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FAIR'S FAIR: WHY CONGRESS SHOULD AMEND US
ANTIDUMPING AND COUNTERVAILING DUTY LAWS TO
PREVENT "DOUBLE REMEDIES"

DANA L. WATTS*

This work examines the US Department of Commerce's (DOC's) new policy of applying countervailing duty (CVD) law to imports from nonmarket economies (NMEs). Since 2007, the DOC has applied CVDs to several imports from the People's Republic of China (China). The DOC has long considered China an NME for the purposes of antidumping (AD) duties. The DOC uses third country surrogate values in its AD calculation for products from NMEs. The DOC currently makes no adjustments to its AD calculation when applying both CVDs and AD duties to products from NMEs. The legality of the DOC's new policy has not been challenged in the US court system. However, it is probably permissible under US law. The strongest argument for finding the policy illegal under US law is that Congress did not intend, in enacting the relevant AD and CVD statutes, to allow the DOC to impose CVDs on NMEs. The stronger argument, however, is that it is unclear what Congress intended. Because the DOC's interpretation is reasonable, it is a permissible interpretation of the statute. After an analysis of the legality of the policy under US domestic law, this work seeks to assess the validity of the policy under WTO law. China has already requested a panel hearing at the WTO to resolve the matter. The case will be heard in early July 2009. For the sake of fairness and to comply with international obligations, this work argues that the Congress should amend US CVD and AD laws so that they simply level the playing field for domestic producers rather than punishing exporters from NMEs.

* J.D. Candidate 2010, University of Kansas School of Law, Lawrence, Kansas, USA.
Address: 1535 West 15th Street, Lawrence, KS 66045, USA. Telephone: 785-864-4550. E-mail: danaleighwatts[at]yahoo.com.

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TABLE OF CONTENTS

- I. INTRODUCTION
- II. APPLYING COUNTERVAILING DUTIES TO IMPORTS FROM CHINA IS LIKELY LEGAL UNDER US LAW
 - A. *US Countervailing Duty Law Generally*
 - B. *Georgetown Steel Should Not Prohibit Countervailing Duties from Being Applied to Imports from China*
 - 1. *Georgetown Steel* Should be Overruled Because Some of the Rationales are Flawed
 - 2. *Georgetown Steel* Stood Only for the Proposition that the DOC Has Discretion in Determining Whether or Not to Apply CVDs to Products from NMEs
 - 3. The Rationales Used in *Georgetown Steel* Do Not Apply to Modern China
 - 4. US CVD Law has Changed since *Georgetown Steel* was Decided
 - C. *Applying Both AD and CVD law to NMEs is Permissible Under US Law*
 - 1. Dumping Calculation
 - 2. Application
- III. APPLYING US CVD LAW TO CHINA MAY VIOLATE WTO RULES
 - A. *China's "As Applied" Claims*
 - 1. Use of Benchmark Outside of China
 - 2. CVD Methodologies
 - 3. Use of NME Methodology for Both AD and CVD Determinations on the Same Product
 - B. *China's "As Such" Claims*
- IV. THE US SHOULD AMEND ITS CURRENT AD AND CVD LAW TO PROHIBIT "DOUBLE COUNTING"
 - A. *Implications of Current Policy*
 - 1. Protectionist Implications
 - 2. Implications for Other NMEs
 - B. *Congress Should Amend AD Law To Allow Adjustments for NMEs*
 - C. *Prohibiting Double Remedies Would Eliminate Most WTO Claims*
 - D. *Alternative Solutions*
 - 1. Grant China Market Economy Status
 - 2. Stop Applying CVDs to NMEs
- V. CONCLUSION

I. INTRODUCTION

On March 30, 2007, the Department of Commerce (DOC) reversed its twenty-three year-old policy of not applying countervailing duty (CVD) law to imports from nonmarket economies. Since then, it has applied countervailing duties to several imports from the People's Republic of China (China). China has become one of the US's most important trading partners. In 1995, the US only imported goods worth about 42,000 million

dollars from China.¹ By 2008, however, the value of Chinese imported goods had increased to 337,790 million dollars, more than from any other trading partner.² The Department of Commerce has long considered China a nonmarket economy (NME) for purposes of antidumping (AD) duties. The legality of the Department of Commerce's shift in policy under US law has not yet been tested directly before the US courts. However, China requested the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) to form a panel to determine whether the policy is permissible under WTO rules, and on January 20, 2009, the DSB granted its request.³ Although the DOC's new policy is likely legal under US law, it may violate WTO law.

Part II of this work examines the DOC's current practice of applying CVD law to Chinese imports and concludes it is probably permissible under U.S. law. Part III gives an overview of China's claims in its pending WTO panel hearing. Finally, part IV concludes that the U.S. should amend its current AD and CVD laws so that the DOC can avoid imposing "double remedies" when it imposes both AD duties and CVDs to NMEs.

II. APPLYING COUNTERVAILING DUTIES TO IMPORTS FROM CHINA IS LIKELY LEGAL UNDER US LAW

A. US Countervailing Duty Law Generally

Under US law, which is based on the Uruguay Round Agreement on Subsidies and Countervailing Measures⁴, a countervailable subsidy occurs when:

¹ U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMS., U.S.-CHINA TRADE: COMMERCE FACES PRACTICAL AND LEGAL CHALLENGES IN APPLYING COUNTERVAILING DUTIES 1 (June 2005) (expressed in 2004 dollars) (hereinafter GAO Report).

² U.S. DEPARTMENT OF COMMERCE, CENSUS BUREAU, FOREIGN TRADE DIVISION, TOP U.S. TRADE PARTNERS *available at* http://ita.doc.gov/td/industry/otea/ttp/Top_Trade_Partners.pdf (last visited 16 April, 2009). The value of imports from the entire European Union was only \$367,927 million. *Id.*

³ Constitution of the Panel Established at the Request of China, *United States-Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/3 (11 March, 2009).

⁴ Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, 15 April, 1994, Annex 1A, Legal Instruments-

“[A]n authority provides a financial contribution, provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or 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.”⁵

This definition helps distinguish countervailable government activities from non-countervailable government activities like providing infrastructure. According to the statute, the term “financial contribution” means “the direct transfer of funds,” “foregoing or not collecting revenue that is otherwise due,” “providing goods or services, other than general infrastructure,” or “purchasing goods.”⁶ The statute also gives four non-exclusive examples of government activities that confer a benefit, which include equity infusions outside the normal practice of private investors, loans on more favorable terms than the market rate for a comparable loan, loan guarantees that result in more favorable loan terms that would otherwise be available on the market and the government’s giving goods or services at less than “adequate remuneration” or buying goods at more than “adequate remuneration.”⁷

Of course, even if the government activity is a financial contribution that provides a benefit, the activity is not countervailable unless it is directed at certain enterprises or industries rather than “broadly available” and “widely used throughout an economy.”⁸ Under US law, export subsidies and import substitution subsidies are *de facto* specific, while domestic subsidies may or may not be specific.⁹ Export subsidies are “contingent upon export performance, alone or as 1 of 2 or more conditions.”¹⁰ For example, if a government pays an industry one dollar for every ton of iron it exports, this payment is an export subsidy. Export subsidies are the most

Results of the Uruguay Round Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 33 I.L.M. 1125 (1994) (hereinafter SCM Agreement)

⁵ 19 U.S.C. § 1677(5)(B) (2008).

⁶ 19 U.S.C. § 1677(5)(D) (2008).

⁷ 19 U.S.C. § 1677(5)(E) (2008).

⁸ RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 1053 (2008) (citing S. REP. NO. 412, 103d Cong., 2d Sess. 92-93 (1994)).

⁹ 19 U.S.C. § 1677(5A) (2008).

¹⁰ 19 U.S.C. § 1677(5A)(B) (2008).

trade-distorting of any support measure.¹¹ Import substitution subsidies are contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions.¹² For example, if a government pays a company one dollar for every one thousand meters of domestic cotton yarn it uses, this payment is an import substitution subsidy. This type of subsidy may make it cheaper for domestic industries to buy higher-priced domestic goods than lower-priced imported goods.

Domestic subsidies are automatically deemed specific as a matter of law if they are limited to a particular enterprise or industry.¹³ They are deemed specific as a matter of fact if the industries or enterprises they apply to are limited, or if one industry or enterprise is a predominant user, a disproportionately large user, or if it enjoys favoritism in receiving the subsidy.¹⁴ Subsidies are also specific if they are limited to industries or enterprises within a certain geographical region.¹⁵

B. Georgetown Steel Should Not Prohibit Countervailing Duties from Being Applied to Imports from China

The landmark case in this area of law is *Georgetown Steel Corp. v. United States*.¹⁶ There, two US steel companies filed CVD petitions with the DOC alleging that Czechoslovakia and Poland, which were both NMEs, had subsidized carbon steel wire rod illegally under US CVD law.¹⁷ The DOC issued final determinations concluding that “bounties or grants within the meaning of section 303 of the Tariff Act of 1930 . . . cannot be found in nonmarket economies.”¹⁸ The US steel companies appealed the ruling to the US Court of International Trade (CIT), which found for the petitioners.¹⁹ The CIT reasoned that the broad, sweeping language of the statute clearly included nonmarket as well as market economies.²⁰ The statute read:

¹¹ BHALA, *supra* note 8, at 1055.

¹² 19 U.S.C. § 1677 (5A)(C) (2008).

¹³ 19 U.S.C. § 1677 (5A)(D)(i) (2008).

¹⁴ 19 U.S.C. § 1677 (5A)(D)(iii) (2008).

¹⁵ 19 U.S.C. § 1677 (5A)(iv) (2008).

¹⁶ 801 F.2d 1308 (Fed. Cir. 1986).

¹⁷ *Id.* at 1310.

¹⁸ *Id.* at 1309.

¹⁹ *Id.*

²⁰ *Id.* at 1315.

[W]henever any country . . . or other political subdivision of government . . . 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 . . . or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether . . . imported directly or otherwise . . . there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.²¹

1. *Georgetown Steel* Should be Overruled Because Some of the Rationales are Flawed

The Court of Appeals for the Federal Circuit (CAFC) reversed the decision by the CIT, holding that the “economic incentives and benefits” bestowed by the governments did not constitute a “bounty” or a “grant”.²² The CAFC looked at the purpose of CVD law, the nature of NMEs, and the actions Congress took in other statutes to reach this conclusion.²³ The first two rationales are flawed. The third rationale, however, may have some merit.

In addressing the first two rationales, the CAFC began with the definitions. Finding none in the statute, the CAFC accepted the DOC’s definition of a bounty or grant as “any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth.”²⁴ It went on to say that this sort of unfair competition resulted from government subsidies to exporting producers, which gave them a competitive advantage they otherwise would not have.²⁵ This type of subsidy could not exist in NMEs, the CAFC reasoned, because the government controls the entire market in the country.²⁶ Therefore, “[t]here 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

²¹ *Id.* at 1313.

²² *Id.*

²³ *Id.* at 1315.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

been sold in the United States at higher prices or on different terms.”²⁷ The incentives the foreign governments were applying could not be considered as subsidies because the governments “would in effect be subsidizing themselves.”²⁸

The flaw of this reasoning, as the *amici curiae* pointed out, is that “it excepts countries that are the worst distorters of world markets from the countervailing duties that are designed to offset and balance those market distortions.”²⁹ While there may be no reason to believe that the potash would have been sold in the US at higher prices or on different terms absent the government intervention, there is also no reason to believe that without the government intervention the potash would have been sold at the same price or on the same terms. The CAFC’s explanation says only that a market is not possible in an NME. It does not say that a subsidy is not possible. As the CIT pointed out, this logic could theoretically allow governments in NMEs to eliminate the market by totally controlling, for example, a raw material, and escape CVDs because they can only be applied where there is a market.³⁰ Perhaps it is for this reason that, in spite of the strong language contained in the opinion, commentators have read *Georgetown Steel* not to stand for the proposition that the DOC *could not* apply CVD law to NMEs, but for the proposition that the DOC did not *have to* apply it. Certainly the CIT interpreted *Georgetown Steel* in this way. In *People’s Republic of China v. United States*, the CIT stated that “it is not clear that Commerce is prohibited from applying countervailing duty law to NMEs.”³¹

The third rationale the court gave was that the Congress signaled its intent not to have CVD law apply to products of NMEs by passing AD statutes with specific provisions for NMEs.³² Under the AD law, the DOC was to use “either a constructed value or the actual selling price of some other market economy country that sells the same or similar merchandise for home consumption or to other countries” when finding the foreign market value of goods from nonmarket economies.³³ The specificity of the

²⁷ *Id.* at 1316.

²⁸ *Id.*

²⁹ *Id.* at 1318.

³⁰ *Continental Steel Corp. v. United States*, 614 F.Supp. 548, 553 (Ct. Int’l Trade 1985).

³¹ 483 F.Supp.2d 1274, 1282 (Ct. Int’l Trade 2007).

³² *Georgetown Steel*, 801 F.2d at 1316.

³³ *Id.* (citing 19 U.S.C. § 164(c) (1976)) (repealed 1979).

AD statute in dealing with NMEs and the fact that the CVD statute was amended at the same time with no mention of applying CVDs to NMEs, helped convince the court of Congressional intent to apply only AD law to NME products. This was then, and is today, the strongest argument for finding the application of CVDs to NMEs illegal. If Congress did not intend CVD law to apply to NMEs, the DOC does not have the authority to do so. One counterargument to this proposition is that Congress did intend CVDs to be applied to NMEs, but considered the statute sufficiently broad to apply to any type of economy as is.

2. *Georgetown Steel* Stood Only for the Proposition that the DOC Has Discretion in Determining Whether or Not to Apply CVDs to Products from NMEs

After *Georgetown Steel*, the DOC repeatedly dismissed petitions asking it to apply CVDs to products from NMEs.³⁴ Then, on November 27, 2006, the DOC began a CVD investigation of coated free sheet paper from China at the request of a domestic paper manufacturer.³⁵ Simultaneously, the DOC requested public comments on the proposed change in policy.³⁶ The Chinese paper manufacturers filed a suit with the CIT to enjoin the DOC investigation on the theory that the CAFC “definitively ruled” that CVDs could not be applied to products from NMEs.³⁷ The CIT recognized that the rule from *Georgetown Steel* was not clear. It simply held that it was not “patently *ultra vires*” for the DOC to commence a CVD investigation into products from NMEs because *Georgetown Steel* could simply be read as “affirm[ing] Commerce’s decision not to apply countervailing duty law to the NMEs in question in that particular case and recogniz[ing] the continuing ‘broad discretion’ of the agency to determine whether to apply countervailing duty law to NMEs.”³⁸ It left open the possibility that a later court could find that *Georgetown Steel* did, as the plaintiffs suggested, hold that CVDs could not be applied to NMEs.

³⁴ *People’s Republic of China v. United States*, 483 F.Supp.2d 1274, 1276 (Ct. Int’l Trade 2007).

³⁵ *Id.* at 1276.

³⁶ *Id.*

³⁷ *Id.* at 1278.

³⁸ *Id.* at 1282.

The Supreme Court established a two-step test in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³⁹ for determining whether an agency construction of its organic statute is permissible. As step one, the court must determine whether Congress has “directly spoken to the precise question at issue.”⁴⁰ Here, the question is whether the statute allows the DOC to apply CVDs to NMEs. The statute does not expressly say that CVDs may be applied to NMEs, nor does it expressly say that CVDs may not be applied to NMEs. Therefore, Congress has not directly spoken on the precise issue.

At step two, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”⁴¹ To determine whether the agency construction is permissible, the court looks at whether the construction is “arbitrary, capricious, or manifestly contrary to the statute.”⁴² In doing so, it gives “considerable weight” to the agency construction.⁴³ Here, while the DOC reversed its long-standing policy of not applying CVDs to NMEs, any issues with this history go to notice rather than to permissibility of the new construction. The DOC retains its right to interpret the statutes it administers so long as such constructions are reasonable. Indeed, the statute defining countervailable subsidies is broadly worded.⁴⁴ While exceptions to the definition are expressly laid out, including limits on what constitutes a benefit and the requisite specificity of a subsidy, products from NMEs are not included in these exceptions.⁴⁵ Also, the new construction is arguably more reasonable than the old construction in which the DOC did not apply CVDs to NMEs, even though the statute arguably applies to all US trading partners. Some say that the specificity of the AD provisions, which expressly provide measures for calculating AD duties when the products come from an NME, *sub silentio* implies that because no such separate measures are spelled out for NMEs when it comes to CVDs, this silence indicates that CVDs should not be applied to NMEs at all. Another interpretation is that there are separate AD provisions for market economies and NMEs but only one umbrella CVD

³⁹ 467 U.S. 837 (1984).

⁴⁰ *Id.* at 842.

⁴¹ *Id.* at 843.

⁴² *Id.* at 844.

⁴³ *Id.*

⁴⁴ See 19 U.S.C. § 1677(5) (2008).

⁴⁵ See 19 U.S.C. § 1677 (2008).

provision for all types of economies. Even if the second interpretation is not more reasonable, *Chevron* deference rules indicate that the DOC should be allowed to interpret the statute this way.

One potential problem with the DOC's new policy from an administrative procedure standpoint is that, so far, it has been applied only to China. The fact that the policy has not been applied to other US trading partners the DOC has designated as NMEs may make it vulnerable to claims that applying CVD law only to China is "arbitrary and capricious" and therefore fails the *Chevron* step two test. However, the DOC could distinguish China from other trading partners by pointing to the volume of trade China does with the US or China's particular economic development. In fact, China's economic development was the reason the DOC cited for its change of policy. In this regard, former Commerce Secretary Carlos M. Gutierrez has stated that "China's economy has developed to the point we can add another trade remedy tool" and went on to say that "[t]he China of today is not the China of years ago", indicating that the DOC considers China different from other NMEs.⁴⁶

3. The Rationales in *Georgetown Steel* Do Not Apply to Modern China

Even if *Georgetown Steel* were upheld, it would, arguably, not prevent the DOC from applying CVDs to China. The day after *People's Republic of China v. United States* was decided, the DOC announced that it would begin applying CVD law to imports from China, an NME country. The DOC explained that, while the subsidies granted by the "1980's Soviet-style economies" that were at issue in *Georgetown Steel* had "no measureable impact", China is a different story.⁴⁷ Because China has evolved and its economy has developed, more trade remedy tools are needed to ensure a level playing field.⁴⁸

More specifically, the Soviet-style economies in *Georgetown Steel* were more completely controlled by the government. "[V]irtually every aspect of these economies was governed by extensive five-year plans created and

⁴⁶ Press Release, U.S. Department of Commerce, Commerce Applies Anti-Subsidy Law to China (March 30, 2007) *available at*: www.manufacturing.gov/news/033007_CVD.asp (last visited 17 April, 2009).

⁴⁷ *Id.*

⁴⁸ *Id.*

administered by central planners.”⁴⁹ The central planners set production quotas, set prices for labor and capital, and directed the flow of all materials.⁵⁰ The government owned and operated almost all industry, banking, transportation, and communication systems, as well as public services and agriculture.⁵¹ Foreign currency was either very restricted or completely inconvertible.⁵² Personal property rights were extremely limited, with most property being owned by the government.⁵³

In today’s China, however, more than ninety percent of price controls have been eliminated, and labor wages “appear to be negotiated”.⁵⁴ Although the Chinese government has mostly retained control of certain key industries, “entrepreneurship is flourishing.”⁵⁵ The People’s Bank of China controls the exchange rate, and companies and individuals, both foreign and domestic, are allowed to buy and sell the renminbi and foreign currencies.⁵⁶

Because modern China is so different from the Soviet-style economies of *Georgetown Steel*, a US court is likely to decide that *Georgetown Steel* does not prohibit the DOC from applying CVDs to China even if it would uphold *Georgetown Steel* in the case of an economy similar to the ones at issue there.

4. US CVD Law has Changed Since *Georgetown Steel* was Decided

The CVD statute in place when *Georgetown Steel* was decided was 19 U.S.C. § 1303 (1982), which was based on Section 303 of the Tariff Act of 1930. Today, CVDs are governed by 19 U.S.C. § 1677, which is based on the Uruguay Round Agreements Act of 1995.⁵⁷ Current CVD law reflects

⁴⁹ Memorandum from Shauna Lee-Alaia & Lawrence Norton, Office of Policy, Import Administration, *Countervailing Duty Investigation of Coated Free Sheet Paper from the People’s Republic of China—Whether the Analytical Elements of Georgetown Steel Opinion are Applicable to China’s Present-Day Economy* 4 (27 March, 2007).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 6.

⁵³ *Id.*

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* at 7.

⁵⁶ *Id.* at 6.

⁵⁷ Uruguay Round Agreements Act, 108 Stat. 4908, Pub. L. 103-465, Title II, sec. 261(a) (8 December, 1994) (repealing 19 U.S.C. § 1303 as of 1 January, 1995).

the language of the WTO's Uruguay Round Agreement on Subsidies and Countervailing Measures to which all its Members are subject. The new statute uses the word "subsidy" and speaks in terms of benefits and specificity, whereas the old statute used the words "bounty" and "grant". Thus, even if a court would uphold *Georgetown Steel* if the statute based on Section 303 were still in place, the court might not uphold it under the new statute, even though the new statute does not specifically address applying CVDs to NMEs.

C. Applying Both AD and CVD Law to NMEs is Permissible Under US Law

1. Dumping Calculations

According to the DOC, "[d]umping occurs when a foreign producer sells a product in the United States at a price that is less than fair value."⁵⁸ A product is dumped if its export price or constructed export price is less than normal value.⁵⁹ Normal value is a foreign home market price. In AD cases involving market economies, it is usually the price of a like product sold in the ordinary course of trade for consumption in the home country of the exporter.⁶⁰ Thus, when the DOC brings AD cases against a product from Mexico (the "subject merchandise"), normal value is the price of a like product in Mexico. Sometimes, however, there is no normal value. In cases where there are no home market sales, there are an insufficient number of home market sales, or there are below cost sales in the exporting country, proxies for normal value must be used.⁶¹

The two types of proxies for normal value in market economies are third country market price and constructed value. Third country market price is the "export sales of the foreign like product to a country other than the United States".⁶² The DOC considers number of sales of the foreign like product, product similarity, the similarity of the third country and US markets, and whether sales to the third country are representative.⁶³ The

⁵⁸ BHALA, *supra* note 8, at 925.

⁵⁹ 19 U.S.C. § 1677(35) (2008).

⁶⁰ BHALA, *supra* note 8, at 926.

⁶¹ 19 U.S.C. § 1677b (a)(1)(B) (2008).

⁶² DEPT OF COMMERCE, ANTIDUMPING & COUNTERVAILING DUTY LAWS, APPENDIX B, ANTIDUMPING (definition of "Third Country Market") (2008).

⁶³ *Id.*

constructed value is “the sum of (1) the cost of materials and fabrication of the subject merchandise, (2) selling, general, and administrative expenses and profit of the foreign like product in the comparison market, and (3) the cost of packing for exportation to the United States.”⁶⁴ The DOC always uses normal value if it is available. If not available, it uses third country market price. If that too is unavailable, it uses constructed value.⁶⁵

In AD cases involving NMEs, using normal value is “inappropriate”⁶⁶ because price data, if available, is considered unreliable.⁶⁷ This is because prices are “not set by market forces of supply and demand, by government fiat—or, at least, the government plays a major role in establishing prices.”⁶⁸ The statutes therefore provide for the use of a special calculation using factors of production for a like product from a suitable substitute market economy third country as a proxy for normal value.⁶⁹ To do this calculation, the DOC considers factors of production, including the number of labor hours needed to produce the good, the quantities of raw materials used, the amount of energy and other utilities used, and representative capital costs, including depreciation.⁷⁰ The DOC then finds the price of these factors in a market economy country with similar economic development that is “a significant producer of the subject merchandise or comparable merchandise.”⁷¹

The export price is the price at which the good is first sold to an entity unaffiliated with the exporter.⁷² The sale must happen before the goods are imported to the US. If the sale happens after importation, a constructed export price is used. A constructed export price is also used before importation if the first sale to an unaffiliated person occurs after importation, as when the US importer is related to the exporter.⁷³ The DOC

⁶⁴ *Id.* (definition of “Constructed Value”).

⁶⁵ *Id.* (definition of “Normal Value”).

⁶⁶ *Id.* (definition of “Factors of Production”).

⁶⁷ BHALA, *supra* note 8, at 1043.

⁶⁸ *Id.*

⁶⁹ 19 U.S.C. § 1677b(c) (2008).

⁷⁰ DEP’T OF COMMERCE, ANTIDUMPING & COUNTERVAILING DUTY LAWS, APPENDIX B, ANTIDUMPING (definition of “Factors of Production”) (2008).

⁷¹ *Id.*

⁷² *Id.* (definition of “Export Price and Constructed Export Price”).

⁷³ *Id.*

uses either the export price or the constructed export price in both market economy and NME cases.

In all AD cases, the DOC makes adjustments to the normal value (or proxy for normal value) and the export price (or constructed export price) to ensure a fair comparison.⁷⁴ These adjustments include adding US packing charges and subtracting foreign packing charges, transportation costs, internal taxes, etc. from the normal value and/or the export price.⁷⁵ Significantly, they also include the amount of any CVDs imposed to offset an export subsidy. The provisions authorizing normal value to be adjusted in this fashion in AD cases are Section 772(c)(1)(C) of the Tariff Act of 1930 and 19 U.S.C. § 1677a(c)(1)(C) which provide that, in making antidumping calculations, “the price used to establish export price and constructed export price shall be increased by . . . the amount of any countervailing duty imposed on the subject merchandise . . . to offset an export subsidy”⁷⁶ This provision, and the DOC’s practice in calculating AD duties, assumes that the entirety of any export subsidies lower export prices *pro rata*. This assumption is called the “*passthrough*” assumption. In market economy cases, therefore, export prices are adjusted to account for export subsidies. No adjustments to export price are made for *domestic* subsidies in market economies, however, because domestic subsidies are presumed to lower both normal value and export price by the same amount.

2. Application

Ever since the DOC began applying CVD law to NMEs, allegations of “double remedies” or “double counting” have been made. The crux of these allegations is that when the DOC applies both AD duties and CVDs to an NME, they are essentially counting the same unfair trade practice twice—once under AD law and once under CVD law—and the exporter therefore has to pay twice for the one unfair trade practice. Because AD and CVD laws work together under the DOC’s market economy methodology, there are no “double remedies” when both laws are applied to products from those economies.

⁷⁴ *Id.* (definitions of “Normal Value” and “Export Price and Constructed Export Price”).

⁷⁵ *Id.*

⁷⁶ 19 U.S.C. § 1677a(c)(1)(C) (2008).

The DOC's use of factors of production from a comparable third country market economy in NME AD investigations already offsets most subsidization because the DOC may only use third country market values that are subsidy free. Domestic subsidies in a market economy reduce both normal value and export price by the same amount, so there is no double counting. However, when the domestic subsidies are in an NME, a third country surrogate price is used for normal value, and so only the export price is reduced. Thus, the difference between normal value and export price is exaggerated. This is the first way that the domestic subsidies are counted. Separate CVDs are then imposed to offset the subsidies. This is the second way the domestic subsidies are counted.

As an example, assume a market economy exporter's finished product uses steel and the market value of the steel is 100 dollars per ton. Assume further that the government gives the exporter a subsidy of 20 dollars per ton for all the steel it uses. If the DOC uses constructed value methodology in its AD investigation, it will use 80 dollars in its input calculation because the DOC uses actual costs of inputs for market economies, whether or not the input is subsidized. The DOC will then apply a CVD of 20 dollars to offset the subsidy. Now assume that steel is still 100 per ton, the government still gives a subsidy of 20 dollars per ton, but this time exporter is in an NME. In this situation, the DOC must find the market price of steel in a third country market in its AD calculation. Because the DOC cannot use a third country market where subsidies are present, the market value will be 100 dollars, and thus the DOC will still apply a CVD of 20 dollars to offset the subsidy. However, in its AD calculation, it will use 100 dollars as normal value. The subsidy of 20 dollars is thus double counted—first in the CVD determination and then in the AD calculation.

This argument was made by China's Ministry of Commerce's Bureau of Fair Trade (BOFT) during the DOC's less-than-fair-value investigation of coated free sheet paper, the first CVD investigation launched against a product from an NME in twenty-three years.⁷⁷ BOFT argued the same "*passthrough*" assumption used to increase export price by the amount of any export subsidies in the DOC's AD calculation should be used to increase

⁷⁷ Memorandum, Dep't of Commerce, *Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Coated Free Sheet Paper From the People's Republic of China (PRC)*, A-570-906 (17 October, 2007) (hereinafter CFS Issues and Decision Memorandum).

the export price of an NME import in the DOC's AD calculation when both CVD and AD duties are imposed. The DOC, however, dismissed the argument.⁷⁸ It reasoned that it could not be assumed that any domestic subsidies in an NME directly lowered the export price by a corresponding amount, the way that an export subsidy could. Instead, the DOC reasoned, domestic subsidies could go to "investing in capital improvements, retiring debt, or any number of other uses".⁷⁹ Therefore, it concluded, no "passthrough" assumption should be made with respect to domestic subsidies. The same argument has since been made in other DOC investigations of products from China involving both CVD and AD investigations, and the DOC has rejected it each time.

While it is true that government subsidies in an NME may not lower export prices by a corresponding amount, they may, in fact, lower export prices by a corresponding amount. The problem with the DOC's methodology is that regardless of how the domestic subsidy affects the export price, no adjustments are made to the calculation. Even if the domestic subsidy lowers the export price the same way it would if it were an export subsidy, the DOC makes no adjustments to its CVD calculation.

III. APPLYING US CVD LAW TO CHINA MAY VIOLATE WTO RULES

Both the US and China are Members of the WTO. Article VI of the General Agreement on Tariffs and Trade (GATT) 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement), and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) govern the AD duties and CVDs that a WTO Member can apply to another.⁸⁰ Additionally, the Protocol on the Accession of the People's Republic of China (Protocol of Accession) sets more specific rules for calculating antidumping and countervailing duties on Chinese imports.⁸¹

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (hereinafter GATT); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Marrakesh Agreement establishing the World Trade Organization, 15 April, 1994, Annex 1A, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (hereinafter AD Agreement); SCM Agreement, *supra* note 4.

⁸¹ World Trade Organization, Protocol on the Accession of The People's Republic of China WT/L/432 (10 November, 2001) (hereinafter Protocol of Accession).

On September 14, 2007, China requested consultations regarding the US DOC's preliminary determination that both AD duties and CVDs were applicable to imports of coated free sheet paper from China.⁸² China alleged the determination violated various provisions of the GATT, the SCM Agreement, and the AD Agreement.⁸³ No further requests were made through the WTO in regard to coated free sheet paper because on November 27, 2007, the US International Trade Commission determined that no US industry was materially injured or threatened with material injury.⁸⁴ This, however, did not settle the issue of whether CVDs could be imposed on imports from NMEs, and the DOC continued to apply both CVDs and AD duties to imports from China. Then on September 19, 2008, China requested consultations with the US regarding the final AD and CVD determinations ordered by the DOC in four separate cases.⁸⁵ China again alleged that the determinations violated GATT, the SCM Agreement, and the AD Agreement.⁸⁶ This time it also alleged the determinations violated the Protocol of Accession.⁸⁷ Consultations between the US and China were held on November 14, 2008.⁸⁸ The consultations failed to resolve the matter, and China requested that the DSB establish a panel to resolve the dispute.⁸⁹ In doing so, China divided its claims against the US into two categories, "As Applied Claims" and "As Such Claims".⁹⁰ Some of these claims revolve around the individual circumstances of the determinations and the companies and products involved. Because a comprehensive analysis of each of these claims would be outside the scope of this paper, focus will be given to the claims that have to do with the DOC's CVD and AD methodology rather than individual circumstances.

⁸² Request for Consultations by China, *United States-Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper From China*, WT/DS368/1 (18 September, 2007).

⁸³ *Id.*

⁸⁴ Press release, U.S. Int'l Trade Comm'n, Coated Free Sheet Paper from China, Indonesia, and Korea Does Not Injure U.S. Industry, Says ITC (27 November, 2007).

⁸⁵ Request for Consultations by China, *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/1 (22 September, 2008).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Request for the Establishment of a Panel by China, *United States-Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/2 (12 December, 2008) (hereinafter Request for Panel).

⁸⁹ *Id.*

⁹⁰ *Id.*

A. China's "As Applied" Claims

1. Use of Benchmark Outside of China

China's "As Applied Claims" state, *inter alia*, that the DOC's use of third country surrogate values in CVD determinations for products from the China violates Article 14 of the SCM agreement, Article 15(b) of the Protocol of Accession, and Article 15(c) of the Protocol of Accession.

First, Article 14 of the SCM Agreement provides for calculation of the amount of a subsidy in terms of the benefit to the recipient.⁹¹ China argues the DOC's use of third country surrogate input factors instead of the "prevailing terms and conditions in China" in determining "whether, and to what extent, subject producers received a subsidy benefit"⁹² violates this provision because in many cases, the PRC is not subsidizing the industry or company in such a way that the subsidy cannot be separated out the way it can in market economies.⁹³ Because the DOC has complete authority to designate countries as NMEs and its decisions are not subject to judicial review,⁹⁴ the only way to challenge the DOC's designation of a country as an NME is to challenge the way in which it is applied.

Second, Article 15(b) of the Protocol of Accession states that:

In [countervailing measure] proceedings . . . relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks.⁹⁵

In other words, the US can use values like the third country surrogate values in calculating CVDs on imports from China, but it must first show that there are "special difficulties" in using the "prevailing terms and

⁹¹ SCM Agreement, *supra* note 4, at art. 14.

⁹² Request for Panel, *supra* note 88, at 5.

⁹³ See *supra* text accompanying notes 51-53.

⁹⁴ 19 U.S.C. § 1677(18)(D) (2008).

⁹⁵ Protocol of Accession, *supra* note 81, at art. 15(b).

conditions in China”.⁹⁶ China argues that the US has made no such showing, and therefore should use actual data from China in figuring CVDs rather than third country surrogate values.

Third, Article 15(c) of the Protocol of Accession requires that WTO Members notify the Committee on Subsidies of Countervailing Measures about its methodologies when it uses something other than the “prevailing terms and conditions” in China for its CVD determinations. This notice requirement will be resolved by simple fact-finding.

2. CVD Methodologies

Article VI of the GATT provides the original AD and CVD provisions of GATT. Later, the SCM Agreement and the AD Agreement supplemented these provisions. China alleges that the US failed “to take all necessary steps to ensure that the imposition of countervailing duties was in accordance with Article VI of the GATT 1994 and the SCM Agreement, as required by Article 10 of the SCM Agreement.”⁹⁷ Specifically, China may look to Article VI:5, which states that “[n]o product . . . shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.”⁹⁸ China could argue this provision prohibits granting a “double remedy” and that the DOC’s current method of finding both CVDs and AD duties in NMEs violates this provision because it allows the same government activity to be counted twice.

Next, China alleges that Article 32.1 of the SCM Agreement prohibits the use of third country surrogate values in CVD determinations for NMEs because such a practice is not explicitly permitted by GATT 1994. Per Article 32.1 of the SCM Agreement, “[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994.”⁹⁹

Article VI:3 of the GATT provides that “[n]o countervailing duty shall be levied on any product . . . in excess of an amount equal to the estimated

⁹⁶ *Id.*

⁹⁷ Request for Panel, *supra* note 88, at 5.

⁹⁸ GATT, *supra* note 80, at art. VI:5.

⁹⁹ SCM Agreement, *supra* note 4, at art. 32.1.

bounty or subsidy determined to have been granted”¹⁰⁰ China argues that using third country values allows the DOC to collect CVDs “in excess” of any actual subsidization.

3. Use of NME Methodology for both AD and CVD Determinations on the Same Product

Article 19.4 of the SCM Agreement provides that “[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist”¹⁰¹ Here the argument is that using third country surrogate inputs instead of China’s actual inputs results in finding higher input values which, in turn, results in higher CVDs. China makes the same argument using Article 9.3 of the AD Agreement.

Next, China makes essentially the same argument using Articles 9.2 of the AD Agreement and 19.3 of the SCM Agreement, saying that the use of both CVD and AD duties results in duty determinations in excess of “appropriate amounts”.¹⁰²

Finally, China contends that the use of NME methodology for both AD and CVD investigations violates Article I of GATT 1994, the Most Favoured Nation (MFN) clause. Here it alleges that the DOC’s methodology for simultaneous AD and CVD determinations for market economy Members prevents a double remedy, while the methodology for simultaneous AD and CVD determinations for China does not prevent a double remedy. China argues that this violates the MFN clause because other Members get better treatment for simultaneous AD and CVD determinations than it does, and Article I provides that:

[w]ith respect to . . . charges of any kind imposed on or in connection with importation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in . . . any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.¹⁰³

B. China’s “As Such” Claims

¹⁰⁰ GATT, *supra* note 80, at art. VI ¶3.

¹⁰¹ SCM Agreement, *supra* note 4, at art. 19.4.

¹⁰² AD Agreement, *supra* note 80, at art. 9.2; SCM Agreement, *supra* note 4, at art. 19.3.

¹⁰³ GATT, *supra* note 80, at art. I.

China's "As Such" Claims are much more succinct. These claims say that because Section 773(c) of the Tariff Act of 1930 and 19 U.S.C. 1677b(c) provide that the DOC must use factors of production from third countries when figuring AD duties for products from NME countries and because the US has not provided the DOC with any legal authority to adjust either the CVD or AD duties when both are applied to the same NME product, US law, as written, violates Articles 19.4, 32.1, and 10 of the SCM Agreement and Articles 9.2, 2.4, and 9.3 of the AD Agreement.¹⁰⁴ Furthermore, US law, as written, violates the MFN provisions of Article I of the GATT 1994 because the US fails to accord to imports from China, immediately and unconditionally, an advantage, favour, privilege or immunity with respect to the method of levying import duties or charges, and with respect to rules and formalities in connection with importation, that it accords to like products originating in the territories of other WTO Members.¹⁰⁵ Put more succinctly, China alleges the US AD and CVD laws treat Members the US designates as NMEs less favorably than Members the US designates as market economies.

IV. THE US SHOULD AMEND ITS CURRENT AD AND CVD LAW TO PROHIBIT "DOUBLE COUNTING"

A. Implications of Current Policy

1. Protectionist Implications

While each has its criticisms, free trade theories generally state that the freer the trade between two countries, the better off each will be in the long run.¹⁰⁶ Modern economists and academics fear that the current global financial crisis will result in countries resorting to protectionism by erecting new barriers or fortifying old barriers to free trade. Doing so, they argue, will deepen and prolong the crisis. Both WTO chief Pascal Lamy and World Bank President Robert B. Zoellick have warned that protectionism could "spiral out of control".¹⁰⁷ The DOC's change in policy was arguably a result of pressure from Congress. Efforts were made in the Congress in 2005 to amend US law to provide higher barriers to imports from China by, among

¹⁰⁴ Request for Panel, *supra* note 88, at 7.

¹⁰⁵ *Id.* at 8.

¹⁰⁶ See, e.g., BHALA, *supra* note 8, at 201-240.

¹⁰⁷ Carol Matlack, *The New Protectionism*, BUSINESSWEEK, 22 June, 2009.

other things, specifically allowing for the imposition of CVDs on imports.¹⁰⁸ Another such effort was made in 2007.¹⁰⁹ Similarly, newly appointed United States Trade Representative Ron Kirk in his confirmation hearings “pledged to ‘work effectively’ with the Department of Commerce and other countries that ‘share our interests’ in maintain the US ability to countervail Chinese subsidies while using non-market methodology in antidumping cases.”¹¹⁰ The goal in dealing with imports should always be to level the playing field for domestic products and imports, not to raise barriers to importation as high as possible. While domestic producers may stay in business, realize higher profits, or get away with greater inefficiencies as a result of such policies, all of the domestic public pays for such policies in the form of higher prices for goods.

While AD duties and CVDs in general receive criticism for being protectionist, the DOC’s current policy is particularly egregious because it allows exporters to be punished twice for the same practice — once under AD law and once under CVD law. Congress should amend the current laws to ensure the DOC can adjust its AD calculations and take away the possibility of overlapping remedies when it applies both CVD and AD duties to imports from NMEs.

2. Implications for Other NMEs

On May 15, 2009, the International Trade Commission (ITC) began CVD and AD investigations on polyethylene bags from Vietnam.¹¹¹ On May 29, 2009, the ITC issued a preliminary determination that the bags materially injured domestic industry.¹¹² The DOC considers Vietnam an NME, and Vietnam is also a member of the WTO. Should the ITC and the DOC decide to apply both CVD and AD duties to the bags, the same issues that arose with China under the DOC’s new policy will be raised with Vietnam. Even if these investigations do not result in a determination of material injury, other US industries may very well petition the ITC to begin

¹⁰⁸ Trade Rights Enforcement Act, H.R. 3283, 109th Cong. (2005). The bill was approved in the House of Representatives but not in the Senate.

¹⁰⁹ Currency Reform for Fair Trade Act of 2007, H.R. 2942, 110th Cong. (2007).

¹¹⁰ *Kirk Promises Strong Defense of AD/CVD Methodology Against China*, 27 INSIDE U.S. TRADE 10 (March 13, 2009).

¹¹¹ Notices, 74 Fed. Reg. 25771 (29 May, 2009).

¹¹² *Id.*

AD and CVD investigations on other products from Vietnam. Furthermore, Ukraine, Belarus, Moldova, Georgia, Armenia, Uzbekistan, Kyrgyzstan, Tajikistan, Turkmenistan, and Azerbaijan are also designated NMEs by the DOC, and out of them Armenia, Moldova, Georgia, Kyrgyzstan are WTO Members. A US industry could petition the DOC to apply CVDs to products from these countries as well. Would *Georgetown Steel* prevent the application of CVDs to ex-Soviet bloc countries? Or would the practice be allowed under the amended CVD laws? Whether or not the practice were allowed, questions could arise under the GATT's Article I MFN provisions.

B. Congress Should Amend AD Law To Allow Adjustments for NMEs

To remedy this problem of double counting, the DOC should either add the value of any CVDs to the export price in its AD calculation for NMEs or deduct the value of the CVDs from the final AD rate. However, in some of the investigations of the cases currently pending before the WTO, the DOC seemed to suggest that it may not have the authority to adjust the AD calculation even if it wanted to. Certainly the domestic industries argued that it does not have this authority. The argument is that while Congress provided specific instructions for adjusting the dumping margin by the amount of any *export* subsidies when both CVD and AD duties are imposed,¹¹³ the statute is silent when it comes to making adjustments for *domestic* subsidies. Proponents of applying both remedies to imports from NMEs say that if Congress intended to allow the dumping margin to be adjusted for domestic subsidies, it would have made provisions for such adjustments in the statute the way it did for export subsidies. Opponents say that double counting is not an issue for domestic subsidies of market economies because both normal value and export price are reduced by the same amount in market economies. However, because third country surrogate prices are used in AD calculations for NMEs, only the export price is reduced. Congress did not anticipate needing to make special provisions for simultaneous AD and CVD investigations for NMEs because the DOC did not apply CVDs to NMEs after *Georgetown Steel*. Thus, opponents say, nothing can be read into the statutory silence.

¹¹³ See 19 U.S.C. § 1677a(c)(1)(C) (2008).

The US Congress should amend US CVD law to allow the DOC to make adjustments to its AD calculations when applying both CVD and AD duties to the same NME imports. This solution would circumvent any challenges to DOC practice under US law and still allow both CVD and AD claims to be brought against products from NMEs.

C. Prohibiting Double Remedies Would Eliminate Most WTO Claims

Most of China's "As Applied" WTO claims and all of its "As Such" claims hinge on the DOC's methodology in applying both CVD and AD determinations to products from NMEs without any adjustments in such a manner that inflicts two punishments for the same unfair trade practice. Amending the current US AD law to allow adjustments to the AD calculation when an NME is involved and CVDs are also applied would eliminate many of these claims.

D. Alternative Solutions

1. Grant China Market Economy Status

The Protocol of Accession allows China to establish itself as a market economy under the national laws of individual WTO members at any time.¹¹⁴ Additionally, China may establish that "market economy conditions prevail" in any of its industries or sectors at any time.¹¹⁵ Regardless, however, China will no longer be classified as an NME in 2016, and the problems of applying US CVD law to it will be moot.¹¹⁶ One way to deal with the problems associated with applying CVD law under NME methodology would be for the US to simply consider China a market economy earlier than 2016. In *Coated Free Sheet Paper*, BOFT suggested this solution as its preference.¹¹⁷ It argued that the DOC was using "market forces and sales values" for the CVD case as if China were a market economy and should therefore use the same standards in its AD case.¹¹⁸ If this method were used, Congress would not have to enact any new legislation. The DOC has complete authority for designating countries as market economies, and its decisions are not reviewable. There would be no

¹¹⁴ Protocol of Accession, *supra* note 81, at art. 15(d).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ CFS Issues and Decision Memorandum, *supra* note 77, at 10.

¹¹⁸ *Id.*

further litigation in US courts over the DOC's methodology in applying CVD law to China. Chinese officials have stated that recognition as a market economy is a goal China seeks for diplomatic reasons.¹¹⁹ Some countries, including Singapore and Malaysia, already recognize China as a market economy.¹²⁰ A less extreme alternative to this approach would be to consider individual Chinese industries as "market-oriented" and apply both market economy CVD and AD duties to products from those industries.

2. Stop Applying CVDs to NMEs

Another solution would be for the DOC to return to the pre-2007 methodology and simply stop imposing CVDs on imports from China and to refrain from applying CVDs to any other NMEs. This solution would eliminate any double remedies and would be legal under both US and WTO law. Arguably, in fact, current US law does not allow CVDs to be applied to NMEs, and the DOC is overstepping its bounds by doing so. The crux of this argument is that Congress never intended CVDs to be applied to NMEs. This is evidenced by the fact that Congress amended the AD statutes in 1974 to give a special calculation for products from NMEs. Although it amended the CVD statute at the same time, it didn't mention CVDs for NMEs, reflecting its intention that they not be applied to NMEs. If this is true, the DOC does not have the authority to impose CVDs on imports from NMEs, including China. Until Congress amends the current AD and CVD laws to allow the dumping margin to be adjusted to reflect any CVDs, the DOC should at least temporarily stop imposing CVDs on imports from China so that double remedies are not imposed.

V. CONCLUSION

The DOC's current policy of applying both CVDs and AD duties to products from NMEs with no adjustments to the dumping margin is probably permissible under US law. The strongest argument for finding the policy illegal is that Congress did not intend, in enacting the relevant AD and CVD statutes, to allow the DOC to impose CVDs on NMEs. However, a court is much more likely to find that it is unclear what Congress intended with respect to applying CVDs to NMEs. Because the DOC's interpretation of the statute is likely to be found reasonable, it is

¹¹⁹ GAO Report, *supra* note 1, at 12.

¹²⁰ *Id.* at 13.

permissible under *Chevron* deference rules. However, while the policy is probably permissible under US law, it may violate WTO obligations. The biggest problem with the DOC's current policy under WTO rules is not that CVDs are imposed on Chinese imports, but rather that CVDs are imposed with no adjustments made to the concurrent AD calculation. This allows for a "double remedy" that may violate WTO law. Even if the DOC's policy is legal under US law, it is fundamentally unfair to punish exporters twice for the same unfair trade practice. However, the DOC may not have the statutory authority to alter the current AD calculation. The US Congress should therefore amend the current AD and CVD statutes to allow for adjustments to the AD calculation that reflect any CVDs imposed. In the meantime, the DOC should stop applying CVDs to imports from China when AD duties are also imposed and refrain from applying both CVDs and AD duties to imports from other NMEs.