

# DOUBLING DOWN IN NON-MARKET ECONOMIES: THE INEQUITABLE APPLICATION OF TRADE REMEDIES AGAINST CHINA AND THE CASE FOR A NEW WTO INSTITUTION

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## I. INTRODUCTION

The globalization of the world's economy has created international trade opportunities on an immeasurable scale, but economic development has drastically outpaced the modernization of international economic institutions, specifically the World Trade Organization ("WTO"). The rise of China's economy has revealed the limitations of the WTO's trade remedy system—shortcomings that have indirectly incentivized some countries to take advantage of others in the global economy. Economic discussions involving China and the United States usually include concern about China's currency manipulation and unwillingness to comply with international obligations. However, recent trade remedy disputes show that the United States is the one taking advantage of weaknesses in the WTO to unlawfully apply trade remedies to exports from China. The use of trade remedies to counteract unfair trading practices in the global economy has been the source of international tension and litigation for decades, but recent developments have produced new, more contentious issues and exposed major flaws in the WTO system. This note examines how changes in the application of trade remedies have affected the trade relationship between China and the United States and proposes a strategy for resolving new trade remedy issues using rational design theory. The United States' application of trade remedies against China provides the best insight into the current shortcomings of the WTO trade remedy system because there

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are a number of recent, thoroughly litigated U.S.-China cases. Although this note focuses on the U.S.-China relationship, the overarching limitations of the WTO's trade remedy regime could affect any WTO Member trading with China in the future, specifically, the European Union, Canada, Japan, and Australia.

Part I of this note addresses the history and fundamental economics of countervailing duty and anti-dumping duty trade remedies. Part II discusses the challenges of imposing trade remedies on products from nonmarket economies, examines the evolving issue of double remedies, and reviews particular cases from the U.S. Court of International Trade, U.S. Court of Appeals for the Federal Circuit, and the WTO Dispute Settlement Body. Part III examines how a new U.S. federal law has impacted the application of trade remedies and produced additional points of contention between the United States and China. Part IV proposes a method for resolving current and potential trade remedy issues in a centralized institution based on rational design theory. Part V places these trade remedy issues within the larger context of the U.S.-China relationship.

## II. THE HISTORY AND ECONOMICS OF COUNTERVAILING DUTIES AND ANTI-DUMPING DUTIES

This Section addresses the issues surrounding the imposition of countervailing duties ("CVDs") and anti-dumping duties ("ADDs") in the global economy, specifically, between China and the United States. Additionally, this Section discusses the basic economic principles underlying the application of CVDs and ADDs essential for understanding the evolving legal issues in this area of international law, as well as the history of the application of these two international trade mechanisms.

### A. COUNTERVAILING DUTIES

The term "subsidy" has varying definitions in different areas of law and economics, but for the purposes of this Note, Alan V. Deardoff's *Glossary of International Economics* provides an effective definition, describing a subsidy as "a payment by government, perhaps implicit, to the private sector in return for some activity that it wants to reward, encourage, or assist."<sup>1</sup> Governments use subsidies as price stabilization mechanisms, to

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1. ALAN V. DEARDOFF, *TERMS OF TRADE: GLOSSARY OF INTERNATIONAL ECONOMICS* 260 (2006).

influence supply and demand, and to transfer wealth for a number of economic and social policy objectives.<sup>2</sup> For example, if a foreign government subsidizes a product by granting companies in a certain industry monetary incentives to manufacture, produce, or export the product, the foreign companies may be able to sell the subsidized products at a lower price than their competitors in another country who have not received government subsidies. This type of subsidy allows manufacturers to compete more effectively in international and domestic markets.<sup>3</sup> In order to counteract the effects of subsidies, WTO Members may impose CVDs.<sup>4</sup> CVDs are tariffs levied on imported products that have received subsidies in their country of origin and are designed to increase the price of the imported product by an amount that offsets the foreign subsidy.<sup>5</sup>

CVDs have been used to offset the effects of foreign export subsidies since 1890, when the United States imposed the first CVD to offset subsidies used in foreign nations to encourage the exportation of refined beet sugar.<sup>6</sup> The CVD was imposed on the imported refined sugar in an effort to raise the price of the foreign product and protect U.S. sugar refiners from unfair competition.<sup>7</sup> Congress authorized the application of CVDs to all imported sugar (raw and refined) in 1894<sup>8</sup> and expanded the CVD concept in 1897 by sanctioning the application of CVDs to any imported product that benefitted from foreign subsidies designed to encourage exportation.<sup>9</sup> The Tariff Act of 1922 drastically expanded the scope of CVDs by changing the focus of CVDs from duties designed to offset export subsidies to a trade remedy aimed at counteracting any subsidy affecting the production, manufacture, or export of foreign products imported into the United States.<sup>10</sup>

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2. See Robert H. Lantz, *The Search for Consistency: Treatment of Nonmarket Economies in Transition Under United States Antidumping and Countervailing Duty Laws*, 10 AM. U. J. INT'L L. & POL'Y 993, 1009 (1995).

3. *Id.* at 1010.

4. See *Anti-dumping, Subsidies, Safeguards: Contingencies, etc.*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) (last visited Sept. 15, 2014).

5. See *id.*

6. See Tariff Act of 1890, ch. 1244, § 237, 26 Stat. 567, 584 (repealed 1894).

7. See *id.*; *Zenith Radio Corp. v. United States*, 437 U.S. 443, 451 (1978).

8. See Tariff Act of 1894, ch. 349, § 182½, 28 Stat. 509, 521 (repealed 1897).

9. See Tariff Act of 1897, ch. 11, § 5, 30 Stat. 151, 205 (repealed 1909).

10. See Tariff Act of 1922, ch. 356, § 303, 42 Stat. 858, 935–36 (repealed 1930).

Congress codified the expanded CVD concept in the Tariff Act of 1930<sup>11</sup> and officially incorporated CVDs into a multilateral agreement in 1947 with the passage of the General Agreement on Tariffs and Trade (“GATT”).<sup>12</sup> Article VI of the GATT specifically defined CVDs as “special dut[ies] levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.”<sup>13</sup> Article VI limited the application of CVDs to an amount “equal to the estimated bounty or subsidy determined to have been granted” on the product, but aside from the rate limitation, the GATT granted member-nations wide discretion to apply CVDs to offset any foreign subsidies that were directly or indirectly affecting imported products.<sup>14</sup>

Several aspects of international trade law changed significantly in the 1970s during the six-year GATT Tokyo round of trade negotiations,<sup>15</sup> including the original GATT CVD framework.<sup>16</sup> During the Tokyo round, GATT signatories negotiated the Subsidies Code to serve as a stand-alone agreement designed to regulate subsidies and control the imposition of CVDs.<sup>17</sup> The Subsidies Code placed an “injury” limitation on the imposition of CVDs, requiring member-nations to determine that the effects of a subsidized import were “causing injury” to the domestic industry.<sup>18</sup> The Subsidies Code also took a strong position against export subsidies, the type of subsidies CVDs were originally designed to counteract,<sup>19</sup> banning the use of export subsidies on all products except for certain primary goods.<sup>20</sup> Although the Subsidy Code placed an extensive ban on export subsidies, it

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11. See Tariff Act of 1930, ch. 497, § 303, 46 Stat. 590, 687 (repealed 1934).

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

13. *Id.* art. VI.

14. *Id.*

15. See *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited Sept. 16, 2014).

16. See Wentong Zheng, *Counting Once, Counting Twice: The Precarious State of Subsidy Regulation*, 49 STAN. J. INT’L L. 427, 432–33 (2013).

17. Agreement on the Interpretation and Application of Articles VI, XVI, and XVIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 1186 U.N.T.S. 204 [hereinafter Subsidies Code].

18. *Id.* art. 4.4.

19. See Tariff Act of 1890, *supra* note 6.

20. Subsidies Code, *supra* note 17, art. 9.1. Primary products were limited to a “product of farm, forest or fishery, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.” *Id.* art. 9.1 n.30 (citing GATT Ad art. XVI(B)(2)).

specifically acknowledged the usefulness of domestic subsidies in achieving desirable economic and social policy objectives, particularly in developing countries.<sup>21</sup>

The Subsidies Code functioned as the institutional framework for levying CVDs until the GATT Uruguay round of negotiations in 1994. The Uruguay round concluded with perhaps the most important development in international trade and a landmark moment in international relations—the establishment of the WTO.<sup>22</sup> The conclusion of the Uruguay round also produced the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”),<sup>23</sup> which is the current multilateral regime governing the use of CVDs for WTO Member-Nations.<sup>24</sup> In the United States, subsidies and CVDs are governed by federal statutes,<sup>25</sup> which were amended after the Uruguay round of negotiations to comply with WTO obligations, specifically, the SCM Agreement.<sup>26</sup> One of the most significant elements of the SCM Agreement was its definition of “subsidy.”<sup>27</sup> Although the Subsidies Code prohibited the use of export subsidies and simultaneously acknowledged the benefits associated with domestic subsidies, a definition of the term “subsidy” was not provided in a multilateral agreement until the SCM Agreement in 1994.<sup>28</sup> The SCM Agreement provides three criteria for determining whether subsidies are

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21. Subsidies Code, *supra* note 17, art. 11.1 (providing examples of economic and social policy objectives that domestic subsidies help achieve: the elimination of industrial, economic and social disadvantages of specific regions; the sustainment of employment and encouragement of retraining and change in employment; the implementation of economic programs and policies to promote the economic and social development of developing countries; and the redeployment of the industry in order to avoid congestion and environmental problems).

22. *See* General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

23. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 231 (1999), 1869 U.N.T.S. 14 (not reproduced in I.L.M.) [hereinafter SCM Agreement].

24. Zheng, *supra* note 16, at 434.

25. *See* 19 U.S.C. §§ 1671–1671(h) (2012) (commonly known as the Uruguay Round Agreement Act (URAA)).

26. *See* Lantz, *supra* note 2, at 1019; DOMESTIC JUDICIAL REVIEW OF TRADE REMEDIES: EXPERIENCE OF THE MOST ACTIVE WTO MEMBERS (Müslüm Yılmaz ed. 2013) at 50 (noting that Congress passed the URAA to signify its understanding that U.S. laws were consistent with the SCM Agreement, but failed to fully adopt the URAA, so U.S. courts reviewing trade remedies are required to apply U.S. statutes, and in the event of a conflict, the U.S. federal laws prevail).

27. *Id.*; SCM Agreement, *supra* note 23, art. 1.

28. PETROS MAVROIDIS, TRADE IN GOODS 196 (2007); Zheng, *supra* note 16, at 434.

present: (i) there must be a “financial contribution by a government or any public body” in the member’s territory;<sup>29</sup> (ii) the financial contribution must confer a benefit;<sup>30</sup> and (iii) the contribution must be “specific to an enterprise or industry or group of enterprises or industries.”<sup>31</sup>

The SCM Agreement reaffirmed the ban on export subsidies,<sup>32</sup> retained the “injury” requirement from the Subsidies Code,<sup>33</sup> and defined actionable domestic subsidies as subsidies causing “adverse effects” to the interests of WTO Members.<sup>34</sup> The Agreement also provided a framework for levying CVDs against WTO Member-Nations subsidizing imports,<sup>35</sup> and authorized WTO Members to initiate dispute settlement proceedings regarding export subsidies<sup>36</sup> or actionable domestic subsidies<sup>37</sup> before the WTO Dispute Settlement Body (“DSB”).<sup>38</sup>

### B. ANTI-DUMPING DUTIES

The economic phenomenon known as “dumping” occurs when a company sells products for a cheaper price in one national market than in another.<sup>39</sup> Economist Jacob Viner defines dumping as “price discrimination between national markets.”<sup>40</sup> Manufacturers that engage in dumping achieve temporary competitive advantages in international trade,<sup>41</sup> which allows them to artificially lower the price of their products in order to

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29. SCM Agreement, *supra* note 23, art. 1.1(a)(1).

30. *Id.*, art. 1.1(b).

31. *Id.*, art. 2.1; *id.*, art. 1.2. *See also* Caribbean Export Development Agency, *An Introduction to Trade Remedies in the Multilateral System*, 1 TRADEWINS, no. 1, 2010, at 1, 4 (explaining that the specificity prerequisite for determining subsidies is necessary to preserve a government’s ability to use broad based subsidies in different economic sectors).

32. SCM Agreement, *supra* note 23, art. 3.

33. *Id.* art. 15; *See id.* art. 15 n.45 (defining injury a “material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry”).

34. *Id.* art. 5.

35. *Id.* pt. V.

36. *Id.* art. 4.4.

37. *Id.* art. 7.4.

38. *See* Zheng, *supra* note 16, at 434.

39. Garrett E. Lynam, Note, *Using WTO Countervailing Duty Law to Combat Illegally Subsidized Chinese Enterprises Operating in a Nonmarket-Economy: Deciphering the Writing on the Wall*, 42 CASE W. RES. J. INT’L L. 739, 744 (2010).

40. JACOB VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 3 (1923).

41. Lynam, *supra* note 39, at 744.

establish a market in the importing nation.<sup>42</sup> WTO Members can levy anti-dumping duties (“ADDs”) to increase the price of the dumped products and prevent the dumping manufacturer from undercutting domestic competition.<sup>43</sup>

The first statutes controlling anti-dumping duties in the United States were issued as part of the Revenue Act of 1916,<sup>44</sup> but the laws were ineffective because they placed a high burden of proof on domestic petitioners, requiring them to prove that the foreign companies intentionally dumped their goods into the United States.<sup>45</sup> Congress replaced the Revenue Act of 1916 with the Antidumping Act of 1921, which contained much of the institutional framework found in current ADD statutes, including injury determinations, purchase price, exporter’s sale price, and foreign market value.<sup>46</sup> In 1947, the GATT condemned the practice of dumping<sup>47</sup> and authorized the use of ADDs to offset or prevent dumping.<sup>48</sup> The 1979 GATT Tokyo round of trade negotiations produced an Antidumping Code designed to make the substantive and procedural aspects of domestic ADD statutes more uniform across WTO Member-Nations.<sup>49</sup>

In addition to the establishment of the WTO and the SCM Agreement, the 1994 Uruguay Round of trade negotiations also produced the

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42. See Daniel Chow, *China’s Coming Trade War With the United States*, 81 U. MO. KAN. CITY L. REV. 257, 264; *id.* at n.69 (explaining that “dumpers” are generally able to charge lower prices because of segregated markets that protect prices of goods in their home countries. Barriers to entry in the exporting nation’s market prevent the horizontal movement of products from the importing nation to the exporting nation, so dumpers are able to artificially lower prices and dump their products in foreign nations while maintaining monopoly profits and protected prices in their home countries); CHOW & SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 445 (2d ed. 2012).

43. Aaron Ansel, *Market Orientalism, Reassessing an Outdated Anti-Dumping Policy Towards the People’s Republic of China*, 35 BROOK. J. INT’L L. 883, 885 (2010).

44. Revenue Act of 1916, ch. 463, §§ 800–806, 39 Stat. 756, 798–800 (1916); Lantz, *supra* note 2, at 999.

45. Lantz, *supra* note 2, at 999–1000; Revenue Act of 1916, ch. 463, § 801, 39 Stat. 756, 798 (repealed 1917).

46. Lantz, *supra* note 2, at n.29, 1000 (citing Greyson Bryan and Dominique Guy Boursereau, *Antidumping Law in the European Communities and the United States: A Comparative Analysis*, 18 GEO. WASH. J. INT’L L. & ECON. 631, 666); Antidumping Act of 1921, ch. 14, §§ 201–212, 42 Stat. 9, 11–15 (1921).

47. GATT, *supra* note 12, art. VI § 1.

48. *Id.* art. VI § 2.

49. Lantz, *supra* note 2, at 1000; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Relating to Antidumping Measures), reprinted in H.R. Doc No. 96–153, Part I, 96th Cong., 1st Sess. 309 (1979).

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), which currently serves as the multilateral framework for ADDs.<sup>50</sup> The Anti-Dumping Agreement defines “dumping” as a situation that occurs when a product is:

[I]ntroduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.<sup>51</sup>

The Anti-Dumping Agreement also specifically outlines how to determine injury to a domestic industry,<sup>52</sup> provides guidance on how to calculate prices to determine dumping margins,<sup>53</sup> and explains the dumping investigation process<sup>54</sup> as well as dispute settlement procedures.<sup>55</sup> In the United States, ADDs and CVDs are both governed by federal statutes<sup>56</sup> that have been amended to ensure compliance with WTO obligations, specifically the Anti-Dumping Agreement.<sup>57</sup>

The U.S. federal statutes govern and enforce ADDs through a bifurcated system.<sup>58</sup> The U.S. Department of Commerce (“Commerce”)<sup>59</sup> makes a “fair comparison” between the price the imported products are sold for in the United States, the “export price,” and their “normal value” to determine the amount of dumping, if any, which is known as the dumping margin.<sup>60</sup> The U.S. International Trade Commission determines whether the dumping “materially injures” an industry in the United States.<sup>61</sup> In market economies, a product’s “normal value” is the appropriate price the product is sold for in the market of the exporting (dumping) country.<sup>62</sup> Under the

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50. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201 [hereinafter Anti-Dumping Agreement]; see Lantz, *supra* note 2, at 1000.

51. Anti-Dumping Agreement, *supra* note 50, art. 2 §2.1.

52. *See id.* art. 3.

53. *Id.* art. 2 § 2.2.

54. *See id.* art. 5.

55. *See id.* art. 17.

56. *See* Tariff Act of 1930, 19 U.S.C. §§ 1673–1673i (1994); 19 U.S.C. §§ 1677–1677n (1996).

57. Lantz, *supra* note 2, at 1000–01.

58. *Id.*

59. *See id.* (explaining that the Trade Agreements Act of 1979 transferred the responsibility of administering ADD and CVD laws from the U.S. Department of the Treasury to Commerce).

60. 19 U.S.C. § 1677b(a) (1994); Lantz, *supra* note 2, at 1000–01.

61. 19 U.S.C. § 1673b (1996); Lantz, *supra* note 2, at 1000–01.

62. 19 U.S.C. § 1677b(a)(1)(B)(i) (1994); *Technical Information on Anti-dumping*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm) (last visited Sept. 15, 2014).



U.S. ADD statutes, both Commerce and representatives of a harmed domestic industry may initiate anti-dumping investigations against foreign exporters.<sup>63</sup> However, ADD petitions initiated by domestic industries are subject to representation thresholds that require petitioners to represent twenty-five percent of the total domestic production of the particular product<sup>64</sup> and fifty percent of the workers and producers expressing an opinion on the issue.<sup>65</sup> These representation requirements ensure that the majority of the domestic industry supports the ADD investigation and allows Commerce to examine the petition for accuracy and adequacy of evidence.<sup>66</sup>

### III. TRADE REMEDIES IN NONMARKET ECONOMIES: CHALLENGES, COMPLEXITIES, AND CHINA

The application of CVDs and ADDs appears straightforward, but applying these simple concepts to nonmarket economies under the current WTO framework and U.S. federal law is complex.<sup>67</sup> The current regime governing the application of trade remedies to nonmarket economies is a system containing “legal nuances that have created a situation ripe for abuse . . . .”<sup>68</sup> These nuances are evident in recent trade disputes between China and the United States regarding ADDs, CVDs, and China’s status as a nonmarket economy (“NME”).

#### A. ANTI-DUMPING DUTIES AND THE SURROGATE METHOD

The ability to accurately determine the price that a product is sold for in the exporting market, the product’s “normal value,” is the foundation for the application of anti-dumping duties.<sup>69</sup> However, in centralized economies, no “market” for the product exists and the government’s

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63. See 19 U.S.C. §§ 1673a(a)–(b) (1996); Ansel, *supra* note 43, at 885.

64. 19 U.S.C. § 1673a(c)(4)(A)(i) (1996); See also Ansel, *supra* note 43, at 885.

65. *Id.* § 1673a(c)(4)(A)(ii). See also Ansel, *supra* note 43, at 885.

66. Ansel, *supra* note 43, at 885–86; See also Tara Gingerich, *Why the WTO Should Require the Application of the Evidentiary Threshold Requirement in Antidumping Investigations*, 48 AM. U. L. REV. 135, 164 (1998).

67. See Symposium, *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, 745–47 (2010).

68. *Id.* at 745.

69. 19 U.S.C. § 1677b(a)(1)(B)(i) (1994); World Trade Organization, *Technical Information on Anti-dumping*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm) (2013).

influence on, or complete control of supply and demand causes difficulty in determining price levels.<sup>70</sup> Centralized economies have traditionally been classified as NMEs and are generally found in current or former communist countries.<sup>71</sup> Current U.S. federal law defines a NME as “any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.”<sup>72</sup> The WTO does not grant market economy status,<sup>73</sup> so the term “administering authority” refers to Commerce.<sup>74</sup> Thus, Commerce is the agency charged with making NME determinations based on several factors, including: convertibility of currency, the extent wages are determined by free bargaining, government ownership or control of the means of production, permissibility of foreign investments and joint ventures, government control over the allocation of resources and over the price and output decisions of enterprises, as well as other factors that Commerce considers appropriate.<sup>75</sup>

If a country is designated as a NME and Commerce is unable to ascertain an accurate normal value for the allegedly dumped product, the current WTO regime and U.S. federal laws grant Commerce wide discretion to construct an appropriate normal value for the product using a practice known as the “surrogate method.”<sup>76</sup> Under the surrogate method, Commerce determines a product’s normal value by using information about various factors related to the manufacturing of the product (including labor, raw materials, energy and utilities consumed, and capital cost)<sup>77</sup> and multiplying the quantities of each factor by a “surrogate value,” which is

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70. Symposium, *supra* note 67, at 745; Richard N. Eid, Note, *The Effect of Georgetown Steel Corp. v. United States on Nonmarket Economy Imports*, 3 AM. U. J. INT’L L. & POL’Y 65, 66 (1998).

71. Symposium, *supra* note 67, at 745. See also William P. Alford, *When Is China Paraguay? An Examination of the Application of the Antidumping and Countervailing Duty Laws of the United States to China and Other ‘Nonmarket Economy’ Nations*, 61 S. CAL. L. REV. 79, 82-83 (1987).

72. 19 U.S.C. § 1677(18)(A) (1996).

73. Lynam, *supra* note 39, at 750.

74. 19 U.S.C. § 1677(1) (1996).

75. *Id.* §1677(18)(B).

76. See *id.* § 1677b(c)(1); Symposium, *supra* note 67, at 745–46; *Technical Information on Anti-dumping*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm) (last visited Sept. 16, 2014).

77. 19 U.S.C. § 1677b(c)(3) (1994).

obtained from a market economy in another “surrogate” country.<sup>78</sup> The surrogate country chosen for this methodology is supposed to operate a market economy, to the extent possible, at a level of economic development comparable to the NME, with significant producers of comparable merchandise.<sup>79</sup> For example, if a Chinese exporter was accused of dumping widgets into the United States, Commerce would examine the factors associated with the production of the widgets. Commerce would then look to a surrogate market economy to determine the value of those production factors to establish a price that the widgets would be sold for in China if China operated a market economy—the “normal value” of the widgets. Finally, Commerce would compare the constructed normal value to the actual export price of the widgets to determine the dumping margin and levy ADDs accordingly.<sup>80</sup>

There are many potential problems related to the surrogate method of ADD calculation for exporters operating in NMEs. The surrogate valuation procedure is generally unfavorable to NME exporters because it increases the likelihood that Commerce will find dumping during its investigation<sup>81</sup> and normally results in higher dumping margins compared to market economy valuations.<sup>82</sup> The results of the surrogate valuation are extremely unpredictable because exporters accused of dumping do not know in advance which country will be chosen as their surrogate.<sup>83</sup> This unpredictability creates uncertainty and makes it impossible for exporters in NMEs to estimate the constructed normal value of their products, increasing the probability that the exporters misprice their products and incur detrimental ADDs.<sup>84</sup> The constructed normal value of products also fails to properly account for any comparative advantages that exporters in NMEs may possess over their surrogate counterparts.<sup>85</sup> Free trade, numerous theories of economic development, and the entire WTO system are all based on the principle of comparative advantage—the idea that

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78. See *id.* § 1677b(c)(1)(B); Elliot J. Feldman & John J. Burke, *Testing the Limits of Trade Law Rationality: The GPX Case and Subsidies in Nonmarket Economies*, 62 AM. U. L. REV. 787, 797 (2013); Symposium, *supra* note 67, at 745–46.

79. 19 U.S.C. § 1677b(c)(4) (1994); Symposium, *supra* note 67, at 746.

80. Feldman & Burke, *supra* note 78, at 792.

81. *Id.* at 789.

82. Ansel, *supra* note 43, at 891.

83. Charlene Barshefsky, *Nonmarket Economies in Transition and the U.S. Antidumping Law: Remarks on the Need for Reevaluation*, 8 B.U. INT'L L.J. 373, 375 (1990).

84. *Id.* at 376; Ansel, *supra* note 43, at 891–92.

85. Symposium, *supra* note 67, at 746; Barshefsky, *supra* note 83, at 375.

“countries prosper first by taking advantage of their assets in order to concentrate on what they can produce best, and then by trading these products for products that other countries produce best.”<sup>86</sup> However, under the current surrogate procedure for constructing normal values, even demonstrable comparative advantages are not accounted for in Commerce’s calculations.<sup>87</sup>

These problems have become particularly evident in trade relations between China and the United States. An estimated eighty countries<sup>88</sup> recognize China as a market economy, but the United States, European Union, Canada, Japan, and Australia still classify China as a NME for trade remedy investigations.<sup>89</sup> The decision by these global trading powers to classify China as a NME has caused severe consequences for Chinese exporters. In some instances, Commerce has produced exceedingly high normal values for Chinese products. For example, one study determined that between 2004 and 2007, the average normal value for Chinese products was thirteen times higher than the average market economy rate in the eight multiple country investigations during that time period.<sup>90</sup> These exceptionally high normal values are hard to justify because it is inconceivable that production costs in China are an average of thirteen times higher than production costs in market economies.<sup>91</sup> In addition to the high normal value determinations, it is exceedingly difficult for Chinese exporters to predict which economy will be chosen as a surrogate. In three years, between 2005 and 2008, Commerce used India, Pakistan, Indonesia,

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86. See *The Case for Open Trade*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact3\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm).

87. See Barshefsky, *supra* note 83, at 375.

88. See Fu Jing & Ding Qingfen, *Experts: EU Statement Opens Door to Status*, CHINA DAILY, Feb. 16, 2012, 7:57 AM, [http://europe.chinadaily.com.cn/europe/2012-02/16/content\\_14622790.htm](http://europe.chinadaily.com.cn/europe/2012-02/16/content_14622790.htm) (estimating that more than eighty countries have recognized China’s status as a market economy); Feldman & Burke, *supra* note 78, at n.44 (explaining that no one, including the Chinese government, maintains a list of which countries classify China as a market economy).

89. Feldman & Burke, *supra* note 78, at 796. See generally, Antidumping, Natural Menthol from the People’s Republic of China; Final Determination of Sales at Less Than Fair Value, 46 FED. REG. 24,614 (May 1, 1981) (providing the original classification of China as a NME).

90. See Submission of the Gov’t of the People’s Republic of China, Ministry of Commerce, on Antidumping Methodologies in Proceedings Involving Nonmarket Economy Countries: Surrogate Country Selection and Separate Rates to the U.S. Dept. of Commerce at 6 (April 20, 2007), <http://enforcement.trade.gov/download/nme-surrogate-20070321/prc-mofcom-cmts-042007.pdf>; Ansel, *supra* note 43, at n.59.

91. See Mitchell & Marshak, *supra* note 90, at 6–7.

Sri Lanka, and the Philippines as surrogates for China.<sup>92</sup> Perhaps most importantly, the surrogate method does not account for any of China's comparative advantages, specifically China's low-cost and highly skilled labor force, flexible regulations, and highly efficient system of transportation and logistics.<sup>93</sup> Thus, although these advantages lower input and production costs for Chinese firms, Commerce does not account for them when determining a product's normal value, even if the effects on costs are discernible.<sup>94</sup>

China's status as a NME makes it an easy target for ADDs,<sup>95</sup> and the consequences of the surrogate method are damaging to Chinese exporters, so Chinese authorities have predictably been seeking market economy status for several years.<sup>96</sup> China's accession protocol, the agreement that made China a member of the WTO in 2001, dictates that WTO Members will not be able to use the surrogate method to calculate dumping margins for the imposition of ADDs against China beginning in December 2016.<sup>97</sup> However, the operative clause in China's accession protocol only applies to ADDs, and could create a series of problematic scenarios regarding the United States' imposition of CVDs against China via the surrogate method, discussed *infra* pt. III(B)(2). China's accession protocol also specifically requires the use of Chinese industry prices in ADD investigations, instead of the surrogate method, but only if the Chinese firm is able to "clearly show that market economy conditions prevail,"<sup>98</sup> a standard that in the United States, requires a showing of the same market economy factors used in a NME determination.<sup>99</sup> Commerce can also choose to apply market economy status to individual Chinese industries,<sup>100</sup> but it has traditionally

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92. INT'L BAR ASS'N DIVS. PROJECT TEAM, *Anti-Dumping Investigations Against China in Latin America*, <http://www.ibanet.org/Document/Default.aspx?DocumentUid=9e90bb3f-ae87-4311-93fc-19976c924504> (2013) at 13.

93. See David Orozco, *Will India and China Profit From Technological Innovation?*, 5 NORTHWESTERN J. TECH. & INTELL. PROP. 426, 14 (2007).

94. Symposium, *supra* note 67, at 747; Barshefsky, *supra* note 83, at 375.

95. Kimberly A. Tracey, *Nonmarket Economy Methodology Under U.S. Anti-Dumping Laws: A Protectionist Shield From Chinese Competition*, CURRENTS: INT'L TRADE L.J., (2006), at 84–85.

96. Feldman, *supra* note 78, at 796.

97. See Protocol on the Accession of the People's Republic of China, WT/L/432, pt. 1 art. 15(d), available at <http://www.worldtradelaw.net/misc/ChinaAccessionProtocol.pdf> (explaining that the use of the surrogate method of calculation for anti-dumping duties against China automatically expires fifteen years after China's accession).

98. *Id.* art. 15(a)(i).

99. 19 U.S.C. § 1677(18)(B); See Tracey, *supra* note 95, at 84.

100. Tracey, *supra* note 95, at 87.

declined to do so, choosing instead to reiterate that any particular Chinese industry operates within the larger, state-influenced Chinese economy.<sup>101</sup> Commerce even recently admitted that it has “no policies, procedures or standards for evaluating the Market Oriented Enterprise (“MOE”) status of a company at this time.”<sup>102</sup> Even if Commerce developed a set of standards, Commerce officials have previously observed that satisfying the criteria for market-oriented industry (“MOI”) designation would be “difficult for producers operating in a nonmarket econom[y].”<sup>103</sup> China continues to seek market economy status,<sup>104</sup> but for now, Chinese industries are operating in uncharted territory—inauspiciously caught between the only two economic classifications currently available in trade remedy law: market and nonmarket.<sup>105</sup>

#### B. FINDING A MARKET IN A NONMARKET ECONOMY: COUNTERVAILING DUTIES, DOUBLE REMEDIES, AND THE SAGA OF *GPX*

The intersection of trade remedies and NMEs becomes more complex and much more controversial when CVDs are imposed against products from NMEs. Recently, there have been fundamental disagreements over the application of CVDs in NMEs, the use of the surrogate method for the imposition of CVDs, and the simultaneous use of CVDs and ADDs against NME products, a situation that often creates what is described as “double remedies.” These issues have generated a series of trade disputes between China and the United States that prominent international law practitioners have referred to as “cases grappling with the most important issues in trade law in the new millennium.”<sup>106</sup> The resolution of these issues could

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101. See *Symposium*, *supra* note 67, at 753; Tracey, *supra* note 95, at 88 (providing an example of a situation where Commerce acknowledged that a Chinese industry was operating based on market considerations, but still decided to use a surrogate because China, as a whole, remained state controlled).

102. *GPX Int'l Trade Corp. v. United States*, 33 Ct. Int'l Trade 1368, 1379 (2009).

103. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-474, U.S.-CHINA TRADE: COMMERCE FACES PRACTICAL AND LEGAL CHALLENGES IN APPLYING COUNTERVAILING DUTIES (2005), <http://www.gao.gov/assets/250/246783.pdf>; Tracey, *supra* note 95, at 88.

104. Feldman & Burke, *supra* note 78, at 796 (citing a speech by former Chinese Premier Wen Jiabao, given before the World Economic Forum, who called on EU leaders to “recognize China’s full market economy status”); *Wen Says World Must Get ‘Houses in Order,’ Not Rely on China*, BLOOMBERG NEWS (Sep. 14, 2011), <http://www.bloomberg.com/news/2011-09-14/china-s-wen-says-world-must-cut-debt-and-deficits-increase-jobs.html>.

105. See Michael Kabik, *The Dilemma of “Dumping” From Nonmarket Economy Countries*, 6 EMORY INT’L L. REV. 339, 379–80 (1992).

106. Feldman & Burke, *supra* note 78, at 825.

seriously affect international trade for several years and underscores the need for a new trade remedy regime.

*1. Countervailing Duties and Nonmarket Economies—Georgetown Steel*

One of the foundational issues of the current U.S.-China trade disputes is the imposition of CVDs against products from NMEs. In 1986, the U.S. Court of Appeals for the Federal Circuit (“CAFC”) issued what became a landmark opinion in *Georgetown Steel Corp. v. United States*.<sup>107</sup> The case concerned two CVD investigations into carbon steel wire rod imports from Czechoslovakia and Poland, where Commerce determined that CVDs were inappropriate because subsidies, as a matter of law, could never be identified in a NME.<sup>108</sup> Commerce based its negative CVD determination on the principle that subsidies simply cannot exist where a market does not exist, stating:

We believe a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in misallocation of resources . . . . [I]n 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 to distort or subvert . . . . [S]ubsidies have no meaning outside the context of a market economy.<sup>109</sup>

In *Georgetown Steel*, the CAFC affirmed Commerce’s reasoning and overturned the Court of International Trade (“CIT”),<sup>110</sup> holding that CVDs were inapplicable to NMEs because subsidies could not exist in NMEs.<sup>111</sup>

Commerce adhered to its beliefs about the unsuitability of CVDs in NMEs in accordance with the *Georgetown Steel* ruling for twenty years. However, in 2006, Commerce issued an internal memorandum during trade remedy investigations involving paper imports from China, Indonesia, and the Republic of Korea that re-examined the applicability of the *Georgetown*

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

108. See Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,370 (May 7, 1984); Carbon Steel Wire Rod from Poland: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,374 (May 7, 1984).

109. Carbon Steel Wire Rod from Czechoslovakia, *supra* note 108, at 19,371; Carbon Steel Wire Rod from Poland, *supra* note 108, at 19,375.

110. See *Cont’l Steel Corp. v. United States*, 9 Ct. Int’l Trade 340 (1985), *vacated*, 801 F.2d 1308 (1986).

111. See *Georgetown Steel*, 801 F.2d 1308 (1986).

*Steel* ruling to China's economy.<sup>112</sup> In the memo, Commerce declared that "China's economy is significantly different from the Soviet-style economies at issue in *Georgetown Steel*"<sup>113</sup> and concluded that because "subsid[ies] [could] be identified and measured" in China, the *Georgetown Steel* ban on imposing CVDs on products from NMEs no longer applied.<sup>114</sup> Commerce's decision to impose CVDs against NME products marked a critical departure from previous trade remedy ideology and is described as the moment that "opened the Pandora's box" of international trade.<sup>115</sup>

In addition to its notorious decision regarding CVDs, Commerce issued another memo related to the same paper imports investigation, which outlined its position on China's economy for ADD investigations.<sup>116</sup> In the ADD memo, issued only seven months before the CVD memo that concluded China's economy had developed enough to identify subsidies and impose CVDs, Commerce announced that "market forces in China are not sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis."<sup>117</sup> Together, the two memos made Commerce's approach to China patently clear: the Chinese economy had developed enough to identify subsidies for CVDs, a concept that, by its own admission, Commerce believed required a "market" to "distort or subvert," but had not developed enough to be considered a "market economy" during ADD investigations.<sup>118</sup>

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112. Memorandum from Shauna Lee-Alaia and Lawrence Norton, Office of Policy, Imp. Admin., to David M. Spooner, Asst. Sec'y, Imp. Admin., Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China - Whether the Analytical Elements of *Georgetown Steel* Opinion Are Applicable to China's Present-Day Economy (Mar. 29, 2007). [hereinafter CFS Paper CVD Memo]. See also Zheng, *supra* note 16, at 438; Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 Fed. Reg. 60,645 (Oct. 25, 2007).

113. CFS Paper CVD Memo, *supra* note 112, at 4.

114. *Id.* at 10.

115. Dukgeun Ahn & Jieun Lee, *Countervailing Duty Against China: Opening Pandora's Box in the WTO System?*, 14 J. INT'L ECON. L. 1, 18 (2011); See Zheng, *supra* note 16, at 439.

116. Shauna Lee-Alaia et al., Office of Policy, Imp. Admin., Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ("China")— China's Status as a Nonmarket Economy ("NME") Shauna Lee-Alaia et al., (Aug. 30, 2006) [hereinafter CFS Paper ADD Memo]; Zheng, *supra* note 16, at 439.

117. CFS Paper ADD Memo, *supra* note 116 at 4.

118. Carbon Steel Wire Rod from Czechoslovakia, *supra* note 108, at 19,371; Carbon Steel Wire Rod from Poland, *supra* note 108, at 19,375.



Commerce's questionable logic opened the floodgates<sup>119</sup> for CVDs against Chinese exports and placed the Chinese economy directly in trade remedy no-man's-land: operating on enough sufficient market principles to be subject to CVDs, but not sufficiently market-driven to escape the NME surrogate method in ADD investigations. Together, the CVD policy reversal and exploding trade deficit between the United States and China, which grew to \$258 billion in 2007,<sup>120</sup> combined to create a situation where U.S. domestic industries, eager to protect their businesses, inundated Commerce with trade remedy petitions against Chinese products.<sup>121</sup> As the trade remedy petitions poured in, the issues of imposing CVDs and ADDs against the Chinese economy culminated in a series of cases and a new U.S. federal law that have had a tremendous impact on the trade relationship between the United States and China and could define world trade for decades.

## 2. *Simultaneous Trade Remedies—the GPX Cases*

Commerce's new trade remedy philosophy was implemented immediately and quickly became the subject of contentious legal battles in various arenas. On June 18, 2007, less than three months after Commerce issued its CVD memo, a group of U.S. tire producers petitioned Commerce to simultaneously impose CVDs and ADDs against Chinese exporters of off-the-road tires.<sup>122</sup> The petitioners claimed that Chinese tire exports had been sold in the United States at prices below their "fair value,"<sup>123</sup> in violation of the federal anti-dumping laws<sup>124</sup> and that Chinese tire manufacturers, producers, and exporters had received government subsidies

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119. See James P. Durling, *Encountering Rocky Shoals: Application of the CVD Law to China*, GEORGETOWN U. L. CENTER CONTINUING LEGAL EDUC., INT'L TRADE UPDATE, Feb. 25, 2010, available at 2010 WL 956090.

120. *Trade in Goods with China*, U.S. CENSUS BUREAU, (Sept. 04, 2014), <http://www.census.gov/foreign-trade/balance/c5700.html>.

121. Lauren W. Clarke, *The Market-Oriented Enterprise Approach: The Best Response to the Questionable United States Trade Practices Scrutinized in GPX International Tire Corp v. United States*, 60 CATH. U. L. REV. 809, 824 (2011) Lauren W.; see generally Chad P. Bown, *The Global Resort to Antidumping, Safeguards, and Other Trade Remedies Amidst the Economic Crisis*, (Int'l Trade Dept., et al. Policy Research Working Paper No. 5051, 2009) available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5051>.

122. Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off-The-Road Tires from the People's Republic of China, 72 Fed. Reg. 43, 591 (Aug. 6, 2007); Clarke, *supra* note 121, at n.114.

123. Initiation of Antidumping Duty Investigation, *supra* note 122, at 43,592.

124. See 19 U.S.C. § 1673.

in violation of the federal countervailing duty laws.<sup>125</sup> After reviewing the petition and conducting investigations, Commerce decided to impose simultaneous ADDs and CVDs concerning more than \$600 million in Chinese tire exports.<sup>126</sup> China quickly filed complaints with the CIT challenging Commerce's decision to impose simultaneous CVDs and ADDs on the Chinese tire exports.<sup>127</sup> China also initiated WTO dispute settlement proceedings by requesting a consultation with the United States concerning the simultaneous imposition of CVDs and ADDs on four Chinese export products (the same off-the-road tires, as well as circular welded carbon quality steel pipe, light-walled rectangular pipe and tube, and laminated woven sacks).<sup>128</sup> The dominant focus of the WTO dispute settlement proceedings was on whether Commerce's "double counting" of trade remedies was inconsistent with various WTO provisions.<sup>129</sup> After a series of procedural missteps and ill-advised motion filings by Chinese counsel,<sup>130</sup> the "double counting" issue also became a focus of the CIT litigation.<sup>131</sup>

Double counting refers to the situation that often occurs when CVDs and ADDs are imposed on the same products from NMEs.<sup>132</sup> When Commerce imposes ADDs in NMEs, it uses the surrogate method to determine the normal value of the product, which effectively accounts for any subsidies that the Chinese industry might be receiving. Thus, when

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125. See 19 U.S.C. § 1671.

126. Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 Fed. Reg. 40, 480-03 (Jul. 15, 2008) (imposing CVDs against three Chinese tire companies); Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 73 Fed. Reg. 51, 624-01 (Sept. 4, 2008) (imposing ADDs on the same three Chinese tire companies); Clarke, *supra* note 121, at n.119; Craig A. Lewis et. al., *The United States Court of International Trade in 2010: Is Commerce Suffering From Adverse Decisions It Wasn't Double-Counting On?*, 43 GEO. J. INT'L L. 47, 65 (2011).

127. *GPX Int'l Tire Corp. v. United States*, 33 Ct. Int'l Trade 1368 (2009).

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

129. Zheng, *supra* note 16, at 445.

130. Feldman & Burke, *supra* note 78, at 798-802.

131. *Id.* at 801-02.

132. Theoretically, there are instances where the simultaneous imposition of ADDs and CVDs will not create double remedies, but in order for that to occur, the domestic subsidy cannot lower the export price of the product in question; *i.e.*, the domestic subsidy must fail to lower the cost of producing the product. See Panel Report, *United States-Countervailing and Anti-Dumping Measures on Certain Products from China*, ¶ 7.378, WT/DS449/R (Mar. 27, 2014) [hereinafter Panel Report DS449].

Commerce then applies CVDs, it is attempting to offset subsidies that have already been accounted for in the ADD application, double counting those subsidies. More simply, double counting occurs when the same subsidy is offset twice.<sup>133</sup> For example, recall the example used to illustrate the surrogate method for ADDs, *supra* pt. III(A). When Commerce looks to a surrogate country to calculate the normal value of a widget, any subsidies Chinese widget producers receive are effectively offset because the Chinese prices for inputs are not accounted for in the equation—only the prices from the surrogate country are calculated, which have not been subsidized by the Chinese government.

The double counting situation is further complicated by the fact that Commerce, lacking any previous example of CVDs being used against NMEs, decided to borrow the surrogate method used in ADD calculations to impose CVDs in NMEs.<sup>134</sup> Thus, when Commerce conducts its CVD investigation, it determines the value of a subsidy to a Chinese company by looking at the value of that subsidy in a surrogate market economy.<sup>135</sup> This creates serious issues and is often incredibly unfair to Chinese industries because subsidies are a fundamental part of China's centrally planned economy and are usually worth much less than their calculated value in a market economy. For example, in one instance, Commerce determined that the granting of land-use rights to a Chinese company in rural Shandong province was a subsidy, but calculated the value of that land-use right by examining how much a private company was paying for a comparably sized piece of land in metropolitan Bangkok.<sup>136</sup> Therefore, Commerce is not only offsetting subsidies twice, but it is also drastically overvaluing the subsidies to the detriment of Chinese exporters. It is important to note that double counting does not occur in market economies because, when ADDs are calculated for market economy products, the normal value is based on the actual cost incurred by the manufacturer to obtain the inputs. Therefore, even if a company in a market economy receives a subsidy, the ADD

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133. Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶103, WT/DS379/AB/R (Mar. 11, 2011) [hereinafter Appellate Report DS379].

134. Feldman & Burke, *supra* note 78, at 802.

135. *Id.*

136. *Id.* See also Laminated Woven Snacks From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination, 72 Fed. Reg. 67, 893–01 (2011) (comparing land use rights to the sales of certain industrial land in industrial areas in China and Thailand).

calculation will be based on the subsidized prices of the inputs, not the market prices, so any subsidy will not be offset by ADDs.<sup>137</sup>

In the first round of CIT litigation (*GPX I*), the Chinese tire industries (collectively, GPX) asserted a strong argument that the U.S. Congress intended for ADDs to be the sole trade remedy available to Commerce for use against NMEs.<sup>138</sup> GPX contended that Congress amended the ADD statutes after signing various trade agreements relating to NMEs, but did not address the applicability of CVDs to NMEs at any point.<sup>139</sup> Therefore, GPX reasoned, Congress had “reaffirmed a statutory scheme that unambiguously does not allow application of the CVD law to NMEs, ‘by continuously leaving the CVD statute intact while actively amending the ADD law as it applied to NME countries.’”<sup>140</sup> Despite GPX’s legislative history argument, the CIT ultimately concluded that it could not decide based on statutory language alone that Commerce did not have authority to impose CVDs on NME products.<sup>141</sup> However, the CIT recognized that Commerce’s simultaneous application of ADDs and CVDs to the same Chinese export products was “unreasonable”<sup>142</sup> and Commerce’s methodology “could very well result in a double remedy,”<sup>143</sup> so the court ordered Commerce to refrain from imposing concurrent ADDs and CVDs until it was “prepared to address [the double counting] problem through improved methodologies or new statutory tools.”<sup>144</sup>

The case was remanded to Commerce with instructions for Commerce to either decline to impose CVDs on the Chinese tire exports or alter its trade remedy methodology to account for the double remedy issue.<sup>145</sup> On remand, Commerce determined it had three options to avoid the double remedy problem: (1) decline to apply the CVDs; (2) treat China as a market economy or the tire industries as MOIs for ADD calculations; or (3) offset

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137. Feldman & Burke, *supra* note 78, at 807.

138. GPX Int’l Tire Corp. v. United States, 33 Ct. Int’l Trade 1368, 1373–74 (2009); Clarke, *supra* note 121, at 826.

139. See GPX Int’l Tire Corp., 33 Ct. Int’l Trade at 1373–74; Clarke, *supra* note 121, at 826.

140. GPX Int’l Tire Corp., 33 Ct. Int’l Trade 1368 at 1373–74 (quoting Pls.’ of P. & A. in Supp. of Mot. For J. on the Agency Rs. Vol. 1: CVD/NME AD Coordination Issue (“Pls.’ Coordination Br.”) 11, 12–20).

141. *Id.* at 1374.

142. *Id.* at 1375.

143. *Id.* at 1378.

144. *Id.* at 1379; Clarke, *supra* note 121, at 829.

145. GPX Int’l Tire Corp., 33 Ct. Int’l Trade at 1388; Zheng, *supra* note 16, at 444.

the CVDs against the ADDs.<sup>146</sup> Despite its determination that both of the first two options would eliminate the possibility of double remedies, Commerce chose to offset the CVDs against the ADDs, weakly reasoning that it was the “least objectionable of the three.”<sup>147</sup> GPX challenged this decision before the CIT (*GPX II*), and in August 2010, the CIT rejected Commerce’s decision to offset the CVDs against the ADDs in its remand determination.<sup>148</sup> The CIT disagreed with Commerce’s methodology for calculating CVDs and ADDs by using regular NME procedures and the surrogate method, only to offset the CVDs against the calculated ADD margin.<sup>149</sup> That methodology, the CIT reasoned, “render[ed] concurrent CVD and ADD investigations unnecessary”<sup>150</sup> because Commerce could impose ADDs without any CVDs and reach the same economic result without “forc[ing] foreign parties to spend many months and large sums of money to go through a [CVD] investigation,”<sup>151</sup> only to have the results offset by the ADD. The CIT decision highlighted Commerce’s inability to avoid the double counting problem and held that “in the absence of new statutory tools” the only option remaining for Commerce was to not apply CVDs to Chinese tire exports.<sup>152</sup>

### *3. Two Victories for China—The WTO and the Federal Circuit*

In addition to the CIT litigation, China simultaneously challenged the double counting issue in the WTO, in dispute DS379. In October 2010, the WTO Dispute Panel issued its report in DS379, recognizing that double counting could occur when CVDs and ADDs were imposed simultaneously, but ultimately deciding that China failed to establish the inconsistency of double remedies with the provisions of the SCM agreement upon which China based its arguments.<sup>153</sup> However, China appealed the decision to the WTO Appellate Body, which reversed the lower Panel’s decision regarding double remedies in March 2011.<sup>154</sup> China’s argument focused on the idea that double remedies violate Article

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146. GPX Int’l Tire Corp. v. United States, Consol. Court No. 08-00285 Slip Op. 09-103 (Sep. 18, 2009).

147. *Id.*

148. GPX Int’l Tire Corp. v. United States, 715 F. Supp. 2d 1337 (Ct. Int’l Trade 2010).

149. *See id.* at 1345.

150. *Id.*

151. *Id.* (quoting GPX’s comments).

152. *Id.* at 1346.

153. Panel Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (Oct. 22, 2010).

154. Appellate Report DS379, *supra* note 133.

19.3 of the SCM Agreement, which requires CVDs to be levied “in the appropriate amount” in each case.<sup>155</sup> The WTO Appellate Body determined that the United States did not fulfill its obligations under Article 19.3 when it neglected to consider the double remedy issue during its simultaneous imposition of ADDs and CVDs on the Chinese imports.<sup>156</sup> Interestingly, Commerce argued that it had “no authority or obligation to avoid the imposition of double remedies” under U.S. law.<sup>157</sup> However, China responded by noting that the CIT had rejected that argument in *GPX II* when it determined that U.S. law required Commerce to avoid double remedies during the concurrent imposition of CVDs and ADDs against NMEs.<sup>158</sup>

The unexpected reversal was a tremendous victory for China because it affirmed the Chinese position that failing to avoid double remedy situations is inconsistent with the international commitments of WTO Members. China’s Ministry of Commerce claimed the WTO’s decision “conclusively established that the US acts unlawfully in the methods by which it calculates and imposes countervailing duties on imports from China.”<sup>159</sup> By contrast, U.S. Trade Representative Ron Kirk said he was “deeply troubled” by the decision.<sup>160</sup> The decision negatively affected Commerce because it invalidated the assertion that Commerce could impose simultaneous ADDs and CVDs simply because China’s market conditions had changed since *Georgetown Steel*. However, the double remedy issue was far from resolved because Commerce chose to appeal the *GPX II* case in the ongoing domestic U.S. litigation.

Commerce appealed the CIT’s ruling to the Court of Appeals for the Federal Circuit (*GPX III*), which issued its opinion in December 2011.<sup>161</sup> The Court of Appeals for the Federal Circuit (“CAFC”) ultimately affirmed

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155. *Id.* at ¶ 122; SCM Agreement, *supra* note 23, art. 19.3.

156. Appellate Report DS379, *supra* note 133.

157. *Id.* at ¶ 106.

158. *Id.*

159. *Appellate Body Reverses Ruling, Hands Victory to China over US in Trade Remedy Case*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (Mar. 16, 2011), <http://ictsd.org/i/news/bridgesweekly/102382/>.

160. Press Release, USTR Statement Regarding WTO Appellate Body Report in Countervailing Duty Dispute with China, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (Mar. 2011), <http://www.ustr.gov/about-us/press-office/press-releases/2011/march/ustr-statement-regarding-wto-appellate-body-report-c>.

161. *GPX Int’l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011); Zheng, *supra* note 16, at 446.

the CIT's ruling banning the use of CVDs against the Chinese tire exports, but the CAFC based its reasoning on legislative ratification and the current state of U.S. federal statutes instead of the double counting issue.<sup>162</sup> The court opined that the CIT's decision to bar CVDs based on the potential for double counting was "problematic" because it was unclear whether U.S. statutes prohibited double counting, and because Commerce was unable to determine whether double counting had occurred.<sup>163</sup> However, in a severe blow to Commerce, the court determined that as a matter of U.S. federal law, CVD law did not apply to NME countries and Commerce was prohibited from applying CVDs to products from NMEs in all situations, even in cases without concurrent ADD investigations where there was no risk of double remedies.<sup>164</sup>

The CAFC based its reasoning on the principle of legislative ratification, the idea that Congress, by enacting various amendments to U.S. trade policy without altering the CVD law to accommodate NMEs, and in some instances specifically rejecting opportunities to grant Commerce the authority to impose CVDs against NME products,<sup>165</sup> had effectively adopted the interpretation of CVD law previously used by Commerce and the courts—that CVDs were inapplicable to NMEs. The CAFC ruled that Congress was "well aware of Commerce's interpretation that countervailing duties could not be imposed on NME imports, and when reenacting the trade law, it rejected amendments designed to alter that approach."<sup>166</sup> The CAFC referenced its previous decision in *Georgetown Steel* as a clear example of a situation where Congress understood how Commerce and the courts were interpreting the CVD law but "took no steps to revise or repeal it."<sup>167</sup> Commerce argued that the *Georgetown Steel* court had simply deferred to Commerce's interpretation of the law, which at the time was that CVDs were inapplicable to NMEs, and contended that since conditions in China changed, the CAFC should defer to Commerce's new decision to allow CVDs against NMEs.<sup>168</sup> However, the CAFC rejected this argument and held that the *Georgetown Steel* decision was

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162. GPX Int'l Tire Corp., 666 F.3d at 745.

163. *Id.* at 737.

164. *Id.* at 734, 745. *See also* Feldman & Burke, *supra* note 78, at 809.

165. *See* GPX Int'l Tire Corp., 666 F.3d at 740–43 (citing 130 CONG. REC. 30, 453 (1984); *Georgetown Steel Corp.*, 801 F.2d 1308; H.R. REP. No. 100-40 (1987); Pub. L. No. 103-465, 108 Stat. 4809 (1994)).

166. GPX Int'l Tire Corp., 666 F.3d at 741.

167. *Id.*

168. *Id.* at 744–45; Feldman & Burke, *supra* note 78, at 808–09.

based in law, and the ruling did not depend on facts concerning the condition of the Chinese economy as Commerce had interpreted it.<sup>169</sup>

The significance of the *GPX III* ruling is perhaps due in large part to Commerce's decision to appeal to the CAFC. The lower CIT ruling only prevented Commerce from imposing simultaneous CVDs and ADDs,<sup>170</sup> and left open the possibility of imposing concurrent CVDs and ADDs if Commerce could solve the double remedy problem.<sup>171</sup> However, Commerce appealed the CIT's ruling to the CAFC, who ultimately prohibited the imposition of CVDs against all NME products. This was a significant decision because the CAFC ruling set the precedent that binds all lower courts and the Department of Commerce in all future cases, unless Congress changes the statute.<sup>172</sup> The decision was a strong victory for China, but the CAFC left the door open for Commerce, ending its opinion by suggesting that "if Commerce believes that the law should be changed, the appropriate approach is to seek legislative change."<sup>173</sup>

#### IV. NEW LAWS, NEW LAWSUITS

In the absence of a legislative change to the U.S. federal laws, the CAFC's decision essentially set an expiration date for all prior CVD determinations and pending CVD investigations against China.<sup>174</sup> However, in a rare bipartisan effort, Congress passed a bill amending the federal laws governing ADDs and CVDs.<sup>175</sup> The new law, Public Law (PL) 112-99, specifically allows Commerce to apply CVDs to products from NMEs and provides a procedure for offsetting CVDs against ADDs.<sup>176</sup> Congress passed the bill at a rapid pace; the Chairman of the Ways and Means Committee suspended rules in the House of Representatives to accelerate the bill's passage, the Senate passed the bill by unanimous consent without any amendment, and President Obama signed the bill into law on March 13, 2012.<sup>177</sup> Although the bill was passed before the CAFC decision went

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169. *GPX Int'l Tire Corp.*, 666 F.3d at 738–39; Feldman & Burke, *supra* note 78, at 794.

170. *GPX Int'l Tire Corp.*, 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009).

171. *Id.* at 1243; Feldman & Burke, *supra* note 78, at 809.

172. Feldman & Burke, *supra* note 78, at 809–10.

173. *GPX Int'l Tire Corp.*, 666 F.3d at 745.

174. Feldman & Burke, *supra* note 78, at 811.

175. See Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, 126 Stat. 265, Mar. 13, 2012.

176. *Id.*

177. Feldman & Burke, *supra* note 78, at 811–12.



into effect, which would have eliminated all CVDs against products imported from China, the new law has created more problems than it has solved.

In Congress's haste to pass a bill protecting the CVDs, it failed to address the real problems underlying the *GPX* cases. Instead of addressing the double counting issue, the main reason Commerce lost its WTO dispute and previous CIT litigation and the issue likely to become the emphasis of subsequent appeals, Congress focused specifically on overturning *Georgetown Steel* and *GPX III*.<sup>178</sup> Due to Congress's shortsightedness, the new law has created an unfortunate situation where CVDs and ADDs can be, and in some cases are required to be, simultaneously imposed without any offset—which constitutes de facto double counting.<sup>179</sup> This occurs because PL 112-99 only provides a reduction in the ADD offset if Commerce is able to “reasonably estimate” the extent to which the CVD increased the calculated dumping margin.<sup>180</sup> If, however, Commerce is unable to make that determination, it cannot make the offset adjustment; but, in accordance with the statute, it must still assess the CVDs on top of the ADDs.<sup>181</sup> This situation is problematic because it essentially requires Commerce to impose CVDs and then attempt to solve the double counting problem with an offset ex post, a procedure that directly conflicts with the CIT's recommendation that Commerce refrain from imposing CVDs until it solved the double counting problem.<sup>182</sup> Furthermore, the law's tolerance for the simultaneous imposition of ADDs and CVDs without any offset is contrary to the WTO's determination that double remedies violate the SCM Agreement.<sup>183</sup>

The new law is also marred by two additional drafting errors. The section of PL 112-99 that allows Commerce to apply CVDs to products from NMEs is retroactive to November 20, 2006, but the section of the law that provides for the offset procedure to avoid double counting situations is only retroactive to cases that were initiated on or after March 13, 2012.<sup>184</sup> The decision to allow the retroactive application of CVDs without any offsetting procedures is problematic because it explicitly creates a six-year

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178. *Id.* at n.143.

179. *Id.* at 813–14.

180. Pub. L. No. 112-99 at sec. 2(a), § 701(f)(1)(C); Feldman & Burke, *supra* note 78, at 814.

181. Pub. L. No. 112-99 at sec. 2(a), § 701(f)(1)(C).

182. Feldman & Burke, *supra* note 78, at n.147.

183. Appellate Report DS379, *supra* note 133, at ¶ 607(d)(i).

184. Pub. L. No. 112-99 at sec. 2(b); Feldman & Burke, *supra* note 78, at 815.

window for double remedy situations in defiance of rulings made by the CIT and WTO. Furthermore, in addition to the “reasonabl[e] estimate” language that limits the applicability of the offset mechanism, the offset procedure is also restricted to situations where subsidies have “been demonstrated” to reduce the price of the export products.<sup>185</sup> This is problematic because the passive language does not identify which party must do the “demonstrating,” and leaves Commerce with maximum discretion to determine each party’s burden of proof under U.S. laws.<sup>186</sup>

The *GPX* case is ongoing, and has been through three additional rounds of litigation since the PL 112-99 was passed: once in the CAFC (*GPX IV*<sup>187</sup>) and twice in the CIT (*GPX V*<sup>188</sup> and *GPX VI*<sup>189</sup>). These subsequent cases have focused on several issues outside the scope of this analysis, many of which are specific to the particular companies involved, but the CIT did address the limited retroactivity of the offset clause in *GPX V*. The *GPX* plaintiffs challenged the divergent retroactivity periods under the Equal Protection Clause, claiming that the law was being applied differently based on the timing of imports.<sup>190</sup> Unsurprisingly, however, the CIT was extremely sympathetic to Congress’s reasoning for allowing CVDs to be applied retroactively without providing the same retroactivity for the offset provision. Congress asserted that retroactive CVD application would strain its “limited resources” because it would require Commerce to recalculate ADD or CVD rates in twenty-four investigations.<sup>191</sup> The *GPX* plaintiffs correctly responded that Commerce could avoid the retroactivity problems by simply choosing not to impose CVDs or applying the offset methodology clearly set out in the new law in those twenty-four investigations; but ultimately the CIT did not force Commerce to accept that logic and “decline[d] to evaluate the merits of Congress’ legislative decision regarding the relative expense and administrative burden of reopening the twenty-four investigations permitted by Section 1 but not covered by Section 2 of the New Law.”<sup>192</sup> *GPX V* was remanded for Commerce to bring its determinations regarding other issues into

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185. Pub. L. No. 112-99 at sec. 2(a). );

186. Durling, *supra* note 119, at 518.

187. *GPX Int’l Tire Corp. v. United States*, 678 F.3d 1308 (Fed. Cir. 2012).

188. *GPX Int’l Tire Corp. v. United States*, 893 F. Supp. 2d 1296 (Ct. Int’l Trade 2013).

189. *GPX Int’l Tire Corp. v. United States*, 942 F. Supp. 2d 1343 (Ct. Int’l Trade 2013).

190. *GPX Int’l Tire Corp.*, 893 F. Supp. 2d at 1316.

191. *Id.* at 1317.

192. *Id.* at 1318.

compliance with PL 112-99, and those adjustments were sustained in *GPX VI* in October 2013.<sup>193</sup> However, GPX could appeal rulings on issues regarding compliance with PL 112-99 as well as the ruling on the retroactivity provision to the CAFC.

In addition to the domestic *GPX* litigation, on September 17, 2012, China filed for consultations with the WTO to determine whether the new law violated WTO agreements.<sup>194</sup> China's Minister of Commerce, Chen Deming, referred to the new law as "pointing fingers" and stated: "We follow the rules of the WTO, but we have no obligation to follow domestic laws or regulations in any specific country that go beyond international rules."<sup>195</sup> The United States responded to China's request for consultation at the December 2012 WTO Dispute Settlement Body Meeting, where an official statement declared that the United States was "disappointed that China has chosen to pursue its request for a panel in this matter" and that the new law was "fully consistent with WTO obligations."<sup>196</sup> Despite objections from the United States, a WTO Dispute Panel was convened in December 2012 to examine China's complaints in a dispute labeled DS449.<sup>197</sup>

China's claims in DS449 were divided into two areas: (i) the legitimacy, enforceability, and effective date of PL 112-99; and (ii) the United States' failure to investigate whether "double remedies" occurred in all of the instances where ADDs and CVDs were simultaneously imposed between November 20, 2006 and March 13, 2012 (the retroactivity window of PL 112-99) in violation of Articles 10, 19.3, and 32.1 of the SCM Agreement).<sup>198</sup> China's challenges to PL 112-99 focused on whether the new law was consistent with Article X of the GATT 1994, specifically: (i)

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193. *GPX Int'l Tire Corp.*, 942 F. Supp. 2d at 1362.

194. Request for the Establishment of a Panel, *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/2 (Nov. 20, 2012) [hereinafter China Panel Request DS449].

195. *US Congress Takes Aim at Beijing, Preserves Anti-Subsidy Tariffs*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV. (Mar. 7, 2012), <http://ictsd.org/i/news/bridgesweekly/127887/>.

196. *Statement by the United States at the December 17, 2012, DSB Meeting*, MISSION OF THE UNITED STATES, GENEVA, SWITZERLAND (Dec. 17, 2012), <http://geneva.usmission.gov/2012/12/18/dsb-meeting-6/>.

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

198. China Panel Request DS449, *supra* note 194.

whether the law had been “published promptly” after its effective date;<sup>199</sup> (ii) if the law had been “enforced” prior to its official publication;<sup>200</sup> and (iii) whether WTO Members are prevented from enacting legislation that supersedes pending decisions of domestic courts and tribunals when the legislation comes into effect.<sup>201</sup> When analyzing China’s claim regarding the double remedies issue, it is important to note that China’s claim in DS449 was materially identical to the one it raised against the United States in DS379, a dispute where China prevailed on appeal. In DS379, the WTO Appellate Body found that the United States’ failure to avoid double remedies was inconsistent with WTO obligations.<sup>202</sup> However, despite China’s reassertion of its successful claim from DS379, the United States took an audacious position on the double remedy issue in DS449, submitting that China’s claim was “founded on an erroneous interpretation”<sup>203</sup> of SCM Article 19.3 and claiming that the WTO Appellate Body’s analysis in DS379 was “not persuasive.”<sup>204</sup> These bold statements illustrate the willingness of WTO Members to disregard WTO decisions, even in materially indistinguishable situations, and challenge the WTO’s authority to resolve trade remedy disputes.

The WTO Panel released its report for DS449 on March 27, 2014, and sided with the United States regarding China’s challenges to the publication date of PL 112-99 and the validity of legislation that supersedes pending domestic court decisions.<sup>205</sup> Although the Panel agreed with China’s assertion that PL 112-99 had been “enforced” prior to its official publication, it ultimately sided with the United States on that claim as well, ruling that PL 112-99 falls outside the scope of Article X:2.<sup>206</sup> However, the Panel found for China on the double remedy issue and reaffirmed its reasoning from DS-379: WTO Members have an affirmative obligation to investigate and avoid double remedies in situations where ADDs and CVDs are simultaneously imposed against products from NMEs.<sup>207</sup> China appealed the Panel’s finding that PL 112-99 is outside the scope of Article

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199. GATT, *supra* note 12, art. X § 1; China Panel Request DS449, *supra* note 194.  
200. GATT, *supra* note 12, art. X § 2; China Panel Request DS449, *supra* note 194.  
201. GATT, *supra* note 12, art. X § 3(b); China Panel Request DS449, *supra* note 194.  
202. Appellate Report DS379, *supra* note 133.  
203. Panel Report DS449, *supra* note 132, at ¶ 7.301.  
204. *Id.*  
205. *Id.* at ¶ 8.1(b).  
206. *Id.*  
207. *Id.* at ¶ 8.1(c). *See id.* at ¶ 7.342.

X:2.<sup>208</sup> The United States appealed the double remedy issue, but made the interesting decision to attack the procedural validity of China's claim rather than its substance. In what appears to be an acknowledgment that it could not win the double remedies issue on its merits, the United States focused its appeal on the idea that China failed to provide a "legal basis of the complaint sufficient to present the problem clearly."<sup>209</sup> Astonishingly, the entire basis for that claim was the fact that China, in its request for a WTO Panel, only referenced that double remedies are inconsistent with Article "19" of the SCM, and did not specifically identify the precise subsection of Article 19—Article "19.3."<sup>210</sup>

The WTO circulated the appellate report on July 7, 2014.<sup>211</sup> The Appellate Body sided with China on its charge that PL 112-99 falls within the scope of Article X:2.<sup>212</sup> However, the Appellate Body reported that it could not complete the analysis of whether the law violated Article X:2 because that analysis depends on whether PL 112-99 changes or clarifies U.S. CVD law, which requires a complete examination of legislation, judicial decisions, and expert legal opinions pertaining to CVD law in the United States.<sup>213</sup> The Appellate Board determined that it was unable to complete such an examination and render a definitive conclusion because the legislation, decisions, and opinions relating to U.S. CVD law are amenable to different interpretations. The Board specifically noted that Commerce's inconsistent application of CVD law to NMEs had made the analysis more difficult, remarking:

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208. Notification of an Appeal by China Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Under Rule 20(1) of the Working Procedures For Appellate Review, *United States—Countervailing and Anti-Dumping Measures on Certain Products From China*, WT/DS449/6 (Apr. 11, 2014).

209. Notification of an Appeal by the United States Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Under Rule 20(1) of the Working Procedures For Appellate Review, *United States—Countervailing and Anti-Dumping Measures on Certain Products From China*, WT/DS449/7 (Apr. 24, 2014) [hereinafter U.S. Appeal Request DS449]; Understanding on Rules and Procedures Governing the Settlement of Disputes art. 6.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

210. U.S. Appeal Request DS449, *supra* note 209; China Panel Request DS449, *supra* note 194.

211. Report of the Appellate Body, *United States—Countervailing and Anti-Dumping Measures on Certain Products From China*, WT/DS449/AB/R (Jul. 7, 2014) [hereinafter Appellate Report DS449].

212. *Id.* at ¶ 4.119.

213. *Id.* at ¶ 5.1; *See id.* at ¶ 4.123–4.183.

We note that [Commerce's] official statements made in the process of applying the US countervailing duty law between 1986 and 2012, in particular before and after 2006, do not appear to be entirely consistent, which may be construed as reflecting a certain level of ambiguity regarding its understanding of the meaning of the CAFC's ruling in Georgetown Steel.<sup>214</sup>

The Appellate Board also found in favor of China regarding the United States' precarious challenge that China had failed to "present the problem clearly," and reiterated that failing to investigate and avoid double remedies is a violation of the SCM Agreement.<sup>215</sup>

On their face, the decisions of the WTO Dispute Panel and Appellate Body in DS449 appear to be significant victories for China. However, the absence of appropriate enforcement mechanisms in the WTO trade remedy system and general lack of respect for WTO Dispute Panel and Appellate Body decisions could seriously diminish or even completely thwart the impact of the DS449 decisions on the double remedy issue. Unable to enforce their decisions or command adherence to their rulings, the Dispute Panel and Appellate Body could only "*recommend* that the United States bring [the trade remedy investigations involving both CVDs and ADDs] into conformity with its obligations under the SCM Agreement,"<sup>216</sup> and advise that the WTO Dispute Settlement Body "*request*" that the United States bring its trade remedy investigations "into conformity with [the SCM] Agreement,"<sup>217</sup> respectively. Whether the United States will comply with the WTO's recommendations and requests concerning the double remedy issue remains to be seen, but the WTO's ruling reaffirmed the reasoning from DS379 that the United States previously claimed was "erroneous"<sup>218</sup> and "not persuasive,"<sup>219</sup> and ultimately disregarded in favor of the continued application of concurrent CVDs and ADDs against Chinese exports.<sup>220</sup>

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214. *Id.* at ¶ 4.165.

215. *Id.* at ¶ 4.52.

216. Panel Report DS449, *supra* note 132, at ¶ 8.3 (emphasis added).

217. Appellate Report DS449, *supra* note 211, at ¶ 5.2 (emphasis added).

218. Panel Report DS449, *supra* note 132, at ¶ 7.301.

219. *Id.*

220. *Id.* at ¶ 7.3.2 Table 1.

The DS449 situation is further complicated by the fact that both China and the United States are claiming the WTO ruling as a victory.<sup>221</sup> The United States has touted its victory over China's challenges to the effective date, legitimacy and enforceability of PL 112-99 as evidence of the new law's compliance with WTO obligations,<sup>222</sup> while China has reiterated its position that the United States is violating its WTO obligations by continuing to simultaneously impose CVDs and ADDs without an appropriate offset.<sup>223</sup> On the same day the Appellate Body released its report in DS449, the Office of the U.S. Trade Representative (USTR) issued a statement entitled, "China Fails A Second Time in its Challenge to U.S. Countervailing Duty Law," which included the claim that "there are no WTO panel or Appellate Body findings that [PL 112-99] breaches WTO rules."<sup>224</sup> Although the statement is technically correct in its assertion that the WTO has not explicitly concluded that PL 112-99 violates WTO obligations, the WTO has unequivocally stated, on three separate occasions,<sup>225</sup> that double remedies violate the SCM Agreement. While PL 112-99 might be procedurally and mechanically valid, its application allows and creates double remedies in defiance and violation of WTO rulings and obligations. The USTR statement briefly acknowledged China's victory on the double remedies issue, but claimed "[a] provision of [PL 112-99] already directs the Department of Commerce to look at the issue of so-called 'double remedies' and make any necessary adjustments in determinations."<sup>226</sup> This statement is also technically accurate, however it fails to mention that the provision of PL 112-99 that allows Commerce to make "necessary adjustments"<sup>227</sup> and avoid double counting is only

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221. See Press Release, Office of the United States Trade Representative, *China Fails A Second Time in its Challenge to U.S. Countervailing Duty Law* (Jul. 7, 2014), <http://www.ustr.gov/about-us/press-office/press-releases/2014/July/China-Fails-Second-Time-in-its-Challenge-to-US-Countervailing-Duty-Law> [hereinafter USTR Statement]; *China Welcomes WTO Ruling: MOC*, XINHUA (Jul. 9, 2014), [http://news.xinhuanet.com/english/china/2014-07/09/c\\_133471428.htm](http://news.xinhuanet.com/english/china/2014-07/09/c_133471428.htm).

222. See USTR Statement, *supra* note 221.

223. See *WTO Appellate Body Issues Mixed Ruling in U.S.-China Trade Remedy Case*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV. (Jul. 10, 2014), <http://www.ictsd.org/bridges-news/bridges/news/wto-appellate-body-issues-mixed-ruling-in-us-china-trade-remedy-case>.

224. USTR Statement, *supra* note 221.

225. Appellate Report DS379, *supra* note 133; Panel Report DS449, *supra* note 132; Appellate Report DS449, *supra* note 211.

226. USTR Statement, *supra* note 221.

227. *Id.*

effective if Commerce is able to “reasonably estimate”<sup>228</sup> the extent to which the CVD increases the dumping margin, and does not apply to the twenty-five simultaneous ADD and CVD investigations initiated between November 20, 2006 and March 13, 2012.<sup>229</sup> Irrespective of the literal accuracy of these statements, the United States’ willingness to claim victory over China despite being deliberately reminded that the simultaneous imposition of CVDs and ADDs without an appropriate offset violates the SCM Agreement and underscores the most pervasive problem in the current WTO trade remedy system: the lack of a proper enforcement mechanism for WTO rulings leaves WTO decisions not only open for interpretation, but vulnerable to complete disregard.

Across the Pacific, China characterized the Appellate Body’s decision as a tremendous victory on the double remedy issue, and largely ignored the United States’ success on the claims regarding the effective date and legitimacy of PL 112-99. The Chinese Minister of Commerce declared the Appellate Body’s ruling a “significant victory of China’s challenge against U.S. abuse of trade remedy measures through legal channels, which is of great impact.”<sup>230</sup> Whether China’s successful re-assertion that double remedies violate WTO obligations will, in fact, become a “significant victory” for China will depend on the United States’ willingness to correct the twenty-five cases at issue, affecting products worth an estimated annual export value of \$7.2 billion,<sup>231</sup> and its proclivity to investigate and avoid double remedies in all future trade remedy investigations. On August 22, 2014, one month after the DSB’s adoption of the Appellate Body’s decision, the United States announced that it “intends to implement the recommendations and rulings of the DSB in [DS449] *in a manner that respects its WTO obligations . . .*”<sup>232</sup> However, the United States made a very similar announcement about its “intention to implement the DSB’s recommendations and rulings” in DS379,<sup>233</sup> before ultimately disregarding

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228. Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, 126 Stat 265 sec. 2(a), § 1677(f)(1)(C).

229. *Id.* sec. 2(b).

230. *U.S. Anti-Dumping Measures on Chinese Products Inconsistent with WTO Rules: WTO*, SHANGHAI DAILY (Jul. 8, 2014), [http://www.shanghaidaily.com/article/article\\_xinhua.aspx?id=228480](http://www.shanghaidaily.com/article/article_xinhua.aspx?id=228480).

231. *Id.*

232. Communication from the United States, *United States–Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/11 (Aug. 22, 2014) (emphasis added).

233. Communication from China and the United States Concerning Article 21.3(c) of the DSU, *United States–Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/10 (May 13, 2011).



the Appellate Body's decision regarding double remedies and referring to the double remedy analysis as "erroneous" and "not persuasive."<sup>234</sup> The United States' decision to include qualifying language about its "WTO obligations" in its announcement could indicate its intention to once again ignore the Appellate Body's decision in favor of its own interpretation of the United States' obligations under the SCM Agreement. Arbitration between China and the United States will determine what amount of time is "reasonable"<sup>235</sup> for the United States to implement the Appellate Body's rulings, but ultimately Commerce must decide if it will end the simultaneous imposition of ADDs and CVDs against products from China, or continue the practice in direct violation of WTO rulings and the SCM Agreement.

#### V. A CENTRALIZED SOLUTION: RATIONAL DESIGN AND THE TRADE REMEDY REGIME

The intensely litigated *GPX* cases, ongoing double remedy problem, China's status as a nonmarket economy, and other ancillary trade remedy issues highlight how the current international trade remedy framework fails to serve the interests of WTO Members. The current system needs to undergo significant changes to properly supervise the trade relationship between nations operating market economies and China. WTO Members, specifically the United States and China, need to respond to the ineffectiveness of the current trade remedy regime by supporting the creation of a trade remedy institution with central authority to confront the complexities of regulating trade remedies in the global economy. A comprehensive overhaul of the WTO system is unrealistic and excessive, but an institutionalized update to the trade remedy system could help avoid the flaws that the *GPX* cases have distinctly exposed as the WTO enters its third decade of supervising international trade.

Rational design theory, a particular division of the institutionalism theory of international law, provides support for a new WTO institution focused on trade remedies. Rational design theory focuses on underlying "cooperation problems" which states try to solve by committing to

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234. Panel Report DS449, *supra* note 132, at ¶ 7.301.

235. Communication from the United States and China Concerning Article 21.3(c) of the DSU, *United States–Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/12 (Sept. 15, 2014).

agreements and establishing multilateral institutions.<sup>236</sup> This theory moves away from the abstract nature of classic institutionalism, which focuses primarily on whether cooperation is possible and whether institutions matter, toward the empirical goal of designing specific institutions intended to resolve defined cooperation problems.<sup>237</sup> Institutions that are “rationally designed” should possess design features effectively linked to a cooperation problem, such as the flexibility of trade remedies and so-called “escape mechanisms.”<sup>238</sup> Designing multilateral institutions in this manner is important because it helps nations create and alter organizations to resolve existing problems, which effectuates change in the future, and thus has an impact on the prospective behavior of states and, in this instance, the future of the international trade system.<sup>239</sup>

The design of the WTO trade remedy system has failed, as evidenced by the ongoing issues that have remained unresolved for years, and the failure has exposed a cooperation problem: the trade remedy system lacks a proper authoritative structure and is in desperate need of an appropriate enforcement mechanism. Rational design theory suggests that countries, specifically the United States and China, could resolve this problem by incorporating information about the cooperation problems into the design choices for a future institution; that is, a specific trade remedy institution within the WTO.<sup>240</sup> The failures of the current system have primarily been caused by the increased use of “escape clauses,” which allow WTO Members to “renege on their commitments under certain circumstances.”<sup>241</sup>

Rational design theorist Peter Rosendorff argues that escape clauses, such as Article VI of the GATT, which permits nations to impose ADDs and CVDs, are necessary for an optimal institutional design because they allow states to escape high periods of political pressure.<sup>242</sup> However, Rosendorff acknowledges that over time, escape clauses have become “more accessible, or easier to achieve; as a consequence we have seen an

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236. Barbara Koremenos, *Institutionalism and International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 59, 63 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

237. *Id.* at 62.

238. *Id.* at 62; Peter B. Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions*, 55 INT'L ORG. 829, 847 (2001).

239. Koremenos, *supra* note 236.

240. *Id.* at 66.

241. Rosendorff & Milner, *supra* note 238.

242. *Id.*

increased use of these measures.”<sup>243</sup> In this particular instance, the frequent use of CVDs and ADDs has created an unstable and inefficient trading environment between the United States and China. Although the use of trade remedies between the United States and China has created serious problems in recent years, Rosendorff explains that the flexibility created by escape clauses reduces the possibility that a system, in this case the WTO, breaks down entirely.<sup>244</sup> In the current trade remedy framework, escape clauses permitting the use of CVDs and ADDs have not caused the WTO trade remedy system to fail, but instead have exposed the need for an effective central authority and enforcement mechanism to supervise their use.

The current WTO dispute resolution system has no true enforcement powers, “no jailhouse, no bail bondsmen, no blue helmets, no truncheons, no tear gas”<sup>245</sup> to generate compliance with Dispute Panel or Appellate Body rulings.<sup>246</sup> The WTO dispute resolution system essentially provides consultations and determines if a Member is in violation of an agreement, but it has no enforcement mechanism to induce compliance with the rulings.<sup>247</sup> But, the lack of a rigid enforcement scheme was, as Rosendorff would explain, a design choice intended to promote flexibility and stability of the overall system by allowing more countries to accede to the deal, countries that probably would not have joined the WTO if it included a rigid enforcement structure.<sup>248</sup>

The current trade remedy problems show that the WTO needs an enforcement mechanism specific to trade remedies. However, the enforcement mechanism does not have to rely on the classical understanding of enforcement, i.e. administering punishments, but instead only needs to recapture the authority to direct and control trade remedies for WTO Members. Essentially, a WTO central authority would have the final say in trade remedy determinations and no trade remedy could be imposed without the approval of that WTO authority, effectively operating as an “enforcement mechanism” for trade remedy agreements. Members

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243. *Id.*

244. *Id.*

245. *Id.* (quoting Judith H. Bello, *The WTO Dispute Settlement Understanding: Less is More*, AM. J. INT’L L. 90, 416 (1996)).

246. *Id.*

247. See *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG. (2013), [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm).

248. Rosendorff & Milner, *supra* note 238.

found in violation of agreements at the Dispute Panel would be subject to trade remedies, just as they are now, except the nation imposing the CVDs or ADDs would only be allowed to enforce the remedies after approval from the WTO trade remedy authority. Similarly, previously approved trade remedies found to be in violation of agreements would be suspended by the central authority until they were brought into compliance and reaffirmed by the trade remedy authority.

This approach would be much more “hands-on” than the current trade remedy regime, but, as the *GPX* cases have shown, the current laissez-faire approach of letting individual nations impose CVDs and ADDs at their own will through their domestic laws, and subsequently trying to adjudicate violations, has failed to resolve the complexities of nonmarket economies. It is easy to understand why China’s trading partners, particularly the United States, are eager to impose simultaneous CVDs and ADDs despite the likelihood of double counting—WTO Members have little incentive not to treat China as harshly as possible under the current trade remedy system. The absence of a proper enforcement mechanism and repeated allegations of currency manipulation and other international violations have created the perfect environment for veteran WTO Members, with years of WTO dispute settlement experience, to test the limits of trade remedies against China—a new, inexperienced, and unpopular opponent operating a nonmarket economy. The attractiveness of this environment, previously described as “ripe for abuse,”<sup>249</sup> will continue to increase until a proper enforcement mechanism is designed to control trade remedies in the global economy. In addition to a centralized enforcement mechanism, the current trade remedy regime must consolidate all remedy-related determinations within a central authority. Allowing an institution with central authority to make determinations that individual WTO Members are currently making, such as NME status, what qualifies as a “subsidy” in different economies, whether double counting is occurring, the retroactivity of trade remedies, etc., would allow nations to settle disputes faster and with more certainty than the current regime provides.

Transferring the power to administer trade remedies from each WTO Member to a centralized WTO trade remedy authority would certainly be contentious. Nations that currently take advantage of the flaws in the trade remedy system, such as the United States, would be reluctant to give up

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249. Symposium, *supra* note 67, at 745.

their control of trade remedies. However, countries that have been the subject of numerous trade remedy investigations, such as China, Argentina, Brazil, India, and Mexico, might be able to assemble enough support from other WTO Members to reform the trade remedy system. Moreover, as the international trade landscape continues to shift due to sustained globalization amidst a global financial crisis, centralizing authority in a stable WTO institution could be viewed as an opportune solution to the developing needs of the global trade network.

Rational design theory supports the concept of centralizing trade remedy authority and enforcement in a single WTO institution. A centralized trade remedy authority would be somewhat similar to the Trade Policy Review Mechanism (“TPRM”), a highly institutionalized part of the WTO that provides information and transparency to WTO Members,<sup>250</sup> in that it would provide assurance that trade remedies were being administered and monitored effectively. In fact, a recent rational design study of the TPRM showed that “delegating certain functions in agreements may help stabilize cooperation by making it more difficult to renege on commitments.”<sup>251</sup> Furthermore, other rational design studies have shown that “having an external body render a decision about compliance may make it more palatable to domestic audiences, thereby increasing the chance that the body’s ruling will be followed and cooperation will ensue.”<sup>252</sup> Thus, U.S. industries and politicians might stop touting the “punishment” of China, which creates varying tides of domestic political pressure for U.S. representatives, if they were simultaneously more confident in the WTO’s control of trade remedies and fearful of violating trade remedy agreements. This alone could have an immediate impact on the trade relationship between the United States and China, a situation that is frequently impacted by nationalist cries from leaders of both countries for a level playing field in the international trade arena.

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250. See *Overseeing National Trade Policies: the TPRM*, WORLD TRADE ORG. (2013), [http://www.wto.org/english/tratop\\_e/tp\\_r\\_e/tp\\_int\\_e.htm](http://www.wto.org/english/tratop_e/tp_r_e/tp_int_e.htm).

251. Koremenos, *supra* note 236, at 71 (citing Arunabha Ghosh, *Developing Countries in the WTO Trade Policy Review Mechanism*, 9 WORLD TRADE REV. 419 (2010)).

252. Koremenos, *supra* note 236, at 71 (citing Beth A. Simmons, *Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes*, 46 J. CONFLICT RESOL. 829 (2002)); Todd Allee & Paul Huth, *The Pursuit of Legal Settlements to Territorial Disputes*, 23 CONFLICT MGMT & PEACE SCI. 285 (2006)).

## VI. CONCLUSION: CONTEXTUALIZING THE CURRENT TRADE REMEDY SITUATION IN THE COMPREHENSIVE U.S.-CHINA RELATIONSHIP

Trade remedy disputes are not a new occurrence in international law or in the WTO, but the rapidly developing landscape of international trade and China's emergence as an economic power in the last decade have significantly complicated the application of trade remedies in the global trade network. The WTO dispute settlement procedures concerning double counting, the *GPX* litigation in the CIT and CAFC, and Congress's attempt to legislate around the issue (in potential violation of WTO rulings and international agreements) are excellent evidence of the current shortcomings of trade remedy law and also a testament to the complexity of the U.S.-China relationship. The intricacies of trade remedies are a complicated reality of the global trade system, but trade remedy issues are only one element of the increasingly complex relationship between the world's two largest trading powers.

China's arrival as a major power in the global economy has forced a dividing wedge between the United States and China on several polarizing issues, including currency devaluation, human rights concerns, environmental policies, intellectual property protection, military spending, and diplomatic relations. The political and social issues are clearly secondary to the prevailing economic concerns of both nations; a subject predominated by concerns of Chinese currency manipulation. The currency devaluation debate has divided the nations for more than a decade, and is arguably the most important issue in international trade due to the enormous amount of money and goods that are affected by China's currency valuation procedures. Interestingly, the currency discussion has recently shifted toward currency devaluation as a form of subsidy,<sup>253</sup> which could make trade remedy issues between the United States and China a significant element of the currency manipulation debate and the principal economic concerns of both countries in the coming years.

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253. Wayne M. Morrison & Marc Labonte, *China's Currency Policy: An Analysis of the Economic Issues*, CONG. RES. SERV. 14 (Jul. 22, 2013), <http://www.fas.org/sgp/crs/row/RS21625.pdf> (explaining that recent legislative proposals have sought to allow Commerce to consider currency devaluation as a government subsidy for the purposes of CVD calculations, a proposal that would dramatically alter the use of CVDs against China and an unusual proposition that many critics argue would be inconsistent with WTO rules, which do not specifically include currency devaluation as a factor involved in the imposition of trade remedies).

Although trade remedy issues are only a single element of this complicated economic relationship, and are certainly secondary to the currency manipulation discussion, the current trade remedy situation represents one problem in the U.S.-China relationship with an identifiable solution. Curing the illogical inconsistencies of trade remedy application and improving the WTO's institutional control over trade remedies would not resolve the U.S.-China trade enigma, but it would significantly impact the global trade system, represent real progress toward improving the overarching U.S.-China relationship, and may even expose possible solutions to other economic, political, and social issues. Disputes over subjects like currency manipulation and human rights violations are fundamentally more challenging and politically sensitive due to the enormous scope of the underlying issues in those debates. Thus, approaching the rudimentary issues in the U.S.-China relationship that have identifiable causes and solutions, such as the inequitable application of trade remedies, could allow the countries to develop a cooperative relationship, approach issues pragmatically, and solve large problems one issue at a time—to cross the river by feeling the stones (摸石头过河).<sup>254</sup>

The world economy has experienced rapid globalization in the last few decades, which has drastically altered the entire global trade network. The WTO must adapt to the changing international trade landscape and develop modern solutions to evolving problems before trade relationships between the world's largest economies are irreparably damaged. China and the United States have spent years fighting protracted legal battles on various fronts without making any progress toward solving the trade remedy issues facing nonmarket economies in the twenty-first century. These trade remedy issues will undoubtedly continue to emerge as nations search for ways to protect their domestic industries while simultaneously attempting to stimulate their own trade development, and the manner in which these issues are resolved or left unresolved could help define the relationship between the United States and China for decades. It is clear that the current trade remedy regime has failed and allowed the U.S. Department of Commerce to exploit major flaws in the WTO trade remedy system. U.S. courts and lawmakers have declined to resolve the situation and, in some instances, have even chosen to exacerbate the inequity behind

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254. "Crossing the river by feeling the stones" is a Chinese idiom associated with Deng Xiaoping's pragmatic approach to economic reform; it describes the process Deng used to approach a large overarching problem by solving smaller issues one at a time, stone by stone.

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a cloak of nationalism and the safety of a weak WTO authority. Placing the control of trade remedy issues inside one rationally designed WTO institution would centralize the trade remedy process, strengthen the entire WTO, and provide much-needed stability to the global economy.