

# Trade Law's Responses to the Rise of China

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## ABSTRACT

This Article offers a systematic examination of trade law's responses to the emergence of China as a major player in world trade. As an intricate set of rules written largely prior to the advent of the China era, trade law had to readjust to the powerful newcomer in ways that eventually changed trade law itself. This Article investigates these changes in four major areas of trade law: antidumping, countervailing duties, safeguards, and managed trade. In almost all of those areas, trade law witnessed a protectionist shift against Chinese products at the expense of sound, consistent principles. But, at the same time, trade law has corrected some of the most egregious protectionist policies on China. These adaptations on the part of trade law tell a story of how an organic legal system evolves in response to changing external circumstances. This Article concludes that at least as an initial assessment, trade law has been rather successful in accommodating China in the new world trade order and has preserved the structural stability of the world trade system without deviating too far from its core principles.

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### INTRODUCTION

One of the “great dramas” of the twenty-first century is the ascent of China on the world stage.<sup>1</sup> In the span of less than four decades, China’s per capita gross domestic product leapt almost forty-fold from less than two hundred U.S. dollars in 1981 to over seventy-five hundred U.S. dollars in 2014.<sup>2</sup> In 2010, China surpassed Japan to become the world’s second-largest economy after the United States.<sup>3</sup> Measured in purchasing power parity, China’s economy has already overtaken that of the United States as the world’s largest.<sup>4</sup>

One key reason for China’s miraculous economic growth is its participation in international trade. In 1978, China accounted for less than one percent of world trade.<sup>5</sup> That percentage jumped to over ten percent in 2013, twelve years after China’s accession to the World Trade Organization.<sup>6</sup> Today, China is one of the most important players in world trade, ranking as the world’s largest exporting country and second largest importing country of merchandise.<sup>7</sup>

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1. See G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, FOREIGN AFF., Jan./Feb. 2008, <https://www.foreignaffairs.com/articles/asia/2008-01-01/rise-china-and-future-west>.

2. See *GDP PER CAPITA (current US\$)*, WORLD BANK (2016), <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.

3. Andrew Monahan, *China Overtakes Japan as World’s No. 2 Economy*, WALL ST. J., Feb. 14, 2011, <http://www.wsj.com/articles/SB10001424052748703361904576142832741439402>.

4. Keith Fray, *China’s Leap Forward: Overtaking the U.S. as the World’s Biggest Economy*, FIN. TIMES, Oct. 8, 2014, <http://blogs.ft.com/ftdata/2014/10/08/chinas-leap-forward-overtaking-the-us-as-worlds-biggest-economy/>. Purchasing Power Parity measures a country’s economy taking into account varying price levels between countries, particularly in goods and services that are not open to international competition. *Id.*

5. Markus Taube, *Economic Relations Between the PRC and the States of Europe*, in CHINA AND EUROPE SINCE 1978: A EUROPEAN PERSPECTIVE 78, 80 (Richard L. Edmonds ed. 2002).

6. See *Trade Profile: China*, WORLD TRADE ORG., <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=CN&> (last visited July 31, 2016).

7. See *id.*

The rise of China represents a seismic shift in the world trade order. While creating enormous economic opportunities within its borders, China's participation in world trade caused massive job losses in countries that import Chinese products.<sup>8</sup> In response, China's trading partners took numerous trade actions against Chinese products, within and without the parameters of global trade law.<sup>9</sup>

This Article documents how trade law responded to the rise of China in world trade. As an intricate set of rules written largely prior to the advent of the China era, trade law had to readjust to the powerful newcomer in ways that eventually changed trade law itself. This Article investigates these changes in four major areas of trade law: antidumping, countervailing duties, safeguards, and managed trade.<sup>10</sup> In almost all of those areas, trade law witnessed a protectionist shift against Chinese products at the expense of sound, consistent principles. But at the same time, trade law has corrected some of the most egregious protectionist policies on China. These nuanced responses showcase trade law's struggle to regain its footing in the face of unprecedented challenges posed by China's emergence as a major economic power.

Trade law's responses to China offer a case study of the compromises inherent in "embedded liberalism," a trade system where the objective of free trade is balanced against the objective of allowing national governments sufficient space for protectionist policies.<sup>11</sup> This Article tells a story of how China disrupted this balance, and how trade law attempted to rebalance itself by finetuning the major trade policy instruments as they were applied to China. The Article concludes that at least as an initial assessment, trade law has been rather successful in preserving the systemic stability of the world trade system without compromising too much on its core principles.

This Article proceeds as follows. Part I lays out the two competing considerations of trade law: free trade principles and protectionism. Part II discusses how trade law's balance between these two competing considerations was altered in response to the external shocks China caused to the world trade system. In so doing, it centers its discussions on WTO law and policies practiced by the United States and the European Union in four major trade law areas: antidumping, countervailing duties, safeguards, and managed trade. Finally, Part

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8. According to an estimate by a Washington-based think tank, trade with China caused the loss of 3.2 million jobs in the United States between 2001 and 2013. See Robert E. Scott & Will Kimball, *China Trade, Outsourcing and Jobs*, ECON. POL'Y INST. BRIEFING PAPER #385, Dec. 11, 2014, at 2, <http://s2.epi.org/files/2014/bp385-china-trade-deficit.pdf>.

9. See Wenhua Ji & Cui Huang, *China's Experience in Dealing With WTO Dispute Settlement: A Chinese Perspective*, 45 J. WORLD TRADE 1, 2 (2011) ("Chinese Products are frequently subjected to trade remedy measures and non-tariff barriers in overseas markets . . .").

10. See *infra* Part II.

11. For discussions of embedded liberalism, see ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* (2011); John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism and the Post-war Economic Order*, 36 INT'L ORGANIZATION 379 (1982).

III offers thoughts on the prospect of trade law's rebalancing with respect to China and whether that rebalancing has been successful thus far.

## I. TRADE LAW AS A BALANCE

This Article starts with a basic proposition that trade law embodies a delicate balance between two competing considerations: free trade principles and protectionism. On one hand, trade law strives to adhere to a set of free trade principles aimed at reducing trade barriers and discriminatory practices. On the other hand, as a matter of practical necessity, trade law condones certain protectionist policies that deviate from its core principles for purposes of maintaining the structural stability of the world trade system. These two competing considerations of trade law have to be viewed together to gain a full appreciation of the nature and practice of trade law. As shall become clear, they also form the basic analytical framework for examining trade law's responses to China's rise in world trade.

### A. *Free Trade Principles*

One overarching goal of trade law is to move from a "power-oriented" to a "rule-oriented" regime.<sup>12</sup> Under the auspices of the General Agreements on Tariffs and Trade (GATT) and subsequently the WTO, trade law has come a long way in accomplishing this goal.<sup>13</sup> Scholars concededly disagree as to the extent to which trade law could be characterized as "law" as a court would apply it.<sup>14</sup> However, there is a broad consensus that having a rule-based trade law

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12. See JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 8-10 (2000) (discussing the value of a rule-oriented approach as opposed to a power-oriented approach in the design of international institutions relating to economic activity).

13. See Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 253-60 (2006) (describing the shift from the power-based dispute resolution system under the GATT to the rule-based system under the WTO); R. E. Hudec, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 1 WORLD TRADE REV. 211, 219-20 (2002) ("The conventional history of GATT/WTO dispute settlement . . . teaches that GATT dispute settlement evolved from a 'diplomatic' instrument into a 'judicial' instrument."); Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775, 776 (1997) ("In recent years, however, there is a growing demand by States to regulate their trade relations by using norms and enforcement procedures that are LEGAL in character, create significant limitations on the sovereignty of the States, and, in extreme cases, even exclude the States' power to determine policy in certain socio-economic fields."). *But see* Joost Pauwelyn, *Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties*, 17 J. INT'L ECON. L. 739, 740-45 (2014) (arguing that since the turn of the millennium trade law has witnessed a stagnation of formal treaty-making and a rise in informal rules and mechanisms).

14. Some scholars take the view that the GATT, in essence, is a legal system. See, e.g., JAMES FAWCETT, *LAW AND POWER IN INTERNATIONAL RELATIONS* 87 (1982) ("GATT is both in form and practice an illuminating example of law in international relations."); Daniel K. Tarullo, *Logic, Myth and International Economic Order*, 26 HARV. INT'L L.J. 533, 533 (1985) (noting that the

system is desirable because it allows for “creating greater predictability, redressing unfair power imbalances, and preventing escalating international tensions.”<sup>15</sup>

Trade law, however, is not just any set of rules. It is built on certain principles. At the core of trade law is the so-called “liberal economic doctrine,” which recognizes the benefits of free trade to all participating countries.<sup>16</sup> As a result, the primary purpose of the GATT and the WTO is to dismantle trade barriers.<sup>17</sup> This free trade agenda manifests itself in the fundamental principles of the GATT and the WTO, such as the most-favored nation principle, the national treatment principle, and the tariff binding principle.<sup>18</sup>

Trade law’s aspiration to be a principles-based system requires it to be systemically coherent, so that its various components reflect the same policy considerations.<sup>19</sup> This systemic coherence is crucial for, among other things, consistent judicial interpretations of inevitably incomplete treaty rules.<sup>20</sup> The desire to maintain systemic coherence in trade law can be seen in the WTO’s umbrella agreement—the Marrakesh Agreement Establishing the WTO. The preamble of the Marrakesh Agreement refers to “the basic principles . . . and the objectives underlying this multilateral trading system.”<sup>21</sup> The WTO Appellate

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international trade system “looks more like a legal system than do the areas of international law traditionally denominated ‘public’False”). Some other scholars recognize that the law has some role in the conduct of international trade relations, but emphasize the limitations of that role. *See, e.g.,* C.F. Teese, *A View from the Dress Circle in the Theatre of Trade Disputes*, 5 *WORLD ECON.* 43, 51 (1982) (“[T]he GATT has been reduced from a legalistic instrument, designed to secure an open trading system, to a document which in respect of some important rules acts only to exhort governments not to intervene in international trade.”); Phillip R. Trimble, *International Trade and the “Rule of Law”*, 83 *MICH. L. REV.* 1016, 1017 (1985) (noting that one group of scholars believe that “the principal value of the GATT is that it provides a process through which trade problems are negotiated and compromised within a general framework of rules.”). For detailed discussions of the two views, see Miquel Montana I Mora, *A GATT With Teeth: Law Wins Politics in the Resolution of International Trade Disputes*, 31 *COLUM. J. TRANSNAT’L L.* 103, 109-11 (1993).

15. JOHN JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 340 (2d ed. 1997). Even Joost Pauwelyn, who emphasizes the role of informal rules and standards in world trade, does not dispute the desirability of a rule-based trade law system. His argument is only that informal rules and standards may better achieve the goals of a rule-based trade law system in terms of predictability, stability, and neutrality. *See* Pauwelyn, *supra* note 13, at 739-40.

16. Reich, *supra* note 13, at 781.

17. *Id.* at 780. *See also* JAN HOOGMARTENS, *EC TRADE LAW FOLLOWING CHINA’S ACCESSION TO THE WTO* 10 (2004).

18. For discussions of the fundamental principles of the GATT and the WTO, see *Principles of the Trading System*, *WORLD TRADE ORG.* (2016), [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm).

19. *See* Ernst-Ulrich Petersmann, *From “Member-Driven Governance” to Constitutionally Limited “Multilevel Trade Governance” in the WTO*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 86, 104-105 (Giorgio Sacerdoti et al. eds. 2006) (discussing the importance of general principles of law in WTO jurisprudence).

20. *Id.* at 105.

21. Marrakesh Agreement Establishing the World Trade Organization, 1867 *U.N.T.S.* 154, 33 *I.L.M.* 1144 (1994), Preamble [hereinafter Marrakesh Agreement].

Body has also endeavored to introduce and consistently apply certain basic principles to the various WTO agreements.<sup>22</sup>

### B. Protectionism

Free trade principles, however, are not the only underlying logic of trade law. While free trade may enhance the economic welfare of the world as a whole, it may also result in concentrated costs for certain segments of a society that have outsized incentives to lobby against free trade.<sup>23</sup> This requires trade law to incorporate many policies that are protectionist in nature in order to soften resistance from parties who would stand to lose from trade liberalization.<sup>24</sup>

Protectionist considerations, therefore, become a constant feature of trade law. Instead of unilaterally reducing trade barriers, which is supposedly in the interests of the liberalizing countries even if other countries do not reciprocate, GATT-WTO member countries wield trade barriers as bargaining chips that will be given away only on a reciprocal basis.<sup>25</sup> Specific examples of protectionist policies can be found in the textile and agricultural sectors, where trade law has deviated from rule-based principles to accommodate political needs.<sup>26</sup> Examples of protectionism are so numerous that Raj Bhala goes as far as arguing that there is no such thing as free trade because “a careful read of any trade agreement reveals . . . express carve-outs for certain preferred sectors, intricate and protective rules of origin, lengthy phase-in periods for trade-liberalizing obligations, and lengthy phase-out periods for trade barriers.”<sup>27</sup>

These two opposing considerations—free trade principles and protectionism—create a fundamental tension in trade law. Protectionism stands for the opposite of almost everything that free trade principles promote. Whereas free trade principles liberalize trade, protectionism restricts it; whereas free trade

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22. See Gabrielle Marceau, *Balance and Coherence by the WTO Appellate Body: Who Could Do Better?*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 326, 326-33 (Giorgio Sacerdoti et al. eds. 2006).

23. BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 27-28 (2d ed. 2001).

24. One example of such protectionist policies incorporated in trade law is antidumping, which functions as a safety valve to alleviate pressures resulting from trade liberalization. See J. Michael Finger et al., *Antidumping As Safeguard Policy* (World Bank, Policy Research Working Paper No. 2730, 2001) (discussing the weaknesses of antidumping as a safeguard mechanism); Wentong Zheng, *Reforming Trade Remedies*, 34 *MICH. J. INT'L L.* 151, 163-67 (2012).

25. See Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 *HARV. INT'L L.J.* 259, 308 n.218 (2013); Sungjoon Cho & Claire R. Kelly, *Are World Trading Rules Passe?* *VA. J. INT'L L.* 623, 632 (2013) (arguing that the basic architecture of the GATT betrays a merchantilist nature because tariff reductions under the GATT are based on reciprocal bargains).

26. See Peter M. Gerhart, *Slow Transformation: The WTO as a Distributive Organization*, 17 *AM. U. INT'L L. REV.* 1045, 1059 (2002).

27. Raj Bhala, *Assessing the Modern Era of International Trade*, 21 *FORDHAM INT'L L.J.* 1647, 1657-58 (1998).

principles disrupt existing trade patterns, protectionism preserves them; whereas free trade principles value systemic coherence, protectionism favors ad hoc solutions. As a practical matter, trade law becomes the compromise of these two opposing considerations.<sup>28</sup>

## II.

### BALANCE DISRUPTED: TRADE LAW'S RESPONSES TO CHINA

The conceptualization of trade law as a balance between two opposing considerations—free trade principles and protectionism—lays the basic framework for analyzing trade law's responses to the emergence of China as a disruptive force in world trade. The exponential growth in Chinese exports dealt a major external shock to the world trade system and dislodged trade law from the delicate balance it managed to maintain prior to China's rise. As will be discussed in detail below, in almost all major areas where trade law authorizes protective measures against import surges, including antidumping, countervailing duties, safeguards, and managed trade, trade law tolerated deviations from its own fundamental principles as a way of preserving the structural stability of the world trade system. The discussions to follow document such deviations and tell a story of trade law losing its balance in response to a powerful, disruptive newcomer.

#### A. Antidumping

Arguably the most important trade-remedy instrument authorized by trade law, antidumping provides a mechanism for an importing country to impose special duties on imports from specific countries without violating the importing country's obligations under global trade rules.<sup>29</sup> Article VI of GATT 1947 defines dumping as the introduction of one country's products into the commerce of another country at "less than the normal value" of the products.<sup>30</sup> Article VI allows an importing country to levy an antidumping duty "not greater in amount than the margin of dumping"<sup>31</sup> if dumping "causes or threatens material injury to an established industry" or "materially retards the establishment of a domestic industry" in the importing country.<sup>32</sup> Subsequent to

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28. Besides the free trade-versus-protectionism compromise, trade law could reflect compromises along other dimensions as well. One compromise that has been the subject of intense scholarly attention is the compromise between trade law and national sovereignty. See, e.g., John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157 (1997). This Article focuses on the free-trade-versus-protectionism compromise as it is most relevant for analyzing how trade law responded to the rise of China.

29. For an overview of antidumping, see Zheng, *supra* note 24, at 159-81.

30. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), art. VI:1 [hereinafter GATT 1994].

31. *Id.* art. VI:2.

32. *Id.* art. VI:1.

GATT 1947, antidumping was further affirmed as a legitimate trade policy tool in the 1967 and 1979 Antidumping Codes and then, upon the establishment of the WTO in 1995, in the WTO Antidumping Agreement.<sup>33</sup>

The idea of antidumping itself is a compromise between free trade principles and protectionism. The conventional rationale offered for antidumping is that dumping is an unfair trade practice.<sup>34</sup> This “unfair trade” narrative, however, has been extensively critiqued in the academic literature as lacking sound economic bases.<sup>35</sup> Scholars have instead argued that antidumping should be better viewed as a safety valve that allows importing countries to limit the adverse impact of surging imports on domestic industries.<sup>36</sup> Without this safety valve, the logic goes, countries would be reluctant to make a free trade commitment in the first place.<sup>37</sup>

Arguably, therefore, antidumping is by design a protectionist tool aimed at maintaining orderly trade, not free trade. The immediate goal of antidumping is contrary to that of free trade, but in the grand scheme of trade policy, antidumping is a necessary evil that must be tolerated for the sake of facilitating free trade.<sup>38</sup> To accomplish this higher goal, a delicate balance must be struck where antidumping will be allowed to function, yet not to the extent that it jeopardizes the rule-based world trade system.

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33. See Agreement on the Implementation of Article VI, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. 6431 [hereinafter 1967 Antidumping Code]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. 9650 [hereinafter 1979 Antidumping Code]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter WTO Antidumping Agreement].

34. See *An Introduction to U.S. Trade Remedies*, U.S. INT’L TRADE ADMIN., <http://enforcement.trade.gov/intro/> (last visited July 31, 2016) (characterizing antidumping as a law that protects businesses from unfair competition resulting from unfair pricing by foreign companies).

35. See, e.g., John J. Barceló III, *Antidumping Laws As Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 502–13 (1972) (rejecting the arguments that dumping is an “unfair trade practice,” confers an “artificial advantage,” “exploit[s] monopoly power,” and “inflict[s] injurious adjustment costs”); Raj Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT’L L. & ECON. 1, 8–21 (1995) (criticizing the economic rationales of antidumping); Reid M. Bolton, *Antidumping and Distrust: Reducing Anti-dumping Duties Under the W.T.O. Through Heightened Scrutiny*, 29 BERKELEY J. INT’L L. 66, 71–74 (2011) (rejecting various economic justifications for antidumping); Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N.C. L. REV. 357, 370–76 (2009) (criticizing the “unfair trade” rationale of antidumping); DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* 162 (3d ed. 2009) (arguing that international price discrimination is neither unfair nor a problem unless it harms competition).

36. See, e.g., Finger, *supra* note 24.

37. For discussions of antidumping as a safety valve, see Zheng, *supra* note 29, at 163–67.

38. See Luz Elena Reyes de la Torre & Jorge G. Gonzalez, *Antidumping and Safeguard Measures in the Political Economy of Liberalization: The Mexican Case*, in *SAFEGUARDS AND ANTIDUMPING IN LATIN AMERICAN TRADE LIBERALIZATION: FIGHTING FIRE WITH FIRE* 205, 243 (J. Michael Finger & Julio J. Nogues eds., 2006) (“On many occasions, high-ranking officials stated that the trade defense system was a necessary evil, but that it should be kept under strict control through its professionalization and the development of its methods and regulations.”).



Trade law's balancing act regarding antidumping was already difficult enough before China upended the prevailing world trade order.<sup>39</sup> With the emergence of China as a major participant in world trade, the protectionist element of antidumping has been stretched far and wide to mitigate the impact of China, to a point that threatens the integrity of the rule-based world trade system.<sup>40</sup> As will be detailed below, the rise of China has accentuated tensions between antidumping and global trade rules in two prominent respects: the use of "surrogate values" in calculating antidumping duties and the resort to country-wide antidumping duty rates.

### 1. *Surrogate Values*

Under Article VI of the GATT, antidumping duties are calculated on the basis of a comparison between the price at which the subject merchandise is sold in the importing jurisdiction and the "normal value" of such merchandise.<sup>41</sup> Dumping arises if the 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>42</sup> When the home-market price of the product is unavailable, dumping arises if the price of the product is less than "either . . . the highest comparable price for the like product for export to any third country in the ordinary course of trade, or . . . the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit."<sup>43</sup> Obviously, these provisions envision the use of *actual* prices or costs of the allegedly dumped product in its home market or third-country markets as the gauge of its normal value.

Drafters of the GATT, however, were well aware that actual prices or costs would not provide a proper basis for comparison when such prices or costs were not determined by market forces. In Ad Article VI,<sup>44</sup> the GATT recognizes that "in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability" for

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39. Over the years, the world trade community has struggled to put constraints on the use of antidumping for the sake of procedural fairness and predictability. For example, one issue that has divided the world trade community is the issue of zeroing in antidumping—the practice of artificially inflating dumping margins by treating negative dumping margins for product subgroups as zero. See Chad Bown & Thomas J. Prusa, *U.S. Antidumping: Much Ado about Zeroing* (World Bank Policy Research Working Paper 5352), <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5352>.

40. As discussed earlier, the strong consensus in the academic literature is that antidumping lacks integrity at a fundamental level, given that what it purports to remedy is not unfair except in very limited circumstances. See *supra* note 34 and accompanying text.

41. GATT 1994, *supra* note 30, art. VI:1(a).

42. *Id.*

43. *Id.* art. VI:1(b).

44. The "Ad" articles of the GATT are the interpretive notes accompanying the GATT articles. See Carol J. Beyers, *The U.S./Mexico Tuna Embargo Dispute: a Case Study of the GATT and Environmental Progress*, 16 MD. J. INT'L L. 229, 237 n.68 (1992).

purposes of the dumping analysis.<sup>45</sup> In such cases, Ad Article VI authorizes an importing country to “take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.”<sup>46</sup> It does not specify, however, exactly how to take this possibility into account, leaving the door open to policy innovations on the part of GATT contracting parties.

Arguably, the GATT’s recognition of the need for special treatment of imports from state-controlled economies makes logical sense. If antidumping duties measure the underpricing of a product, they should not be based on home-market prices artificially set by a government for “social and political engineering” purposes.<sup>47</sup> Otherwise, one effective way to circumvent antidumping duties would be for a government to use its unlimited financial power to set home-market prices at artificially low levels.<sup>48</sup>

The flexibility allowed under the GATT for imports from nonmarket economies (NMEs) soon found its use in the Cold War era. Beginning in the 1960s, the U.S. Treasury Department, the agency responsible for antidumping investigations in the United States at the time, began experimenting with a special antidumping methodology for imports from the Soviet Union and Eastern European countries.<sup>49</sup> Rejecting the home market prices in those countries as being state-controlled, the U.S. Treasury Department used the home market or export prices of the same or similar products produced in countries where the relevant product markets were not state-controlled, primarily Western European countries, as the basis of comparison with U.S. prices in calculating antidumping duties.<sup>50</sup> This practice was subsequently recognized by section 205(c) of the Trade Act of 1974, which provided that the “foreign market value”—the U.S. term at the time for “normal value”—of a product from a state-

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45. GATT 1994, *supra* note 30, ad art. VI.

46. *Id.*

47. See Robert A. Anthony, *The American Response to Dumping from Capitalist and Socialist Economies—Substantive Premises, and Restructured Procedures After the 1967 GATT Code*, 54 CORNELL L. REV. 159, 204 (1969) (“Prices in a ‘controlled’ economy are often the instruments of social and political engineering, and may be set at artificial levels for reasons having nothing to do with natural economic relationships as those would be judged in a free-market economy.”).

48. *Id.*

49. See, e.g., Bicycles from Czechoslovakia, 25 Fed. Reg. 6657 (1960); Jalousie-Louvre-Sized Sheet Glass from Czechoslovakia, 27 Fed. Reg. 8457 (1962); Portland Cement from Poland, 28 Fed. Reg. 6660 (1963); Window Glass from U.S.S.R., 29 Fed. Reg. 8381 (1964); Fur Felt Hoods, Bodies, and Caps from Czechoslovakia, 31 Fed. Reg. 15,024 (1966); Cast Iron Soil Pipe and Fittings from Poland, 32 Fed. Reg. 2901, 8250 (1967); Pig Iron from East Germany, 33 Fed. Reg. 5105, 9375 (1968); Titanium Sponge from the U.S.S.R., 33 Fed. Reg. 5467, 5960, 6377 (1968).

50. Anthony, *supra* note 47, at 200-201. For more detailed descriptions of the Treasury Department’s antidumping practices for imports from the former Soviet Union and Eastern European countries in the 1960s, see Alexis C. Coudert, *The Application of the United States Antidumping Act in Light of a Liberal Trade Policy*, 65 COLUM. L. REV. 189, 224-27 (1965); Comment, *U.S. Trade Laws Hinder the Development of U.S.-P.R.C. Trade*, 22 COLUM. J. TRANSNAT’L L. 135, 146-49 (1983) [hereinafter *U.S.-P.R.C. Trade*]; Peter Buck Feller, *The Antidumping Act and the East-West Trade*, 66 MICH. L. REV. 115, 126-33 (1967).

controlled-economy country should be determined on the basis of either the price at which the same or similar merchandise of a non-state-controlled-economy country is sold for domestic consumption or exports to other countries, or the constructed value of the same or similar merchandise in a non-state-controlled-economy country.<sup>51</sup>

The sound logic of this surrogate-value approach, however, coincides with a grave potential for unfair treatment. Producers from NME countries could exert little control over the amount of antidumping duties imposed on their products, given that it is not their own prices or costs, but prices or costs from surrogate countries, that matter in the antidumping process.<sup>52</sup>

This potential for unfair treatment was most vividly on display in 1975 in *Electric Golf Cars from Poland*, in which a Polish golf car manufacturer was found to have dumped its products in the United States, first based on the sales prices of a small Canadian producer<sup>53</sup> and then later, based on the sales prices of a U.S. producer.<sup>54</sup> Using U.S. producers' prices as the basis of normal value effectively barred the import of these products, as imported products would have to be sold at a higher price than the same or similar U.S. products when transportation costs are taken into account.<sup>55</sup>

The nonsensical outcome in *Electric Golf Cars from Poland* prompted the U.S. Treasury Department to rectify the most unreasonable elements of its surrogate-country methodology by promulgating a new antidumping regulation in 1978.<sup>56</sup> The 1978 regulation prioritized the use of prices or constructed values from third countries whose stages of economic development were comparable to that of the exporting state-controlled-economy country.<sup>57</sup> When the foreign market value of the allegedly dumped product had to be constructed from the costs of producing the product, the 1978 regulation required that the *actual* amounts of the factors of production incurred by the specific NME producer in producing the product be used in calculating the constructed value, although such factors of production would still be valued using prices taken from surrogate countries.<sup>58</sup> These provisions reduced the arbitrariness inherent in the

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51. See Pub. L. No. 93-618, Title III, § 321, 88 Stat. 1978 (repealed, Trade Agreements Act of 1979, Pub. L. 96-39, Title I, § 106, 93 Stat. 144). For more discussions of section 205(c) of the Trade Act of 1974, see Comment, *Dumping by State-Controlled-Economy Countries: The Polish Golf Cart Case and the New Treasury Regulations*, 128 U. PENN. L. REV. 217, 224-27 (1979) [hereinafter *Dumping by SCE Countries*].

52. See *id.* at 224-25.

53. See *Electric Golf Cars from Poland*, 40 Fed. Reg. 25,497, 25497 (1975).

54. See Letter from Carl W. Schwarz, Counsel for Melex USA, Inc., to Representative Charles A. Vanik, Chairman of the Subcomm. on Trade of the House Comm. on Ways and Means (Apr. 27, 1979), reprinted in *Multilateral Trade Negotiations: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means, 96th Cong., 1st Sess.* 734, 735 (1979).

55. See *Dumping by SCE Countries*, *supra* note 51, at 229.

56. See 43 Fed. Reg. 35,262, 35265 (Aug. 9, 1978).

57. 19 C.F.R. § 153.7(b) (1979) (setting forth a hierarchy of three alternative methods for measuring the foreign market value of merchandise from state-controlled-economy countries).

58. 19 C.F.R. § 153.7(c). The 1978 regulation used the term "specific objective components

NME methodology and, for the first time, granted NME producers some limited abilities to predict and control their antidumping exposure.

It was against this backdrop that China came on the antidumping scene. In the late 1970s, shortly after China embarked on its ambitious economic reform programs, trade between China and Western countries began to increase rapidly.<sup>59</sup> In 1981, in *Natural Menthol from China*, the first-ever antidumping action filed in the United States against a Chinese product, the U.S. Commerce Department (USDOC) <sup>60</sup> rejected Chinese domestic menthol prices as a benchmark for measuring antidumping duties for Chinese menthol exported to the United States because the Chinese prices were state-controlled.<sup>61</sup> In so doing, the USDOC entertained, but eventually rejected, the Chinese respondents' argument that China's state control in the particular economic sector in question—the agricultural sector—was not to such an extent that would disqualify Chinese menthol prices from being considered in antidumping investigations.<sup>62</sup> The USDOC then went on to use prices of menthol exported from Paraguay to the United States as the basis for calculating antidumping duties for Chinese menthol.<sup>63</sup> Subsequent to the Chinese menthol case, in the 1980s, the USDOC routinely treated China as a state-controlled-economy country and used prices from surrogate countries to calculate antidumping duties for Chinese products.<sup>64</sup>

By then, however, China did not appear to be receiving a higher level of scrutiny from antidumping authorities than other state-controlled-economy countries, to which the same surrogate-country methodology was regularly applied.<sup>65</sup> After all, as of the 1980s, China's potential as a disruptive force in

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or factors of production" to refer to the actual amounts of the factors of production used in producing the allegedly dumped product. *See id.*

59. The volume of bilateral trade between China and the United States, for example, increased from \$374 million in 1977 to \$5.49 billion in 1981. *See* U.S. DEP'T OF COMMERCE, INT'L TRADE ADMIN., FOREIGN ECONOMIC TRENDS AND THEIR IMPLICATIONS FOR THE UNITED STATES—CHINA, FET 82-112 (1982).

60. In January 1980, President Jimmy Carter transferred the responsibility for conducting antidumping investigations from the Treasury Department to the Commerce Department. *See* 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, 88 n.51 (1987).

61. *See Antidumping, Natural Menthol from the People's Republic of China; Final Determination of Sales at Less Than Fair Value*, 46 Fed. Reg. 24614, 24614 (Dep't of Comm. May 1, 1981) [hereinafter *Chinese Menthol Final USDOC Determination*].

62. *See Natural Menthol from the People's Republic of China; Antidumping—Preliminary Determination of Sales at Less Than Fair Value and Suspension of Liquidation*, 46 Fed. Reg. 3258, 3258-60 (Dep't of Comm. Jan. 14, 1981) [hereinafter *Chinese Menthol Preliminary USDOC Determination*].

63. *See Chinese Menthol Final USDOC Determination*, *supra* note 61, at 24,614.

64. The countries that were used as China's surrogate included Thailand, the Dominican Republic, Colombia, Pakistan, Singapore, Hong Kong, India, Indonesia, and Spain. *See* Alford, *supra* note 59, at 89.

65. *Id.*

world trade was not fully visible, obviating any need for aggressive, nonconventional antidumping policy aimed specifically at China.

During the late 1980s, with no NME countries posing an existential threat to the world trade order,<sup>66</sup> the constant tug-of-war between free trade principles and protectionism within trade law continued to tip in the direction of the former in the area of NME methodology. In the United States, the 1988 Omnibus Trade and Competitiveness Act modified the NME methodology used by the USDOC, making the constructed value of the factors of production of the NME product the preferred method of measuring the normal value of the product.<sup>67</sup> Only when the information necessary for calculating the constructed value of the factors of production was unavailable would the USDOC be allowed to measure the normal value of the NME product on the basis of the price at which the same or similar product was sold in a surrogate country.<sup>68</sup>

In implementing the new NME methodology under the 1988 law for Chinese producers, the USDOC initially showed much greater flexibility than the statute required. In 1991, in *Oscillating Fans and Ceiling Fans from the People's Republic of China*, the USDOC adopted a "mix-and-match" approach for NME prices and stated that if it could be established that inputs purchased in an NME were purchased at market-oriented prices, such actual prices might be substituted for surrogate-country values in the factors-of-production analysis.<sup>69</sup> Later in the same year, in *Chrome-Plated Lug Nuts from the People's Republic of China*, the USDOC again confirmed the mix-and-match approach, stating that "for certain inputs into the production process, market forces may be at work."<sup>70</sup> That would be the case, according to the USDOC, if inputs were imported from suppliers in market economy countries, or if market forces were at work "in determining the prices for locally-sourced goods in the nonmarket economy."<sup>71</sup> In these cases, the USDOC believed that "it is appropriate to use those prices in lieu of values of a surrogate, market-economy producer, because they are market-driven prices and they reflect the producer's actual experience."<sup>72</sup> In an implicit admission to the drawbacks of the surrogate-country method, the USDOC further stated that "[t]here is nothing to be gained in terms of accuracy,

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66. During this time period, the country perceived to be posing the largest threat to the existing world trade order was Japan, which, despite its hierarchical economic structures, was not considered an NME country.

67. See 19 U.S.C. § 1677b(c)(1)(1989).

68. See 19 U.S.C. § 1677b(c)(2).

69. *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 25,664, 25,667 (Dep't of Comm. Jun. 5, 1991) (preliminary determinations of sales at less than fair value).

70. *Chrome-Plated Lug Nuts from the People's Republic of China*, 56 Fed. Reg. 46,153, 46,154 (Dep't of Comm. Sept. 10, 1991) (final determination of sales at less than fair value).

71. *Id.*

72. *Id.*

fairness, or predictability in using surrogate values when market-determined values exists in the NME country.”<sup>73</sup>

The USDOC’s push to rationalize the surrogate-value method, however, led to tensions between antidumping and another area of trade law—countervailing duty law. A parallel trade remedy instrument authorized under global trade rules, countervailing duty law allows an importing country to impose special countervailing duties on imported products to offset subsidies conferred by foreign governments on such products.<sup>74</sup> Prior to the 1990s, the USDOC took the position that a subsidy was “any action that distorts or subverts the market process and results in a misallocation of resources.”<sup>75</sup> Because markets were fictitious in NME countries in the first place, subsidies “have no meaning” in such countries.<sup>76</sup> But when the USDOC began recognizing some prices in China as being driven by market forces, United States petitioners wasted no time in reviving the argument that countervailing duty law should begin to apply to Chinese products in market-oriented sectors.<sup>77</sup>

Apparently reluctant to change its long-standing practice of not applying countervailing duty law to imports from NMEs, the USDOC retreated from using actual Chinese prices as the comparison basis in antidumping. In *Sulfanilic Acid from the People’s Republic of China* in 1992, the USDOC announced three criteria for determining whether an NME producer operates within a market-oriented industry in the NME: (1) there must be virtually no government involvement in setting prices or amounts to be produced for the merchandise under investigation; (2) the industry producing the merchandise under investigation should be characterized by private or collective ownership; and (3) market-determined prices must be paid for “all significant inputs, whether material or non-material, and for an all but insignificant proportion of all the inputs accounting for the total value of the merchandise under investigation.”<sup>78</sup> If these conditions were not met, the producer would be treated as an NME producer and surrogate prices or costs from third countries would be used to calculate the normal value of the merchandise under investigation.<sup>79</sup> Once the NME producer failed this market-oriented-industry test, the USDOC would effectively no longer grant requests to evaluate whether individual inputs used

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73. *Id.*

74. See GATT 1994, *supra* note 30, art. VI:3.

75. Carbon Steel Wire Rod from Poland, 49 Fed. Reg. 19,374, 19375 (Dep’t of Comm. May 7, 1984) (final negative countervailing duty determination).

76. *Id.* (“It is this fundamental distinction—that in an NME system the government does not interfere in the market process, but supplants it—that has led us to conclude that subsidies have no meaning outside the context of a market economy.”).

77. See *Oscillating Fans and Ceiling Fans from the People’s Republic of China*, 56 Fed. Reg. 57,616 (Dep’t of Comm. Nov. 13, 1991) (initiation of countervailing duty investigations); *Chrome Plated Lug Nuts from the People’s Republic of China*, 57 Fed. Reg. 877 (Dep’t of Comm. Jan. 9, 1992) (initiation of countervailing duty investigations).

78. *Sulfanilic Acid from the People’s Republic of China*, 57 Fed. Reg. 9409, 9411 (Dep’t of Comm. Mar. 18, 1992) (preliminary determination of sales at less than fair value).

79. *Id.*

by the producer were sourced from within the NME in accordance with market principles.<sup>80</sup> In so doing, the USDOC ushered in an all-or-nothing approach to replace the mix-and-match approach it used only months before in *Oscillating Fans and Ceiling Fans* and *Chrome Plated Lug Nuts*.

After abandoning the mix-and-match approach, the USDOC moved to terminate the pending countervailing duty proceedings against Chinese producers, on the grounds that the Chinese industries in question were not market-oriented.<sup>81</sup> For the next twenty-five years, antidumping would become the sole remedy against low-priced Chinese imports.<sup>82</sup> In the meantime, the USDOC strictly applied the market-oriented industry test in antidumping proceedings involving Chinese products, resulting in a *de facto* rule under which surrogate values were used for all Chinese producers.

For the time being, the USDOC managed to defuse a crisis in trade law as it applied to China. One could disagree with the USDOC about the soundness of its judgment that Chinese industries were still not market-oriented despite progress in market reforms in China. But, at least the USDOC's policy towards China was internally consistent. If market forces were not strong enough in China to allow Chinese prices to be used as the comparison basis in antidumping, they should not be strong enough to give rise to subsidies, which are a meaningful concept only if there are real markets to deviate from. At the time, the USDOC was able to rely on antidumping as the exclusive remedy for Chinese imports in part because in the early 1990s, the level of import protection offered by antidumping—with the help of the surrogate-value method—was adequate to cope with China's burgeoning, yet still not dominating, export prowess. This would change twenty-five years later, when China's threat to the global trade order and the pressure to counteract it were in full swing.<sup>83</sup> As

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80. In *Sulfanilic Acid*, the Chinese respondent argued that the prices at which it purchased some of its inputs were not subject to state control and were market driven. *Id.* The USDOC rejected this argument by citing the lack of documentary evidence indicating that market forces were at work for those inputs. *Id.* Subsequently, in its amended final determination in *Chrome Plated Lug Nuts* in response to court remand, the USDOC made clear that once it was shown that one significant input was not purchased at a market-determined price, "there [was] no need to reach a similar determination with respect to any other significant inputs." *Chrome Plated Lug Nuts*, 57 Fed. Reg. 15,052, 15053 (Dep't of Comm. Apr. 24, 1992) (amendment to final determination of sales at less than fair value and amendment to antidumping order).

81. See *Oscillating and Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24,018, 24019 (Dep't of Comm. Jun. 5, 1992) (final negative countervailing duty determinations) ("Therefore, we have determined that the PRC fan industry is not an MOI. As a result, we determine that the CVD law cannot be applied to the PRC fan industry."); *Chrome-Plated Lug Nuts and Wheel Locks from the People's Republic of China*, 57 Fed. Reg. 10,459, 10460 (Dep't of Comm. Mar. 26, 1992) (rescission of initiation of countervailing duty investigation and dismissal of petition) ("[W]e determine that the PRC producers of lug nuts are nonmarket economy producers to which the countervailing duty law cannot be applied.").

82. This changed in 2007, when the USDOC applied countervailing duty law to Chinese products, citing changes that occurred in the Chinese economy. See *infra* Part II.B.1 for more discussions.

83. The trade deficit of the United States with China grew to \$258 billion in 2007. See *Trade in Goods with China*, U.S. CENSUS BUREAU (Sept. 04, 2014),

discussed in more detail below, escalating protectionist pressures eventually resulted in a more dramatic response to Chinese exports, a response that entailed the simultaneous imposition of antidumping duties calculated using the NME methodology and countervailing duties on Chinese products at the expense of trade law's internal logic and coherence.<sup>84</sup>

The use of surrogate values in antidumping proceedings involving Chinese products has been sanctioned by global trade rules. Upon the establishment of the WTO in 1994, global trade rules inherited the basic framework laid under the GATT for handling antidumping for NME producers. The WTO Antidumping Agreement, enacted to interpret and implement Article VI of the GATT, contained no explicit references to the use of surrogate values for imports from NME countries.<sup>85</sup> Therefore, Ad Article VI of the GATT 1947, which was now incorporated into the GATT 1994, remained the only explicit provision in the WTO's founding legal documents on the surrogate-value issue. The absence of the surrogate-value issue in the WTO Antidumping Agreement indicates that by 1994, WTO members perhaps did not consider the threats from NME countries to be grave enough to warrant heightened attention to the surrogate-value issue, given that the communist regimes in the former Soviet Union and Eastern Europe collapsed several years earlier and that China's export machines were just beginning to rev up.

This changed when China gained WTO membership in 2001, by which time China's surging exports, along with the prospect of even greater market access afforded by WTO membership, forced existing WTO members to explicitly authorize the use of surrogate values for Chinese products in China's WTO accession documents. Paragraph 15(a) of the China Accession Protocol states that "[i]n determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation *or a methodology that is not based on a strict comparison with domestic prices or costs in China.*"<sup>86</sup> Paragraph 15(a)(ii) further provides that the use of non-Chinese prices or costs would be allowed if "the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."<sup>87</sup> Paragraph 15(a)(ii), however, is set to expire fifteen years after the date of China's accession.<sup>88</sup>

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<http://www.census.gov/foreign-trade/balance/c5700.html>.

84. See *infra* Part II.B.1.

85. See Chad P. Bown & Petros C. Mavroidis, *One (Firm) Is Not Enough: A Legal-Economic Analysis of EC-Fasteners*, 12 *WORLD TRADE REV.* 243, 255 (2013).

86. Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432 (Nov. 23, 2001), art. 15(a) [hereinafter China Accession Protocol].

87. *Id.* art. 15(a)(ii).

88. *Id.* art. 15(d). There are fierce debates on the legal consequences of the expiration of Paragraph 15(a)(ii). See *infra* notes 291-297 and accompanying text.



Like Ad Article VI of the GATT, Paragraph 15(a) of the China Accession Protocol only states that surrogate values could be used for Chinese products, but does not elaborate on how they should be used. The lack of specifics in the GATT and the China Accession Protocol affords WTO member countries wide latitude in the use of surrogate values and therefore preserves flexible policy space for handling antidumping for Chinese imports. In 2011, a WTO Dispute Settlement Panel affirmed this flexible policy space in *EU-Footwear*. In this case China challenged the European Commission's surrogate-country selection procedure and its selection of Brazil as the surrogate country for antidumping investigations involving imports of Chinese footwear.<sup>89</sup> Because there are no WTO rules on the procedure or criteria for the selection of a surrogate country,<sup>90</sup> China could only assert that the European Union's surrogate-country selection procedure violated its general obligations under other WTO provisions. In particular, China claimed that the EU had violated Article 2.4 of the WTO Antidumping Agreement, which requires a "fair comparison" between the export price and the normal value in calculating antidumping duties.<sup>91</sup> The WTO Panel rejected this argument, stating that Article 2.4 of the WTO Antidumping Agreement only concerns the comparison of the export price and the normal value after the component elements of the comparison have already been established.<sup>92</sup>

## 2. Country-Wide Rates

In addition to the use of surrogate values, the protectionist pressures to contain China's exports in the multilateral trading system led to another policy innovation by importing countries: the use of country-wide, instead of company-specific, antidumping duty rates. As discussed below, this policy innovation, when coupled with the use of adverse facts available, results in much higher antidumping rates, effectively serving the protectionist needs of importing countries. However, the policy innovation has a tenuous legal basis in trade law. As discussed below, China successfully challenged the use of country-wide antidumping rates for its products before the WTO as being inconsistent with WTO rules. When asked to choose between preserving the integrity of the rule-

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89. See Report of the Panel, European Union-Anti-Dumping Measures on Certain Footwear from China, WT/DS405/R (Oct. 28, 2011). The European Commission selected Brazil as the surrogate country in the underlying investigations despite the Chinese parties' argument that Thailand, India, or Indonesia would be a more suitable surrogate country than Brazil. See *id.* ¶¶ 7.254-.255.

90. China Accession Protocol, *supra* note 86, ¶ 7.258.

91. *Id.* ¶ 7.261. China argued that this "fair comparison" requirement is an independent obligation that applies to all aspects of the establishment of normal value, including the selection of a surrogate country. *Id.*

92. *Id.* ¶ 7.263 ("[I]t is clear that the requirement to make a fair comparison in Article 2.4 logically presupposes that normal value and export price, the elements to be compared, have already been established."). The WTO Panel also rejected China's other arguments that the EU's surrogate-country selection procedure violated Articles 2.1 and 17.6(1) of the WTO Antidumping Agreement. See *id.* ¶¶ 7.259-.260.

based world trade system and granting sufficient policy leeway to protect the status quo, the WTO opted for the former.

By way of background, Article 6.10 of the WTO Antidumping Agreement requires that “[antidumping] authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation.”<sup>93</sup> The authorities may deviate from this requirement if “the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable.”<sup>94</sup> In such cases, the authorities are allowed to “limit their examination either to a reasonable number of interested parties or products by using samples . . . , or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.”<sup>95</sup>

In the late 1980s—a period that predated the WTO Antidumping Agreement—United States petitioners began making the argument that a country-wide antidumping duty rate should be assigned to Chinese producers or exporters who could not demonstrate an absence of government control over their business operations. In *Certain Headwear from the People’s Republic of China* in 1989, for example, the U.S. petitioner argued that the Chinese government owned all trading companies in China and the establishment of company-specific rates with large variations “facilitates circumvention in a state-controlled economy where exports can be easily directed and diverted among the trading companies by the State.”<sup>96</sup> The USDOC rejected this argument, stating that “[t]he former branches of the national trading companies have separated from the national companies and we found no evidence that the prices the branches charge for exports to the United States are set by or coordinated through the national trading companies.”<sup>97</sup> The USDOC also noted that in past antidumping investigations, it always calculated separate rates for different Chinese national trading companies even though it treated China as a state-controlled economy.<sup>98</sup>

In 1991, however, the USDOC made an about-face on the separate-rate issue and denied, for the first time, a request for separate rates by Chinese exporters. In *Heavy Forged Hand Tools from the People’s Republic of China*, the USDOC assigned one country-wide antidumping rate to three Chinese exporters that were former branches of a Chinese national trading company.<sup>99</sup>

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93. WTO Antidumping Agreement, *supra* note 33, art. 6.10.

94. *Id.*

95. *Id.*

96. *Certain Headwear from the People’s Republic of China*, 54 Fed. Reg. 11983, 11986 (Dep’t of Comm. Mar. 23, 1989) (final determination of sales at less than fair value).

97. *Id.*

98. *Id.* (citing *Shop Towels from the People’s Republic of China*; Final Results of Administrative Review of Antidumping Duty Order (50 FR 26020, June 24, 1985)).

99. See *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People’s Republic of China*, 56 Fed. Reg. 241, 244 (Dep’t of Comm. Jan. 3, 1991) (final determinations of sales at less than fair value).

The USDOC asserted that the Chinese national trading company in question failed to submit adequate documentation of its claim that the three exporters were independent corporations.<sup>100</sup> This failure, according to the USDOC, left “no alternative than to treat the three as branches of the same exporting entity.”<sup>101</sup>

Shortly afterwards, the USDOC doubled-down on its denial of separate rates for Chinese exporters. In *Iron Construction Castings from the People's Republic of China*, the USDOC assigned one country-wide antidumping rate to two exporters that were former branches of another Chinese national trading company.<sup>102</sup> The assignment of a country-wide rate in this case is all the more striking as it reversed the USDOC's preliminary decision in the same case to calculate separate rates for the two exporters.<sup>103</sup> More significantly, the USDOC broadly stated in this case that in a state-controlled economy, “all entities are presumed to export under the control of the state” and this presumption can be rebutted only by “a clear showing of legal, financial and economic independence.”<sup>104</sup>

Later in the same year, in *Sparklers from the People's Republic of China*, the USDOC elaborated on its criteria for separate rates for exporters from NME countries.<sup>105</sup> To qualify for company-specific rates, exporters from NME countries have to pass a two-pronged test by demonstrating “an absence of central government control, both in law and in fact, with respect to exports.”<sup>106</sup> For each of the two prongs of the test—referred to by the USDOC as “*de jure* absence of control” and “*de facto* absence of control”—the USDOC set forth a list of evidence supporting, but not requiring, a finding of absence of central control.<sup>107</sup>

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100. *Id.* The Chinese national trading company in question claimed that it was divided into seven independent corporations pursuant to a government order. The USDOC repeatedly requested a copy of the government order or other official Chinese government documentation at the time of or prior to the date of the order. The national trading company never submitted such documentation. *See id.*

101. *Id.*

102. *See Iron Construction Castings from the People's Republic of China*, 56 Fed. Reg. 2742, 2744 (Dep't of Comm. Jan. 24, 1991) (Final Results of Antidumping Duty Administrative Review).

103. *See id.* at 2743-44. The USDOC stated that after it made its preliminary decision to assign separate rates to the two exporters, “[s]ubsequent review of the information on the record has led us to reevaluate the claims made by [the two exporters] with respect to separation and independence from the national corporation.” *Id.* at 2743. This reevaluation found no information on the record indicating that “the national import/export corporations are independent from one another.” *Id.* at 2744.

104. *Id.*

105. *See Sparklers from the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (Dep't of Comm. May 6, 1991) (Final Determination of Sales at Less Than Fair Value).

106. *Id.*

107. According to the USDOC:

Evidence supporting, though not requiring, a finding of *de jure* absence of central control includes: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments

By now, the USDOC's rejection of separate rates for Chinese companies had progressed from a facts-based decision for specific companies to a presumed norm for all Chinese entities. From this point on, all Chinese companies, regardless of whether they had been historically part of the same national trading company, had to overcome the presumption of central government control in order to obtain separate antidumping rates.<sup>108</sup>

Ironically, the move towards country-wide antidumping rates for Chinese companies took place at a time when China was undergoing rapid economic reforms that conferred higher degrees of independence from the government on Chinese firms.<sup>109</sup> Arguably, the adoption of country-wide antidumping rates for Chinese products comports not with economic principles, but with protectionist policy needs. In calculating country-wide antidumping rates, the USDOC often relies on information provided by petitioners and inferences adverse to respondents.<sup>110</sup> As a result, country-wide antidumping rates tend to be much

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decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies. De facto absence of central government control with respect to exports is based on two prerequisites: (1) Whether each exporter sets its own export prices independently of the government and other exporters; and (2) whether each exporter can keep the proceeds from its sales.

*Id.*

108. Subsequent to *Sparklers*, the USDOC tinkered with its separate-rate criteria as applied to Chinese companies. In *Certain Compact Ductile Iron Waterworks Fittings and Accessories Thereof from the People's Republic of China* in 1993, the USDOC determined that state ownership per se precluded a finding of absence of government control. See 58 Fed. Reg. 37,908, 37,909 (Dep't of Comm. Jul. 14, 1993) (Final Determination of Sales at Less Than Fair Value). According to the USDOC, "an entity cannot be completely free of central government control with respect to exports if it is owned by the central government, regardless of whether the indicia set forth in *Sparklers* have been met." This deviation from the *Sparklers* test, however, was short-lived. In *Silicon Carbide from the People's Republic of China* in 1994, the USDOC changed course and determined that "the ownership of [respondent companies] 'by all the people,' in and of itself, cannot be considered as dispositive in determining whether those companies can receive separate rates." 59 Fed. Reg. 22,585, 22,586 (Dep't of Comm. May 2, 1994) (Notice of Final Determination of Sales at Less Than Fair Value). Therefore, a Chinese respondent could still receive a separate rate "if it establishes on a *de jure* and *de facto* basis that there is an absence of governmental control." *Id.* at 22,587. The USDOC then amplified the *Sparklers* test by adding two factors to the *de facto* analysis: (1) whether the respondent has authority to negotiate and sign contracts and other agreements, and (2) whether the respondent has autonomy from the central government in making decisions regarding selection of management. *Id.* For more detailed discussions of the evolution of the USDOC's separate-rate methodology, see Priya Alagiri, *Reform, Reality, and Recognition: Reassessing U.S. Antidumping Policy Toward China*, 26 L. & POL'Y INT'L BUS. 1061, 1068-79 (1995).

109. See Alagiri, *supra* note 108, at 1082-85 (discussing changes in the Chinese economy in 1989-1994); see also Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 652-54, 662-67 (2010) (discussing price liberalization and reforms of state-owned enterprises in China).

110. For Chinese respondents that have not demonstrated an absence of central government control, the USDOC relies on the Chinese government to identify them and to submit a consolidated questionnaire response on their behalf. But it is difficult for the Chinese government to persuade all exporters of the subject merchandise to provide information needed for the consolidated questionnaire response. See Alagiri, *supra* note 108, at 1068. The USDOC may base the country-wide antidumping rate on adverse facts available when some exporters that are part of the NME-wide entity do not respond to the antidumping questionnaire. See *2015 Antidumping Manual*, U.S.

higher than company-specific antidumping rates. According to a 2006 study by the U.S. Government Accountability Office, the USDOC imposed antidumping duties on the same product from both China and one or more market-economy countries in twenty-five cases.<sup>111</sup> The average antidumping rate applied to Chinese companies in the twenty-five cases was over twenty percent higher than the average rate applied to market-economy companies.<sup>112</sup> Much of this difference is attributable to the unusually high country-wide rates for Chinese companies. While company-specific rates for Chinese companies were similar to those assigned to market-economy companies, country-wide rates for Chinese companies were over sixty percent higher than comparable market-economy rates.<sup>113</sup>

The main problem with country-wide antidumping rates, however, is that their legal basis is questionable. In 2009, China mounted its first attack on country-wide antidumping rates before the WTO in *European Communities-Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (EC-Fasteners)*.<sup>114</sup> China argued, among other things, that the European Union's imposition of country-wide antidumping rates on Chinese products solely because China is an NME country violated the EU's obligations under the WTO Antidumping Agreement and other WTO agreements.<sup>115</sup>

By way of background, the European Union operates an antidumping scheme similar to the country-wide antidumping rate scheme in place in the United States. Article 9(5) of Council Regulation (EC) No. 1225/2009 of 30 November 2009 (EU Basic Antidumping Regulations) provides that when a supplier is from an NME country, the antidumping authority will specify an antidumping duty for the entire supplying country unless the supplier can demonstrate sufficient independence from the government.<sup>116</sup> This is often referred to as the "Individual Treatment" test in EU antidumping law.<sup>117</sup>

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DEPARTMENT OF COMMERCE IMPORT ADMINISTRATION at 7 (2015), <http://enforcement.trade.gov/admanual/2015/Chapter%2010%20NME.pdf>.

111. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, U.S.-CHINA TRADE: ELIMINATING NONMARKET ECONOMY METHODOLOGY WOULD LOWER ANTIDUMPING DUTIES FOR SOME CHINESE COMPANIES 16 (2006).

112. *Id.* at 19.

113. *Id.* at 20-21.

114. See Request for Consultation, *European Communities-Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/1 (Aug. 4, 2009).

115. *Id.* at 1-2.

116. See Council Regulation (EC) No. 1225/2009 of 30 November 2009 on Protection Against Dumped Imports from Countries Not Members of the European Community, Art. 9(5) [hereinafter EU Basic Antidumping Regulations]. To receive company-specific rates, NME suppliers must demonstrate that:

- (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
- (b) export prices and quantities, and conditions and terms of sale are freely determined;
- (c) the majority of the shares belong to private persons; state officials appearing on the

In *EC-Fasteners*, the WTO Appellate Body addressed the compatibility of the EU's Individual Treatment test with relevant WTO provisions, particularly Article 6.10 of the WTO Antidumping Agreement. The Appellate Body examined the language of Article 6.10 and concluded that the use of the terms "shall" and "as a rule" in the first sentence of Article 6.10 expresses a mandatory obligation, not a mere preference, to determine company-specific dumping margins.<sup>118</sup> This obligation, according to the Appellate Body, is subject only to the exception to use sampling as provided for in the second sentence of Article 6.10 and additional exceptions allowed in other WTO agreements.<sup>119</sup> The Appellate Body found no provisions in relevant WTO agreements that would allow a WTO member to depart from the obligation to determine company-specific dumping margins only with respect to imports from NMEs.<sup>120</sup> In particular, the Appellate Body rejected the EU's efforts to justify its country-wide antidumping rate scheme under Article 15(d) of the China Accession Protocol. The Appellate Body concluded that while Article 15 of the China Accession Protocol establishes special rules regarding the use of surrogate values, "it does not contain an open-ended exception that allows WTO Members to treat China differently for other purposes under the Anti-Dumping Agreement and the GATT 1994, such as the determination of export prices or individual versus country-wide margins and duties."<sup>121</sup> The Appellate Body finally found that the EU's Individual Treatment test, as provided for in Article 9(5) of the EU Basic Antidumping Regulations, is inconsistent with Article 6.10 of the WTO Antidumping Agreement because "it conditions the determination of individual dumping margins for and the imposition of individual anti-dumping duties on NME exporters or producers to the fulfilment of the [Individual Treatment] test."<sup>122</sup>

The Appellate Body's ruling on country-wide antidumping rates in *EC-Fasteners* rejected a long-standing practice that was essential to keeping

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board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;

(d) exchange rate conversions are carried out at the market rate; and

(e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty."

*Id.*

117. See, e.g., Chad P. Bown & Petros C. Mavroidis, *One (Firm) is Not Enough: A Legal-Economic Analysis of EC-Fasteners*, 12 *WORLD TRADE REV.* 243, 244 (2013).

118. Report of the Appellate Body, *European Communities-Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R (Jul. 15, 2011), ¶¶ 315-17 [hereinafter *EC-Fasteners AB Report*].

119. *Id.* ¶ 320.

120. *Id.* ¶ 328.

121. *Id.* ¶ 290.

122. *Id.* ¶ 385. The Appellate Body also addressed the compatibility of Article 9(5) of the EU Basic Antidumping Regulations with other WTO provisions, such as Article 9.2 of the WTO Antidumping Agreement and Article I:1 of the GATT 1994. See *id.* ¶¶ 330-54, 386-98.

antidumping duties high for Chinese products.<sup>123</sup> What prompted the Appellate Body to take this dramatic step appears to be the fact that the relevant WTO provisions on this issue are relatively clear. The way the provisions were drafted simply does not allow for the calculation of country-wide antidumping rates merely because the suppliers are from NME countries.<sup>124</sup> To hold otherwise in the face of such textual clarity would strain the credibility of the rule-based world trade system. In the perpetual tug-of-war between free trade principles and protectionism, the former won an important battle.<sup>125</sup>

### B. Countervailing Duty Law

Besides antidumping, another area of trade law that has seen constant tussles between free trade principles and protectionism in the face of China's threats to the existing world trade order is countervailing duty law. Due to concerns about the systemic coherence of trade law, the United States had resisted the idea of applying countervailing duty law to Chinese products, until the level of protection offered by antidumping alone became inadequate to cope with surging imports from China. The application of countervailing duty law to Chinese products raises a host of thorny issues, including the potential double-counting of subsidies, the determination of whether a firm is a "public body" capable of conferring subsidies, and the use of cross-border benchmarks in measuring the magnitudes of subsidies. As discussed below, the WTO's handling of these issues further disturbed the already delicate balance struck by trade law with respect to China.

#### 1. To Countervail or to Not Countervail?

As a threshold matter, the basic WTO rules governing countervailing duties—Article VI of the GATT and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)—place no limitations on the reach of countervailing duty law. However, the USDOC, the U.S. agency responsible for assessing antidumping and countervailing duties, initially chose not to apply countervailing duty law to imports from NMEs. In 1984, the USDOC laid out its

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123. For the importance of country-wide antidumping rates to antidumping authorities, see *supra* notes 111-113 and accompanying text.

124. It is not clear why the use of country-wide antidumping rates for Chinese companies, which predated China's entry into the WTO, was not explicitly recognized and sanctioned in the China Accession Protocol. As the Appellate Body in *EC-Fasteners* observed, Paragraph 15 of the China Accession Protocol only concerns the use of surrogate values, not the use of country-wide antidumping rates, for Chinese companies. The failure to explicitly provide for a central antidumping tool in China's Accession Protocol is likely an oversight on the part of Western trade negotiators and treaty drafters.

125. In June 2012, the European Union implemented the Appellate Body's findings in DS397 with respect to country-wide antidumping rates by eliminating the presumption of non-independence from the state for producers from NME countries. See Regulation (EU) No. 765/2012 of the European Parliament and of the Council of 13 June 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R0765>.

position on countervailing duties for NME countries in *Carbon Steel Wire Rod from Poland*.<sup>126</sup> The USDOC asserted that subsidies, which it defined as “any action that distorts or subverts the market process and results in a misallocation of resources,”<sup>127</sup> were a meaningless concept in NME countries because those countries had no market processes to be distorted or subverted to begin with.<sup>128</sup> The U.S. Court of Appeals for the Federal Circuit upheld this determination in the landmark case of *Georgetown Steel Corp. v. United States* in 1986.<sup>129</sup> After examining the purpose of countervailing duty law, the nature of nonmarket economies, and the action Congress had taken in other statutes that specifically addressed the question of imports from NMEs, the Federal Circuit concluded that the economic incentives and benefits provided by the NMEs in question for exports to the United States did not constitute subsidies within the meaning of U.S. countervailing duty law.<sup>130</sup>

As discussed in Part II.A.1 above, in the early 1990s, the USDOC briefly recognized some Chinese domestic prices as market-driven and therefore used them for price comparisons in antidumping proceedings. The USDOC was then confronted with the question of whether the same market forces it recognized as being present in China should lead to the conclusion that countervailing duty law should be applied to China.<sup>131</sup> The USDOC eventually said no to this question, and opted to reverse its uses of actual Chinese prices in antidumping for the sake of trade law’s internal coherence.<sup>132</sup>

Arguably, the USDOC was able to withstand pressure to impose countervailing duties on Chinese products on top of antidumping duties in the 1980s and early 1990s because such pressure was not severe enough at the time. Fast forwarding twenty-five years, when U.S. petitioners tried again to impose countervailing duties on Chinese products, the USDOC changed course. In a 2007 policy memorandum, the USDOC examined whether the analytical elements of the Federal Circuit’s *Georgetown Steel* decision were still applicable to China’s present-day economy.<sup>133</sup> The USDOC stated that China’s economy at the time was “significantly different” from the Soviet-style economies at issue in *Georgetown Steel*.<sup>134</sup> China’s economy was more flexible, said the USDOC,

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126. *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19,374 (Dep’t of Comm. May 7, 1984) (final negative countervailing duty determination).

127. *Id.* at 19,375.

128. *Id.*

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

130. *Id.* at 1313-18.

131. *See supra* note 77 and accompanying text.

132. *See supra* note 81 and accompanying text.

133. *See* Memorandum from Shauna Lee-Alaia & Lawrence Norton, Office of Policy, Import Admin., to David M. Spooner, Asst. Sec’y, Import Admin., Countervailing Duty Investigation of Coated Free Sheet Paper from the People’s Republic of China—Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China’s Present-Day Economy (Mar. 29, 2007) [hereinafter *Georgetown Steel* Memo].

134. *Id.* at 4.



than the Soviet-style economies in terms of the power to set wages and prices, access to foreign currency, personal property rights and private entrepreneurship, foreign trading rights, and allocation of financial resources.<sup>135</sup> As a result, the USDOC concluded that “it is possible to determine whether the PRC Government has bestowed a benefit upon a Chinese producer (i.e., the subsidy can be identified and measured) and whether any such benefit is specific.”<sup>136</sup>

It could be argued that the USDOC’s decision to apply countervailing duty law to China was based on principles, not on expediency. After all, it is undeniable that China’s economy in 2007 had undergone dramatic transformations since the 1980s. The policy of not applying countervailing duty law to NMEs—a policy rooted in the conceptualization of NMEs as Soviet-style economies—arguably no longer reflected China’s economic reality.

What made the USDOC’s move problematic, however, is that while the USDOC recognized market forces in China for countervailing duty purposes, it continually refused to recognize market forces in China for antidumping purposes. In 2006, in its latest assessment of whether China should continue to be designated as an NME, the USDOC determined that “market forces in China are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department’s dumping analysis.”<sup>137</sup> A year later, in its *Georgetown Steel* memorandum, which concluded that countervailing duty law now applied to China, the USDOC acknowledged that “[t]he features and characteristics of China’s present-day economy also suggest that modification of some aspects of the Department’s current NME antidumping policy and practice may be warranted, such as the conditions under which the Department might grant an NME respondent market economy treatment.”<sup>138</sup> In 2007, the USDOC issued requests for public comments on how it might be able to grant market-economy treatment to individual Chinese respondents in antidumping proceedings.<sup>139</sup> These requests for comments, however, have not resulted in any concrete action on the part of the USDOC. As such, the USDOC’s policy towards China is caught in an obvious contradiction: Market forces in China are considered strong enough for subsidies to be identified and measured, but not strong enough for Chinese domestic prices or costs to be used as the basis of

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135. *Id.* at 5-9.

136. *Id.* at 10. After determining that the Chinese government had granted a subsidy, the USDOC could then potentially apply countervailing duty law to Chinese imports.

137. Shauna Lee-Alaia et al., Imp. Admin., Antidumping Duty Investigation of Certain Lined Paper Products from the People’s Republic of China (China)—China’s Status as a Non-Market Economy (NME) 4 (2006), <http://enforcement.trade.gov/download/prc-nme-status/prc-lined-paper-memo-08302006.pdf>.

138. *Georgetown Steel Memo*, *supra* note 133, at 11.

139. Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 Fed. Reg. 29,302 (Dep’t of Comm. May 25, 2007) (request for comment); Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise: Request for Comment, 72 Fed. Reg. 60,649 (Dep’t of Comm. Oct. 25, 2007).

comparison in antidumping. While one could explain away this contradiction by pointing to the hybrid nature of China's economy today, a more plausible interpretation appears to be that the USDOC's new policy serves the needs to maintain maximum levels of protection against Chinese products.

## 2. *Double Counting*

After the USDOC started applying countervailing duty law to imports from China, Chinese respondents filed legal actions in both U.S. domestic courts and international venues to challenge the simultaneous imposition of countervailing and antidumping duties calculated using the surrogate-value methodology. One central issue raised in these legal actions was whether the amount of antidumping duties calculated using the surrogate-value methodology already captures subsidies that may have been conferred on the subject merchandise. If so, then the subsidies would have been double-counted, once through the countervailing duties and once through the antidumping duties. As discussed in detail below, litigation over the double-counting issue forced the USDOC to roll back some, but not all, of the countervailing duties imposed on Chinese products.

Initially, Chinese respondents attempted to have U.S. courts strip the USDOC of its authority to apply countervailing duty law to imports from China altogether. In *GPX International Tire Corp. v. United States* ("*GPX I*"), decided in September 2009, Chinese respondents argued that the U.S. countervailing duty statute barred the application of countervailing duty law to imports from NMEs.<sup>140</sup> The U.S. Court of International Trade (CIT) disagreed. Citing the ambiguity in both the Federal Circuit's *Georgetown Steel* ruling and the countervailing duty law itself regarding the applicability of the countervailing duty law to NMEs, the CIT stated that it "cannot say from the statutory language alone that Commerce does not have the authority to impose [countervailing duties] on products from an NME-designated country."<sup>141</sup>

While Chinese respondents' argument that the USDOC lacked statutory authority to apply countervailing duty law to NME imports floundered, their alternative argument regarding double-counting gained traction in U.S. courts. In *GPX I*, the Chinese plaintiff argued that "double counting occurs when Commerce imposes a CVD remedy to offset an alleged government subsidy, but then compares a subsidy-free constructed normal value (essentially using information from surrogate countries) with the original subsidized export price to calculate the AD margin."<sup>142</sup> Imposing countervailing duties on top of the antidumping duties, according to the plaintiff, will therefore result in the double counting and double remedy of the subsidies.<sup>143</sup> The CIT in *GPX I* turned out to

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140. 645 F.Supp.2d 1231, 1236-40 (Ct Int'l Trade 2009) (discussing whether the USDOC has the statutory authority to apply countervailing duty law to imports from NMEs) [hereinafter *GPX I*].

141. *Id.* at 1239.

142. *Id.* at 1241.

143. *Id.* For detailed illustrations of why double counting might occur in simultaneous

be highly receptive to this analysis. The CIT stated that under the surrogate-value method, “the export price is not being compared with the price of the good in the PRC in which case both sides of the comparison would be equally affected, but rather, export price, however it is affected by the subsidy, is compared with the presumptively subsidy-free constructed normal value.”<sup>144</sup> Without some type of adjustment, therefore, the simultaneous imposition of antidumping duties and countervailing duties in this situation “could very well result in a double remedy.”<sup>145</sup> The CIT went on to hold that “if . . . it is too difficult for Commerce to determine whether, and to what degree double counting is occurring, Commerce should refrain from imposing CVDs on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools.”<sup>146</sup> The CIT remanded the case back to the USDOC, requiring the USDOC to either forego the imposition of countervailing duties on the Chinese products at issue or to adopt additional policies and procedures to address the double-counting issue.<sup>147</sup>

In its remand determination issued in response to the CIT ruling in *GPX I*, the USDOC explored ways to avoid the double remedy of subsidies for Chinese products.<sup>148</sup> The USDOC concluded that it had three options: It could choose not to apply countervailing duty law to Chinese products, choose to apply the market economy antidumping methodology to Chinese products, or apply both countervailing duty law and the NME antidumping methodology to Chinese products but use the countervailing duties to offset the antidumping duties.<sup>149</sup> The DOC adopted the third option because it believed that it was “the least objectionable of the three.”<sup>150</sup>

Upon appeal of the USDOC’s remand determination, in August 2010, the CIT once again rejected the USDOC’s handling of the double-counting issue. In *GPX International Corp. v. United States (GPX II)*, the CIT observed that under the offset proposed by the USDOC, the combined antidumping and countervailing duties will always equal the unaltered antidumping duties.<sup>151</sup> This, according to the CIT, “renders concurrent CVD and AD investigations unnecessary because the same remedial price adjustment can otherwise be

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antidumping and countervailing duty cases involving NME products, see Wentong Zheng, *Counting Once, Counting Twice: The Precarious State of Subsidy Regulation*, 49 STAN. J. INT’L L. 427, 439-40 (2013).

144. *GPX I*, *supra* note 140, at 1242.

145. *Id.*

146. *Id.* at 1243.

147. *Id.* at 1251.

148. Dep’t of Commerce, Final Results of Redetermination Pursuant to Remand (2010), <http://ia.ita.doc.gov/remands/09-103.pdf>.

149. *Id.* at 8.

150. *Id.* For discussions of why the USDOC found the first two options to be more objectionable, *see id.* at 8-9.

151. *GPX Int’l Corp. v. United States*, 715 F. Supp. 2d 1337, 1345 (Ct. Int’l Trade 2010) [hereinafter *GPX II*].

obtained by merely conducting an NME AD investigation.”<sup>152</sup> The CIT agreed with the Chinese plaintiffs that “it is not reasonable to ‘force[] foreign parties to spend many months and large sums of money to go through an investigation, the end result of which is to calculate a CVD margin, but then to eliminate that CVD [margin] because it has been offset by some parallel investigation.”<sup>153</sup> The CIT further held that the proposed offset had no legal basis in U.S. antidumping law anyway.<sup>154</sup> Given the USDOC’s inability to determine whether and to what degree double counting was occurring, the CIT held that the only option left for the USDOC was not to apply the countervailing duty law to imports from China.<sup>155</sup>

In December 2011, in *GPX International Corp. v. United States (GPX III)*, the Federal Circuit affirmed the CIT’s *GPX II* ruling, but on a different ground.<sup>156</sup> The Federal Circuit was far more skeptical than the CIT about the entire double-counting argument. It expressed doubts about whether U.S. law prohibited double-counting, and gave credence to the fact that the USDOC had determined that it was not clear whether double counting had in fact occurred.<sup>157</sup> But the Federal Circuit still held that U.S. countervailing duty law barred the imposition of countervailing duties on imports from NMEs because of the principle of legislative ratification. Since Congress amended U.S. trade law many times after the *Georgetown Steel* decision, but did not make any changes that would have altered the USDOC’s handling of countervailing duty law for NME imports, the Federal Circuit concluded that Congress ratified the USDOC’s then-prevailing policy of not applying countervailing duty law to NME imports.<sup>158</sup> If the USDOC believed that countervailing duty law should apply to NME imports, said the Federal Circuit, then “the appropriate approach would be to seek legislative change.”<sup>159</sup>

While the *GPX* litigation was pending in U.S. courts, the Chinese government filed claims before the WTO against the USDOC’s simultaneous application of NME antidumping and countervailing duties to Chinese products. In October 2010 a WTO dispute settlement panel issued DS379, its final report

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152. *Id.*

153. *Id.* The CIT did not explain why the respondents could not simply ignore the countervailing duty proceedings. Arguably, this is because the combined antidumping and countervailing duty rate will equal the unaltered antidumping rate only if the countervailing duty rate is less than the unaltered antidumping rate. If the countervailing duty rate is greater than the unaltered antidumping rate, the combined antidumping and countervailing duty rate will equal the countervailing duty rate. The respondents could not ignore the countervailing duty proceedings, because there is a possibility that the combined rate will be determined by the countervailing duty rate.

154. *Id.*

155. *Id.* at 1346.

156. *GPX Int’l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011) [hereinafter *GPX III*].

157. *See id.* at 737.

158. *Id.* at 739-45.

159. *Id.* at 745.

in which China pressed its double-counting claims.<sup>160</sup> The panel acknowledged the theoretical possibility of double counting, noting that the use of the NME antidumping methodology leads to “an asymmetric dumping margin comparison between an *unsubsidized* normal value and *subsidized* export price.”<sup>161</sup> This, in turn, led the panel to believe that “at least *some* double remedy will *likely* arise from the concurrent imposition of countervailing duties and antidumping duties calculated under an NME methodology.”<sup>162</sup> That said, however, the panel went on to hold that even if double counting did occur, it was not inconsistent with any of the WTO provisions cited by China and therefore raised no issues under WTO law.<sup>163</sup>

Upon appeal of the WTO panel’s ruling in DS379, China found a more friendly audience for its double-counting claims at the WTO Appellate Body. In its final report issued in March 2011, the Appellate Body reversed the panel’s findings as to whether WTO law prohibited double counting.<sup>164</sup> Specifically, the Appellate Body held that the panel erred in its interpretation of Article 19.3 of the SCM Agreement,<sup>165</sup> which requires a countervailing duty to be imposed in the “appropriate” amounts.<sup>166</sup> The Appellate Body stated that “the amount of a countervailing duty cannot be ‘appropriate’ in situations where that duty represents the full amount of the subsidy and where antidumping duties, calculated at least to some extent on the basis of the same subsidization, are imposed concurrently to remove the same injury to the domestic industry.”<sup>167</sup> The Appellate Body then recognized that the occurrence of double counting depended on “whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation.”<sup>168</sup> In the USDOC proceedings at issue, however, the USDOC “did not initiate any examination of whether double remedies would arise . . .

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160. See Report of the Panel, United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R (Oct. 22, 2010) [hereinafter *DS379 Panel Report*].

161. *Id.* ¶ 14.72 (emphasis original).

162. *Id.* ¶ 14.75 (emphasis original).

163. *Id.* ¶ 14.76. China argued that double counting was inconsistent with Articles 10, 19.3, 19.4 and 32.1 of the SCM Agreement and Articles VI:3 and I:1 of the GATT 1994. The panel rejected all of these arguments. See *id.* at 14.104-.140, .144-.149, .164-.182.

164. See Report of the Appellate Body, United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R (Mar. 11, 2011), ¶¶ 545-91 [hereinafter *DS379 AB Report*].

165. *Id.* ¶ 582.

166. WTO Agreement on Subsidies and Countervailing Measures, 1869 U.N.T.S. 14, art. 19.3 [hereinafter *SCM Agreement*] (“When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury . . .”).

167. *DS379 AB Report*, *supra* note 164, ¶ 582.

168. *Id.* ¶ 599.

and refused outright to afford any consideration to the issue or to the submissions pertaining to the issue that were presented to it.”<sup>169</sup> The Appellate Body found this failure to conduct any factual inquiries as to the double-counting issue to be inconsistent with the requirement of Article 19.3 of the SCM Agreement.<sup>170</sup>

Confronted with two adverse rulings on the application of U.S. countervailing duty law to imports from NMEs, one by the Federal Circuit and one by the WTO Appellate Body, the United States Congress took up the task of amending U.S. countervailing duty law by enacting Public Law 112-99 (P.L. 112-99) in March 2012.<sup>171</sup> In P.L. 112-99, Congress overrode the Federal Circuit’s ruling in *GPX III* and explicitly provided that U.S. countervailing duty law applied to imports from NMEs.<sup>172</sup> To comply with the Appellate Body’s ruling in DS379, P.L. 112-99 added a new provision to U.S. countervailing duty law requiring the USDOC to reduce the antidumping duty amount by the amount of countervailable subsidies that are demonstrated to have been double-counted.<sup>173</sup>

In July 2012, pursuant to the new statutory requirements set forth in P.L. 112-99, the USDOC issued its amended determinations for the antidumping and countervailing duty proceedings challenged in DS379.<sup>174</sup> In the amended determinations, the USDOC allocated to the Chinese respondents the burden of demonstrating their entitlement to adjustments to their antidumping duty rates.<sup>175</sup> The USDOC considered the Chinese respondents to have met this burden with respect to certain input subsidies, namely, subsidies on inputs used in the manufacturing of the subject merchandise.<sup>176</sup> The USDOC calculated the amount of the input subsidies that had been double-counted as being sixty-three

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169. *Id.* ¶ 604.

170. *Id.* ¶ 606.

171. See Act of Mar. 13, 2012, Pub. L. No. 112-99, 126 Stat. 265 [hereinafter P.L. 112-99].

172. *Id.* section 1(a) (“[T]he merchandise on which countervailing duties shall be imposed under [section 701(a) of the Tariff Act of 1930] includes a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country.”).

173. *Id.* section 2(a). The new provision requires the USDOC to adjust the antidumping duty amount only if the countervailing duty “has been demonstrated to have reduced the average price of imports of the class or kind of merchandise,” and the USDOC can “reasonably estimate” the extent to which the countervailing duty has increased the antidumping duty.

174. See Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China (Dep’t of Commerce July 31, 2012) (final section 129 determination) [hereinafter CWP Section 129 Determination], <http://ia.ita.doc.gov/download/section129/prc-cwcq-steel-pipe-Final-129-Determination-20120830.pdf>; Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China (Dep’t of Commerce July 31, 2012) (final section 129 determination), <http://ia.ita.doc.gov/download/section129/prc-otr-tires-Final-129-Determination-20120830.pdf>; Laminated Woven Sacks from the People’s Republic of China (Dep’t of Commerce July 31, 2012) (final section 129 determination), <http://ia.ita.doc.gov/download/section129/prc-lw-sacks-Final-129-Determination-20120830.pdf>.

175. See, e.g., CWP Section 129 Determination, *supra* note 174, at 14.

176. *Id.* at 14-15.

percent of the subsidies.<sup>177</sup> As a result, the USDOC subtracted sixty-three percent of the input subsidies from the amount of the antidumping duties.<sup>178</sup>

In sum, through its legal maneuvers on the double-counting issue, China succeeded in forcing the United States to scale back some of the countervailing duties it had newly imposed on Chinese products. In the face of highly complex economic issues surrounding the double-counting issue,<sup>179</sup> the WTO Appellate Body took a cautious approach and required member countries to at least take cognizance of the double-counting issue. The WTO's willingness to reject a trade practice on the basis of the mere possibility of unfairness manifests its preference to err on the side of overreaction for the sake of sound principles. But at the same time, the United States was able to impose at least some countervailing duties on top of antidumping duties for Chinese products, with the end result being a higher level of protection against Chinese products.

### 3. *Public Body*

Aside from the threshold questions of whether countervailing duty law applies to Chinese products and whether they have been double-counted, countervailing duty investigating authorities from around the world also have to grapple with questions that are of a technical nature but have a big impact on the way countervailing duties are assessed for Chinese products. One such technical question is whether Chinese state-owned enterprises and banks should be considered "public bodies" and therefore capable of conferring subsidies within the meaning of the SCM Agreement. As discussed below, the hybrid nature of the Chinese economy created an opening for importing countries to interpret the term "public body" in ways that made it easier to prove the existence of a countervailable subsidy. The WTO, however, rejected some of those interpretations and required more evidence than mere government ownership in determining whether a Chinese entity is a public body.

Under the SCM Agreement, only a government or public body is capable of directly giving subsidies.<sup>180</sup> If a private body is accused of giving a subsidy, it must be demonstrated that a government "entrusts or directs" the private body to carry out a function that "would normally be vested in the government" and the practice followed by the private body "in no real sense . . . differs from practices normally followed by governments."<sup>181</sup>

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177. *Id.* at 19. In arriving at this number, the USDOC compared the ratio of change between input prices as proxied by an aggregate-level China purchasing price index and output prices as proxied by an aggregate-level China production price index. *See id.* at 18-19.

178. *Id.* at 35-36.

179. For discussions of the economics behind the double-counting issue, see Wentong Zheng, *Counting Once, Counting Twice: The Precarious State of Subsidy Regulation*, 49 STAN. J. INT'L L. 427, 450-58 (2013).

180. SCM Agreement, *supra* note 166, art. 1.1(a)(1) ("[A] subsidy shall be deemed to exist if . . . there is a financial contribution by a government or any public body within the territory of a Member . . .") (emphasis added).

181. *Id.* 1(a)(1)(iv).

The interpretation of the term “public body,” which the SCM Agreement does not define, proved to be a particularly thorny issue in U.S. countervailing duty proceedings involving Chinese state-owned enterprises (SOEs) or state-owned commercial banks (SOCBs). Some of the subsidies alleged in those proceedings were input subsidies given by Chinese SOEs that sold products to downstream producers of the subject merchandise at below-market prices and loan subsidies given by Chinese SOCBs that made loans to producers of the subject merchandise at below-market interest rates.<sup>182</sup> If the SOE input suppliers and SOCB lenders were considered public bodies, then the USDOC would be able to bypass the requirement to show “entrustment or direction” for those entities, making it much easier to prove the existence of a countervailable subsidy.<sup>183</sup>

The USDOC moved precisely in this direction by treating Chinese SOEs and SOCBs as public bodies. In *Light-Walled Rectangular Pipe and Tube from People’s Republic of China* in 2008, for example, the USDOC investigated certain Chinese steel producers for allegedly providing input subsidies to downstream steel pipe and tube producers by selling steel products to them for less than adequate remuneration.<sup>184</sup> In determining whether those input suppliers were public bodies, the USDOC refused to apply a five-factor test that it had used in prior cases involving non-Chinese producers, on the grounds that the Chinese government failed to provide sufficient information on factors other

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182. See, e.g., Memorandum from Stephen J. Claeys, Assistant Sec’y for Import Admin., to David M. Spooner, Deputy Assistant Sec’y for Import Admin., Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain New Pneumatic Off-the-Road Tires (OTR Tires) from the People’s Republic of China 9-15 (Jul. 7, 2008), <http://enforcement.trade.gov/frn/summary/PRC/E8-16154-1.pdf> [hereinafter OTR Tires CVD I&D Memo]; Memorandum from Stephen J. Claeys, Assistant Sec’y for Import Admin., to David M. Spooner, Deputy Assistant Sec’y for Import Admin., Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Laminated Woven Sacks from the People’s Republic of China 18-26 (Jun. 16, 2008), <http://enforcement.trade.gov/frn/summary/PRC/E8-14256-1.pdf> [hereinafter LWS CVD I&D Memo]; Memorandum from Stephen J. Claeys, Assistant Sec’y for Import Admin., to David M. Spooner, Deputy Assistant Sec’y for Import Admin., Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Light-Walled Rectangular Pipe and Tube from the People’s Republic of China 8-9 (Jun. 13, 2008), <http://enforcement.trade.gov/frn/summary/PRC/E8-14250-1.pdf> [hereinafter LWP CVD I&D Memo]; Memorandum from Stephen J. Claeys, Assistant Sec’y for Import Admin., to David M. Spooner, Deputy Assistant Sec’y for Import Admin., Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Circular-Welded Carbon Quality Steel Pipe from the People’s Republic of China 9-12, 14-15 (May 29, 2008), <http://enforcement.trade.gov/frn/summary/PRC/E8-12606-1.pdf> [hereinafter CWP CVD I&D Memo].

183. Proving “entrustment or direction” is no easy matter. In *US—Countervailing Duty Investigation on DRAMs*, the WTO Appellate Body held that to show “entrustment or direction,” there must be a “demonstrable link between the government and the conduct of the private body.” Report of the Appellate Body, *United States-Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS296/AB/R (Jun. 27, 2005), ¶ 112. It further held that “mere policy pronouncements” are insufficient, and that “entrustment and direction” imply “a more active role than mere acts of encouragement” and cannot be “inadvertent or a mere by-product of government regulation.” *Id.* ¶ 114.

184. See LWP CVD I&D Memo, *supra* note 182, at 8-9.



than the government ownership of the input suppliers<sup>185</sup> Instead, for those input suppliers, the USDOC adopted a “majority ownership” rule, under which any input suppliers that were majority owned by the Chinese government were considered public bodies<sup>186</sup> In another case, *Coated Free Sheet Paper from the People’s Republic of China* in 2007, the USDOC similarly treated Chinese SOCBs as public bodies on the grounds that the Chinese government maintained near complete state ownership of the banking sector in China and exercised extensive control and influences over the operations of SOCBs.<sup>187</sup>

China challenged the USDOC’s public body determinations before the WTO. In DS379, the WTO dispute settlement panel sided with the USDOC with respect to its determinations for both the SOEs and the SOCBs. As for the SOEs, the panel interpreted the term “public body” in Article 1.1(a)(1) of the SCM Agreement as “any entity controlled by a government.”<sup>188</sup> Government ownership, according to the Panel, was “highly relevant (indeed potentially dispositive) evidence of government control.”<sup>189</sup> The panel therefore found “no legal error . . . in giving primacy to evidence of majority government-ownership.”<sup>190</sup> For the same reasons, the panel also upheld the USDOC’s determination that the Chinese SOCBs in question were public bodies.<sup>191</sup>

On appeal of the panel’s report in DS379, the WTO Appellate Body reversed the panel’s finding as to the SOEs but upheld its finding as to the SOCBs. The Appellate Body first disagreed with the panel’s equation of public body with government control, stating that “control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body.”<sup>192</sup> The Appellate Body went on to hold that the assessment of whether an entity is a public body “must focus on evidence relevant to the question of whether the entity is vested with or exercises government authority.”<sup>193</sup> According to the Appellate Body, the USDOC’s reliance on government ownership in its public body determinations was not sufficient “because evidence of government ownership, in itself, is not evidence of meaningful control of an entity by government and cannot, without more, serve as a basis

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185. *Id.* at 28-30. The five-factor test the USDOC used in prior cases inquires about the government ownership of an entity, the government’s presence on the entity’s board of directors, the government’s control over the entity’s activities, the entity’s pursuit of governmental policies or interests, and whether the entity is created by statute. *Id.* at 26-27.

186. *Id.* at 29.

187. See Memorandum from Stephen J. Claeys, Assistant Sec’y for Import Admin., to David M. Spooner, Deputy Assistant Sec’y for Import Admin., on the Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet Paper from the People’s Republic of China 55-61 (Oct. 17, 2007), <http://enforcement.trade.gov/frn/summary/PRC/E7-21046-1.pdf> [hereinafter CFP CVD I&D Memo].

188. DS379 Panel Report, *supra* note 160, ¶ 8.94.

189. *Id.* ¶ 8.134.

190. *Id.* ¶ 8.136.

191. *Id.* ¶¶ 8.142-.143.

192. DS379 AB Report, *supra* note 164, ¶ 320.

193. *Id.* ¶ 345.

for establishing that the entity is vested with authority to perform a governmental function.”<sup>194</sup> As for the SOCBs, the Appellate Body noted that the USDOC considered “extensive evidence relating to the relationship between the SOCBs and the Chinese Government, including evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions.”<sup>195</sup> The Appellate Body concluded that “these considerations, taken together, demonstrate that the USDOC’s public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government.”<sup>196</sup>

In a subsequent WTO dispute settlement proceeding, DS437, a WTO dispute settlement panel further clarified the meaning of “public body” in Article 1.1(a)(1) of the SCM Agreement.<sup>197</sup> The panel in DS437 understood the Appellate Body in DS379 “to have found that the critical consideration in identifying a public body is the question of authority to perform governmental functions.”<sup>198</sup> The panel was not persuaded, however, by China’s argument that “[a] public body, like government in the narrow sense, thus must itself possess the authority to ‘regulate, control, supervise or restrain’ the conduct of others.”<sup>199</sup> That interpretation, according to the panel, would equate the term “public body” with the term “government agency,” an approach that the Appellate Body in DS379 did not follow.<sup>200</sup> But at the same time, the panel also rejected a definition of the term “public body” based on “simple ownership or control by a government.”<sup>201</sup> The panel thus concluded that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement when it found that Chinese SOEs were public bodies “based solely on the grounds that these enterprises were (majority) owned, or otherwise controlled, by the Government of China.”<sup>202</sup>

In sum, through its interpretations of the term “public body,” the WTO stayed away from automatically treating all Chinese SOEs as part of the Chinese government itself. The WTO took a more nuanced approach that requires inquiries into whether the SOEs exercise governmental functions. While this approach poses hurdles to finding a countervailable subsidy from the business operations of Chinese SOEs, it preserves WTO member countries’ ability to

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194. *Id.* ¶ 346.

195. *Id.* ¶ 355.

196. *Id.*

197. See Report of the Panel, United States—Countervailing Duty Measures on Certain Products from China, ¶ 7.65–.75, WT/DS437/R (July 14, 2014) [hereinafter DS437 Panel Report].

198. *Id.* ¶ 7.66.

199. *Id.* ¶ 7.67.

200. *Id.* ¶ 7.68.

201. *Id.* ¶ 7.68–.72.

202. DS437 Panel Report, *supra* note 197, ¶ 7.75. The panel, however, did not address the United States’ argument that the term “public body” should be interpreted to mean “an entity that is controlled by a government such that the government can use the resources of that entity as its own.” See *Id.* ¶ 7.74. The panel considered it unnecessary to evaluate that argument because it was not the basis of the USDOC’s public body determinations in the underlying proceedings. *Id.*

impose countervailing duties if the Chinese SOEs are indeed engaged in activities of governmental nature.

#### 4. *Out-of-Country Benchmarks*

Another issue that has had a tremendous impact on the assessment of countervailing duties for Chinese products is the use of out-of-country or cross-border benchmarks in measuring the magnitudes of subsidies. As discussed below, the extensive role of the Chinese government in China's economy created an opportunity for investigating authorities to discard Chinese domestic prices and opt for third-country prices as the benchmark in calculating the amounts of countervailing duties. Like the use of surrogate values in antidumping, the use of out-of-country benchmarks in countervailing duty proceedings tends to inflate the amounts of countervailing duties and result in a higher level of protection against Chinese products. But as detailed below, China was able to persuade the WTO to reject the use of out-of-country benchmarks in some of the most egregious situations, dealing a setback to investigating authorities and petitioners seeking to take advantage of the WTO's tolerance of such benchmarks.

Under the SCM Agreement, a countervailable subsidy exists only if the alleged subsidy confers a "benefit" on the recipient of the subsidy.<sup>203</sup> The SCM Agreement, however, does not offer a definition of the term "benefit." It only provides guidelines on how to calculate the benefit of a subsidy to the recipient in four scenarios involving the government provision of equity capital, loans, and loan guarantees, and the provision of goods or services or the purchase of goods by a government.<sup>204</sup> In *Canada—Measures Affecting the Export of Civilian Aircraft*, the WTO Appellate Body made clear that the common theme of those guidelines is to identify a subsidy by determining "whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."<sup>205</sup> In *United States-Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, the Appellate Body held that under Article 14(d) of the SCM Agreement, which concerns the government provision of goods or services for less than adequate remuneration, an investigating authority "may use a benchmark other than private prices in the country of provision . . . if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods."<sup>206</sup> This opened the

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203. SCM Agreement, *supra* note 166, art. 1.1(b).

204. *Id.* art. 14.

205. Report of the Appellate Body, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 157, WT/DS70/AB/R (Aug. 2, 1999).

206. Report of the Appellate Body, *United States-Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, ¶ 90, WT/DS257/AB/R (Jan. 19, 2004).

door to the use of out-of-country prices as the benchmark for measuring the benefit of a subsidy.<sup>207</sup>

After the USDOC started applying countervailing duties to Chinese products in 2007, the USDOC moved swiftly to use out-of-country benchmarks to measure the magnitudes of several types of alleged Chinese subsidies: loan, input, and land use subsidies. In *Coated Free Sheet Paper from the People's Republic of China* in 2007, the USDOC investigated whether the Chinese producers of the subject merchandise received loans from Chinese policy banks and state-owned commercial banks (SOCBs) at below-market interest rates.<sup>208</sup> In evaluating whether the loans were at below-market rates and, if so, by how much, the USDOC refused to use the interest rates for loans made by private and foreign banks in China as the benchmark for market interest rates. This was because “[the Chinese government]’s intervention in the banking sector creates significant distortions, even restricting and influencing private and foreign banks within the PRC.”<sup>209</sup> The USDOC also rejected Chinese national interest rates as the benchmark by pointing to the “pervasiveness of the [Chinese government]’s intervention in the banking sector.”<sup>210</sup> Having rejected these in-country benchmarks, the USDOC constructed an out-of-country loan benchmark based on the interest rates of thirty-three lower- to middle-income countries considered comparable to China’s economic development level.<sup>211</sup> After *Coated Free Paper from the People's Republic of China*, the USDOC routinely used the same kind of out-of-country loan benchmarks in subsequent countervailing duty proceedings involving Chinese products.<sup>212</sup>

The USDOC also used out-of-country benchmarks to measure whether Chinese SOEs sold inputs to downstream producers at below-market prices. In *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, for example, the USDOC found that 96.1% of the input in question, hot-rolled steel, was provided by SOEs.<sup>213</sup> The USDOC thus rejected Chinese domestic prices for hot-rolled steel as the market price benchmark because “where the Department finds that the government provides the majority, or a

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207. For detailed discussions of the history of out-of-country benchmarks in countervailing duty law, see Wentong Zheng, *The Pitfalls of the (Perfect) Market Benchmark: The Case of Countervailing Duty Law*, 19 MINN. J. INT'L L. 1, 8-35 (2010).

208. See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China (Oct. 17, 2007), at 5, <http://enforcement.trade.gov/frn/summary/PRC/E7-21046-1.pdf> [hereinafter China CFS Paper I&D Memo].

209. *Id.* at 5.

210. *Id.* at 6.

211. *Id.* In constructing the out-of-country loan benchmark, the USDOC did not use the simple average of the interest rates of the comparable countries, but regressed the interest rates of the comparable countries on a World Bank governance index measuring the quality of each country's institutions. See *id.*

212. See, e.g., CWP CVD I&D Memo, *supra* note 182, at 6-7; LWS CVD I&D Memo, *supra* note 182, at 82-83; OTR Tires CVD I&D Memo, *supra* note 182, at 7-9.

213. CWP CVD I&D Memo, *supra* note 182, at 11.

substantial portion of the market for a good or service, prices for such goods and services in the country will be considered significantly distorted and will not be an appropriate basis of comparison for determining whether there is a benefit.”<sup>214</sup> The USDOC then used the import prices the Chinese respondents paid to suppliers from outside of China or, when such import prices were not applicable, world market export prices, to determine if the Chinese SOEs provided a benefit to the downstream producers of the subject merchandise.<sup>215</sup>

The USDOC also applied the same out-of-country benchmark analysis to Chinese land use subsidies. In *Laminated Woven Sacks from the People's Republic of China*, the USDOC probed whether the Chinese government granted land-use rights to Chinese producers of the subject merchandise at below-market prices.<sup>216</sup> The USDOC rejected Chinese land prices as the market price benchmark because “Chinese land prices are distorted by the significant government role in the market.”<sup>217</sup> The USDOC then compared the prices for land use rights in China with certain land prices in Thailand, prices that the USDOC argued were “comparable market prices for land purchases in a country at a comparable level of economic development that is reasonably proximate to, but outside of, China.”<sup>218</sup>

China challenged the USDOC's use of out-of-country benchmarks for alleged Chinese input, loan, and land use subsidies before the WTO in two dispute settlement proceedings, DS379 and DS437. In DS379, China failed to persuade the panel and the Appellate Body that the USDOC acted inconsistently with WTO law in using such out-of-country benchmarks. As for input subsidies, the Appellate Body in DS379 interpreted its report in *Softwood Lumber* as “exclud[ing] the application of a per se rule, according to which an investigating authority could properly conclude in every case, and regardless of any other evidence, that the fact that the government is the predominant supplier means that private prices are distorted for the use of out-of-country benchmarks.”<sup>219</sup> The Appellate Body acknowledged that the USDOC's consideration of factors other than government market share in the underlying proceedings “appears to have been somewhat cursory.”<sup>220</sup> But since the Chinese government had a predominant 96.1% market share in the market in question, the Appellate Body considered the USDOC's rejection of in-country benchmarks to be justified because “evidence of factors other than government market share will have less weight in the determination of price distortion than in a situation where the government has only a ‘significant’ presence in the market.”<sup>221</sup> As for loan

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214. *Id.* at 64.

215. *Id.* at 66.

216. See LWS CVD I&D Memo, *supra* note 182, at 14.

217. *Id.* at 15.

218. *Id.* at 17.

219. DS379 AB Report, *supra* note 164, ¶ 443.

220. *Id.* ¶ 454.

221. *Id.* ¶ 455.

subsidies, the Appellate Body held that its reasoning in *Softwood Lumber* concerning the use of out-of-country benchmarks was “equally applicable” in measuring the benefits of loan subsidies.<sup>222</sup> On this basis, the Appellate Body concluded that the USDOC’s decision not to rely on interest rates in China for Chinese loans was “reasoned and adequate.”<sup>223</sup> The Appellate Body found, however, that the panel below failed to make an objective assessment of whether the out-of-country benchmark constructed by the USDOC for Chinese loans was consistent with the requirement of Article 14(b) of the SCM Agreement.<sup>224</sup> As for land use subsidies, an issue not appealed by China to the Appellate Body, the panel in DS379 determined that the USDOC underwent sufficient analysis in rejecting Chinese land-use prices as the subsidy benchmark.<sup>225</sup> The panel further upheld the out-of-country benchmarks the USDOC constructed from Thailand prices, noting that although those out-of-country benchmarks were not a perfect representation of what land use prices would be in China in the absence of government distortions, it was not clear that adjusting the benchmarks in ways suggested by China “would ensure a closer approximation of the counterfactual situation.”<sup>226</sup>

In DS437, China pressed again on the use of out-of-country benchmarks for Chinese input subsidies, this time with success. The Appellate Body in DS437 found that the panel below “failed to conduct a case-by-case analysis of whether the USDOC had properly examined whether the relevant in-country prices were market determined or were distorted by governmental intervention.”<sup>227</sup> Instead, the panel “simply assumed that because the Appellate Body had faced a similar situation in [DS379], China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d).”<sup>228</sup> After reversing the panel, the Appellate Body went on to complete the legal analysis and concluded that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by rejecting in-country prices in China as the subsidy benchmark.<sup>229</sup> According to the Appellate Body, the USDOC based its rejection of in-country prices in China on the fact that government-related entities were the predominant suppliers of the relevant goods.<sup>230</sup> The USDOC did not explain whether and how the government-related suppliers “possessed and exerted

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222. *Id.* ¶ 489.

223. *Id.* ¶ 509.

224. *Id.* ¶ 527. But because of the lack of factual records before it, the Appellate Body was unable to make a judgment of its own on whether the USDOC’s out-of-country loan benchmark was sufficient. *See id.* ¶¶ 528-37.

225. DS379 Panel Report, *supra* note 160, ¶ 10.81.

226. *Id.* ¶ 10.189.

227. Report of the Appellate Body, United States—Countervailing Duty Measures on Certain Products from China, ¶ 4.79, WT/DS437/AB/R (Dec. 18, 2014) [hereinafter DS437 AB Report].

228. *Id.*

229. *Id.* ¶¶ 4.95-96.

230. *Id.* ¶ 4.95.

market power such that other in-country prices were distorted.”<sup>231</sup> “Nor did the USDOC explain whether the prices of the [government-related suppliers] themselves were market determined.”<sup>232</sup>

In sum, in a pattern that has become all too familiar, trade law has worked its way into a delicate balance regarding the use of out-of-country benchmarks for Chinese subsidies: It accepted such benchmarks when there was evidence of extensive market distortion by the Chinese government, but refused to infer market distortion simply from the Chinese government’s predominant presence in the market through SOEs. Investigating authorities would still be able to discard prices charged by Chinese SOEs as being distorted, but that would require a more rigorous market distortion analysis than simply pointing to the government ownership and control of those SOEs. This will pose a hurdle to efforts to use countervailing duty law as a protectionist tool against Chinese products.

### C. Safeguards

Aside from antidumping and countervailing duties, trade law also authorizes the imposition of so-called safeguard measures—measures that temporarily suspend a WTO member country’s tariff concessions or other WTO obligations in order to remedy serious injury to domestic industries caused by surges of imports from other WTO member countries.<sup>233</sup> However, this type of safeguard, referred to as the general safeguard below, was considered inadequate to deal with surges of imports from China. Upon China’s entry into the WTO, WTO member countries negotiated with China a special, temporary type of safeguard that allows them to specifically target imports from China under lowered evidentiary standards.<sup>234</sup> As will be discussed below, this “China safeguard” deviates from the WTO’s fundamental non-discrimination principle and is designed to channel protectionist pressures resulting from China’s WTO entry.

Unlike antidumping and countervailing duties, which do not facially single out China, the China safeguard is by design a trade remedy instrument with explicit, lopsided biases against Chinese products. First, the China safeguard allows WTO member countries to suspend their WTO obligations only towards China, in sharp contrast to the non-discrimination requirement under the general safeguard.<sup>235</sup> Second, the China safeguard can be invoked under a lower injury

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231. *Id.* ¶ 4.96.

232. *Id.*

233. See GATT 1994, *supra* note 30, art. XIX:1(a); WTO Agreement on Safeguards, June 1, 1995, 1869 U.N.T.S. 154, art. 2.1 [hereinafter WTO Agreement on Safeguards].

234. China Accession Protocol, *supra* note 86, ¶ 16.

235. Article 2.2 of the WTO Agreement on Safeguards requires that a general safeguard be applied to imports regardless of source. See Agreement on Safeguards, arts. 2(2), in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

standard than the general safeguard. Under the China Accession Protocol, WTO member countries can resort to the China safeguard when Chinese products are imported “in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.”<sup>236</sup> The term “market disruption” is further defined to refer to the situation where imports “are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry.”<sup>237</sup> This injury standard is generally understood to be easier to meet than the “serious injury” standard under the general safeguard.<sup>238</sup> Third, it is harder for China to seek trade compensations from countries that impose the China safeguard than for other countries to seek trade compensations from countries that impose the general safeguard. Under the general safeguard, a country whose products are subject to the safeguard is allowed to suspend substantially equivalent concessions to the trade of the country that imposes the safeguard,<sup>239</sup> subject to a three-year delay if the safeguard is based on an absolute increase in imports.<sup>240</sup> By contrast, under the China safeguard, China is entitled to no trade compensations for the first two years of a China safeguard even if the safeguard is based on a relative increase in imports.<sup>241</sup> Finally, the general safeguard may not be applied for more than

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236. China Accession Protocol, *supra* note 86, ¶ 16.1.

237. *Id.* art. 16.4.

238. The “serious injury” standard under the general safeguard is defined in the WTO Agreement on Safeguards as “a significant overall impairment in the position of a domestic industry.” WTO Agreement on Safeguards, *supra* note 233, art. 4.1(a). The WTO Appellate Body has found that this standard is “exacting” and “very high” compared to the “material injury” standard contained in the WTO Antidumping Agreement, the SCM Agreement, and Article VI of the GATT. Report of the Appellate Body, United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, ¶ 124, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001). By contrast, the “market disruption” standard under the China safeguard is understood to be a lower standard. A White House summary of the U.S.-China Bilateral WTO Agreement, the blueprint for the China Accession Protocol, stated that under the China safeguard, the United States would be able to apply restraints unilaterally based on standards that are lower than those in the WTO Safeguards Agreement.” Summary of the U.S.-China Bilateral WTO Agreement, Prepared by the White House National Economic Council, November 15, 1999, 16 Int’l Trade Rep. (BNA) 1888, 1890 (1999). In a congressional testimony, then U.S. Trade Representative Charlene Barshefsky stated that the China safeguard “permits us to act based on lower showing of injury.” Accession of China to the WTO; Hearing Before the House Comm. on Ways and Means, 106th Cong. 49 (2000) (Statement of Hon. Charlene Barshefsky, United States Trade Representative). For more discussions of the injury standard under the general safeguard and the China safeguard, see Jeanne J. Grimmett, *Chinese Tire Imports: Section 421 Safeguards and the World Trade Organization (WTO)*, CONG. RES. SERV. (Jul. 12, 2011), at 7-9; Jing Ma, *Product-Specific Safeguard in China’s WTO Accession Agreement: An Analysis of Its Terms and Its Initial Application in Section 421 Investigations*, 22 BU INT’L L.J. 189, 195-197 (2004).

239. See WTO Agreement on Safeguards, *supra* note 233, art. 8.2.

240. *Id.* art. 8.3.

241. China Accession Protocol, *supra* note 86, ¶ 16.6 (“If a measure is taken as a result of a relative increase in the level of imports, China has the right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than two years.”).



four years initially and eight years in total.<sup>242</sup> By contrast, the only requirement for the duration of the China safeguard is that the China safeguard is to be imposed “only for such period of time as may be necessary to prevent or remedy the market disruption.”<sup>243</sup>

With these institutional biases against China on the China safeguard, the WTO Appellate Body has restrained itself from disturbing the outcome of China's WTO entry negotiations. In one WTO dispute settlement proceeding, DS399, China challenged a safeguard measure applied by the United States to imports of certain passenger vehicle and light truck tires from China.<sup>244</sup> The Appellate Body in DS399 took a very flexible approach to the interpretation of the phrase “increasing rapidly” in Paragraph 16.4 of the China Accession Protocol, granting investigating authorities sufficient leeway in determining whether the requisite “market disruption” exists for the invocation of the China safeguard.<sup>245</sup> The Appellate Body then evaluated to what extent the injury to the importing country's domestic industry must be caused by rapidly increasing imports from China before the China safeguard could be triggered.<sup>246</sup>

Paragraph 16.4 of the China Accession Protocol provides that for there to be market disruption, imports from China must be increasing rapidly so as to be “a significant cause” of material injury, or threat of material injury, to the importing country's domestic industry.<sup>247</sup> The Appellate Body interpreted that language to mean that rapidly increasing imports from China “may be one of several causes that contribute to producing or bringing about material injury to the domestic industry.”<sup>248</sup> The Appellate Body added that while “the contribution made by rapidly increasing imports to the material injury of the

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242. WTO Agreement on Safeguards, *supra* note 233, art. 7.1, 7.3.

243. China Accession Protocol, *supra* note 86, ¶ 16.6. Note, however, that China is entitled to suspend substantially equivalent concessions to the trade of the country imposing the China safeguard if the safeguard is still in effect after two years where the safeguard was based on a relative increase in imports, or after three years where the safeguard was based on an absolute increase in imports. *See id.*

244. *See* Request for Consultation by China, United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China, WT/DS399/1 (Sept. 16, 2009), at 1.

245. *See* Report of the Appellate Body, United States—Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China, ¶¶ 126-170, WT/DS399/AB/R (Sept. 5, 2011) [hereinafter DS399 AB Report]. Specifically, the Appellate Body held that the “increasing rapidly” phrase did not require an investigating authority to “focus on the movements in imports during the most recent past, or during the period immediately preceding the authority's decision.” *Id.* ¶ 149. The Appellate Body also found that the ordinary meaning of the term “rapidly” did not suggest “an exclusive focus on the rates of increase in subject imports.” *Id.* ¶ 158. Particularly, the Appellate Body held that a decline in the yearly rate of increase did not necessarily preclude a finding that imports are increasing rapidly. *Id.* ¶ 162. Finally, the Appellate Body held that the phrase “increasingly rapidly” did not require an investigating authority to assess the most recent rate of increase in subject imports relative to the rates of increase in earlier periods. *Id.* ¶ 167.

246. *Id.* ¶¶ 171-338.

247. China Accession Protocol, *supra* note 86, ¶ 16.4.

248. DS399 AB Report, *supra* note 245, ¶ 177.

domestic industry must be important or notable,”<sup>249</sup> the inclusion of the term “significant” to qualify “a cause” does not impose “a more rigorous causation standard than other WTO agreements, which require that imports ‘cause’ injury.”<sup>250</sup> In so holding, the Appellate Body essentially read the word “significant” out of the injury standard for the China safeguard. Furthermore, in what appeared to be an insinuation that China itself negotiated a lower injury standard for the China safeguard as part of its WTO entry deal, the Appellate Body stated that the object and purpose of the China Accession Protocol “seems to weigh in favour of an interpretation pursuant to which temporary relief is available whenever rapidly increasing imports are making an ‘important’, rather than a ‘particularly strong [and] substantial’, contribution to the material injury of the domestic industry.”<sup>251</sup> Based on this low injury standard, the Appellate Body finally held that the United States International Trade Commission did not err in concluding that rapidly increasing imports from China were a significant cause of material injury to the domestic industry within the meaning of Paragraph 16.4 of the China Accession Protocol.<sup>252</sup>

The China safeguard epitomizes the perpetual dilemma facing trade law: On one hand, trade law needs to adhere to principles to maintain a rule-based trade system, but on the other hand, trade law needs sufficient flexibility to accommodate and contain disruptive forces like China. The China safeguard solves this dilemma by compromising on principles, but only for a limited period of time. Pursuant to Paragraph 16.9 of the China Accession Protocol, the duration of the China safeguard is limited to twelve years from China’s WTO entry.<sup>253</sup> The China safeguard, therefore, expired on December 11, 2013. With this temporary deviation from principles, trade law afforded the world trade community greater abilities to withstand the impact from liberalizing trade with China.

#### D. Managed Trade

One important feature of trade law’s responses to China’s rise in world trade is its tolerance of the frequent uses of managed trade measures – namely, restrictive trade measures imposed through voluntary agreements, for Chinese products. As will be discussed below, one guiding principle of trade law is to discourage the use of managed trade measures, but when it comes to China, managed trade has played an important role in easing the tensions stemming from China’s participation in the world trade order.

Managed trade was once a mainstay in world trade. Between 1974 and 2005, world trade in textiles and apparel products was governed by an exquisite

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249. *Id.*

250. *Id.* ¶ 181. The Appellate Body believed that the term “cause” in other WTO agreements also required a “genuine and substantial relationship of cause and effect.” *Id.*

251. *Id.* ¶ 184.

252. *Id.* ¶ 338.

253. China Accession Protocol, *supra* note 86, ¶ 16.9.

managed-trade system established under the Multi-Fiber Arrangement (MFA),<sup>254</sup> which allowed “a complex system of unilateral and bilateral quotas, on a product-by-product and country-by-country basis.”<sup>255</sup> In the 1970s and 1980s, GATT member countries frequently resorted to the so-called voluntary export restraints (VERs), that is, negotiated export arrangements outside the rubric of GATT rights and obligations, as a way of resolving trade disputes.<sup>256</sup> VERs gained increasing popularity with countries seeking to protect their domestic industries<sup>257</sup> and became “arguably the most pernicious form of protection in the 1970s and 1980s.”<sup>258</sup>

Managed-trade measures like VERs have been widely criticized as operating in a gray area outside of the GATT framework and undermining the integrity of the multilateral trade system.<sup>259</sup> The adverse economic impact of managed trade has also been well-documented.<sup>260</sup> But nonetheless, managed trade became a popular trade policy tool because it was a politically attractive form of protection.<sup>261</sup> In particular, all of the parties involved in a managed-trade regime, including the importing country, the exporting country, and third countries, lack sufficient incentives to object to its use.<sup>262</sup>

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254. See Multi-Fiber Arrangement, Formerly the Arrangement Regarding International Trade in Textiles, 25 UST 1001, TIAS No 7840 (Dec 20, 1973).

255. Alice J.-H. Wohn, *Towards GATT Integration: Circumventing Quantitative Restrictions on Textiles and Apparel Trade under the Multi Fiber Arrangement*, 22 U. PA. J. INT'L ECON. L. 375, 395 (2001).

256. Many of such VERs were targeted at Japan, whose surging exports at the time were flooding the world market. In the 1970s and the 1980s, a number of Japanese products, including color television sets, motor vehicles, video tape recorders, motor cycles, machine tools, quartz watches, and fork-lift trucks were made subject to voluntary export arrangements negotiated between the United States, Europe, and Canada on one hand and Japan on the other hand. See Philip Turner & Jean-Pierre Tuveri, *Some Effects of Export Restraints on Japanese Trading Behavior*, OECD ECON. STUD., Spring 1984, 93, 94-95.

257. As of 1991, only twenty four safeguard measures taken pursuant to Article XIX of the GATT were in force, while two hundred and eighty four gray-area measures such as VERs were known to exist. Terence P. Stewart et al., *Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and That Special Needs Are Addressed*, 24 FORDHAM INT'L L.J. 652, 657 (2000).

258. Jeffrey J. Schott, *Safeguards*, in THE NEW WORLD TRADING SYSTEM: READINGS 113, 114 (Organisation for Economic Co-Operation and Development ed., 1994).

259. See, e.g., JAGDISH BHAGWATI, PROTECTIONISM 47 (1988); ALAN O. SYKES, THE WTO AGREEMENT ON SAFEGUARDS: A COMMENTARY 24-25 (2006).

260. See, e.g., Jaime de Melo & L. Alan Winters, *Do Exporters Gain from VERs?*, 37 EUR. ECON. REV. 1331 (1993) (arguing that VERs cause efficiency losses to importing countries by inducing inputs to shift from their most efficient industries to protected industries); Phedon Nicolaides, *Safeguards and the Problem of VERs*, INTERECONOMICS, January/February 1990, 18, 21-22 (arguing that VERs encourage collusion among producers in the exporting country).

261. Nicolaides, *supra* note 260, at 20.

262. *Id.* The affected exporting country tolerates managed trade because it would enable the exporting country to charge higher prices. The importing country prefers managed trade because unlike tariffs, quantitative restrictions under managed trade prevent foreign producers from increasing their market share as their efficiency improves. Third countries rarely object to managed trade because it handicaps their most efficient competitors. *Id.*

In the Uruguay Round negotiations, the GATT sought a collective solution to the managed trade problem and undertook an ambitious task of reining in the use of managed-trade measures like the VERs. As a result of the Uruguay Round, the Agreement on Textiles and Clothing (ATC) was signed as one of the basic legal texts of the newly established WTO.<sup>263</sup> The ATC terminated the managed trade system for the textiles and clothing sector with a ten-year phase-out period.<sup>264</sup> During the phase-out period, quotas for textiles and clothing products were progressively reduced until they were completely eliminated on January 1, 2005.<sup>265</sup> As for VERs, the WTO Agreement on Safeguards provides that WTO member countries “shall not seek, take or maintain any voluntary export restraints, orderly marketing agreements or other similar measures on the export or the import side.”<sup>266</sup> The prohibited actions include “actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members.”<sup>267</sup>

China’s WTO entry in 2001, however, posed a problem for the WTO’s efforts to scale back managed trade. The sheer size of China’s economy demanded flexibility in dealing with China’s potential impact on world trade, and, aside from creative applications of antidumping and countervailing duty laws, trade law resorted to managed trade as a way of providing that flexibility.

Trade law’s turn to managed trade can be seen in the way it accommodated China in the textiles and clothing sector. China joined the WTO in 2001, three years before the quota system established under the MFA was scheduled to be dismantled.<sup>268</sup> To protect importing countries from the short-term shock that China would be causing to the textiles and clothing markets in a quota-less world,<sup>269</sup> the WTO created a special safeguard mechanism just for textiles and clothing products from China for the first three years after the expiration of the ATC. Paragraph 242 of the Working Party Report on China’s Accession allows

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263. Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods—Results of the Uruguay Round, 33 I.L.M. 28, [http://www.wto.org/english/docs-e/legal\\_e/16-tex.pdf](http://www.wto.org/english/docs-e/legal_e/16-tex.pdf).

264. *Id.* art. 9 (“This Agreement and all restrictions thereunder shall stand terminated on the first day of the 121st month that the WTO Agreement is in effect, on which date the textiles and clothing sector shall be fully integrated into GATT 1994. There shall be no extension of this Agreement.”).

265. *Id.* art. 2.6-2.7.

266. WTO Agreement on Safeguards, *supra* note 233, art. 11.1(b). In a footnote, Article 11.1(b) of the WTO Agreement on Safeguards provides that “examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.” *Id.* art. 11.1(b) n.4.

267. *Id.* art. 11.1(b).

268. As noted above, the ATC was scheduled to terminate on January 1, 2005. *See supra* note 264 and accompanying text.

269. Between 2001 and 2004, China’s exports of textiles and clothing products to the United States more than doubled, increasing from about \$7 billion to about \$15 billion. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, U.S.-CHINA TRADE: TEXTILE SAFEGUARD PROCEDURES SHOULD BE IMPROVED (April 2005), at 1.

WTO member countries to place limits on imports of textiles and clothing products from China through the end of 2008 if such imports “were, due to market disruption, threatening to impede the orderly development of trade in these products.”<sup>270</sup>

Both the European Union and the United States took advantage of the special China textiles safeguard. In April 2005, the European Commission launched safeguard investigations into the sharp surge in imports of Chinese textiles and clothing products to the European Union.<sup>271</sup> On June 10, 2005, the European Union and China reached an agreement to terminate the pending safeguard investigations and to manage the growth of Chinese imports to the EU.<sup>272</sup> In a quintessential managed-trade deal, the EU and China agreed to limit growth in ten categories of Chinese imports to between 8 percent and 12.5 percent per year for 2005, 2006, and 2007.<sup>273</sup> In the United States, twice in 2003 and again in 2004, U.S. producers petitioned the U.S. government for safeguard quotas on imports of textiles and clothing products from China.<sup>274</sup> The U.S. government granted all three petitions and imposed quotas on ten categories of textiles and clothing products imported from China.<sup>275</sup> On November 6, 2005, the United States and China signed a memorandum of understanding that replaced those quotas and additional pending safeguard investigations with a managed-trade system covering most categories of textiles and clothing products for 2006, 2007, and 2008.<sup>276</sup> The U.S.-China MOU capped the rate of increase of imports of textiles products from China to the U.S. to 12.5 percent in 2006 and 2007, and 15 percent in 2008.<sup>277</sup> For imports of clothing products from China to the U.S., the maximum rate of increase was 10 percent in 2006, 12.5 percent in 2007, and 15 percent in 2008.<sup>278</sup>

Aside from authorizing managed trade for Chinese textiles and clothing products, trade law has also tolerated the use of managed trade for Chinese products for which it has not been explicitly authorized. In July 2013, the European Commission reached a price undertaking agreement with Chinese solar panel exporters to settle pending antidumping investigations into Chinese

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270. Report of the Working Party on the Accession of China, WT/MIN01(3) (Nov. 10, 2001), ¶ 242.

271. Press Release, European Commission launches investigations into sharp surge in Chinese textiles imports, IP/05/473 (Apr. 24, 2005), [http://europa.eu/rapid/press-release\\_IP-05-473\\_en.htm](http://europa.eu/rapid/press-release_IP-05-473_en.htm).

272. See Press Release, EU-China textiles agreement 10 June 2005, MEMO/05/201 (Jun. 12, 2005), [http://europa.eu/rapid/press-release\\_MEMO-05-201\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-05-201_en.htm?locale=en).

273. *Id.*

274. Michael F. Martin, U.S. Clothing and Textile Trade With China and the World: Trends Since the End of Quotas, CRS Report for Congress (Jul. 10, 2007), at 23.

275. *Id.*

276. See Memorandum of Understanding Between the Governments of the United States of America and the People's Republic of China Concerning Trade in Textile and Apparel Products (Nov. 6, 2005), [http://otexa.trade.gov/PDFs/US-China\\_Textile\\_MOU.pdf](http://otexa.trade.gov/PDFs/US-China_Textile_MOU.pdf).

277. Martin, *supra* note 274, at 24.

278. *Id.*

solar panel products sold in the European Union.<sup>279</sup> The price undertaking agreement replaced provisional antidumping duties imposed on imports of Chinese solar panel products to the EU with a minimum price commitment that capped the price of the Chinese imports at fifty-six euro cents per watt.<sup>280</sup> The agreement did not exempt Chinese solar panel imports from antidumping duties when such imports exceeded seven gigawatts, roughly half of the EU's demand for solar panels.<sup>281</sup> The price undertaking agreement, therefore, functioned as a tacit permission for Chinese producers to supply half of the EU's solar panel market. Although this attempt at managing solar panel trade between the EU and China does not technically violate WTO rules,<sup>282</sup> it goes against the spirit of the WTO's prohibition of VERs in every practical sense.<sup>283</sup>

In sum, despite trade law's earlier efforts to limit the use of managed trade, it had to turn to the device as a way of mitigating the impact of China on the world trade order. Again, between principles and protectionism, trade law had to favor the latter, albeit temporarily and tacitly, to accommodate the disruptive forces that China would have otherwise unleashed onto the world trade system.

### III.

#### TRADE LAW'S REBALANCING: SUCCESS OR FAILURE?

The foregoing discussions tell a story of how China disrupted trade law's balance. As trade law deviates from its previous principles-versus-protectionism equilibrium, a crucial question to ask is whether trade law will be able to stabilize in a new equilibrium where China's role in world trade is taken into account.

Unfortunately, this question cannot be fully answered before China's role itself is stabilized. Will China continue on the path of expansion it has been on

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279. European Commission Press Release, Commissioner De Gucht: "We found an amicable solution in the EU-China solar panels case that will lead to a new market equilibrium at sustainable prices" (Jul. 27, 2013), [http://europa.eu/rapid/press-release\\_MEMO-13-729\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-729_en.htm).

280. Robin Emmott & Ben Blanchard, *EU, China resolve solar dispute - their biggest trade row by far*, REUTERS (Jul. 27, 2013), <http://www.reuters.com/article/2013/07/27/us-eu-china-solar-idUSBRE96Q03Z20130727>.

281. *Id.*

282. The WTO Antidumping Agreement allows WTO member countries to suspend or terminate antidumping proceedings "upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated." WTO Antidumping Agreement, *supra* note 33, art. 8.1.

283. Michael Moore demonstrates that in a perfectly-competitive small-country model, a maximum level of imports under a VER and a minimum import price undertaking can result in identically higher prices, lower imports, increased domestic profits, and higher domestic production compared to free trade. See Michael O. Moore, *VERs and Price Undertakings under the WTO*, 13 REV. INT'L ECON. 298, 298 (2005). Moore further demonstrates that in the context of a domestic monopoly facing foreign competition, a minimum price undertaking can result in even lower consumer welfare than under a quantity-based VER. *Id.* at 298-99.

in the last three decades?<sup>284</sup> Or will China plateau and be integrated into a steady world trade system?<sup>285</sup> Or will China's export growth collapse and force the legal structures that trade law put in place in response to China's rise to unravel?<sup>286</sup> Without knowing which development trajectory China will follow, it is premature to predict whether or when trade law's rebalancing act on China will be complete.

That said, a preliminary assessment of trade law's responses to China's rise *so far* could yield valuable policy implications. This assessment has to be done in light of the ultimate goals trade law is supposed to serve. Given the two competing considerations of trade law—free trade principles and protectionism—an objective evaluation of whether trade law has by far successfully handled challenges posed by China requires the assessor to approach the task from a holistic point of view, taking into account both considerations. Under this holistic approach, the criterion for judging the success or failure of trade law's rebalancing in response to China has to be whether trade law was able to offer protection from China's impact without deviating too much from its core principles.

Based on the analyses in the previous section, this Article's answer to the question of whether trade law has by far succeeded in accommodating China is a cautious "yes." On one hand, trade law's record on China is not perfect: on many occasions it has shifted, blatantly or subtly, to a less principle-oriented approach in contravention of the fundamental principles cherished by trade law elsewhere. Trade law sanctioned the use of surrogate values in antidumping proceedings in a manner that gives importing countries wide discretion to inflate antidumping margins for Chinese products. Trade law considered China's economy to be market-based enough to apply countervailing duty law, but not market-based enough to warrant market-economy treatment in antidumping proceedings. Trade law also fashioned a discriminatory China-specific safeguard and tolerated the use of managed trade that it had vowed to eliminate in other settings for Chinese products.<sup>287</sup> All of these represent a shift towards protectionism at the expense of sound, consistent principles.

But on the other hand, trade law has corrected itself on some of the most egregious protectionist policies on China. Trade law rejected the presumption of

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284. Proponents of this scenario predict that China's economy will soon surpass that of the United States to become the world's largest. See *Chinese and American GDP Forecasts: Catching the Eagle*, *ECONOMIST* (Aug. 22, 2014), <http://www.economist.com/blogs/graphicdetail/2014/08/chinese-and-american-gdp-forecasts>.

285. Official economic data coming out of China suggests that China's GDP growth has slowed in recent years but is not showing further signs of deceleration. In the first two quarters of 2015, China maintained an enviable growth rate of seven percent. See Mark Magnier, *China Surprises With 7% Growth in Second Quarter*, *WALL ST. J.* (Jul. 21, 2015), <http://www.wsj.com/articles/china-surprises-with-7-growth-in-second-quarter-1436927081>.

286. This scenario is likely if China's economic growth stalls. For a pessimistic view of the prospect of China's economy, see Paul Krugman, *Hitting China's Wall*, *N.Y. TIMES* (Jul. 18, 2013), [http://www.nytimes.com/2013/07/19/opinion/krugman-hitting-chinas-wall.html?\\_r=0](http://www.nytimes.com/2013/07/19/opinion/krugman-hitting-chinas-wall.html?_r=0).

287. See *supra* Part II.

country-wide antidumping duty rates for Chinese products, forced investigating authorities to not double-count certain types of Chinese subsidies when applying countervailing duty law in conjunction with antidumping law, declined to automatically treat Chinese SOEs as public bodies capable of conferring subsidies, and refused to infer price distortion merely from government dominance in the market. These decisions demonstrate trade law's commitments to principles even in the face of high protectionist pressures.

Trade law's responses to China have been rather successful especially compared to its responses to the previous disruptor of the world trade system—Japan. Between the 1950s and the 1980s, when Japan was upending the existing world trade order, the world trade community responded primarily with bilateral negotiations, retaliations, and threats of retaliations.<sup>288</sup> In particular, in one of the most infamous trade wars in world trade history, the United States reached a managed-trade agreement with Japan on trade in semiconductor products and, after Japan allegedly violated the agreement, imposed retaliatory tariffs on imports from Japan.<sup>289</sup> By contrast, the world trade community managed to avoid such disruptive spikes in tariffs against Chinese products, despite its many maneuvers not entirely consistent with trade law principles. More importantly, the world trade community managed to incorporate China into the world trade system without major political, economic, and social upheavals. As an indication of that incorporation, China has become one of the countries that most frequently make use of the WTO dispute settlement mechanism.<sup>290</sup>

The interactive dynamics between free trade principles and protectionism identified in this Article have important policy implications. First of all, they hold predicative values for the future trajectory of trade law as applied to China. One important insight from this Article is that trade law is never an outcome of principles alone, or protectionism alone. Interpretations of trade law—and predictions of what those interpretations will be—have to be made in light of both. The ongoing debates on China's market-economy status after December 2016 provides a perfect example. As discussed above, Paragraph 15(a)(ii) of the China Accession Protocol, which provides for the use of surrogate values in antidumping proceedings involving Chinese products, expires in December 2016.<sup>291</sup> Views diverge, however, as to whether China should be granted market-economy status automatically upon the expiration of Article 15(a)(ii), or whether WTO member countries should be allowed to continue to treat China as a non-market economy if China does not meet their standards for being considered a market economy. In February 2016, the European Union launched

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288. See John O. Haley, *Luck, Law, Culture and Trade: The Intractability of United States-Japan Trade Conflict*, 22 CORNELL INT'L L.J. 403, 413-16 (1989) (discussing trade disputes between the United States and Japan between the 1950s and the 1980s).

289. See JOHN M. ROTHGEB, JR., U.S. TRADE POLICY: BALANCING ECONOMIC DREAMS AND POLITICAL REALITIES 189-190 (2001).

290. In 2009 alone, China was a party to half of the fourteen new WTO dispute settlement proceedings initiated in that year. Ji & Huang, *supra* note 9, at 2.

291. See *supra* note 88 and accompanying text.



public consultation on how to proceed on China's market-economy status.<sup>292</sup> Options being considered by the EU included automatic market-economy status for China either with or without strengthened trade remedy rules in other respects.<sup>293</sup> The United States, however, appears reluctant to consider the possibility of automatically granting China market-economy status.<sup>294</sup> While a full examination of this issue is beyond the scope of this Article, the analysis set forth in this Article suggests that the eventual outcome of this issue will not depend on legal analysis alone.<sup>295</sup> Instead, it will depend in large part on commercial circumstances.<sup>296</sup> If the threat from Chinese exports is perceived to be waning, and if China is showing willingness to allay trading partners' concerns in other aspects of trade policy such as currency manipulation, it will be much easier for China's trading partners to come to the conclusion that the expiration of Article 15(a)(ii) mandates market-economy status for China.<sup>297</sup> In other words, decisions on China's market-economy status are inherently policy decisions, particularly so when the legal analysis does not provide unambiguous answers.

Finally, the principles-versus-protectionism dynamics identified in this Article will also likely determine trade law's responses to the next challenger to the world trade system. If the next challenger threatens the stability of the world trade system like China does, trade law will likely show flexibilities on principles to contain the challenger. The specific issues on which trade law will show flexibilities, however, may not be the same as those featured in trade law's China responses. Particularly, if the next challenger is generally considered a

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292. See Public online consultation concerning a possible change in the methodology to establish dumping in trade defence investigations concerning the People's Republic of China, EUR. COMMISSION, [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=191](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=191) (last updated Aug. 1, 2016).

293. See Memorandum from Leopoldo Rubinacci on China Market-Economy Status (Feb. 2, 2016), <http://www.politico.eu/wp-content/uploads/2016/02/160202ChinaMESpaper.pdf> [hereinafter EU Memo on China Market-Economy Status].

294. It was reported that Deputy United States Trade Representative Michael Punke was of the view that China's graduation from non-market economy should not be automatic with the change of a date. See Bryce Baschuck, *U.S., China at Logheads Over Market Economy Status*, BLOOMBERG BNA WTO REPORTER (Mar. 11, 2016).

295. It is not helpful that Paragraph 15 of the China Accession Protocol has enough ambiguities to allow it to be interpreted in different ways. For arguments that Paragraph 15 does not require automatic market-economy status for China after December 2016, see Alan H. Price, Written Statement Before the U.S.-China Economic and Security Review Commission (Feb. 24, 2016), [http://www.uscc.gov/sites/default/files/Panel%204\\_Price%20statement\\_022416.pdf](http://www.uscc.gov/sites/default/files/Panel%204_Price%20statement_022416.pdf).

296. One of the most important factors in the debates on this issue is the economic impact of the change in antidumping methodology. For example, as the EU considers granting market-economy status to China, its top concern appears to be losses of jobs within the EU in response to lower antidumping rates for Chinese products. See EU Memo on China Market-Economy Status, *supra* note 293, at 4-6.

297. Gary Hufbauer of the Peterson Institute for International Economics holds the same view. See Gary Clyde Hufbauer, Testimony Before the U.S.-China Economic and Security Review Commission on China's Shifting Economic Realities and Implications for the United States, at 3, [http://www.uscc.gov/sites/default/files/Panel%204\\_Hufbauer%20statement\\_022416.pdf](http://www.uscc.gov/sites/default/files/Panel%204_Hufbauer%20statement_022416.pdf).

market-economy country, the next rounds of trade law debates may not revolve around issues that are peculiar to non-market economies, such as surrogate values and country-wide rates in antidumping. What is certain, however, is that trade law will tolerate deviations from principles on *some* issues and those deviations will allow trade law to adjust the level of trade protection commiserate with the level of threats posed by the challenger.

#### CONCLUSION

World trade has undergone a sea change since China began its ascent in the global economic order. So has trade law. In almost all major areas of trade law, there has been a shift towards protectionism at the expense of principles. But on some of the most important trade policy issues relating to China, trade law has overcome the urge to become a purely protectionist exercise. These nuanced responses to China reveal the protean nature of trade law and offer guidance as to how trade law will likely handle future disruptors of the world trade system.