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THE MARKET-ORIENTED ENTERPRISE APPROACH: THE BEST RESPONSE TO THE QUESTIONABLE UNITED STATES TRADE PRACTICES SCRUTINIZED IN GPX INTERNATIONAL TIRE CORP. V. UNITED STATES

Lauren W. Clarke*

There is essentially only one argument for free or freer trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable regional division of labor, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe.¹

Liberal trade policy characterizes the modern trend in international trade.² For decades, nations have recognized the importance and benefits of free trade, which creates marketplace efficiencies and promotes global welfare.³ With the reduction of tariffs and elimination of quantitative restrictions, countervailing and antidumping laws serve as the legal mechanisms to counteract imperfections caused by economic globalization and liberal trade policy.⁴

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³ See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 45 (5th ed. 2008) (outlining the growth and importance of international trade liberalization). But see THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 9-10 (Daniel Bethlehem et al. eds., 2009) (explaining how a protectionist approach toward trade remained the norm into the late eighteenth century, but also noting that trade liberalization eventually did spread to Europe).

⁴ JACKSON ET AL., supra note 2, at 691, 752. In particular, countervailing and antidumping laws combat “unfair” trade practices. Id. (“[E]xtensive counter-measures are permitted to respond to imports that are ‘dumped,’ subsidized, or otherwise considered to be in
More specifically, these trade remedies provide “relief from unfair trade practices that hinder [the] competitiveness [of domestic industries and workers] in the U.S. market and abroad.”

Countervailing duties (CVDs) are applied when domestic industries have been harmed by the exporting country’s government or a public entity has harmed domestic industries. Meanwhile, antidumping duties (ADs) respond to goods imported from a foreign market and priced at “less than [their] fair value.” To levy either trade remedy, there must be proof that the domestic industry has suffered injury caused by the exporting country’s unfair trade violation of international rules of conduct.

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6. See BLACK’S LAW DICTIONARY 1565 (9th ed. 2004) (defining “subsidy” as a “specific financial contribution by a foreign government or public entity conferring a benefit on exporters to the United States”).

7. See Tariff Act of 1930, Pub. L. No. 367-71, 46 Stat. 590 (codified as amended at 19 U.S.C. § 1671(a) (2006)). To invoke a CVD, federal law stipulates that there be a finding that (1) the specified imports have been subsidized; and (2) the domestic industry is “materially injured, or is threatened with material injury, or . . . is materially retarded.” Id. See generally Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, (defining the WTO rules and procedures governing CVDs that are binding on all member States).

A countervailable subsidy applies when a government or public entity confers a benefit, through direct financial contributions or indirect support through a payment to a funding mechanism, to a domestic manufacturer, producer, or other party. 19 U.S.C. § 1677(5); see also Scott D. McBride, Something Wicked this Way Comes: The United States Government’s Response to Unsafe Imported Chinese Toys and Subsidized Chinese Exports, 45 TEX. INT’L L.J. 233, 276 (2009) (“[C]ountervailing duty laws allow the respective governments to impose duties on certain imported merchandise that has been shown to be subsidized in the country of production to the detriment of domestic producers.”). The amount of the CVD shall equal the calculated amount of subsidization provided by the foreign country. VIVIAN C. JONES, CONG. RESEARCH SERV., RL 33550, TRADE REMEDY LEGISLATION: APPLYING COUNTERVAILING ACTION TO NONMARKET ECONOMY COUNTRIES 2 (2008).

8. 19 U.S.C. § 1673; see also JACKSON ET AL., supra note 2, at 756 (explaining that dumping occurs when goods are exported (1) at prices below the prices charged in the origin market, or (2) at prices that are insufficient to cover the cost of production); Aaron Ansel, Market Orientalism: Reassessing an Outdated Anti-Dumping Policy Towards the People’s Republic of China, 35 BROOKLYN J. INT’L L. 883, 885 (2010) (“Anti-dumping laws operate by imposing a duty on foreign imports equal to the amount by which the import is considered undervalued, in cases where domestic manufacturers of similar goods . . . are hurt by such undervaluation.”).
practices.\textsuperscript{9} The application of CVDs and ADs is relatively seamless when imposed against other market economies.\textsuperscript{10} However, the application of these trade remedies becomes considerably more problematic when imposed against countries designated as nonmarket economies (NMEs).\textsuperscript{11}

When levied against NME countries, the application of trade remedies creates several complications because products in those countries do not "reflect the fair value of the merchandise."\textsuperscript{12} For this reason, many U.S. laws give parties more leeway in applying ADs and CVDs against NME countries.\textsuperscript{13} Prior case law reflects the irresolute nature of the United States’ application of trade remedies against NME countries.\textsuperscript{14} However, problems arise when the


\textsuperscript{10} See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-608T, U.S.-CHINA TRADE: CHALLENGES AND CHOICES TO APPLY COUNTERVAILING DUTIES TO CHINA 17 (2006) (statement of Loren Yager, Director of International Affairs and Trade). In the context of ADs, the Department of Commerce (Commerce) simply calculates the dumping margin by finding the difference between the company’s export price and the normal value of the product in its home market. See Patricia H. Piskorski, A Dangerous Discretionary “Duty”: U.S. Antidumping Policy Toward China, 34 HOFSTRA L. REV. 595, 603–04 (2005). In the context of CVDs, however, Commerce can assess the amount of the government subsidy with specificity because the economy operates according to market principles. See Sanghan Wang, U.S. Trade Laws Concerning Nonmarket Economies Revisited for Fairness and Consistency, 10 EMORY INT’L L. REV. 593, 602 (1996) (explaining how subsidies can be measured in market economies by “parsing out the governmentprovided [sic] benefits from the independent financial condition of the enterprise”).

\textsuperscript{11} See 19 U.S.C. § 1677(18)(A) (defining a “nonmarket-economy country” as a foreign country that “does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise”); U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 10, at 17–19; Piskorski, supra note 10, at 603–05; Wang, supra note 10, at 598–608.

\textsuperscript{12} 19 U.S.C. § 1677(18)(A); see also YAN LUO, ANTI-DUMPING IN THE WTO, THE EU, AND CHINA 162 (2010) (defining an “NME” as a national economy, which is greatly influenced by central planning of the government, rather than normal market forces).

In fact, NMEs did not exist when Congress drafted the original countervailing and antidumping statutes. Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1314 (Fed. Cir. 1986). Congress added subsequent provisions and amendments to the statutory text to respond to the changing and dynamic global marketplace. See generally TODD B. TATELMAN, CONG. RESEARCH SERV., RL 33976, UNITED STATES’ TRADE REMEDY LAWS AND NON-MARKET ECONOMIES: A LEGAL OVERVIEW 1–15 (2007) (explaining the evolution of legislation to accommodate for NME countries in international trade).

\textsuperscript{13} See PHILIP BENTLEY & AUBREY SILBERSTON, ANTI-DUMPING AND COUNTERVAILING ACTION: LIMITS IMPOSED BY ECONOMIC AND LEGAL THEORY 8 (2007) (explaining how the law affords greater leniency in the context of NMEs, as compared to the rules and procedures designed for the application of trade remedies against other market economies).

\textsuperscript{14} See Christopher Blake McDaniel, Sailing the Seas of Protectionism: The Simultaneous Application of Antidumping and Countervailing Duties to Nonmarket Economies—An Affront to Domestic and International Laws, 38 GA. J. INT’L & COMP. L. 741, 759–62 (2010) (presenting the various approaches in U.S. trade remedy law against NMEs since 1986); see also discussion
law and jurisprudence attempt to accommodate the current dynamic structure of the global economy. Exporters in NME countries—such as China—question the fairness of the current, contradictory practice of applying ADs according to NME status, while applying CVDs according to market-economy status. Many Chinese enterprises criticize U.S. trade law as unfair because it “fail[s] to keep pace with the market reforms of the Chinese economy.”

For nearly twenty years, the United States applied ADs as the sole remedy against unfair trade practices posed by NME countries. During that time, the Department of Commerce (Commerce) categorically refused to review any countervailing petitions against NME countries. Congress periodically amended the antidumping statutes to levy duties against NME countries more effectively and accurately. And, recently, Commerce has accepted that some NME countries—such as China—have substantially transitioned to no longer

infra Part I. Since 1986, ADs provided the sole remedy against unfair trade practices by NME countries. Infra Part I. However, in 2007, Commerce concluded that both ADs and CVDs could be applied against certain NME countries that had significantly reformed from the traditional Soviet-style communist economies. Infra Part I.C.


17. See discussion infra Part I.B.


20. See discussion infra Part I.B.


22. See Tariff Act of 1930, 19 U.S.C. § 1677b(c) (2006) (stipulating that in instances when the normal value cannot be accurately determined, the normal value shall be derived from the costs in a surrogate country with a comparable level of development); see also BENTLEY & SILBERSTON, supra note 13, at 12, 66–67 (explaining how “an ‘analogue’ or ‘surrogate’ normal value” can be used to calculate dumping margins for NMEs); JACKSON ET AL., supra note 2, at 783 (explaining the difficulty of applying traditional antidumping rules to NMEs because the prices in the home market are artificial); McBride, supra note 7, at 278 (describing the special methodology for measuring dumping margins in NMEs).
resemble traditional, Communist-controlled markets. Thus, Commerce has recognized the need to adjust its current approach regarding the application of trade remedies against certain NME countries.

In GPX International Tire Corp. v. United States (GPX I), Chinese exporters argued that the United States was "double counting" duties when it imposed (1) ADs according to methodologies for NMEs; and (2) CVDs according to market-economy status. The Court of International Trade (CIT), agreeing that there was a "high potential" for double counting, remanded the case, instructing Commerce to develop a methodology that avoided the double punishment.

On remand, in GPX International Tire Corp. v. United States (GPX II), the CIT concluded that Commerce had failed to develop a sound methodology that would avoid double punishment when applying concurrent remedies against NME countries. The GPX II holding demonstrates how the CIT has restricted the revolutionary policy reversal made by Commerce in 2007. The decision brings to the forefront the need for a trade-remedy regime that has the capability of protecting the interests of domestic industries, while ensuring fair and prosperous trade relations with foreign exporters.

Recognizing the importance of healthy trade relations, especially during times of an escalating trade deficit, makes it difficult to ignore the problems that have surfaced regarding the U.S. trade-remedy regime toward NME

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23. See Memorandum from Shauna Lee-Alaia & Lawrence Norton, Office of Policy, Imp. Admin., to David M. Spooner, Assistant Sec’y for Imp. Admin. 4 (Mar. 29, 2007) [hereinafter Georgetown Steel Memorandum] (on file with the author); see also infra notes 93-97 and accompanying text.

24. See Georgetown Steel Memorandum, supra note 23, at 10–11 (allowing for the application of both ADs and CVDs against China and similar NME countries).

25. GPX I, 645 F. Supp. 2d 1231, 1240–41 (Ct. Int’l Trade 2009) ("GPX argue[d] that double counting occurs when Commerce imposes a CVD remedy to offset an alleged government subsidy, but then compares a subsidy-free constructed normal value (essentially using information from surrogate countries) with the original subsidized export price to calculate the AD margin."); see also James P. Durling, Encountering Rocky Shoals: Application of the CVD Law to China, Georgetown University Law Center Continuing Legal Education, International Trade Update, 2010 WL 956090, at *11 (Feb. 25, 2010).

26. GPX I, 645 F. Supp. 2d at 1240.

27. See id. at 1251.


29. See Julie Zeveloff, GPX Ruling Could Shake up Duty Calculation Methods, LAW 360 (Oct. 20, 2009), http://www.law360.com/articles/125932 ("The [GPX] ruling represents a relatively rare instance in which the [CIT] broke precedence by going against agency policy.").

30. See Dep’t of Commerce Press Release, supra note 5 (discussing the need to strengthen trade enforcement and describing proposed measures, which include addressing the concerns addressed in GPX I and GPX II).

While trying to appease domestic industries, Commerce has departed from its longstanding commitment against applying simultaneous duties toward NME countries. In response, NME countries continue to criticize the defective application of trade remedies by the United States. For these reasons, the United States must devise a methodology that balances the interests of domestic producers with exporters from NMEs.

This Note discusses the far-reaching impact of GPX I and GPX II on international trade law. It first acknowledges the prevalence of global liberal trade policies and recognizes the necessity of trade remedies in counteracting the harm precipitated by economic globalization. This Note then examines the settled case law governing the application of ADs and CVDs against NME countries. Next, it discusses the recent trend in updating and reforming applicable trade policies to accommodate transitioning NMEs, like China. In light of this current development, this Note explores the subsequent case before the CIT, GPX International Tire Corporation v. United States, analyzes the implications of the holding, and presents possible solutions to manage this new development. Finally, this Note proposes that market-oriented enterprise (MOE) treatment provides the superior solution in advancing the preferences of domestic industries and foreign exporters, while also maintaining the integrity of the governing law.

I. TRADE-REMEDY LAW ATTEMPTS TO ACCOMMODATE CONDITIONS OF AN EVOLVING GLOBAL MARKET

A. The Steel Cases of the 1980s

I. Commerce Concluded that Subsidies Cannot Be Found in NMEs

In November 1983, several U.S. steel manufacturers filed CVD petitions with the International Trade Administration (ITA). In Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,370 (May 1, 1984) [hereinafter Carbon Steel Wire Rod from Czechoslovakia]; Carbon Steel Wire Rod from Poland: Final Negative Countervailing Duty
Rod from Czechoslovakia, petitioners alleged that certain Czechoslovakian and Polish manufacturers, producers, and exporters of carbon steel wire rods were "receiv[ing], directly or indirectly, benefits constituting [subsidies] within the meaning of section 303 of the [Trade] Act [of 1930]." The ITA concluded that CVDs were inapplicable because subsidies could not be found in economies that do not function under ordinary market principles.

First, the ITA reasoned that subsidies do not exist in an NME:

[A] subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth.

In NME[s], 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. Resources may appear to be misallocated in an NME when compared to the standard of a market economy, but the resource misallocation results from central planning, not subsidies.

The ITA concluded that both Czechoslovakia and Poland could be characterized as NMEs because the government of each nation maintained...
centralized control over the market and extensively involved itself in price planning.\textsuperscript{40}

Second, the ITA considered the congressional intent regarding the application of CVDs to NMEs.\textsuperscript{41} The original countervailing statutes did not address treatment toward NMEs because no country had exhibited that market form when Congress initially drafted the statutes.\textsuperscript{42} Although the language of the countervailing statute remained largely unchanged throughout the years,\textsuperscript{43} Congress specifically amended antidumping\textsuperscript{44} and safeguard\textsuperscript{45} laws to combat harm caused by trade with NME countries.\textsuperscript{46} Considering the congressional silence and lack of clear intent, the ITA inferred that Congress did not intend for countervailing duties to be levied against imports from NMEs.\textsuperscript{47}

Finally, the ITA afforded a high degree of deference to administrative decisions,\textsuperscript{48} recognizing that Commerce maintains “broad discretion” in determining whether a subsidy exists under various circumstances.\textsuperscript{49} From this analysis, the ITA conclusively determined that such a subsidy could not exist in an NME.\textsuperscript{50}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{40} Id. at 19,373; Carbon Steel Wire Rod from Poland, 49 Reg. at 19,377 (“[F]or NME[‘]s . . . prices are administered and . . . do not have the same meaning as prices in a market economy . . . economic activity is centrally directed through the use of administered prices, plans and targets.”). Because NMEs fail to exhibit traditional market forces, in an NME country, [p]rices are set by central planners. “‘Losses’” suffered by production and foreign trade enterprises are routinely covered by government transfers. Investment decisions are controlled by the state. Money and credit are allocated by the central planners. The government sets the wage bill. Access to foreign currency is restricted. Private ownership is limited to consumer goods. Id. at 19,376; see also Cont’l Steel Corp. v. United States, 614 F. Supp. 548, 549 (Ct. Int’l Trade 1985) (“[T]he existence of [NMEs] was found to be evidenced by central government control of prices, central government control of the allocation of resources and . . . extremely limited convertibility of the national currency.”), vacated, rev’d in part sub nom. Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).
\item \textsuperscript{41} Carbon Steel Wire Rod from Czechoslovakia, 49 Fed. Reg. at 19,373.
\item \textsuperscript{42} See Georgetown Steel Corp., 801 F.2d at 1314.
\item \textsuperscript{43} Carbon Steel Wire Rod from Czechoslovakia, 49 Fed. Reg. at 19,373.
\item \textsuperscript{44} See Trade Act of 1974, Pub. L. No. 93-618, §321(c), 88 Stat. 1978, 2047 (codified as amended at 19 U.S.C. §1677b(c) (2006)) (deriving dumping calculations from surrogate market-economy countries because valuations from state-controlled-economy countries were unreliable).
\item \textsuperscript{45} See 19 U.S.C. §§ 2436, 2437 (providing special provisions for application against NME countries).
\item \textsuperscript{46} See, e.g., Carbon Steel Wire Rod from Czechoslovakia, 49 Fed. Reg. at 19,373.
\item \textsuperscript{47} Id. at 19,374 (finding that “Congress [had] reaffirmed its determination to regulate unfair competition from NME countries” by deliberately amending the antidumping statute and preserving the countervailing statute.).
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id. (citing United States v. Zenith Radio Corp., 562 F.2d 1209, 1316 (C.C.P.A. 1977), aff’d, 437 U.S. 443 (1978)).
\item \textsuperscript{50} Id.
\end{enumerate}
\end{footnotesize}
2. The CIT Held that Commerce Misapplied the Law in the Steel Cases

After the ITA issued its decision, petitioners quickly challenged the holding before the CIT.\textsuperscript{51} In \textit{Continental Steel}, the CIT reversed the ITA’s conclusion in \textit{Carbon Steel Wire Rod from Czechoslovakia}.\textsuperscript{52}

First, the CIT inferred that Congress intended for the countervailing-duty law to cover “any country,” regardless of the form of the nation’s economy.\textsuperscript{53} The court reasoned that the comprehensiveness and “meticulous inclusiveness” of the statutory language demonstrated Congress’s intent “to cover all possible variations of the acts sought to be counterbalanced [by CVD’s].”\textsuperscript{54} Therefore, the court concluded that Congress did not intend for countervailing actions to include a jurisdictional bar based on a country’s economic system.\textsuperscript{55}

Second, the CIT found that the ITA based its decision on fallacies and illogical reasoning.\textsuperscript{56} The court disagreed with the ITA’s underlying premise that subsidies can exist only in market economies.\textsuperscript{57} In fact, the court stated that the essence of subsidization is “the encouragement of exportation by means of some type of special preference.”\textsuperscript{58} Although such preferential treatment may be difficult to identify and measure in an NME,\textsuperscript{59} the court found that these difficulties should not excuse the imposition of CVDs.\textsuperscript{60}

Based on its review of the legislative history and statutory language, the CIT concluded “that variation in the extent of control exercised by the foreign government over the economy was not a factor impeding the enforcement of


\textsuperscript{52} See Cont’1 Steel, 614 F. Supp. at 550, 557 (“The position taken by Commerce is at odds with the plain meaning and purpose of the law. It contradicts judicial interpretation of the law. It is inconsistent with past administration of the law. It also appears to be self-contradictory from its inception.”).

\textsuperscript{53} Id. at 550.

\textsuperscript{54} Id. at 551.

\textsuperscript{55} See id. at 551–52.

\textsuperscript{56} Id. at 550.

\textsuperscript{57} Id. at 552.

\textsuperscript{58} Id. at 553.

\textsuperscript{59} See Wang, supra note 10, at 602 (“[I]t may be practically impossible to determine the level of specific subsidies in a nonmarket economy.”); \textit{see generally} Carbon Steel Wire Rod from Czechoslovakia, 49 Fed. Reg. 19,370, 19,372 (May 1, 1984) (pronouncing Congress’s difficulty “disaggregat[ing] government actions in such a way as to identify the exceptional action that is a subsidy” in the context of NMEs).

\textsuperscript{60} Cont’1 Steel, 614 F. Supp. at 554.
the [countervailing] law." Thus, the CIT directed Commerce to reinitiate countervailing investigations on the parties to the case.

3. The Federal Circuit Reinstated the ITA's Ruling, Holding that Countervailing Law Does Not Apply to NMEs

The United States appealed the CIT's ruling in Continental Steel, and the Court of Appeals for the Federal Circuit heard the consolidated case in Georgetown Steel v. United States. The Federal Circuit vacated the CIT's decision and reinstated the ITA's conclusions in Carbon Steel Wire Rod from Czechoslovakia. Considering the legislative history and the development of applicable trade law, the Federal Circuit concluded that Congress intended for antidumping law—not countervailing law—to remedy unfair trade practices by NMEs.

In reaching its decision, the Federal Circuit first considered whether economic incentives and benefits granted by the government of the NME country constituted a "subsidy" under the U.S. countervailing statute. In determining whether CVDs could apply to NMEs, the court found that it could not rely on the statute's plain language because NMEs did not exist when Congress originally drafted the statute in 1897. The court believed that the evidence that Congress had amended the countervailing statute six times, yet failed to address the issue of treatment toward NMEs, "strongly suggest[ed] that Congress did not intend to change the scope or meaning of the provision." Furthermore, through the Trade Act of 1974, Congress deliberately amended the Antidumping Act of 1921 to address exports from NMEs through the "surrogate country" methodology. Ultimately, the court reasoned that "changes in the antidumping law [that] were necessary to make that law more effective in dealing with exports from [NMEs], coupled with [congressional] silence about application of the countervailing duty law to such exports, strongly indicate[d] that Congress did not believe that the latter law covered nonmarket economies." Thus, the court found that the legislative

61. Id. at 556–57.
62. Id. at 557. In its conclusion, the court noted, "[t]o allow [Commerce] to develop such an extraordinary exception to the law would go beyond deference to an administrative agency." Id.
63. Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1308–10 (Fed. Cir. 1986) (examining the propriety of imposing CVDs on potassium chloride (potash) products imported from the German Democratic Republic and the Soviet Union).
64. Id. at 1317–18.
65. Id.
66. Id. at 1313.
67. Id. at 1314.
68. Id.
69. Id. at 1316; see also 19 U.S.C. § 1677b(c) (1982) (outlining the methodology in which the antidumping duties in NME countries are determined by the "value of such or similar merchandise in a non-State-controlled-economy country").
70. Georgetown Steel, 801 F.2d at 1317.
history clearly demonstrated Congress’s intention for antidumping law to serve as the exclusive remedy against imports from NMEs.\textsuperscript{71}

The court also recognized that the administrative agency has "broad discretion in determining the existence of a 'bounty' or 'grant' under [countervailing] law."\textsuperscript{72} Therefore, the judiciary must afford substantial deference to Commerce's conclusions.\textsuperscript{73} Thus, after evaluating the statutory language, the characteristics of NMEs, and the legislative history, the Federal Circuit ultimately concluded that Congress did not intend for countervailing law to address harm caused by imports from NMEs.\textsuperscript{74}

\textbf{B. The Long-Standing Commitment to Georgetown Steel}

Congress's subsequent actions demonstrate its agreement with the Federal Circuit's ruling in \textit{Georgetown Steel}.\textsuperscript{35} Although the House of Representatives proposed a bill that would have "amend\[ed\] the Tariff Act of 1930 to state that the countervailing duty law does apply to a nonmarket economy country to the extent that the administering authority can reasonably identify, and determine the amount of, a subsidy provided by that country," this language was not adopted in the final Omnibus Trade and Competitiveness Act of 1988.\textsuperscript{76} Moreover, five subsequent Congresses attempted to address the application of CVDs against NMEs by permitting the countervailable subsidy to be measured through a surrogate country methodology; however, committees later dropped each proposed bill.\textsuperscript{77}

\textsuperscript{71} Id. at 1318 ("Congress . . . has decided that the proper method for protecting the American market against selling by nonmarket economies at unreasonably low prices is through the antidumping law.").

\textsuperscript{72} Id. (citing \textit{Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837, 842-45 (1984)). \textit{Chevron} is the landmark case establishing agency deference. \textit{Chevron}, 467 U.S. at 842-45 (citations omitted) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations . . . ."); see also \textit{Jackson ET AL.}, supra note 2, at 123 ("[W]here courts are dealing with broad grants of power to [an administrative agency] . . . they are unlikely to second guess the Executive Branch."); 21A \textit{AM. JUR. 2D Customs Duties and Import Regulations} § 257 (West 2008) (describing agency deference in countervailing and antidumping proceedings).

\textsuperscript{73} \textit{See Chevron}, 467 U.S. at 842-45.

\textsuperscript{74} \textit{Georgetown Steel}, 801 F.2d at 1314.

\textsuperscript{75} \textit{See JONES, supra note 7, at 11} (explaining that the \textit{Georgetown Steel} decision "triggered [an] immediate reaction in Congress"). \textit{But see Wang, supra note 10, at 606-07 n.61} (noting that some politicians sought to counter \textit{Georgetown Steel} through congressional action, but these attempts proved unsuccessful).


\textsuperscript{77} \textit{JONES, supra note 7, at 11}.
Similar to Congress's reaction, Commerce loyalty adhered to the court's holding in *Georgetown Steel*.78 Courts have recognized this consistency, noting, "Commerce's past interpretation of the [countervailing] statutes had only been along clear lines—either a country was an NME country and CVDs were not imposed, or it was a[] [market-economy] country and CVDs could be imposed."79 In fact, Commerce categorically refused to carry out any CVD investigations against NMEs for nearly twenty years.80 This trend continued through the early years of the twenty-first century.81 Between 2000 and late 2006, Commerce had initiated forty-six petitions for ADs and zero petitions for CVDs against China.82

One narrow exception arose in 1991, when Commerce reviewed a petition for the imposition of CVDs in *Oscillating and Ceiling Fans from the People's Republic of China*.83 The petitioner alleged that despite China's NME status, Commerce could properly calculate CVDs because the specific fan industry was sufficiently market-oriented.84 In considering whether a petitioner qualifies as a market-oriented industry (MOI),85 Commerce set forth the following criteria:

1. There must be virtually no government involvement in setting prices or amounts to be produced....
2. [T]he industry... should be characterized by private or collective ownership...
3. [M]arket-determined prices must be paid for all significant inputs...
and for an all-but-insignificant proportion of all the inputs accounting for the total value of the merchandise.86

78. *Id.* at 8.
80. *JONES*, supra note 7, at 8; see *TATELMAN*, supra note 12, at 9–10.
82. *Id.*
84. Initiation of Countervailing Duty Investigations: Oscillating Fans and Ceiling Fans from the People's Republic of China, 56 Fed. Reg. at 57,616–17. The petitioner argued that the fan industry operates like a market economy because privately owned producers comprise the majority of the fan sector, the government does not control input by central planning, and the government does not influence pricing or production decisions. *Id.*
85. Under the market-oriented industry approach, Commerce (foregoing the surrogate-country valuation) calculates duties according to the values in its home market. See *Ansel*, supra note 8, at 898–99.
Nevertheless, the ITA ultimately concluded that the fan industry did not meet the third requirement due to the government’s substantial involvement in "supplying significant inputs" to the fan industry. Therefore, Commerce declined to apply countervailing duties against that specific industry.

Commerce remained steadfast in its adherence to the Georgetown Steel ruling. Although the Oscillating and Ceiling Fans from the People’s Republic of China decision potentially indicated a wavering approach toward trade remedies against NMEs, Commerce adamantly refused to investigate any CVD petitions until late 2006.

C. Departure from Georgetown Steel: Accommodating for Trends in the Modern Global Economy

By 2007, Commerce departed from its general policy prohibiting the application of CVDs to NMEs. Commerce re-evaluated the Georgetown Steel decision, considering whether the holding remained applicable to the present Chinese economy. Although Commerce determined that China
should remain an NME for the purposes of antidumping law,\textsuperscript{94} it concluded that the substantial economic reforms of the Chinese economy made it possible to identify and measure benefits and incentives, such as subsidies, for the purposes of countervailing law.\textsuperscript{95}

Commerce reasoned that China should remain designated as an NME under antidumping law because of the government’s extensive involvement in the economy.\textsuperscript{96} The agency found that the Chinese government continued to maintain control over the economy as demonstrated through extensive state-owned enterprises, restriction of the movement of workers through limited free bargaining, and insulation of Chinese national currency from market forces.\textsuperscript{97}

Nevertheless, Commerce concluded that China’s present-day economy embodied a significant departure from the Soviet-style economies exemplified in *Georgetown Steel*.\textsuperscript{98} The agency noted that the Chinese government had eliminated price controls on nearly all Chinese products,\textsuperscript{99} allowed for the development of an extensive private-industrial sector in areas not reserved for the state’s operation,\textsuperscript{100} and permitted employers and employees to renegotiate wages.\textsuperscript{101} In essence, the Chinese government substantially reduced its control over many areas of its economy.\textsuperscript{102} Because the present-day Chinese economy exhibits more market-oriented features than the economies illustrated in *Georgetown Steel*, Commerce could determine subsidies under countervailing law.\textsuperscript{103}

\textsuperscript{94} See *Georgetown Steel Memorandum*, supra note 23, at 2–4 (noting that the Chinese Government has “preserved a significant role for the state in the economy”).


\textsuperscript{96} *Georgetown Steel Memorandum*, supra note 23, at 5–6.

\textsuperscript{97} Id. at 3.

\textsuperscript{98} See id. at 5 (observing that although the Chinese market remained “riddled with distortions attendant to the extensive intervention of the PRC government,” it had become notably more flexible).

\textsuperscript{99} Id. The Memorandum reports that “market forces now determine the prices of more than 90 percent of products traded in China.” Id. (quoting THE ECONOMIST INTELLIGENCE UNIT, COUNTRY COMMERCE: CHINA 73 (2006)).

\textsuperscript{100} Id. at 6–7 (explaining that many of the state-owned industries have been significantly privatized).

\textsuperscript{101} Id. at 5.

\textsuperscript{102} See id. at 7 (noting that the present-day Chinese economy “features both a certain degree of private initiative as well as significant government intervention, combining market processes with continued state guidance”).

\textsuperscript{103} See id. at 10 (“[W]e [Commerce] believe that it is possible to determine whether the PRC Government has bestowed a benefit upon a Chinese producer . . . and whether any such benefit is specific.”).
As a result, Commerce definitively changed its course in 2007 when the agency issued its first CVD investigation against an NME country. In Coated Free Sheet Paper from the People’s Republic of China, Commerce investigated subsidies on Chinese imports of coated free sheet paper. The agency’s actions in Coated Free Sheet Paper marked a drastic departure from its long-standing commitment to the Federal Circuit’s landmark decision in Georgetown Steel; Commerce demonstrated that it could measure subsidies in China—an NME country.

II. GPX v. UNITED STATES RESTRICTS COMMERCE’S POLICY SHIFT BY REQUIRING IMPROVED METHODOLOGIES TO MEASURE DUTIES AGAINST NMES

A. A Surge of Petitions for CVDs and ADs Against China

With Commerce’s monumental policy shift in 2007, “the floodgates had opened,” and Commerce was inundated with petitions seeking to invoke CVDs against China. In response, the agency has initiated twenty-five CVD investigations and thirty-seven AD investigations against China. These...
events marked the dramatic change in the U.S. approach to applying trade remedies against China and other NMEs. The decision in *Coated Free Sheet Paper* lifted the moratorium placed on CVDs against NME countries and triggered a starkly different trend in trade-remedy law.

B. U.S. Tire Producers Sought to Invoke Concurrent Duties Against Chinese Exporters of Off-the-Road Tires

Producers of off-the-road tires joined the flood of petitioners and requested that Commerce impose simultaneous duties on certain imports from China. On June 18, 2007, petitioners filed a complaint on behalf of certain U.S. tire producers, seeking to invoke ADs and CVDs against Chinese exporters of off-the-road tires. The petitioners claimed that they had been materially injured by Chinese imports of certain off-the-road tires “sold in the United States at less than fair value,” in violation of 19 U.S.C § 1673 (antidumping law). The petitioners further alleged that domestic producers were materially injured...
by Chinese exports of certain off-the-road tires that received unlawful government subsidies in violation of 19 U.S.C. § 1671 (countervailing law).116

Commerce reviewed the petition and agreed to initiate both countervailing and antidumping investigations.117 In carrying out its investigation, Commerce selected Guizhou Tire Company (GTO), Hebei Starbright Tire Company, Ltd. (Starbright), and Tianjin United Tire & Rubber International Company (TUTRIC), as mandatory respondents to represent Chinese producers and exporters of the targeted merchandise.118 After conducting a thorough investigation, the ITA announced that it would impose both ADs and CVDs on Chinese imports of off-the-road tires.119 Additionally, the International Trade Commission found the imposition of import-restricting remedies proper because the targeted Chinese imports had caused material injury to the specified domestic tire industry.120 This affirmative-duty determination accompanied the influx of simultaneous import-restricting remedies placed against imports from China since Coated Free Sheet Paper.121

C. Attacking the Existence of a Chinese Exporters Challenged the New U.S. Trade Policy

With the surge of petitions requesting CVDs against NME countries, Chinese exporters have both resisted and challenged the new U.S. trade policy.122 In particular, exporters from NMEs argued that the U.S. trade-remedy law is manifestly unjust and contradictory, creating a regime

119. See Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 73 Fed. Reg. at 51,625 (imposing an AD on Starbright (29.93%), TUTRIC (8.44%), and GTC (5.25%)); Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 Fed. Reg. at 40,483 (imposing a CVD on Starbright (14%), TUTRIC (6.85%), and GTC (2.45%)).
120. Certain off-the-Road Tires from China; Determination, 73 Fed. Reg. 51,842 (Sept. 5, 2008). For both ADs and CVDs, the ITA is responsible for determining the existence of dumping or countervailable subsidies, whereas the ITC is responsible for the injury determination. See 19 U.S.C. § 1671(a) (imposing countervailing duties); id. § 1673 (imposing antidumping duties).
121. See McBride, supra note 7, at 285; AD & CVD Investigations Since 2000, supra note 81.
122. See McBride, supra note 7, at 286, 294 ("Given the implications of Commerce's change in practice and determination that it is possible to calculate countervailing duty rates with respect to Chinese subsidies, it should come as no surprise that some of its determinations are now in litigation."); see also supra note 17.
premised on the notion that China is market-oriented in the context of countervailing law, but not market-oriented for the purposes of antidumping law.123 This was the basis of GPX’s argument when it filed a complaint in the CIT on September 9, 2008, challenging Commerce’s affirmative determination to apply concurrent ADs and CVDs against certain Chinese imports of off-the-road tires.124 Upon examination of the court’s reasoning in GPXI, it is evident that the ruling marked a new stage in U.S. trade policy with regard to NME countries.125

D. The CIT’s Mixed Ruling: Allowing for the Application of CVDs Against NME Countries, but Requiring Improved Methodologies in the Application of Such Duties

1. CVDs Can Be Applied Against NME Countries

In GPXI, the CIT ruled that there was no statutory bar on the imposition of CVDs against NME countries because it could not conclude “from the statutory language alone that Commerce does not have the authority to impose CVDs on products from an NME-designated country.”126 However, GPX argued that Congress intended for antidumping law to be the sole remedy to combat unfair-trade practices by NMEs.127 GPX explained that the legislative history clearly demonstrated the inapplicability of countervailing law against NME countries because Congress “continuously [left] the CVD statute intact while actively amending the AD law as it applied to NME countries.”128

The court, however, reasoned that Commerce had broad discretion to determine the application of its import-restricting trade remedies.129 And, although Commerce previously indicated that it would not apply CVDs to NME countries because it could not disaggregate countervailable subsidies in the Soviet-style markets of the 1980s,130 the court held that Commerce still maintained the ability to decide whether the subsidy exists and whether the remedy is proper.131

123. See Durling, supra note 25, at *7 (noting the incompatibility of Commerce’s new practice in “try[ing] to defend two opposing and arguably irreconcilable views at the same time”).
125. See Durling, supra note 25, at *1–4.
126. GPXI, 645 F. Supp. 2d at 1239–40; see also Durling, supra note 25, at *6 (“[T]he CVD statute is ambiguous on the treatment of NME countries, and . . . the Department has the discretion to apply CVD law to NME countries.”).
127. See GPXI, 645 F. Supp. 2d at 1239.
128. Id.
129. Id. (citing Magnola Metallurgy, Inc. v. United States, 508 F.3d 1349, 1355 (Fed. Cir. 2007); Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1318 (Fed. Cir. 1986)).
130. See supra text accompanying note 39.
131. See GPXI, 645 F. Supp. 2d at 1239.
2. Commerce Charged with Correcting the High Potential for Double Counting Duties

Although the CIT concluded that Commerce possesses the authority to apply CVDs against NME countries, the court recognized the uncertainty regarding "how Commerce is to account for the overlap between the statutes when imposing both CVD and AD duties on goods from an NME country." The court acknowledged that a "high potential" for double counting existed when the U.S. imposes simultaneous duties. In GPX I, the court stated, "Commerce's interpretation of the NME AD statute in relation to the CVD statute here and the resulting methodologies are unreasonable." For these reasons, the court ordered Commerce to refrain from imposing simultaneous duties until it could accurately determine the existence and extent of the double counting.

At its inception, Congress did not foresee the possibility of a "hybrid" trade-remedy regime in which NME-methodology ADs would be imposed simultaneously with market-economy CVDs. However, concurrent ADs and CVDs were imposed in this instance. Thus, Commerce applied the ADs based on the antidumping margin, which is calculated by subtracting the export price from the normal value of the merchandise. In the context of NMEs, where prices and values are significantly distorted, Commerce uses data...
from a surrogate (market-economy) country to measure the normal value of the particular product.140 Therefore, when Commerce subtracts the export price from the normal value (derived from third-country data), the price differential should "reflect the price advantages that the exporting company has obtained from both export and domestic subsidies."141 Thus, a high potential for double counting exists when CVDs are applied in addition to ADs, which, in theory,142 have already offset the domestic benefit through the surrogate-country methodology.143

Both federal statutes and applicable World Trade Organization (WTO) agreements set forth rules and procedures to ensure the fair and accurate measurement of trade remedies.144 One court has commented that the statutory scheme is designed to "facilitate [Commerce's] determination of dumping margins as accurately as possible."145 More specifically, federal statutes and WTO agreements include provisions that require the antidumping margin to account for a concurrent CVD imposed on the targeted product.146 In the context of countries designated as NMEs, Commerce and the WTO allow

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140. See 19 U.S.C. § 1677b(c); see also JACKSON ET AL., supra note 2, at 783 (explaining antidumping rules in the context of NME); Piskorski, supra note 10, at 603–09 (explaining dumping calculations for exports from nonmarket economies). Commerce generally selects India or Pakistan as a surrogate for measuring the fair-market value of Chinese exports. Lei Yu, Note, Rule of Law or Rule of Protectionism: Anti-Dumping Practices Toward China and the WTO Dispute Settlement System, 15 COLUM. J. ASIAN L. 293, 327 (2002); see also supra note 22 (discussing the use of surrogate countries to calculate the normal value of products).

141. U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 10, at 18. The study further articulates the issue by describing the methodology that is used among market-economy countries:

In contrast, when a market[-]economy methodology is used, both the normal value and the export price will, in principle, reflect the benefits that the producer has derived from domestic subsidies. Therefore, comparing the normal value with the export price will not result in an antidumping duty rate that captures the benefits provided by these subsidies; these benefits will be captured only in a CVD investigation. Thus, domestic subsidy benefits generally would not be double counted.

Id. at 18 n.27.

142. Although the NME antidumping methodology largely offsets the benefits derived from domestic subsidies, the surrogate country methodology may not entirely offset the countervailable subsidy in the NME country. See id. at 18 n.28.

143. Id. at 17–19; see GPX II, 715 F. Supp. 2d 1337, 1344 n.5 (Ct. Int'l Trade 2010) ("The broad NME AD margin would cover measureable benefits from a subsidy, which a CVD margin is intended to counteract."); McDaniel, supra note 14, at 762–65 (presenting the double-counting issue in the context of NME countries).

144. See infra notes 145–48 and accompanying text.

145. Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185, 1191 (Fed. Cir. 1993).

146. See 19 U.S.C. § 1677a(c)(1)(C) (2006) (requiring the calculation of the dumping margin to account for any countervailable subsidy); General Agreement on Tariffs and Trade, art. VI, Oct. 30, 1947, 61 Stat. A–11, A–24, 55 U.N.T.S. 188, 214 ("No product . . . shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.").
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147. See U.S. Gov’t Accountability Office, GAO-06-231, U.S.-China Trade: Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies 26–27 (2006); Protocol of Accession, Accession of the People’s Republic of China, WT/L/432 § 15(a)(i) (Nov. 23, 2001) (providing that, if the industry demonstrates that it is sufficiently market-oriented, then the WTO must use the domestic prices in measuring the AD); see also supra text accompanying note 86 (listing the criteria for the designation as a market-oriented industry).

148. See 19 U.S.C.A. § 1677a n.15 (Supp. 2010); GPX I, 645 F. Supp. 2d 1231, 1242–43 (Ct. Int’l Trade 2009); McBride, supra note 7, at 293 (explaining that the exporter must demonstrate: (1) the domestic subsidy lowered all the prices in the domestic market; and (2) the existence of the double remedy).

149. See supra text accompanying notes 146–48.

150. See, e.g., infra note 238 (describing characteristics of China’s economy, including its work force, labor, and resources).

151. See GPX I, 645 F. Supp. 2d at 1240.

152. Id. at 1239.

153. Id. at 1242.

154. Id.

155. Id. at 1243; see 19 U.S.C.A. § 1677a n.15 (Supp. 2010).

156. GPX I, 645 F. Supp. 2d at 1243.

157. Id. at 1243–44. In noting significant reforms to the Chinese economy, Commerce recognized the need to modify its current antidumping policy toward NME countries. See Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 Fed. Reg. 29,302, 29,303 (May 25, 2007) (requesting public
for MOE status because it had no policies, procedures, or standards for evaluating MOE status was arbitrary and capricious and unsupported by substantial evidence."\(^{158}\)

For these reasons, the CIT remanded the case and ordered Commerce to cease its imposition of CVDs against Chinese imports of off-the-road tires until the agency adopted additional methodologies that would avoid double counting when parallel duties are imposed.\(^{159}\) The court also instructed Commerce to review GPX’s application for treatment as an MOE.\(^{160}\)

**E. In GPX II, the CIT Affirmed Its Concerns About the High Probability of Double Counting**

After the CIT remanded *GPX I*, Commerce took steps, although under protest, to comply with the court’s instructions.\(^{161}\) Commerce continued to apply CVDs against China, but offset the CVD against the antidumping margin, calculated according to the NME methodology.\(^{162}\) Commerce also agreed to evaluate Starbright’s request for treatment as an MOE,\(^{163}\) but it concluded that Starbright did not present adequate evidence to merit such a status.\(^{164}\)

On August 4, 2010, in *GPX II*, the CIT reviewed Commerce’s compliance with the remand instructions.\(^{165}\) The court’s determinations ushered in a new era in trade-remedy law for tariffs applied against NMEs.\(^{166}\) The decision has raised legal issues, demonstrating the insufficiency and uncertainty of the

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\(^{158}\) *GPX I*, 645 F. Supp. 2d at 1246.

\(^{159}\) *Id.* at 1234–35. In its decision, the court explained, "[i]f Commerce is to apply CVD remedies where it also utilizes NME AD methodology, Commerce must adopt additional policies and procedures for its NME AD and CVD methodologies to account for the imposition of the CVD law to products from an NME country and avoid to the extent possible double counting of duties."

\(^{160}\) *Id.* at 1246.

\(^{161}\) Dep’t of Commerce, Final Results of Redetermination Pursuant to Remand at 2, *GPX Int’l Tire Corp. v. United States (GPX I)*, 645 F. Supp. 2d 1231 (Ct. Int’l Trade 2009), available at http://ia.ita.doc.gov/remands/09-103.pdf [hereinafter Remand Results] (describing Commerce’s respectful disagreement with the Court’s reasoning in *GPX I*).

\(^{162}\) *See id.* at 7–11; *see also GPX II*, 715 F. Supp. 2d 1337, 1345 (Ct. Int’l Trade 2010) ("Commerce proposes guarding against double counting by merely offsetting CVD against NME AD after it uses its regular methodologies to calculate the CVD and NME AD margins.").

\(^{163}\) *See infra* text accompanying note 176.


\(^{165}\) *See GPX II*, 715 F. Supp. 2d at 1341.

\(^{166}\) *See infra* notes 181–83 and accompanying text (describing why *GPX II* may lead to substantial reform in trade policy).
countervailing and antidumping statutes and the limitations of agency deference.167

1. Failure to Correct the "Double Counting" Problem

Although the court reaffirmed the propriety of imposing CVDs against NME countries, the GPX II court found fault with Commerce's methodology of offsetting the CVD against the AD calculation.168 The court found it redundant and wasteful to conduct a comprehensive countervailing investigation because the new offset value would "always equal the unaltered NME AD margin."169 Although Commerce argued that the statute required it to levy CVDs if a countervailable subsidy existed,170 the court believed that Commerce's interpretation was contrary to Georgetown Steel.171 Thus, the court held that the "offset [did] not comply with the statute." Finding Commerce's "improved methodologies"172 insufficient, the court ordered Commerce to cease its imposition of CVDs on the parties to the action.174

2. Commerce's Decision to Deny MOE Status to Starbright was Justified

Despite the lack of established rules and criteria to evaluate the existence of an MOE,175 the GPX I court ordered Commerce to consider its applicability.176 Upon examining Starbright's request to be treated as an MOE, the GPX II court agreed with Commerce's conclusion that Starbright did not warrant MOE status.177 Starbright claimed it should be treated as an MOE because of "(1) its complete ownership by a U.S. company, GPX; (2) its focus upon external markets; and (3) its belief that any distortions to its manufacturing costs would

167. See infra note 182.

168. GPX II, 715 F. Supp. 2d at 1345.

169. Id.

170. See Remand Results, supra note 161, at 8 (interpreting the language in the 1930 Tariff Act as providing for a mandatory duty: "if a country is providing a countervailable subsidy ... a countervailing duty 'shall' be imposed"); see also Bennet Marsh, Commerce Issues Redetermination On Tires CVD Case "Under Protest," INSIDE US-CHINA TRADE, Sept. 8, 2010, at 1, 10 (presenting Commerce's contention about the mandatory nature of the CVD statute).

171. GPX II, 715 F. Supp. 2d at 1345 (quoting GPX I, 645 F. Supp. 2d 1231, 1240 (Ct. Int'l Trade 2009)) (noting that Georgetown Steel "makes clear that Commerce need not apply CVD law to the same goods that are subject to NME AD calculations").

172. Id. at 1342. The court noted that because 19 U.S.C. § 1677a provides specified permissible offsets for the dumping margin, Commerce's actions are inconsistent with the statute. See 19 U.S.C. § 1677a(c)-(d) (2006) (listing specific adjustments to export prices); GPX II, 715 F. Supp. 2d at 1345.

173. GPX II, 715 F. Supp. 2d at 1342.

174. Id. at 1341–42.

175. See supra note 157 and accompanying text (discussing Commerce's explanation for refusing to review Starbright's request to be treated as an MOE).

176. GPX II, 715 F. Supp. 2d at 1343.

177. Id. at 1347–48.
be addressed in the companion CVD case."\textsuperscript{178} Commerce disagreed because Starbright had provided insufficient evidence and a cursory analysis in its separate rates application.\textsuperscript{179} The court ultimately found Commerce's conclusion to be "reasonable and supported by substantial evidence."\textsuperscript{180}

\textbf{F. GPX II Brings the Need for Reform to the Forefront of Trade Policy}

Although this case is binding only on the actual parties to the dispute,\textsuperscript{181} \textit{GPX II} has the potential to incite a new chapter in trade-remedy jurisprudence, agency regulation, and legislation.\textsuperscript{182} Trade policy had remained relatively unchanged for twenty-three years.\textsuperscript{183} Nevertheless, Commerce has recognized the need to update trade policy to meet the modern demands of the present-day economy.\textsuperscript{184} \textit{GPX II} demonstrates the flaws inherent in the policy shift, and other adjustments that must be made to ensure that the law effectively and fairly accomplishes its objective.

\section*{III. THE FAR-REACHING IMPACT OF \textit{GPX II}: HIGHLIGHTING THE NEED FOR AN EFFECTIVE SOLUTION}

\textbf{A. GPX II Reaches Beyond the Tire Industry}

To foster a strong and successful domestic economy, U.S. trade law must promote healthy trade relations with China.\textsuperscript{185} Economic ties with China began to flourish in 1979, when the parties signed a bilateral trade agreement

\begin{itemize}
\item \textsuperscript{178} Remand Results, \textit{ supra} note 161, at 12.
\item \textsuperscript{179} \textit{GPX II}, 715 F. Supp. 2d at 1347. Commerce concluded that Starbright's MOE status was unwarranted because it (1) failed to provide concrete evidence demonstrating that it operated independently from the government regarding its export activities; (2) it failed to provide evidence supporting its premise that its exclusive orientation to external markets eliminates the influence of nonmarket factors in its business decisions; and (3) it failed to provide a "factual or legal basis to conclude that the presence of a companion CVD case and findings that a company has received countervailable subsidies." Remand Results, \textit{ supra} note 161, at 16-20.
\item \textsuperscript{180} \textit{GPX II}, 715 F. Supp. 2d at 1348. Although MOE status was not proper in this case, the court was "alerting Commerce to the possibility of using MOE treatment to guard against double counting." \textit{Id.} at 1348 n.9.
\item \textsuperscript{182} Layton et al., \textit{ supra} note 91 (discussing the potential outcomes that could stem from the CIT's decision in \textit{GPX II}).
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{See} Georgetown Steel Memorandum, \textit{ supra} note 23, at 3.
\item \textsuperscript{185} \textit{See} KERRY DAMBAUGH, \textit{CONG. RESEARCH SERV.}, R40457, \textit{CHINA-U.S. RELATIONS: CURRENT ISSUES AND IMPLICATIONS FOR U.S. POLICY}, at i (Nov. 20, 2009) ("The bilateral relationship between the U.S. and [China] is vitally important, [to a] wide range of areas including . . . economic policy, security, foreign relations, and human rights.").
\end{itemize}
that restored diplomatic ties.\textsuperscript{186} As of June 2010, China has become the second-largest trading partner of the United States,\textsuperscript{187} the third-largest export market,\textsuperscript{188} and the greatest supplier of imports.\textsuperscript{189} Nevertheless, the mounting economic downturn has strained U.S. trade relations with China.\textsuperscript{190} China’s “unfinished transition from a centrally planned economy,”\textsuperscript{191} coupled with a severe trade deficit,\textsuperscript{192} has magnified tensions and concerns regarding China’s viability as a trading partner.\textsuperscript{193}

The \textit{GPX II} decision bears the capacity for a far-reaching impact on current trade-remedy law\textsuperscript{194} in both the United States and abroad. \textit{GPX II} demonstrates the unsettled nature of trade-remedy law in the modern global economy.\textsuperscript{195} “[I]nherent contradiction[s]”\textsuperscript{196} riddle Commerce’s recent rulings, and Commerce and the CIT continue to disagree as to the meaning of the governing legislation and case law.\textsuperscript{197} However, both agree that China has

\begin{itemize}
  \item \textsuperscript{186} Morrison, supra note 31, at 1.
  \item \textsuperscript{187} Aside from Canada, China is the United States’ largest trading partner, with goods totaling $366 billion in 2009. Lum, supra note 32, at 8.
  \item \textsuperscript{188} United States’ exports to China totaled $69.6 billion in 2009. Office of the U.S. Trade Representative, supra note 31.
  \item \textsuperscript{189} In 2009, the United States imported $296.4 billion worth of goods from China. Id.
  \item \textsuperscript{190} Morrison, supra note 31, at 1–3, 14.
  \item \textsuperscript{192} Office of the U.S. Trade Representative, supra note 31 (“The U.S. goods trade deficit with China was $226.8 billion in 2009 . . . account[ing] for 45.3% of the overall U.S. goods trade deficit in 2009.”).
  \item \textsuperscript{193} Morrison, supra note 31, at 14 (describing major issues with the Chinese economic climate, such as China’s reluctance to adopt a market-based currency, its ineffective commitment to its obligations under its accession to the WTO, and its government’s involvement in promoting certain domestic industries); see also Wayne M. Morrison & Marc Labonte, Cong. Research Serv., RL 32165, China’s Currency: Economic Issues and Options for U.S. Trade Policy 23–26 (2008) (discussing the challenges of China’s currency manipulations, which give China a competitive trade advantage and harm U.S. jobs and businesses); Press Release, U.S. Dep’t of Treasury, Treasury Dep’t Statement Regarding Decision to Delay the Int’l Econ. and Exch. Rate Policies Rep. to Cong. (Oct. 15, 2010), available at http://www.treasury.gov/press-center/press-releases/Pages/tg910.aspx [hereinafter Treasury Dep’t Statement] (presenting the need to correct China’s significantly undervalued currency problem); Howard Schneider, U.S. Ramps Up China Currency Fight, Wash. Post, Oct. 7, 2010, at A18 (describing how the United States places pressure on China to let its currency freely float).
  \item \textsuperscript{194} See Layton et al., supra note 91.
  \item \textsuperscript{195} See GPX Int’l Tire Corp. v. United States (GPX III), No. 08-00285, 2010 WL 3835022, at *1 (Ct. Int’l Trade, Oct. 1, 2010) (admitting to the “unsettled state of the law” regarding \textit{GPX II}’s procedural and substantive issues); Marsh, supra note 170, at 10.
  \item \textsuperscript{196} Memorandum from Stephen J. Claeys, Deputy Assistant Sec’y for Imp. Admin., to David M. Spooner, Assistant Sec’y for Imp. Admin. (July 7, 2008).
  \item \textsuperscript{197} See, e.g., Remand Results, supra note 161, at 2 (illustrating the conflicting interpretations of law because the redetermination was made “under protest” from Commerce).
taken substantial strides in reforming economic policies in its transition to a free-market economy.\textsuperscript{198}

\textbf{B. Implications and Legality of Alternative Approaches}

According to GPX and the Chinese Government, the \textit{GPX I} ruling gave Commerce two options on remand: either “not applying the CVD law to China, or not applying the NME AD methodology.”\textsuperscript{199} Unless Congress passes legislation that specifically allows for Commerce’s application of parallel duties (despite risks of double counting),\textsuperscript{200} Commerce should employ an MOE analysis in its dumping and subsidy investigations to ensure fairness and equity to both Chinese exporters and domestic producers.\textsuperscript{201}

\textit{1. Legislation Authorizing Concurrent Duties Against NMEs}

With an express grant from Congress, Commerce may continue applying simultaneous duties against NME countries.\textsuperscript{202} In fact, Congress has already proposed such legislation through the Trade Enforcement Act\textsuperscript{203} and the Nonmarket Economy Trade Remedy Act.\textsuperscript{204}

Many spectators believe, as a result of the \textit{GPX II} ruling, that Congress will hurriedly pass legislation to authorize Commerce’s actions toward China.\textsuperscript{205} This notion finds support in President Barack Obama’s recent trade agenda, which announced Commerce’s new initiative to strengthen U.S. trade laws\textsuperscript{206}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{198} See \textit{GPX I}, 645 F. Supp. 2d 1231, 1249 (Ct. Int’l Trade 2009); Georgetown Steel Memorandum, supra note 23, at 4–11.
\item \textsuperscript{199} Remand Results, supra note 161, at 41; see Ansel, supra note 8, at 921.
\item \textsuperscript{200} See \textit{discussion infra Part III.B.1}.
\item \textsuperscript{201} See Ansel, supra note 8, at 923.
\item \textsuperscript{202} See 25 C.J.S. Customs Duties § 28 (West 2002). The judiciary’s statutory interpretation is restricted by the legislative intent. \textit{Id.} If Congress has expressly approved of Commerce’s actions, then the court must adhere to the legislative grant of authority. \textit{Id.} (“If the language of the statute is clear, then the Court of International Trade must defer to Congressional intent.” (citation omitted)).
\item \textsuperscript{203} See Trade Enforcement Act of 2009, H.R. 496, 111th Cong., § 201 (2009), available at http://www.govtrack.us/congress/bill.xpd?bill=h111-496 (“To amend United States trade laws to eliminate foreign barriers to exports of United States goods and services, to restore rights under trade remedy laws, to strengthen enforcement of United States intellectual property rights and health and safety laws at United States borders, and for other purposes.”).
\item \textsuperscript{204} Nonmarket Economy Trade Remedy Act of 2009, H.R. 499, 111th Cong., § 2(f) (2009), available at http://www.govtrack.us/congress/bill.xpd?bill=h111-499 (“To amend title VII of the Tariff Act of 1930 to provide that the provisions relating to countervailing duties apply to nonmarket economy countries and for other purposes.”).
\item \textsuperscript{205} David Spooner, former Assistant Secretary of Commerce for the Import Administration, stated, “The issue generally is huge, but I wouldn’t make too much of an issue about [the outcome of \textit{GPX II}]... I am confident Congress [will] step in, in a week and make it clear Commerce has the ability [to impose concurrent trade remedies against China].” Drajem, supra note 106.
\item \textsuperscript{206} See Dep’t of Commerce Press Release, supra note 5 (announcing a new trade policy to improve the competitiveness of domestic industries).
\end{itemize}
\end{footnotesize}
to further the President’s National Export Initiative. This new initiative lists fourteen measures that will enhance the effectiveness of U.S. ADs and CVDs. In light of the Obama administration’s support in enhancing trade law to protect the domestic industry, Congress may follow this trend and authorize Commerce’s application of concurrent duties against NME countries.


Both petitioners and Commerce retain the right to appeal the GPX II decision to the Court of Appeals for the Federal Circuit. If neither party appeals the CIT’s decision, then “the court’s final opinion will become conclusive,” and the government will forego its collection of CVD duties from the parties to the case. However, because Commerce’s actions upon remand were made “under protest,” commentators foresee that an appeal is “almost certain.” But, an appeal will involve some risks.

Currently, GPX II is not binding precedent because the ruling pertains only to the parties in the case. If the Federal Circuit affirms the CIT’s ruling, then Commerce would be prohibited from applying concurrent duties against NMEs without providing for improved methodologies to prevent double punishment. However, if the court overrules GPX II, then Commerce’s practice would be upheld and it could continue its current practice.

Until the court deems Commerce’s practices legal, exporters from NME countries will continue to challenge the legality of the U.S. trade-remedy regime. Parties similarly situated to GPX will bring their cases to the CIT, using GPX II as support to plead their case.

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208. See Dep’t of Commerce Press Release, supra note 5.
209. See Layton et al., supra note 91.
210. Id.; see supra note 51.
212. Remand Results, supra note 161, at 2.
213. See GPX III, 2010 WL 3835022, at *1 (“[T]he government has made it clear that it will appeal the court’s decision . . . .”); Marsh, supra note 170, at 1.
214. Burke, supra note 181.
215. Id. (noting that the court’s affirmation would create a binding precedent for all parties).
216. Id.
217. Layton et al., supra note 91.
218. Id.

Commerce has the administrative authority to determine whether to grant a foreign country market-economy status. Given China's substantial economic reforms, many scholars believe that Commerce should recognize China as a market economy. Nevertheless, Commerce has repeatedly established that China does not warrant designation as a market economy.

In its Remand Results, Commerce reiterated that China has failed to demonstrate characteristics meriting market-economy status. It would be improper to designate China as a market economy because China continues to exhibit great control over its market, mainly through resource allocation and ownership over the means of production. Commerce has repeatedly declined to grant MOI status to certain Chinese industries because, from Commerce's viewpoint, they fail to satisfy the three-prong test. Thus, it remains highly unlikely that Commerce would grant market-economy status to the entire nation.


221. Tracey, supra note 220, at 81. Chinese officials have lobbied for market-economy status claiming, "[i]f 498 out of 500 Fortune 500 companies do business with China, it's because we're a market economy." John W. Miller, Politics & Economics: EU May Lift Trade Rank of China for Concessions, WALL ST. J., June 25, 2007, at A7 (quoting Chinese Commerce Minister Bo Xilai).

222. See Georgetown Steel Memorandum, supra note 23, at 2–4 (discussing Commerce's reaffirmation of China's NME status); Tracey, supra note 220, at 87. But see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-474, U.S.-CHINA TRADE: COMMERCE FACES PRACTICAL AND LEGAL CHALLENGES IN APPLYING COUNTERVAILING DUTIES 13 (2005) (noting that other countries, such as Malaysia and Singapore, have deemed China a market economy); Miller, supra note 221, at A7 (reporting how just over one-third of WTO members grant China full market-economy status).

223. Remand Results, supra note 161, at 9.

224. See GPX I, 645 F. Supp. 2d 1231, 1237 (Ct. Int'l Trade 2009) (outlining some prevalent government constraints in China "such as the slow process of liberalizing the [Chinese currency] to allow development of a normal foreign exchange market, the continuing restrictions on foreign investment, the slow pace of reforms in the banking sector, and the limitations on private ownership"); Georgetown Steel Memorandum, supra note 23, at 2–4; Tracey, supra note 220, at 90 ("[The Chinese] government continues to nurture state firms to create larger enterprises with greater advantages over privatized establishments." (citation omitted)).

225. Tracey, supra note 220, at 88 (noting the difficulty of separating an entire industry from governmental control in a state-controlled economy).

226. McDaniel, supra note 14, at 765–66 (explaining how the lack of transparency and reduced duties on imports make Commerce less inclined to grant market-economy status to the entire nation or certain Chinese industries).
Market-economy status may be proper when “the Chinese central government will allow the free market to reign stronger in China.” However, granting China market-economy status prematurely could impose significant hardships on the global economy. Congress has afforded Commerce the discretion to make this determination, and courts should defer to the agency’s administrative decisions.

4. The MOE Approach: The Superior Solution

Some scholars’ observations indicate that “China’s economy has changed over the last twenty years. It is neither a free market, nor completely run by the central government. It is arguably an economy like the world has never seen before, and it is not surprising that the old rules no longer apply.” Even Commerce has recognized that “[t]he features and characteristics of China’s present-day economy . . . suggest that modification of some aspects of [Commerce’s] current NME antidumping policy and practice may be warranted, such as the conditions under which [Commerce] might grant an NME respondent market[-]economy treatment.”

Commerce should respond to the different evolving markets and treat certain respondents as MOEs. If Commerce utilizes this approach, then it can effectively protect U.S. domestic industries from harm and still ensure that the U.S. import duties reflect the conditions of the specific market of origin. This method will limit, to the extent possible, double counting duties because domestic values will determine the dumping margin, allowing Commerce to levy parallel duties while avoiding double punishment.

228. Cf. id. (“Internal Chinese prices can also be heavily influenced by the central government to the extent that it is incorrect to call China a market economy.”).
231. Georgetown Steel Memorandum, supra note 23, at 11.
233. MOE treatment provides the superior solution because the United States can levy duties based on different rates and tariffs, accurately reflecting the conditions of the foreign marketplace.
234. See supra note 10. If a specific industry is categorized as market-oriented, then Commerce will use its standard methodology in applying trade remedies. This standard method, used for market-economy countries, eliminates the risk of double counting because the values are consistent and based on prices in the home market. Id.
Dumping margins increase substantially when calculated according to surrogate-country information. Studies demonstrate that the “average AD duty rates imposed on Chinese (NME) exporters . . . [are] significantly higher than those imposed on market[-]economy exporters of the same products.” The MOE method exemplifies the fairest option by lawfully and accurately capturing China’s current market conditions. The majority of Chinese businesses have significantly reformed to meet the standards of market economies. It would be prejudicial and harmful for the United States to deprive certain complainant corporations of market-economy treatment under circumstances where it is warranted. It is worth noting that in GPX II, the CIT hinted that the MOE test provided the best compromise. In this way, the MOE methodology is the superior option because it would allow some companies to benefit from market-oriented treatment, without prematurely granting the entire country market-economy status.

IV. CONCLUSION

In an age of liberal trade policy, unprecedented globalization, and a worldwide economic deficit, flaws within the global trading system become


236. U.S. Gov’t Accountability Office, supra note 147, at 19 (finding that the AD rates were twenty percentage points higher for Chinese companies than market economies); see Ansel, supra note 8, at 895 (“[U]sing surrogate[-]country values of production leads to higher normal value calculations, and thus higher penalties, than comparable anti-dumping actions against [market economy] exporters.”); cf. Tracey, supra note 220, at 91 (criticizing India as a surrogate country because its prices fail to “fully capture China’s competitiveness”).

237. Ansel, supra note 8, at 933 (asserting that an MOE approach provides a “predictable, consistent, and accurate valuation” of duties against imports from NMEs).

238. See U.S. Gov’t Accountability Office, supra note 147, at 20 (“[I]ndividually determined duty rates assigned to Chinese companies . . . were not substantially different . . . from the individually determined rates assigned to market economy companies.”); see also Bentley & Silberston, supra note 13, at 37–38 explaining that valuations in China are different because “it has very low wage costs, an enormous workforce, high levels of skill in many industries, and large inward investment, bringing with it technological progress and increased productivity”).

239. See e.g., Georgetown Steel Memorandum, supra note 23, at 4–11 (indicating that the United States has recognized that the Chinese economy has transitioned enough to be accorded CVDs).

240. See Tracey, supra note 220, at 93 (warning that not granting China market-economy status would inhibit global trade and harm domestic firms as well as consumers).

241. GPX II, 715 F. Supp. 2d 1337, 1347 (Ct. Int’l Trade 2010); see supra note 180.

242. See McDaniel, supra note 14, at 766 (emphasizing that granting individual enterprises market-economy status will also help acclimate the global economy to the WTO-mandated market classification of China by 2016).
magnified. The law must constantly evolve and develop to meet the demands of the ever-changing global market.

*GPX II* illustrates the current problems facing U.S. countervailing policy as applied against China, but this case does not represent the only issue within U.S.-China relations. First, China’s deliberate undervaluation of its national currency threatens U.S. domestic industries as well as the prosperity of the global market. Second, China’s use of certain “WTO-inconsistent” practices and policies gives it an unfair trade advantage, while harming U.S. businesses and jobs. The importance of these issues has become critical, especially given the approaching 2016 deadline by which all WTO members must grant China market-economy status.

The *GPX II* case is just one example of the various issues that threaten U.S.-China relations. The recent decision from the WTO Appellate Body, finding the U.S. practice of “double remedies” inconsistent with the WTO Agreement on Subsidies and Countervailing Measures, substantiates the validity of GPX’s argument. Trade analysts speculate that this ruling will greatly impede Commerce’s ability to levy CVDs against China. This ruling indicates the global disagreement with the current practice of the United States and may be a catalyst for trade reform in Washington, D.C. The executive, legislative, and judicial branches are now charged with developing a system that can effectively handle the pending U.S. trade-related problems. The MOE

243. *See supra* Part II.F.

244. Schneider, *supra* note 193, at A18 (expressing concern that other countries will follow China’s example by manipulating their currencies, putting stress on the global economy). China plays a crucial role in the viability of the global economy,

[b]y continuing to implement reforms to strengthen domestic demand and by allowing the exchange rate to move higher to reflect fundamental economic forces, China will make a significant positive contribution to the global rebalancing effort, help reduce pressure on those emerging market economies that have more flexible exchange rates, and provide a more level playing field for trading partners around the world.

Treasury Dep’t Statement, *supra* note 193.


approach provides a superior solution—fairly regulating free-trade practices, while safeguarding domestic prosperity.\textsuperscript{249}

\textsuperscript{249} \textit{See supra} Part III.B.4.