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Countervailing Duty against China: Opening a Pandora's Box in the WTO System?

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Countervailing Duty against China:

Opening a Pandora's Box in the WTO System?

Dukgeun Ahn [*] ***and Jieun Lee*** [**]

Abstract

In this paper, we trace the jurisprudential history of the applicability of US countervailing duty (CVD) law to non-market economies (NMEs). We describe how, since the United States reversed its long standing policy of not imposing CVDs on NMEs, concurrent application of antidumping (AD) and countervailing duties has become the country's major trade remedy action against China. Although the WTO panel rejected China's claim of WTO-inconsistency regarding the current US practices, the US Court of International Trade firmly ruled that the Department of Commerce's double counting of AD and CVD against China violates domestic regulation. Finally, the WTO Appellate Body ruled that this 'double remedy' violates the rule to levy CVDs 'in the appropriate amounts' under Article 19.3 of the SCM Agreement. We will argue that, although the Appellate Body's ruling is praiseworthy in preventing an illogical practice, its legal reasoning may give rise to some doubts and controversy when the negotiating history of Article 19 is examined. We will also analyze key features of current double remedy practices in the United States and Canada.

I. Introduction

The recent global economic crisis poses unique challenges for the world trading system, especially for the Sino-American trade relationship. The United States and the People's Republic of China (China) are held most responsible for the massive global economic imbalances which are thought to have bred the recent financial crisis itself. The position of the United States as the 'world's biggest spender and borrower' and China as the 'world's biggest saver and lender' has continually created not only global trade asymmetry but also irritation of the US government.[1] Statistics show that US-China trade balances have been continually widening, specifically in the 2000s, until slight improvements were made in 2009.[2] However, even the latest turnover was due to reduced US imports rather than growth of its exports, and signs of even sluggish recovery seem clouded.

While the Obama administration pushes hard its $787 billion stimulus package and its recent 'National Export Initiative' to improve current conditions, it appears that the trade imbalances will be difficult to resolve without China's 'cooperation'.[3] In the midst of the recession, China surpassed

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[1] *2009 Report to Congress of the US-China Economic and Security Review Commission*, One Hundred Eleventh Congress–First Session (November 2009), 3. For the recent account of US-Sino trade conflicts, see Hufbauer and J. Woollacott, 'Trade Disputes between China and the United States: Growing Pains So Far, Worse Ahead?', PIIE Working Paper Series 10-17 (December 2010).

[2] US Census Bureau, http://www.census.gov/foreign-trade/balance/c5700.html (visited 13 December 2010).

[3] See 'The American Recovery and Reinvestment Act of 2009' enacted by the One Hundred Eleventh US Congress

Germany as the world's top exporter in 2009 and Prime Minister Wen Jiabao has become blunter in defending the Chinese currency, which has been at the center of US-China trade tensions.[4] These developments have brought forth strident calls from US Congress members and economists to correct the alleged unfair trade practices by China and its currency manipulation.[5] Various US efforts of directly pressuring China to revalue its currency, however, have not yet brought about any amicable solutions.

In this regard, one of the most notable trade remedy responses to China has been the US Department of Commerce's (DOC) reversal of its conventional policy of not applying the countervailing duty (CVD) law to nonmarket economies (NMEs).[6] This event shortly followed the outcry of the US Congress on China's currency manipulation and led to multiple trade remedy actions intended to slow down firestorm of Chinese imports.[7]

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in 13 February 2009. The Act followed other economic recovery legislations passed in the final year of the Bush presidency including the 'Economic Stimulus Act of 2008' and the 'Emergency Economic Stabilization Act of 2008' which created the 'Troubled Assets Relief Program.' The stimulus was intended to create jobs and promote investment and consumer spending during the recession. Also refer to the 'Executive Order-National Export Initiative' issued on 11 March 2010, available at http://www.whitehouse.gov/the-press-office/executive-order-national-export-initiative (visited 20 January 2011).

[4] The emergence of China as the leading exporter in the world drew much public attention. See, e.g., Steven Mufson, 'China Surpasses Germany as World's Top Exporter', http://www.washingtonpost.com/wp-dyn/content/article/2010/01/10/AR2010011002647.html (visited 11 January 2010); Michael Wines, 'Chinese Leader Defends Currency and Policies', http://www.nytimes.com/2010/03/15/world/asia/15china.html (visited 14 March 2010); and BBC News, 'China Denies Currency Undervalued', http://news.bbc.co.uk/2/hi/8566597.stm (visited 14 March 2010).

[5] The US Congress has been pressuring the Obama administration to levy duties on Chinese imports if China does not revalue the renminbi. The Peterson Institute for International Economics (PIIE) estimates that the Chinese renminbi is undervalued by between 20 and 40 percent. Meanwhile, Paul Krugman, Nobel Prize winning economist, has been hitting hard on China's currency manipulation debate. See, e.g., Paul Krugman, 'Taking on China', http://www.nytimes.com/2010/03/15/opinion/15krugman.html (visited 14 March 2010); and Paul Krugman, 'Capital Export Opinion, Elasticity Pessimism, and the Renminbi (Wonkish)', http://krugman.blogs.nytimes.com/2010/03/16/capital-export-elasticity-pessimism-and-the-renminbi-wonkish (visited 16 March 2010). On the other hand, there are opposing views on taking legal actions against China based on foreign exchange policies. See e.g., R. Staiger and A. Sykes, 'Currency Manipulation and World Trade', 9 World Trade Review 4, 583-627 (2010); and S. Evenett ed., 'The US-Sino Currency Dispute: New Insights from Politics', Economics and Law (CEPR, 2010).

[6] The only statutory guideline for defining a nonmarket economy (NME) is provided in the Tariff Act of 1930, as amended (hereinafter, 'the Act'), 19 USC § 1677(18). This Section, which appears in the context of an antidumping regulatory scheme, defines a nonmarket economy as follows:

> [A]ny 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.

By making the determination a matter of discretion for the US administering authority, the statute grants a significant amount of flexibility to the US Department of Commerce (DOC). The decision made by the DOC remains effective until revoked by that authority and is excluded from judicial review.

The current list of countries designated as NMEs for purposes of the US trade remedy laws include Armenia, Azerbaijan, Belarus, Georgia, the Kyrgyz Republic, Moldova, the People's Republic of China, the Socialist Republic of Vietnam, Tajikistan, Turkmenistan and Uzbekistan.

[7] The US subprime mortgage crisis broke out on April 2, 2007, hallmarked by the bankruptcy of the New Century Financial Corporation, which used to be the second biggest US subprime mortgage company. It spread from the real estate market to the credit market, and proceeded to evolve into a global financial crisis. The US DOC's policy reversal soon followed on April 9, 2007, with its preliminary affirmative countervailing duty (CVD) determination of *Coated Free Sheet Paper* originating from China. See *Coated Free Sheet Paper from the People's Republic of China : Amended Preliminary Affirmative Countervailing Duty Determination*, 72 US Federal Register 17484 (Department of Commerce, 9 April 2007).

Prior to change, the United States, even as the most frequent user of countervail relief, did not approve CVDs on NME countries.[8] NMEs were entirely exempted from the coverage of the CVD law based on the theory that pervasive state control in these economies made it impossible to establish an effective benchmark against which the Department could measure whether a particular government action created a countervailable subsidy. The normal practice of the DOC regarding transitional economies has been to not apply CVDs until the agency grants market economy status to those countries.[9] China, still classified as an NME, has become the first target country against which US CVD measures have been applied, disregarding the nature of its economy.[10] The policy shift was significant and sweeping, and it brings about many questions.

The next section provides an overview of a jurisprudential history of the applicability of US CVD law to NME countries. Specifically, we discuss several backbone cases that ruled that CVD law did not apply to NMEs, and then we compare these cases with the *Coated Free Sheet Paper* case, which hallmarked the DOC's paradigm shift. Part Three examines the current state of CVD actions against China, primarily by the United States and Canada. Part Four highlights potential challenges of the US CVD actions and analyzes legal issues concerning the recent WTO panel and the Appellate Body decisions.

II. Jurisprudential History of the Applicability of US CVD Law to NMEs

The US statute allows CVDs to offset injurious subsidization and the country has become the heaviest user of countervail relief in the world trading system.[11] However, it had been the DOC's longstanding policy not to apply countervailing measures against NMEs. Only recently has the DOC reversed its policy to investigate and apply CVDs to NME countries.

A. Backbone Cases for the Non-Application of US CVD Law to NMEs

1. Textiles, Apparel and Related Products from China

The first attempt to apply the CVD law against a NME country was undertaken in September 1983. The American Textile Manufacturers Institute, the Amalgamated Clothing and Textile Workers Union and the

[8] The United States is the most frequent user of countervailing actions in the World Trade Organization (WTO) system. Since the inception of the WTO until 30 June 2010, the United States has initiated a total of 104 CVD investigations. WTO, http://www.wto.org/english/tratop_e/scm_e/cvd_init_rep_member_e.pdf (visited 4 December 2010).

[9] In a CVD case involving exports from Hungary, the US DOC determined that subsidies provided by a transitional country, before its status change to a market economy, are not subject to the US CVD law. See *Final Affirmative Countervailing Duty Determination: Sulfanilic Acid from Hungary*, 67 US Federal Register 60223 (Department of Commerce, 25 September 2002).

[10] In the antidumping case involving lined papers from China in August 2006, the DOC held the view that market forces in China are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the dumping analysis. This view was dramatically changed in March 2007 when the DOC found that 'market forces now determine the prices of more than 90 per cent of products traded in China' and these market forces are sufficiently developed to evaluate whether a particular alleged subsidy 'constitutes a distortion in the normal allocation of resources.'

[11] The US CVD authority is 19 USC § 1671(a). According to WTO statistics, from January 1, 1995 to June 30, 2009, the US initiated 94 CVD investigations out of a total of 226 cases reported, and amongst, ordered 57 measures out of the 113 effective cases worldwide. Statistics are available at http://www.wto.org/english/tratop_e/scm_e/cvd_init_rep_member_e.pdf and http://www.wto.org/english/tratop_e/scm_e/cvd_meas_rep_member_e.pdf (visited 23 January 2011).

International Ladies' Garment Workers Union, on behalf of the US textile and clothing industries, filed a petition alleging subsidization of textiles and apparel exported from China.[12] However, the petition was withdrawn on the day the DOC was scheduled to issue its preliminary determination. As a result, the legal question of whether CVD law applies to NMEs was never formally addressed. Yet the attempt stirred the US government to take measures that would reduce its textile imports from China.[13]

2. Carbon Steel Wire Rod from Czechoslovakia and Poland

On 23 November 1983, only two months after the textile industry's filing against China, four US steel manufacturers–Atlantic Steel Company, Continental Steel Company, Georgetown Steel Corporation and Raritan Steel Company–filed a CVD petition on behalf of the US industry producing carbon steel wire rod. Petitioners alleged that the manufacturers and exporters in Czechoslovakia and Poland received benefits which constituted 'bounties or grants' under the countervailing law.[14]

Since the earlier CVD investigation of textiles and apparel from China was terminated, the DOC had its 'first opportunity to determine preliminarily whether practices by a government of a so-called nonmarket economy country confer countervailable benefits.'[15] The two main jurisdictional questions of the preliminary investigation were i) whether Section 303 applied to nonmarket economy countries and ii) whether government activities in an NME conferred a 'bounty or grant' within the meaning of Section 303. Regarding the former, the DOC preliminarily held that NME countries are not exempt *per se* from the CVD law. The final determination upheld its former ruling which was 'correctly addressed' based on a narrow reading of Section 303, focusing on the phrase that the CVD law can be applied to '*any country*, dependency, colony, province, or other political subdivision of government.'[16] Regarding the latter jurisdictional question, the DOC concluded that 'bounties or grants' within the meaning of Section 303 could not be found in the two cases.[17] Whereas the preliminary determination limited the decision to the two particular cases of Czechoslovakia and Poland, the final determination reconsidered this question in a more general context.[18]

In the preliminary procedure, the DOC analyzed the programs in two stages: i) whether the

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[12] See *Initiation of Countervailing Duty Investigations; Textiles, Apparel, and Related Products from the People's Republic of China*, 48 US Federal Register 46600 (Department of Commerce, 13 October 1983).

[13] The American textile industry withdrew its petition only after receiving assurance from the US government that it would take measures to reduce import. In effect, the American textile industry was considerably benefited from the mere filing of a CVD petition. See Michael G. Egge, 'The Threat of United States Countervailing Duty Liability to the Newly Emerging Market Economies in Eastern Europe: A Snake in the Garden?', 30 Virginia Journal of International Law 953 (1990) and Stanislaw J. Soltysinski, 'The US Import Relief Laws and Trade with Centrally Planned Economies', 3 Florida Journal of International Law 59 (1987), at 66. See also Alan F. Holmer and Judith H. Bello, 'US Trade Law and Policy Series #7: The Countervailing Duty Law's Applicability to Nonmarket Economies', 20 International Lawyer 319 (1986), at 322.

[14] See *Carbon Steel Wire Rod from Czechoslovakia; Preliminary Negative Countervailing Duty Determination*, 49 US Federal Register 6773 (Department of Commerce, 23 February 1984); *Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination*, 49 US Federal Register 19370 (Department of Commerce, 7 May 1984); *Carbon Steel Wire Rod from Poland; Preliminary Negative Countervailing Duty Determination*, 49 US Federal Register 6768 (Department of Commerce, 23 February 1984); and *Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination*, 49 US Federal Register 19374 (Department of Commerce, 7 May 1984).

[15] See *Carbon Steel Wire Rod from Czechoslovakia; Preliminary Negative Countervailing Duty Determination*, 49 US Federal Register 6773-74 (Department of Commerce, 23 February 1984).

[16] See, e.g., *Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination*, 49 US Federal Register 19370-71 (Department of Commerce, 7 May 1984).

[17] Ibid.

[18] See, e.g., *Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination*, 49 US Federal Register 19374-75 (Department of Commerce, 7 May 1984).

programs would confer a subsidy in a market economy and ii) whether its first conclusion would be different for an NME country. Accordingly, the agency first reasoned that the multiple exchange rate systems, currency retention schemes, trade conversion coefficients for official exchange, tax exemption payments and price equalization mechanisms of Czechoslovakia and Poland do not confer bounties or grants either in market or in nonmarket economies.[19] On such a basis, the DOC preliminarily determined that, while Congress did not essentially exempt NME countries from the CVD law, the alleged practices of Czechoslovakia and Poland did not constitute a provision of bounties or grants within the meaning of the CVD law.

In arriving at the final conclusion, the DOC sought more economic and definitional rationality of the existence of subsidies in an NME using a variety of sources, including Congressional guidance, US governmental and academic sources. The DOC took the stand that government activities in an NME cannot confer a subsidy because a subsidy, by definition, means an act which distorts the operation of a market. It reasoned that it is theoretically and practically impossible to determine a subsidy in a NME country, which is subject to central planning rather than market forces. The DOC summarized the methodological problems it faced in these cases as follows:

> We believe a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources…. In NMEs, resources are not allocated by a market. With varying degrees of control, allocation is achieved by central planning. Without a market, it is obviously meaningless to look for a misallocation of resources caused by subsidies. There is no market process to distort or subvert…. It is a fundamental distinction–that in an NME system the government does not interfere in the market process but supplants it–that has led us to conclude that subsidies have no meaning outside the context of a market economy.[20]

Based upon the legislative history of the CVD law and general international trade law, the DOC concluded that Congress 'never has confronted directly the question of whether the countervailing duty law applies to NME countries.'[21] Since Congress enacted the first generally applicable CVD law in Section V of the Tariff Act of 1897, the statutory language of a 'bounty or grant' had remained substantially unaltered through several subsequent revisions. The growing importance of imports from NMEs had not changed the situation, and Congress had not taken any action to adapt the concept of a 'bounty or grant' to deal with the unique problems posed by imports from NMEs.

In 1974, and again in 1979, Congress undertook actions to address the problem of unfair trade practices with respect to imports from NME countries. Yet the option of applying the CVD law to NMEs was never raised. Rather, Congress turned to two other trade remedy measures for dealing with this problem. Specifically, in the Trade Act of 1974, Congress amended Section 205 of the Antidumping Act to establish rules to administer unfair competition from NME countries.[22] Congress also enacted Section 406, a special 'market disruption' rule in the Trade Act of 1974, in order to protect US industries from trade harms caused by Communist countries.[23]

Likewise, Congress did not amend any CVD provisions in the Trade Agreement Act of 1979, in which Congress substantially revised the US CVD law. Although Article 15 of the very Act, implementing the Subsidies and Countervailing Code of the General Agreement of Tariffs and Trade (GATT), explicitly permitted to regulate unfairly priced imports from NME countries under either

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[19] Trade conversion coefficients for official exchange and tax exemption programs for foreign trade earnings were programs specific to Czechoslovakia whereas the price equalization mechanism was that to Poland.

[20] See above n 16, at 19372.

[21] Ibid, at 19373.

[22] See 773(c) of the Act, 19 USC § 1677b(c) (1982).

[23] See 19 USC § 2436 (1974).

antidumping or countervailing duty legislation, Congress remained silent about the CVD track. Instead, Congress reenacted the special provision of the antidumping law governing NME country cases.

Accordingly, the Comptroller General of the DOC, in a study report to Congress, concluded that it is only 'remotely possible' to identify and classify subsidies in NMEs.[24] Academic guidance also advised that the CVD law could not be applied to NME countries. For instance, Professor John H. Barcelo III stated that 'if a nonmarket economy exporting country is involved, most of the analysis used thus far for both export and domestic subsidies, is entirely inapplicable….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.'[25]

These reasonings led the DOC to finally conclude that, as a matter of law, Section 303 was inapplicable to NMEs. Since the DOC determined both Czechoslovakia and Poland to be NME countries, it issued, effective 7 May 1984, final negative CVD determinations for the two countries.

3. Potassium Chloride from the German Democratic Republic and Soviet Union

On 30 March 1984, shortly before the final determinations of the Czechoslovak and Polish cases, the DOC received petitions from Amax-Chemical, Incorporated and Kerr-McFee Chemical Corporation on behalf of the US industry producing potassium chloride (hereinafter, 'potash'), alleging illegal subsidization from the German Democratic Republic and Soviet Union. However, in light of its final negative determination in the *Carbon Steel Wire Rod* case, which concluded that bounties or grants, within the meaning of the CVD law, could not be found in NME countries, the DOC rescinded the potash investigations and dismissed the petitions.[26]

4. Court Decisions Regarding the Non-Application of CVD Law to NMEs

(1) Reversal by the US Court of International Trade

Following the final negative determination and dismissal of the 1984 cases, the petitioners of the steel rod and potash industries sought review with the US Court of International Trade (CIT). The CIT consolidated the cases and reviewed the ruling of the DOC which concluded that, as a matter of law, subsidies cannot be found in NMEs. The CIT held that the CVD law 'covers countries with nonmarket economies in light of fact that government subsidies that are target of law may be found in nonmarket economies as well as in market economies.'[27] In its detailed opinion, the CIT addressed each of the four grounds on which the DOC had based its determination of non-applicability of countervailing procedures to NME countries.[28]

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[24] See Comptroller General of the US, *Report to the Congress of the United States: US Laws and Regulations Applicable to Imports from Nonmarket Economies Could Be Improved* (1981), at 32.

[25] J. Barcelo, 'Subsidies and Countervailing Duties Analysis and a Proposal', 9 Law and Policy in International Business 779 (1977), at 850.

[26] See *Potassium Chloride from the German Democratic Republic; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition*, 49 US Federal Register 23428 (Department of Commerce, 6 June 1984) and *Potassium Chloride from the Soviet Union; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition*, 49 US Federal Register 23428 (Department of Commerce, 6 June 1984).

[27] See *Continental Steel Co. v. United States*, 9 C.I.T. 340, 614 F. Supp. 548 (30 July 1985).

[28] The four grounds, as addressed in detail above in *ii) Development of the Preliminary v. Final Determination* of section b. 1984, Carbon Steel Wire Rod from Czechoslovakia and Poland include: (a) the view that a subsidy cannot be conferred in a NME 'because subsidy, *by definition*, means an act which distorts the operation of a [free] *market*' (both italics in the original); (b) Congressional 'silence' on the issue and its apparent preference for other trade remedial procedures; (c) consensus of academic opinion as to the non-applicability of CVD law to NME countries; and (d) the International Trade Administration (ITA)'s asserted broad discretion to determine the existence of subsidies.

To begin with, in the view of the CIT, the DOC's position was 'self-contradictory'.[29] The DOC appeared to have recognized that the CVD law covers 'any country' and does not allow *per se* exemptions from the law for any political entity. However, the DOC went on to address its 'additional jurisdictional question', namely, whether or not government activities in a NME can confer a 'bounty or grant' within the meaning of the law. According to the Court, if such was truly a 'jurisdictional' question, a failure to meet the criteria would actually amount to a *per se* exemption from the law, and would be in conflict with the preceding statement that the law covers 'any country'.[30] The Court highlighted that the language of a statute must ordinarily be regarded as conclusive absent clear legislative intent to the contrary and thereby ruled that the language of Section 303 is perfectly indifferent to the forms of an economy, holding that NME countries cannot be exempted from the countervailing law.[31] Furthermore, the CIT added that the usage of the broadest possible language 'clearly demonstrates to cover as many beneficial acts as possible.'[32]

Secondly, refuting congressional preference for other remedial measures, the CIT determined that Section 406 of the Trade Act of 1947 was enacted as a separate remedy action for a separate circumstance.[33] Thus, the existence of alternative remedies would not alter the specialized nature of the CVD law. Moreover, the CIT pointed out that Article 15 of the Trade Agreements Act of 1979 'clearly gives [the United States] the choice of using subsidy law or antidumping law for imports from a country with a state-controlled economy' and that Congress was informed that NME countries participated in the preparation of the Code.[34]

Thirdly, the CIT held that it could not be persuaded by the economic academia which voiced that governments of NME countries 'cannot show what amounts to favoritism towards the manufacture, production, or export of particular merchandise' and stated that such ideas 'violate common sense' and 'conflict with a rational construction of law'.[35]

Nowhere did the CIT object to DOC's broad discretion in determining the applicability of CVD law to NMEs. Rather, the CIT argued that while the DOC gave the CVD law a 'grandiose, theoretical objective', it destroyed a significant part of its practical purpose to 'assure effective protection of domestic interests from foreign subsidies…' and it should rather 'enforce the law to the full extent of the agency's authority and ability.'[36]

All the considerations above led the CIT, on 30 July 1985, to conclude that the DOC's determinations were contrary to law and to reverse the carbon steel wire rod cases of 1984.[37]

(2) Reversal by the US Court of Appeals for the Federal Circuit

The DOC appealed the CIT decision to the Court of Appeals for the Federal Circuit.[38] Although the Court of Appeals dismissed the jurisdiction of the CIT based on the petitioner's procedural mistakes, it went on to rule that subsidization is a market phenomenon.[39] The Court of Appeals reasoned that the government

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[29] See above n 27, at 342.
[30] Ibid, at 342-43.
[31] Ibid, at 344. For more discussion on the Court decision, refer to Congressional Research Service, *Trade Remedy Legislation: Applying Countervailing Action to Nonmarket Economy Countries* (31 January 2008), at 9.
[32] See above n 27, at 344.
[33] See above n 23. This Section, namely the safeguard provision, was passed to protect US industries from injurious market disruption due to sudden increases in imports from Communist countries.
[34] See above n 27, at 349.
[35] Ibid, at 348.
[36] Ibid, at 347.
[37] Ibid, at 351.
[38] See *Georgetown Steel Co.* v. *United States*, 801 F.2d. 1308 (18 September 1986).
[39] The Circuit Judge held that the steel companies did not invoke jurisdiction of the CIT when they mailed complaint with insufficient postage within thirty days of filing of summons and then re-mailed the complaint beyond

of a NME 'subsidizes' in accordance with its central plan and not for purposes of unfair foreign market competition. Hence, it opined that the US countervailing law in question should not be applied to NME countries. Arguably, the *Georgetown Steel* decision was not premised on the assumption that a subsidy cannot exist in a nonmarket economy, but rather, on the reasoning that a NME country does not intend to engage in 'unfair competition' by granting a subsidy.[40]

The Court of Appeals also reviewed, in detail, the legislative history and development of relevant trade remedy laws. It described the CIT's finding on the 1979 Act as a 'definite understanding by Congress that the CVD law covers countries with nonmarket economies' a 'non-sequitur', and stated that the CIT's decision is 'inconsistent with [the Court of Appeals'] analysis of the Congressional understanding and purpose in enacting the provisions in the 1974 and 1979 Acts dealing with the application of the antidumping duty law to NME's.'[41] The Court of Appeals stated that Congress decided the proper method for protecting the American industries against selling by NMEs at unreasonably low prices through the AD law, and thus it is 'up to Congress to provide any additional remedies it deems appropriate.'[42] The Court of Appeals ruled that it followed a precedent that 'recognized that the agency administering the CVD law [i.e., the DOC] has broad discretion in determining the existence of a 'bounty' or 'grant' under that law.'[43]

In conclusion, the US Court of Appeals, on 18 September 1986, reversed and reinstated the DOC's original determinations, thus affirming that the agency has the discretion to not apply the CVD law to NME countries.[44] It also reversed the CIT order insofar as it set aside the DOC's final actions regarding the potash cases.[45]

B. Shift in Policy of CVD Application in Regards to China

1. Reversal by the Department of Commerce[46]

On 27 November 2006, the DOC announced its initiation of a CVD investigation on imports of coated

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deadline. *Georgetown Steel* contended that the only jurisdictional prerequisite for invoking jurisdiction of the CIT was the filing of a summons within thirty days after the negative CVD determination, and that the CIT was authorized under its Rule 6(b) to waive the thirty-day limit for filing a complaint. However, the Court of Appeals refuted *Georgetown Steel's* argument based on the language of Section 1516a(a)(2)(A) which requires both the filing of a summon and a complaint on time and the legislative history of the provision.

[40] See Egge, above n 13. In his analysis, Egge summarizes the two schools of thoughts reflected in the *Georgetwon Steel* case, regarding the applicability of CVD law to NMEs. The idea was originally discussed in Gary Horlick and Shannon Shuman, 'Nonmarket Economy Trade and US Antidumping/Countervailing Duty Laws', 18 International Lawyer 807 (1984), at 829. The fundamental distinction between the two approaches is their differing conceptions of the legal definition and purpose of a countervailable subsidy. The first school defines a countervailable subsidy in terms of market distortion and therefore views the purpose of the CVD law as market-correction. Egge explains that the determination of the Court of Appeals is in line with this view. Meanwhile, the second school defines a countervailable subsidy in terms of preferentiality and views the purpose of the CVD law as protection of the domestic industry. This school of thought is characterized by Judge Watson's opinion in the CIT ruling.

[41] See above n 38, at 1317.

[42] Ibid, at 1318.

[43] Ibid.

[44] Ibid.

[45] Ibid.

[46] Note that Congressional pressure might be another important factor in the DOC's policy reversal. In the middle of 2000s, Congress had pending several bills such as S.593(Collins)/H.R.1216(English) and H.R.3283(English), which would have required application of countervailing procedure to imports from nonmarket economy countries. Although these bills never became law, such Congressional efforts would have pressured the DOC to comply with the previous CIT ruling to apply CVDs to 'any country', including NMEs, ahead of any statutory changes.

free sheet paper (CFSP) from China. This was the first CVD investigation involving China since 1991.[47]

In the meantime, there had been some significant regulatory changes. The CVD regulations in *Georgetown Steel* were subject to 19 USC. §1303, based on Section 303 of the Tariff Act of 1930. CVD actions are now governed by 19 USC. §1677, modified pursuant to the Uruguay Round Agreements Act of 1995.[48] The current CVD regulations are much more elaborate than the former, as they further incorporate the WTO SCM Agreement.

The initiation of the investigation required the DOC to review its long-standing policy of not applying the CVD law to NME countries, such as China.[49] On 15 December 2006, the US International Trade Commission (ITC) preliminarily determined that 'there was a reasonable identification that a US domestic industry is materially injured or threatened with material injury' by reason of allegedly subsidized imports from China, thus referring the case back to the DOC for a preliminary determination. On the same day, the DOC issued a notice requesting comment on the applicability of the CVD law to imports from China.[50]

On 9 April 2007, the DOC announced its affirmative preliminary determination of the investigation.[51] The preliminary determination was primarily based on the DOC's analysis issued in March 2007 that discussed, in detail, the 'substantial difference' in economies at issue in *Georgetown Steel* and China's present-day economy.[52] Based on the new developments, the DOC concluded that it 'believe[s] that it is possible to determine whether the PRC Government has bestowed a benefit upon a producer (i.e., the subsidy can be identified and measured) and whether any such benefit is specific.'[53] The DOC determined that its approach in the *Georgetown Steel* litigation was inapposite to the

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[47] Since the conclusion of the wire rod and potash cases, the DOC had not initiated any CVD investigations of allegedly subsidized imports from NME countries with one special exception. On November 13, 1991, the DOC initiated a CVD investigation on *Ceiling and Oscillating Fans* imported from China. Petitioners claimed that, while China is an NME country, 'the PRC fan sector operates substantially pursuant to market principles and that the CVD law should apply.' However, in its final determination, the DOC concluded that 'the prices of several significant inputs are not market-determined' and the DOC issued the final negative determination. See *Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans from the People's Republic of China*, 57 US Federal Register 24018 (Department of Commerce, 5 June 2002).

[48] Dana Watts, 'Fair's Fair: Why Congress should amend US antidumping and countervailing duty laws to prevent "Double Remedies"', 1(1) Trade Law and Development 145 (2009), at 155.

[49] The DOC has classified China as an NME country since 1981. See *Final Determination at Less Than Fair Value: Natural Menthol from the People's Republic of China*, 46 US Federal Register 24614 (Department of Commerce, 1 May 1981). The DOC reaffirmed its determination in the context of an investigation on certain lined paper from China. See *The People's Republic of China Status as an Non-Market Economy*, Memorandum (15 May 2006). The agency conducted a more comprehensive analysis of the issue in an antidumping investigation of *Certain Lined Paper Products* from the PRC. See *China's Status as a Non-Market Economy*, Memorandum (30 August 2006).

[50] See *Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment*, 71 US Federal Register 75507 (Department of Commerce, 15 December 2006). All issues raised in the case and rebuttal briefs by parties to this investigation are addressed in the Decision Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration. Refer to DOC, *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China* (17 October 2007).

[51] See *Coated Free Sheet Paper from the People's Republic of China : Amended Preliminary Affirmative Countervailing Duty Determination*, 72 US Federal Register 17484 (Department of Commerce, 9 April 2007).

[52] The analysis elaborates the significant difference of China's economy from the Soviet-style economies at issue in *Georgetown Steel* based on its wages, prices, access to foreign currency, personal property rights, private entrepreneurship, foreign trading rights and allocation of financial resources. For details, see DOC, *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*, Memorandum (29 March 2007).

[53] Ibid.

investigation in hand and would not prevent the application of CVD law to imports from China. Preliminary estimates of the net countervailable duty ranged from 10.9 to 20.35 percent.[54] In the next phase of investigation, the DOC released its final affirmative countervailing duty with net countervailable subsidy rates, ranging from 7.40 to 44.25 percent.[55]

However, on 7 December 2007, the ITC announced its negative determination of injury in both the countervailing and antidumping investigations of CFSP.[56] Given that the ITC issued a final negative injury determination, the proceeding was terminated and all estimated duties deposited or securities posted as result of the investigation were refunded or cancelled. Nevertheless, the significance of this case lies in the DOC's reversal of its longstanding policy of the non-applicability of CVDs to NME countries and the applicability of the CVD laws to allegedly subsidized imports from China.

2. Decision by US Court of International Trade

In the decisions in the CFSP case, the DOC reversed its long standing practice to exempt NMEs from the US CVD law on the basis of the inherent challenges in defining and measuring subsidies from a state-distorted market. The shift in a policy which stood for more than two decades could not be smooth. A contentious debate loomed over the revision. For instance, more than 47 comments, representing more than fifty industries and persons were filed in response to the DOC's notice requesting comments on the applicability of CVD law to imports from China.[57] Notwithstanding the adoption and practice of the new policy, the controversy has not yet ended. All decision memorandums regarding US CVD orders against Chinese imports contain at least one comment confronting the DOC's authority to apply the CVD law to China.[58]

Despite strong objections from respondents and importers, the DOC has set a very firm position. Referring to the 'country' provisions of Sections 701(a), 771(5) and (5a) of the Act, the DOC argued that none of these limits its authority to determine a countervailable subsidy only from market economies. The DOC also brought attention to the 1984 *Carbon Steel Wire Rod* cases and the Federal Circuit's *Georgetown Steel* ruling that affirmed its 'broad discretion' in determining whether the CVD law applies to imports from an NME.

On the other hand, the Chinese paper manufacturers brought a suit to the CIT to enjoin the DOC investigation arguing that the Court of Appeals definitively prohibited the application of CVDs on products from NMEs. However, the CIT reaffirmed the DOC's 'broad discretion' and commented that the DOC's past decisions were reasonable based upon the facts of the case and not upon the NME factor *per*

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[54] See above n 7.

[55] The net subsidy rate of 7.40 percent was determined to be applied to Gold East Paper Co., Ltd. and 'all-others' while the rate of 44.25 percent was designated to Shandong Chenming Paper Holdings Ltd. The high rate of the latter can be explained by the application of the adverse facts available (AFA) in its final determination as Shandong Chenming failed to respond fully to the Department's questionnaires. Refer to *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 US Federal Register 60645 (Department of Commerce, 25 October 2007) and the decision memo at above n 62.

[56] ITC, *Coated Free-Sheet Paper from China, Indonesia, and Korea* (Final), Publication 3695 (December 2007).

[57] Refer to the Request for Comment of above n 49 and 'Application of Countervailing Duty Law to Imports from the People's Republic of China, Comments Received, 15 January 2007 (updated: 30 January 2007)' available at http:ia.ita.doc.gov/download/prc-cvd/cmts-011507/prc-cvd-comts-index.html (visited 11 November 2010). Among the 47 comments, 8 were against and 39 supported the policy shift.

[58] See, e.g., DOC, *Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain New Pneumatic Off-the Road Tires from the People's Republic of China* (7 July 2008). Analyses of comments include 'application of the CVD law to NMEs, including the PRC' and 'application of the CVD law to the PRC is consistent with the Administrative Procedure Act (APA).' Starting from late 2008, comments over the DOC's applicability of CVD law to China began to focus on its legal authority to apply the CVD law to China while simultaneously treating the PRC as an NME in parallel antidumping investigations.

se.[59]

The DOC has argued that several Congressional actions express its understanding that the CVD law may be applied to China. For example, Congress authorized funding for the DOC to 'monitor compliance by the People's Republic of China with its commitments under the WTO, assist United States negotiators with the ongoing negotiations in the WTO, and defend United States antidumping and countervailing duty measures with respect to products of the People's Republic of China.'[60] Congress also approved the US-China bilateral agreement 'concerning the terms of China's eventual accession to the WTO' and ordered the US government to 'effectively monitor and enforce its rights' under the agreements.[61]

III. CVD Actions against China

After the CIT decision to reject the request to enjoin the DOC from proceeding, the DOC opened a floodgate of CVDs against China. In addition, more WTO Members have been trying to use CVDs against China.

A. Countervailable Subsidies under China's WTO Accession Protocol

As a necessary cost of the WTO accession, China has made unusual commitments, particularly in terms of its current trade practices.[62] All the China-specific rules were set out in both the text of China's WTO Accession Protocol and the selected provisions of the *Report of the Working Party on the Accession of China* that were incorporated into the Accession Protocol, and that were made 'an integral part of the Agreement.'[63] Such specific commitments have become enforceable through the WTO dispute settlement procedure as part of a 'covered agreement.'[64]

Two specific trade remedy rules designed to protect the producers of other Members from potential adverse effects of Chinese subsidies are worth noting. First, the Protocol makes subsidies to state-owned enterprises (SOEs) in China automatically specific under the SCM Agreement.[65] Second, Section 15(b) of the Protocol authorizes the importing Member to use so-called 'NME methodologies' to identify and calculate Chinese subsidies. Conditions to impose such use are few.[66] The Protocol states:

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[59] See *Government of the People's Republic of China v. United States*, 483 F. Supp. 2d 1282 (29 March 2007). The Court states that '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.'

[60] See 22 USC § 6943(a)(1).

[61] See 22 USC § 6901(8), 6941(5).

[62] See Qungjiang Kong, 'China's WTO Accession: Commitments and Implications', 3 Journal of International Economic Law 655 (2000).

[63] See WTO Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49 (1 October 2001), at 29-31 and Part I, Section 1 of WTO, *Accession of the People's Republic of China*, WT/L/432 (23 November 2001). The latter is based on the decision of *Protocol on the Accession of the People's Republic of China to the Marrakesh Agreement Establishing the World Trade Organization* (10 November 2001). For the general landscape of the China-specific rules, see Julia Ya Qin, '"WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System – An Appraisal of the China Accession Protocol', 37(3) Journal of World Trade 483 (2003).

[64] See Julia Ya Qin, 'WTO Regulation of Subsidies to State-Owned Enterprises (SOEs)–A Critical Appraisal of the China Accession Protocol', 7 Journal of International Economic Law 863 (2004).

[65] WTO, *Accession of the People's Republic of China*, WT/L/432, Section 10.2 (23 November 2001).

[66] In fact, the lack of concrete criteria for countervailing measures is starkly contrasted with the case for antidumping measures. While paragraph 151 of the 'Report of the Working Party on the Accession of China' elaborates the conditions for WTO Members to rely on non-market economy provisions, there is no similar

> In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.[67]

Section 15(b) above, is the first and only WTO provision that explicitly authorizes the use of alternative benchmarks for a nonmarket economy.[68] Importantly, in contrast with the transient antidumping provisions under Section 15 and the product-specific safeguard provisions under Section 16, the very provision is granted on a permanent basis, regardless of the nature of China's economy.[69] In this regard, countervailing measures against allegedly subsidized imports from China are expected to surge in anticipation of the expiration of alternative NME-specific trade remedies.

B. CVD Measures against China in the WTO System

As of October 2010, a total of twenty seven countervailing measures were in force against China.[70] These consist of eighteen cases imposed by the US, another eight by Canada and a more recent one by Australia. Notably, this has been a very recent trend. Only starting in 2004, has China become a target of CVD investigations and only starting in 2005, have effective countervailing measures been put in place.[71]

Table 1. CVD Actions against China by WTO Members[72]

	2004	2005	2006	2007	2008	2009	2010	Total
Investigation Initiation	3		2	8	11	13	5	42
	Canada(3)		Canada(1) US(1)	Canada(1) US(7)	Australia(2) Canada(3) S. Africa(1)	Australia(1) Canada(1) India(1)	Canada(1) EU(2) US(2)	

clarification for CVDs.

[67] See WTO, WT/L/432, Section 15(b).

[68] See Qin, above n 64, at 892.

[69] The Protocol notes that its special antidumping provision under Section fifteen shall expire 15 years after the date of China's accession (till 2016) while the product-specific safeguard measure under Section sixteen is to be terminated in 12 years (till 2013).

[70] WTO statistics updated by authors based on online database statistics of the US DOC, Import Administration and of the Canada Border Services Agency (CBSA). The period of investigation in the current thesis spans from the beginning of 1995 to the end of October, 2010.

[71] See WTO, 'CV Initiations: By Exporting Country From 01/01/95 to 30/06/09', available at http://www.wto.org/english/tratop_e/scm_e/cvd_init_exp_country_e.pdf and 'CV Measures: By Exporting Country From 01/01/95 to 30/06/09', available at http://www.wto.org/english/tratop_e/scm_e/cvd_meas_exp_country_e.pdf (visited 23 February 2011).

As shown in Appendix2, there have been attempts by the Australian, Indian and South African trade authorities to countervail allegedly subsidized Chinese goods. However, the single Indian and South African cases were terminated whereas one of the Australian initiations became effective as of 14 April 2010.

[72] The data are collected from the webpages of the WTO as well as each investigating authorities. Since there was some inconsistency among the data, for example, the WTO notification versus their own records of WTO Members, we focused on the original records of the Member countries.

					US(5)	US(10)		
Measure		2		1	10	6	8	27
		Canada(2)		Canada(1)	Canada(3) US(7)	Canada(1) US(5)	Australia(1) Canada(1) US(6)	

Although only Australia, Canada and the US have so far used actual CVDs against China, CVD investigations have been enacted by more countries – such as India, South Africa and the EU. The EU decided to initiate its first CVD investigation against China in April 2010. While it was Canada that first initiated the countervailing investigations of China, the US has emerged as the heaviest user.

Table 2. US CVD Actions against China (2006-October 2010)

Case No.	Product	DOC Initiation	Order
C-570-906	Coated Free Sheet Paper	11/27/2006	**ITC Negative**
C-570-911	Circular Welded Carbon Quality Steel Pipe	7/5/2007	7/22/2008
C-570-915	Light-Walled Rectangular Pipe and Tube	7/24/2007	8/5/2008
C-570-917	Laminated Woven Sacks	7/25/2007	8/7/2008
C-570-926	Sodium Nitrite	12/5/2007	8/27/2008
C-570-913	Certain New Pneumatic Off-the-Road Tires	8/7/2007	9/4/2008
C-570-923	Raw Flexible Magnets	10/18/2007	9/17/2008
C-570-921	Lightweight Thermal Paper	11/2/2007	11/24/2008
C-570-936	Circular Welded Carbon Quality Steel Line Pipe	4/28/2008	1/23/2009
C-570-931	Circular Welded Austenitic Stainless Pressure Pipe	2/25/2008	3/19/2009
C-570-938	Citric Acid and Certain Citrate Salts	5/13/2008	5/29/2009
C-570-940	Certain Tow-Behind Lawn Groomers and Certain Parts Thereof	7/21/2008	8/3/2009
C-570-942	Certain Kitchen Appliance Shelving and Racks	8/26/2008	9/14/2009
C-570-944	Certain Oil Country Tubular Goods	5/5/2009	1/20/2010
C-570-946	Prestressed Concrete Steel Wire Strand	6/23/2009	7/7/2010
C-570-963	Sodium and Potassium Phosphate Salts	10/23/2009	7/22/2010
C-570-948	Steel Grating	6/25/2009	7/23/2010
C-570-950	Wire Decking	7/2/2009	**ITC Negative**
C-570-953	Narrow Woven Ribbons with Woven Selvedge	8/6/2009	9/1/2010
C-570-955	Magnesia Carbon Bricks	8/25/2009	9/21/2010
C-570-957	Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe	10/14/2009	
C-570-959	Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses	10/20/2009	
C-570-961	Steel Fasteners	10/22/2009	**ITC Prelim Negative**
C-570-966	Drill Pipe	1/27/2010	
C-570-968	Aluminum Extrusions	4/27/2010	

*Source: Import Administration, US Department of Commerce, *Antidumping and Countervailing Duty Case Information*, Retrieved from <http://ia.ita.doc.gov/stats/caselist.txt> and <http://ia.ita.doc.gov/stats/inv-initiations-2000-current.html>.

*Note: Cases listed by date of 'Order'

As shown in Table 2, the eighteen US countervailing measures in force against China have been active since 2008: seven cases have been in order since 2008, five since 2009, and six since 2010. Excluding three cases terminated due to ITC's negative injury determination, all other investigations

initiated from 2007 to October 2010 produced affirmative actions.[73] On the other hand, it is noteworthy that the most recent termination of investigations was based on the preliminary negative determination on industry injury.

For Canada, as summarized in Table 3, two countervailing measures have been in action since 2005, one since 2007, three since 2008 and each one since 2009 and 2010.[74] Eight countervailing measures are in force out of a total of nine investigations.[75]

Table 3. Canadian CVD Measures against China (1995-Current).

Case No.	Product	Initiation/ Re-Initiation	CBSA Preliminary	CBSA Final	CITT Affirmative
D-15-48	Laminate Flooring	10/24/2004; Ex.12/17/2004	2/16/2005	5/17/2005	6/16/2005
		Re.10/23/2008	.	5/29/2009	.
D-15-49	Carbon Steel Screws (Fasteners)	4/28/2004	9/10/2004	12/9/2004	1/7/2005
		Re. 9/24/2009	.	3/24/2010	.
D-15-50	Copper Pipe Fitting	6/8/2006; Ex.8/17/2006	10/20/2006	1/18/2007	2/19/2007
		Re. 2/17/2007	.	8/27/2008	.
D-15-51	Seamless Carbon or Alloy Steel Oil and Gas Well Casing	8/13/2007	11/9/2007	2/7/2008	3/10/2008
D-15-52	Carbon Steel Welded Pipe	1/23/2008	4/22/2008	7/21/2008	8/20/2008
D-15-53	Thermoelectric Containers (Coolers and Warmers)	5/15/2008	8/13/2008	11/10/2008	12/11/2008
D-15-54	Aluminum Extrusions	8/18/2008	11/17/2008	2/25/2009	3/24/2009
D-15-56	Certain Oil Country Tubular Goods	8/24/2009	11/26/2009	2/22/2010	3/23/2010

*Source: Canada Border Services Agency, *Measures in Force: Goods Subject to Anti-dumping or Countervailing Duties,* http://cbsa-asfc.gc.ca/sima-lmsi/mif-mev-eng.html.
*Note1: 'Ex.' stands for the date of extension and 'Re.' stands for the date of re-initiation.
*Note2: Cases listed by case number.

It is also interesting that the two countries have only recently started taking countervailing measures against unfair trade practices of the Chinese government, even though China's WTO Accession Protocol in 2001 allowed importing Members to impose CVDs against Chinese goods, regardless of the nature of its economy. The countervailing measures in force imposed by the US and Canada are further discussed in the following sections.

C. US CVD Orders against China

[73] Refer to Appendix3. As of 28 April 2010, the US has initiated a total of 102 CVD cases since 1995. Amongst, 25 cases target China including the 13 cases currently in force.
[74] Canada has evidently followed the US practice not to use CVDs in case AD is imposed. See G. Bowman, et al., *Trade Remedies in North America* (The Netherlands: Kluwer Law International 2010) 205-06.
[75] The only Canadian case eventually terminated is *Outdoors Barbeques* from China. See CBSA, *Anti-dumping & Countervailing Program–Statement of Reasons for Outdoor Barbeques Originating in or Exported from the People's Republic of China* (Ottawa, 3 December 2004), available at http://cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1318/ad1318tsor-eng.html (visited 10 November 2010).

Although *Coated Free Sheet Paper* was eventually terminated due to the ITC's final negative determination, the DOC had finally opened the Pandora's box of the applicability of CVD law to NME countries. Since then, CVD investigations against China have proliferated.

Thirty-two countervailing investigations had been initiated against Chinese imports as of October 2010, leading to the eighteen CVD measures shown in Table 2. This amounts to more than eighty percent of all those initiated since 2007.[76] The sudden surge in US countervailing initiations against China is remarkable considering the short period since CVD investigations were filed against the country.[77]

Based on the Harmonized Tariff Schedule of the United States (HTSUS), seven countervailing cases concern Chinese products outlined in section XV, three in section XVI, three in section VI, two in section XI and one each in sections VII, X and XIII.[78] As with other trade remedy actions, steel industries in China have been most heavily targeted by US CVD actions, followed by the chemicals sector and machinery sector. At least in terms of target industries so far, CVD actions against China do not seem to address any special industry injury problems, which is distinguishable from other trade remedy actions worldwide.

CVD margins of all individually investigated companies were calculated in accordance with Section 705(c)(1)(B)(i)(I) of the Tariff Act. The 'all-others' rates, designated to all non-individually determined firms, were derived as the weighted average of countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero, *de minimis* countervailable subsidy rates and any rates based entirely on Section 766 of the Act.[79] Despite a few cases that applied the simple average rather than the weighted average rate for 'all-others' due to 'risks of disclosure of proprietary information', most rates were derived based on Section 705(c)(5)(A)(i) of the Act.[80] Appendix 1 presents all the US CVD rates determined against subsidized Chinese imports.

While the difference between CVD rates applied to individual companies spans quite broadly from case to case, the general level of CVDs against China tends to be considerably high compared to CVDs against other countries. Notably, adverse facts available were more frequently used to result in much greater duty margins. For instance, in *Circular Welded Carbon Quality Steel Pipe*, a final countervailing duty amounting to 616.83 percent was ordered against Tianjin Shuangjie Steel Pipe Group

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[76] After *Coated Free Sheet Paper* opened the possibility of determining countervailable subsidies from NME China, the DOC initiated 24 investigations regarding Chinese imports out of a total of 29 cases filed since 2007 which amounts to approximately 83 percent of all the recent investigations.

[77] This is likely to become the second major CVD surges by the US, after the massive CVD action period of the early 1980s. For example, in 1982 alone, the US initiated 123 CVD investigations. For a more detailed account on the early CVD surge period, see M. Finger and J. Nogues, 'International Control of Subsidies and Countervailing Duties', 1 The World Bank Economic Review 707 (1987).

[78] The description for each chapter may be found in the HTSUS, available at http://www.usitc.gov/tata/hts/bychapter/index.htm. The most updated revision took effect in 26 August 2010.

[79] Sections 776(a)(1) and (2) of the Act provide that the Department shall apply 'facts otherwise available' if, *inter alia*, necessary information is not on the record or an interested party or any person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of Section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by Section 782(i) of the Act.

[80] A simple average rate was calculated for 'all-others' in the cases of C-570-911, C-570-917, C-570-936 and C-570-938 due to risks of disclosure of proprietary information. See *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty and Final Affirmative Determination of Critical Circumstances*, 73 US Federal Register 31969 (Department of Commerce, 5 June 2008); *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 US Federal Register 35641 (Department of Commerce, 31 January 2008); *Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Affirmative Countervailing Determination*, 73 US Federal Register 70963 (Department of Commerce, 24 November 2008); and *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 US Federal Register 16837 (Department of Commerce, 13 April 2009).

Co., Ltd.; Tianjin Wa Song Imp. & Exp. Co., Ltd.; and Tianjin Shuanglian Galvanizing Products Co, Ltd. (collectively, 'Shuangjie'). As an uncooperative firm, adverse facts available were applied to Shuangjie regarding all alleged subsidy programs. Consequently, a final CVD rate of approximately 617 percent was computed.

It is also noteworthy that the subsidy margins tend to significantly increase in the final determinations. Only in very recent cases did reduction of CVDs occur during final determinations. The sudden increases of CVDs at the final determination – for example, from 2.5% to 353% in *Laminated Woven Sacks* or from *de minimis* to 254% in *Magnesia Carbon Bricks* – raise concerns as to the stability and predictability of the US's trade remedy practice and system.[81]

In terms of subsidy programs determined to be countervailable, the most typical subsidy program provided by the central government was found to be fiscal benefits such as tax exemption or credits. As summarized in Appendix 2, this type of subsidy is followed by the provision of goods or services, such as land use rights or utilities. In contrast, the most popular provincial subsidy program turned out to be direct grants. While local governments in China seem to prefer indirect subsidization through their engagement in industry and trade promotion policies, the central government appears to be more direct in its subsidization of domestic firms.

Lastly, all US CVDs against China have been imposed simultaneously with antidumping duties. Considering the already exceptionally high level of CVDs, the duplicative trade remedy actions against China deserve more scrutiny in order to prevent unnecessary tension arising from political economy rather than legal legitimacy.

Aggressive CVD actions by the US against China, especially those initiated in recent years, should be implemented cautiously, if not to provoke unnecessary trade conflicts between major WTO Members. The record so far, however, indicates arbitrary application of CVD actions and a great variance among duty rates.[82] The potential legal issues in the WTO system will be analyzed in a later section.

D. Canadian CVD Orders against China

Unlike the US practices, Canadian CVD law and practice governed under the Special Import Measures Act (SIMA) has never barred or limited the application of CVDs on goods from NME countries entering Canadian borders. Under SIMA, the necessary criteria that define a 'subsidy' depend on whether a financial contribution by a state confers a benefit to the recipient and *not* on the nature of the economy.[83]

Canadian countervailing cases against China, however, were non-existent until 2004. The absence of such initiations was not due to impediments under the Canadian law. Rather, it was the reluctance of Canadian industries to file these cases against foreign governments, which entails large legal expenses and practical difficulties. Generally, the antidumping relief is 'more expeditious, less expensive and more likely' than the 'slow, cumbersome, costly, and not entirely certain' countervail relief.[84]

Presumably, the change in Canada Border Services Agency's (CBSA) AD policy regarding China's market economy status in 2004 has triggered CVD actions against the country.[85] For dumping

[81] The US DOC classifies duty rates less than 1% for developed countries or 2% for developing countries as *de minimis*. The 1% threshold is applied to China because the country is not yet designated as a developing country by the United States Trade Representative (USTR). See 'Comment 1' of the *Issues and Decision Memorandum for Final Determination in the Countervailing Duty Investigation of Certain Welded Austenitic Stainless Pressure Pipe from the People's Republic of China* (21 January 2009).

[82] The discriminative use of AFA in US CVD cases against China is elaborated in detail in Chapter IV, section b.

[83] See Special Import Measures Act (SIMA) § 2(1)(i)(a)-(b).

[84] See Lawrence L. Herman, 'The China Factor: Canada's Trade Remedy Response to China's Economic Challenge', 33 Canada-US Law Journal 25 (2008), at 35.

[85] The CBSA and the Canadian International Trade Tribunal (Tribunal, CITT) are jointly responsible for administering the SIMA. The 'Anti-dumping and Countervailing Directorate' of the CBSA conducts investigations

investigations, the CBSA abandoned its existing policy of a blanket categorization of China as a NME country in favor of a case-by-case sector examination under review.[86] Incidentally, the first CVD investigation against Chinese-made *Outdoor Barbecues* was initiated on 13 April 2004.[87] Eventually, the case was terminated due to the determination of insignificant amount of subsidies in accordance with paragraph 14(1)(b) of the SIMA.[88] However, after that case, eight more investigations were initiated and were all determined affirmative. By now, some of the early cases have expired or been reinitiated as shown in Table 3.[89]

Based on the Harmonized System classification numbers, Canada has six countervailing cases in order concerning Chinese products as outlined in section XV, and one case each in sections IX and XVI.[90] In other words, Canadian CVDs have been focused disproportionately on the steel industry.

Pursuant to paragraph 41(1)(a) of the SIMA, CBSA made final affirmative determinations of the eight goods in question and their amounts of countervailable subsidies in terms of Chinese Renminbi. Table 5 summarizes the amounts and weighted average countervailable subsidy margins determined for the exporters and producers investigated. As shown, the simple average of the eight weighted averages is about 33 percent. Similar to the US cases, the CBSA imposed punitive CVD rates in accordance with ministerial specification on companies that failed to fully comply or cooperate in the investigation process.[91] Nevertheless, Canadian CVD levels are generally much lower than that of the United States.

Table 4. Canadian CVDs against Chinese Imports

Case No.	Product	CVD Payable	W.A. Margin
D-15-48	Laminate Flooring	3.54 RMB/m^2	3
D-15-49	Carbon Steel Screws (Fasteners)	1.25 RMB/kg	31.53
D-15-50	Copper Pipe Fitting	17.73 RMB/kg	51
D-15-51	Seamless Carbon or Alloy Steel Oil and Gas Well Casing	3,381 RMB/MT	19
D-15-52	Carbon Steel Welded Pipe	5,280 RMB/MT	73

and determines whether goods imported into Canada are dumped or subsidized. The Tribunal is responsible for deciding whether the dumped or subsidized goods have caused injury or are threatening to cause injury to the Canadian industry, or have caused retardation of the establishment of an industry in Canada. The CBSA is analogous to the Import Administration of the US DOC whereas the CITT is that to the ITC of the United States.

[86] The policy change was formally promulgated by the CBSA in an important notice to stakeholders in June 2004.

[87] CBSA, *News Releases–The Canada Border Agency Imposes Provisional Duty on Outdoor Barbeques* (27 August 2004), available at www.cbsa-asfc.gc.ca/sima (visited 10 November 2010).

[88] SIMA, which came into force on December 1, 1984, incorporates in law Canada's rights and obligations in respect of antidumping and countervailing actions. The Act, as amended, incorporates the requirements of the North America Trade Agreement (NAFTA) and implements the relevant Agreements which resulted from the Uruguay Round of Multilateral Trade Negotiations signed on April 15, 1994 and which became effective on January 1, 1995.

[89] E.g., *Laminate Flooring* originating in or exported from China and France will expire on June 15, 2010. See CBSA, *Dumping and Subsidizing Expiry–Laminate Flooring* issued on September 30, 2009. Meanwhile, *Certain Steel Fasteners* was re-initiated on September 24, 2009. See CBSA, *Notice of Conclusion of Re-Investigation–Certain Steel Fasteners* issued on March 24, 2010. Similarly, *Copper Fittings* from the US, the Republic of Korea and China was re-investigated. See CBSA, *Notice of Conclusion of Re-investigation–Copper Fittings* issued on August 27, 2008.

[90] See above n 78 for descriptions of each HTSUS section and chapter.

[91] Ministerial specification is specified under Article 29(1) of the SIMA. The Article 29(1) states that where the deputy minister is of the opinion that sufficient information has not been furnished or is not available for the determination of normal value and export price under Sections 15 to 28, then these will be set by ministerial specification. See Jean Gabriel Castel, The Canadian Law and Practice of International Trade: With Particular Emphasis on Exports and Imports of Goods and Services (Toronto, Canada: Edmond Montgomery 1997).

D-15-53	Thermoelectric Containers (Coolers and Warmers)	53.27 RMB/unit	9.9
D-15-54	Aluminum Extrusions	15.84 RMB/kg	47
D-15-56	Certain Oil Country Tubular Goods	4,070 RMB/MT	25.7
Average of Weighted Average Margins			**32.52**

*Source: Canadian International Trade Tribunal, <http://www.citt.gc.ca/index_e.asp> and
Canada Border Services Agency, *Measures in Force: Goods Subject to Anti-dumping or Countervailing Duties*, <http://cbsa-asfc.gc.ca/sima-lmsi/mif-mev-eng>.
*Note: 'W.A. Margins' stand for the weighted average subsidy margins determined in each case.

Similar to US CVD cases, Canadian CVDs against China are also always accompanied by antidumping duties. Although the levels of Canadian CVDs against China are generally lower than that of the US, the double imposition of CVDs and antidumping duties raise concerns as to excessive trade protection as well as political conflicts between the governments.

Compared to the US CVD cases, Canadian CVDs against China have addressed provincial programs more frequently. Income tax reduction and credits appear to be the most typical kinds of provincial subsidy programs. Classification of individual countervailable subsidy programs challenged in each CVD case in force is presented in Appendix 3.

Finally, in contrast with the US practice, Canada considers China as a developing country in light of CVD investigations. CBSA normally refers to the 'Development Assistance Committee List of Official Development Assistance (ODA) Recipient' for guidance in determining a developing country.[92] China is currently listed as an ODA recipient and thereby treated as a developing country.[93]

IV. Challenges for the CVD Law and Practice against China

While the US and Canadian governments now impose CVD measures against China, they continue to face practical challenges in addressing Chinese subsidy programs.[94] For example, the USTR has pointed to the lack of transparency in China's subsidy regime, stating that 'Chinese subsidies are often the result of internal administrative measures and are not publicized.'[95] Only in 2006 did China first submit its long-overdue subsidies notification to the WTO's Subsidies Committee.[96] Yet other WTO Members – in particular, the United States, which has been devoting significant efforts to monitor and investigate Chinese subsidy programs – identified significant omissions in this notification.[97] Besides, the USTR

[92] The Organization for Economic Co-operation and Development, DAC List of ODA Recipients as of January 1, 2006, the document is available at http://www.oecd.org/dataoecd/32/40/43540882.pdf (visited 15 January 2011).
[93] Certain Oil Country Tubular Goods Originating in or Exported from the People's Republic of China, CBSA, 4214-26(AM) AD/1385; 4218-27 CVD/125, 16 (8 September 2009).
[94] See General Accountability Office (GAO), *US-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties* (Washington D.C., 2005).
[95] See USTR, *National Trade Estimates Report* (Washington D.C., March 2004), at 159.
[96] WTO Committee on Subsidies and Countervailing Measures, *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement-People's Republic of China*, G/SCM/N/123/CHN (13 April 2006).
[97] Congress ordered the DOC to effectively monitor and to enforce its rights under 22 USC Chap. 77(III)(B) § 6941(5). Despite China's reporting of its 87 subsidy programs, the United States reiterated its concerns as to the lack of provincial and local programs in China's subsidy notification and raised several other issues, including export-contingent subsidies, industrial subsidy policy administration, government assistance in the textiles and civil

stressed that China's progress towards further liberalization began to slow down beginning in 2006, despite its substantial adoption of market-oriented reforms in its early years of accession.[98]

Such problems have problematized CVD actions in response to alleged China's subsidy programs.[99] Moreover, growing tension concerning China's exchange rate policies has provoked more aggressive CVD actions, especially by the United States. This inevitably raises issues concerning the WTO's consistency.

A. Current Practices and US Court Decisions for 'Double Remedy'

Both WTO rules and US laws require adjustments in combined duty rates to avoid double counting of export subsidies. Article VI:5 of GATT specifies that no product can be subject to both antidumping and countervailing duties 'to compensate for the same situation of dumping or export subsidization.' The US law, parallel to this provision, requires the DOC to adjust antidumping duties in the event that CVDs are applied simultaneously to counter export subsidies on the same products.[100] More specifically, export prices are increased by the amount of CVDs imposed on the product to offset the export subsidy effect.[101] The simplified mechanism of this method is shown in Figure 1. Suppose that Country A provides $20 per unit subsidy to its own exporter, Company *a*, which charges $100 for the domestic market and $70 for exportation to the US market. When the DOC countervails the subsidy by $20 CVD, this amount would be added to the actual export price of $70 so that the dumping margin, or difference between the normal value and export price, is $10. The DOC explains that this practice avoids the imposition of double remedy in parallel trade remedy investigations involving imports from WTO Members that are designated as market economies.[102] In contrast, when there is a domestic subsidy that affects both the export price and normal value, the DOC does not make an adjustment to export prices. For example, if the normal value is also reduced to $80 by the subsidy in Figure 1, the dumping margin would be determined simply by comparing the normal value ($80) and the export price ($70).

Figure 1. CVD Offset Structure in Dumping Margin Calculation: Market Economy

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aerospace sectors and price controls on fuels and land administration. See USTR, *The 2010 Trade Policy Agenda and 2009 Annual Report of the President of the United States on the Trade Agreements Program* (Washington D.C., 2010).

[98] See USTR, *The 2009 Trade Policy Agenda and 2009 Annual Report of the President of the United States on the Trade Agreements Program* (Washington D.C., 2009), at 159.

[99] In recent years, the US frustration on China's exchange rate policies has provoked numerous CVD related congressional bills. For a more detailed account on the legality of such legislative actions, see R. Staiger and A. Sykes, above n 5; Dukgeun Ahn, 'Is the Chinese exchange rate regime "WTO-legal"?', in Simon Evenett (eds), *The US-Sino Currency Dispute: New Insights from Economics, Politics and Law* (London: CEPR, 2010) 139-46.

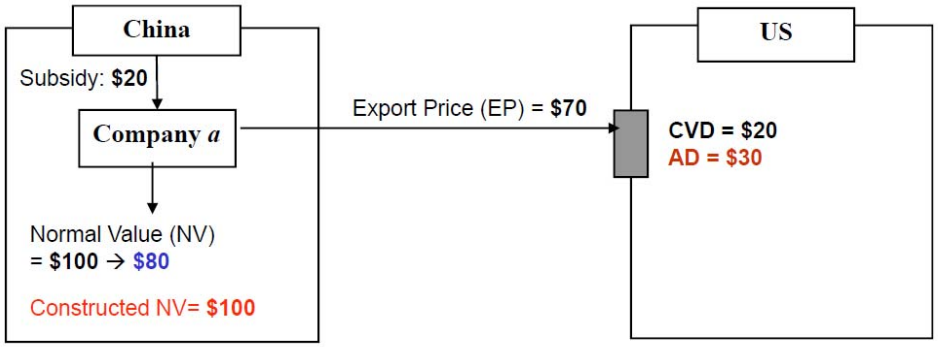
[100] 19 USC § 1677a(c)(1)(C) and Section 772(c)(1)(C) of the Tariff Act of 1930.

[101] However, domestic subsidies affecting both export price and normal value presumably by the same amount do not entail price adjustments.

[102] For recent adjustment practices, see, e.g., Notice of *Final Results of Antidumping Administrative Review: Low Enriched Uranium from France*, 69 US Federal Register 46501 (Department of Commerce, 3 August 2004); *Certain Cut-to-Length Carbon Steel Plate from Germany: Final Results of Antidumping Administrative Review*, 62 US Federal Register 18390 (Department of Commerce, 15 April 1997); and *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 US Federal Register 19153 (Department of Commerce, 12 April 2004).

But the DOC has not applied the same methodology for price adjustment when both CVD and AD duties are charged against non-market economies.[103] When the DOC addresses dumping problems by NMEs, it compares a subsidy-free constructed normal value with the subsidized export price to calculate the dumping margin. As a result, the difference reflects the price advantages that the exporting company has obtained from both export and domestic subsidies. Thus, in theory, antidumping duties derived in this way will already offset much of the benefits occurred by both types of subsidies. Any additional CVD in this situation may create a double remedy for the alleged subsidy problems. Figure 2 shows a numerical example for how concurrent application of AD and CVD against NMEs may create double remedy problems with respect to domestic subsidies. In the dumping margin calculation, the DOC compares the constructed normal value that is calculated by using data from other market economies with the actual subsidized export price. Thus, in Figure 2, the dumping margin for NMEs would be $30. Accordingly, concurrent application of $20 CVD in this case would amount to a 'double remedy'.[104]

Figure 2. CVD Offset Structure in Dumping Margin Calculation: Non-Market Economy

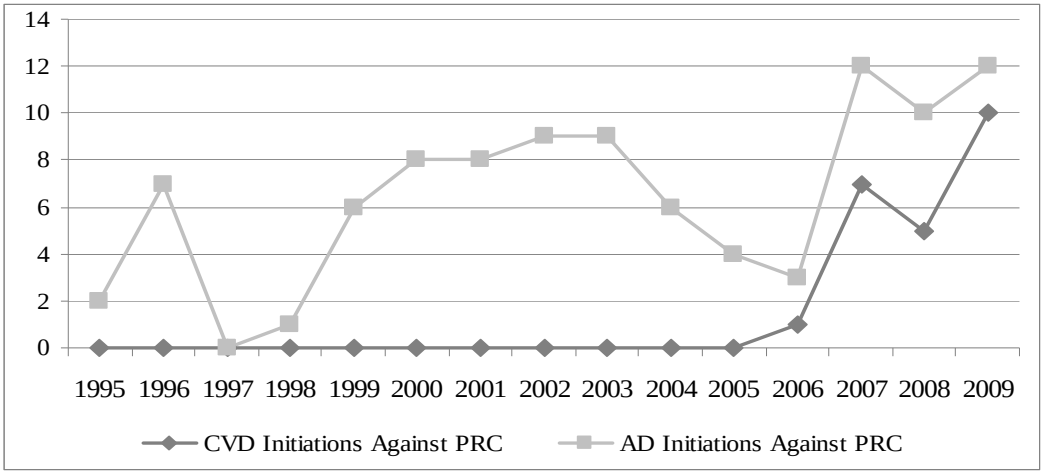


[103] On December 12, 2008, China filed an official request for the formation of a WTO panel to examine US antidumping and CVDs on certain Chinese products. Specifically, the China WTO case makes two types of challenges to the US AD and CVD investigations: 'as such' claims and 'as applied' claims. As part of its 'as such' claims, China argues that the combined application of CVD and NME AD methodology to China violates the Most Favored Nation (MFN) treatment provisions of Art. 1 of GATT (1947). See *United States–Definitive Antidumping and Countervailing Duties on Certain Products from China: Request for the Establishment of a Panel by China*, WT/DS392/2 (12 December 2008).

[104] For a theoretical possibility of concurrent application of AD and CVD to resolve double remedy problems, see Brian D. Kelly, 'The Offsetting Duty Norm and the Simultaneous Application of Countervailing and Antidumping Duties', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653631 (visited 12 November 2010).

In case a NME provides an export subsidy that affects only export prices, GATT Article VI:5 mandates the choice between AD and CVD. This is reasonable because either AD or CVD, but not both, can fully address subsidy impacts to an export price. If an export price is reduced by more than the subsidy amount – probably embracing dumping elements, AD would be enough to address the full subsidized and dumped price effects. In other words, if the export price is reduced by more than $20 due to the export subsidy of $20 in Figure 2 while the normal value remains $100, the dumping margin would cover both subsidy and dumping effects. On the other hand, if an export price is reduced by less than the subsidy amount, CVD would be – actually more than – enough to counter the price effects. The CVD of $20 in Figure 2 should suffice to deal with any price effects of export subsidy that reduces the export price by less than $20.

Figure 3. US CVD and AD Measures in Force against China (1995-31 December 2009)



*Source: Import Administration, US Department of Commerce, *Antidumping and Countervailing Duty Case Information,* <http://ia.ita.doc.gov/stats/caselist.txt> and <http://ia.ita.doc.gov/stats/inv-initiations-2000-current.html>.

The shift in DOC's CVD policy starting from 2006 resulted in a surge of AD and CVD cases against China. As presented in Figure 3, US antidumping actions against China have shown a steady decline following a peak in the early 2000s, but then upturned with a sharp increase since 2007. After 2007, the trends of AD and CVD actions significantly correlate, illustrating the fact that all CVD measures in force were aligned with parallel antidumping actions. The introduction of countervailing measures clearly enhanced protective incentives to bring subsequent antidumping cases against China.[105] Considering that NME treatment of China under the WTO Accession Protocol expires in 2016, it is very likely that the US industries will continue to exploit the current trade remedy practices for the immediate time being.

As illustrated in Figure 1, no offset for CVDs in dumping margin calculation would lead to much higher antidumping duties. By pairing 'all-others' CVD rates and 'PRC-wide' AD rates, Table 5 confirms this situation.[106]

[105] See Kenneth J. Pierce and Mathew R. Nicely, 'Transitioning to China's Market Economy Antidumping Treatment in 2016', available at http://www.abanet.org/intlaw/spring09/materials (visited 24 November 2010).

[106] There are many different rates for major exporters in these cases. So, for the sake of simplicity, 'all other rates' were chosen for the comparison.

Table 5. Simultaneous Imposition of CVD and AD Measures to the Same Chinese Imports

Case No.	CVD Margin	Product	Case No.	AD Margin
C-570-911	37.28	CWP	A-570-910	85.55
C-570-915	15.28	LWRP	A-570-914	264.64
C-570-917	226.85	LWS	A-570-916	91.73
C-570-926	169.01	Sodium Nitrite	A-570-925	190.74
C-570-913	5.62	OTR Tires	A-570-912	210.48
C-570-923	109.95	RFM	A-570-922	185.28
C-570-921	13.63	LWTP	A-570-920	115.29
C-570-936	35.67	Line Pipe	A-570-935	101.1
C-570-931	1.1	CWASPP	A-570-930	55.21
C-570-938	8.14	Citric Acid	A-570-937	156.87
C-570-940	13.3	Lawn Groomers	A-570-939	386.28
C-570-942	13.3	KASR	A-570-941	43.09
C-570-944	13.41	OCTG	A-570-943	99.14
C-570-946	27.64	PCSWS	A-570-945	193.55
C-570-948	62.46	Steel Grating	A-570-947	145.18
C-570-953	1.56	NWR with WS	A-570-952	247.65
C-570-955	24.24	MCB	A-570-954	236.00
C-570-963	109.11	S&PPS	A-570-962	95.40

*Source: Federal Register Notices.
*Note1: 'CVD Margins' are based on 'all-others' rates whereas 'AD Margins' are those of the 'PRC-wide' rates.
*Note2: Cases listed by date of 'Order'.

Notably, the AD rates against China were, on average, roughly three times greater than the corresponding CVD rates when imposed simultaneously. Excluding *Laminated Woven Sacks*, AD rates were considerably higher than parallel CVD rates. This is in contrast with the previous perception that antidumping duties are likely to be reduced to account for the imposition of CVD measures to China.[107] Contrary to that perception, AD rates are far from being reduced. Moreover, the average AD/CVD ratio in these China cases remains considerably higher than that level derived for market economies. For example, based on data for market economies between 1995 and 2005, the average duty rate imposed in 36 CVD cases was about 13 percent, while the average AD rate imposed on NMEs was roughly double, at about 26 percent.[108] In the subsidy cases regarding China, the CVD rates imposed on Chinese merchandise were notably high, but companion AD rates were even much higher.

Chinese respondents subject to *Pneumatic Off-the-Road Tires* challenged the DOC's NME treatment methodologies in their dumping margin calculations at the US CIT.[109] In a decision issued in September 2009, regarding *GPX International Corporation et al v. United States*, the CIT concluded that the DOC did not apply US law correctly and ordered the agency to revisit, and if necessary, recalculate

[107] See GAO, *US-China Trade: Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies* (Washington D.C., 10 January 2006).
[108] Ibid.
[109] See *GPX International Co. v. United States*, Case No. 08-00285 (Ct. Int'l Trade 2008).

the AD and CVD margins within ninety days. The most important aspect of the CIT decision in the GPX case may be its requirement that the DOC develop methodologies or new statutory tools to prevent double counting of subsidies if it applies AD and CVD duties simultaneously on imports of the same product, and to refrain from imposing CVDs on NME goods until it is prepared to address this problem.[110] The CIT also found that 'Commerce reasonably can do all of its remedying through the NME AD statute, as it likely accounts for any competitive advantages the exporter received that are measurable.'[111]

More significant decisions from the US CIT were issued in the second remand case. The US CIT ruled that the DOC must forego the imposition of CVDs on the NME products 'because its 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, or to otherwise comply with the unfair trade statutes in this regard.'[112] The DOC tried to comply with the US CIT decision by merely offsetting CVD against NME AD after calculating the CVD and NME AD margins with regular methods. The US CIT, however, concluded that this offset method always leads to the unaltered NME AD margin, rendering concurrent CVD and AD investigations unnecessary. Perhaps more importantly, it ruled the method to be inconsistent with the US law by specifically permitting offsets only to export prices. Whether this decision can survive review by the Court of Appeals and congressional actions remains to be seen.

B. Consistency in the WTO System

Meanwhile, the Chinese government brought a case to the WTO, arguing that the failure of the US to take action to avoid the double counting of duties that results from the combined application of the CVD and NME AD methodology is contrary to provisions of the AD Agreement and SCM Agreement, which limits the duties to 'appropriate amounts', as well as the most favored nation treatment (MFN) provision of Article 1 of GATT. It is noteworthy that the DOC always takes offset procedures for CVDs in calculating dumping margins when dealing with market economies. The first litigation raised issue with the very first DOC decision to impose a CVD against China. However, this case was terminated as the ITC issued a negative injury determination.[113] In September 2008, China again raised the same issue concerning four CVDs imposed along with antidumping duties.[114] In October 2010, the panel ruled that China did not establish the inconsistency of the imposition of 'double remedies' under, among others, SCM Agreement Articles 10, 19.3, 19.4 and 32.1, GATT Article VI:3 and GATT Article I:1.[115] Rejecting the panel's 'rather mechanistic' reasoning[116], however, the Appellate Body in *US – AD CVD on China* ruled that the imposition of a double remedy is prohibited by Article 19.3 of the SCM Agreement.[117]

The panel in *US – AD CVD on China* acknowledged that the concurrent imposition of ADs calculated under an NME methodology and of CVDs creates the potential of imposing a 'double

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[110] *GPX International Co. v. United States*, 645 Fed Supp 2d. 1231 (US Ct Int'l Trade 2009).
[111] Ibid, at 19.
[112] *GPX International Co. v. United States*, 715 Fed Supp 2d. 1337 (US Ct Int'l Trade 2010).
[113] *United States — Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WT/DS368/1 (18 September 2007).
[114] WTO, *United States–Definitive Antidumping and Countervailing Duties on Certain Products from China: Request for the Establishment of a Panel by China*, WT/DS379/2 (12 December 2008).
[115] WTO Panel Report, *United States–Definitive Antidumping and Countervailing Duties on Certain Products from China* (*US - AD/CVD on China*), WT/DS379/R, adopted 25 March 2011.
[116] WTO Appellate Body Report, *US - AD/CVD on China*, WT/DS379/AB/R, adopted 25 March 2011, para 567.
[117] Ibid, para 583. This paper limits the scope of the analysis to 'double remedy' issue, leaving other important legal issues such as 'public bodies'. For a more comprehensive legal analysis of the case, see Dukgeun Ahn, 'United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China', American Journal of International Law (forthcoming, 2011).

remedy'.[118] However, the panel explained that CVDs are collected 'in the appropriate amounts' insofar as the amount collected does not exceed the amount of subsidy 'found to exist'. Since the imposition of ADs calculated under an NME methodology has no impact on whether the amount of the concurrent CVD collected is 'appropriate' or not, the panel ruled that Article 19.3 of the SCM Agreement does not address the question of double remedies. The Appellate Body viewed this panel interpretation as a 'willful isolation' of two agreements, explaining that '[i]t is counterintuitive to suggest that, while each agreement sets forth rules on the amounts of anti-dumping duties and countervailing duties that can be levied, there is no obstacle to the levying of a total amount of anti-dumping and countervailing duties which, if added together, would not be appropriate and would exceed the combined amounts of dumping and subsidization found.'[119] Thus, there was the fundamental difference in understanding of Article 19.3 in terms of whether the text provides the basis to link the two agreements on anti-dumping duties and countervailing duties.

On the other hand, a critical development in the drafting history relevant to the double remedy issue is the exclusion of Article 15 of the Tokyo Round Subsidies Code that explicitly required the choice between AD and CVD for addressing injuries caused by imports from NMEs. In fact, that provision did not draw any attention among the GATT contracting parties at that time, probably because no party ever used or was affected by it.[120] Consequently, Article 15 of the Tokyo Round Subsidies Code did not appear at the negotiation agenda and was removed even from the very first draft text of the SCM Agreement prepared in September 1990.[121] The panel considered the existence of Article 15 of the Tokyo Round Subsidies Code to be 'significant'.[122] China argued that 'the circumstances surrounding the Uruguay Round negotiations strongly suggest that issues relating to these double remedies were no longer considered relevant at the time' because no contracting party had a practice of applying ADs concurrently with CVDs to NMEs and even the US –the largest user of CVDs – had taken a clear position of not applying CVDs to imports from NMEs.[123] The United States countered by noting that the Tokyo Round Subsidies Code contained provisions that were virtually identical to Articles 19.3 and 19.4 of the SCM Agreement. In other words, the United States argued that 'had these provisions prohibited the imposition of double remedies, as China contends, there would have been no need to include in the same Code an express prohibition on concurrent anti-dumping and countervailing duty investigations.'[124]

The panel 'consider[ed] it likely that the rationale for the inclusion of Article 15 of the Tokyo Round Subsidies Code was the potential for double remedies to result from the concurrent imposition of NME methodologies in calculating anti-dumping duties and of countervailing duties, or at least the recognition that the use of an NME methodology would capture price differences resulting from subsidies granted on the product subject to antidumping duties.'[125] Although the panel did not provide explicit rulings about how to interpret the omission of Article 15 of the Code in the SCM Agreement, it ruled that the existence of Article 15 in the Code explicitly addressing the concurrent imposition of ADs and CVDs on NME should mean that Articles 19.3 and 19.4 of the SCM Agreement have no relevance for the question of the permissibility of double remedies.[126]

In relation to this issue, the panel noted that the prohibition of double remedy under Article VI:5 of GATT is limited only to export subsidies. Therefore, it is the panel's view that while the double remedy

[118] WTO, above n 115, paras 14.69-14.70.
[119] WTO, above n 116, para 572.
[120] For example, while more than 30 submissions on the SCM Agreement were made by the contracting parties during the Uruguay Round negotiation, none was made by a NME country.
[121] GATT, MTN.GNG/NG10/W/38/Rev.1 (4 Sep. 1990). There appears no documentary evidence related to this part of the negotiating history. See WTO, above n 115, footnote 1025.
[122] Ibid, para 14.119.
[123] Ibid, para 14.85.
[124] Ibid, para 14.87.
[125] Ibid, footnote 1026.
[126] Ibid, para 14.119.

in respect to export subsidies has been prohibited since the establishment of the GATT, the explicit elaboration for double remedy against NMEs was clearly changed during the Uruguay Round negotiation, implying that the drafters actually intended to broaden the scope of CVDs against NMEs.

Another relevant development is Section 15 of China's Protocol of Accession, which permits CVDs against China.[127] Although Section 15 does not directly address whether double remedy is allowed without any limitation, the Chinese government in the proceeding conceded that 'its Protocol of Accession permits the concurrent imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties.'[128]

The Appellate Body categorically rejected this part of the panel finding. Ruling that the Tokyo Round Subsidies Code 'may, at most, form part of the circumstances of the conclusion of a treaty' under Article 32 of the Vienna Convention of the Law of the Treaties (VCLT) rather than an 'element of context' within the meaning of Article 31 of VCLT, the Appellate Body did not consider it 'necessary to confirm the interpretation of Article 19.3 by relying on supplementary means of interpretation.'[129] Moreover, the Appellate Body explained that 'the absence of a provision like Article 15 of the Tokyo Round Subsidies Code in the SCM Agreement cannot be interpreted as indicating that Members intended to exclude from the scope of the SCM Agreement a different and narrower obligation, such as a prohibition on double remedies' because Article 15 'does more than merely prohibit double remedies in that it prohibits the concurrent application of anti-dumping and countervailing duties, regardless of whether they offset the same situation of subsidization'.

This ruling of the Appellate Body may raise some controversy because it is difficult to justify the interpretation of Article 15 as having a broader role than merely prohibiting double remedies. Considering the commonsensical understanding that the whole purpose of Article 15 was to prevent double remedies, the Appellate Body should have rendered a more convincing interpretation or explanation for deleting a directly relevant provision from the Tokyo Round Subsidies Code. Indeed, given the fact that overall disciplines under the SCM Agreement were significantly strengthened to regulate subsidy measures during the Uruguay Round negotiation, and that China – a major NME with huge trade potential – tried to join GATT then, it may not be completely implausible to assume that CVD possibilities against NMEs were intentionally broadened, although this issue did not draw much attention among other – mostly inexperienced – contracting parties.

A more fundamental issue in the Appellate Body ruling is the legal interpretation of 'appropriateness' in Article 19.3 to link the imposition of ADs and CVDs. From the policy perspective, the Appellate Body set forth a desirable decision, in stating that 'it should not be possible to circumvent the rules in each agreement by taking measures under both agreements to counteract the same subsidization.'[130] However, the legal basis for the decision raises several controversial questions. For example, while the Appellate Body considers existence of the parallel expressions, 'in the appropriate amounts in each case', as evidence of the need to 'read the two agreements together', the 'appropriate amounts' expression in fact originated from the Kennedy Round Antidumping Code with which the matching Subsidies Code was not existent. Therefore, one can raise a question concerning the assumption that the parallel provisions in both agreements were designed to communicate with each other.

Moreover, the whole structure of Article 19 in the SCM Agreement may be viewed somewhat differently from the description provided by the Appellate Body. In fact, Article 19 of the SCM Agreement is a selected and modestly restructured provision from Article 4 of the Tokyo Round Subsidies Code. After laying out the general principle of CVD impositions in Article 19.1, the paragraphs that follow set forth the rules for subsequent stages of CVD imposition and collection. In other words, for the decision stage, Article 19.2 explains the full authority of an importing member for imposing CVDs –

[127] WTO, WT/L/432 (dated 23 November 2001).
[128] WTO, above n 115, footnote 1028.
[129] WTO, above n 116, paras 576-80.
[130] Ibid, para 572.

even in a lesser duty that is 'desirable'. In the next stage of actual CVD imposition, Article 19.3 stipulates appropriateness and non-discrimination as the guiding principle. When a CVD is finally collected, Article 19.4 clarifies the maximum ceiling with the concrete criteria that 'the amount of the subsidy found to exist, [should be] calculated in terms of subsidization per unit of the subsidized and exported product'. It is noted that the maximum is set in terms of subsidy amount instead of price effect on exportation.

If we follow this reading of Article 19, the 'levying' rather than 'imposition' of CVDs 'in the appropriate amounts in each case' may be understood in a more specific and narrower context confined to CVD actions. As the United States adopts a retrospective system for levying or collecting CVDs, actual CVD amounts to be levied often differ from the initially imposed CVDs depending on the administrative review decisions. Thus, levying CVDs in the appropriate amount in each case may be understood to allow some variation in the final stage of CVD actions which constitutes the unique and most important feature of the US practices. The origin of this expression from the Kennedy Round Antidumping Code may render the above interpretation more persuasive. Even if this alternative interpretation is accepted, it may still be controversial whether such contextual or historical interpretations should prevail over perhaps a more literal approach by the Appellate Body, in tune arguably with the current WTO membership.

The following explanation of the Appellate Body on its interpretation of 'appropriateness' is also puzzling:

> In *EC – Salmon (Norway)*, the panel found that the appropriate amount of an anti-dumping duty "must be an amount that results in offsetting or preventing dumping, when all other requirements for the imposition of anti-dumping duties have been fulfilled". We consider that the panel's interpretation of Article 9.2 of the *Anti-Dumping Agreement* in *EC – Salmon (Norway)* is consistent with our interpretation of the phrase "in the appropriate amounts" in Article 19.3 of the *SCM Agreement*, as prohibiting the imposition of double remedies, and with the notion that the two agreements should be read together in a consistent and coherent manner. In fact, applying the reasoning of the panel in *EC – Salmon (Norway)*, an appropriate amount of countervailing duty should be an amount that results in offsetting subsidization, with due regard being had to the concurrent application of anti-dumping duties on the same product that offset the same subsidization. (underline added)

The panel in *EC – Salmon (Norway)* emphasized the determination of appropriate AD amount within the context of the AD Agreement. It is not very clear how the panel's ruling in *EC – Salmon (Norway)* can be applied to the question of the concurrent application of ADs in determining appropriate amounts of CVDs.

The Appellate Body's ruling on 'appropriateness as a tool to link AD and CVD amounts filled another important gap in the porous textual language of the WTO Agreements, rectifying dangerously abusive trade remedy practices in the WTO system. Despite such contribution, the legal justification of the Appellate Body ruling may create complications for future disputes due to the potentially overreaching implication of its legal interpretation.

V. Concluding Remarks

The United States has actually broadened the scope of CVD actions against NMEs by including Vietnam in 2009.[131] After a preliminary determination of 2 to 5% actionable subsidy rates for polyethylene retail carrier bags, in its final determination the DOC authorized rates ranging from 0.44% to 5.28%, except for

[131] See *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 75 US Federal Register 16428 (Department of Commerce, 1 April 2010).

one firm to which 52.56% was applied on the basis of adverse facts available in the final determination.[132] The US DOC practically applied the same methodology to this case as the one employed for other cases involving China.

Both China and Vietnam have been working through bilateral arrangements with many WTO Members to resolve the AD problems caused by NME provisions in the WTO Accession Protocol. Although several major WTO Members, such as the United States, EU, Japan and Canada, refuse to treat China and Vietnam as market economies, many other WTO Members, including Australia, New Zealand, Korea and ASEAN countries, have agreed to essentially repeal the NME treatment provisions. But US CVD actions against NMEs have opened a whole new possibility for the trade remedy actions, which pressures even the WTO Members abandoning NME provisions to consider CVDs for their aggrieved domestic industries. In this regard, it is noted that the number of WTO members using countervailing measures has been constantly increasing since the inception of the WTO.[133]

This situation is disturbing since the WTO Members show a clear tendency toward bringing retaliatory actions against others when their subsidy policies are challenged. NMEs such as China and Vietnam may end up facing more politically controversial problems dealing with CVD actions based on the status of their economies, and not necessarily on particular trade policy measures. Moreover, another troubling problem is the possibility of using CVD actions against many other NMEs, some recently acceded to the WTO and still many others, such as Russia and Kazakhstan, in the process of WTO accession negotiations. Despite considerably articulated norms in the SCM Agreement, the authority of a WTO Member to impose CVDs against NMEs is completely contingent upon the discretionary judgment of whether a NME substantially differs from the former Soviet style economies or, generally speaking, whether the economic circumstances of a NME somehow render governmental functions as illegal subsidies that interfere with market competition. No better rule on this matter is expected in the foreseeable future in the WTO system. Although one of the most egregious problems of CVD actions against NMEs, i.e., the 'double remedy' issue was settled by the Appellate Body ruling, CVD actions would still become major trade policy measures against NMEs in the WTO system and continue to raise unprecedented complexity in legal jurisprudence.

While some improvements are expected to be made in due course, the perils of the prevailing order have many implications for future Sino-American trade relations and trade remedy practices against other transitional economies. Given the WTO Appellate Body decision to prohibit CVD actions against NMEs with the penalty of double remedy, many WTO Members need to articulate or refine their trade remedy actions. And yet numerous controversial legal challenges concerning CVD action against NMEs will be introduced into the WTO system through the newly opened door and will demand collective endeavor by the WTO Membership to balance political compromises and the legal reality.

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[132] Due to relatively high dumping margins of 52.3 to 76.11%, CVD actions were not taken seriously at least from the commercial point of view.

[133] By the end of 2009, the number of the WTO Members that imposed countervailing measures reached to fifteen, among the twenty Members that initiated countervailing investigations. http://www.wto.org/english/tratop_e/scm_e/cvd_meas_rep_member_e.pdf (visited 29 September 2010). Moreover, as of October 2009, 90 WTO Members notified their countervailing regulations to the WTO SCM Committee. This is in stark contrast with the GATT regime in which only contracting parties maintained countervailing regulations. See WTO, G/L/906 (26 October 2009).

Appendix 1. Rates and Target Industries in US CVDs against China

Case No.	Product	Sector	Producer/Exporter	Prelim	Final	Order
C-570-911	**CWP**	**XV**	East Pipe	*0*	29.57	29.62
			Shuangjie**	264.98	615.92	616.83
			Kingland	16.59	44.86	44.93
			All-Others	16.59	37.22	37.28
C-570-915	**LWRP**	**XV**	(Kunshan)	*0.27*	2.17	2.17
			Qingdao**	77.85	200.58	200.58
			ZZPC	2.99	15.28	15.28
			All-Others	2.99	15.28	15.28
C-570-917	**LWS**	**XI**	SSJ*	2.57	352.82	352.82
			(Aifudi)	11.59	29.54	29.54
			Han Shing Chemical*	57.14	223.74	223.74
			Ningbo*	57.14	223.74	223.74
			Qilu*	57.14	304.4	304.4
			All-Others	2.57	226.85	226.85
C-570-926	**Sodium Nitrite**	**VI**	Shanxi Jiaocheng**	93.56	169.01	169.01
			Tianjin Soda Plant**	93.56	169.01	169.01
			All-Others	93.56	169.01	169.01
C-570-913	**OTR Tires**	**VII**	Guizhou Tire	3.13	2.45	2.45
			Starbright	2.38	14	14
			TUTRIC*	6.59	6.85	6.85
			All-Others	4.44	5.62	5.62
C-570-923	**RFM**	**XVI**	Cixi**	70.41	109.95	109.95
			Polyflex**	70.41	109.95	109.95
			All-Others	70.41	109.95	109.95
C-570-921	**LWTP**	**X**	Hanhong	*0.57*	*0.57*	*0.57*
			Xiamen**	Pending	123.65	124.93
			Shenzhen Yuanming**	59.5	137.25	138.53
			*MDCN***	59.5	123.65	124.93
			GG	5.68	13.17	13.63
			All-Others	5.68	13.17	13.63
C-570-936	**Line Pipe**	**XV**	Huludao Companies	18.89	35.63	31.29
			Liaoning Northern Steels	31.65	40.05	40.05
			All-Others	25.27	37.84	35.67
C-570-931	**CWASPP**	**XV**	Froch**	106.85	299.16	299.16
			Winner	1.47	1.1	1.1
			All-Others	1.47	1.1	1.1
C-570-938	**Citric Acid**	**VI**	Anhui BBCA**	97.72	118.95	118.95
			TTCA*	1.41	12.68	12.68
			Yixing Union	3.92	3.6	3.6
			All-Others	2.67	8.14	8.14
C-570-940	**Lawn Groomers**	**XVI**	Princeway	*0.95*	*0.56*	*0.56*
			Superpowers	2.77	13.3	13.3
			*Qingdao Hundai***	254.52	264.98	264.98
			*Qingdao Taifa***	254.52	264.98	264.98
			*Qingdao EA***	254.52	264.98	264.98
			*Maxchief Investments***	254.52	264.98	264.98
			*World Factory***	254.52	264.98	264.98
			All-Others	2.77	13.3	13.3

C-570-942	**KASR**	**XVI**	Asber**	197.14	170.82	170.82
			Wire King	13.22	13.3	13.3
			*Changzhou Yixiong***	162.87	149.91	149.91
			*Foshan Winleader***	162.87	149.91	149.91
			*Kingsun Enterprises***	162.87	149.91	149.91
			*Zhongshan Iwatani***	162.87	149.91	149.91
			*Yuyao Hanjun***	162.87	149.91	149.91
			All-Others	13.22	13.3	13.3
C-570-944	**OCTG**	**XV**	Changbao	24.33	11.98	12.46
			TPCO*	10.9	10.36	10.49
			Wuxi*	24.92	14.61	14.95
			Jianli	30.69	15.78	15.78
			All-Others	21.33	13.2	13.41
C-570-946	Prestressed Concrete Steel Wire Strand	**XV**	Xinhua	12.06	45.85	45.85
			Fasten	7.53	8.85	9.42
			Jiangyin	7.53	8.85	9.42
			All Others	9.80	27.35	27.64
C-570-948	Steel Grating	**XV**	Ningbo	7.44	62.46	62.46
			All others	7.44	62.46	62.46
C-570-953	Narrow Woven Ribbons with Woven Selvedge	**XI**	Yama	0.29	1.56	1.56
			Changtai	118.68	117.95	117.95
			All Others	59.49	1.56	1.56
C-570-955	Magnesia Carbon Bricks	**XIII**	Mayerton	de minimis	253.87	253.87
			RHI	de minimis	24.24	24.24
			All Others	de minimis	24.24	24.24
C-570-963	Sodium and Potassium Phosphate Salts	**VI**	Lianyungang	109.11	109.11	109.11
			Mianyang	109.11	109.11	109.11
			Shifang	109.11	109.11	109.11
			All Others	109.11	109.11	109.11

*Source: <http://ia.ita.doc.gov/stats/inv-initiations-2000-current.html>.

*Note1: 'Prelim' stands for the preliminarily determined duty rates; 'Final' stands for that of final determinations; and 'Order' presents the actual subsidy margins that were levied to individual producers and exporters.

*Note2: Parenthesized 'Producers/Exporters' are the voluntary respondents while the italicized ones are uncooperative firms that were neither mandatory nor voluntary respondents in each case.

*Note3: Italicized duty margins represent zero or *de minimis* rates.

*Note4: Asterisks mark the use of AFA in the countervailable subsidy margin determination. Two asterisks were indicated for those cases based on total AFA.

Appendix 2. Subsidy Program Determined to be Countervailable by US DOC

Section Description	Base Metals and Articles								Machinery			Chemicals		Rubber	Paper	Textile		Stone	SUM
Section/HS Code Two Digit	XV/73								XVI/84,85			VI/28,29		VII/40	X/48	XI/63,58		XIII/68,69	
National Programs Case Numbers (C-570-number)	911	915	931	936	944	946	948	963	923	940	942	926	938	913	921	917	953	955	
I. Provision of Goods and Services at Less than Adequate Remuneration	x	x	x	x	x	x	x		x	x	x	x	x	x	x	x		x	16
II. Grants					x	x	x	x	x			x	x	x			x		9
III. Loans				x	x	x						x	x	x	x	x	x		9
IV. Income Tax Reduction and Exemption Programs		x	x	x	x	x		x	x	x	x	x	x	x	x		x	x	15
V. Other Tax Exemption Programs														x	x				2
VI. Income Tax Credit and Refund Programs				x	x				x	x		x	x					x	7
VII. Indirect Tax Programs and Import Tariff Programs			x			x	x	x	x	x		x	x	x	x		x	x	12
VIII. Debt Forgiveness	x				x									x	x				4
Countervailable National Subsidy Programs by Section	28								11			12		7	6	2	4	4	74

Section Description	Base Metals and Articles								Machinery			Chemicals		Rubber	Paper	Textile		Stone	SUM
Section/HS Code Two Digit	XV/73								XVI/84,85			VI/28,29		VII/40	X/48	XI/63,58		XIII/68,69	
Provincial Programs Case Numbers (C-570-number)	911	915	931	936	944	946	948	963	923	940	942	926	938	913	921	917	953	955	
I. Provision of Goods and Services at Less than Adequate Remuneration						x			x			x		x					4
II. Grants	x			x		x	x	x	x	x		x	x		x		x		11
III. Loans	x								x			x	x						4
IV. Income Tax Reduction and Exemption Programs						x		x	x		x				x			x	6
V. Indirect Tax Programs and Import Tariff Programs				x															1
Countervailable Provincial Subsidy Programs by Section	10								6			5		1	2	0	1	1	26

*Source: Data compiled from the Decision Memorandums of the thirteen effective US CVD cases against China.
*Note: Individual cases based upon total AFA are excluded.

Appendix 3. Subsidy Program Determined to be Countervailable by CBSA

Section Description		Base Metals and Articles						Machinery	SUM
Section/HS Code Two Digit		XV/73, 76						XVI/84	
National Programs	Case Numbers (D-15-number)	**56**	**52**	**51**	**50**	**49**	**54**	**53**	
I. Provision of Goods and Services at Less than Adequate Remuneration		**x**	**x**			**x**	**x**		4
II. Grants				**x**	**x**	**x**			3
III. Loans					**x**	**x**		**x**	3
IV. Income Tax Reduction and Exemption Programs									0
V. Other Tax Exemption Programs									0
VI. Income Tax Credit and Refund Programs				**x**					1
VII. Indirect Tax Programs and Import Tariff Programs									0
VIII. Debt Forgiveness		**x**							1
Countervailable National Subsidy Programs by Section		2	1	2	2	3	1	1	12

Section Description		Base Metals and Articles						Machinery	SUM
Section/HS Code Two Digit		XV/73, 76						XVI/84	
Provincial Programs	Case Numbers (D-15-number)	**56**	**52**	**51**	**50**	**49**	**54**	**53**	
I. Provision of Goods and Services at Less than Adequate Remuneration							**x**		1
II. Grants		**x**	**x**		**x**		**x**		4
III. Loans									0
IV. Income Tax Reduction and Exemption Programs		**x**	**x**	**x**	**x**	**x**	**x**	**x**	7
V. Other Tax Exemption Programs					**x**				1
VI. Income Tax Credit and Refund Programs		**x**		**x**	**x**	**x**		**x**	5
VII. Indirect Tax Programs and Import Tariff Programs		**x**			**x**	**x**	**x**		4
VIII. Debt Forgiveness									0
Countervailable Provincial Subsidy Programs by Section		4	2	2	5	3	4	2	22

* Source: Statement of Reasons, CBSA.
* Note: D-15-49, 50 based on programs identified at initiation.