14.129.
[836] DS379-AB Report, *supra* note 832, para. 582.
[837] *Id.*
[838] *Id.*
[839] *Id.*
[840] DS379-AB Report, *supra* note 832, para. 583. *See also* Dukgeun Ahn, *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, AB Report*, 105 AM. J. INT'L L. 761, 763 (2011).

ADDs and CVDs.[841] This depends rather on whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation.[842] With respect to the four specific cases that the GOC claimed in this dispute, the Appellate Body found that the U.S. Department of Commerce, by declining to address China's claims concerning double remedies arisen in these cases, failed to fulfill its obligation to determine the "appropriate" amount of CVDs within the meaning of Article 19.3 of the Subsidies Agreement.[843] Therefore, the Appellate Body concluded that, in the circumstances of the four sets of AD and CVD investigations at issue, by virtue of Commerce's imposition of ADDs calculated on the basis of an NME methodology, concurrently with the imposition of CVDs on the same products, without having assessed whether double remedies arose from such concurrent duties, the United States acted inconsistently with its obligations under Article 19.3 of the Subsidies Agreement.[844] Finally, the Appellate Body recommended that the Dispute Settlement Body ask the United States to bring its measures into conformity with its obligations under the Subsidies Agreement.[845]

China's Ministry of Commerce described the WTO's decision as a significant victory, stating that the U.S. Department of Commerce had long refused to correct the double counting problem despite pleas from Chinese trade officials and despite the CIT decisions in GPX I and GPX II.[846] By contrast, the United States Trade Representative ("USTR") Ron Kirk proclaimed that the WTO's decision "appears to be a clear case of overreaching by the Appellate Body."[847] Despite disagreement, the USTR later directed

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[841] DS379-AB Report, *supra* note 832, para. 599.
[842] *Id.*
[843] *Id.* para 605.
[844] *Id.* para. 606.
[845] *Id.* para. 612.
[846] *See* Melissa Lipman, *WTO Rejects U.S. Duty Double-Counting in China Fight,* Law360 (March 11, 2011).
[847] USTR Statement Regarding WTO Appellate Body Report in Countervailing Duty Dispute with China, March 11, 2011, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/march/ustr-statement-regarding-wto-appellate-body-report-c. *See also* Richard Lockridge, *Doubling down in Non-Market Economies: The Inequitable Application of Trade Remedies against China and the Case for a New WTO Institution*, 24 S. CAL. INTERDISC. L.J. 249, 271 (2014).

Commerce to implement its final determinations under section 129 of the URAA[848] regarding the concurrent AD and CVD investigations of the four cases including CWP, OTR Tires, LWRP, and LWS, in compliance with the WTO's recommendations and rulings.[849] To a certain extent, this WTO victory together with the CIT's rulings in favor of the Chinese producers had significant impacts on Commerce's efforts to impose simultaneous ADDs and CVDs against China.

4.3.2.7. U.S. Congressional Action: Legitimization of CVD Application to NMEs

The existence of double counting resulting from the simultaneous imposition of ADDs and CVDs to China as an NME country was supported by the WTO's DSB in DS379 and by the U.S. CIT in the GPX I and GPX II cases. Furthermore, the decision of U.S. CAFC in GPX III, which was made after the WTO's rulings, had a great influence on the U.S. Department of Commerce because the CAFC barred the applicability of the CVD law to China so long as it was still designated as an NME. In reality, the CAFC's ruling had a broader and stronger impact than the rulings of WTO and U.S. CIT because the CAFC's ruling sent a strong message that Commerce cannot apply the CVD law to China and other NME countries in future cases, unless Congress changes the applicable statute.[850] More importantly, the CAFC's ruling also set an expiration date for the previously imposed CVD orders and pending CVD investigations against China.[851] Such critical pressures put Commerce in a position

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[848] 19 U.S.C. § 3538(b)(2). Section 129 of the URAA governs the nature and effect of determination issued by Commerce to implement findings by WTO dispute settlement panels and the Appellate Body. Specifically, section 129(b)(2) of the URAA provides that "notwithstanding any provision of the Tariff Act of 1930," upon a written request from the USTR, the Department shall issue a determination that would render its actions not inconsistent with an adverse finding of a WTO panel or the Appellate Body. *See* Department of Commerce, ITA, Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube from the People's Republic of China, 77 FR. 52683 (August 30, 2012) [hereinafter Section 129 Redeterminations].
[849] *Id.* 77 FR 52683, at 4.
[850] Elliot J. Feldman & John J. Burke, *Testing the Limits of Trade Law Rationality: The GPX Case and Subsidies in Non-Market Economies*, 62 AM. U. L. REV. 787, 809 (2013).
[851] *Id.* at 811. *See also* Lockridge (2014), *supra* note 848, at 273 (2014).

consider both judicial and legislative options (*i.e.*, appeal the CAFC's ruling or seek a legislative change).[852] In order to give the Congress more time to pass such a law, the United States government concurrently opted for a strategy to file a petition with the CAFC for a rehearing *en banc* in GPX III, which at least had the effect of keeping the mandate from issuing.[853] While this case was pending at the CAFC, the United States government quickly pursued a legislative strategy by pushing Congress to change the CVD law. Therefore, Congress was put in a situation wherein it had no choice but to find a way to legitimize Commerce's prior change of practice for using the CVD law against China; or otherwise, Commerce would have to revoke all existing CVD orders and terminate pending investigations[854]. As a result, the U.S. Congress, in a rare bipartisan effort, passed a bill amending both CVD and AD laws at a rapid pace.[855] On March 13, 2012, President Obama officially signed the bill into law (coded as P.L 112-99), namely "An Act to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for Other Purposes."[856] P.L 112-99, also known as "GPX Legislation," abrogated (that is, legislatively overturned) the CAFC's ruling in GPX III so as to apply the CVD law to NME countries.

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[852] CRS Report, WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases, (name redacted) Legislative Attorney (April 23, 2012), at 63. In a letter sent to the chairmen and ranking members of the House Ways and Means Committee and the Senate Finance Committee, USTR Ron Kirk and Commerce Secretary John Bryson said that the administration is still reviewing "all its options," including a request for a rehearing by the full appellate court and concurrently proceeding the legislative change. *See Kirk, Bryson Urge Congress to Fix GPX Decision in Parallel to Judicial Review*, Inside U.S.-China Trade (January 25, 2012).

[853] *Id.* (The CAFC set a one-time March 5, 2012, deadline for the United States to file a petition for rehearing; the United States had asked the court for a 60-day extension of the original February 2, 2012, deadline).

[854] According to the sponsors of the bill, if the CAFC's ruling were to stand, Commerce would be forced to terminate 23 existing countervailing duties on products from China and fellow NME country Vietnam, as well as five ongoing investigations, and it would possibly require a refund of duties already collected. *See* Megan Leonhardt, *House Vote Sends Countervailing Duty Bill to Obama,* Law360 (March 06, 2012).

[855] *See* Lockridge (2014), *supra* note 848 Bill H.R. 4105 was introduced in the House of Representatives Ways and Means Committee on February 29, 2012, and quickly passed by the House and Senate on March 6 and March 7, 2012, respectively without amendment. *See* H.R. 4105*,* a bill to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries and for other purposes (March 5, 2012); available at https://www.congress.gov/bill/112th-congress/house-bill/4105/actions.

[856] P.L. 112-99, *supra* note 147.

P.L. 112-99 has two sections: (1) Section 1, which directs Commerce to impose CVDs on goods from NME countries except where it is "unable to identify and measure subsidies provided by the government of the [NME] country or a public entity within the territory of the [NME] country because the economy of that country is essentially comprised of a single entity";[857] and (2) Section 2, which applies only to proceedings initiated following the enactment of P.L. 112-99, and which directs Commerce to "reduce" the ADD in all proceedings involving the concurrent imposition of ADDs and CVDs where it can "reasonably estimate the extent to which the countervailable subsidy … increased the weighted average dumping margin" for the subject merchandise.[858] However, it was controversial that P.L. 112-99 extends the application of CVD law to NME countries retroactively, back to 2006. In essence, the first purpose of this law was to legitimize Commerce's imposition of CVDs to NME goods from China and other NME countries such as Vietnam. The second purpose was to retain all existing CVD orders and pending CVD investigations by devising a controversial provision that the law could apply to "all proceedings initiated on or after November 20, 2006."[859] This retroactive application clearly meant that Commerce had the lawful authority to apply the CVD law to China and any other NME country back to the initiation date of the CFS Paper case (*i.e.*, November 20, 2006). This intentional action shows the Congress's enormous efforts to save Commerce from revoking its CVD orders against China and Vietnam that had been already issued before the enactment of P.L. 112-99.[860]

Another key component of P.L. 112-99 is the congressional attempt to avoid the potential problems of double remedies as claimed by the CIT in GPX cases and in

[857] *Id.* Section 1(a).
[858] *Id.* Section 2.
[859] *Id.* Section 1(b)(1).
[860] In a statement supporting the legislation, Rep. Bill Pascrell, Jr. (D-NJ) announced, "This legislation will once again allow the application of our countervailing duty laws in the enforcement of existing orders to nonmarket economies like China. Let's not stop with the passage of this bill but continue to move forward on a fair-trade policy that places American workers and businesses first." *See* Press Releases, *Rep. Pascrell Backs Bipartisan Legislation That Protects American Manufacturing and Jobs* (March 6, 2012), available at https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=3025.

the WTO's AB Report in DS379. Specifically, the law allows Commerce to adjust the ADDs in the proceedings involving concurrent application of ADDs and CVDs against NME imports.[861] In order to satisfy the ADD adjustment, Commerce must find the following three conditions: (i) a countervailable subsidy (other than an export subsidy) has been provided; (ii) such countervailable subsidy has reduced the average export price of the subject merchandise; and (iii) Commerce can "reasonably estimate" the extent to which the countervailable subsidy has increased the dumping margin of the subject merchandise.[862] If these criteria are met, Commerce is required to reduce the ADD by the estimated amount of the increase in the dumping margin inflated by the countervailable subsidy on the export price.[863] The law also sets a maximum limit for the ADD reduction which is not more than the portion of the CVD rate attributable to a countervailable subsidy.[864] It should be noted that this adjustment methodology is limited to the extent that the export price has been affected by the domestic subsidy only. Ironically, the legal authority to adjust the ADDs, however, does not apply retroactively back to 2006, but it only applies to the investigations and reviews initiated on or after March 13, 2012 (*i.e.,* P.L 112-99's enactment date).[865]

It appears that the U.S. Congress has attempted to implement the findings and recommendations by both WTO and U.S. CIT to resolve the problems of double counting by adopting the methodology of ADD adjustment. In fact, it does so by requiring Commerce to avoid double remedies by offsetting the dumping margin in a situation where a countervailable domestic subsidy is passed through to lower export prices.[866] However, Commerce remains the right to reject the adjustments if it cannot "reasonably estimate" the effects of the domestic subsidies on the dumping margins. In this situation, it is not clear from the law how Commerce can effectively avoid double counting problems. In fact, while the law provides Commerce a legal ground for its

[861] P.L. 112-99, *supra* note 147. Section 2. Adjustment of Antidumping Duty in Certain Proceedings Relating to Imports from Nonmarket Economy Countries.
[862] *Id. S*ection 2(a). (codified at 19 U.S.C. § 1677f-1(f)(1)(A)(B)(C)).
[863] *Id.*
[864] *Id.* Section 2(a)(f)(2).
[865] *Id.* Section 2(b)(1).
[866] Hartmann (2014), *supra* note 828, at 158.

estimate, this law does not provide any specific guidelines on how to make a "reasonable estimate" or how to avoid occurrence of double counting if such "reasonable estimate" is unable to make.

Since this new law came into force, Commerce has applied and developed the methodology of ADD adjustments for the first time in the proceeding of Section 129 Determinations, revising the determinations in the four sets of AD and CVD investigations examined in the WTO DS379 dispute.[867] In each of the four determinations, Commerce used the same methodology to estimate the extent that the subsidies reduced the average export price of the respective subject merchandise.[868] For instance, in *OTR Tires Section 129 Final Determinations*, Commerce conducted its analysis at the industry level (rather than requesting information from individual respondent parties).[869] Based on the industry-level information provided by the GOC, Commerce identified a correlation between changes in input costs and changes in output prices.[870] It also found that certain types of subsidies had reduced input costs in an industry.[871] Accordingly, Commerce concluded that the variable cost-price link, as measured by its RCT test,[872] was a reasonable estimate of the extent to which subsidies

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[867] *See* Section 129 Redeterminations, *supra* note 849. Commerce issued four respective memoranda for the four different orders. *See* Memoranda from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, dated July 31, 2012, regarding: (1) Final Determinations: Section 129 Proceedings Pursuant to the WTO Appellate Body's Findings in WTO DS 379 Regarding the Antidumping and Countervailing Duty Investigations of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China ("OTR Tires Section 129 Final Determinations"); (2) Final Determinations: Section 129 Proceedings Pursuant to the WTO Appellate Body's Findings in WTO DS 379 Regarding the Antidumping and Countervailing Duty Investigations of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China ("CWP Section 129 Final Determinations"); (3) Final Determinations: Section 129 Proceedings Pursuant to the WTO Appellate Body's Findings in WTO DS 379 Regarding the Antidumping and Countervailing Duty Investigations of Laminated Woven Sacks from the People's Republic of China ("Sacks Section 129 Final Determinations"); and (4) Final Determinations: Section 129 Proceedings Pursuant to the WTO Appellate Body's Findings in WTO DS 379 Regarding the Antidumping and Countervailing Duty Investigations of Light-Walled Rectangular Pipe and Tube from the People's Republic of China ("LWRPT Section 129 Final Determinations").

[868] Hartmann (2014), *supra* note 828, at 159.

[869] OTR Tires Section 129 Final Determinations, *supra* note 868, at 36.

[870] *Id.* at 20.

[871] *Id.*

[872] *Id.* at 43. RCT is an abbreviation for Ratio Change Test - the ratio between changes to an index of Chinese producer prices (Bloomberg's monthly CHEFTYOY producer price index) and changes to an index of producer input costs (Bloomberg's monthly CNPPIY index). Specifically, Commerce took the

that impacted variable cost passed through to prices.[873] As a result, Commerce determined that those input-price subsidies demonstratably reduced the OTR Tires industry's export prices and made pass-through estimates.[874] However, by using a methodology limited to variable cost-price link, the adjustments of the ADDs for respective Chinese respondents were insignificant or even unchanged.[875] In this case, it is also important to note that Commerce believes the concurrent application of NME ADDs and CVDs does not necessarily and automatically results in "overlapping remedies."[876] According to Commerce, this notion was upheld by the WTO's AB Report in DS379.[877] Hence, Commerce insisted that a finding that there is an overlap in remedies, and any resulting adjustment, must be part of a fact-based inquiry.[878] Furthermore, Commerce also believed that the burden of proof would be on the respondent parties to demonstrate its entitlement to a particular ADD adjustment.[879]

4.3.2.8. Second Round of Legal Battles at Both US Courts and WTO's Dispute Settlement Body

4.3.2.8.1. Legal Challenges at U.S. Courts

producer price index in China (Bloomberg symbol CHEFTYOY) and divided it by the purchasing price index in China (Bloomberg symbol CNPPIY). Both of these ratios are determined monthly, comparing the value from the same month in the prior year. Commerce noted that this method of comparing a finished-good price index with an intermediate-good price index is a typical approach for studying how input costs pass through to finished-goods prices over time.

[873] *Id.* at 25-26.

[874] *Id.* at 38.

[875] *Id.* at 39. For GPX: its original ADD rate of 29.93% was unchanged; Guizhou Tyre Co., Ltd.: 5.25% was reduced to 5.1%; Tianjin United Tire & Rubber International Co., Ltd.: 8.44% was reduced to 8.39%; Xuzhou Xugong Tyres Co., Ltd.: 10.01% was reduced to 9.92%; and all other companies: 12.91% was reduced to 12.83%.

[876] OTR Tires Section 129 Final Determinations, *supra note 868,* at 16. In its arguments in this case and in most of the cases, it seems that Commerce has tried to avoid using the term "double remedies" or "double counting." Instead, it often uses the term "overlapping remedies," or "overlap of remedies," or "overlap in remedies".

[877] AB Report, *supra note 832,* at para 599. The AB Report found that "double remedies would likely result from the concurrent application of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties" and also stated that it was "not convinced that double remedies necessarily result in every instance of such concurrent application of duties."

[878] *Id.* at 17.

[879] *Id.* at 18.

As it was noted in the preceding section, before the enactment of the GPX Legislation to apply the CVD law to NME countries, the United States government embarked upon a judicial strategy by requesting for a rehearing *en banc* by the CAFC, essentially in order to give Congress more time to change the CVD law before the CAFC issued its mandate. That litigation strategy did help Congress to meet the judicial deadline, but it consequently initiated the CAFC's rehearing *en banc*.

GPX IV: The rehearing *en banc* requested by the United States government was subsequently granted, and, following the enactment of the GPX Legislation, the CAFC requested additional briefing on the impact of the new legislation.[880] In this resumed litigation, GPX argued that the GPX Legislation was unconstitutional because (i) it attempted to prescribe a rule of decision for this case after the CAFC's decision in GPX III was rendered; and (ii) it properly creates a special rule applicable only to this specific case due to the different effective dates in the two provisions; it thus creates a situation in which both ADDs and CVDs may be imposed, without providing a mechanism to account for potential double counting.[881] In its decision, the CAFC observed that this case was still pending on appeal when Congress enacted the GPX Legislation, as the court's mandate had not yet issued precisely because the United States government had petitioned for a rehearing *en banc* in GPX III.[882] As a result, according to the CAFC, no issue was raised by the fact that the GPX III decision was issued prior to enactment of the GPX Legislation, because this case remained pending on appeal.[883] With respect to GPX's argument on the constitutionality of the new legislation, the CAFC sided with the United States government in concluding that

[880] *GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308 (Fed. Cir. 2012) [hereinafter GPX IV].
[881] *Id.* at 1312.
[882] *Id.* at 1313. (citing Fed. R.App. P. 41(b)-(c); *see also Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir.2004) ("An appellate court's decision is not final until its mandate issues.")). Rule 41(b) of the Federal Rules of Appellate Procedure provides: "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing *en banc*, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order." *See* Rule 41. Mandate: Contents; Issuance and Effective Date; Stay, available at https://www.federalrulesofappellateprocedure.org/title-vii/rule-41/.
[883] *Id.*

because this issue was raised for the first time in the rehearing petition, it should be "considered by the Trade Court in the first instance."[884] As a result, the CAFC remanded the case to the CIT for a determination on the constitutionality of the GPX Legislation and for other appropriate proceedings.[885]

GPX V: On remand from the CAFC, GPX argued that the GPX Legislation was unconstitutional for three reasons.[886] GPX claimed that the GPX Legislation violated the *Ex Post Facto* Clause of the Constitution,[887] as well as the due process and equal protection rights of the Fifth Amendment to the Constitution.[888] The CIT disagreed with all of GPX's arguments and finally concluded that the GPX Legislation (also referred to as the "New Law" in this case) was constitutional.[889]

In more detail, GPX's first argument was that the New Law violated the Ex Post Facto Clause of the Constitution because it effectively penalized certain importers for past conduct.[890] The United States government, however, argued that the New Law was remedial in nature and therefore not subject to the proscriptions of the Ex Post Facto Clause.[891] The CIT concluded that the Ex Post Facto Clause "does not prohibit the imposition of all retrospective laws."[892] Instead, the clause only "prohibits the imposition of retrospective penal legislation, which often, though not always, takes the

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[884] *Id.*
[885] *Id.*
[886] *GPX Int'l Tire Corp. v. United States*, 893 F. Supp. 2d 1296, 37 C.I.T. 19 (January 7, 2013) [hereinafter GPX V], at 1306.
[887] *Id. Ex post facto* means "from a thing done afterward" in Latin. *Ex post facto* is most typically used to refer to a criminal statute that punishes actions retroactively, thereby criminalizing conduct that was legal when originally performed. *See* Ex Post Facto, Legal Information Institute, Cornell Law School, available at https://www.law.cornell.edu/wex/ex_post_facto. Article I, Section 9 of the U.S. Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed." That means this Clause prohibits Congress from passing any laws which apply *ex post facto*. *See* U.S. Const. Art. I § 9, cl. 3.
[888] The due process clause of the Fifth Amendment provides that "[n]o person shall be… deprived of life, liberty, or property, without due process of law." The equal protection right is understood as follows: "Economic legislation or an administrative classification that neither targets a suspect class nor implicates a fundamental right will be upheld under the Equal Protection Clause, so long as it bears a rational relation to some legitimate end." U.S. Const. amend. V.
[889] *Id.* at 1334.
[890] *Id.* at 1309.
[891] *Id.*
[892] *Id.*

form of criminal law."[893] Further, the CIT agreed that retroactive remedial laws are not prohibited by the Ex Post Facto clause.[894]

Secondly, GPX claimed that the New Law violated the Fifth Amendment's due process clause by retrospectively altering legitimate expectations of the level of duties that would be imposed on their imports.[895] Specifically, GPX argued that the New Law is a new tax being applied retroactively without notice to the affected importers and with harsh and oppressive effects deprived it of property without due process of law.

The United States government rejected the GPX's claims, arguing that Congress sought to correct an unexpected judicial decision with the New Law, and that GPX did not have a settled expectation that trade-remedy duties would not have to be paid on the covered imports.[896] The CIT found that the retrospective nature of the New Law does not violate the due process because customs duties and trade remedies are part of a uniquely "retrospective assessment scheme."[897] That means that GPX could not have reasonably relied on any predicted duty rate prior to the enactment of the New Law. Consequently, the CIT concluded that because the New Law was general economic legislation, "it is subject to a rational basis review," and that GPX failed to meet its burden to prove that Congress did not have a rational basis for passing the New Law or that GPX had a vested interest in not having the CVD law applied to its imports.[898]

The third argument made by GPX was that the New Law violated the right to equal protection under the law by applying a different law to respondents whose products were covered by CVD investigations between November 20, 2006, and March

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[893] *Id.*
[894] *Id.*
[895] *Id.* at 1311.
[896] *Id.*
[897] *Id.* at 1314. (The court also noted that "because, as to trade remedies, neither exporters nor importers have any real certainty as to the final rate on the imported product at the time of entry, they cannot demonstrate that a property right in a particular duty rate has vested, with which Congress may not interfere." In addition, the court noted that "GPX and the other importers were aware that their importation of goods from China could give rise to duty liability in the form of traditional customs duties as well as trade remedy duties, and therefore, a modification to the boundaries of those laws does not constitute a "wholly new tax.". *Id.* at 1316.
[898] *Id.* at 1312.

13, 2012, as compared to other companies whose products would be investigated for unfair trade practices after the New Law was enacted.[899] GPX pointed out that there was a gap between the New Law's effective dates for Section 1, November 20, 2006, and Section 2, March 13, 2012. During this interim period, goods from NMEs may be subject to the concurrent imposition of duties under the CVD and AD laws without any possible offset for overlapping remedies.[900] The United States government contended that Congress had a rational reason to make only Section 1 expressly retroactive. Specifically, because approximately 24 CVD investigations were conducted on goods from NMEs during the interim period, Congress feared that without retroactive application of Section 1, the results of these investigations could be overturned.[901] Similarly, retroactive application of Section 2 of the law would have subjected those investigations to reopening based on the New Law, requiring Commerce to recalculate the AD or CVD rates in those investigations.[902] Therefore, to preserve the finality of the investigations and to avoid additional recalculation by Commerce, the United States government argued that this interim period was needed.[903] Furthermore, the United States government explained that Section 2 was the result of an attempt to conform to the WTO's ruling in DS379. This action is normally taken under section 129 of the URAA, with prospective application only.[904] For such reasons, the United States government argued that this feature of the legislation was rationally related to the government's interests in conserving limited resources and also consistent with the general statutory approach of prospective implementation of changes based on an adverse ruling in a WTO dispute.[905] The CIT upheld all arguments made by the United States government and concluded that the New Law was rationally related to legitimate

[899] *Id.* at 1316.
[900] *Id.* at 1317.
[901] *Id.*
[902] *Id.*
[903] *Id.*
[904] *Id.*
[905] *Id.*

government interests and therefore did not violate the equal protection guarantees of the Constitution.[906]

GPX VI: GPX appealed the CIT's determinations under the Ex Post Facto and Due Process Clause to the CAFC.[907] It should be noted that while this appellate process was pending, the CAFC made a decision in another case challenging the ex post facto nature of the GPX Legislation as well.[908] In *Wireking*, the court held that the GPX Legislation, while retroactive, did not violate the ex post facto clause because it was remedial in nature rather than punitive.[909] Therefore, in GPX VI, the court did not deviate from its ex post factor analysis in *Wireking* and instead adopted the same reasoning to dismiss GPX's challenge on the ex post facto issue. Then, the court focused on analysis of GPX's arguments related to the Due Process Clause to resolve the dispute. GPX continued to argue that the New Law violated the Due Process Clause because it operates retroactively. However, the United States government argued that "legislation cannot implicate the due process clause unless it disturbs a vested right," and that GPX's due process challenge was therefore foreclosed at the outset by its failure to establish a vested right in this case.[910] In analyzing the claimed due process violation, the court did not agree with the United States government that "the outcome of the due process analysis depends upon a determination that a vested right exists" (that is, even if there was a vested right, the outcome might still have been against GPX); however, the Court noted that "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied

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[906] *Id.* at 1334.
[907] *GPX Int'l Tire Corp. v. United States*, 780 F.3d 1136 (Fed. Cir. 2015) [hereinafter GPX VI].
[908] *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194 (Fed. Cir. 2014) [hereinafter Wireking].
[909] *Id.* at 1207. The court explained that "Article I, Section 9, Clause 3 of the Constitution states "[n]o Bill of Attainder or ex post facto Law shall be passed." A law only violates the Ex Post Facto Clause if it (1) applies retroactively and (2) imposes a punishment for an act that was not punishable at the time it was committed or increases the punishment for an act that was committed before the new law was enacted." *Id.* at 1200 (citing U.S. CONST. Art. I, §9, cl. 3).
[910] GPX VI, *supra* note 908, at 1141.

retroactively."[911] According to the CAFC, due process was satisfied "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."[912] Specifically, the court assessed five factors utilized by the Supreme Court in precedential cases to determine whether the retroactive application of the New Law satisfied rational-basis scrutiny.[913] The court found that each of the five factors weighed in favor of a conclusion that the New Law was not unconstitutional; and thus, holding that the retroactive impositions of ADDs and CVDs in cases involving China and other NME countries, after Congress passed legislation allowing it to do so, did not violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution.[914]

From this case, it can be understood that an importer does not have constitutional rights to maintain an existing duty rate in the fact of new legislation or quasi-legislative executive actions.[915] This CAFC decision is the most recent case in a series of cases regarding the application of CVD duties to NME countries. This case apparently ended China's judicial efforts to challenge to the retroactive application, on constitutional grounds, of the imposition of CVD duties to China at the U.S federal courts. This case also reflects a judicial assertion from the appellate court to clear away the uncertainties of the legality of imposing CVDs upon NME imports in trade remedy investigations. In short, all three branches of powers—judicial, legislative and executive—of the U.S. government confirmed the application of the CVD law to NME

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[911] *Id.* at 1142 (citing Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) [hereinafter Pension Corp. Case).

[912] *Id.* (citing Pension Corp. Case, at 730, 104 S.Ct. 2709).

[913] *Id.* at 1142. (The court noted that "the Supreme Court has articulated five considerations that are relevant to the rational basis analysis under the Due Process Clause: (1) whether the retroactive provision is 'wholly new,' *United States v. Hemme*, 476 U.S. 558, 568, 106 S.Ct. 2071, 90 L.Ed.2d 538 (1986); (2) whether the retroactive action resolves uncertainty in the law, see Romein, 503 U.S. at 184–85, 191–92, 112 S.Ct. 1105; (3) the length of the period of retroactivity, see Carlton, 512 U.S. at 32–33, 114 S.Ct. 2018; (4) whether the affected party had notice of the potential change prior to the conduct that was retroactively regulated, see Pension Benefit, 467 U.S. at 731–32, 104 S.Ct. 2709; and (5) whether the retroactive provisions are remedial in nature, *see* Romein, 503 U.S. at 191, 112 S.Ct. 1105. In this case, at least four of these considerations (excluding the length of the retroactive effect) weigh heavily against finding a due process violation.").

[914] *Id.* at 1145.

[915] Reed, Patrick C., *Access to Judicial Review of Customs Duties: The Overlooked Constitutional Rights*, 29 FED. CIR. B.J. 1, 18 (2019).

countries such as China and Vietnam. It is unlikely that China or any other NME country could seek to overturn the application of the CVD law to NMEs by pursuing new legal battles at the U.S. federal courts (*e.g.*, an appellate battle aimed at seeking ultimate relief in the U.S. Supreme Court would be unsuccessful, even if the Supreme Court decided to hear the case). The next section discusses China's legal challenges against the retroactive application of the CVD law at the WTO.

4.3.2.8.2. WTO Challenges: United States - Countervailing and Anti-dumping Measures on Certain Products from China (WT/DS449)

The claimed irrationality of the retroactive application of the GPX Legislation, together with Commerce's continued failure to completely examine the double counting occurring in the existing CVD orders and pending investigations, were the main reasons that China initiated yet another WTO case. On September 17, 2012, about three months after GPX had started its challenge to the GPX Legislation's constitutionality at the U.S. CIT, China started the first step in the WTO dispute settlement proceedings by requesting formal consultations with the United States.[916] Two months later, the GOC officially requested the WTO's DSB to establish a panel to resolve the dispute.[917] The Chinese government focused on the two main challenges: (1) Section 1 of the GPX Legislation was inconsistent with the transparency

[916] WTO, United States - Countervailing and Anti-dumping Measures on Certain Products from China - Request for consultations by China, WT/DS449/1, Sept. 20, 2012.
[917] WTO, United States - Countervailing and Anti-dumping Measures on Certain Products from China, WT/DS449/2, Nov. 20, 2012 [hereinafter DS449-Panel Request].

requirements under Articles X:1,[918] X:2[919] and X:3(b)[920] of the GATT 1994; and (2) the United States failed to investigate and avoid double remedies in certain investigations and reviews initiated between November 20, 2006, and March 13, 2012, and the resulting CVD measures therefore violate the Subsidies Agreement.[921]

For the first challenge, the GOC first argued that the GPX Legislation does not meet the requirement of prompt publication under Article X:1 because, even though it was enacted on March 13, 2012, the legislation was actually "made effective" as of November 20, 2006.[922] In fact, Section 1(b) of the GPX Legislation refers to November 20, 2006, as the "effective date." According to the GOC, the term "made effective" refers to when the measure became "operative," that is, when it could have an actual effect "in practice," not the date on which it was formally promulgated or formally entered into force.[923] Therefore, the GOC claimed that the United States violated Article X:1 because the latter did not promptly publish the legislation that was actually effective as of November 20, 2006. Specifically, the GOC contended that the United States backdated the legal authority of Commerce to conduct CVD investigations against NME countries and did not provide public notice of this authority until more than five years after it became effective.[924] Second, based on such legal arguments, the

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[918] General Agreement on Tariffs and Trade 1994, 1867 U.N.T.S. 187, April 15, 1994 (GATT 1994). Article X:1 requires the prompt publication of certain measures of general application, providing that: "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports … shall be published promptly in such a manner as to enable governments and traders to become acquainted to them."

[919] *Id.,* Article X:2 prohibits the enforcement of certain measures of general application before their official publication, providing that: "No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published."

[920] *Id.* Article X:3(b) requires a contracting party to maintain or institute judicial, arbitral or administrative tribunals for the purpose of the prompt review and correction of administrative action relating to customs matters.

[921] WTO, United States - Countervailing and Anti-Dumping Measures on Certain Products from China, Report of the Panel, WT/DS449/R (March 27, 2014) [hereinafter DS449-Panel Report], at para. 7.8.

[922] *Id.* at para. 7.59.

[923] *Id.* (citing Panel Reports, EC – IT Products, paras. 7.1045-7.1046 and 7.1048).

[924] *Id.* at para. 7.60.

GOC further claimed that under Article X:2, the United States was prohibited from enforcing the CVD law prior to its official publication on March 13, 2012.[925] In particular, the GOC argued that the United States enforced the measure of general application in Section 1(b) of the GPX Legislation by having the measure provide retroactive legal authority for the imposition and continued maintenance of CVD measures on Chinese products resulting from investigations initiated between November 20, 2006, and March 13, 2012.[926] Therefore, according to the GOC, such retroactive enforcement was inconsistent with the prohibition in Article X:2 against the enforcement of a measure "before such measure has been officially published."[927] Third, the GOC claimed that Section 1 of the GPX Legislation was also inconsistent with the obligation of Article X:3(b) because it amended the U.S. CVD law retroactively and made it applicable to judicial proceedings concerning administrative actions taken prior to its enactment.[928] Accordingly, the GOC argued that the intervention in a pending judicial proceeding by the legislative branch of the U.S. government was incompatible with the obligations of the United States under Article X:3(b).[929]

For the second challenge, pertaining to the double remedies, the GOC claimed that the United States failed to investigate and avoid double remedies in 26 CVD investigations and administrative reviews initiated over the period 2008-2012.[930] The GOC referred to the DS379-AB Report to argue that Article 19.3 of the Subsidies Agreement obligates an investigating authority to investigate and determine, on the basis of "positive evidence," whether double remedies arise in situations when an investigating authority concurrently imposes CVDs and ADDs calculated under a NME methodology.[931] Based on this interpretation, the GOC alleged that the U.S.

[925] *Id.* at para. 7.91.
[926] *Id.*
[927] *Id.*
[928] *Id.* at para. 7.244.
[929] *Id.*
[930] *Id.* para. 7.300.
[931] *Id.*

Department of Commerce had failed to take any steps to investigate and avoid double remedies in the investigations and reviews at issue.

In response to China's first challenge, the United States rejected and argued that the GPX Legislation was "made effective" on the enactment date, *i.e.,* on March 13, 2012.[932] The United States submitted that the ordinary meaning of the "made effective" clause confirms that it is aimed at limiting Article X:1's application to measures that have been adopted or brought into operation.[933] On this basis, the United States contended that the GPX Legislation came into existence and was made effective on March 13, 2012.[934] With respect to China's Article X:2 claim, the United States contended that Section 1 is not of general application and neither effects an advance in a rate of duty nor imposes a new or more burdensome requirement or restriction on imports.[935] Further, the United States argued that Section 1 was not enforced until its publication on March 13, 2012.[936] In response to China's Article X:3(b) claim, the United States asserted that the claim fails for two reasons: (1) Article X:3(b) does not impose any limitations on the ability of a national legislature to enact legislation or how that legislation may be applied; and (2) Article X:3(b), instead, contains a "structural" obligation on members to establish tribunals whose final decisions should be implemented by agencies.[937] Beside these two arguments, according to the United States, China's claim also failed because the litigation in question never produced a final decision with legal effect prior to the time that the GPX Legislation was enacted.[938]

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[932] *Id.* para. 7.61.
[933] *Id.* (citing, The United States refers to Panel Reports, EC – IT Products, para. 7.1045; and Appellate Body Reports, China – Raw Materials, para. 356).
[934] *Id.*
[935] *Id.* at para. 7.92.
[936] *Id.*
[937] *Id.* at para. 7.246.
[938] *Id. See also* Mostafa Beshkar & Adam S. Chilton, *Revisiting Procedure and Precedent in the WTO: An Analysis of U.S. - Countervailing and Anti-Dumping Measures (China)*, 15 WORLD TRADE REV. 375, 381 (2016).

China's second challenge was also rejected by the United States, which argued that China's claims were baseless both legally and factually.[939] Regarding the legal basis, the United States submitted that China's claim was "founded on an erroneous interpretation" of Article 19.3, and claimed that the Appellate Body's reasoning in DS379 was "not persuasive."[940] Such allegations demonstrated the continued unwillingness of the United States to comply fully with the WTO decision. Regarding the factual basis, the United States claimed that China failed to substantiate its assertions regarding Commerce's failure to investigate to avoid double remedies.[941]

In a mixed decision, the Panel rejected all of China's Article X-related claims and upheld the GPX Legislation that allows the United States to apply the CVD law to NME countries; however, the Panel sided with China in ruling that the United States failed to examine whether a double remedy had resulted from applying ADDs and CVDs at the same time. Specifically, the Panel agreed with the United States that Section 1 of the GPX Legislation was "made effective" on March 13, 2012 (and not on November 20, 2006), and published on the same day.[942] The Panel's holding is generally based on the Panel's interpretation of Article X:1 that this provision does not prohibit the United States from "making effective" CVD measures to events or circumstances that occurred before their entry into force, provided such measures are promptly published.[943] With respect to Article X:2 arguments, the Panel concluded that although Section 1 of the GPX Legislation was enforced before the law has been officially published, the United States does not violate Article X:2 because Section 1 does not "effect an advance in rate of duty or other charge on imports under an established and uniform practice," or "impose a new or more burdensome requirement, restriction, or prohibition on imports."[944] Regarding the arguments of Article X:3(b), the Panel ruled that the provision, which requires that the administrative agencies

[939] *Id.* at para. 7.301.
[940] *Id.*
[941] *Id.*
[942] *Id.* at para. 7.78.
[943] *Id.* at para. 7.73.
[944] *Id.* at para. 8.1.(b)(ii).

implement and be governed by decisions of the tribunals maintained to review their administrative action relating to customs matters, does not prohibit the United States from taking legislative action in the nature of Section 1 of the GPX Legislation.[945] China did not appeal the Panel's rulings related to the provisions of Article X:1 and X:3(b), but it did appeal the Panel's finding and interpretation of Article X:2 to the Appellate Body.[946] China, however, won on the issue of double remedies. The Panel sided with China and concluded that in 25[947] parallel CVD and AD investigations and reviews initiated between November 20, 2006, and March 13, 2012, the United States acted inconsistently with its obligation under Article 19.3 of the Subsidies Agreement in order to investigate whether, on the basis of positive evidence, double remedies arose from the imposition of concurrent duties.[948] The United States did not directly appeal this double-remedy ruling to the Appellate Body, but it focused the appeal on accusing China of a procedural violation, rather than arguing on the substance of the legal questions at issue. Surprisingly, the United States claimed on appeal that China's claims listed in Part D of its panel request[949] were in violation of Article 6.2 of the

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[945] *Id.* at para. 7.291.

[946] WTO, United States - Countervailing and Anti-Dumping Measures on Certain Products from China, AB-2014-4, Report of the Appellate Body, WT/DS449/AB/R (July 7, 2014) [hereinafter DS449-AB Report].

[947] China identified 26 cases in Appendix A of Exhibit CHI-24 to its panel request. The Panel, however, found one case, namely *Drawn Stainless Steel Sinks*, that was initiated after the enactment of the GPX Legislation. Therefore, the Panel excluded this particular case because it fell outside of the scope of China's claim. *Id.* at para. 7.367, 7.369, and 7.372.

[948] *Id.* at para. 7.392.

[949] Part D of China's panel request read:

"D. Failure to Investigate and Avoid Double Remedies in Certain Investigations and Reviews Initiated Between 20 November 2006 and 13 March 2012

Between 20 November 2006 and 13 March 2012, the U.S. authorities initiated a series of anti-dumping and countervailing duty investigations and reviews that resulted in the imposition of anti-dumping and countervailing duties in respect of the same imported products from China, either on a preliminary or final basis. In none of these investigations and reviews did the U.S. authorities take steps to investigate and avoid double remedies.

In light of the failure of the U.S. authorities to investigate and avoid double remedies in the identified investigations and reviews, China considers that the resulting countervailing duty measures, including any countervailing duties collected pursuant to their authority, are inconsistent with Articles 10, 15, 19, 21, and 32 of the SCM Agreement and Article VI of the GATT 1994. China further considers that the associated anti-dumping measures in each such instance, including any anti-dumping duties collected pursuant to their authority, are inconsistent with Articles 9 and 11 of the AD Agreement and Article VI of the GATT 1994." *See* DS449-Panel Request, *supra* note 918, at pp.4.

Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)[950], which required China to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." According to the United States, China merely listed general articles of the applicable laws (including the Subsidies Agreement, AD Agreement, and GATT 1994) instead of pointing out specific sub-articles (*e.g.*, Article 19.3 in lieu of merely reference to Article 19), in violation of this procedural rule.[951]

As for the appeals from both sides, the key issues focused on Article X:2 and Article 6.2 of the DSU. In its ruling, the Appellate Body reversed the Panel's interpretation of Article X:2 as requiring a comparison between the measure of general application and an established and uniform practice.[952] Although the Appellate Body partly sided with China on the interpretation of Article X:2, it concluded that it was unable to complete the analysis under Article X:2 and determine whether the GPX Legislation violated the WTO requirement because the Panel's report did not provide sufficient factual findings to examine this claim.[953] Consequently, this claim was declared moot and had no legal effect to the United States. That means that Commerce's actual application of CVD law to China between 2006 and 2012 was deemed to be lawful under the U.S. law. Therefore, the United States succeeded in continuing its application of the CVD law to China and other NME countries.

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[950] DS449-AB Report, *supra* note 947, at para. 2.68. Article 6.2 of the DSU provides in relevant part: "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." In defining the scope of the dispute, Article 6.2 serves the function of establishing and delimiting the panel's jurisdiction. *See* DS449-AB Report, at para. 4.5.

[951] *Id.*

[952] *Id.* at para. 4.120. Specifically, the Appellate Body found that the Panel erred in finding that the phrase "under an established and uniform practice … serves to define the relevant prior rate that is to be used to establish whether or not an advance in a rate [of duty] has been effected" and that the relevant comparison contemplated by Article X:2 is "between the new rate effected by the measure at issue and the rate that was previously applicable under an established and uniform practice." Furthermore, the Appellate Body found that the Panel erred in finding that, in order to determine whether a measure of general application imposes a new or more burdensome requirement or restriction, a comparison should be made with "a requirement or restriction that results from, and reflects, an interpretation of … a measure adopted and publicly communicated by an administering agency." *Id.* at para. 4.93.

[953] *Id.* at para. 5.1.g.

With respect to the United States' claim that China's panel request was inconsistent with Article 6.2 of the DSU, the Appellate Body noted that in order for a panel request to meet this provision's requirements to "present the problem clearly," it must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed."[954] Further, the narrative of a panel request functions to "explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question."[955] After a thorough examination of the narrative explanation of China's panel request, the Appellate Body addressed that, even without a specification of the relevant paragraphs of Article 19 of the Subsidies Agreement, Article 19.3 was nonetheless capable of being identified as the pertinent provision.[956] The reference to "double remedies" in China's panel request helps present the problem clearly by creating a plain connection between the measure at issue and the legal claims.[957] As a result, the Appellate Body concluded that it was clear that the general reference to Article 19 of the Subsidies Agreement, when read in conjunction with the narrative, could be considered to meet the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[958] Therefore, the Appellate Body upheld the Panel's finding that claims under Articles 10, 19.3, and 32.1 of the Subsidies Agreement were identified in China's panel request consistently with Article 6.2 of the DSU, and were therefore within the Panel's terms of reference.[959] That meant that the United States, as recommended by the Panel, was required to bring 25 investigations and reviews initiated between November 20, 2006 and March 13, 2012, into conformity with the WTO obligations.

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[954] *Id.* at para. 4.26. (citing Appellate Body Report, *U.S. - Oil Country Tubular Goods Sunset Reviews,* para. 162).
[955] *Id.* (citing Appellate Body Reports, *China - Raw Materials,* para. 226 (quoting Appellate Body Report, *EC - Selected Customs Matters,* para. 130 (emphasis original))).
[956] *Id.* at para. 4.30.
[957] *Id.*
[958] *Id.*
[959] *Id.* at para. 4.52.

China and the United States separately claimed victory in this dispute. China won the legal battles of double remedies in both DS379 and DS449 cases, while the United States defeated China in its repeated attempts to challenge the United States' enactment and application of the CVD law to China and other NME countries. As will be discussed in Chapter 5, the case discussed in Chapter 4 paved the way for the series of trade battles that have transpired between Vietnam and the United States, many of which have given rise to some of the same issues as those that arose in the Chinese cases—but with even greater complexity as Commerce continues to pursue its policy of aggressive AD and CVD investigations against countries that have been categorized as having nonmarket economies.

Chapter 5. Case Studies of Vietnam

5.1. Introduction

Following the end of the war between the United States and Vietnam was ended on April 30, 1975, the South of Vietnam was reunified with the North ("Reunification Day"), and, on July 2, 1976, the Socialist Republic of Vietnam was officially proclaimed on July 2, 1976.[960] In contrast, the loss of the Vietnam war was difficult to accept for the United States government at the time; as a result, the United States isolated the entire country of Vietnam by extending the trade and investment embargo that had been previously imposed only against the North of Vietnam since 1964 (a decade after the French defeat).[961] From an American perspective, the Vietnam war remained "a source of deep emotional conflict," and there was actually a "fierce antiwar sentiment both at home and abroad" under the then-President Nixon administration.[962]

After the Reunification Day, Vietnam faced formidable development challenges.[963] For example, essential infrastructures had been destroyed during the war, societal wounds from internal conflicts between the North and the South were yet to heal, food and other basic commodities were in short supply, and millions of people

[960] On July 2, 1976, the National Assembly for reunification of Vietnam has decided to change the country's name to the Socialist Republic of Vietnam. *See,* Nghi Quyet Ve Ten Nuoc, Quoc Ky, Quoc Huy, Thu Do, Quoc Ca (Resolution on the Country's Name, National Flag, National Emblem, Capital, National Anthem), promulgated by the National Assembly of the Socialist Republic of Vietnam, July 2, 1976.

[961] *End of U.S. Embargo on Vietnam Will Boost Asia Trade, Stability*, Associated Press Worldstream, February 04, 1994. *See also* St. Louis Post-Dispatch (Missouri), *U.S. Embargo on Vietnam Assailed*, FIVE STAR Edition, February 11, 1993.

[962] Stauch, Thomas R., *The United States and Vietnam: Overcoming the Past and Investing in the Future*, 28 INT'L LAW. 995 (1994).

[963] World Bank and Ministry of Planning and Investment of Vietnam. 2016. *Vietnam 2035: Toward Prosperity, Creativity, Equity, and Democracy*. Washington, DC: World Bank. doi:10.1596/978-1-4648-0824-1. License: Creative Commons Attribution CC BY 3.0 IGO, Box 1.1 A chronology of major market-oriented *Doi Moi* reforms [hereinafter Vietnam 2035 Report], at 78.

were dead, wounded or displaced.[964] However, after a decade of struggling with the stagnant economy under the centrally planned economy model, in 1986, Vietnam started the most comprehensive economic reform package in its history, known as "Doi Moi" ("renovation" in English). This was a significant economic transformation from a centrally planned economy to a market-oriented economy where the state plays a key leading role. The 1986 Doi Moi policy was historically viewed as a strong move from bureaucratic centralized management based on state subsidies to a multisector, market-oriented economy, one that would be open to world markets.[965] These large-scale economic reforms focused on the key areas such as price reforms, agriculture sector reforms, economic integration, macroeconomic stabilization, enterprise reforms, decentralization, and social equity.[966] In pursuit of the objectives of the Doi Moi policy, prioritizing the economic integration and enterprise reforms, the National Assembly of Vietnam for the first time enacted a Foreign Investment Law in 1987[967] (providing a basic legal framework for foreign investors to invest and do business in Vietnam), and, in 1990, it enacted two sets of enterprise laws including the Company Law (providing the legal framework for the registration of limited liability companies and joint-stock companies) and the Private Enterprise Law (providing a legal basis for the establishment of private enterprises).[968]

Reforms of the banking system in Vietnam have been also implemented since the 1990s by the enactment of several laws and regulations that have expanded and opened the banking system to both domestic and foreign investors. Specifically, in

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[964] *Id. see also* Martin Rama, based on conversations with H.E. Vo Van Kiet with Professor Dang Phong and Doan Hong Quang, *Making Difficult Choices: Vietnam in Transition*, Commission on Growth and Development, The International Bank for Reconstruction and Development / The World Bank, Working Paper 40 (2008), at 9.
[965] Vietnam 2035 Report, *supra* note 964, at 81.
[966] *Id.,* at 82-85.
[967] Law No. 04-HDNN8 of December 29, 1987, on Foreign Investment in Vietnam (repealed).
[968] Law No. 47-LCT/HDNN8 of December 21, 1990, on Company; and Law No. 48-LCT/HDNN8 of December 21, 1990, on Private Enterprise. These two sets of laws were amended in 1994 and later replaced and incorporated into the Law on Enterprises in 1999. *See* Enterprise Law No. 13/1999/QH10, enacted by the National Assembly of the Socialist Republic of Vietnam on June 12, 1999 (repealed).

1990, private commercial banks (including branches of foreign banks and joint-venture banks) were permitted to open and operate in Vietnam.[969]

The Doi Moi reforms boosted Vietnam's underperforming economy remarkably during the 1990s; in particular, the economic reforms focused on building a market-oriented economy and creating opportunities for private-sector competition sent a message to the world that Vietnam was willing to integrate into the global economy. In fact, the impressive changes in Vietnam's foreign and domestic policies have been positively recognized by the international community. The International Monetary Fund (IMF) agreed to resume lending to Vietnam in 1993. That action was a motivation for the World Bank and the Asian Development Bank (ADB) to recommence their lending to Vietnam shortly thereafter.[970] These funds were integral to Vietnam's post-war reconstruction of its infrastructure.

The most successful outcome of Vietnam's efforts at economic reforms was the lifting of the U.S. trade embargo. On February 3, 1994, then-President Clinton ordered an end to the 19-year embargo that had banned all trade between the United States and Vietnam.[971] From President Clinton's perspective, he lifted the trade ban because Vietnam had made improvements in assisting the United States to search for American prisoners of war (POWs) and those missing-in-action (MIAs).[972] In addition, this action was viewed as "casting away a central remnant of one of America's most divisive wars"

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[969] Ordinance No. 37-LCT/HDNN8, on the State Bank of Vietnam promulgated by the Council of State on May 23, 1990 (repealed); Ordinance No. 38-LCT/HDNN8, on banking, credit cooperatives and finance companies promulgated by the Council of State on May 23, 1990 (repealed); and Decree No. 189-HDBT, making regulations for operations of branches of foreign banks, joint-venture banks operated in Vietnam issued by the Council of Ministers on June 15, 1991 (repealed).

[970] Viet D. Dinh, Financial Reform and Economic Development in Vietnam, 28 LAW & POL'Y INT'L BUS. 857, 867 (1997).

[971] Douglas Jehl, *Opening to Vietnam; Clinton Drops 19-Year Ban on U.S. Trade with Vietnam; Cites Hanoi's Help on M.I.A.'s,* The New York Times, Washington, Feb. 3, 1994.

[972] Robert S. Greenberger, *Clinton Lifts Ban on Trade with Vietnam --- Full Ties Await Accounting for Missing Soldiers; U.S. Firms Ready to Go,* the Wall Street Journal, Feb. 4, 1994. The lifting of trade embargo against Vietnam opened the door to reconciliation with [Vietnam]. President Clinton said that "the ending of 19-year embargo was the best way to ensure cooperation from Vietnam and to continue getting the information Americans want on POWs and MIAs (prisoners of war and military personnel missing in action). *See*, John Maher, *Vietnam Markets Open to U.S. Dropping Trade Ban,* Austin American-Statesman (Texas), Feb. 4, 1994.

and "opened a potentially lucrative market to American goods."[973] However, it should be noted that the lifting of the trade embargo was only the first step toward establishing ties with Vietnam; it did not "constitute a normalization" of diplomatic relations. Rather, the Clinton administration admonished that further progress for bilateral ties would depend on Vietnam's continued cooperation in helping in POW/MIA searches.[974]

From the perspective of Vietnam, the end to the trade ban was a remarkable stepping stone for Vietnam to promote its integration into the region and the world economy. In fact, in the subsequent year, Vietnam became a full member of the Association of Southeast Asian Nations (ASEAN) in 1995[975], and Vietnam also entered into a cooperation agreement with the European Union (EU) in the same year.[976] 1995 was indeed a historic year for Vietnam's foreign relations, for it also achieved a second remarkable step in rebuilding its relationship with the United States: specifically, in July 1995, twenty years after Vietnam's Reunification Day, the United States moved forward to establish the formal diplomatic relations with Vietnam.[977] This important event supplemented Vietnam's accomplishments in establishing its foreign relations with the three economic spheres including ASEAN (a regional relation), EU (a multilateral relation) and the United States (a bilateral relation). In addition, the historic 1995 accomplishments paved the way for Vietnam to join into the global economy in the following years.

Since 1995, Vietnam and the United States have implemented several significant steps toward bilateral trade normalization and cooperation. In July 2000, both nations entered into an unprecedented bilateral trade agreement ("BTA"), marking

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[973] *Id.*
[974] *U.S. Lift Trade Embargo Against Vietnam; Clinton Cites Progress in MIA Search*, International Affairs Section, Facts on File World News Digest, Feb. 3, 1994.
[975] ASEAN Economic Community, *Vietnam in ASEAN: Toward Cooperation for Mutual Benefits*, available at https://asean.org/?static_post=vietnam-in-asean-toward-cooperation-for-mutual-benefits.
[976] Ky Tran-Trong, *A Would-Be Tiger: Assessing Vietnam's Prospects for Gaining Most Favored Nation Status from the United States*, 38 WM. & MARY L. REV. 1583, 1584 (1997).
[977] Washington Dateline, *Chronology of Events in U.S. Relations with Vietnam*, The Associated Press, July 11, 1995; *Clinton normalizes ties with Vietnam*, Agence France Presse - - English, July 12, 1995.

a key step in the historic reconciliation between the United States and Vietnam.[978] The BTA includes five major sections: (1) market access for industrial and agricultural goods; (2) intellectual property rights; (3) market access for services; (4) investment provisions; and (5) transparency provisions.[979] The BTA was a major step for Vietnam to fulfill a condition necessary to have Normal Trade Relations ("NTR") status, also known as Most-Favored-Nation ("MFN") status, granted by the United States.[980] In June 2001, then-President Bush submitted the BTA to Congress for approval; it was passed by both the House and the Senate in September 2001 and October 2001, respectively.[981] Thereafter, the BTA was signed into law on October 16, 2001.[982] The National Assembly of Vietnam ratified the BTA on November 28, 2001[983], and the Vietnamese President Tran Duc Luong signed the agreement into law on December 4 of the same year.[984] The BTA came into force on December 10, 2001, when the United States and Vietnam formally exchanged notices of acceptance.[985] The successful conclusion of the BTA was a further key stepping stone along Vietnam's path to joining the WTO. Indeed, the BTA is regarded as an important step in securing the United States' support for Vietnam's accession to the WTO. In addition, the processes of negotiating and implementing the BTA were useful for upgrading Vietnam's legal,

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[978] The White House, Office of the Press Secretary, *Fact Sheet on Vietnam Bilateral Trade Agreement 07/13/00*, 2000 WL 967020, July 13, 2000.

[979] Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations, available at https://ustr.gov/sites/default/files/US-VietNam-BilateralTradeAgreement.pdf. [hereinafter BTA]. *Id.*

[980] White House Press Releases, *Fact Sheet: Background on the U.S.-Vietnam Bilateral Trade Agreement,* June 8, 2001. ("Under the U.S. law, two conditions must be met in order for Vietnam to receive the NTR status: (1) a bilateral trade agreement must be completed and approved by Congress, and (2) the President must waive the 'Jackson-Vanik' provision, indicating that such a waiver would substantially promote freedom of emigration from Vietnam. Since 1998, the President has granted the annual Jackson-Vanik waiver for Vietnam. Thus, completion of this agreement, and its subsequent approval by Congress, would clear the way for Vietnam to receive NTR treatment on an annual basis. This in turn would bring Vietnam's trade commitments into force.")

[981] CRS Report for Congress, *The Vietnam-U.S. Bilateral Trade Agreement*, updated September 9, 2002 [hereinafter CRS Report 2002].

[982] *Id.*

[983] Resolution No. 48/2001/QH10 of the National Assembly of the Socialist Republic of Vietnam, on approval of the U.S.-Vietnam Bilateral Trade Agreement, November 28, 2001.

[984] Order No. 14/2001/L-CTN of the President of the Socialist Republic of Vietnam, on announcement of the National Assembly's Resolution, December 4, 2001.

[985] CRS Report 2002, supra note 982.

regulatory, and economic systems to WTO standards.[986] It should be noted that as part of the BTA, Vietnam was granted only a conditional or temporary NTR or MFN status; that status requires annual Presidential extensions, which must be approved by the U.S. Congress. Following the BTA, the next step toward normalizing U.S.-Vietnam trade relations was restoring permanent NTR or MFN status for Vietnam.

On May 31, 2006, U.S. and Vietnamese negotiators signed a bilateral agreement on the conditions for Vietnam's accession to the WTO.[987] However, the WTO requires its members to extend unconditional MFN or permanent NTR (PNTR) status in order to receive the benefits of WTO membership in their bilateral trade relations. Thus, in order for the United States to get the benefits of the trade concessions that Vietnam grants to all WTO members, the United States has to grant PNTR status to Vietnam. With recognition of the important economic and trade relations between the two countries, the United States granted PNTR status to Vietnam on December 29, 2006.[988] This important event marked a full economic normalization between the two countries. Thereafter, Vietnam formally became a member of WTO in January 2007.[989]

In June 2007, the United States and Vietnam signed a Trade and Investment Framework Agreement (TIFA) and set up a platform to discuss issues related to Vietnam's WTO commitments and additional investment and trade liberalization.[990] Thereafter, then-President Barack Obama's administration supported a free trade

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[986] *Id.* at CRS-10.

[987] This agreement with the United States is just the last, but the most difficult of the bilateral agreements that Vietnam has had to negotiate with 28 WTO Members (including the EU). *See* CRS Report for Congress, *Vietnam PNTR Status and WTO Accession: Issues and Implications for the United States* by Mark E. Manyin and William H. Cooper, Bernard A. Gelb (August 2., 2006) [hereinafter CRS Report 2006].

[988] CRS Report for Congress, *U.S.-Vietnam Relations: Background and Issues for Congress* by Mark E. Manyin (January 3, 2008) [hereinafter CRS Report 2008].

[989] Vietnam's WTO Working Party was established on 31 January 1995. The negotiations gained momentum after Vietnam signed the BTA with the U.S. in July 2001, they accelerated in the period 2004-2005, and they were completed in October 2006. The WTO General Council approved Vietnam's accession package on November 7, 2006. On January 13, 2007, Vietnam officially became the 150th member of the WTO. *See* Tu-Anh Vu-Thanh, *Does WTO Accession Help Domestic Reform?* The Political Economy of SOE Reform Backsliding in Vietnam, 16 WORLD TRADE REV. 85, 86 (2017).

[990] CRS Report for Congress, *U.S.-Vietnam Economic and Trade Relations: Key Issues in 2018*, R45172 (April 16, 2018) [hereinafter CRS Report 2018]. *See also* Eleanor Albert, *The Evolution of U.S.-Vietnam Ties, Council on Foreign Relations* (March 20, 2019).

agreement, namely the Trans-Pacific Partnership (TPP), that would have consisted of a dozen countries in the Asia-Pacific region, including Vietnam, as a "lynchpin of a U.S. strategic pivot to the region."[991] However, based on the allegation that the TPP would undermine the U.S. manufacturing base, President Trump withdrew the United States from the TPP shortly after he took office in 2017.[992]

Although the United States declined to join the TPP, U.S.-Vietnam bilateral trade has increased remarkably during the past decades. According to U.S. trade statistics, trade flows between the two nations grew quickly from $1.5 billion in 2001 to $77.6 billion in 2019, transforming Vietnam into the seventh-largest source of U.S. imports and 27th-largest destination for U.S. exports.[993] That rapid trade growth inevitably caused the U.S. trade deficit with Vietnam to rise from $592 million in 2001 to more than $39 billion in 2018.[994] Overall, from 2009 to 2019, imports of goods into the U.S. from Vietnam increased 442.2%.[995]

Needless to say, the rapid increase in bilateral trade has created trade friction over specific products in the two countries. Fierce competition has with regard to such products as catfish, shrimp, plastic bags, steel pipes, and so forth. The rapid growth in Vietnam's exports of catfish (also known as *basa, tra,* or *pangasius*) since 2002 has generated especially high trade tensions between the two nations. There is now a long and bitter war between the Catfish Farmers of America ("CFA"), representing U.S. catfish processors, and the Vietnamese producers and exporters of catfish in the Mekong Delta region of Vietnam. Indeed, a catfish antidumping investigation was the first trade remedy case that the United States government initiated against Vietnamese producers, following the CFA's petition in 2002[996], and an antidumping (AD) order

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[991] Albert (2019), *supra* note 991.
[992] *Id.*
[993] Michael F. Martin, Specialist in Asian Affairs, CRS Report for Congress, *U.S.-Vietnam Economic and Trade Relations: Issues in 2020*, IN FOCUS, February 13, 2020 [hereinafter CRS Report 2020].
[994] *Id.*
[995] Office of the United States Trade Representative, Southeast Asia & Pacific, Vietnam; available at https://ustr.gov/countries-regions/southeast-asia-pacific/vietnam, accessed on March 20, 2020.
[996] Initiation of Antidumping Duty Investigation: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 67 FR 48437 (July 24, 2002).

was finally imposed against Vietnamese catfish producers and exporters in 2003.[997] The catfish AD order has now remained in place for more than 17 years, and it remains in effect today. Following the initiation of the catfish war, several other antidumping (AD) and countervailing duty (CVD) cases have been initiated against Vietnam. From 2003 to 2019, there were 15 AD and CVD orders imposed against Vietnamese exporters and producers of frozen fish fillets (AD), shrimp (AD), uncovered innerspring units (AD), polyethylene retail carrier bags (AD/CVD), steel wire garment hangers (AD/CVD), utility scale wind towers (AD), welded stainless pressure pipe (AD), oil country tubular goods (AD), steel nails (AD/CVD), tool chests and cabinets (AD), and laminated woven sacks (AD/CVD).[998] For these currently imposed AD and CVD orders, in every investigation, the U.S. Department of Commerce has persistently considered Vietnam a non-market economy (NME) country; therefore, it regularly uses the NME methodology to calculate the AD and CVD rates imposed against the Vietnamese exporters and producers. Pursuant to ITC statistical data, most of the Vietnamese products investigated are similar to Chinese products for which the Department of Commerce has also imposed AD or CVD orders.[999] That is because the same U.S. petitioners have attempted to prevent unfair trade competition with regard to similar products imported from both China and Vietnam. In addition, in order to restrict a bypass or circumvention of an AD or CVD order, U.S. petitioners have a tendency to file an AD or CVD petition against Vietnam after a similar AD or CVD order has been imposed upon China, or the U.S. petitioners may file a new AD or CVD petition against both countries at the same time.

This chapter presents a series of case studies, focusing on countervailing duty cases that the U.S. Department of Commerce ("Commerce") has lodged against Vietnam as an NME country. In Section 5.2, the author will examine why Vietnam has

[997] Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 47909 (August 12, 2003).
[998] ITC, Import Injury Investigations, Research Tools, AD/CVD Orders, Antidumping and Countervailing Duty Orders in Place as of February 01, 2020. Available for online access at https://www.usitc.gov/investigations/import_injury?f%5B0%5D=field_investigation_status%3Aactive.
[999] *Id.*

been treated as an NME (by the U.S trade laws and under Vietnam's WTO commitments). In Section 5.3, through analysis of specific CVD cases, the author seeks to identify the subsidy programs provided by the. Government of Vietnam ("GOV") that Commerce most frequently determines to be countervailable. Then, in Chapter 6, the author will recommend strategies for the GOV and Vietnamese companies to adopt in order to mitigate the challenges of U.S. countervailing duty investigations.

5.2. Vietnam's Nonmarket Economy Status

5.2.1. Vietnam's WTO Commitments on NME Status

To integrate into the WTO as a world trading system, Vietnam (as an acceding member) spent years negotiating the terms of its accession with all WTO members.[1000] This accession process took Vietnam for 12 years, from January 1995 to December 2006. In late 2006, at the final meeting of the Working Party, Vietnam successfully concluded its negotiations on the terms of accession and later became an official WTO member after ratification of the Protocol on the Accession of Vietnam.[1001]

Similar to China, Vietnam also agreed to be treated as an NME in antidumping and countervailing duty proceedings. Specifically, Vietnam made commitments under

[1000] Negotiations on terms of accession take place in four main parts: (1) multilateral negotiations in the Working Party on the rules to be accepted; (2) plurilateral negotiations among interested parties on agricultural domestic support and export subsidies; (3) bilateral negotiations between interested parties on concessions on goods; and (4) bilateral negotiations between interested parties on specific commitments on services. *See* Handbook on Accession to the WTO: Chapter 4, The accession process - the procedures and how they have been applied, available at https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s6p1_e.htm#:~:text=Negotiations%20on%20terms%20of%20accession,and%20TBT)%3B%20bilateral%20negotiations, accessed on January 11, 2020.

[1001] WTO, Working Party on the Accession of Vietnam, *Report of the Working Party on the Accession of Vietnam*, WT/ACC/VNM/48 (October 27, 2006). Note: Protocol of Accession is the formal document by which a new member joins the WTO and agrees to be bound by its multilateral agreements. All commitments made in the Working Party are incorporated into the Protocol of Accession; Protocol on the Accession of the Socialist Republic of Vietnam to the Marrakesh Agreement Establishing the World Trade Organization Done at Geneva on 7 November 2006, Notification of Acceptance and Entry into Force, WLI/100, December 19, 2006.

its WTO Accession Protocol Agreement that an importing WTO Member, when determining price comparability in an antidumping proceeding, may use either Vietnamese prices or costs (*i.e.*, the ME methodology) or a methodology that is not based on a strict comparison with domestic prices or costs in Vietnam (*i.e.,* the NME methodology).[1002] The ME methodology may be used if the producers under investigation can clearly show that ME conditions prevail in the industry producing the product with regard to the manufacture, production, and sale of that product. In such circumstances, the importing WTO Member can use Vietnamese prices or costs for the industry under investigation in determining price comparability.[1003] On the other hand, the NME methodology may be used if the producers under investigation cannot clearly show that ME conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.[1004] This NME methodology - or the so-called surrogate country approach - has consistently been used by the U.S. Department of Commerce in all antidumping investigations against Vietnam.

As for its WTO's commitments on countervailing duty proceedings, Vietnam agreed that if there are special difficulties in the application of a methodology for identifying a countervailable subsidy, an importing WTO member may use alternative methodologies for identifying and measuring the subsidy benefit that take into account the possibility that prevailing terms and conditions in Vietnam may not be available to serve as appropriate benchmarks.[1005] This means that Vietnam agreed under its WTO

[1002] *Id.* para. 255(a). Paragraph 255(a) provides "In determining price comparability under Article VI of the GATT 1994 and the Antidumping Agreement, the importing WTO Member shall use either Vietnamese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam based on the [rules as set forth in (i) or (ii)]."
[1003] *Id.* para 255(a)(i). This paragraph provides "If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Vietnamese prices or costs for the industry under investigation in determining price comparability."
[1004] *Id.* para 255(a)(ii). This paragraph provides "The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."
[1005] *Id.* para. 255(b). Paragraph 255(b) provides "In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies, the relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use alternative methodologies for identifying and measuring the subsidy benefit which take into account the

obligations that the investigating authority of an importing WTO member can select external benchmarks in CVD investigations for determining the benefits granted to Vietnamese producers. For example, when loans are extended at "preferential" interest rates and are challenged through CVD actions, the investigating authority can look to a surrogate country (that is, a reasonably similar country with a market economy) to identify what a market interest rate would have been, in order to then identify the amount of the subsidy implied by the preferential interest rates available in the NME country.[1006]

According to the Vietnam's WTO commitments, the application of the NME methodology in antidumping proceedings was to endure until at least December 31, 2018.[1007] After that date, if Vietnam had established that it has a market economy satisfying the market economy criteria in accordance with the national law of the importing WTO member, the NME methodology should no longer be used in antidumping proceedings.[1008] Or, if Vietnam could establish that a particular industry or sector within Vietnam had prevailing market economy conditions, the NME methodology should no longer be applied to that industry or sector.[1009] Surprisingly, there was no commitment as to the expiration of non-Vietnamese benchmarks in CVD actions.[1010] In general, under Vietnam's terms of accession to the WTO, Vietnam was to remain in NME status until December 31, 2018 (*i.e.,* 12 years from the date of accession), or until it can satisfy the conditions of market economy treatment set forth under U.S. law. In other words, the United States was not obligated to designate Vietnam as a market economy country automatically as of December 31, 2018; rather,

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possibility that prevailing terms and conditions in Viet Nam may not be available as appropriate benchmarks."

[1006] David A. Gantz, *Polyethylene Retail Carrier Bags: Non-Market Economy Status and U.S. Unfair Trade Actions Against Vietnam*, 36 N.C.J. INT'L L. & COM. REG. 85, 96-97 (2010).

[1007] Report of the Working Party on the Accession of Vietnam, *supra* note 1002, para. 255(d).

[1008] *Id.*

[1009] *Id.*

[1010] *Id.* Paragraph 255(d) states that "in any event …subparagraph (a)(ii) shall expire on 31 December 2018." That means this expiry date applies to the NME methodology (*i.e.,* surrogate country methodology) used in AD actions only, *i.e.,* "a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam". *See* para. 255(a)(ii), *supra* note 1005.

the NME status of Vietnam must affirmatively be revoked by the United States in accordance with its current trade laws. In reality, as of today, Vietnam is still regarded as an NME country in all AD and CVD actions by the United States.

5.2.2. Vietnam's NME Treatment by the United States

Shortly after the historic U.S.-Vietnam Bilateral Trade Agreement ("BTA") entered into force in 2001, catfish products imported from Vietnam started to appear more and more in U.S. supermarkets and restaurants, and, with their cheaper prices, the rapidly became preferred by many American buyers and consumers. In fact, in 2001, a large quantity of Vietnamese catfish fillets (about 17 million pounds) was imported into the U.S. market and sold at a retail price of $1.60 per pound, compared with $2.40 for U.S. catfish.[1011] The rapid increase in the sale of Vietnamese catfish fillets caused a threat to the American catfish farmers and processors concentrated in the regions of Mississippi, Arkansas, and Louisiana, who feared losing their domestic market shares. Consequently, on June 28, 2002, American catfish farmers and processors filed an antidumping petition against Vietnamese catfish producers and exporters.[1012] This landmark case over the control of America's catfish market was known as the first U.S.-Vietnam trade war since trade normalization in 1995.

In this catfish antidumping case, Vietnam was for the first time treated as a non-market economy country. The subject merchandise in this investigation was referred to as frozen "basa" and "tra" fillets, as they are commonly called by the Vietnamese producers and exporters. The U.S. petitioners claimed that the subject merchandise imported into the U.S. market was sold at less than the normal value and that such imports caused material injuries or threatened material injuries to the U.S. industry. In addition, the petitioners alleged that Vietnam was a non-market economy country for

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[1011] Jeffrey Gettleman, Times Staff Writer, *The Nation; U.S. Catfish Is in Troubled Water as Asian Catch Seizes the Market; Food: Vietnamese basa and tra look and taste like the fish along the Mississippi Delta. Farmers contend they are sold below cost*, Los Angeles Times (July 16, 2002).
[1012] Initiation of Antidumping Duty Investigation: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 67 FR 48437 (July 24, 2002) [hereinafter Catfish Initiation Notice].

purposes of the U.S. antidumping law, and, therefore, Vietnam could not provide specific and reliable information on the production factors of the subject merchandise in Vietnam.[1013]

For the purpose of its investigation, Commerce conducted an analysis of Vietnam's economic reforms in order to make a decision on the market/non-market economy status of Vietnam. As required by 19 U.S.C. § 1677(18)(B), Commerce had to conduct an extensive analysis of all six factors when making its NME status determination.[1014] Commerce also invited public comment on Vietnam's economy in regard to the six factors as set out by the Act.[1015] After nearly three months of analyzing all the comments received from Vietnam and all other interested parties, Commerce determined that Vietnam had a non-market economy for the purposes of antidumping and countervailing duty proceedings, effective July 1, 2001.[1016] Specifically, in applying the six factors established by the Act, although Commerce recognized Vietnam's positive economic reforms during the period of Doi Moi, Commerce concluded that Vietnam's economy remained in transition and, therefore, Vietnam had not yet become a market economy country.[1017]

First, in its assessment of Factor 1, the extent to which the currency of the foreign country is convertible into the currency of other countries, Commerce observed that Vietnam's currency (*i.e.,* Vietnam dong, or VND*)* is not fully convertible for current account purposes and is practically inconvertible for capital account purposes, and the exchange rate remains effectively set by the government.[1018]

[1013] *Id.* at 3.
[1014] 19 U.S.C. § 1677(18)(B). *See supra*, Section 4.2 (discussing the six-factor analysis).
[1015] Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Opportunity to Comment on Petitioner's Allegation That Vietnam Has a Non-Market Economy, 67 FR 52942 (August 14, 2002) [hereinafter "VN NME Notice of Request for Comment"].
[1016] Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 4986 (January 31, 2003) [hereinafter Catfish Prelim Notice].
[1017] Shauna Lee-Alaia et al, Office of Policy, Import Administration, Memorandum for Faryar Shirzad, Assistant Secretary, Import Administration, Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status [hereinafter Market Status Memo], at 44.
[1018] *Id.* at 11.

Second, in its analysis of Factor 2, the extent to which wage rates in the foreign country are determined by free bargaining between labor and management, Commerce stated that the government of Vietnam retains *de jure* control over some wage levels, which could affect free bargaining between employers and employees; consequently, such control causes an ultimate effect on price formation.[1019]

Third, in assessment of Factor 3, the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country, Commerce recognized that Vietnam had attracted foreign direct investments ("FDI") for the purpose of economic development; however, Vietnam did not show a willingness to allow FDI to participate in all economic sectors.[1020] In addition, the government of Vietnam used licensing and registration procedures and limitations on choice of corporate form as the means to direct FDI and implement the government's economic development plan.[1021]

Fourth, in assessment of Factor 4, the extent of government ownership or control of the means of production, Commerce claimed that the government of Vietnam ("GOV" preserved an active leading role for state-owned enterprises ("SOEs") and that competition between the private sectors and public sectors remained limited.[1022] Further, it was noted that there was no private land ownership in Vietnam.[1023] In other words, the land is owned by "all the people" and unitedly managed by the state. Thus, Commerce concluded that the ownership right over private property and private sector involvement in Vietnam's economy was greatly limited due to government intervention.[1024]

Fifth, in assessment of Factor 5, the extent of government control over the allocation of resources and over the price and output decisions of enterprises, although Vietnam has made impressive progress in the development of its private sector, such

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[1019] *Id.* at 16.
[1020] *Id.* at 22.
[1021] *Id.*
[1022] *Id.,* at 29.
[1023] *Id.* In practice, the government leases land and grants limited land-use rights (or LURs) to individuals and entities while the transfer and conversion of LURs are subject to government review and approval.
[1024] *Id.*

as with the growth of small-and medium-sized businesses, Commerce stated that the GOV still had considerable control over interest rates and lending policies; and consequently, the private sector was constrained from access to essential credit for its business development according to the principles of a market economy.[1025] In addition, Commerce noted that Vietnam still maintained a control over prices in key sectors in relation to state monopolies (e.g., not only in traditional state monopolies such as electricity, postal service, and telephone services, but also in cement, steel, iron, other industrial products and pharmaceuticals, etc.).[1026]

Sixth, in its broad and flexible assessment of Factor 6, such other factors as the administering authority considers appropriate, Commerce was free to evaluate additional issues that it considered relevant to its consideration of market economy status for Vietnam. Commerce focused on issues such as trade liberalization, rule of law, and corruption. Specifically, Commerce acknowledged Vietnam's significant efforts toward trade liberalization by entering the BTA with the U.S. in 2001, joining the ASEAN Free Trade Agreement ("AFTA") by 2006, and preparing for accession to the world trading system (*i.e.*, the WTO).[1027] Regarding the other issues, Commerce stated that the rule of law in Vietnam was still weak and that the levels of corruption in Vietnam were high, although the GOV was taking steps to address this problem.[1028] Commerce admitted, however, that corruption is a major problem in many other transition economies and even some market economies.[1029]

By a detailed application of the six factors, Commerce concluded that the market forces in Vietnam were not yet sufficiently developed to permit the use of prices and costs to calculate the normal values in its antidumping investigation. Beyond this conclusion, Commerce also recommended that Vietnam be treated as an NME country in countervailing duty investigations as well. This NME determination has been applicable to both antidumping and countervailing duty proceedings and is effective

[1025] *Id.* at 39.
[1026] *Id.* at 30-31.
[1027] *Id.* at 40-41.
[1028] *Id.* at 42.
[1029] *Id.*

from July 1, 2001 to present day. For the purpose of application of the U.S. antidumping and countervailing duty laws to NME countries, Commerce has published a list of eleven countries currently designated as nonmarket economy countries, including Armenia, Azerbaijan, Belarus, China, Georgia, Kyrgyz, Moldova, Tajikistan, Turkmenistan, Uzbekistan, and Vietnam.[1030]

In order for an NME country to change its status and be treated as a market economy country, either it must make a formal request for review, or a respondent from that country in an antidumping proceeding must claim that its country has market economy status.[1031] Over the years, several NME countries have successfully "graduated" to become market economy countries, such as Poland in 1993, Russia in 2002, and Ukraine in 2006.[1032] Section 5.3 will discuss Commerce's revocation of its NME designations for Poland, Russia, and Ukraine, and it will also analyze China's failed efforts to change its NME status.

5.3. Other Countries' Attempts to Escape NME Status

Poland came to be recognized by the United States as a market economy country as early as 1993. During an antidumping investigation against imports of steel plates from Poland in 1993, Commerce agreed to revoke Poland's status as an NME country (retroactively effective from January 1, 1992) for purposes of applying the U.S. antidumping law.[1033] Commerce's revocation was based on the finding that Poland's economic reforms satisfied the statutory six factors established in 19 U.S.C. § 1677(18)(B) of the Tariff Act of 1930, as amended. In particular, Commerce found that Poland's domestic markets, unlike those of a traditional NME, were open to trade and

[1030] Commerce Department, ITA, Countries Currently Designated as Non-Market Economy Countries. Available at https://www.trade.gov/nme-countries-list.
[1031] Tariff Act of 1930 (as amended), sections 751(b) and 771(18)(C)(ii) (codified at 19 U.S.C. § 1675(b) and § 1877(18)(B)).
[1032] 2019 Congressional Research Service (CRS) Report, China's Status as a Nonmarket Economy (NME), January 10, 2019.
[1033] Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Poland, 58 FR 37205 (July 9, 1993) [hereinafter Poland's ME Status Determination].

foreign investment and were not insulated or protected from external market influences.[1034] In addition, Commerce found that Poland's economy operated on the basis of market principles to such an extent that its domestic prices could reasonably be used as a basis for determining fair market value under the U.S. antidumping law.[1035] For these reasons, Commerce determined that, by 1992, Poland's major economic reforms , which had begun in 1990, had progressed to the point that 1992 Polish domestic prices could be considered market-driven.[1036]

As to the case of Russia, following several formal requests by Russian steel companies in an AD proceeding on hot-rolled steel products from Russia, Commerce initiated an inquiry into the status of Russia as an NME country under the AD and CVD laws in October 2001.[1037] As in the case of Poland, Commerce's overall conclusion was also based on its analysis of the six factors. Commerce stated that Russia had generally made the transition to a market economy. Focusing its reasoning on Factor 1[1038], Commerce opined that the Russian ruble was convertible for investment purposes, it was fully convertible for trade purposes, and the exchange rate was market-based.[1039] With respect to the internal pricing mechanism in Russia, Commerce found that prices for the vast majority of goods and services were not subject to price controls and were based on market forces of supply and demand. Commerce also remarked that Russian privatization had been comprehensive and had placed the great majority of industry, property, and assets in the hands of the private sector.[1040] Although Commerce pointed out some unsatisfactory aspects in the Russian economy such as Russia's tax

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[1034] *Id.*
[1035] *Id.*
[1036] *Id.*
[1037] Notice of Initiation of Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the Antidumping and Countervailing Duty Laws, 66 FR 54197 (October 26, 2001).
[1038] Factor 1, *supra* note 426 (19 U.S.C. § 1677(18)(B)(i) or Factor 1, provides that Commerce must take into consideration "the extent to which the currency of the foreign country is convertible into the currency of other countries."
[1039] Memorandum for Faryar Shirzad, Assistant Secretary, Import Administration, Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law, Case No. A-821-816, Inquiry, Public Document (June 6, 2002) [hereinafter Russia's ME Status Determination].
[1040] *Id.*

system and its business registration and licensing requirements, which still kept investment relatively low, and although Russian workers on the whole were paid relatively low wages, Commerce ultimately accepted that foreign investment was permitted and encouraged in Russia, and that Russian wages were market-based.[1041] Furthermore, Commerce noted that Russian's banking reforms had lagged, its pace of industrial restructuring has been slow, and regulated energy prices remained a significant concern in the economy.[1042] Despite those difficulties, Commerce finally concluded that Russia's economy overall had become market-based.[1043] Based on these reasons, Commerce revoked Russia's NME status, effective as of April 1, 2002.[1044]

In the case of Ukraine, in April 2005, the Government of Ukraine ("GOU") formally asked Commerce to conduct a review of Ukraine's NME status within the context of a changed circumstances review of the AD order on carbon and certain steel wire rod from Ukraine.[1045] Based on its assessment of the statutory six factors, Commerce found that Ukraine's currency (*i.e.*, the hryvnia) was freely convertible and was subject to market forces.[1046] Ukraine's employees and management could freely negotiate wages, and workers had trade union rights.[1047] Further, Commerce found that foreign direct investment was encouraged in almost all sectors of Ukraine's economy, and foreign-invested enterprises could have an equal treatment as with domestic enterprises.[1048] It is worth noting that Ukraine was able to show its privatization efforts, as a result of which at least 65% of Ukraine's GDP was held by the private sector, whereas there were relatively few large state-owned enterprises remaining.[1049] In addition, Commerce found that land in Ukraine (including land for agricultural use) could be privately held, and that foreign investors may own the land on which their

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[1041] *Id.*
[1042] *Id.*
[1043] *Id.*
[1044] *Id.*
[1045] Final Results of Inquiry into Ukraine's Status as a Non-Market Economy Country, 71 FR 9520 (February 24, 2006) [hereinafter Ukraine's ME Status Determination].
[1046] *Id.*
[1047] *Id.*
[1048] *Id.*
[1049] *Id.*

investments are located.[1050] With respect to the banking sector and price controls in Ukraine, Commerce stated that the GOU had withdrawn its previous position as a primary resource allocator in the economy by privatizing virtually the entire banking sector and eliminating most price controls.[1051] Despite such substantial economic progress, Commerce recommended that Ukraine continue to enhance such privatization mechanisms for trade in land, particularly for agricultural land.[1052] Based on this reasoning, Commerce finally concluded that Ukraine's significant economic reforms warranted treatment as a market economy country, effective as of February 1, 2006.[1053]

As for the case of China, pursuing an ME status has been its long-term strategic target. In 2017, China asked Commerce to revoke China's NME status, but Commerce declined that revocation request.[1054] In its decision, after an extensive analysis of the six factors, Commerce concluded that China was still an NME country because "the state's role in the economy and its relationship with markets and the private sector results in fundamental distortions in the Chinese economy."[1055] Specifically, some of the key findings in Commerce's six-factor analysis included persistent problems related to China's currency convertibility, where Commerce found that the Government of China ("GOC") "still maintains significant restrictions on capital account transactions and intervenes considerably in onshore and offshore foreign exchange market."[1056] With respect to the wages, Commerce found that there remained "significant institutional constraints on the extent to which wage rates were determined through free bargaining between labor and management."[1057] In particular, Commerce realized that

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[1050] *Id.*
[1051] *Id.*
[1052] *Id.*
[1053] *Id.*
[1054] U.S. Department of Commerce, International Trade Administration, Memorandum from Leah Wils-Owens, Office of Policy, Enforcement & Compliance, to Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Operations, China's Status as a Non-Maret Economy, Investigation No. A-570-053 (October 26, 2017) [hereinafter China's NME Status Memo], available at https://enforcement.trade.gov/download/prc-nme-status/prc-nme-review-final-103017.pdf, accessed on August 18, 2021.
[1055] *Id.* at 7.
[1056] *Id.* at 4.
[1057] *Id.* at 5.

the formation of independent trade unions to represent labor was still prohibited, and workers did not have the right to strike.[1058] Regarding China's foreign investment regime, Commerce found that there still existed "significant barriers to foreign investment, including equity limits and local partner requirements, opaque approval and regulatory procedures, and technology transfer and localization requirements."[1059] With respect to China's control over production, Commerce found that the GOC continued to "exert significant ownership and control over the means of production," through (1) "the role and prevalence of state-invested enterprises (SIEs)" and (2) "the system of land ownership and land-use rights."[1060] Firstly, the SIEs overwhelmed other major economies, and due to the SIEs' priority in allocation of resources, SIEs were "not strictly disciplined by market principles of supply and demand."[1061] Secondly, the GOC owned and controlled all land in China (including both rural and urban land), which is another key means of production.[1062] Regarding China's control over the allocation of resources, prices, and the banking sector, Commerce found that the GOC continued to maintain state planning in its industrial policies to influence economic outcomes, a high degree of control over essential or strategic prices (*e.g.*, in provision of electricity), and state ownership and control over the largest commercial banks.[1063] Lastly, Commerce found that the legal system in China was used by the GOC and the CCP to "secure discrete economic outcomes, channel broader economic policy, and pursue industrial policy goals." From these key findings, Commerce concluded that China was not qualified to be deemed a market economy country.

In parallel with China's efforts to challenge its NME designation directly with the U.S. Department of Commerce in 2017, China requested consultations with both the U.S. (in Case DS515) and the EU (in Case DS516) before the WTO in December

[1058] *Id.*
[1059] *Id.*
[1060] *Id.*
[1061] *Id.*
[1062] *Id.* at 6.
[1063] *Id.*

2016.[1064] In each dispute, China claimed that according to certain provisions of its WTO's Accession Protocol in 2001, China must be recognized as a market economy after 15 years had elapsed from its accession to the WTO.[1065] According to China, the provisions of Section 15(a)(ii) and Section 15(d) of its Accession Protocol, which had allowed other WTO members to treat China as an NME in AD investigations, expired on December 11, 2016 ("Expiry Date").[1066] Section 15 generally allows a WTO member to disregard Chinese domestic prices and use surrogate prices from a third country instead, under the NME methodology. Section 15(d) provides that the NME provision as set forth under Section 15(a)(ii) "shall expire 15 years after the date of accession."[1067] Thus, based on its simple understanding of Section 15(d), China interpreted the expiry provision of Section 15(a)(ii) as creating a legal obligation for

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[1064] *See* Request for Consultations by China, *United States--Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS515/1 (Dec. 15, 2016) [hereinafter US - Price Comparison Methodologies (DS515)], available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm, accessed on October 25, 2021; Request for Consultations by China, *European Union - Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/1 (December 15, 2016) [hereinafter EU - Price Comparison Methodologies (DS516)], available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm, accessed on October 25, 2021.

[1065] *See* WTO, Protocol on the Accession of the People's Republic of China, WT/L/432 (November 10, 2001) (incorporating the Report of the Working Party on the Accession of China, P150, WT/ACC/CHN/49 (October 1, 2001)) [hereinafter China's Accession Protocol].

[1066] *Id.* Subparagraphs 15(a)(ii) and 15(d) provide as follows:

"15. Price Comparability in Determining Subsidies and Dumping

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(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) ….

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

….

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector."

[1067] *Id.* Section 15(d).

other WTO members to grant China ME status automatically. If China's interpretation were commonly accepted, it would benefit Vietnam, because Vietnam had similar provisions in its WTO Accession Protocol: the provisions regarding the application of the NME methodology in AD actions against Vietnam was supposed to expire on December 31, 2018.[1068] Accordingly, because of the legal importance of the China dispute as well as its implications for Vietnam's related interest, Vietnam also requested to join the consultations in both cases DS515 and DS516 in December 2016.[1069] Notably, at the request of China, a WTO panel was established in the EU case (DS516) only, but not in the U.S. case (DS515), simply because China did not request establishment of a panel in that case.[1070] The matters that China raised in the EU consultation were closely related to the ones in the U.S. consultation. The United States, as a third party in DS516, disagreed with China's interpretation and stated that following the expiry of Section 15(a)(ii), China must have "an adequate evidentiary basis" for a determination to use a methodology that is not based on a strict comparison with domestic prices or costs in China in determining price comparability in AD proceedings involving Chinese products that are imported into a WTO member after December 11, 2016.[1071] The United States agreed with the EU that the expiry of Section 15(a)(ii) meant that the particular standard of evidence introduced in that paragraph was no longer applicable, and that after December 11, 2016, an importing Member must "fall back" on the standard of evidence generally applicable in AD proceedings—which does not necessarily mean treatment as an ME country.[1072] In May 2019, China requested the Panel to suspend the proceedings in DS516.[1073] That meant that China

[1068] *See* Vietnam's Accession Protocol, paragraph 255(d), *supra* note 1011.
[1069] *See* DS516 and DS515, *supra* note 1065.
[1070] *Id.*
[1071] EU - Price Comparison Methodologies (DS516), Responses of the United States to the European Union's Questions Following the First Substantive Meeting of the Panel with the Parties (January 29, 2018), at para. 41, available at https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.EU.Qs.fin.%28public%29.pdf, accessed on October 25, 2021.
[1072] *Id.* at para. 42.
[1073] WT/DS516/13, EU - Price Comparison Methodologies, Communication from the Panel (June 17, 2019), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/516-13.pdf&Open=True, accessed on October 25, 2021.

decided temporarily to end its efforts at the WTO battlefield for recognition as a market economy. One may infer that China withdrew from the WTO dispute to avoid showing to the world its potential defeat.[1074] Another possible explanation for China's withdrawal is that the Panel supported the EU's position that the Expiry Date merely shifts the burden of proof and does not terminate a member's substantive right to apply the NME methodology to China.[1075]

In sum, the successful examples of Poland, Russia, and Ukraine, as well as China's unsuccessful efforts in applying for ME graduation with the United States and the EU, provide important lessons for Vietnam. So far Vietnam, has not formally asked Commerce to reconsider Vietnam's NME label that was attached in 2002. However, the fact that Poland, Russia, and Ukraine have been recognized by Commerce as market economies does not depend only on their significant economic reforms, but above all, upon the diplomatic relations and political factors that also contributed to their success. For example, in the case of Ukraine, prior to Commerce's decision on the reclassification of Ukraine's NME status, during an official visit to Ukraine, the former U.S. Secretary of State, Condoleezza Rice, voiced her hope that "the United States would grant market economy status to Ukraine soon," and she also said that the United States "highly values the friendship and its cooperation with Ukraine, a large strategic partner, and a country of great importance in Europe."[1076] It can be said that this strategic partnership between Ukraine and the United States substantially helped Ukraine to succeed in acquiring recognition as a market economy country.

5.4. Case Studies of U.S. CVD Actions Against Vietnam

[1074] Henry Gao, SMU, and Weihuan Zhou, UNSW, *The end of the WTO and the last case?*, East Asia Forum, available at https://www.eastasiaforum.org/2019/07/10/the-end-of-the-wto-and-the-last-case/, accessed on October 26, 2021.
[1075] *Id.*
[1076] Ukraine Business Daily, *US will grant market Economy Status to Ukraine soon, Rice hopes*, 2005 Interfax News Agency, December 7, 2005, accessed on Lexis on October 20, 2021.

This section will discuss and analyze several CVD actions initiated by the United States against Vietnam. Section 5.3.1 presents the case of polyethylene retail carrier bags. Section 5.3.2 presents the case of certain welded steel pipe. Section 5.3.3 presents the case of steel wire garment hangers. Section 5.3.4 presents the case of certain frozen warmwater shrimp. Section 5.3.5 presents the case of steel nails, laminated woven sacks, and utility scale wind towers. And, finally, Section 5.3.6 present the most recent case, concerning tires for passenger vehicles and light trucks. Together, these cases span the twelve-year period 2009-2021. As the author will discuss, the cases show that Vietnamese producers suffer less-favorable outcomes in these CVD actions because of the application of the NME methodology. Moreover, despite the presence of market forces in many sectors in Vietnam, Commerce has consistently found that prices in Vietnam do not reflect market values, with the result that Vietnamese producers are treated as having received countervailable subsidies in a wide array of circumstances, such as by obtaining land, credit, or raw materials at lower prices than, according to Commerce, they could have done in a true market economy.

5.4.1. Polyethylene Retail Carrier Bags

5.4.1.1. Introduction

The analysis of the first CVD investigation involving Vietnam is very important in understanding the series of Commerce's CVD cases against Vietnam. This first CVD case operated as a foundation for Commerce to implement and apply its new CVD practice in subsequent investigations against Vietnam. In addition, this first CVD case provides a good lesson for Vietnamese exporters and producers (especially for those who are exporting to the U.S. market) in understanding Commerce's investigation process and its requirements, as well as for preparing to deal with similar cases in the future.

Therefore, in this section, the author will focus on analyzing the legal grounds and reasoning employed by Commerce in applying the CVD law to Vietnam as a nonmarket economy country. The author will also examine Vietnamese government programs that Commerce determined for the first time constituted countervailable subsidies. In addition, this section will clarify how Commerce selected benchmarks to calculate the benefits that Vietnamese exporters and producers received under each subsidy program.

5.4.1.2. Case Summary

On April 20, 2009, in a dual antidumping and countervailing duty action petitioned by U.S. industry, Commerce initiated the first ever CVD investigation against Vietnamese producers of polyethylene retail carrier bags ("PRCBs").[1077] PRCBs are better known by American consumers as plastic grocery and shopping bags. In its petition, the U.S. domestic producers of PRCBs including Hilex Poly Co., LLC and Superbag Corporation (collectively, the "Petitioners") alleged that the Vietnamese producers of PRCBs received subsidies from the Government of Vietnam ("GOV") and that such imports caused or threatened to cause material injury to domestic U.S. industry.[1078] According to the USITC's import statistics, in terms of volume, between 2006 and 2008, imports of PRCBs from Vietnam by the U.S. increased by 134.9 percent.[1079] In terms of value, subject imports from Vietnam were valued at an estimated US$79.4 million in 2008, showing a significant increase from US$65.4 million in 2007 and from US$17.5 million in 2006.[1080] Therefore, the rapid increase in

[1077] Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation and Request for Public Comment on the Application of the Countervailing Duty Law to Imports from the Socialist Republic of Vietnam, 74 FR 19064 (April 27, 2009) [hereinafter PRCBs CVD Initiation].
[1078] *Id.*
[1079] Polyethylene Retail Carrier Bags from Indonesia, Taiwan, & Vietnam, USITC Inv. No. 701-TA-462 (Apr. 2010) (Citing Memorandum INV-HH-037 (Apr. 14, 2010)/PR at Table C-4).
[1080] US Department of Commerce, International Trade Administration, Fact Sheet, "Commerce Initiates Antidumping Duty Investigations on Imports of Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam, Indonesia, and Taiwan" (Citing Source: U.S. International Trade Commission, Dataweb (HTSUS 3923.21.0085), available at

quantity and value of PRCBs imported into the U.S. market is likely the main reason that the Petitioners initiated this dual trade remedy action.

In its preliminary determination issued on August 28, 2009, Commerce determined that under U.S. trade law, there was no legal impediment to the application of the CVD law to imports from Vietnam, which was considered as a nonmarket economy country. Notably, Vietnam was designated as an NME country in the catfish antidumping case in 2003. Since that time, the United States has not modified Vietnam's status as a nonmarket economy. In this CVD investigation, although Vietnam had a nonmarket economy, Commerce said that, because Vietnam had recently undergone many economic reforms, at the time of this proceeding, Commerce believed that it had the ability to identify and calculate any benefits that the GOV granted to Vietnamese exporters and producers. Regarding the existence of a subsidy, Commerce preliminarily found that a number of countervailable subsidies were provided to Vietnam's exporters and producers of PRCBs. In March 2010, Commerce reaffirmed its preliminary determination. Accordingly, based on the benchmarking methodologies developed by Commerce in previous CVD cases against China, Commerce calculated the net subsidy rate for the three mandatory respondents that were individually examined in this CVD proceeding. In particular, Advance Polybag Co., Ltd. (API), Chin Sheng Company Ltd. (Chin Sheng), and Fotai Vietnam Enterprise Corp. (Fotai Vietnam) and Fotai Enterprise Corporation (collectively, Fotai) received final subsidy rates of 52.56 percent, 0.44 percent (*de minimis*), and 5.28 percent, respectively.[1081] All other producers and exporters from Vietnam (which were not individually examined) received a final CVD rate of 5.28 percent.[1082]

Commerce's determination on the existence of countervailable subsidies was subsequently affirmed by the USITC. In its final voting, the USITC ruled that U.S.

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https://enforcement.trade.gov/download/factsheets/factsheet-prcb-ad-init-042109.pdf; accessed on July 5, 2020.

[1081] U.S. Department of Commerce, International Trade Administration, Import Administration, Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 75 FR 16428 (Thursday, April 1, 2010) [hereinafter referred to as PRCBs Final CVD Determination].

[1082] *Id.*

industry is threatened with material injury by reason of imports of PRCBs from Vietnam.[1083] As a result, Commerce issued a CVD order on PRCBs imported from Vietnam, effective as of May 4, 2010.[1084]

In the simultaneous antidumping investigation against PRCBs from Vietnam, Commerce assigned to both mandatory respondents API and Fotai the Vietnam-wide entity rate of 76.11% due to their withdrawal from the AD investigation prior to Commerce's preliminary determination.[1085] Normally, if a mandatory respondent withdraws from participation, it is regarded as non-cooperative, and, therefore, it will be subjected to a total adverse-facts-available ("AFA") rate, which is the highest dumping margin alleged by the petitioner. As for Chin Sheng (a mandatory respondent in the CVD case), because it was not a mandatory respondent in the AD investigation, it was assigned a separate rate of 52.30%.[1086]

In sum, as a result of the concurrent AD and CVD investigations, API, Fotai and Chin Sheng received the combined AD and CVD rates of 128.67%, 81.39%, and 52.74% respectively. From this case study, it is notable that the respondents (either mandatory or non-mandatory) involved in parallel AD and CVD investigations must ensure that they are able to succeed in *both* cases to be allowed to continue their exports to the U.S. market with a relatively low duty rate or even a zero duty rate. Otherwise, if they will not be able to withstand hight duty rates, they may have to close their

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[1083] U.S. International Trade Commission, Polyethylene Retail Carrier Bags from Indonesia, Taiwan and Vietnam, USITC Publication 4144, Investigation Nos. 701–TA–462 and 731–TA–1156–1158, 75 FR 22842 (Friday, April 30, 2010).

[1084] Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Countervailing Duty Order, 75 FR 23670 (May 4, 2010).

[1085] Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 74 FR 56813 (November 3, 2009), Westlaw, accessed on July 10, 2021.

[1086] *Id.* Normally a separate rate is determined based on the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding de minimis margins or margins based entirely on AFA. However, if the estimated weighted-average margins for all individually investigated respondents are de minimis or based entirely on AFA, Commerce may use any reasonable method. In the AD case, because the rate for all individually investigated respondents was based on AFA, Commerce relied on information from the Petition to determine a rate to be applied to respondents that have demonstrated entitlement to a separate rate. Specifically, Commerce assigned a simple average of the margins contained in the Petition, as adjusted by Commerce for purposes of initiation, i.e., 52.30 percent, as the separate rate for its determination. Id.

manufacturing plants or target other export markets. As in the case of Chin Sheng, although it achieved a *de minimis* rate (*i.e.,* zero percent) in the CVD case, it was subjected to an AD duty rate of 52.30%. Chin Sheng was excluded from a CVD order on the basis of a *de minimis* subsidy rate, but its AD rate was no insignificant.

5.4.1.3. Application of the CVD Law to Vietnam

5.4.1.3.1. A Precedent Case from China

As discussed above in Chapter 4, Commerce formerly pursued a long-standing policy of not applying the CVD law to NME countries. In 1986, in its ruling in *Georgetown Steel*, the CAFC affirmed Commerce's determination that the CVD law could not apply to NME countries.[1087] However, in a controversial action, on November 20, 2006, Commerce still made the decision to initiate a CVD investigation on imports of coated free sheet paper ("CFS Paper") from China.[1088] This was the first countervailing duty investigation against China since 1991, when Commerce initiated investigations against lugnuts and ceiling fans, which had to be terminated before going to an order.[1089] The investigation into CFS Paper from China required Commerce to review its long-standing policy of not applying the CVD law to NME countries like China. In that case, Commerce compared China's economic situation during the period of investigation in 2006 with the economies that had been at issue in *Georgetown Steel.* Through its comparison, Commerce noticed that there was a substantial difference between the modern economy in China and the 1980s Soviet-style economy in

[1087] See *Georgetown Steel Corp. v. United States* (1986), *supra* note 523.
[1088] U.S. Department of Commerce, International Trade Administration, Import Administration, Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper from the People's Republic of China, Indonesia, and the Republic of Korea, 71 FR 68546 (November 27, 2006).
[1089] U.S. Department of Commerce, International Trade Administration, Import Administration, Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks from the People's Republic of China ("PRC"), 57 FR 10459 (March 26, 1992); and Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans from the People's Republic of China, 57 FR 24018 (June 5, 1992).

Georgetown Steel.[1090] As a result, Commerce concluded that its policy that gave rise to *Georgetown Steel'*s litigation was inapposite to the investigation of CFS Paper from China, and therefore, did not bar the application of the CVD law to imports from China.[1091] With this reasoning, on October 17, 2007, Commerce confirmed its preliminary determination to apply the CVD law to China.[1092]

5.4.1.3.2. Application of the CVD Law to Vietnam

Just as with China, when the CVD action against PRCBs from Vietnam was initiated in 2009, because Commerce had never investigated the imposition of any countervailing duty against Vietnam, Commerce was required to determine whether the CVD law was applicable to Vietnam. In the petition against PRCBs from Vietnam, the Petitioners argued that there was no statutory bar to the application of the CVD law to imports from NME countries like Vietnam.[1093] Referring to *Georgetown Steel*, the Petitioners pointed out that the CAFC affirmed Commerce's decision regarding the application of the CVD law to NME countries.[1094] Furthermore, the Petitioners claimed that the Vietnamese economy, like China's economy, is significantly different from the Soviet-style economy analyzed in *Georgetown Steel.* And for that reason, Commerce should not have any particular difficulty in determining and calculating NME-related subsidies.[1095] In addition, the Petitioners contended that Vietnam's economy (at the

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[1090] U.S. Department of Commerce, International Trade Administration, Import Administration, Memorandum for David M. Spooner, CVD Investigation of Coated Free Sheet Paper from the People's Republic of China - Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy (March 29, 2007) [hereinafter referred to as *Georgetown Steel* Memo] available at http://ia.ita.doc.gov/download/nme-sep-rates/prc-cfsp/china-cfs-georgetown-applicability.pdf.

[1091] *Id*.

[1092] U.S. Department of Commerce, International Trade Administration, Import Administration, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China, 75 FR 16428 (Thursday, April 01, 2010).

[1093] PRCBs CVD Initiation, *supra* note 1078.

[1094] *Id.*

[1095] Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 74 FR 45811 (September 4, 2009) [PRCBs Preliminary CVD Determination].

time of this investigation) significantly mirrored China's present-day economy and is at least as different from the Soviet-style economy at issue in *Georgetown Steel*, as China's economy was found to be in 2007.[1096] The Petitioners also argued that Vietnam's integration into the WTO allowed Commerce to apply the CVD law to imports from Vietnam.[1097] The WTO Subsidies and Countervailing Measures Agreement ("SCM Agreement"), similar to U.S. law, permits the imposition of CVDs on subsidized imports from member countries and nowhere exempts NME imports from being subject to the provisions of the SCM Agreement.[1098] The Petitioners argued that because Vietnam had agreed to be bound under the SCM Agreement and other WTO provisions related to the use of subsidies, Vietnam must be subject to the same rules as other members.[1099]

On May 27, 2009, when Vietnam submitted its comments to Commerce regarding whether the CVD law should be applied to imports from Vietnam, the GOV argued that Commerce should comprehensively examine whether Vietnam's economy is fully market oriented to allow Commerce to conduct a CVD action as it did with China.[1100] In addition, the GOV also contended that Commerce's countervailing duty initiation was inconsistent with the U.S. law and its WTO obligations. Specifically, the GOV argued that CAFC's decision, followed by the U.S. Congress's failure to overturn that decision and by Commerce's policy of not applying the CVD law against NMEs for 20 years, clearly established that the application of CVD law to NMEs was inconsistent with U.S. law.[1101]

To assess whether the CVD law was applicable to Vietnam, Commerce took a quick review of Vietnam's economy. Specifically, Commerce looked at recognizable features or characteristics in Vietnam's manufacturing, finance, trade, state-owned

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[1096] *Id.*
[1097] *Id.*
[1098] *Id.*
[1099] *Id.*
[1100] Official Letter dated May 27, 2009 of the Ministry of Industry and Trade (MOIT) on behalf of the Government of Vietnam, regarding the Application of Countervailing Duty Law to Imports from Vietnam: Request for Comments (copy on file with author).
[1101] *Id.*

enterprise sector, land administration, and trade and investment mechanisms.[1102] Based on its "snap-shot" examination, Commerce determined that "Vietnam is no longer a classic style, centrally planned economy as described in *Georgetown Steel."*[1103] Commerce noted that "the economic space of Vietnam is a mixed landscape of public, private and foreign ownership,"[1104] and that the non-State sector had grown rapidly and has accounted for an increasing share of production, investment, employment and trade, although SOEs continued to play a significant role in the economy.[1105] However, Commerce noted that economic reforms in Vietnam were incomplete and that structural and institutional legacy problems still remained.[1106] Although private enterprises shared the economic space, they did not share it equally or on the same terms and conditions with the State sector, especially in the important areas of access to credit and land.[1107] Finally, Commerce concluded that, as a result of such developments, it was possible to determine whether the GOV had bestowed a benefit upon a Vietnamese producer (*i.e.,* the subsidy could be identified and measured) and whether any such benefit was specific.[1108] Commerce's rationale was that because it was capable of applying the necessary criteria set forth in the CVD law, Commerce's policy that gave rise to the Georgetown Steel litigation did not prevent it from concluding that the GOV had bestowed a countervailable subsidy upon a Vietnamese producer.[1109]

In making its determination on the date of applicability of the CVD law to Vietnam, Commerce determined that the date from which it is appropriate and administratively feasible to identify and measure subsidies in Vietnam for the purposes of CVD actions was January 11, 2007 (*i.e.,* the effective date of Vietnam's WTO

[1102] U.S. Department of Commerce, International Trade Administration, Import Administration, Memorandum for Ronald K, Lorentzen, Countervailing Duty Investigation of Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam - Whether the Countervailing Duty Law is Applicable to Vietnam's Present Day Economy (copy on file with author) [hereinafter referred to as Vietnam CVD Applicability Memo].
[1103] *Id.*
[1104] *Id.*
[1105] *Id.*
[1106] *Id.*
[1107] *Id.*
[1108] *Id.*
[1109] *Id.*

accession).[1110] The practice of choosing a cut-off date for a CVD investigation was similarly adopted in China's CVD final determinations involving imports of welded pipe, woven sacks, OTR tires, and thermal paper from China, wherein Commerce held in each case that December 11, 2011 (*i.e.*, the effective date of China's WTO accession), was the most appropriate starting date for identifying and measuring subsidies in China.

5.4.1.4. Use of Benchmarks

Commerce normally uses benchmarks other than actual prices or interest rates available in Vietnam, and it does so based on Commerce's findings that the GOV has taken a predominant role in land ownership and in the provision of loans in Vietnam. Further, the GOV's direct intervention in the markets for lending and land-use rights is claimed to impact prices, rendering those prices inappropriate for determining the amount of the benefit conferred by a subsidy. Thus, Commerce usually resorts to out-of-country benchmarks to measure the benefit of a subsidy in most of its countervailing duty investigations against Vietnam.

5.4.1.4.1. Interest-Rate Benchmarks

Before choosing benchmarks, Commerce conducted a review of Vietnam's banking sector. Based on its findings that "loans provided by Vietnamese banks reflect significant government intervention in the banking sector and do not reflect interest rates that would be found in a functioning market," Commerce determined that it should use an out-of-country, market-based interest-rate benchmark for the purposes of determining the benefits provided by the GOV's preferential lending programs.[1111]

[1110] U.S. Department of Commerce, International Trade Administration, Import Administration, Issues and Decision Memorandum for Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, at 2 (March 25, 2010) [hereinafter referred to as PCRBs Final CVD Decision Memo], available at http://ia.ita.doc.gov/frn/summary/VIETNAM/2010-7395-1.pdf.
[1111] PRCBs Prelim CVD Determination, *supra* note 1096.

For VND-denominated loans, Commerce calculated the external benchmark based on regression analysis that was previously developed by Commerce in CFS Paper from China and updated in other subsequent Chinese CVD cases.[1112] Technically, Commerce's regression analysis bases the benchmark interest rate on the inflation-adjusted interest rates of countries with per capita gross national incomes (GNIs) similar to Vietnam's, taking into account a key factor involved in interest formation, that of the quality of a country's institutions, which is not directly tied to state-imposed distortions in the banking sector.[1113] For USD-dominated loans, Commerce uses LIBOR rates with some adjustments.[1114]

In this CVD case, in the preliminary determination, Commerce determined that the loans provided by the Vietnam Development Bank (VDB) and state-owned commercial banks (SOCBs) were considered government financial contributions and conferred a specific benefit because such preferential loans targeted the plastics industry under the GOV's Plastic Plan.[1115] However, in the final determination, Commerce concluded that the preferential lending under the Plastics Plan was not used by PRCBs exporters and producers in Vietnam.[1116]

For Fotai, unfortunately, it was still assigned an AFA subsidy rate of 2.17% for the program of preferential lending for exporters.[1117] The reason for this was that during Commerce's verification of Fotai's submitted information and data, Commerce was unable to verify the accuracy and completeness of Fotai's reported short-term loan information.[1118] In particular, during the verification, Commerce found that the actual figures in Fotai's books and records were different numbers than reported on Fotai's

[1112] *Id.* at 45815.
[1113] *Id.*
[1114] *Id. see also* Gantz (2010), *supra* note 1007, at 120.
[1115] PRCBs Prelim CVD Determination, supra note 1096, at 45817.
[1116] PCRBs Final CVD Decision Memo, supra note 1111, at 19.
[1117] *Id.* at 15.
[1118] *Id.*

initial responses.[1119] Thus, Commerce concluded that Fotai failed to cooperate to the best of its ability and that the AFA was applicable to Fotai.[1120]

5.4.1.4.2. Land Benchmarks

Commerce's regulations set forth the basis for identifying comparative benchmarks to assess whether a government good or service is provided for "less than adequate remuneration" (LTAR).[1121] In other words, Commerce employs the three-tiered benchmark approach to determine whether the government provides land rent for LTAR. Specifically, Commerce may use market prices from actual transactions within Vietnam (a Tier-1 Benchmark). When actual prices in Vietnam cannot be used due to government intervention, Commerce resorts to world market prices that would be available to purchasers in Vietnam (a Tier-2 Benchmark). In cases where there are no world market prices available to purchasers in Vietnam, Commerce goes forward to assess whether the government prices are consistent with market principles (a Tier-3 Benchmark).[1122]

Based on its separate research and analysis of the land markets in Vietnam, Commerce concluded that "the purchase of land-use rights in Vietnam is not conducted in accordance with market principles."[1123] In fact, Commerce stated that the GOV's dominance of the land market in Vietnam distorted the market for provision of land rent; consequently, no non-distorted benchmarks could be selected.[1124] Commerce's conclusion was based on the facts that the GOV was involved in the allocation, access, and pricing of land.[1125] Such involvement, according to Commerce, restricted the development of a market-based land system because the GOV maintained a

[1119] *Id.*
[1120] *Id.*
[1121] 19 C.F.R. § 351.511(a)(2).
[1122] 19 C.F.R. § 351.511(a)(2)(iii).
[1123] PRCBs Prelim CVD Determination, *supra* note 1096, at 45815.
[1124] PRCBs Final CVD Decision Memo, *supra* note 1111, at 26. (citing Land Market Analysis Memorandum).
[1125] *Id.* at 28.

predominant role in Vietnam's land market.[1126] Commerce acknowledged that there may be land transactions via sub-leasing of land-use rights between private parties; however, access to these rights and the parameters within which these transactions were permitted to operate were also set by the GOV.[1127] Accordingly, Commerce determined that it could not use in-country transactions as a benchmark because land prices in Vietnam were distorted.

In evaluating which source was appropriate to use for an external land benchmark to apply to the case of Vietnam, following the precedential cases involving China, Commerce focused on the factors of per capita GNI and population density.[1128] Based on that methodology, Commerce chose to use average rental rates for industrial property in the cities of Pune and Bangalore in India as surrogate rates because these two cities were determined by Commerce to have the closest match in terms of per capita GNI and population density, noting that the per capita GNI for India is $1,070, compared to $890 for Vietnam, even though the Philippines was found to be a closer match in terms of population density to Ho Chi Minh City, Vietnam than the two Indian cities.[1129]

In this CVD investigation, Fotai was found to have received a countervailable subsidy from the program of land rent exemption for exporters. Specifically, Fotai was exempt from land rent because its project was in "the list of special encouragement" and Fotai's value of exported products reached the rate of 90%.[1130] For these reasons, Commerce determined that the portion of land use rights provided to Fotai exempted from land rental fees was specific as an export subsidy.[1131] In addition, Commerce determined that there was a financial contribution because the rented land use rights constituted the provision of a good or service.[1132] As a result, Commerce determined that there existed a benefit to the extent that these land use rights were provided to Fotai for less than

[1126] *Id.*
[1127] *Id.*
[1128] PRCBs Prelim CVD Determination, *supra* note 1096, at 45816.
[1129] *Id.*
[1130] PRCBs Final CVD Decision Memo, *supra* note 1111, at 7.
[1131] *Id.* at 8.
[1132] *Id.*

adequate remuneration (LTAR).[1133] In calculating the benefit that Fotai received, Commerce multiplied the Indian benchmark land rental rate by the area of Fotai's exempted portion of land use rights.[1134] Then, Commerce divided that amount by Fotai's export sales to calculate a countervailable subsidy rate of 0.71%% ad valorem for Fotai.[1135]

5.4.1.5. Analysis of Other Countervailable Subsidies

5.4.1.5.1. Income Tax Preferences for Encouraged Industries

The Petitioners further alleged that the foreign-invested enterprises (FIEs) operating in industries and business sectors that are either "encouraged" or "specially encouraged" by the State are eligible for income tax preferences.[1136] The Petitioners gave an example that the FIEs are eligible for preferential rates of 10 or 15 percent, for up to 15 years, if they satisfy one or more criteria including operating a project identified in the GOV's list of encouraged projects.[1137] During its investigation, Commerce found that one of the mandatory respondents, Chin Sheng Company, Ltd., benefited from a corporate income tax rate reduction for the tax return filed during the POI.[1138]

Specifically, Commerce noted that Chin Sheng qualified for its tax preferences because of its investment in an encouraged industry (*i.e.,* a new investment project in plastic doors and plastic bags).[1139] Accordingly, Commerce determined that this type of

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[1133] *Id.*
[1134] *Id.*
[1135] *Id.*
[1136] Petition for the Imposition of Antidumping Duties Against Polyethylene Retail Carrier Bags from Indonesia, Taiwan, and Vietnam and Countervailing Duties Against Polyethylene Retail Carrier Bags from Vietnam, Volume I: General Information and Injury, Antidumping, and Countervailing Duty Allegations, at 88-89 [a copy filed by the Petitioners on March 31, 2009, Investigation Number: 701-TA-462 [Hereinafter referred to as PRCBs Petition].
[1137] *Id.* (citing Decree No. 24/2000/ND-CP of July 31, 2000, Detailing the Implementation of the Law on Foreign Investment in Vietnam, at Article 46).
[1138] PRCBs Final CVD Decision Memo, *supra* note 1111, at 6. The period for which Commerce measured subsidies in this CVD case, *i.e.,* the period of investigation (POI), was January 1, 2008, through December 31, 2008 (See PRCBs Final CVD Determination, *supra* note 1082, at 16429).
[1139] PCRBs Final CVD Decision Memo, *supra* note 1111, at 6.

subsidy (*i.e.,* income tax reduction and exemption) satisfies the conditions of (i) specificity to a group of industries and (ii) being a financial contributions in the form of revenue foregone by the government, and (iii) providing a benefit to Chin Sheng Company, Ltd., in the amount of the tax savings.[1140] Thus, Commerce concluded that this subsidy program was countervailable.

5.4.1.5.2. Income Tax Preferences for FIEs

The Petitioners further claimed that the GOV treated FIEs differently from other similarly situated enterprises during the period of investigation ("POI").[1141] For this allegation, Commerce found that Fotai received countervailable income tax preferences under the Income Tax Preferences for FIEs program.[1142] Specifically, Fotai benefited from a reduction in the standard corporate income tax rate for the tax return filed during the POI because of its FIE status.[1143] Such preferences were found by Commerce to be specific (as a matter of law) to a group of enterprises, FIEs; they were found to be a financial contribution in the form of revenue foregone by the government; and provision of a benefit to Fotai in the amount of tax savings.[1144] Thus, this subsidy program was determined as a countervailable subsidy.

5.4.1.5.3. Import Duty Exemptions for Imported Raw Materials for Exported Goods

In its initial Petition and in new subsidy allegations lodged on June 25, 2009, the Petitioners claimed that companies in Vietnam were entitled to exemptions from import duties on raw materials if they were FIEs or located in industrial zones.[1145] While both API and Fotai were in fact exempt from paying duties on imported raw materials, their

[1140] *Id.*, at 6-7.
[1141] *Id.*
[1142] *Id*., at 7.
[1143] *Id.*
[1144] *Id.*
[1145] See PRCBs Preliminary CVD Determination, *supra* note 1096, at 45818.

exemptions stem from Article 16 of the Law on Import Tax and Export Tax, Law No. 45/2005/QH-11, June 14, 2005, included as Exhibit 43 of the GOV's July 8, 2009 questionnaire response.[1146] Article 16 states that "Goods imported for processing for a foreign party which are then exported" are exempt from import duties.[1147] According to the GOV, the FIE exemption program was part of a terminated law and there was no exemption program for industrial zones.[1148]

At the preliminary stage of investigation, Commerce determined that API received countervailable benefits under this program to the extent that it imported materials not consumed in exported products.[1149] Commerce clarified that these exemptions are specific as export subsidies because they are contingent upon export performance.[1150] As to Fotai, Commerce noted that Fotai also had imports of materials under this program, but it was unclear to Commerce whether all of these materials were consumed in the exported products.[1151] Chin Sheng reported that its imports were subject to a zero rate under the normal tariff schedule, and therefore, it did not benefit from the program.[1152] In making its final determination, Commerce gathered more information regarding how the GOV established and verified which goods were consumed in the production of exported products and how it reconciled imports and exports under these exemptions.[1153]

During the final stage of investigation, since API dropped out of the investigation,[1154] Commerce requested both Chin Sheng and Fotai to report imports of all raw materials

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[1146] *Id.*
[1147] *Id.*
[1148] *See* Footnote 10 as cited in PRCBs Preliminary CVD Determination, *supra* note 1096, at 45818.
[1149] *See* PRCBs Preliminary CVD Determination, *supra* note 1096, at 45818.
[1150] *Id.*
[1151] *Id.*, at 45819.
[1152] *Id.*
[1153] *Id.*
[1154] *See* PCRBs Final CVD Decision Memo, *supra* note 1111, at 4. On October 21, 2009, API informed Commerce it would no longer participate in the investigation and withdrew its business-proprietary information from the record. As noted by Commerce, given API's complete withdrawal from the proceeding as a mandatory respondent, in an action clearly within the scope of section 776(a)(2), the Commerce based API's CVD rate on facts otherwise available. Because API chose not to participate and thus did not cooperate to the best of its ability in the investigation, in selecting from among the facts available, an adverse inference was warranted (i.e., AFA).

and other materials used in production of the exported product on which the company received import duty exemption.[1155] Chin Sheng reported that it had not received any import duty exemption on any of its raw materials or other materials; Fotai reported that it had received such exemptions on both raw materials and other materials.[1156] Commerce carried out verification at the final stage of investigation and found that the GOV did not have in place a system to confirm which inputs were consumed in the production of exported products and in what amounts, including a normal allowance for waste.[1157] Finally, Commerce determined that the duty exemptions on raw materials imported under this program during the POI provided countervailable benefits.[1158] Commerce further explained that in order to find import duty exemptions on raw materials non-countervailable, the government in question must have a system in place to confirm which inputs are consumed in the production of the exported product, including a normal allowance for waste; however, the GOV did not have such a system and companies were, in fact, allowed to choose their own yield rates within a range established by the GOV.[1159] Thus, the duty exemptions on raw materials for exports were found to be fully countervailable.[1160]

5.4.1.5.4. Exemption of Import Duties on Imports of Spare Parts and Accessories for Industrial Zone Enterprises

Commerce found that Fotai received import duty exemptions during the POI on imported spare parts and accessories and that Fotai qualified for such exemptions because one of its plants was located in an industrial zone.[1161] Commerce stated that exemptions from import duties are normally treated as a recurring subsidy.[1162] In addition, spare parts and accessories are imported on a regular basis and, presumably,

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[1155] *Id.* at 8.
[1156] *Id.*
[1157] *Id.* 19 C.F.R. § 351.519(a)(4), citing GOV Verification Report at 21-25.
[1158] *Id.*
[1159] *Id.*
[1160] *Id.*
[1161] *See* PCRBs Final CVD Decision Memo, *supra* note 1111, at 10, citing 19 C.F.R. § 351.524(c)(1).
[1162] *Id.*

Fotai could expect exemptions on such imports on an ongoing basis from year to year.[1163] Commerce then determined that benefits under this program were specific because the exemptions were limited to enterprises located within a designated geographical region (*i.e.,* industrial zones) within the jurisdiction of the authority providing the subsidy.[1164] Further, Commerce determined that a financial contribution existed because the exempted duties represented revenue foregone by the GOV.[1165]

5.4.1.6. Conclusion

Commerce's findings regarding the subsidized programs granted to the Vietnamese exporters and producers of PRCBs was the first-ever affirmative CVD determination against imports from Vietnam. It marked a turning point from the outset that Commerce found Vietnam had undergone certain economic reforms to the extent that, at the time of this CVD initiation, Commerce was able to identify and measure Vietnam's subsidy benefits. Although Commerce acknowledged that Vietnam had taken steps toward economic reforms, but Commerce still noted that such "economic reforms are incomplete and structural and institutional legacy problems remain." Those are the main reasons cited by Commerce to apply the CVD law to Vietnam.

In this CVD case, Commerce used external benchmarks to calculate the amount of the benefits received from government loans and preferential land rents. First, Commerce rejected Vietnam's local bank interest rates because these rates were claimed to be controlled by the GOV. Instead, Commerce relied on the average commercial bank lending rates in the World Bank's pool of "lower middle income countries" (excluding nonmarket-oriented countries). Second, Commerce went over the border of Vietnam to use surrogate data of land rents in India to calculate the land rents in Vietnam. Commerce's rationale was based on the conclusion that the GOV has

[1163] *Id.*
[1164] *Id.*
[1165] *Id.*

controlled all land prices in Vietnam; and as a result, the land prices in Vietnam were not reliable enough to be selected as a market-based benchmark for calculating the benefits received from the land rent program.

In addition to the preferential lending program (which Commerce ultimately concluded to be inapplicable to PRCB exporters and producers in Vietnam) and the land rent reduction/exemption program, the program of import duty exemptions for imported raw materials for exported goods was also of equal importance. Fotai was determined to have received a countervailable subsidy from an import duty exemption for imported raw materials with a CVD rate of 2.17%, accounting for 41% of its total CVD rate (5.28%). In order for Commerce to find that this program was *not* countervailable, Commerce cautioned that the GOV "must have a system in place to confirm which inputs are consumed in the production of the exported product, including a normal allowance for waste." At the time of this conclusion, the GOV did not have such a system in place.

5.4.2. Circular Welded Carbon-Quality Steel Pipe

5.4.2.1. Introduction

The PRCBs CVD case became a precedent that other U.S. petitioners could rely on to initiate other CVD investigations against Vietnamese exporters and producers. Normally, after the final affirmative determination of a CVD case, the government under investigation has not had enough time to change its policies and regulations in response to Commerce's adverse findings. If the CVD investigations quickly continue case after case, however, the government under investigation will face even more challenges in adjusting its policies and subsidy programs to avoid having them determined to be countervailable subsidies.

The second CVD action against Vietnamese steel pipes was an example of a U.S. petitioner that quickly took the opportunity to attack steel pipes imported from Vietnam. However, in this second CVD case, both of the mandatory respondents

successfully overturned Commerce's preliminary determination and obtained a final determination by Commerce that they had not in fact received countervailable subsidies. This provides insight into arguments that Vietnamese producers may wish to make in future cases in order to avoid a CVD affirmative determination.

5.4.2.2. Case Summary

The U.S. domestic producers of circular welded carbon-quality steel pipe ("Steel Pipe") filed a CVD petition against imports of the same product from India, Oman, the United Arab Emirates, and Vietnam on October 26, 2011.[1166] The U.S. domestic producers of Steel Pipe are comprised of Allied Tube and Conduit, JMC Steel Group, Wheatland Tube, and United States Steel Corporation (collectively, "Petitioners").[1167]

On December 15, 2011, Commerce selected SeAH Steel VINA Corp. (''SeAH VINA'') and Vietnam Haiphong Hongyuan Machinery Manufactory Co., Ltd. (''Haiphong Hongyuan'') as mandatory respondents.[1168]

In this CVD proceeding, Commerce reaffirmed that the CVD law was applicable to Vietnam as an NME because on March 13, 2012, Public Law 112-99 (or the NME Act) was enacted, making clear that Commerce was officially permitted to apply it.[1169] As with the PRCBs case, Commerce used the date of January 11, 2007, the date on which Vietnam became an official WTO Member, as the date from which Commerce would identify and measure subsidies in Vietnam for purposes of CVD investigations.[1170]

[1166] Circular Welded Carbon-Quality Steel Pipe from India, the Sultanate of Oman, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigations, 76 FR 72173 (November 22, 2011) [hereinafter Steel Pipe CVD Initiation].
[1167] *Id.*
[1168] Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 77 FR 19211 (March 30, 2012) [hereinafter Steel Pipe CVD Prelim Affirmative Determination].
[1169] Public Law 112-99 applies to this CVD case because it can apply retroactively to all proceedings initiated on or after November 20, 2006.
[1170] Steel Pipe CVD Prelim Affirmative Determination, *supra* note 1169, at 19214.

In the preliminary determination, Commerce concluded that Haiphong Hongyuan and SeAH VINA received countervailable subsidies from the following subsidized programs: (i) Import Duty Exemptions for Imported Raw Materials for Exported Goods; (ii) Import Duty Exemptions for Imported Fixed Assets, Spare Parts, and Accessories for Export Processing Enterprises or Export Processing Zones; and (iii) Import Duty Exemptions for Imported Fixed Assets, Spare Parts, and Accessories for Encouraged Projects.[1171] Haiphong Hongyuan was determined to have received benefits from programs (i) and (ii) with respective calculated CVD rates of 8.04% and 0.02%.[1172] SeAH VINA was determined to have received a countervailable subsidy of 0.04% under program (iii).[1173]

At the on-site verification, both mandatory respondents succeeded in persuading Commerce that they did not receive countervailable subsidies under the preliminary determination. As a result, Commerce determined that the Petitioners' alleged countervailable subsidies were not provided to Vietnamese producers and exporters of Steel Pipe.[1174] Therefore, the CVD investigation against Steel Pipe imported from Vietnam was terminated because Commerce had reached a final negative determination.

5.4.2.3. Use of benchmarks

Commerce have reviewed all evidence on record and determined that neither respondent received preferential financing in the steel industry.[1175] With respect to SeAH VINA's land, Commerce found that SeAH VINA obtained its land-use rights prior to the cut-off date (January 11, 2007). Thus, Commerce concluded that SeAH

[1171] *Id.* at 19215-16.
[1172] *Id.*
[1173] *Id.* at 19216.
[1174] Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam: Final Negative Countervailing Duty Determination, 77 FR 64471, 64472 (October 22, 2012) [hereinafter Steel Pipe CVD Final Negative Determination].
[1175] Memorandum to Paul Piquado, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the Socialist Republic of Vietnam (October 15, 2012) [hereinafter Steel Pipe CVD Final Decision Memo], at 31.

VINA did not receive countervailable benefits. With respect to Haiphong Hongyuan's land, in the preliminary determination, Commerce found that Haiphong Hongyuan's land price and terms of its lease were established through negotiations between Haiphong Hongyuan and an industrial development company (Hai Phong Do Son Industrial Joint Venture Company).[1176] At the verification stage, Commerce further affirmed its finding that the authority to negotiate the price and enter into land use contracts in the Hai Phong Do Son Industrial Zone rests with the Hai Phong Do Son Industrial Zone Joint Venture Company.[1177] As such, the provision of land-use rights within the industrial zone is not limited to an enterprise or industry located within a designated geographic zone.[1178] Therefore, Commerce determined that Haiphong Hongyuan did not receive a benefit, and did not use this program.

Because Commerce determined that both mandatory respondents did not benefit from policy lending and preferential land rent reduction/exemption programs, Commerce did not reach the issues of appropriate interest rate and land benchmarks.

5.4.2.4. Analysis of Countervailable Subsidies

5.4.2.4.1. Import Duty Exemptions on Imported Raw Materials for Export Processing Enterprises and Export Processing Zones

Under this program, SeAH VINA verified that it paid the applicable import tariffs on its imported raw materials.[1179] Therefore, SeAH VINA could prove that this program was not applicable to SeAH VINA. As for Haiphong Hongyuan, it reported to Commerce that it did not pay import duties on the imported raw materials used to produce exported goods because Haiphong Hongyuan was an export processing enterprise (*i.e.*, a non-tariff area).[1180] In fact, Haiphong Hongyuan is located in an

[1176] Steel Pipe CVD Prelim Affirmative Determination, *supra* note 1169, at 19217.
[1177] Steel Pipe CVD Final Decision Memo, *supra* note 1176, at 7.
[1178] *Id.*
[1179] *Id.*
[1180] *Id.*

export processing zone that is considered as a non-tariff area under the Vietnamese laws and regulations.[1181] Pursuant to the GOV's regulations, because Haiphong Hongyuan is an export processing enterprise, its imported goods from foreign countries into non-tariff zones for use only in non-tariff zones are not liable for import duties. Therefore, Haiphong Hongyuan did not pay any import duties on its imported raw materials in the first place and could not be said to have received an import duty exemption.[1182] Accordingly, Commerce accepted that Haiphong Hongyuan did not receive a financial contribution from its duty-free imports of raw materials.

For the above reasons, this program was non-countervailable as to both mandatory respondents.

5.4.2.4.2. Import Duty Exemptions for Imported Fixed Assets, Spare Parts and Accessories for Export Processing Enterprises and Export Processing Zones

This program was also determined not to be countervailable. Haiphong Hongyuan was an export processing enterprise and, as such, it qualified for the GOV's regulations applicable to non-tariff areas.[1183] Following the same principle that Haiphong Hongyuan's imports of raw materials were not subject to duties, its imports of fixed assets, spare parts, and accessories were also not subject to duties.[1184] Thus, Commerce determined that Haiphong Hongyuan did not receive a financial contribution from import duty exemption under this program.

5.4.2.4.3. Import Duty Exemptions for Imported Fixed Assets, Spare Parts and Accessories for Encouraged Projects

During the on-site verification, Commerce found that SeAH VINA did not receive any import duty exemptions under this program, although its investment

[1181] *Id.* at 4. (citing Article 3.3 of the GOV's Law on Import Duty and Export Duty).
[1182] *Id.*
[1183] *Id.*
[1184] *Id.*

certificate made it eligible to import these items duty free.[1185] Instead, Commerce verified that SeAH VINA had paid the applicable duties for its imports of fixed assets, spare parts, and accessories.[1186] Therefore, Commerce determined that SeAH VINA did not benefit from this duty exemption program.

5.4.2.5. Conclusion

Among all CVD investigations against Vietnam up to this present time, this is the only CVD case where Commerce found that neither of the two Vietnamese mandatory respondents received countervailable subsidies. In this CVD case, both mandatory respondents were 100% foreign-owned enterprises. SeAH VINA is a wholly owned subsidiary of SeAH Steel Corp., based in South Korea. And Haiphong Hongyuan is wholly owned by MAT Holdings, Inc., which is located in the United States. Being foreign-owned enterprises was a positive factor for them in this CVD investigation. One of the reasons for their success in this case is that both of these companies maintained clear and transparent accounting bookkeeping and data related their sales and production. This was demonstrated by the fact that both companies could successfully meet on-site verifications by Commerce. Both respondents and the GOV worked closely in responding Commerce's questions, and all actively participated up to the final stage of the investigation.

The fact that SeAH VINA and Haiphong Hongyuan both did not receive benefits from the government loans and land rent exemption/reduction program was also a great advantage leading to their success. Accordingly, they could eliminate the risk of using external benchmarks that most of respondents in other CVD investigations cannot control due to the uncertainty and unpredictability of surrogate benchmarks.

Vietnamese producers can derive lessons from this case. First, maintaining clear and transparent accounting will help to avoid an AFA determination during an investigation. Second, a respondent should, if possible, try to demonstrate that benefits

[1185] *Id.* at 25.
[1186] *Id.*

such as land-use rights were received prior to the cut-off date for applying the CVD law. Third, a respondent should consider declining government benefits where accepting them could result in the imposition of external benchmarks in a potential CVD investigation.

5.4.3. Steel Wire Garment Hangers

5.4.3.1. Introduction

Steel wire garment hangers were not among the key export products of Vietnam until 2008. After steel wire garment hangers from China were subject to Commerce's AD order in 2008,[1187] Vietnam's export of steel wire garment hangers to the U.S. market began to increase. Unfortunately, in May 2010, M&B Metal Products Co., Inc. ("Petitioner"), asked Commerce to initiate and conduct an anti-circumvention inquiry into two Vietnamese companies to determine whether certain hangers, which were allegedly products of China exported from Vietnam, were circumventing the China AD order.[1188] Commerce accepted the Petitioner and initiated an anti-circumvention inquiry in July 2010. Following its inquiry, Commerce finally affirmed that there was circumvention of the China AD order as a result of Angang's assembly of China-origin, semi-finished hangers into finished garment hangers in Vietnam for export to the United States.[1189]

Because of arrangements like this, it is inevitable that Vietnam will be the next target for the Petitioner's request to initiate a concurrent antidumping and countervailing duty investigation against steel wire garment hangers from Vietnam.

[1187] Notice of Antidumping Duty Order: Steel Wire Garment Hangers from the People's Republic of China, 73 FR 58111 (October 6, 2008). In this AD case, the two mandatory respondents Shanghai Wells Hanger Co., Ltd. and Shaoxing Gangyuan Metal Manufactured Co., Ltd., received AD duty rates of 15.83% and 94.78% respectively. All other non-mandatory respondents received a rate of 55.31%, and the PRC-Wide rate is 187.25%.

[1188] Steel Wire Garment Hangers from the People's Republic of China: Initiation of Anti-Circumvention Inquiry, 75 FR 42685 (July 22, 2010).

[1189] Steel Wire Garment Hangers from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 76 FR 66895 (October 28, 2011).

5.4.3.2. Case Summary

In January 2012, Commerce officially initiated a parallel investigation for antidumping and countervailing duties against steel wire garment hangers fabricated from carbon steel wire ("Garment Hangers") from Vietnam.[1190] For the CVD case, Commerce continued to confirm that the CVD law is applicable to Vietnam as an NME country.[1191]

The Petitioner alleged that the imports of Garment Hangers from Vietnam were benefiting from countervailable subsidies and that such imports caused, or threatened to cause, material injury to the U.S. industry.[1192] The following programs were alleged as countervailable subsidies: preferential lending to exporters; the provision of goods or services for LTAR such as land rent reduction/exemption for FIEs, land rent reduction/exemption for an exporter, and land preferences for enterprises in encouraged industries or industrial zones; grants under the export promotion program; and tax programs such as income tax preferences for FIEs and enterprises in industrial zones, an income tax refund for reinvestment by FIEs, and import duty exemptions on imports of goods for encouraged projects and for raw materials for exported goods.[1193]

In its final affirmative determination, Commerce concluded that countervailable subsidies were provided to the exporters and producers of Garment Hangers from Vietnam.[1194] As a result, the CVD rate of 31.58% was assigned to Hamico Companies (including South East Asia Hamico Export Joint Stock Company (SEA Hamico), Nam A Hamico Export Joint Stock Company (Nam A), and Linh Sa

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[1190] Steel Wire Garment Hangers from the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation, 77 FR 3737 (January 25, 2012) [hereinafter Garment Hangers CVD Initiation].
[1191] Certain Steel Wire Garment Hangers from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 77 FR 32930 (June 4, 2012).
[1192] Garment Hangers CVD Initiation, supra note 1191.
[1193] *Id.*
[1194] Certain Steel Wire Garment Hangers from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination, 77 FR 75973 (December 26, 2012) [hereinafter Garment Hangers CVD Final Determination].

Hamico Company Limited (Linh Sa)); the highest CVD rate of 90.42% was assigned to the Infinite Companies (including Infinite Industrial Hanger Limited (Infinite) and Supreme Hanger Company Limited (Supreme)) due to the use of adverse facts available ("AFA").[1195] Infinite Companies received an AFA rate due to its non-cooperation during Commerce's verification of information provided. Just before the verification, Infinite Companies withdrew and explained that "the level of the antidumping preliminary determination (*i.e.,* 135.81%) and the reasons for that determination made [it] impossible to continue shipment and it is economically impossible to continue to participate in these investigations."[1196] For that reason, Infinite Companies received the highest CVD rate in this case.

5.4.3.3. Analysis of Countervailable Subsidies

Commerce finally found the following programs were countervailable: (i) preferential lending to exporters (or loan subsidies); (ii) land preferences from enterprises in encouraged industries or industrial zones (or land subsidies); and (iii) other tax programs such as corporate income tax reductions for newly established investment projects and import duty exemptions or reimbursements for raw materials.[1197]

5.4.3.3.1. Loan Subsidies

One of the lending institutions in Vietnam, Vietnam Joint Stock Commercial Bank for Industry and Trade (VietinBank), was found to have provided loans under an

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[1195] *Id.*

[1196] Letter of Withdrawal from Proceeding filed on August 03, 2012, by Barnes, Richardson & Colburn, the law firm that represents Infinite, Case No. C-552-813. *See also* Steel Wire Garment Hangers from the Socialist Republic of Vietnam: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 77 FR 46044 (August 2, 2012).

[1197] ITA, CVD Investigation: Certain Steel Wire Garment Hangers from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Determination, Investigation C-552-813 (December 17, 2012) [hereinafter Garment Hangers CVD Final Determination Memo].

"export loan program" to SEA Hamico and Linh SA.[1198] Under this export loan program, these two companies received preferential interest rates from VietinBank for their exporting activities.[1199] VietinBank was regarded as a state-owned commercial bank ("SOCB") because at the time of investigation VietinBank was 80% owned by the GOV.[1200] Therefore, as in the preceding CVD cases, Commerce determined that the GOV provided a specific financial contribution to these companies through this preferential lending program. In order to calculate the benefit granted by this program, Commerce was required to calculate the difference between what the companies paid on the loans provided by VietinBank and the amount the companies would have paid on comparable, commercial loans.[1201] This methodology is called adoption of an interest-rate benchmark. Pursuant to the CVD law, Commerce normally uses comparable commercial loans reported by the companies in question as a benchmark. If there are no comparable commercial loans during the period of investigation, Commerce would use "a national average interest rate for comparable commercial loans." The benchmark to be used should be a market-based rate.[1202] However, in the Garment Hangers case, Commerce chose to use an external, market-based benchmark interest rate to calculate the loan subsidies because it believed that the loans provided by VietinBank were distorted by a significant government intervention and, therefore, did not reflect the market interest rates. In other words, Commerce rejected the use of in-country loan benchmarks but used an external, market-based out-of-country benchmark interest rate. Specifically, Commerce used the same methodology that it had developed in its previous CVD investigations against China (*e.g.,* in the CFS Paper and Thermal Paper cases) to calculate external benchmark interest rates based on the interest rates of those countries that were classified by the World Bank as lower-middle

[1198] *Id.* at 16.
[1199] *Id.*
[1200] *Id.*
[1201] *Id.* Section 771(5)(E)(ii) of the Act provides that the benefit for loans is the "difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market."
[1202] Section 771(5)(E)(ii).

income countries having a gross national income similar to Vietnam.[1203] As a result, Commerce used external benchmark interest rates to calculate the benefit from each loan that each company received from VietinBank.

5.4.3.3.2. Land Subsidies

In its subsidy analysis, Commerce found that the exemption of annual land rent applied to those companies which are located in "encouraged" industrial zones is a specific land subsidy.[1204] This type of subsidy is provided under the form of a provision of a good that confers a benefit under the U.S. CVD law. Since Commerce believed that the land prices in Vietnam were not based on market principles, it used an external, market-based land rent benchmark to calculate the benefit conferred by this program. Specifically, Commerce analyzed "comparable market-based prices in another country at a comparable level of economic development within the geographic vicinity of Vietnam."[1205] By this analysis, Commerce selected the cities of Pune and Bangalore in India and then used "a simple average of all rental rates for industrial property in both cities" to use as the appropriate land benchmark for Vietnam.[1206] This land benchmark methodology was previously used in PRCBs case. By using this methodology, Commerce calculated a net CVD rate of 25.41% for Hamico Companies, which occupies more than 80% of its total CVD rate.[1207]

5.4.3.3.3. Other countervailable subsidies

Commerce found that SEA Hamico received a 50% reduction in its income taxes payable in 2010.[1208] Export performance was a condition to receive these incentives. Thus, Commerce determined that the income tax reduction and exemption

[1203] Garment Hangers CVD Final Determination Memo, *supra note* 1198.
[1204] *Id.*
[1205] *Id.*
[1206] *Id.*
[1207] *Id. see also* Garment Hangers CVD Final Determination, *supra* note 1195.
[1208] Garment Hangers CVD Final Determination Memo, *supra* note 1196.

were financial contributions in the form of revenue foregone by the government, and they provide a benefit to SEA Hamico in the amount of tax savings.[1209]

Commerce also found that SEA Hamico and Linh Sa received duty exemptions on imported raw materials.[1210] Under the Vietnamese law, import duty exemptions or reimbursements for imported raw materials are granted to the following cases of import: "raw materials and supplies used for manufacture of equipment and machinery," "raw materials, supplies and accessories imported for production activities of investment projects on the list of domains where investment is particularly encouraged or the list of geographical areas meeting with exceptional socio-economic difficulties," "goods imported for processing for foreign partners then exported or goods exported to foreign countries for processing for Vietnam then re-imported under processing contracts", and "raw materials or supplies imported for the production of export goods."[1211] In particular, SEA Hamico and Linh Sa received duty exemptions on raw materials for exported goods. In this case, Commerce repeated its finding in PRCBs case that "the GOV does not have in place a system to confirm which inputs are consumed in the production of the exported products and in what amounts, including a normal allowance for waste."[1212] As a result, Commerce determined that the import duty exemptions on raw materials conferred a benefit equal to the total amount of the duties exempted.[1213] Based on that analysis, Commerce calculated a CVD rate of 4.46% for Hamico Companies.[1214]

5.4.3.4. Conclusion

It is surprising that from the beginning of the investigation, Vietnam did not hire any international trade counsel. Vietnam Competition Authority (VCA), under the

[1209] *Id.*
[1210] *Id.*
[1211] *Id.* at 15. (citing the GOV's March 30, 2012, questionnaire response at Exhibits 60).
[1212] *Id.* at 16.
[1213] *Id.*
[1214] *Id.*

Ministry of Industry and Trade (MOIT), on behalf of the GOV, directly participated, prepared, and responded to all questionnaires and supplemental questionnaires issued by Commerce during this CVD investigation.[1215] Undoubtedly, VCA had to do a lot of work in this case. For example, for only for the original questionnaire response, VCA's submission consisted of nearly 4,000 pages, including 103 exhibits.[1216] One of the selected mandatory respondents, Hamico Companies, also did not hire any counsel to help them. Right at the beginning of the investigation, Barnes, Richardson & Colburn filed a letter to Commerce to withdraw its representation for Hamico Companies and asked Commerce to send all future correspondence to Hamico Companies directly.[1217] What is even more surprising is that Hamico Companies decided to fight alone without hiring a counsel in the parallel antidumping investigation.[1218] In the AD investigation, Hamico Companies was finally assigned a duty rate of 220.68% as a Vietnam-Wide entity due to its non-cooperation.[1219] When combined with the CVD rate, Hamico Companies received the worst total rate of any case against Vietnam: 252.26% for both AD and CVD.

In sum, the strategies that the mandatory respondents and VCA pursued for this CVD proceeding should be reconsidered. This case was an expensive lesson for Vietnamese exporters as well as management authorities in terms of the importance of coordination and cooperation with Commerce.

[1215] *See* GOV's CVD Response: Steel Wire Garment Hangers from Vietnam, March 30, 2012, Public Version, Case No. C-552-813.
[1216] *Id.*
[1217] Barnes/Richardson, Steel Wire Hangers from the Socialist Republic of Vietnam: Withdrawal as Counsel, Public Document, Case No. C-552-813, February 24, 2012.
[1218] Barnes/Richardson, Steel Wire Hangers from the Socialist Republic of Vietnam: Withdrawal as Counsel, Public Document, Case No. A-552-812, February 24, 2012.
[1219] Steel Wire Garment Hangers from the Socialist Republic of Vietnam: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 77 FR 75980 (December 26, 2012). Hamico failed to provide the information requested by Commerce in a timely manner and in the form required, which significantly impeded the Commerce's ability to calculate an accurate margin. Commerce was unable to calculate a margin without the necessary information, requiring the application of facts otherwise available to Hamico. *Id.*

5.4.4. Certain Frozen Warmwater Shrimp

5.4.4.1. Introduction

Shrimp imports from Vietnam into the U.S. market have increased significantly since 2009.[1220] According to U.S. import statistics, the value of Vietnam's frozen warmwater shrimp imports into the United States increased from US$369 million in 2009 to US$493 million in 2011.[1221] Besides Vietnam, the United States has also imported shrimp from many other countries such as China, Ecuador, India, Indonesia, Thailand, and Malaysia.[1222] These countries are also large shrimp exporters to the U.S. market. In 2011 alone, Indonesia's shrimp exports to the U.S. market were valued nearly US$667.7 million.[1223] Ecuador and India also exported at significant values to the U.S., reaching US$523.6 million and US$511.7 million, respectively.[1224]

Among the above exporting countries, China, India, Thailand, and Vietnam have been subject to antidumping duty orders since 2005.[1225] Normally, the continued increase in shrimp imports into the U.S. market is a threat to American domestic shrimp processors. However, although those exporting countries with large quantities of shrimp imported to the U.S. market have been subject to AD orders (except for Indonesia and Malaysia), their AD duty rates are not high enough to reduce or stop their continued exports to the U.S. market. This, of course, has not satisfied the

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[1220] U.S. Department of Commerce, International Trade Administration, Fact Sheet, Commerce Initiates Countervailing Duty Investigations of Certain Frozen Warmwater Shrimp from the People's Republic of China, Ecuador, India, Indonesia, Malaysia, Thailand, and the Socialist Republic of Vietnam. Available at https://enforcement.trade.gov/download/factsheets/factsheet_multiple-shrimp-cvd-init-20130118.pdf. Online access on August 20, 2020.

[1221] *Id.*

[1222] *Id.*

[1223] *Id.*

[1224] *Id.*

[1225] Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the People's Republic of China, 70 FR 5149 (February 1, 2005); Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India, 70 FR 5147 (February 1, 2005); Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand, 70 FR 5145 (February 1, 2005); Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 70 FR 5152-01 (February 1, 2005).

competing domestic shrimp processors. For example, in 2011, Vietnamese shrimp exporters, under Commerce's administrative review for the period of 2009-2010, received very low cash deposit rates (effective as of September 12, 2011) in the range of 0.83 percent to 1.15 percent.[1226] Similarly, Chinese exporters received the dumping margins of 0.04 percent and 0.00 percent from their own administrative review by Commerce.[1227] Indian shrimp exporters similarly received a very low dumping margin of 1.69 percent for the same period of review.[1228]

As a result of the increase of shrimp imports from other countries into the U.S. market, along with the very low antidumping duty rates that some export countries have enjoyed, American shrimp producers unsurprisingly decided to initiate another trade remedy fight.

5.4.4.2. Case Summary

On December 28, 2012, the Coalition of Gulf Shrimp Industries ("Petitioner"), an American business association representing its members who are producers and wholesalers of shrimps, filed a CVD petition to allege that China, Ecuador, India, Indonesia, Malaysia, Thailand, and Vietnam provided subsidies to their exporters and producers of frozen warmwater shrimps.[1229]

In its petition, the Petitioner accused Vietnam of maintaining 20 subsidy programs.[1230] In addition to the GOV's mandatory participating role, Minh Qui Seafood Co., Ltd. (Minh Qui), and Nha Trang Seaproduct Company (Nha Trang) were selected as two mandatory respondents because, in terms of quantity and value

[1226] Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 76 FR 56158 (September 12, 2011).
[1227] Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 76 FR 51940 (August 19, 2011).
[1228] Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review, Partial Rescission, and Final No Shipment Determination, 76 FR 41203 (July 13, 2011).
[1229] Certain Frozen Warmwater Shrimp from the People's Republic of China, Ecuador, India, Indonesia, Malaysia, Thailand, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigations, 78 FR 5416 (January 25, 2013) [hereinafter VN Shrimp CVD Initiation].
[1230] *Id.*

imported into the U.S. market, they were the two largest exporters and producers of shrimp in Vietnam during the period of investigation.[1231]

In its final determination, Commerce determined that both Minh Qui and Nha Trang had received several countervailable subsidies from government programs. In particular, Minh Qui was subjected to a CVD rate of 7.88%, up from 5.08% in the preliminary determination,[1232] and Nha Trang received a CVD rate of 1.15%,[1233] which was significantly reduced from 7.05%.[1234] All other companies finally received the "all others" rate of 4.52%, which is an average based on the final rates of Minh Qui and Nha Trang.[1235]

In its separate investigations, Commerce determined that Indonesia and Thailand's producers received no countervailable subsidies.[1236] On the other hand, Vietnam and the other four countries including China, Malaysia, India, and Ecuador all received final affirmative determinations. However, at the final stage of USITC proceeding, all five countries successfully persuaded USITC to make a negative injury determination. Specifically, USITC determined that no industry in the United States was materially injured or threatened with material injury, and the establishment of the shrimp industry in the United States was not materially impaired by reason of frozen warmwater shrimp imports from China, Ecuador, India, Malaysia, and Vietnam.[1237] As a result of the USITC's final ruling, Commerce did not issue CVD orders.

[1231] Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 78 FR 50387 (August 19, 2013) [hereinafter VN Shrimp CVD Final Determination].

[1232] Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Countervailing Duty Determination, 78 FR 33342 (June 4, 2013) [hereinafter VN Shrimp CVD Prelim Determination].

[1233] VN Shrimp CVD Final Determination, *supra* note 1232.

[1234] VN Shrimp CVD Prelim Determination, *supra* note 1233.

[1235] VN Shrimp CVD Final Determination, *supra* note 1232.

[1236] Certain Frozen Warmwater Shrimp from the Republic of Indonesia: Final Negative Countervailing Duty Determination, 78 FR 50383 (August 19, 2013); Certain Frozen Warmwater Shrimp from Thailand: Final Negative Countervailing Duty Determination, 78 FR 50379 (August 19, 2013).

[1237] U.S. ITC, Frozen Warmwater Shrimp from China, Ecuador, India, Malaysia, and Vietnam, Investigation Nos. 701-TA-491-493, 495, and 497 (Final), Publication 4429 (October 2013).

5.4.4.3. Use of Benchmarks

5.4.4.3.1. Interest Rate Benchmarks

Based on an analysis of Vietnam's banking sector, Commerce believed that Vietnam's domestic interest rates were not market-determined but rather were distorted by the GOV's predominant role in the banking sector.[1238] Commerce pointed out that Vietnam's predominant role was manifested through indirect and direct ownership of commercial banks, and also through other means such as interest rate control, policy, plans and administrative guidance.[1239] From this analysis, Commerce determined that Tier-1 benchmarks were not appropriate, and, therefore, Commerce went on to select an external, market-based benchmark interest rate.[1240]

Counsel for the GOV and mandatory respondents ("VN Counsel") objected to Commerce's determination, arguing that Commerce's analysis did not compare the GOV's interventions in the banking system in Vietnam with interventions conducted by other central banks.[1241] Further, VN Counsel stated that absent an objective standard, Commerce could not make a judgment on whether Vietnam's banking sector or that of a country used for an external benchmark was market based.[1242] Therefore, VN Counsel claimed that Commerce's analysis was not a proper analysis because it ignored the assessment of central bank interventions in other countries.[1243] Interestingly, VN Counsel raised the questions of whether there was an interest rate market in the United States when "the Federal Reserve has manipulated interest rates to low single digits" and "held them at that level for nearly five years," or in India, "a country which has a

[1238] Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 78 ITADOC 33342 (May 28, 2013) [hereinafter VN Shrimp CVD Prelim Memo], at 13.
[1239] *Id.*
[1240] *Id.*
[1241] Curtis, Mallet-Prevost, Colt & Mosle LLP, Case Brief on Behalf of the GOV, MPG, and NTSF: Certain Frozen Warmwater Shrimp from Vietnam, Investigation Case No.: C-552-815, Public Version (July 10, 2013) [hereinafter VN Case Brief], at 32.
[1242] *Id.*
[1243] *Id.*

history both of controlling interest rates and of state ownership of a majority of the banking sector."[1244]

In response to VN Counsel's arguments, Commerce stated that neither the CVD law nor Commerce's regulations require it to compare the interventions of the SBV in its financial market to the actions of the central banks of other countries.[1245] Commerce further explained that it deals only with the issues in this case and only for the parties involved in this investigation.[1246] Finally, Commerce was silent on VN Counsel's questions about whether there was an interest rate market in the United States or India.

5.4.4.3.2. Land Benchmarks

Commerce referred to the PRCBs case for the proposition that it could not rely on a Tier-1 Benchmark to determine whether the GOV was receiving adequate remuneration for land.[1247] In this case, Commerce reiterated that the GOV retained ultimate ownership of all land in Vietnam and that all land prices in Vietnam were determined by the government through decrees and regulations.[1248] Although Commerce was aware of some sub-leasing transactions between private parties, it found that the GOV had placed restrictions on those leasing rights.[1249] Also, Commerce found that the GOV had significant control over the supply of land in the market through conversions and that the GOV (not the market) decided the allocation of land in Vietnam.[1250]

From the above analysis, Commerce continued to adopt the same methodology of external benchmarking that it used in PRCBs case to measure the benefit from

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[1244] *Id.*
[1245] Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp From Vietnam, 78 ITADOC 50387 (August 19, 2013) [hereinafter VN Shrimp CVD Final Memo], at Comment 5.
[1246] *Id.*
[1247] *Id.* at 15.
[1248] *Id.*
[1249] *Id.*
[1250] *Id.*

industrial land leased from the GOV.[1251] In particular, Commerce selected Hyderabad in India as a surrogate source for choosing rental rates for industrial property.[1252] Commerce explained that it selected Hyderabad because it had the closest population density to the areas in which the respondents under this investigation are located.[1253] With respect to aquacultural land leased from the GOV, since Commerce could not find any related Indian rate, it relied on "ranged publicly available data on agricultural land prices" in Ecuador.[1254]

VN Counsel of course objected to the use of external benchmarking for land in Vietnam. VN Counsel proposed that Commerce use a Tier-1 Benchmark for the following reasons: (i) record evidence established that land-use rights in Vietnam were sold based on market principles, and (ii) land rents charged by the GOV were based on market prices for comparable transactions involving only private parties.[1255] Notwithstanding VN Counsel's arguments, Commerce has consistently affirmed its Preliminary Determination that Tier-3 Benchmarks should be used to measure the benefit from the provision of land rents in Vietnam.

5.4.4.4. Analysis of Countervailable Subsidies

Commerce found the GOV had targeted its aquaculture and seafood processing industries for development.[1256] To achieve this development goal, the state-run commercial banks under the GOV's control provided loans to companies operating in these industries.[1257] According to Commerce, such loans confer benefits on the companies and are, thus, countervailable subsidies. Accordingly, Commerce used external benchmark interest rates to calculate the subsidies that the respondents had received. Minh Phu Group was calculated at 0.71% and Nha Trang Seafood Group was

[1251] *Id.*
[1252] *Id.*
[1253] *Id.*
[1254] *Id.*
[1255] VN Case Brief, *supra* note 1242, at 34-35.
[1256] VN Shrimp CVD Final Memo, *supra* note 1246.
[1257] *Id.*

at 0.26%.[1258] In addition, Minh Phu Group was found to have participated in an export lending program provided by VietinBank.[1259] This program is regarded as an export loan that confers a specific benefit to Minh Phu Group. By comparing the interest rate benchmark to this export loan, Minh Phu Group was calculated to have received a net subsidy of 1.17%.[1260]

Besides the above lending programs, such programs as income tax preferences, import duty exemptions/reimbursements for imported raw materials for exported goods, and farmer subsidies were found to be countervailable subsidies. Among these subsidy programs, only Minh Phu Group received the highest CVD rate at 8.34% for the program of import duty reimbursement for imported raw materials for exported goods. This subsidy program has often appeared in previous cases. In previous investigations, Commerce always concluded that the GOV does not have in place a system to confirm which inputs are consumed in the production of the exported products and in what amounts, including a normal allowance for waste.[1261] In this case, Commerce continued to find that the GOV's system does not account for resalable waste, because such waste is exempt from duties.[1262] As a result, Commerce continued to determine that this program was a countervailable subsidy.

5.4.4.5. Conclusion

The negative determination by the USITC marked a great victory for the shrimp industry in Vietnam after nearly a year pursuing the proceeding before both Commerce and the USITC. This was also the second success following the Steel Pipe case, wherein the USITC has also issued a negative determination of injury or threat to the U.S. domestic steel pipe industry. The success of Vietnam and other countries in the ITC's final decision proves that the U.S. domestic shrimp industry has not suffered any

[1258] *Id.* at 13.
[1259] *Id.* at 14.
[1260] *Id.* at 15.
[1261] *Id.* at 20.
[1262] *Id.*

adverse effects from imported shrimp into the U.S. market. Moreover, the case shows that continued participation in the investigation by the producers and the GOV, coupled with capable counsel litigating the question of injury, is instrumental to a favorable outcome in a CVD proceeding.

5.4.5. Steel Nails, Laminated Woven Sacks, and Utility Scale Wind Towers

5.4.5.1. Introduction

Following the final determination in the Frozen Warmwater Shrimp CVD case, from 2014 to 2019, Commerce initiated three other CVD investigations against Vietnamese exporters and producers in the industries of steel nails ("Steel Nails"), laminated woven sacks ("LWS"), and utility scale wind towers ("USWT").[1263] These three CVD investigations were all accompanied by parallel antidumping investigations concerning the same products.[1264] Like previous CVD investigations, the exporters and producers of steel nails, laminated woven sacks, and utility scale wind towers were found to have received benefits from a range of government subsidies such as income tax preferences; preferential lending policies; import duty exemptions; and reimbursements for imported raw materials for exported goods, land rent exemptions, and provision of utilities for LTAR in industrial zones.[1265]

[1263] Certain Steel Nails from India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigations, 79 FR 36014 (June 25, 2014); Laminated Woven Sacks from the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation, 83 FR 14253 (April 3, 2018); Utility Scale Wind Towers from Canada, Indonesia, and the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigations, 84 FR 38216 (August 6, 2019).

[1264] Certain Steel Nails from India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam: Initiation of Less-Than-FairValue Investigations, 79 FR 36019 (June 25, 2014); Laminated Woven Sacks from the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigation, 83 FR 14257 (April 3, 2018); Utility Scale Wind Towers from Canada, Indonesia, the Republic of Korea, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations, 84 FR 37992 (August 5, 2019).

[1265] *See* ITA, Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Steel Nails from the Socialist Republic of Vietnam (October 27, 2014); ITA, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation

5.4.5.2. Steel Nails

In the Steel Nails case, Commerce preliminarily found that certain government subsidies benefited the two subject producers and exporters in Vietnam, namely Region Industries Co., Ltd. ("Region"), and United Nail Products Co., Ltd. ("United Nail"). The CVD rates were preliminarily calculated at very low rates of 8.35% and 0.17% for Region and United Nail, respectively.[1266] Region was subjected to a higher rate than United Nail because Region received the benefits from the program of import duty exemptions and reimbursements for imported raw materials for exported goods. For this specific subsidy program of exemptions and reimbursements, Region received a CVD rate of 8.34% (the remaining 0.01% came from rent exemptions, discussed below). This program of import duty exemptions and reimbursements had also been determined to be a countervailable subsidy in other previous cases. It is important to understand why this particular program has repeatedly been regarded as a government subsidy. Under Commerce's regulations, an import duty exemption on raw materials for exported goods cannot exceed the amount of duty levied; otherwise, the excess amount exempted confers a countervailable benefit.[1267] Further, Commerce instructed that the foreign government under investigation must have a system or procedure to confirm which inputs are consumed in production and in what amounts, and such system or procedure must be reasonable, effective for the purposes intended and based on generally accepted commercial practices in the country of export; otherwise, the exemptions confer a benefit equal to the *total* amount of duties exempted.[1268] After reviewing the responses and supporting documents submitted by the mandatory

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of Laminated Woven Sacks from the Socialist Republic of Vietnam (April 4, 2019) [LWS Final IDM]; ITA, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Utility Scale Wind Towers from the Socialist Republic of Vietnam (June 29, 2020) [Wind Towers Final IDM].

[1266] Certain Steel Nails from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 79 FR 65184 (November 3, 2014).

[1267] *See* 19 CFR 351.519(a)(1)(i); Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Steel Nails from the Socialist Republic of Vietnam, 79 ITADOC 65184 (October 27, 2014) [hereinafter Steel Nails CVD Prelim Memo], at 18.

[1268] *See* 19 CFR 351.519(a)(4); Steel Nails CVD Prelim Memo, *supra* note 1269.

respondents and the GOV, Commerce concluded that the GOV does not have in place an adequate system to confirm which inputs are consumed in production of the exported products and in what amounts, including a normal allowance for waste.[1269] In addition, Commerce stated that the government of Vietnam does not account for resalable waste because such waste is exempt from duties.[1270] Therefore, firstly, the program of import duty exemptions on raw materials was deemed to confer a benefit equal to the total amount of the duties exempted. Secondly, because the import duty exemptions on raw materials are contingent upon export performance, such exemptions were concluded to be specific and constituted a financial contribution in the form of forgone revenue.[1271] With respect to the land rent exemption, Region was found to have received a specific benefit under this program. The reason Region received a very low CVD rate (0.01%) for this subsidy is that, under the land contract, Region was not required to pay lump-sum payments at the time the land contract was signed.[1272] Instead, the land contract called for annual rent payments, which the GOV exempted for Region.[1273] Because such an annual rent exemption constitutes a recurring subsidy, Commerce allocates the benefit accruing from the rent exemption only to the year in which the exemption was received.[1274]

As for United Nail, Commerce determined that United Nail received certain benefits from income tax reductions and preferential lending from the Bank for Investment and Development of Vietnam (or BIDV).[1275] With respect to the preferential lending program, like in previous cases, Commerce maintained the position it took in Frozen Warmwater Shrimp from Vietnam that the domestic interest rate in Vietnam is distorted due to GOV's continued control of the banking sector through direct and indirect ownership and through other means such as control of interest rate,

[1269] Steel Nails CVD Prelim Memo, *supra* note 1269.
[1270] *Id.* at 20.
[1271] *Id.*
[1272] *Id.* at 22.
[1273] *Id.*
[1274] *Id.*
[1275] *Id.* at 13-18.

policy, plans and administrative guidance.[1276] Therefore, Commerce continued to use an external, market-based benchmark interest rate in calculating the benefit received by United Nail under the preferential lending program. As a result, United Nail's VND loans from BIDV was determined to be a countervailable subsidy, resulting in a CVD rate of 0.10%.[1277]

In general, the total CVD rate of 0.17% was a successful outcome for United Nail because this *de minimis* rate will be treated as zero.[1278] However, because this CVD investigation was accompanied by a parallel antidumping investigation for the same steel nails products manufactured and exported by United Nail, the antidumping results also impacted whether Steel Nail could avoid a trade remedy altogether. In the parallel AD investigation, on December 29, 2014, Commerce preliminarily decided that the dumping margins for Region and United Nail were 103.88% and 93.42%, respectively.[1279] The other Vietnamese companies that were not selected as mandatory respondents received the rate that was applicable to a Vietnam-Wide Entity: 323.99%.[1280] Needless to say, Region and United Nail were extremely disappointed with such high AD margins. As a result, on January 5, 2015 and January 8, 2015, United Nail and Region respectively informed Commerce that they wanted to withdraw from the CVD investigation.[1281] In the withdrawal letters, the two companies did not explain why they withdrew. However, the reasonable inference is that they did not want to expend more financial resources when they foresaw high antidumping duty rates that would effectively preclude future exports to the United States. Because both mandatory respondents withdrew their participation during the post-preliminary stage, Commerce

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[1276] *Id.* at 10-11.
[1277] *Id.* at 15.
[1278] *See supra,* Section 3.2.2.3, De Minimis Countervailable Subsidies for more details on the *de minimis* standards.
[1279] Certain Steel Nails from the Socialist Republic of Vietnam: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures, 79 FR 78058-01 (December 29, 2014).
[1280] *Id.*
[1281] ITA Case No C-552-819, Kutak Rock LLP, Letter of Withdrawal from Proceeding, Certain Steel Nails from Vietnam; Upcoming Verification, submitted on behalf of United Nail, January 5, 2015; ITA Case No C-552-819, Kutak Rock LLP, Letter of Withdrawal from Proceeding, Certain Steel Nails from Vietnam; Upcoming Verification, submitted on behalf of Region, January 8, 2015.

applied adverse facts available to calculate the subsidy rates for them. In the final determination, Region received a subsidy rate of 288.56% and United Nail received a rate of 313.97%.[1282] Their withdrawal from the CVD proceeding negatively influenced the results calculated for the other companies that were not selected as mandatory respondents. All other companies received an average rate of 301.27%.[1283]

The CVD rates calculated for Region, United Nail and other companies in the preliminary and final stages are summarized in the table below.

Table 1: Preliminary Calculation Data for Region[1284]

Program Name	Preliminary Rate
Land Rent Exemption	0.01%
Import Duty Reimbursement for Imported Raw Materials for Exported Goods	8.34%
Total	**8.35%**

Table 2: Preliminary Calculation Data for United Nail[1285]

Program Name	Preliminary Rate
Preferential Lending	0.10%
Income Tax, Decree 24	0.02%
Income Tax, Decree 60	0.01%
Import Duty Exemption	0.04%
Total	**0.17%**

Table 3: Final Calculation Data for Region, United Nail and All-Others Rate[1286]

[1282] Certain Steel Nails from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 80 FR 28962-01 (May 20, 2015).
[1283] *Id.*
[1284] Attachment List Excel File, Region Industries Co., Ltd.: Preliminary Calculation Memorandum, ITA, US Department of Commerce, Investigation No. C-552-819, AD/CVD OI: SB, PUBLIC VERSION, October 27, 2014.
[1285] Attachment 1, United Nail Products Co., Ltd. Preliminary Calculation Memorandum, ITA, US Department of Commerce, Investigation No. C-552-819, AD/CVD I: TES, PUBLIC VERSION, October 27, 2014.
[1286] Final Calculation Memorandum for Region Industries Co., Ltd., United Nail Products Co., Ltd., and the All-Others Rate, ITA, US Department of Commerce, Investigation No. C-552-819, AD/CVD I: TES, Public Document, May 13, 2015.

Program Name	AFA Rate	Export Subsidies
Preferential Lending to Exporters	1.17%	1.17%
Income Tax Preferences	25.00%	
Import Duty Exemptions and Reimbursements for Imported Raw Materials for Exported Goods	4.46%	4.46%
Import Duty Exemption on Equipment and Machinery Imported to Create Fixed Assets for Preferred Industries	0.03%	
Provision of Wire Rod for Less Than Adequate Remuneration (LTAR)	25.41%	
Land Rent Exemptions Under Decision 189	25.41%	
Export Factoring	1.17%	1.17%
Financial Guarantees	1.17%	1.17%
Export Credits from the Vietnam Development Bank	0.21%	0.21%
Interest Rate Support Program under the State Bank of Vietnam (SBV)	0.05%	
Export Promotion Program	25.41%	25.41%
Land Preferences for Enterprises in Encouraged Industries or Industrial Zones under Decree 142	25.41%	
Land Rent Reduction/Exemption for Exporters	25.41%	
Land Use Fees or Leases Exemptions/Reductions (Article 26 of Decree 108)	25.41%	
Import Duty Exemption on Equipment and Machinery Imported to Create Fixed Assets in Designated Geographic Areas	0.03%	
Land-Use Levy Exemption/Reduction (Article 17 of Decree 51)	25.41%	
Land-Rent Exemption/Reduction (Article 18 of Decree 51)	25.41%	
Land Use Tax Exemptions/Reductions (Article 19 of Decree 51)	25.41%	
Investment Support (Article 30 of Decree 51)	1.17%	
Infrastructure Development Investment Support (Article 8 of Decree 51)	25.41%	
Land Preferences for Enterprises in Encouraged Industries or Industrial Zones	25.41%	
United	**313.97%**	**33.59%**
Region	**288.56%**	**33.59%**
All Others	**301.27%**	**33.59%**

From the above tables, at the preliminary stage, United Nail successfully received a *de minimis* rate of zero percent. The major subsidy programs that both

Region and United Nail received are related to import duty reimbursements or exemptions and the land rent exemptions. Region, however, received a higher CVD rate due to its receiving benefits from import duty reimbursements for imported raw materials for exported goods.

5.4.5.3. Laminated Woven Sacks and Utility Scale Wind Towers Cases

Due to the scope of this study, the author briefly lists below the subsidy programs and corresponding CVD rates as determined by Commerce in the Laminated Woven Sacks and Utility Scale Wind Towers cases.

5.4.5.3.1. Laminated Woven Sacks from Vietnam

The two mandatory respondents in the Laminated Woven Sacks case were Duong Vinh Hoa Packaging Company ("DVH") and Xinsheng Plastic Industry Company ("Xinsheng").

Table 4: Preliminary and Final Calculation Data for DVH[1287]

Countervailable Subsidy Programs	**Preliminary *Ad Valorem* Rate**	***Final Ad Valorem* Rate**
Preferential Lending to Exporters	1.60%	1.38%
Income Tax Preferences to Companies in Special Zones	0.51%	0.51%
Import Duty Exemptions on Imports of Raw Materials for Exporting Goods	1.13%	1.13%
Total	**3.24%**	**3.02%**

[1287] Countervailing Duty Investigation of Laminated Woven Sacks from the Socialist Republic of Vietnam: Preliminary Calculation Memorandum for Duong Vinh Hoa Packaging Company Limited, ITA, Department of Commerce, Investigation C-552-824, Public Version, E&C/OIV: AG, August 6, 2018; Countervailing Duty Investigation of Laminated Woven Sacks from the Socialist Republic of Vietnam: Final Calculation Memorandum for Duong Vinh Hoa Packaging Company Limited, ITA, Department of Commerce, Investigation C-552-824, Public Version, E&C/OIV: AG, April 4, 2019.

Table 5: Preliminary Calculation Data for Xinsheng[1288]

Countervailable Subsidy Programs	*Ad Valorem* Rate
Preferential Lending to Exporters	0.00%
Income Tax Preferences to Companies in Special Zones	0.08%
Import Duty Exemptions on Imports of Raw Materials into "NonTariff Export Processing Zones"	6.06%
Import Duty Exemptions on Imports of Spare Parts and Accessories into Industrial Zones	0.01%
Total	**6.15%**

Table 6: Final Calculation Data for Xinsheng[1289]

Program	Selected AFA Rate	Source
Preferential Lending and Export Credits from the Vietnam Development Bank	1.38%	DVH's calculated rate
Preferential lending to exporters	1.38%	
Interest rate support program	1.38%	
Export factoring	1.38%	
Financial guarantees for export activities	1.38%	
Land rent reductions or exemptions for plastic producers	25.41%	Calculated for the Hamico Companies in Certain Steel Wire Garment Hangers from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination, 77 FR 75973 (December 26, 2012) (Hangers from Vietnam) for the "Land Preferences for Enterprises in Encouraged Industries or Industrial Zones" program
Land rent exemptions for exporters		
Land rent exemptions for foreign-invested enterprises		
Land rent exemptions for enterprises located in special zones		
Provision of utilities for LTAR in industrial zones		
Income tax preferences for exporters		Vietnam Tax Rate - See Memorandum, "Countervailing Duty Investigation: Laminated Woven Sacks (LWS) from the
Income tax preferences for companies in special zones		
Income tax preferences for small and medium sized enterprises		

[1288] Countervailing Duty Investigation of Laminated Woven Sacks from the Socialist Republic of Vietnam: Preliminary Calculation Memorandum for Xinsheng Plastic Industry Co., Ltd., ITA, Department of Commerce, Investigation C-552-824, Public Version, E&C/OIV: AG, August 6, 2018.
[1289] Attachment I, Countervailing Duty Investigation of Laminated Woven Sacks from the Socialist Republic of Vietnam: Final Calculation Memorandum for Xinsheng Plastic Industry Co., Ltd., ITA, Department of Commerce, Investigation C-552-824, Public Document, E&C/OIV: TEM, April 4, 2019.

Income tax exemptions and reductions for business expansion and intensive investment	25.00%	Socialist Republic of Vietnam; Verification Report: The Government of the Socialist Republic of Vietnam," dated October 25, 2018 at 3.
Preferential income tax programs for foreign invested entities		
Import duty exemptions on imports of raw materials for exporting goods	1.13%	DVH's calculated rate
Import duty exemption on imports of spare parts and accessories for companies in industrial zones	4.46%	Calculated for the Hamico Companies in Hangers from Vietnam for the "Import Duty Exemptions or Reimbursements for Raw Materials" program
Import duty exemptions for foreign-invested entities		
Import duty Exemptions on Imported Raw Materials for Export Processing Enterprises and Export Processin		
Export Promotion Program	25.41%	Calculated for the Hamico Companies in Hangers from Vietnam for the "Land Preferences for Enterprises in Encouraged Industries or Industrial Zones" program
Total	**198.87%**	

In this case, DVH received very low CVD rates at both the preliminary and final stages. The two subsidy programs that account for the highest proportion of the final CVD rate for DVH are (1) preferential lending to exporters and (2) import duty exemptions on imports of raw materials for exported goods.

In the case of Xinsheng, at the preliminary stage, Xinsheng received a total CVD rate of 6.15%. The subsidy programs from which Xinsheng received the most benefits were import duty exemptions on imports of raw materials into "non-tariff export processing zones." However, at the final stage of Commerce's investigation, Xinsheng withdrew its participation from the CVD investigation. Consequently, Xinsheng was subject to an AFA rate of 198.87% because of its non-cooperation.

5.4.5.3.2. Utility Scale Wind Towers from Vietnam

In this CVD investigation, Commerce selected only one mandatory respondent, CS Wind Vietnam.

Table 7: Preliminary and Final Calculation Data for CS Wind Vietnam[1290]

Subsidy Programs	Preliminary *CVD Ad Valorem* Rate	*Final CVD Ad Valorem* Rate
Income Tax Preferences under Chapter V of Decree 24	0.29%	0.29%
Import Duty Exemptions on Imports of Spare Parts and Accessories in Industrial Zones	0.02%	0.40%
Import Duty Exemptions on Imports of Raw Materials for Exporting Goods	2.12%	2.16%
Total	**2.43%**	**2.84%**

Based on the above table of results, the final CVD rate calculated for CS Wind Vietnam was 2.84 percent. As in other previous cases, the program of import duty exemptions on imports of raw materials for exported goods accounts for a very large portion of the total subsidies that the respondent received.

5.4.5.4. Conclusion

In summary, through these three CVD investigations, one lesson learned is that a respondent must carefully consider the potential economic impact of withdrawal from cooperation with Commerce in a CVD investigation. Moreover, a respondent must consider the potential impact of its withdrawal on other companies. In addition, in a CVD case, the role of the GOV is crucial to the outcome of an investigation. It is extremely important for the GOV to respond promptly, timely, and accurately to Commerce's questionnaires. The GOV must coordinate well with those companies that are selected as mandatory respondents to develop and carry out a consistent strategy

[1290] Attachment I, Preliminary Calculations, Public Information, Preliminary Determination of Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam: Calculation Memorandum for CS Wind Tower Co., Ltd., ITA, Department of Commerce, Investigation C-552-826, Public Version, E&C O/IV: DF, December 6, 2019; Attachment I, Final Calculations, Public Information, Final Determination of Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam: Calculation Memorandum for CS Wind Vietnam Co., Ltd., ITA, Department of Commerce, Investigation C-552-826, Public Version, E&C/OIV: DF, June 29, 2020.

for engaging in the proceeding, in order to achieve the best results for the mandatory respondents, and also, to some extent, for the best interests of all industry in Vietnam.

5.4.6. Passenger Vehicle and Light Truck Tires

5.4.6.1. Introduction

This case is important because, as of October 2021, it is the most recent case that Commerce has concluded on the existing subsidy programs provided by the GOV. It is also very useful for the GOV to understand why Commerce has repeatedly determined some programs to be countervailable subsidies. Importantly, in this CVD investigation presented the first instance in which Vietnam was found to have provided Vietnamese exporters and producers with a new type of subsidy, a so-called currency undervaluation (or currency manipulation, as alleged by the U.S. Government). As with prior cases, the author will focus on key issues of this CVD investigation such as countervailable subsidy programs and Commerce's selection of internal or external benchmarks in measuring each specific subsidy. The author also analyzes the issues related to Commerce's determination regarding the GOV's currency-undervaluation subsidy and its implications for Vietnam.

5.4.6.2. Case Summary

Following a petition filed by the U.S. Petitioner (representing the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (commonly known as the United Steelworkers)) in May 2020, Commerce initiated a CVD investigation against Vietnam in June 2020, concerning imports of passenger vehicle and light truck tires ("Passenger Tires"), which are classified as new pneumatic tires, of rubber, with a passenger vehicle

or light truck size designation.[1291] This CVD case was accompanied by a concurrent investigation concerning whether Passenger Tires from Vietnam and other countries such as Korea, Taiwan and Thailand were dumped on the U.S. market.[1292]

Six years earlier, the same U.S. Petitioner had also requested for concurrent AD and CVD actions against Passenger Tires from China; and as a result, Chinese exporters and producers of Passenger Tires have been subject to both AD and CVD orders since August 2015.[1293]

In relation to the CVD investigation of Passenger Tires from Vietnam, Commerce selected the top two exporters and producers of Passenger Tires that were exported for consumption into the U.S. market. According to Commerce, in light of resource constraints, it could not examine all exporters and producers from Vietnam.[1294] Thus, Kumho Tire (Vietnam) Co., Ltd. ("KTV"), and Sailun (Vietnam) Co., Ltd. ("Sailun"), the two top exporters or producers by volume of the Passenger Tires under investigation, were selected as mandatory respondents for individual examination.[1295] For those companies that were not selected as respondents, because they were not individually examined, Commerce determines an estimated all-others rate. Such a rate is normally called All-Others Rate, which is an amount equal to the weighted average of the estimated subsidy rate established for individually examined respondents KTV and Sailun, excluding any zero and de minimis rates and any rates based entirely under section 776 of the Act.[1296] As observed in previous CVD cases,

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[1291] Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation, 85 FR 38850 (June 29, 2020).
[1292] Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Initiation of Less Than-Fair-Value Investigations, 85 FR 38854 (June 29, 2020).
[1293] Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 80 FR 47902 (August 10, 2015).
[1294] Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Respondent Selection, ITA, US Department of Commerce, Investigation C-552-829, ADCVD Ops/Office I/TES, PUBLIC VERSION (June 8, 2020).
[1295] *Id. at 5.*
[1296] Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination, 85 FR 71607 (November 10, 2020).

the role of the GOV in a CVD proceeding is very important. To achieve a favorable outcome, the mandatory respondents and the GOV must fully cooperate with Commerce in all stages of the proceeding. For instance, if either the GOV or any mandatory respondent fails to cooperate or disregards any questions asked by Commerce, or fails to submit information timely, that non-cooperation or untimely filing could result in a very high CVD rate due to the application of AFA.

The legal grounds for Commerce to continue the application of the CVD law to imports from Vietnam as an NME country were based mainly on its arguments in *PRCBs from Vietnam*, and as permitted by the Nonmarket Economies Act of 2012.[1297] Since Vietnam has been designated an NME country, in this Passenger Tires CVD case, Commerce continued to use the NME methodology for calculating the CVD rates for the individually examined mandatory respondents. That means Commerce continued to use interest rate benchmarks, input benchmarks and land benchmarks to calculate the benefits conferred to KTV and Sailun as mandatory respondents.

In May 2021, Commerce announced its final affirmative determination that Passenger Tires from Vietnam benefited from a range of government subsidies, including income tax benefits, import duty exemptions on imports of raw materials for exported goods, exemption of import duties for imports into industrial zones, and preferential rent for areas with difficult socioeconomic conditions.[1298] In addition, Commerce determined that KTV and Sailun both received benefits from provision of natural rubber for less than adequate remuneration.[1299] More importantly, it is the first time Commerce has reached a conclusion that Vietnam's currency undervaluation is a countervailable subsidy.[1300] According to Commerce, "This finding includes

[1297] Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, 85 ITADOC 71607 (November 10, 2020) [hereinafter Passenger Tires CVD Prelim IDM].
[1298] Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 86 FR 28566 (May 27, 2021) [hereinafter Passenger Tires CVD Final Determination]; *See also* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, 86 ITADOC 28566 (May 21, 2021) [hereinafter Passenger Tires CVD Final IDM].
[1299] *Id.*
[1300] *Id.*

Commerce's first affirmative findings regarding a currency-related subsidy involving the conversion of U.S. dollars into Vietnamese dong at an undervalued exchange rate."[1301] But the GOV's counsel reiterated that "the U.S. lacked the authority to treat currency undervaluation as a subsidy."[1302] He also claimed that "the calculation of a precise rate of benefit from a so-called undervalued currency is arbitrary and capricious as there is no universally accepted methodology for quantifying how much a currency is undervalued on a bilateral basis."

Under the final determination, KTV and Sailun received respective final CVD rates of 7.89% and 6.23%, and the other non-selected companies received an All Others Rate of 6.24%.[1303] In the companion AD final determination, KTV, Sailun and four other companies (including Kenda Rubber (Vietnam) Co., Ltd.; Bridgestone Corporation; Bridgestone Tire Manufacturing Vietnam LLC; and The Yokohama Rubber Co., Ltd.) all received a rate of zero percent.[1304] However, the other companies eligible for a Vietnam-wide entity rate received an AFA rate of 22.27% (after adjustment for a subsidy offset).[1305] These companies were assigned with an AFA rate because Commerce found that they withheld information, failed to provide information timely, and impeded the proceeding by not submitting Quantity and Value information requested by Commerce.[1306]

Below, the author presents a table showing the final CVD rates for KTV and Sailun with corresponding ratios for each subsidy program from which each respondent benefited. The objective is to show the level of importance of each subsidy program in

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[1301] ITA, Press Release, *U.S. Department of Commerce Issues First Analysis of Currency Undervaluation as a Countervailable Subsidy*, available at https://www.trade.gov/press-release/us-department-commerce-issues-first-analysis-currency-undervaluation-countervailable, accessed on August 22, 2021.

[1302] Jennifer Doherty, Law360, *Commerce Affirms Duties Based on Currency Manipulation*, May 24, 2021, LexisNexis accessed on August 22, 2021.

[1303] Passenger Tires CVD Final Determination, *supra* note 1300, at 5.

[1304] Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Final Determination of Sales at Less Than Fair Value, 86 FR 28559 (May 27, 2021).

[1305] *Id.*

[1306] Decision Memorandum for the Preliminary Affirmative Determination in the Less-than-fair-value Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, 86 ITADOC 504 (December 29, 2020).

contributing to the total aggregated CVD duty for each mandatory respondent in this investigation.

Subsidy Programs	KTV	KTV Ratio	Sailun	Sailun Ratio
1. Import Duty Exemptions on Imports of Raw Materials for Exporting Goods	0.52%	7%	2.78%	45%
2. Exemption of Import Duties for Imports into Industrial Zones	0.04%	1%	0.01%	0%
3. Natural Rubber for LTAR	0.06%	1%	0.11%	2%
4. Preferential Rent for Areas with Difficult Socio-Economics Conditions	5.16%	65%	2.14%	34%
5. Currency Undervaluation	1.69%	21%	1.16%	19%
6. Income Tax Benefits	0.42%	5%	n/a	
7. Tax Benefits for New Investments	n/a		2.78%	45%
Total	**7.89%**	**100%**	**6.23%**	**100%**

From the above table, one observes that the programs related to tax benefits, import duty exemptions, preferential land rent, and currency undervaluation account for a high proportion of all countervailable subsidy programs that the mandatory respondents received. Typically, Commerce uses benchmarks to calculate the amount of a benefit in the following categories of subsidies: (i) grants, loans, and loan guarantees (see section 3.2.1.2.2) and (ii) provision of goods or services at LTAR (see section 3.2.1.2.3). Referring to the above Table, the two subsidy programs including natural rubber for LTAR and preferential rent for areas with difficult socioeconomic conditions fall into category (ii): provision of goods or services at LTAR. To measure the benefits received from these two subsidy programs, Commerce used input benchmarks and land benchmarks. In this Passenger Tires CVD case, for the first time, Commerce decided to use an internal benchmark to calculate the net subsidy rate related to provision of natural rubber at LTAR. Nevertheless, like in other CVD cases, Commerce still used out-of-country benchmarks in calculating the net countervail-able subsidy related to provision of preferential land rent in Vietnam. Finally, KTV and

Sailun were not found to have received any countervailable subsidy under category (i): grants, loans, and loan guarantees.

5.4.6.3. Use of Benchmarks

5.4.6.3.1. Interest Rate Benchmarks

As a matter of practice, Commerce usually selects an external market-based interest rate benchmark instead of using internal interest rates of Vietnam. Commerce has reasoned that domestic interest rates in Vietnam are distorted due to the predominant role of the GOV in the banking sector through (i) its direct and indirect ownership, and (ii) its interest rate control, policy, plans, and administrative guidance.[1307] To come to such a conclusion, Commerce conducted a separate analysis of Vietnam's financial system[1308]. From its findings in this comprehensive review, Commerce concluded that interest rates in Vietnam are still largely set or influenced by the GOV and cannot be used as a benchmark for CVD purposes.[1309]

Notably, Commerce compared the current Vietnamese banking sector with the actual situation in 2013, when Commerce conducted the first review of the Vietnamese banking sector in the Frozen Warmwater Shrimp CVD case ("2013 Review"). Specifically, Commerce found that the number of state-owned commercial banks ("SOCBs") operating in Vietnam has not significantly changed since the 2013 Review and that the share of loans provided by SOCBs in the Vietnamese banking sector has

[1307] Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam (October 30, 2020) [hereinafter Passenger Tires CVD Prelim IDM]. Commerce's similar reasoning was previously used in *Certain Frozen Warmwarter Shrimp from Vietnam*. *See* Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Countervailing Duty Determination, 78 FR 33342 (June 4, 2013), and accompanying Preliminary Decision Memorandum (PDM) at 1213, unchanged in Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 78 FR 50387 (August 19, 2013).

[1308] Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, Analysis of Vietnam's Financial System (issued on October 30, 2020); attached with a memorandum on "Review of Vietnam's Financial Sector for Countervailing Duty (CVD) Benchmarking Purposes" (issued on May 12, 2020).

[1309] *Id.* Review of Vietnam's Financial Sector for Countervailing (CVD) Benchmarking Purposes, at 28.

remained constant over the preceding six years.[1310] In fact, the number of SOCBs has decreased from five to four following the 2013 Review; currently there are four big SOCBs: Agribank, the Vietnam Joint Stock Commercial Bank of Industry and Trade (VietinBank), the Joint Stock Commercial Bank for Foreign Trade of Vietnam (Vietcombank), and the Bank for Investment and Development of Vietnam (BIDV).[1311] However, Commerce found that such SOCBs still have some degree of government ownership and continue to play a dominant role in the commercial banking sector.[1312] Accordingly, through its major ownership of each of Vietnam's SOCBs and policy banks, the GOV was found to control 47% of the banking sector.[1313] With respect to the interest rates in Vietnam, Commerce continued to reaffirm its conclusion in the 2013 Review that Vietnamese interest rates are not market-determined.[1314] In particular, the GOV, through its ministerial agency, State Bank of Vietnam ("SBV"), still used its administrative orders such as circulars, decrees and decisions in order to impose interest rate controls on banks and to allocate credit throughout Vietnam.[1315] For example, the SBV's imposed an interest rate cap of 5.5% on all VND denominated demand and short-term deposits (1-6 months), which was found to cause distortion.[1316] In addition, the SBV has also controlled commercial lending rates via direct lending rate caps.[1317] For instance, the SBV's Circular No. 39 provides that the rate set by both parties in a loan agreement shall not exceed the maximum interest rate decided by the SBV's governor to meet certain funding demands.[1318] According to Commerce, this regulation means that the SBV has full discretion to set interest rate caps at any time.[1319]

[1310] *Id.* at 2.
[1311] *Id.* at 7 and 9. The decrease came in 2015 when BIDV acquired Bank of Mekong Delta, one of the SOCBs listed in the 2013 review.
[1312] *Id.* at 9.
[1313] *Id.*
[1314] *Id.,* at 14-20.
[1315] *Id.* at 14.
[1316] *Id.* at 15.
[1317] *Id.* at 16.
[1318] *Id. See also* Circular of the State Bank of Vietnam prescribing lending transactions of credit institutions and/or foreign bank branches with customers" (No. 39/2016/TT-NHNN), Article 13, Section 1.
[1319] *Id.* at 17.

Further, Commerce found that the GOV imposed controls over sector-specific lending rates as well.[1320] For example, there have been specific regulations on determining lending rates based on priority sectors such as agriculture, export goods, business operations serving high tech enterprises, business operations serving production, and business operations of small and medium enterprises ("SMEs").[1321] As of 2019, the short-term interest rate of 6.5% has been applied to such priority sectors, and the rates of 6.8% to 9% have applied to other non-priority sectors.[1322] Finally, Commerce realized that the GOV has implemented certain reforms in stabilizing the Vietnamese banking sector and meeting macro-economic growth targets.[1323] However, according to Commerce, it is more important for Vietnam to conduct an institutional change and reduce the chronic and systemic state intervention in the banking sector or otherwise make the banking sector more market-determined.[1324] Unfortunately, such a reform is not seen anywhere in the GOV's most recent roadmap for the development of Vietnam's banking sector from 2018 to 2025 with an orientation to 2030.[1325] Under this plan, the GOV's goal is to maintain the dominant role of SOCBs in the 2018 to 2025 period as one of a "key and dominant force in scale, market share and ability to regulate the market."[1326] The state will continue to have a "dominant role" in the management of SOCBs and maintain its government ownership of at least 65% of their total voting shares.[1327]

In summary, at this time the GOV's continued significant intervention in the banking sector as analyzed by Commerce makes it difficult to prove that the interest rates for commercial loans in Vietnam are based on market-determined principles.

[1320] *Id.*
[1321] *Id.*
[1322] *Id.*
[1323] *Id.* at 2.
[1324] *Id.*
[1325] Decision on Approving the Strategy to Develop Vietnam's Banking Industry to 2025, Orientation to 2030" (No. 986/QD-TTg), Government of Vietnam, August 8, 2018, Article 1 (i) 2a; Id. at Article 1(II) 7(a).
[1326] *Id.* at 26.
[1327] *Id.*

Thus, it is likely that Commerce will continue to use external interest rate benchmarks for this CVD proceeding and for future CVD actions against Vietnam in general.

5.4.6.3.2. Input Benchmarks

Ordinarily, Commerce uses benchmarks within the exporting country to measure whether a government-procured good, service, or land has been provided for less than adequate remuneration (LTAR). Commerce regards such in-country benchmarks as Tier-One benchmark.[1328] But Commerce almost always finds NME-based benchmarks unreliable or not reflective of a functioning market. Thus, Commerce usually goes to Tier Two, which are global benchmarks.[1329] However, too often, Tier-Two benchmarks are not specific and result in uncertainty and opportunities for distortion. And, in the case of goods or services such as land and electricity, Commerce often resorts to Tier-Three external benchmarks, which are essentially benchmarks in a single surrogate country. Tier-Three external benchmarks also allow Commerce to measure the adequacy of remuneration by assessing whether the exporting government price is consistent with market principles.[1330] Unfortunately, the U.S. laws and regulations do not provide any specific guidelines for application of Tier-Three external benchmarks. So, Commerce has a broad discretion in its assessments to determine whether adequate remuneration has been paid in one country based on market forces in an entirely different country.

In this Passenger Tires CVD case, both mandatory respondents purchased natural rubber as an input material for manufacturing the subject merchandise.[1331] So, the question is which benchmark is to be used to measure the benefit of the provision of natural rubber. During the investigation, it was found that the supplier of natural rubber to the respondents was a state-owned company, namely Vietnam Rubber Group

[1328] 19 CFR 351.511(a)(2)(i).
[1329] 19 CFR 351.511(a)(2)(ii).
[1330] 19 CFR 351.511(a)(2)(iii).
[1331] Passenger Tires CVD Prelim IDM, *supra* note 1299, at 10.

(VRG), making natural rubber arguably a "government-procured good".[1332] Although VRG is a state-owned company, however, the GOV successfully proved that the market for natural rubber is not distorted by government predominance in the market, and that the GOV does not intervene in the natural rubber market.[1333] Based on the GOV's submitted information, Commerce determined that the market for natural rubber is not distorted through the GOV's predominant role in the market via VRG, and nor does the GOV intervene in the market, specifically by implementing controls on imports and exports. Accordingly, Commerce determined that market prices from actual transactions within Vietnam may serve as a Tier-One benchmark. This was notable because it marked the first time that Commerce agreed to use an internal benchmark to calculate the benefit from the provision of an input sourced in Vietnam.

Based on the selected Tier-One benchmark, Sailun's actual prices paid for purchasing natural rubber from VRG were admitted and it finally got a countervailable subsidy rate of 0.11% *ad valorem*.[1334] With respect to KTV, Commerce preliminarily found that KTV had no purchases of natural rubber from private producers, nor did KTV import any natural rubber.[1335] In the preliminary stage, KTV reported all its purchases of natural rubber were from a producer that is majority-owned by entities controlled by the GOV.[1336] Then, Commerce selected UN Comtrade import data, which was submitted by KTV, as the appropriate benchmark for KTV. At the final determination, Commerce continued to use the UN Comtrade import prices submitted by KTV on the record as the basis for the benchmark, but have added 5 percent VAT

[1332] *Id.*

[1333] *Id.* In particular, the GOV successfully proved that it "does not issue any laws or policies to control or govern the pricing of natural rubber", that it "does not impose any restriction on the production or development of natural rubber capacity or interfere in the decisions of natural rubber producers on how to develop their capacity or production volume", and that there "have not been any price controls or established any price floors or ceilings for the natural rubber during the POI or the prior two years." Id.

[1334] *Id.* at 20. Sailun's CVD rate of 0.11 percent in the preliminary determination is remained unchanged in the Final Determination. *See* Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 86 FR 28566 (May 21, 2021) [hereinafter Passenger Tires CVD Final Determination]; Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam [Passenger Tires CVD Final IDM] (May 21, 2021).

[1335] *Id.* Passenger Tires CVD Final IDM, at 37.

[1336] *Id.*

and 3 percent of import duties, to calculate the benefit received by KTV.[1337] Accordingly, KTV finally received a subsidy rate of 0.06% *ad valorem* for provision of natural rubber for LTAR.[1338]

5.4.6.3.3. Land Benchmarks

The three-tier benchmark analysis is also used by Commerce in determining the extent of any countervailable benefit received from provision of land at LTAR. In its practice, Commerce concluded that it could not use any Tier-One Vietnamese land prices or Tier-Two world market prices for purposes of benchmarking land-use rights in Vietnam. Instead, Commerce routinely uses out-of-country benchmarks or Tier-Three external benchmarks to measure the subsidy benefit from the provision of land to Vietnamese producers under investigation. The application of Tier-Three external benchmarks is usually based on the conclusion that the GOV controls all land use rights in Vietnam, and therefore, the land prices in Vietnam are not market-determined benchmarks.[1339] Commerce had previously reached the same conclusions in the PRCBs and Frozen Warmwarter Shrimp CVD cases.[1340] In the previous cases, Commerce found that (i) the GOV had placed restrictions on leasing rights, (ii) the GOV had significant control over the supply of land on the market through conversions, and (iii) the GOV (but not the market) determined land allocations.[1341]

[1337] Passenger Tires CVD Final IDM, supra note 1300, at 39. 19 CFR 351.511(a)(2)(iv) provides on "Use of delivered price" that in measuring adequate remuneration under the internal benchmark scenario, Commerce will adjust the comparison price to reflect the price that a company actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties. So, at the final determination, Commerce agreed with the Petitioner that the preliminary determination did not include import duties and VAT.
[1338] *Id.* at 4.
[1339] Passenger Tires CVD Prelim IDM, *supra* note 1299, at 11.
[1340] PCRBs Final CVD Decision Memo, *supra* note 1111, at Comment 9; PCRBs Final CVD Decision Memo, *supra* note 1239, at Comment 6.
[1341] PCRBs Final CVD Decision Memo, *supra* note 1111, at Comment 9.

In this Passenger Tires CVD case, Commerce also conducted a separate analysis of Vietnam's land market subsequent to 2009 ("Land Analysis Memo").[1342] According to the Land Analysis Memo (consisting of 400 pages), Commerce found that, although modest reforms had taken place (e.g., improvements in the use-rights of some landholders, although rights of rural landholders remain severely restricted), the reforms have not addressed the fundamental institutional factors that underlie the GOV's monopoly control over land use, which precludes landholders from putting their land to best use and realizing the market value of their *landholdings*.[1343] Commerce reaffirmed that all land in Vietnam is still owned by the Vietnamese government.[1344] Accordingly, the GOV is the sole supplier of land-use rights in the primary land market and directly sets those prices on a non-commercial basis.[1345] In addition, the GOV was found to indirectly distort prices of land in the secondary market through restrictions and limitations on land-use and land-use transfers.[1346] Thus, the GOV ultimately decides whether and how land is used in Vietnam under a unified but decentralized land planning system.[1347] Such factors, according to Commerce, do not reflect the market outcomes in Vietnam. For such reasons, Commerce determined that it cannot use any Tier-One, domestic Vietnamese land prices for purposes of benchmarking the government provision of land-use rights in Vietnam.[1348] Further, Commerce determined that since land located and sold outside of Vietnam is not simultaneously available to an in-country purchaser, Tier-Two global prices are not suitable as benchmarks for land-use rights either.[1349] So, when the global prices are inapplicable, according to the Tier-Three approach, Commerce will normally measure the adequacy

[1342] Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, Analysis of Vietnam's Land-Use Rights (issued on October 30, 2020); attached with a memorandum on "Benchmark Analysis of the Government Provision of Land-Use Rights in Vietnam for Countervailing Duty Purposes" (issued on May 17, 2020) [hereinafter Land Analysis Memo].
[1343] *Id.* at 2.
[1344] *Id.*
[1345] *Id.*
[1346] *Id.*
[1347] *Id.*
[1348] *Id.* at 3.
[1349] Id.

of remuneration by assessing whether the government price is consistent with market principles.[1350] When applying this rule, Commerce found that the legal procedures for government land valuation are vague by design and there is thus significant scope for government discretion in their implementation.[1351] The result is that government-determined prices are not consistent with market principles, but rather with the government's controlling and allocating land use on an administrative basis in the pursuit of policy objectives, which do not reflect commercial considerations.[1352] From such findings, Commerce finally determined to use land-use prices outside Vietnam as an appropriate basis to determine the extent to which land-use rights are provided for LTAR in Vietnam.[1353]

In selecting a benchmark for land, Commerce analyzed comparable market-based prices in another surrogate country at a comparable level of economic development within the geographic vicinity of Vietnam.[1354] Commerce decided to use the land prices in India, which were provided by CBRE Group, Inc., for valuing land rents in this Passenger Tires CVD investigation.[1355] In particular, for KTV, Commerce selected Kolkata, which is in West Bengal, as the location with the "closest population density" to Binh Duong, the province in which KTV's head office and tire production facility are located.[1356] For Sailun, Commerce selected Hyderabad, which is in Andhra Pradesh, as the location with the "closest population density" to Tay Ninh, the province in which Sailun is located.[1357] In the final determination, Commerce affirmed its preliminary determination that KTV and Sailun received preferential rent as a result of their locations in areas with difficult or especially difficult socioeconomic conditions.[1358] Consequently, by using the selected land benchmarks as explained

[1350] 19 CFR 351.511(a)(2)(iii).
[1351] *Id.*
[1352] *Id.*
[1353] *Id.*
[1354] Passenger Tires CVD Prelim IDM, *supra* note 1299 at 12.
[1355] *Id.*
[1356] *Id.*
[1357] *Id.*
[1358] Passenger Tires CVD Final IDM, *supra* note 1300, at Comments 10 and 11.

above, Commerce calculated the benefit from the preferential rent by comparing the rent that either KTV or Sailun paid to a benchmark rate from the Indian surrogate city. Finally, Sailun received a net countervailable subsidy rate of 2.14% *ad valorem* (accounting for 34% of its total CVD rate), and KTV received a net countervailable subsidy rate of 5.16% *ad valorem* (accounting for 65% of its total CVD rate).[1359]

In certain situations, the selection of Tier-3 benchmark is not accurate. For example, in the case of KTV, Commerce used rental rates for one Indian city, Kolkata, as Tier-3 benchmark for measuring the benefit from KTV's land-use rights. According to KTV's counsel, Kolkata was selected because it is located in the Indian state of West Bengal, which has the "closest population density" to Binh Duong province in Vietnam.[1360] However, instead of using average land-rental rates for the entire state of West Bengal, Commerce used rental rates for a single city, whose population density is many multiples of that of the province and town in which KTV's facility is located.[1361] Another piece of evidence potentially showing the risk of inaccuracy is that the population density of Kolkata is approximately 39 times that of Binh Duong province, and approximately 20 times that of Ben Cat Town.[1362]

5.4.6.4. Other Countervailable Subsidies

Besides the subsidy programs pertaining to preferential land rents and the provision of natural rubber for LTAR, import duty exemptions on imports of raw materials for exported goods were also determined to be a countervailable subsidy. This subsidy program has repeatedly been found in most of the CVD investigations against Vietnam. In practice, import duty reimbursements for imported raw materials for goods to be exported are governed by several Vietnamese laws and regulations. Under the

[1359] *Id.* at 4.
[1360] Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from Vietnam - Case Brief of Kumho Tire (Vietnam) Co., Ltd., Case No. C-552-829, AD/CVD Operations, Office I, Public Version (March 9, 2021), at 11.
[1361] *Id.* at 12.
[1362] *Id.* at 13.

program, import duty exemptions are provided for imported raw materials that are incorporated into exported goods or are directly used in the processing of such goods.[1363] The GOV reported to Commerce that KTV and Sailun received import duty exemptions under this program.[1364] In prior investigations, Commerce always concluded that the GOV does not have in place a system to confirm which inputs are consumed in the production of the exported products and in what amounts, including a normal allowance for waste.[1365] During this investigation, the GOV conceded that it had not made any changes to that system since the last time it was investigated in 2017; however, the GOV stated that this situation differs from those in prior determinations regarding this program because in this case the GOV conducted an inspection of actual inputs involved to confirm which inputs were consumed in the production of the exported product.[1366] Nevertheless, Commerce continued to find that the GOV's system does not meet Commerce's regulatory requirements under 19 CFR § 351.519(a)(4)(i) for calculating a benefit on an amount other than the total amount of exempted duties.[1367] Finally, Commerce determined that the import-duty exemptions used by KTV and Sailun are countervailable because they confer a benefit equal to the total amount of the duties exempted.[1368]

Another program found to be a countervailable subsidy was corporate income tax preferences. Under this program, the GOV provided tax preferences to support newly established investment projects of certain sectors or satisfying certain criteria under the GOV's corporate income tax regulations.[1369] One mandatory respondent, Sailun, was found to have received tax benefits under this program. On this basis, Sailun was subjected to a CVD rate of 2.78%.[1370]

[1363] Passenger Tires CVD Prelim IDM, *supra* note 1299, at 13-14. *See* GOV's IQR at Exhibit A-4-1.
[1364] *Id.*
[1365] Passenger Tires CVD Final IDM, *supra* note 1300, at 35. *See also e.g.*, Wind Towers Final IDM, *supra* note 1266, at Comment 2; and LWS Final IDM, *supra* note 1266, at Comment 2.
[1366] Passenger Tires CVD Final IDM, *supra* note 1300.
[1367] *Id.* at 36.
[1368] *Id.*
[1369] Passenger Tires CVD Prelim IDM, *supra* note 1299, at 13.
[1370] Passenger Tires CVD Final IDM, *supra* note 1300, at 3.

5.4.6.5. Currency Undervaluation Subsidy

Four months before the CVD investigation of Passenger Tires from Vietnam was initiated, Commerce issued its Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings ("Final Rule").[1371] Commerce's new regulations have paved the way for it to investigate a foreign government's "currency undervaluation" as a countervailable subsidy for purposes of CVD proceedings. The Final Rule is controversial because it has been promulgated by Commerce itself without any amendment to the U.S. CVD law. Notably, Commerce acknowledged that neither the Tariff Act of 1930 (as amended) nor Commerce's existing CVD regulations specify how to determine the existence of a benefit or specificity when Commerce is examining a potential subsidy resulting from the exchange of currency under a unified exchange rate system.[1372] The controversy of Commerce's new regulations will be discussed in the conclusion below.

Notably, the Final Rule clarifies how Commerce "determines the existence of a benefit resulting from a subsidy in the form of currency undervaluation," and clarifies that "companies in traded goods sector of an economy can constitute a group of enterprises for the purposes of determining whether a subsidy is specific."[1373] The Final Rule is applicable to all segments of proceedings initiated on or after April 6, 2020.[1374] The "all segments of proceedings" language means that the Final Rule can be applied to all CVD initial investigations and administrative reviews or new shipper reviews as of April 6, 2020.

Technically, Commerce added a new regulation providing that Commerce will determine that a countervailable currency undervaluation subsidy benefit exists where:

[1371] Department of Commerce, International Trade Administration, "Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings", 85 FR 6031, February 4, 2020, 19 C.F.R. § 351.502 [hereinafter Final Rule].
[1372] *Id.*
[1373] *Id.*
[1374] *Id.*

(1) a country's currency is undervalued during the relevant period; (2) there has been government action on the exchange rate that contributes to a currency undervaluation; and (3) the amount of local currency a firm receives in exchange for U.S. dollars is greater than the amount the firm would have received if the country's nominal, bilateral U.S. dollar exchange rate were consistent with the equilibrium real effective exchange rate ("REER").[1375] In essence, these new regulations established a methodology to identify whether a foreign manufacturer benefited from its government's actions that led to the currency undervaluation.

With the publication of Commerce's new regulations on currency undervaluation at this time, it is likely that U.S. petitioners representing domestic industries will be willing to make use of it in their new subsidy allegations or even in CVD administrative reviews against subject foreign exporting countries, especially against NME countries such as China and Vietnam, where their banking sectors are still controlled by their governments.

In fact, in its petition against Vietnam in the Passenger Tires CVD case submitted in May 2020, the U.S. Petitioner, among other allegations, claimed that the GOV provides countervailable subsidies to exporters of Passenger Tires from Vietnam by undervaluing its currency through government action on the exchange rate between the U.S. dollar and the Vietnamese dong.[1376] Specifically, the U.S. Petitioner affirmed that Commerce's new regulations, which are effective on or after April 6, 2020, apply to this subsidy investigation.[1377]

In its final determination, Commerce came to an affirmative determination that the GOV committed an act of undervaluing its currency, and that such undervaluation

[1375] *Id.* at 6043. *See also* 19 C.F.R. § 351.528.
[1376] Roger B. Schagrin et al., Counsel to the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Petition for the Imposition of Countervailing Duties pursuant to Section 701 and 731 of the Tariff Act of 1930, as amended, Volume VI, Information Related to Vietnam - Countervailing Duties, Public Document, DOC Investigation NO. C-552-829, May 13, 2020, at 38.
[1377] *Id.*

constituted a financial contribution, that is specific and provided a benefit.[1378] Commerce's determination is based on the following key findings.

Financial contribution: Commerce mentioned that in prior CVD cases, it has found Vietinbank and Vietcombank to be state-owned commercial banks (SOCBs).[1379] Further, the GOV's submitted documents on record show that Vietinbank and Vietcombank are SOCBs with 64.46% and 74.8% majority government ownership, respectively.[1380] In addition, Commerce's Memorandum of Vietnam's Financial Sector also shows that state ownership and control has been observed at the highest level of SOCBs' corporate structures.[1381] Thus, Commerce concluded that the GOV is able to control the decisions of these SOCBs through a board of members appointed by Communist Party of Vietnam, and the banks are vested with government authority.[1382] Accordingly, for all foreign currency exchange transactions involving Vietinbank and Vietcombank, Commerce found a direct financial contribution by an "authority" under the CVD law in the form of a direct transfer of funds.[1383]

With respect to private banks, notably, Commerce found that through the GOV's various laws and regulations, private banks, like GOV state-owned banks, must exchange USD for dong for any party wishing to do so, and the rates for that exchange must be within the rate of +/-3 percent to +/-1 percent as established by the State Bank of Vietnam (SBV).[1384] In other words, the SBV sets the official exchange rate within this narrow band.[1385] Therefore, aside from the direct financial contribution through SOCBs, Commerce found that based on the GOV's implementation of laws and decrees, the GOV requires private banks to exchange currency within a narrow exchange rate, thereby entrusting or directing private banks to provide dong at an

[1378] Passenger Tires CVD Final IDM, *supra* note 1300, at 8.
[1379] Passenger Tires CVD Final IDM, *supra* note 1300, at 20. *See also* VN Shrimp CVD Final Memo, *supra* note 1246, at 14; PRCBs Preliminary CVD Determination, *supra* note 1096.
[1380] *Id. See* GOV's IQR at Exhibit F-1.
[1381] Passenger Tires CVD Final IDM, *supra* note 1300.
[1382] *Id. at 21.*
[1383] *Id.*
[1384] *Id.* at 22.
[1385] *Id.*

undervalued rate.[1386] Accordingly, Commerce concluded that the GOV entrusts or directs private banks to provide this financial contribution.[1387]

As a result, Commerce determined that (i) the exchange of currency by authorities under section 771(5)(B) of the Act and (ii) the exchange of currency by private Vietnamese and/or foreign owned banks, entrusted or directed by the GOV under section 771(5)(B)(iii) of the Act, constituted financial contributions in the form of direct transfers of funds to both mandatory respondents KTV and Sailun.[1388]

Specificity: Commerce found that the subsidy is predominantly used by the group of enterprises constituting the traded goods sector.[1389] As explained by Commerce, due to the GOV's inability to provide certain data which Commerce requested for its evaluation, Commerce relied upon the data submitted to the IMF by the SBV to analyze whether the exchange of foreign currency is disproportionately or predominantly used by the traded goods sector.[1390] Based on the IMF data, Commerce estimated the total proportion of USD inflows Vietnam has received in the POI through the following four major channels of exchange: (a) exports of goods, (b) exports of services, (c) various forms of portfolio and direct investment, and (d) earned income from abroad.[1391] Additionally, in order to account for USD inflows which may not have resulted in currency conversion, Commerce discounted Vietnam's exports of goods by the amount of intermediary goods inputs.[1392] After such an adjustment, Commerce found that among the four channels, the vast majority (71.94 percent) of USD inflows coming into Vietnam during the POI came from exports of goods.[1393] As a result, Commerce determined that enterprises that buy or sell goods internationally are the

[1386] *Id.*
[1387] *Id.*
[1388] *Id.*
[1389] *Id.* at 23.
[1390] *Id.*
[1391] *Id.* at 23-24.
[1392] *Id.*
[1393] *Id.* at 24. *See also* Memorandum, "Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Calculation Based on USD Inflows Calculation," dated concurrently with Passenger Tires CVD Prelim IDM.

predominant users of the GOV's currency undervaluation subsidy, and thus, this program is *de facto* specific under the CVD law.[1394]

Findings of undervaluation, government action and benefit: Pursuant to the Final Rule, normally Commerce will make an affirmative finding of undervaluation only if there has been government action on the exchange rate that contributes to that undervaluation.[1395] In other words, finding of a government action on the exchange rate that contributed to the undervaluation is a prerequisite to the finding of undervaluation. In its next step, after making such an affirmative finding of undervaluation, Commerce will determine the existence of a benefit after examining the difference between the "nominal, bilateral United States dollar rate consistent with the equilibrium REER," and the "actual nominal, bilateral United States dollar rate during the relevant time period, taking into account any information regarding the impact of government action on the exchange rate."[1396] Pursuant to the Final Rule, the U.S. Department of Treasury ("Treasury") will be asked by Commerce to provide an evaluation and conclusion regarding the issues of undervaluation, government action, and the U.S. dollar rate gap.[1397] Commerce acknowledges that Treasury has considerable experience and data that are relevant to such an analysis of currency undervaluation.[1398] Treasury explained that in 2019 there was a gap between Vietnam's REER and its equilibrium REER.[1399] Further, Treasury found that the GOV's actions on the exchange rate had the effect of undervaluing the dong relative to the U.S. dollar by 4.7 percent.[1400] With respect to government action, Treasury also concluded that Vietnam's undervaluation in the POI was exclusively a result of government action.[1401] Consequently, based on Treasury's

[1394] *Id.*
[1395] 19 CFR 351.528(a)(2).
[1396] 19 CFR 351.528(b)(1).
[1397] 19 CFR 351.528(c).
[1398] Final Rule, *supra* note 1373, at 6037.
[1399] Passenger Tires CVD Prelim IDM, *supra* note 1299, at 24.
[1400] *Id.*
[1401] *Id.* at 24-25.

evaluation and conclusion, Commerce determined that Vietnam's currency vis-à-vis the U.S. dollar was undervalued during the POI by 4.7 percent.[1402]

Calculating the amount of benefit: Based on the provision of the Final Rule, Commerce calculated "the difference between the amount of currency the firm received in exchange for United States dollars and the amount of currency that firm would have received absent the difference referred to in paragraph (b)(1) of this section" by applying the 4.7 percent undervaluation reported by Treasury to each currency exchange transaction reported by KTV and Sailun during the POI.[1403] For each respondent, Commerce then aggregated the total benefits in USD based on the sum of these individual transactional during the POI.[1404] Using this benefit as a numerator, Commerce then calculated a subsidy rate for the exchanges of currency by dividing the benefits obtained by each respondent during the POI by that respondent's total sales conducted in USD.[1405] On that basis, Commerce determined a net countervailable subsidy rate of 1.69% ad valorem for KTV and a net countervailable subsidy rate of 1.16% ad valorem for Sailun during the POI.[1406]

The Government of Vietnam has strongly rebuked Commerce's determination that Vietnamese exporters of passenger tires were subsidized by a currency undervaluation. Immediately after the release of Commerce's final determination, Foreign Ministry spokeswoman Le Thi Thu Hang said that "Vietnam doesn't dump nor subsidize its automobile tires for exports and doesn't manipulate currency to gain unfair advantage in international trade."[1407] The most critical issue that the GOV raised is the statutory authority of Commerce to promulgate the Final Rule in order to countervail the exchange of currency. This is also one of the controversial issues that some legal

[1402] *Id.*
[1403] *Id.*
[1404] *Id.*
[1405] *Id.*
[1406] *Id.*
[1407] Reuters Asia Pacific, *Vietnam denies subsidizing tires, rejects U.S. filing*, May 27, 2021, available online at https://www.reuters.com/world/asia-pacific/vietnam-denies-subsidising-tires-rejects-us-finding-2021-05-27/, accessed on September 10, 2021.

experts have commented on in the process of Commerce's making the Final Rule.[1408] The GOV argued that Commerce lacks legal authority to investigate and countervail this so-called currency-undervaluation program.[1409] A GOV's representative in the public hearing argued that currency undervaluation cannot be characterized as a countervailable subsidy under the WTO's Subsidies Agreement because of three reasons: (1) the undervaluation of currency is not a financial contribution under the Subsidies Agreement; (2) the undervaluation of currency does not create a benefit under the Subsidies Agreement; (3) undervaluation of currency, if any, is not a policy under Article 2 of the Subsidies Agreement.[1410] Further, the GOV's counsel argued that Commerce lacks statutory authority due to the fact that numerous legislative attempts to amend the Act to provide such authority have all failed.[1411] This counsel explained that if the Act already provided statutory authority to treat an undervalued currency as a countervailable subsidy, then it would not have been necessary to make numerous attempts to revise the law to provide such authority.[1412] Thus, the counsel argued, Commerce's unilateral actions to promulgate the Final Rule for treating an undervalued currency as a specific subsidy and setting out the method for calculating a benefit from currency undervaluation are unlawful and void.[1413] However, Commerce rejected all of these arguments and found that Commerce was acting in accordance with the U.S. CVD law, specifically the Act and Commerce's regulations. Commerce confirmed that the CVD law fully implements the United States' obligation under the Subsidies Agreement. Further, Commerce reiterated that it is the Act and Commerce's regulations

[1408] During the rulemaking process prior to the publication of the Final Rule, two commenters claimed that Commerce lacks the statutory authority to change its approach without Congressional change to the Tariff Act of 1930, as amended. According to these two commenters, the proposed rule is unlawful because Congress failed to approve legislation that would specifically deem currency undervaluation as a countervailable subsidy. *See* Final Rule, *supra* note 1373, at 6033.
[1409] Morris, Manning & Martin, LLP, Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: GOV's Case Brief, Investigation Case No.: C-552-829, Public Version, March 10, 2021 [hereinafter GOV's Case Brief], at 4.
[1410] United Sates of America, Department of Commerce, Public Hearing, In the matter of: Passenger Vehicle and Light Truck Tires from Vietnam., Case No. C-552-829, Public Document, Friday, April 16, 2021.
[1411] GOV's Case Brief, *supra* note 1411, at 19.
[1412] *Id.*
[1413] *Id.* at 21.

that have direct legal effect under U.S. law, and not the WTO Agreements or WTO reports.[1414] As a result, Commerce said the GOV's WTO-related arguments had no merit in the proceeding.[1415] Commerce rejected the arguments that the legislative attempts to amend the Act supported the conclusion that Commerce lacks the statutory authority to treat currency undervaluation as a countervailable subsidy.[1416] Commerce's position relied upon the U.S. Supreme Court's ruling that "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."[1417] Therefore, Commerce determined that the fact that there have been such legislative attempts that failed is not relevant to Commerce's interpretation of the Act as it currently stands.[1418] From this reasoning, Commerce continued its arguments that Congress authorized it, through the CVD law, to countervail injurious subsidies, regardless of what form they take.[1419] Also, the Trade Agreements Act of 1979 authorized Commerce to administer CVD investigations, and therefore, Congress intended for Commerce to have the authority to address currency undervaluation.[1420] In other words, Commerce sought to establish that it has broad discretion within its administration of the CVD law in order to promulgate new regulations including currency-undervaluation regulations.

Another important and controversial point was Commerce's finding of specificity. Commerce found that the GOV's currency-undervaluation subsidy is predominantly used by a group of enterprises that buy or sell goods internationally, constituting the traded goods sector. And as a result, Commerce found this program is *de facto* specific. The GOV did not agree with this finding and argued that "the traded

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[1414] Passenger Tires CVD Final IDM, *supra* note 1300, at 8.
[1415] *Id.*
[1416] *Id.* at 9.
[1417] *Id. See* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994) (Central Bank of Denver).
[1418] *Id.*
[1419] *Id.* at 10.
[1420] *Id.*

goods sector is too broad to constitute a specific group of enterprises."[1421] In particular, the GOV explained that the traded goods sector accounts for a significant portion of the Vietnamese economy. According to GOV, since members of the traded goods sector are in virtually all industries of the Vietnamese economy, any alleged subsidy provided to such a group would be spread throughout the entire Vietnamese economy, rendering it non-specific.[1422] However, Commerce rejected the GOV's arguments and stated that "there need not be shared characteristics among the enterprises that comprise a group," and therefore, "it does not matter if these enterprises represent unrelated industries."[1423]

In sum, Commerce's finding that the undervaluation of currency is a countervailable subsidy is a controversial determination. Commerce's determination could be appealed at the U.S. Court of International Trade, or challenged at the WTO. Vietnam or China or any other country similarly targeted, would have plausible claims that Commerce's determination with respect to a currency-undervaluation subsidy is inconsistent with the WTO's Subsidies Agreement.

5.4.6.6. Conclusion

In this case, Commerce continued to use external benchmarks to measure the benefits of the land rents. With respect to the land system in Vietnam, Commerce continued to conclude that the GOV controls all land use rights and influence all land prices, and therefore, there is no useable market benchmark from within Vietnam.

But, notably, Commerce for the first time agreed to use an in-country Tier-One benchmark to calculate the benefit received from the provision of natural rubber (a raw material for goods to be exported) that a respondent, Sailun, purchased from a state-owned enterprise. The reason that Sailun was able to succeed in convincing Commerce to accept a Tier-One benchmark is that the GOV offered' close cooperation in

[1421] GOV's Case Brief, *supra* note 1411, at 33.
[1422] *Id.* at 32-33.
[1423] Passenger Tires CVD Final IDM, *supra* note 1300, at 20.

providing persuasive records and data for Commerce's review during the CVD investigation. Specifically, the GOV provided data indicating that the volume of natural rubber produced by the sole state-owned rubber company was relatively small compared to the volume produced by all producers in Vietnam and compared to the volume of imports of rubber into Vietnam. Furthermore, the GOV established the absence of laws, policies, controls or government interventions with regard to the production, import, and export of natural rubber. Thus, Commerce determined that market prices for natural rubber transactions within Vietnam may serve as Tier-One benchmarks. While this is only one case, it nevertheless stands in contrast to Commerce's repeated determinations to not rely on domestic prices as tier one benchmarks in CVD investigations against China. This shows that the GOV's strong cooperation in a CVD investigation is crucial to a favorable outcome for the respondent.

As for which interest rate benchmarks to select, Commerce conducted an analysis of Vietnam's banking system to see whether there is still government intervention as to or dominance in the operations of state-owned banks and private banks. From its analysis, Commerce continued to conclude that the GOV still maintains substantial intervention and dominance in the banking sector. Thus, the interest rates used for commercial loans in Vietnam are not considered market-determined rates. As a result, Commerce decided to continue the use of external interest rate benchmarks in measuring benefits received from lending programs in current and future CVD investigations. With respect to the alleged lending programs in this CVD investigation, Commerce did not find any related countervailable subsidies provided to Sailun and KTV.

Some programs such as import duty exemptions on imports of raw materials for exported goods and corporate income tax benefits for new investments are frequently and repeatedly treated by Commerce as countervailable subsidies. It is puzzling that Vietnam seems to be slow to adapt to Commerce's regulatory requirements for these programs to reduce the CVD rates for the exporting companies under investigation.

Another possibility is that Vietnam gives greater priority to attracting foreign investments than to such adaptation, or that it seeks the best possible way to support both foreign and Vietnamese investors that engage in import and export activities.

Lastly, Commerce's determination on currency undervaluation is an important ruling for Vietnam as well as other countries currently exporting to the United States market. Those countries with a similar policy related to undervaluing currencies could become targets for potential CVD investigations by Commerce. Commerce's modification of its regulations regarding an undervalued-currency subsidy, accompanied with its affirmative finding of countervailable undervalued-currency subsidy in this CVD case against Vietnam, could trigger future legal disputes at both U.S. judicial courts and international dispute settlement bodies. In fact, on September 8, 2021, KTV filed a complaint at the U.S. Court of International Trade to challenge Commerce's final determination.[1424] KTV contested that Commerce's determination to impose CVDs to address a foreign-government's currency practices was "arbitrary and capricious, unsupported by substantial evidence on the record, or otherwise not in accordance with law."[1425] This litigation will unfold in the coming months. It is inevitable that this and similar litigation will drag on for years because the issue of a currency-undervaluation subsidy is a rather new and complicated one that requires the participation of many experts and professionals with high expertise in banking and financial sectors.

Particularly in Vietnam, those enterprises involved in exporting activities to the U.S. market are potentially subjects affected by Commerce's affirmative determination. Especially for those exporters that are subject to U.S. AD and CVD orders, they will face the risk of being accused of benefiting from Vietnam's currency-undervaluation subsidies.

[1424] Kumho Tire (Vietnam) Co., Ltd. v. United States, 1:21CV00397 (C.I.T. 2021), available on Westlaw; accessed on October 1, 2021.
[1425] *Id.*

Chapter 6. Recommendations

6.1. Vietnam's Trajectory Towards a Market Economy

After more than 30 years of Doi Moi, Vietnam has transformed itself from a centrally planned economy towards a globally integrated, "socialist-oriented" market economy. Vietnam's commitment to pursue and perfect its socialist-oriented market economy was affirmed by the Communist Party of Vietnam ("CPV") in 2017.[1426] To unify the perception of this socialist-oriented market economy within Vietnam, CPV clarified that in a socialist-oriented market economy, "the State plays a role of orienting, building and perfecting economic institutions; creates a fair, transparent and healthy competitive environment; uses tools, policies and resources of the State to orient and regulate the economy, promote production and business, and protect natural resources and the environment; [and] develops cultural and social fields."[1427] CPV further explained that "the market plays a key role in effectively mobilizing and allocating resources, which is the main driving force for releasing productive power; State resources are allocated according to strategies, master plans and plans in line with the market mechanism."[1428] Importantly, CPV also insisted on the requirement to "clearly define and properly implement the position, role, function and relationship of the State, the market and the society in accordance with the market economy; ensure the socialist orientation."[1429] Thus, the relationship among the State, the market, and the realization of a socialist-oriented market economy in Vietnam is tied to the ongoing

[1426] Resolution No. 11-NQ/TW of June 3, 2017, at the 5th Conference of the Central Executive Committee of the 12th term, on "perfecting institutions of the socialist-oriented market economy" [hereinafter Resolution 11].
[1427] *Id.*
[1428] *Id.*
[1429] *Id.*

economic transition; this is major relationship that needs to be carefully considered, and its maintenance is "a strategic task to perform."[1430]

Following Vietnam's accession to the WTO in 2007, as of June 2020, Vietnam has been recognized by 71 other countries around the world as a country with market economy.[1431] The recognition of market economy status awarded by these countries supports the position that Vietnam has been regarded as an economy in which market prices are determined by free competition. Concurrently, Vietnam has also demonstrated to many countries that it has been making impressive economic transformations, although such an economy may not be deemed a full-fledged market economy according to the concept of a free-market economy employed by the United States. Indeed, with the United States, although it is an important trading partner of Vietnam, there have been many difficulties stemming from the government-influenced nature of Vietnam's economic institutions as well as from the relationship between the State and the market, all of which may discourage the United States from reclassifying Vietnam as a country with a market economy. To be sure, the Government of Vietnam ("GOV") has the objective of being recognized by the United States as a market economy country, a designation that would have great economic impact along Vietnam's course of bilateral trade normalization between the two countries. The following sections will set forth various recommendations for the GOV to undertake in order to aid its long-term goal of being recognized as a market economy country by the United States.

[1430] Tran Hong Minh, Director of Central Institute for Economic Management (CIEM) and Director of Aus4Reform Program, *Mối Quan Hệ giữa Nhà Nước và Thị Trường và Cải Cách Thể Chế Kinh Tế ở Việt Nam* [The Relationship between the State and Market and Economic Institutional Reform in Vietnam in English language], Aus4Reform Program, Hanoi (2019), available at http://st.aus4reform.org.vn/staticFile/Subject/2020/04/27/sach-_nha-nuoc-thi-truong-the-che_da-sua_27161804.pdf, accessed on October 22, 2020.

[1431] VCCI's WTO Center, "List of countries recognizing Vietnam as market economy (June 2020)", Advisory Council on Trade Remedies - VCCI, available at https://chongbanphagia.vn/danh-sach-cac-quoc-gia-cong-nhan-viet-nam-la-nen-kinh-te-thi-truong-62020-n21072.html, accessed on October 22, 2020.

6.2. Vietnam's Quest for Market Economy Status in the United States

As discussed in Section 5.2.2, U.S. trade law provides a basis for treating Vietnam as a market economy country. Congress has delegated great discretion to Commerce to make such a decision. To that end, the author recommends that the GOV continue to strengthen its diplomatic and trade relations with the U.S., and particularly that in diplomatic discussions, the GOV voice its desire that the U.S. confer market economy status upon it.

The U.S. and Vietnam established diplomatic relations 25 years ago, trade normalization has been in progress 2001, and the current relationship remains essentially a comprehensive partnership. In a visit to Vietnam this year, Vice President Harris reaffirmed the United States' commitment to "a strong, prosperous, and independent Vietnam, as well as free, open, healthy, and resilient Indo-Pacific region."[1432] The Vice President launched a new CDC Southeast Asia Regional Office in Hanoi and emphasized the U.S. government's efforts to promote economic and opportunity.[1433] These are promising steps towards the development of the sort of relationship that may ultimately enable Vietnam to receive market economy treatment.

Indeed, Vietnam has established strategic partnerships with other countries such as Japan (2006), South Korea (2009), the U.K (2010), and Germany (2011).[1434] In 2010, the then-Secretary of State Hillary Clinton proposed the idea of a bilateral strategic partnership with Vietnam, that idea resurfaced in 2021.[1435] The GOV should consider taking this opportunity to develop such a partnership.

[1432] United States, Briefing Room, "FACT SHEET: Strengthening the U.S.-Vietnam Comprehensive Partnership," The White House, Statements and Releases (August 25, 2021), available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/25/fact-sheet-strengthening-the-u-s-vietnam-comprehensive-partnership/, accessed on October 25, 2021.

[1433] *Id.*

[1434] Le Hong Diep, "How many strategic partners are enough for Vietnam?", Vietnamnet Bridge, (April 26, 2013), available at http://english.vietnamnet.vn/fms/government/71780/how-many-strategic-partners-are-enough-for-vietnam-.html, accessed on October 25. 2021.

[1435] Carlyle A. Thayer, "The US-Vietnam Comprehensive Partnership: what's in a name?", Australian Strategic Policy Institute, The Strategist (July 31, 2013), available at https://www.aspistrategist.org.au/the-us-vietnam-comprehensive-partnership-whats-in-a-name/, accessed on October 25, 2021. *See also* Alexander L. Vuving, "Will Vietnam Be America's Next

Of course, under the current trade regime, it is ultimately Commerce that must determine that Vietnam has a market economy. And, as discussed in Section 5.2.2, despite Vietnam's economic transformation, Commerce currently takes the position that Vietnam's economy does not operate on market principles, and that prices and costs in Vietnam are not market-driven. So, the GOV should take certain steps, discussed below, in order to persuade Commerce that Vietnam has sufficient characteristics of a market economy country to warrant that designation. As discussed in Section 5.3, although Russia and Ukraine have had their fair share of difficulties during their economic transitions, they were still granted market economy status by Commerce, so it is not implausible that Vietnam could realize the same. And China's failed efforts at seeking market economy status also provides a profound lesson for Vietnam in choosing its strategy: China focused on winning disputes in the WTO, essentially hoping that by winning a dispute with the EU, the result of that dispute would in turn cause the U.S. to bestow market economy status. But the global trade regime is not so easily overcome: Vietnam should instead position itself to request a changed-circumstances review directly with Commerce, presuming that Vietnam has taken certain steps to increase the likelihood of a favorable result from that review.

In Section 5.2.2, the author discussed Commerce's application of the six-factor test to determine market economy status. If Commerce applies the six factors strictly as it has in the past against Vietnam and China, it is unlikely that Vietnam would receive market economy status in the near future. But Vietnam should focus on certain factors that it can more easily control, such as by taking steps to improve currency convertibility and reducing state control over the allocation of resources, particularly within the banking sector and as pertains to land transactions.

Regarding currency manipulation or undervaluation, Vietnam is already taking some steps. Commerce's finding of currency undervaluation in the PVLT Tires case was discussed in Section 5.4.6; apart from that, the USTR also launched a Section 301

Strategic Partner?", The Diplomat (August 21, 2021), available at https://thediplomat.com/2021/08/will-vietnam-be-americas-next-strategic-partner/, accessed on October 25, 2021.

investigation to decide whether any trade action should be taken against Vietnam.[1436] However, Vietnam quickly reacted to the Section 301 investigation and successfully entered into an agreement with the U.S. Department of the Treasury, promising to the U.S. that the State Bank of Vietnam would henceforth allow Vietnam's currency to move in line with the development of Vietnam's financial and foreign exchange market and with Vietnam's economic fundamentals.[1437] This cooperation is emblematic of the relationship that Vietnam should continue to cultivate with the USTR and the Treasury Department regarding Vietnam's currency valuation. This relationship will help Vietnam both in the context of specific CVD investigations and in its long-term goal of attaining market economy status.

The author also recommends that Vietnam continue to take steps to permit privatization, although the Government of Vietnam prefers to call it "equitization," the idea being that the GOV has converted state-owned entities ("SOEs") into joint stock companies in which the state remains a majority shareholder.[1438] As required under its international commitments, especially under free trade agreements, Vietnam is committed to create a level playing field for all forms of business. Therefore, Vietnam has attempted to decentralize its government control and cut its state ownership in SOEs (*e.g.*, under CPTPP).[1439]

[1436] Office of the USTR, Initiation of Section 301 Investigation: Vietnam's Acts, Policies, and Practices Related to Currency Valuation, 85 FR 63637 (October 8, 2020). This investigation was pushed by the Trump Administration with the purpose of increasing import tariffs against Vietnam's exporters and producers.

[1437] U.S. Department of the Treasury, "Joint Statement from the U.S. Department of the Treasury and the State Bank of Vietnam," Press Release, Statements & Remarks (July 19,2021), available at https://home.treasury.gov/news/press-releases/jy0280, accessed on October 26, 2021. *See also* Office of the USTR, Determination on Action and Ongoing Monitoring: Vietnam's Acts, Policies, and Practices Related to Currency Valuation, 86 FR 40675 (July 28, 2021).

[1438] Breaking down the figures of SOEs, in which 81.1% of the stake was held by the government, 70 enterprises had a state holding of over 90% of charter capital, including 15 large groups and corporations – such as Petrolimex (95%), VnSteel (93.6%), Viet Nam Airlines (95.5%), Airports Corporation of Viet Nam (92.5%), Lilama (98%), and Viglacera (93%) (Ministry of Finance 2018). *See* Le Ngoc Dang, Dinh Dung Nguyen, and Farhad Taghizadeh-Hesary, "State-Owned Enterprise Reform in Vietnam: Progress and Challenges", ADBI Working Paper Series, No. 1071, January 2020, available at https://www.adb.org/sites/default/files/publication/562061/adbi-wp1071.pdf, accessed on October 26, 2021.

[1439] CPTPP is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which is a free trade agreement with eleven members, including Australia, Brunei, Darussalam, Canada, Chile,

Vietnam should consider changing the concept of "equitization." In practice, Vietnam has attempted to unwind direct ownership in key sectors, but the process of privatization is still sluggish and behind schedule. Some obstacles that the SOEs under an equitization schedule may face pertain to land-use rights. This is important because land-use rights are a key factor in determining an SOE's valuation for investors during the process of equitization. For example, Agribank (one of the largest state-owned commercial banks) has encountered obstacles in getting approval from the Ministry of Finance to continue to use its real property throughout the equitization process due to its large size.[1440] Thus, Vietnam should consider providing an expedited privatization process by easing regulations and procedures pertaining to the valuation of land-use rights.

Vietnam's state ownership in SOEs is still significant, accounting for 28% of GDP, and if including state-owned commercial banks ("SOCBs"), it accounts for 34% of GDP; while foreign enterprises account for 18% of GDP, and private enterprises accounts for less than 10%.[1441] Speeding up the privatization process would help Vietnam compare more favorably to other market economy countries.

In the modern market economy, the role of the state remains very important. But the role should be to stabilize the macroeconomy (not microeconomy), to establish a legal framework and enforcement apparatus for the market to function well, and to overcome defects and failures of the market in order to ensure equal development

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Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Under CPTPP, Vietnam made a commitment that SOEs must operate under market mechanisms. See Vietnam Investment Review, "SOE divestment a priority in CPTPP era," January 30, 2019, available at https://vir.com.vn/soe-divestment-a-priority-in-cptpp-era-65586.html, accessed on October 27, 2021.

[1440] Luu Huong, "Divestment slow off the blocks for banks," Vietnam Investment Review, April 13, 2021, available at https://vir.com.vn/divestment-slow-off-the-blocks-for-banks-83651.html, accessed on October 26, 2021.

[1441] Trung Kien, *Tiếp tục hiện đại hoá nền kinh tế, phát triển kinh tế tư nhân* [Continuing to modernize the economy, developing the private economy], Electronic News Portal of Ho Chi Minh City Party Committee, February 15, 2021, available at https://hcmcpv.org.vn/tin-tuc/tiep-tuc-hien-dai-hoa-nen-kinh-te-phat-trien-kinh-te-tu-nhan-1491874739, accessed on October 26, 2021. The data and information in this news article is from an interview with Professor Vo Dai Luoc, former director of the Institute of World Economy, Academy of Social Sciences, talked to the website portal of the Party Committee of Ho Chi Minh City on this issue.

opportunities for every business entity. The state can still achieve such goals without holding a large proportion of state ownership in SOEs and SOCBs.

Notably, under the Constitution of Vietnam, land is public property owned by the entire people and managed by the State; land is also considered a "special resource of the nation."[1442] Vietnam's land law stipulates that the land is owned by the entire people and is uniformly managed by the State on behalf of the owners.[1443] Through a system of State agencies, land price frameworks are issued every five years for each type of land and for each region.[1444] The land price frameworks serve as the basis for each province or city to determine appropriate land price tables as a reference for land users and for the purpose of land management (*e.g.*, for calculation of land use fees, land use tax, land allocation, and land rents).[1445] However, in reality, market land prices are always higher than the state's land price frameworks.[1446] There are also temporal limitations upon land allocation, limits for the scale of land allocation, and fixed restrictions regarding the purpose of land use. These restrictions on land use were integral to CVD determinations discussed in Sections 5.4.1.4.2 and 5.4.6.3.3. In order to continue on its quest for market economy status, Vietnam needs to change its land pricing evaluation mechanism. To that end, Vietnam should reform the system of land pricing to be based on marketable supply and demand of land rather than on State-issued frameworks and tables. Importantly, because all land is stipulated as being owned by the people, land rents and land allocation should be transparent and based on voluntary agreements between land users and the State, or, in the event that business

[1442] The Constitution of the Socialist Republic of Vietnam, passed on November 28, 2013, by the 13th National Assembly of the Socialist Republic of Vietnam, at its 6th session [hereinafter 2013 Vietnam Constitution], at Articles 53-54.
[1443] Land Law No. 45/2013/QH13 promulgated by the National Assembly of the Socialist Republic of Vietnam on November 29, 2013 [hereinafter Vietnam Land Law], at Article 4.
[1444] *Id.* at Article 113.
[1445] *Id.* at Article 114.
[1446] VVFC, Vietnam Appraisal, *Những bất cập và hệ lụy* [Inadequacies in land prices and consequences], available at http://www.vvfc.vn/tin-nganh/nhung-bat-cap-trong-gia-dat-va-he-luy.html; *see also* Viet Hoa, *TP.HCM: Kiến nghị Thủ tướng bỏ khung giá đất* [Ho Chi Minh City: Proposing that the Prime Minister repeal land price frameworks], Phap Luat News, September 14, 2020, available at https://plo.vn/thoi-su/tphcm-kien-nghi-thu-tuong-bo-khung-gia-dat-938366.html, accessed on October 26, 2021.

enterprises gain greater land-use rights, agreements between such enterprises and farmers, for instance.

In short, Vietnam needs to develop its conceptualization of itself. Although private ownership of land will be at odds with Vietnam's concept of socialism, Vietnam will struggle to achieve market economy status if it does not more clearly delineate private land-use rights and permit market factors to determine land rents and the parameters for land transactions. Regardless, Vietnam should continue to clarify what it means to have a socialist-oriented market economy. Doing so will only help Vietnam as it continues its progress from a transition economy to a full-fledged economy.

6.3 The Market-Oriented Industry & Mix-and-Match Approaches

Section 4.3.2.4.1.2 discussed the market-oriented industry ("MOI") theory, which, if employed by Commerce, would permit the use of a market economy methodology in calculating CVD against Vietnamese producers within certain industries even if Vietnam on the whole lacks market economy status. However, Commerce's current test for recognizing an MOI is too strict: it is "all-or-nothing," that is, market-determined prices must be paid for all significant inputs within the industry. One may hypothesize an example that could pass this test: if Apple, for instance, opened a factory in an export processing zone in Vietnam, at which it manufactured phones and laptops for exporting back to the U.S., it *might* be able to pass the test because within export processing zones there is much less state control within the markets, and Commerce might then be able to conclude that all significant inputs (even land and labor) were paid at market prices. To increase the likelihood that Commerce will employ the MOI test, Vietnam should continue to ensure that export processing zones are home to market-driven prices and costs. Vietnamese producers in a CVD investigation may also consider arguing the extent to which individual inputs are "significant"; although the MOI test requires all significant inputs to be at market

prices, there is some discretion built into Commerce's determination as to what is a significant input.

Even better would be if Commerce were to adopt the "mix and match" approach, as it appeared to do in the Tires case when it applied Tier-1 (in-country) benchmarks to natural rubber as an input because the respondents showed that the market for that specific input was not distorted by government intervention.[1447] To successfully persuade Commerce to use this approach in future cases, Vietnamese exporters and producers should develop a strategy of sourcing inputs from suppliers at prices that are demonstrably market-driven; or, when sourcing inputs from a SOE, they should, as with the natural rubber in the Tires case, show that the government's presence in the input market did not have the effect of distorting it.

6.4. The Use of Tier-3 Benchmarks

The author further recommends that Commerce cease the use of Tier-3 benchmarks, because these benchmarks may be inaccurate and, in any event, their use is always uncertain and unpredictable. Vietnamese enterprises can plan for the possibility of the imposition of ADD and CVD, but it is very difficult to anticipate the CVD rates that Commerce may decide to impose if Commerce looks to Tier-3 benchmarks to calculate them. This in turn makes it difficult for an enterprise to know whether it is worth exporting goods to the U.S. market in the first place, or perhaps whether it is worthwhile to participate in a CVD proceeding once one has begun. This has further consequences that the GOV should take into consideration because one enterprise's decision not to participate in a CVD proceeding may result in an unfavorable determination that then harms other potential entrants to the market who are at least preliminarily subject to that same CVD determination against their exports to the U.S.

[1447] *See supra*, Section 5.4.6.3.2.

Imposing CVD rates using Tier-3 benchmarks also goes beyond the purpose of the CVD law; the CVD law is meant to ensure fairness in the global trade arena, but using unpredictable third-country benchmarks borders on punitive. Nor is the rationale behind such use very strong: Commerce reasons that in nonmarket economies, prices may be subject to distortion, but there is distortion from tax breaks and subsidies even within market economies as well.

6.5. Recommendations for Vietnamese Enterprises

Finally, the author provides certain recommendations for Vietnamese enterprises. *First*, they should be cautious with Chinese investors who move factories to Vietnam for the purpose of exporting products similar to those that are currently subject to AD or CVD order against China. In the past, there have been several circumvention cases that result in unfavorable AD or CVD determinations for the exporter.[1448] *Second*, when exporting to the U.S. market, Vietnamese enterprises should consider hiring trade counsel to advise on strategies and plans and to prevent potential risks (such as unfavorable or overly costly AD or CVD proceedings) early on. Trade counsel can help exporters to develop business practices that will make compliance with a U.S. investigation easier, less costly, and more likely to result in a favorable outcome. *Third*, even businesses that have not been sued or investigated should maintain clear and transparent accounting systems that are independently audited. As seen in the Circular Welded Carbon-Quality Steel Pipe case, maintaining books to American standards permitted easy onsite verification of the respondents' submitted data, which in turn helped to facilitate a determination that the respondents had not received countervailable subsidies.[1449]

[1448] *See supra*, Section 5.4.3. Products that are subject to AD/CVD orders from certain countries can be investigated by Commerce for circumvention where those products were made from parts from a subject country and completed or assembled in a third country or the United States.
[1449] *See supra*, Section 5.4.2.5.

Fourth, Vietnam's Trade Remedy Authority has put in place an "early warning system" for potential trade remedy actions.[1450] Businesses should ensure that they receive frequent updates from this system to be well prepared for any imminent investigations. And when an investigation occurs, businesses should promptly consult with trade counsel to answer Commerce's questionnaires in a timely and cooperative manner. As seen in the Steel Wire Garment Hangers, Steel Nails, and Laminated Woven Sacks cases, failure to cooperate with Commerce in an AD or CVD investigation can have unfavorable consequences for the respondents. The litigation process may last for 12 to 18 months, but businesses should remain involved until the final determination to avoid being subject to the use of adverse facts available ("AFA") or being subject to a Vietnam-Wide Entity rate rather than a more favorable rate that would have resulted from continued participation in the proceedings.[1451]

Fifth, businesses should ensure that they participate in both Commerce's proceedings and in the parallel injury proceedings in the ITC. As seen in the Certain Frozen Warmwater Shrimp case, even if Commerce finds the existence of a countervailable subsidy, the ITC may still determine that there is no actual or threatened injury to American industry. The business under investigation should consult with trade counsel to determine which investigation has better odds of a favorable outcome, in order to efficiently allocate resources that are available to litigating the proceeding.

Sixth, in a CVD proceeding, businesses should recognize the importance of the role of the GOV in explaining and proving the nature of alleged subsidy programs. That means that when an investigation commences, businesses must work together with other respondents and must call upon the GOV to help produce a coordinated and cooperative response that clearly conveys the extent to which government programs may, for example, be generalized rather than industry-specific and thus not subject to

[1450] Trade Remedies Authority of Vietnam, TIN CẢNH BÁO SỚM (EARLY WARNING NEWS), available at http://www.trav.gov.vn/default.aspx?page=news&do=browse&category_id=116d0b73-1399-4d78-91d9-bd883c1421c8, accessed on October 26, 2021).
[1451] *See supra*, Section 5.4.3.4.

CVD.[1452] Relatedly, the GOV should hire professional trade counsel to prepare legal briefs, participate in hearings, and coordinate with respondents' counsel.

Seventh, businesses should avoid participating in government programs that have been determined to provide countervailable subsidies. As discussed in Sections 5.4.1, 5.4.3, 5.4.5, and 5.4.6, programs such as preferential land rents, import duty reimbursement for imported raw materials for Exported goods, and preferential rent for areas with difficult socio-economics conditions are frequently deemed to provide countervailable subsidies. Businesses should weigh the potential short-term benefits of participating in such programs against the potential long-term cost of being subject to a higher CVD rate as a result.

Eighth, and finally, enterprises that export to the U.S. market should consider diversifying their debt portfolio and taking loans from an array of domestic commercial banks rather than only from one or two SOCBs. This will reduce the likelihood that terms-of-credit will be treated as a countervailable subsidy in a CVD proceeding.

In sum, businesses and the GOV should work with Commerce during any CVD proceeding, both to produce a favorable result from that proceeding and to encourage Commerce to use a more favorable methodology in carrying out the proceeding. The author hopes that Commerce will employ greater use of the "mix and match" approach rather than categorically employing the nonmarket economy methodology in calculating CVD rates. And in the longer run, the author hopes that, as the GOV continues to make economic transformations, Commerce will recognize the existence of market-oriented industries within Vietnam. In time, with strengthened diplomatic and trade relations, perhaps it is possible that Vietnam may receive market economy treatment by the United States.

[1452] *See supra*, Section 5.4.5.4.

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