

# Trade Remedies and Non-Market Economies:

## Economic Implications of the First US Countervailing Duty Case on China

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## Abstract

In 2007, the United States Department of Commerce altered a 23-year old policy of not applying the countervailing duty law to non-market economies, and initiated eight countervailing and antidumping duty investigations on Chinese imports. The change brings heated debate on trade remedy policies and issues of non-market economies. This study focuses on the first countervailing duty case on imported coated free sheet paper from China and analyzes the implications of this test case for United States-China bilateral trade, and industrial policies in transitioning market economies. The paper also provides a brief review of the economics

of subsidies, World Trade Organization rules on subsidies and countervailing measures, and United States countervailing duty laws applied to non-market economies. While recently acceded countries should review their domestic development policies from the perspective of economic efficiency and comply with the World Trade Organization rules, it is also important to further clarify the issues of non-market economies under the multilateral trading system, and pay keen attention to the rules negotiations in the current World Trade Organization Doha Development Round.

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This paper—a product of the Poverty Reduction & Economic Management Division, World Bank Institute—is part of a larger effort in the department to synthesize and develop the most up-to-date materials on trade policy and WTO related issues for training and capacity building. Policy Research Working Papers are also posted on the Web at <http://econ.worldbank.org>. The author may be contacted at [ywang2@worldbank.org](mailto:ywang2@worldbank.org).

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**TRADE REMEDIES AND NON-MARKET ECONOMIES:  
ECONOMIC IMPLICATIONS OF THE FIRST US COUNTERVAILING DUTY  
CASE ON CHINA**

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# TRADE REMEDIES AND NON-MARKET ECONOMIES: ECONOMIC IMPLICATIONS OF THE FIRST US CVD CASE ON CHINA

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## TRADE REMEDIES AND NON-MARKET ECONOMIES: ECONOMIC IMPLICATIONS OF THE FIRST US CVD CASE ON CHINA

### I. Introduction

In 2007, the United States Department of Commerce (USDOC) altered a long standing policy of not applying the countervailing duty (CVD) law to non-market economies (NMEs), and initiated eight countervailing and antidumping duty investigations on Chinese imports. The change brings heated debate on trade remedy policies and NME issues.

Trade remedies mainly include antidumping, countervailing, and safeguards. The World Trade Organization (WTO) permits certain responses from importing nations which can prove that they suffered material injury due to unfair trade practices. So far, antidumping is the most popular trade remedy measure in the worldwide trade disputes. Countervailing duties are less common than antidumping measures. From January 1, 1995 to December 31, 2006, a total of 3048 antidumping and 191 countervailing initiations were notified to the WTO by reporting members (See Table 1).

The United States did not apply CVD to China until recently as China has been classified as a “non-market economy” since 1981.<sup>1</sup> This policy rests on two principles advanced in 1984 and confirmed by a federal appeals court.<sup>2</sup> On November 21, 2006, the US Department of Commerce announced its decision to initiate an antidumping and countervailing duty investigation on imports of coated free sheet paper from China. This decision changed the long standing precedent that the “non-market economies” could not be subject to the U.S. CVD investigations, on the basis that the extent of such subsidies cannot be accurately identified or measured.

In the case of coated free sheet paper, the USDOC has found several countervailing subsidies provided by the Chinese government, but no injury to the US industry was found by the International Trade Commission (USITC). Thus the first case was concluded in November 2007 without CVD order. Nonetheless, the change in USDOC policy has opened the gate for more CVD cases on China. By the end of 2007, eight AD and CVD investigations against Chinese imported goods have been filed and more cases are expected (Table 2).

Today, policymakers from developing countries argue that antidumping measures have been increasingly used as preferred means by which industries in industrial countries seek protection from their governments. Countervailing measures are a matter of even greater concern as they can be more easily abused due to ambiguous rules. Developing and

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<sup>1</sup> From January 1, 1995 to December 31, 2006, the United States has initiated 373 antidumping and 75 countervailing cases (reported to the WTO), of which there are 64 AD initiations against China. The Website of the WTO, visited on June 15, 2007.

<sup>2</sup> GAO, *US-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*. GAO-05-474, Report to Congressional Committees, Washington, D.C.: June, 2005.

administering disciplines on the use of subsidies seems to be one of the most difficult works of international economic policy and rule making. As a matter of fact, both AD and CVD measures are extremely costly and ineffective as shown in the following sections.

The change of the U.S. CVD policy has broad trade policy implications for China, Vietnam, and other NME countries. Several technical issues may be of great concerns by developing countries: How to distinguish between legitimate governmental industrial policies and distortion trade subsidies in a developing and transition economy? Are American trade remedy policies consistent with the WTO Agreements and its commitments? What are implications of the United States changing its policy of not applying CVD laws to NME countries? How to clarify the rules on antidumping, countervailing, and NME issues in the WTO negotiations?

This study intends to shed light on the abovementioned questions by providing a review of the economics of subsidies, WTO principles on subsidies and countervailing measures, and US antidumping and countervailing duty laws and criteria for subsidies in non-market economies. The paper will focus on the first completed CVD case on coated free sheet paper from China; analyze the implications of this unprecedented case for trade and industrial policy implementations in China and other transition economies.

The rest of the paper is organized as follows. The section II gives a brief overview of the definition and classification of subsidies under the WTO Agreement on Subsidies and Countervailing Measures (SCM). The economic impact of subsidies and countervailing duties is discussed in section III. In section IV we trace the evolution of NME issues under the GATT/WTO system, and compare the different criteria for a market economy between the U.S. and EU. Section V discusses how the U.S. trade remedy laws treat non-market economies. Section VI presents an analysis on the first U.S. CVD and AD investigations on the Chinese imported CFSP, and discusses the main controversial issues and implications for China's public policies. We also provide a preliminary assessment of China's related subsidies, and discuss various challenges facing China, Vietnam and other NME countries in this section. It is our view while acceding countries should revise their domestic development policies in the perspective of economic efficiency, social welfare, and comply with the WTO rules, it is also important to further clarify the NME issues under the WTO system, and pay keen attention to the rules negotiations on the use of trade remedy measures in the current WTO Doha Round.

## **II. Subsidies and CVD under the WTO Agreement**

Based on the GATT 1979 Tokyo Round Subsidies Code, the WTO Agreement on Subsidies and Countervailing Measures (SCM) has further strengthened disciplines on the use of subsidies and countervailing measures by the WTO Members. This section will give a brief overview of the definition and classification of subsidies under the WTO SCM Agreement.

The WTO SCM Agreement improves on the Tokyo Round Code by: (1) defining certain key terms, such as “subsidy” and “serious prejudice”; (2) prohibiting export subsidies and subsidies contingent on the use of domestic instead of imported goods, including *de facto* export subsidies that are tied to exports or export earnings in practice though not in law; (3) creating a special presumption of serious prejudice for certain egregious subsidies; (4) defining and significantly strengthening the procedures for showing when serious prejudice exists in importing markets; (5) establishing a category of government assistance that will be non-actionable and non-countervailable only when strict conditions and criteria are satisfied; (6) requiring all developing countries, other than the least developed, to phase-out export subsidies and import substitution subsidies, and to accelerate the phase-out of export subsidies in situations where a developing country has achieved global export competitiveness in a particular product sector; and (7) applying the rapid, effective WTO dispute settlement mechanism.

### **A. Definition of a Subsidy and Specificity**

The SCM Agreement begins by defining a subsidy in Article 1. A subsidy requires two elements: (1) “a financial contribution” by a government or any public body within the territory of a Member; and (2) consequent conferral of “a benefit.” In order to be actionable either under WTO dispute settlement procedures or in a domestic countervailing duty (CVD) proceeding, a subsidy also must be “specific” in accordance with the SCM provisions of Article 2.

**Financial Contribution:** SCM Article 1 specifies five categories of practices that constitute a financial contribution: (1) a direct transfer of funds (*e.g.*, grants, loans, and equity infusions) or potential direct transfers of funds or liabilities (*e.g.*, loan guarantees); (2) government revenue otherwise due that is foregone or not collected (*e.g.*, fiscal incentives such as tax credits); (3) government provision of goods or services (other than general infrastructure) or purchase of goods; (4) government payments to a funding mechanism or entrustment of or direction to a private body to carry out a function identified in (1) to (3) above (*i.e.*, delegating a function normally vested in government); and (5) income or price support which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, the territory of a WTO member (*see* Article XVI:1 of GATT 1994).

**Benefit:** While the SCM Article 1 identifies the practices that constitute a “financial contribution,” it does not define “benefit” or set out criteria for measurement of whether a benefit is conferred, or its amount. The SCM Article 14 sets guidelines for methods used to calculate benefit. These guidelines follow the benefit-to-the-recipient methodology used in U.S. CVD proceedings. Subsidies are generally valued as the benefit to the recipient rather than the cost to the government.<sup>3</sup>

**Specificity:** The SCM Article 2 provides that to be actionable a subsidy must be specific to “certain enterprises” (*i.e.*, to an enterprise or industry or group of enterprises or

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<sup>3</sup> WTO, “Canada-Measures Affecting the Export of Civilian Aircraft.” WT/DS70AB/R, Appellate Body Report adopted by the DSB on August 20, 1999.

industries) within the jurisdiction of the granting authority. Government assistance that is both generally available and widely and evenly distributed throughout the jurisdiction of the subsidizing authority is not an actionable subsidy. However, Article 2.1 makes clear that a subsidy is specific not only when the subsidy is limited to certain enterprises by law (*de jure*) but also where, despite the existence of neutral and objective eligibility criteria, the subsidy is provided in fact (*de facto*) only to certain enterprises. Under Article 2.3 all export subsidies and import substitution subsidies within the meaning of Article 3 of the SCM Agreement are automatically deemed to be specific.

However, there are some arguments about the “jurisdiction of the granting authority.” The United States argues that Article 2.2 is similar to the US CVD practice, which recognizes that subsidies granted by a state or province on a generally available basis within a state or province (*i.e.*, not limited to certain enterprises within a state or province) are not specific, and therefore are not actionable. However, central government subsidies limited to a region (including a province or state) are specific, even if generally available throughout that region. The EU opposed this interpretation.

## **B. Classification of Subsidies**

The SCM Agreement establishes a three-class framework for the categorization of subsidies and subsidy remedies: (1) prohibited subsidies; (2) actionable subsidies, which may be challenged in WTO dispute settlement proceedings and domestically countervailed if they cause adverse trade effects; and (3) non-actionable subsidies. A brief summary of subsidies is listed in Table 3.

**Prohibited Subsidies.** Prohibited subsidies are also termed as red subsidies. The SCM Article 3 lists two types of subsidies that are prohibited under all circumstances. (1) Export subsidies: subsidies contingent, in law or in fact, whether solely or as one of several other conditions, on export performance; and (2) Import substitution subsidies: subsidies contingent, whether solely or as one of several other conditions, on the use of domestic rather than imported goods.

An illustrative list of export subsidies is set out in Annex I to the SCM Agreement. To challenge such a subsidy successfully in WTO dispute settlement proceedings, a complaining country need only prove that the subsidy exists; there is no need to demonstrate that the subsidy has had adverse trade effects. If a panel or the Appellate Body finds that a government is maintaining a prohibited subsidy, the Dispute Settlement Body of the WTO (DSB) must authorize countermeasures if the subsidy is not withdrawn expeditiously. The US CVD action under domestic law also may be taken against prohibited subsidies, but an affirmative injury determination still must be made.

**Non-Actionable Subsidies.** The SCM Article 8.2 sets out the criteria and conditions under which three types of subsidies may be non-actionable or green light subsidies: (1) Research and development: government assistance for industrial research and pre-competitive development activities; (2) Disadvantaged regional development: government assistance to disadvantaged regions; and (3) Environmental adaptation:

government assistance to adapt existing plant and equipment to new environmental requirements.

Non-actionable subsidies must meet some strict conditions and criteria. The SCM Article 8 establishes procedures designed to ensure that governments do not abuse the limited right to use these types of subsidies. In addition, Article 9 provides a remedy that is available if a non-actionable subsidy causes serious adverse effects to the industry of another WTO member. Finally, under Article 31, Articles 8 and 9 automatically expired on December 31, 1999, and not yet renewed due to the delay of the new round negotiation.

**Actionable Subsidies.** The SCM Agreement refers to two kinds of actionable subsidies against which action can be taken in the WTO or in domestic CVD proceedings if adverse effects are identified. They are also termed as dark amber subsidies and yellow subsidies based on their extent on distorting trade. Article 5 sets out three types of adverse effects: (1) injury to the domestic industry of another WTO Member; (2) nullification or impairment of benefits accruing directly or indirectly to other WTO Members under GATT 1994 in particular the benefits of concessions bound under article II of GATT 1994; and (3) serious prejudice to the interests of another Member.

*Dark Amber Subsidies:* The first type actionable subsidy is listed in Article 6.1. Those are presumed to cause serious prejudice. Where serious prejudice is presumed, the burden is placed on the subsidizing government to demonstrate that serious prejudice did not result from the subsidization in question. The four "dark amber" subsidies are: (1) total subsidization of a product exceeding five percent *ad valorem*, which is calculated in accordance with Annex IV on a cost-to-the-government basis; (2) subsidies to cover operating losses sustained by an industry; (3) subsidies to cover operating losses sustained by an enterprise other than one-time measures that are non-recurrent and cannot be repeated for that enterprise and that are given merely to provide time for the development of long-term solutions and to avoid acute social problems; and (4) direct forgiveness of government-held debt. Under Article 31, Article 6.1 also automatically expired on December 31, 1999, but not yet renewed due to the delay of the new round negotiation.

*Yellow Light Subsidies:* The second type is yellow light subsidies, which are any subsidies causing injuries that are not otherwise dealt with by the Agreement as prohibited or non-actionable subsidies. Under the Agreement, a determination of serious prejudice must be based on measurable, verifiable data. Serious prejudice arises where the effect of a subsidy is manifested in: import displacement or impediment in either the subsidizing-country or third-country markets; significant price undercutting, significant price suppression, price depression or lost sales in any market; or an increase in world market share. Articles 6.4 through 6.6 provide more detailed guidance on the criteria set out in Article 6.3.

The SCM Article 7 and Annex V establish expeditious and effective procedures for resolving disputes regarding "dark amber" and "yellow light" subsidies. The procedures

are virtually identical to those for other WTO dispute settlement proceedings. Once a member requests consultations regarding such a subsidy, the Agreement allots 180 days for completion of the panel proceedings and the issuance of a decision by the Dispute Settlement Body (DSB). The Agreement provides an additional 60 days for appeals of panel findings. The losing party cannot block adoption of an adverse panel or Appellate Body (AB) report and the DSB must authorize countermeasures where a signatory has not either withdrawn a subsidy found to be causing serious prejudice or eliminated its adverse effects within six months.

### **III. The Economics of Subsidies and Countervailing Duties**

While the WTO SCM Agreement strengthens disciplines on trade distorting subsidies, there are still disputes on government subsidies and countervailing duties. The most difficulty issues still related to the problem of distinguishing between “legitimate” government activities and trade-distorting subsidies. The governments of the major developed trading nations continue to maintain divergent views on the role of government involvement with industry, and even more disagreement is found when the policies of developing countries are considered.<sup>4</sup> This section reviews the economic impact of subsidies and countervailing duties on trade and welfare, and what countervailing duties are appropriate.

#### **A. Economics of Subsidies**

Three types of economic assets are crucial for the long run growth of an economy: physical capital, human capital, and natural capital. Physical capital has traditionally been the focus of attention since it directly contributes to growth, which in turn affects social welfare. However, human capital, which includes knowledge accumulation, technological innovation, and health, along with natural capital directly affect social welfare and growth. The three assets are subject to market failures in varying degrees, some more, some less. Ideally, government should mitigate the effects of market imperfection by regulation and providing incentives to invest in assets that are under-provided especially public or semi-public goods. The optimal government policy would be implemented to ensure that the social returns to the three assets are equal.<sup>5</sup> However, this is not necessarily the case in reality.

In reality, we often see government policies including subsidies that have caused over-investment in certain sectors, and under-investment in sectors affected by market failures, such as education and health, rural infrastructure; and over-exploitation of the natural resources. Trade subsidy is considered one of the subsidies that are distortionary, leading to inefficiencies and welfare loss. Now let’s review the details.

There are two types of subsidies in the international trade parlance: the export subsidy and domestic or production subsidy. The export subsidy is paid to an industry only on

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<sup>4</sup> Jackson, H. John, William J. Davey, and Alan O. Sykes, Jr. *Legal Problems of International Economic Relations: Cases, Materials and Text*, Fourth Edition, West Group, St. Paul, Minnesota, 2002.

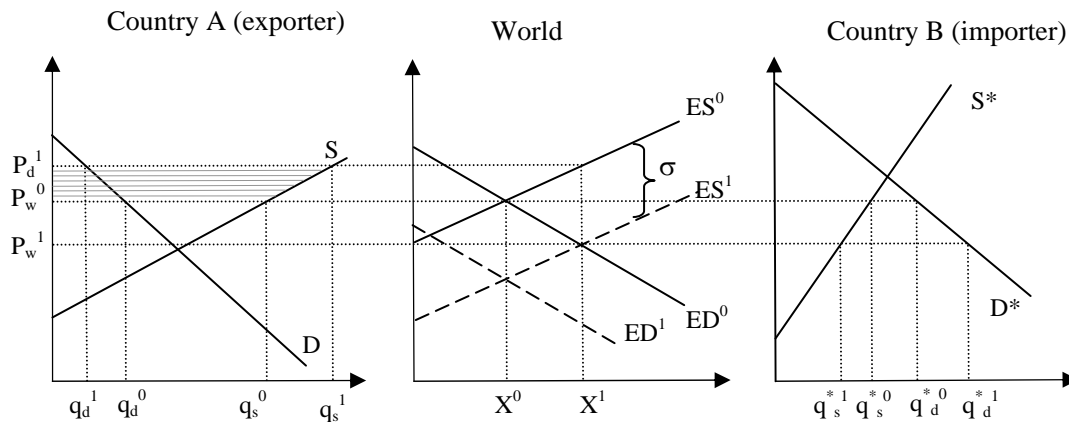
<sup>5</sup> This framework is based on a World Bank Institute study on *The Quality of Growth*, World Bank 2000.

products that are exported. The domestic subsidy is granted to an industry on all of its production of a product, regardless of whether that products are exported. There is a big literature to show the impacts of subsidies on trade and welfare. Some subsidies can correct market failures and enhance economic welfare; other subsidies can distort resource allocation and reduce economic welfare.<sup>6</sup>

**Export Subsidy.** Export subsidies take on many forms in the real world. These include tax rebates conditioned on export (excluding VAT rebate), subsidized loans to exporters or foreign purchasers, insurance guarantees, guarantees against losses, and direct grants or subsidized loans.<sup>7</sup> The economic effects of export subsidies are symmetrical with those of import tariffs. Just as tariffs cause import-competing sector to expand, export subsidies lead to an expansion in the exportable production.

We now assume that there are two large countries trading a particular product in a partial equilibrium model. The exporting country A is assumed large enough to influence the world price in this particular product. Initially, consumption and production in country A are  $q_d^0$ ,  $q_s^0$ , and consumption and production in country B are  $q_d^{*0}$ ,  $q_s^{*0}$ , respectively. After the exporting country introduces a per-unit export subsidy, it will lead to an increase in the supply of export, which reduces the world price of the good and the price in the importing country from  $P_w^0$  to  $P_w^1$ , and raise the price of the good in the exporting country  $P_d^1$  relative to the free trade price  $P_w^0$ , as more products are exported rather than sold domestically for consumption. Consumers in exporting countries lose. See Figure 1.

Figure 1. Partial equilibrium model of an export subsidy



Source: Kathy Baylis, 2005.

<sup>6</sup> Alan O. Sykes. 1989. "Countervailing Duty Law: An Economic Perspective." *Columbia Law Review*, V. 89 No. 2.

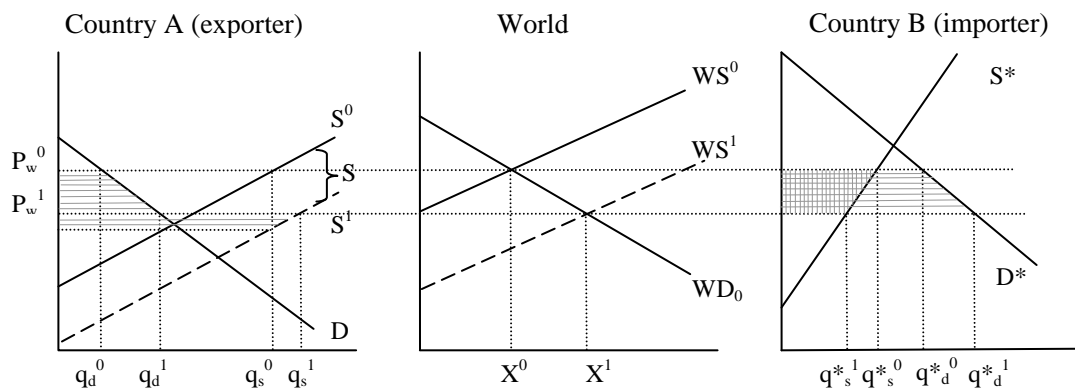
<sup>7</sup> Husted, Seven, and Michael Melvin. 2004. *International Economics*, sixth edition. Pearson Addison-Wesley. VAT rebate is considered trade-neutral, see Grossman 1980.

In the importing country, the consumer surplus increases but producer surplus decreases, the total welfare increased as the gain in consumer surplus is greater than the loss in producer surplus. However, in the exporting country, economic waste is created because the cost of increasing output to expand export exceeds the revenue earned from the export. (If this is not the case, manufacturers would produce more even without the subsidy.) Consumers /households lose significantly because (a) the consumer surplus declined, and (b) consumers have to bear the burden of additional taxes that are required to finance the export subsidy. In the case where the country does not have the comparative advantage in a product which, for example, is resource-intensive, this will lead to further inefficiency due to misallocation of resources and depletion of natural resources.

In the cases where countries are relatively small and cannot influence world prices, the consequence would be different. Exporters are price takers in this case. Providing export subsidies will not influence the price in the world market, but, still, the consumer surplus increases but producer surplus has no change in importing country; consumers in exporting countries would have to bear the fiscal burden of export subsidies.

**Production Subsidies.** Now assume the exporting country provides a per-unit production subsidy on a tradable good. We assume that two large countries trade a particular product in a partial equilibrium model. The exporting country is assumed large enough to influence the world price in this particular product. Initially, consumption and production in country A are  $q_d^0$ ,  $q_s^0$ , and consumption and production in country B are  $q_d^*0$ ,  $q_s^*0$ , respectively. After the exporting country introduced a per-unit production subsidy, the domestic supply curve will shift down to the right from  $S$  to  $S'$  by the amount of subsidy, reflecting the lower costs the industry now faces. This shift increases the export and drives down the prices in both exporting and importing countries from  $P_w^0$  to  $P_w^1$ . See Figure 2.

Figure 2. Partial equilibrium model of a production subsidy with trade



Source: Kathy Baylis, 2005.

In the exporting country, consumers and producers are both better-off. However, taxpayers in the country must bear the burden which is equal to the per-unit subsidy times the total production, an amount that is greater than the summation of consumers and producers surplus. The exporting country as a whole loses in this model.

The effect of the production subsidy on the importing country is the same as that of the export subsidy, the consumer surplus increases and the producer surplus decreases, but the total welfare of the country as a whole increases as the gain in consumer surplus is bigger than the loss in producer surplus in this case.

## **B. Rationales for Countervailing Duties**

As shown above, the exporting country usually loses in welfare when subsidizing the production of a good, while the importing country gains. Why should an importing country use countervailing duties to stop the gains coming from subsidized imports? In fact, a considerable body of economic literature suggests that such a response is unwise. The importing country-or at least its consumers-should be grateful, and send a “Thank-you note” to the subsidizing country.<sup>8</sup> However, from a global perspective, some subsidies may distort international production and trading patterns, leading to the misallocation of resources and a reduction in world welfare.<sup>9</sup> This is the most important economic rationale for banning or regulating distortion subsidies. But, can countervailing duties help to achieve that goal?

Most of the rationales for importing nations to apply countervailing duties originate from competing producer groups. One of the traditional arguments stresses the adjustment costs for domestic industry to go out of business due to the subsidized imports of a foreign country. Another possible argument notes that subsidies can be used for trade policy strategy, or for “predatory purposes.” Some rationales on CVD are unrelated to economic welfare but are quite relevant to national security, employment, social stability, or political considerations. Finally, there may be some policies with regard to subsidization and CVD that are connected to national government’s general approach to its economic system.<sup>10</sup>

Countervailing duties are not effective in preventing various distortionary effects of subsidies. Subsidization may have at least three effects, and countervailing duties can not provide a remedy for all. For example, subsidization in country A allows A to expand its export into importing country B. In such a case, country B may wish to respond with countervailing duties. Second, subsidization of country A may enhance the expansion of

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<sup>8</sup> Jackson, H. John. *The World Trading System: Law and Policy of International Economic Relations*. Second Edition, the MIT Press, Cambridge, Massachusetts, 1997.

<sup>9</sup> Alan Deardorff and Robert M. Stern, “Current Issues in Trade Policy: An Overview,” in *U.S. Trade Policies in a Changing World Economy*, Robert M. Stern, ed. Cambridge, MA: MIT Press, 1987. Cited from John H. Jackson, *Ibid*.

<sup>10</sup> *Ibid*.

its export to a third country C, where A competes with similar products that are exported from B. In such a case, country B does not have easy recourse to a response. A third effect is that the presence of domestic subsidies in a product may restrain the import of the same product into the subsidizing country. The subsidy in this situation has become an import barrier with the effect similar to a tariff. Country B may need to respond with other measures for such subsidies.

#### **IV. The NME Issues under the GATT/WTO System**

##### **A. Non-market Economy Status**

NME issues can be traced back as early as the bilateral trade agreement in 1935 between the United States and the Soviet Union. It provided that in exchange for most-favored-nation treatment the Soviet Union would accept an obligation to import products from the United States worth at least \$30 million a year. In the post-war period, while addressing the non-market phenomenon, both official documents and economic texts employed the term “State Trade Countries.” This was due to the overwhelming role that the State played in the foreign trade of a group of countries, predominantly in Eastern Europe.<sup>11</sup>

GATT was designed by market economies and for market economies. The market-based nature of the GATT stems from the drafting history of the so-called Havana Charter, the legal foundation of the abortive International Trade Organization (ITO), and from the early years of GATT operation.<sup>12</sup> As has been extensively discussed elsewhere, self-interested policies such as import quantitative restrictions, prohibitive tariffs, the manipulation of currency exchange rates and frequent changes in import regulation pursued by many governments in the 1930s had dramatic consequences for international trade and the world economy in general.<sup>13</sup> In addition during the Second World War, the necessity of strictly controlling imports and exports resulted in an expansion of State trading into countries that normally based their economy on the private sector. Driven by those developments, at the first session of the United Nations Economic and Social Council (ECOSOC) in 1946, the United States put forward a “Suggested Charter for an International Trade Organization” that was designed to deal with the factors impeding international trade, including State trading. The “Suggested Charter” served as the basis for negotiations in the Preparatory Committee for the ITO that, by 1948, finally led to drafting of the Havana Charter.<sup>14</sup>

The “Suggested Charter” initially had three articles in the section on State trading. One of them was entitled “Expansion of Trade by Complete State Monopolies of Import Trade.” The article proposed a methodology for dealing with countries possessing a State foreign trade monopoly similar to that which had been included in the bilateral trade agreement

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<sup>11</sup> Alexander Polouektov, “*The Non-Market Economy*” Issue in *International Trade: In the Context of WTO Accessions*, United Nations Conference on Trade and Development, UNCTAD/DITC/TNCD/MISC.20, October 9, 2002.

<sup>12</sup> John H. Jackson, *World Trade and the Law of GATT*, Indianapolis: Bobbs-Merrill, 1969.

<sup>13</sup> *Ibid.*

<sup>14</sup> Polouektov, *supra* note 11.

between the United States and the Soviet Union in 1935. It provided that a State-trading country member should negotiate with other member countries on “an arrangement under which, in conjunction with the granting of tariff concessions by such other Members, and in consideration of the other benefits of this Chapter, it shall undertake to import in the aggregate over a period products of the other Members valued at not less than any amount to be agreed upon.”<sup>15</sup>

Although the Soviet Union voted for the establishment of the ITO at the ECOSOC session, it repeatedly declined, for political reasons, to participate in deliberations of the Preparatory Committee, and did not show any interest in the parallel negotiations that led to the formation of GATT. Eventually, the provision was dropped from the final text of the General Agreement. In the course of the Preparatory Committee deliberations it was also considered appropriate to reduce State-trading provisions concerning that “mixed economies,” to a large extent, were a passing phenomenon of the post-war period. At last, the General Agreement preserved only one of the proposed articles, which became Article XVII obligating State-trading enterprises to abide by the general principles of non-discriminatory treatment.<sup>16</sup>

Following progressive liberalization of foreign trade relations and a related dilution of an absolute State monopoly on foreign trade transactions, the emphasis of economists and politicians shifted to another feature of the non-market economic systems, namely the central planning system. Accordingly, there emerged the term, “centrally planned economy”, which has superseded the state-trading economy. In the United States Customs Regulation of 1973, the term “controlled-economy country” first appeared. At the same time, on the other side of the ideological world, the term “socialist country” was preferred. With the start of profound market reforms in almost all centrally planned economies in the late 1980s and early 1990s, this phenomenon became universally known as “transition to a market economy.” However, along with the rather definite notion of “transition countries” the term “non-market economies” has been used, which appears to have a philosophical connotation rather than an economic or legal one.<sup>17</sup>

Within the WTO framework, the NME issue has its roots in paragraph 1 of the *AD Article VI* of GATT 1994. “It is recognized 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 the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.”<sup>18</sup> Through this provision, WTO Members explicitly recognize that non-market economy countries may need to be treated differently than market economies in antidumping cases. This provision dates from the 1954-55 Review Session of the GATT and has its origins in the

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<sup>15</sup> “Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment”, London, 1946, p. 59.

<sup>16</sup> For a more detailed discussion on origins of GATT, see Jackson, *supra* note 12.

<sup>17</sup> Polouektov, *supra* note 11.

<sup>18</sup> GATT 1994.

consideration of issues relating to the Working Party on the Accession of Poland. The Agreement on Implementation of Article VI of GATT 1994 has carried through the provision to the current Antidumping Agreement. The provision allows discriminatory treatment in the case of countries that have a complete or substantially complete government monopoly over international trade and where all domestic prices are fixed by the state.

Authorities administering antidumping legislation and investigations have generally taken advantage of this provision to reject information on costs and prices provided by those countries considered to be non-market economies. As an alternative to the use of such price and cost information, they make their decision based on cost and price information from third party surrogate countries with market economic systems. In each case, the market economy country chosen is to be at a level of development comparable to that of the non-market economy that is subject to the antidumping investigation. In some cases, these investigating authorities have developed and used synthetic cost and price information.<sup>19</sup>

## **B. Criteria of Market Economy**

“GATT (General Agreement on Tariffs and Trade) was designed by market economies for market economies.”<sup>20</sup> However, there is not a standard criterion for the market vs. non-market economy distinction. A comparison of legal criteria for market economy treatment in US, EU, Mexico and Malaysia is listed in table 4.

**UNCTAD Criteria.** In the Glossary of Customs Terms of the United Nations Conference on Trade and Development (UNCTAD), UNCTAD defines a market economy and non-market economy in the following ways:<sup>21</sup>

A national economy of a country is a market economy that relies heavily upon market forces to determine levels of production, consumption, investment and savings without government intervention.<sup>22</sup> A national economy is a non-market economy in which the government seeks to determine economic activity largely through a mechanism of central planning, as in the former Soviet Union, in contrast to a market economy, which depends heavily upon market forces to allocate productive resources. In a “non-market” economy, production targets, prices, costs, investment allocations, raw materials, labor, international trade and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority; hence, the public sector makes the major decisions affecting demand and supply within the national economy.<sup>23</sup>

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<sup>19</sup> John H. Jackson, William J. Davey, and Alan O. Sykes, p.721-722, supra note 4.

<sup>20</sup> Polouektov, supra note 11.

<sup>21</sup> UNCTAD’s Glossary of Customs Terms can be found in the Automated Systems for Customs Data (ASYCUDA). The ASYCUDA is developed by UNCTAD, and takes into account the international codes and standards developed by ISO (International Organization for Standardization), WCO (World Customs Organization) and the United Nations. See [www.asycuda.org](http://www.asycuda.org) in details.

<sup>22</sup> Ibid, see ‘market economy’.

<sup>23</sup> Ibid, see ‘non-market economy’.

UNCTAD has also used the State Trading Nations and Group D to differentiate a non-market economy from a market economy. Prior to their 1989-1991 conversions to market-oriented policies, Group D consisted of the socialist countries of Eastern Europe participating in UNCTAD, excluding Romania and Yugoslavia (which were considered members of the Group of 77) and Albania (which did not actively participate in UNCTAD and other elements of the United Nations system). Group D countries showed a particular interest in the division of the UNCTAD Secretariat concerned with “Trade between Countries with Different Economic Systems.”<sup>24</sup> However, today few countries have an absolute central planning system, and there are a number of ways to measure the market orientation of a transition economy.

**European Union.** In the Council Regulation (EC) No 905/98 of 27 April 1998,<sup>25</sup> the EU allows Chinese respondent enterprises to apply for the status of market economy in anti-dumping investigations and stipulates five criteria for determining the status of a market economy, namely:

- (1) Decisions of firms regarding prices, costs and inputs, including for example, raw materials, cost of technology and labor, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values;
- (2) Firms have one clear set of basic accounting records that are independently audited in line with international accounting standards and are applied for all purposes;
- (3) The production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts;
- (4) The firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms; and
- (5) Exchange rate conversions are carried out at the market rate.

**The United States.** From the adoption of the Antidumping ACT of 1921 until the passage of the Trade Act of 1974, the application of AD law to non-market economies was devised and implemented exclusively through administrative agency action. In the 1960s, the United States Department of Treasury developed and used what was known as the “surrogate country” approach for applying AD law to non-market economies.<sup>26</sup> This approach was adopted and codified by Congress in the Trade Act of 1974. Congress adopted also Treasury’s another methodology, known as the “factors of production”

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<sup>24</sup> Ibid, see Group D.

<sup>25</sup> OJL 128, 30.04.1998, p.18. Council Regulation (EC) No 905/98 of 27 April 1998, amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community.

<sup>26</sup> At that time, the US Treasury Department was the agency with responsibility over domestic trade remedy laws until the passage of the Trade Agreement Act of 1979, which transferred administrative authority from Treasury to the Department of Commerce.

approach, in the Trade Agreement Act of 1979 as an alternative to be used in NME cases where there was no available surrogate country.<sup>27</sup>

In the Omnibus Trade and Competitiveness Act of 1988 (OTCA), US Congress enacted numerous reforms to the AD laws, starting with a definition of a NME, as well as a set of standards that the DOC was to take into consideration when determining whether a specific country is a non-market economy. According to the OTCA, a non-market economy is a country that “does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” The Act requires that the USDOC shall take six criteria into account when making a determination. The six criteria are the following:

- (1) The extent to which the currency of the foreign country is convertible into the currency of other countries.
- (2) The extent to which wage rates in the foreign country are determined by free bargaining between labor and management.
- (3) The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country.
- (4) The extent of government ownership or control of the means of production.
- (5) The extent of government control over the allocation of resources and over the price and output decisions of enterprises.
- (6) Such other factors as the administering authority considers appropriate.<sup>28</sup>

In addition, the OTCA provides the USDOC with significant administrative discretion for determining when a foreign country is a non-market economy. Determinations of non-market economy status made by the USDOC are not subject to judicial review in any antidumping investigation.<sup>29</sup>

It is obvious, that the criteria of market economy defined by the U.S. and EU are based on the factors that may affect fairness of trade in anti-dumping actions. The U.S. criteria have directly raised the issue for a country to be a market economy as a whole, while the EU mainly targets the criteria of market economy of an enterprise and an industry. Furthermore, these criteria form an integrated system, any one single criterion should not be applied independently. The European countries and the U.S. will not make their judgment just according to one criterion, but sum up the results of investigations in all aspects covered by these criteria in determining whether or not enterprise or the industry has reached the critical point of a market economy, so as to reach a conclusion whether the country, the industry, or the enterprise in question has achieved the status of a market economy. In an actual treatment of an anti-dumping case, the defending party will have to be prepared in line with the standards of the country that is initiating the anti-dumping action.

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<sup>27</sup> Tatelman, B. Todd. “United States’ Trade Remedy Laws and Non-market Economies: A Legal Overview,” CRS Report for Congress, Order Code RL 33976, April 23, 2007.

<sup>28</sup> 19 U.S.C. § 1677(18) (B) (2000).

<sup>29</sup> Jackson, Davey, and Sykes, *supra* note 4.

However, the current lack of precisely defined rules in the U.S. and EU leaves considerable discretion in the hands of those officials who apply the rules. As a result, they may use the rules only when appropriate to effectuate the real purpose of the rules. Their exercise of discretion will be difficult to review, however. And, of course, it presents serious problems of potential abuse. The problems themselves may be magnified, since those seeking protection from the officials are constituents of sorts of the officials, while those who will be adversely affected are foreigners.<sup>30</sup>

## **V. The U.S. Trade Remedy Laws with Respect to NMEs**

In the United States, there are two major forms of domestic trade remedy laws, antidumping law (AD) and countervailing duty law (CVD), which are designed to counteract foreign “unfair” trade. Antidumping laws provide relief to domestic industries that have been, or are threatened with, the adverse impact of imports sold in the U.S. market at prices less than the fair market value (LTFMV). CVD give a similar kind of relief to domestic industries that have been, or are threatened with the adverse impact of imported goods that have been subsidized by a foreign government or public entity. The relief provides an additional import duty placed on the dumped or subsidized imports. Both of these remedies are available to the imported goods from market economy countries, but until recently CVD law had not been applied to those imported goods from “non-market economies”.<sup>31</sup>

### **A. Antidumping Law and NMEs**

The antidumping regulatory framework is currently embodied in Subtitle B of Title VII of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979, and subsequently amended. Prior to the Tokyo Round U.S. AD law was not entirely consistent with GATT Article VI, principally because it required domestic producers to show only injury, not material injury.<sup>32</sup> It also granted a great deal of discretion to the administrators of the law, the Department of Treasury (DOT) and the International Trade Commission (ITC), who exercised that discretion in a way that seldom resulted in the imposition of AD duties, which caused many in Congress to believe that the Executive Branch did not take the enforcement of the AD laws seriously enough. Since 1980 the administration of the U.S. AD law has been split between the International Trade Administration (ITA) of the U.S. Department of Commerce (DOC), which determines whether dumping has occurred, and the ITC, which determines whether U.S. industry has demonstrated sufficient injury due to the dumped imports.<sup>33</sup>

The Tariff Act directs the DOC to determine whether foreign merchandise is being sold in the United States at LTFMV. For dumping that is alleged from market-based

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<sup>30</sup> Ibid, p. 681.

<sup>31</sup> Vivian C. Jones. “Trade Remedies: A Primer.” CRS Report for Congress, Order Code RL 32371, Updated June 14, 2006. Todd B. Tatelman. “United States’ Trade Remedy Laws and Non-market Economies: A Legal Overview.” CRS Report for Congress, Order Code RL 33976, April 23, 2007.

<sup>32</sup> Jackson, Davey, and Sykes, *supra* note 4.

<sup>33</sup> See 19 U.S.C. § 1677(2000).

economies, DOC has applied a standard methodology for determining whether a foreign manufacturer's goods were sold in the United States at LTFMV by comparing the U.S. price of the product (identified as either the "export price" or "constructed export price") with the "normal value" of the subject merchandise, which is typically measured as either the price at which the merchandise is sold in the exporter's or manufacturer's home market, or a "constructed price" if there are no sales of the targeted product in the home market.<sup>34</sup>

The AD law is applied to NME countries in a manner different than that applicable to market economies. It assumed that domestic prices and costs are not based on market factors in NME countries and are thus inappropriate for comparison with the producer's prices in the United State. The DOC is instead statutorily authorized to employ a quite different price comparison methodology for NME imports, which has gone through several transformations of its rules to handle this particular problem and the United States Court of International Trade (USCIT) has continuously reviewed these actions.

In the 1960s, the DOT developed and began using what was known as the "surrogate country" approach for applying AD law to NMEs. Under this approach, comparable prices and costs from similarly situated third market-based economies were substituted for the NMEs to determine fair market value.<sup>35</sup> This approach was adopted and codified by Congress in the Trade Act of 1974. The administration had adopted an alternative methodology, known as "factors of production," which was used when an appropriate surrogate could not be located in 1975. The "factor of production" approach required that the amount of each factor input be taken from a market economy country selected to be at a comparable stage of economic development.<sup>36</sup> In 1979, Congress passed the Trade Agreements Act, which further refined the computation of fair market value for non-market economies, and transferred administrative authority from the DOT to the DOC. According to the DOC, market value should be determined on the basis of either (1) the home market prices or export prices of such or similar items in a surrogate market economy, or (2) the constructed value of those items in a surrogate market economy.

In 1988, the U.S. Congress again reversed AD provisions for dealing with NMEs in the Omnibus Trade and Competitiveness Act of 1988 (OTCA).<sup>37</sup> The OTCA enacted numerous reforms to the antidumping laws, starting with a definition of a non-market economy and a set of standards for determining whether a specific nation is a NME country. The OTCA also provide the DOC with significant administrative discretion for determining when a foreign country is a non-market economy, which is not subject to judicial review in any antidumping investigation.<sup>38</sup>

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<sup>34</sup> 19 U.S.C. § 1677b(a) (2000) and 19 U.S.C. § 1677b(e) (2000).

<sup>35</sup> Department of Commerce, *Bicycles from Czechoslovakia*, 25 Fed Reg. 6657 (1960), cited from Tatelman, supra note 27.

<sup>36</sup> Department of Commerce, *Electric Golf Cars from Poland*, 40 Fed Reg. 25497 (1975), cited from Tatelman, Ibid.

<sup>37</sup> Luke P. Bellocchi, "The Effects of and Trends in Executive Policy and Court of International Trade Decisions Concerning Antidumping and the Non-Market Economy of the People's Republic of China," 10, *New York International Law Review*, Winter 1997.

<sup>38</sup> 19 U.S.C. § 1677 (18) (C) and (D) (2000).

The United States first classified China as a “non-market economy” country in *Preliminary determination of Sales at Less than Fair Value, Greige Polyester Cotton Print Cloth from China* in 1982,<sup>39</sup> and recently reaffirmed the determination by ITA on May 15, 2006 ( and more comprehensively on August 30, 2006) in the context of an investigation on certain lined paper from China.<sup>40</sup> Since 1982 the US employs a special NME methodology to calculate AD duties on products from China. This methodology results usually in duty rates that are significantly higher than those applied to market economy countries. The United States Government Accountability Office (GAO) has found that Commerce applied duties to the same product from both China and one or more market economies on 25 occasions from 1985 to 2004, and AD duties on Chinese products were on average over 20 percentage points higher than those applied to market economies. China country-wide AD duties were over 60 points higher than comparable market economy rates.<sup>41</sup>

## **B. Countervailing Duty Law and NMEs**

The United States has had some form of countervailing duty legislation in place since 1897. It was strengthened and elaborated in the Tariff Act of 1930, section 303, which authorized the Treasury Department to impose duties on imported merchandise to offset any subsidies. This applied only to dutiable imports, but was extended to non-dutiable imports in the Trade Act of 1974. The Trade Agreement Act of 1979 implemented the Tokyo Round Subsidies Code under U.S. law, changed the countervailing duty law dramatically and created procedures much like those applicable to antidumping cases. The authority to investigate allegations of subsidization was transferred from DOT to DOC, International Trade Administration (ITA).<sup>42</sup>

The CVD laws are designed to provide relief to U.S. industries that have been, or are threatened with, the adverse impact from imported goods that have been subsidized by a foreign government or public entity. Similar to AD law, for an industry to obtain relief, both the ITC and the DOC must make affirmative conclusions. The DOC must find that the targeted imports have been subsidized, and the ITC must find that the industry has been materially injured or threatened with material injury due to the subsidized imports. Investigations are to be subjected to tight time limits. Both ITA and ITC determinations are made appealable to the Court of International Trade (CIT), and subsequently to the Federal Circuit.<sup>43</sup>

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<sup>39</sup> 48 Fed. Reg. 9897 (1982)

<sup>40</sup> ITA, *The People's Republic of China (PRC) Status as a Non-Market Economy (NME)*, Memorandum, May 15, 2006, and *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')*, Memorandum, August 30, 2006.

<sup>41</sup> GAO, *US-China Trade: Eliminating Non-market Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies*. GAO-06-231, Report to Congressional Committees, Washington, D.C.: January 2006.

<sup>42</sup> Jackson, H. John, William J. Davey, and Alan O. Sykes, Jr., *supra* note 4.

<sup>43</sup> *Ibid.*

There are five stages in the overall investigation process for countervailing duty cases, each ending with a determination by either DOC or ITC: (1) initiation of the investigation by DOC; (2) the preliminary phase of the ITC's investigation; (3) the preliminary phase of DOC's investigation; (4) the final phase of DOC's investigation; and (5) the final phase of the ITC's investigation. With the exception of Commerce's preliminary determination (stage 3), a negative determination by either the DOC or the ITC results in a termination of proceedings at both agencies. The statutory deadlines relating to the five stages are listed in Table 5.<sup>44</sup>

Unlike the AD law, the U.S. CVD law requires an internal market-oriented benchmark to determine whether, and to what extent, subsidization has occurred. Since it has been argued that in non-market economies there are no such internal market-oriented benchmarks,<sup>45</sup> the U.S. CVD law has not been traditionally applied to non-market economies. This is largely as a result of a 1984 determination by the DOC that there is no adequate way to measure market distortions caused by subsidies in NME countries. In order to have a clear background on this determination, we will review some CVD petitions in the 1980s.

In September 1983, the countervailing duty petition against the People's Republic of China (PRC) was filed with the USDOC pursuant to 19 U.S.C. §1303 (1980) on behalf of the American Textile Manufacturers Institute (ATMI), the Amalgamated Clothing and Textile Workers Union (ACTWU), and the International Ladies' Garment Workers' Union (ILGWU). This petition represented the first time that the USDOC has been called upon to evaluate the countervailability of alleged producer subsidies in an NME country. The subsidy alleged in the petition was the PRC's dual exchange rate system whereby one particular yen conversion rate is offered to producers of certain non-export goods and another more generous rate is offered to producers of goods keyed for export. The keyed goods in this case were textiles, apparels and related products. After the hearings were held in Washington, D. C. in November 1983, USDOC Secretary Baldrige convinced the Textile producers to withdraw the CVD petition and promised to reinstate the investigation if later requested by the industry.<sup>46</sup>

In November 1983, the appellees, Georgetown Steel Corporation, Raritan River Steel Company, and Atlantic Steel Company (collectively, Georgetown Steel), and Continental Steel Corporation (Continental Steel), filed two countervailing duty petitions with the Administration on behalf of domestic producers of carbon steel wire rod. They alleged that carbon steel wire rod imported into the United States from Czechoslovakia and Poland, respectively, was "subsidized" and therefore subject to countervailing duties under section 303. The Administration instituted countervailing duty investigations based upon those complaints. After the hearing, the International Trade Administration of the

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<sup>44</sup> ITC, *Antidumping and Countervailing Duty Handbook*, Twelfth Edition, April 2007. Available on website at: [www.usitc.gov/trade\\_remedy/731\\_ad\\_701\\_cvd/handbook.pdf](http://www.usitc.gov/trade_remedy/731_ad_701_cvd/handbook.pdf).

<sup>45</sup> See Barshefsky, Charlene. "Non-Market Economies in Transition and The US Antidumping Law: Remarks on the Need for Reevaluation," *Boston University International Law Journal* v.8 (Fall 1990).

<sup>46</sup> "Countervailing Duties and Non-Market Economies: the Case of the People's Republic of China". *Syracuse Journal of International Law and Commerce*, v. 10 (Fall/Winter 1983), p. 405-20.

Department of Commerce (Administration) issued final negative determinations. It held that the Czechoslovakian and Polish exports of wire rod had not received any "bounty" or "grant" under the terms of section 303, so that countervailing duties on those items were not applicable.

The Administration concluded that, as a matter of law, section 303 was inapplicable to non-market economies.<sup>47</sup> The Court of International Trade reversed, holding that the Administration's determination was contrary to law. The substantive issue in this case, here on appeal from the Court of International Trade, is whether the countervailing duty provisions in section 303 of the Tariff Act of 1930, as amended, *19 U.S.C. §1303* (1982), apply to alleged subsidies granted by countries with so-called non-market economies for goods exported to the United States. The Administration held that section 303 does not apply to non-market economies. The Court of Appeals for the Federal Circuit reversed the ruling of the Court of International Trade and upheld the Administration's determination that U.S. countervailing duty laws should not apply to imports from NMEs.<sup>48</sup>

The U.S. Uruguay Round Implementing Act of 1994 did not explicitly change the U.S. jurisprudence described above, but Article 29 of the Subsidies Agreement concerns "Transformation into a Market Economy," and provides for a grace period of non-application for some subsidy rules, after which it seems the normal subsidy rules will apply.<sup>49</sup>

A recent study analyzed the impact of foreign subsidization on the US steel industry (Blonigen and Wilson, 2007). The study covered data on 37 different steel products from 22 different foreign countries to the US market from 1979-2002. The results provide strong evidence of both cyclical and structural excess capacity effects for exports to the US market. However, the effects are confined to such a narrow range of country-product combinations that is unlikely that such effects were a significant factor in the misfortunes of US steel firms over the past decades. The US steel industry fought hard and filed 241 CVD cases during 1980-2003, among which 78 cases (32 percent) were considered affirmative, and countervailing duties were charged. However, these duties only affected a small percentage of the total imports to the US steel market (Blonigen and Wilson, 2007).

## **VI. The First U.S. CVD Case on China**

### **A. CFSP Case Review: A Chronological Description**

On October 31, 2006, the NewPage Corporation of Dayton, Ohio, a U.S. manufacturer of glossy paper, filed a petition with DOC and ITC alleging that an industry in the United States is materially injured or threatened with material injury by reason of subsidized and less than fair value (LTFV) imports of CFSP from China, Indonesia, and Korea. In the petition, NewPage

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<sup>47</sup> 49 Fed. Reg. 19370, 19374 (1984).

<sup>48</sup> *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed Cir 1986).

<sup>49</sup> John H. Jackson, p. 336, *supra* note 8.

alleged that several Chinese paper companies were recipients of government subsidies such as grants, policy loans, and tax breaks.<sup>50</sup> NewPage's petition marks the first CVD investigation against China since 1991 when a U.S. company formally requested the DOC to initiate a CVD investigation of *Ceiling and Oscillating Fans Imported from China*.<sup>51</sup> According to the DOC statistics, from 2005 to 2006, imports of CFSP products from China increased by approximately 177 percent in volume, and were valued at an estimated \$224 million in 2006.<sup>52</sup>

On November 20, 2006, the DOC announced its decision to initiate CVD and AD investigations against China, Indonesia and Korea with respect to "coated free sheet paper," which altered its longstanding policy of not applying the countervailing duty law to NME countries.<sup>53</sup> Then the ITC issued its affirmative preliminary determination on December 29, 2006, considered that there is a reasonable indication that an industry in the United States is materially injured by reason of allegedly subsidized import of CFSP from China, Indonesia, and Korea.<sup>54</sup>

The case was delayed when the Chinese Government and one of the Chinese exporters filed in the U.S. Court for International Trade (CIT) arguing that the DOC lacked the legal authority to levy CVD against China and should cease its investigation. The Department of Commerce maintained that the 1986 court decision merely affirmed its authority to determine whether to apply countervailing duties to non-market economies. The U.S. CIT formally rejected China's motion on March 29, 2007.

On March 30, 2007, the U.S. DOC announced its preliminary decision to apply U.S. CVD law to imports from China. This is the first time countervailing duties will be imposed on imports from a non-market economy. The decision alters a 23-year old bipartisan policy of not applying the countervailing duty law to non-market economy countries.<sup>55</sup> The preliminary decision determined that Chinese producers and exporters of coated free sheet paper received actionable subsidies ranging from 10.90 to 20.35 percent (Table 6).

There have been several reactions to the DOC's preliminary decision. Some U.S. Congress Members welcomed the Commerce Department's decision to impose duties on certain kinds of Chinese paper imports, and adhered that Congress should still pass

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<sup>50</sup> ITA, "Commerce Initiates Countervailing Duty Investigation on Coated Free Sheet Paper from the People's Republic of China," [http://www.ita.doc.gov/press/press\\_releases/2006/paper\\_china2\\_112106.asp](http://www.ita.doc.gov/press/press_releases/2006/paper_china2_112106.asp), November 21, 2006.

<sup>51</sup> 56 Fed. Reg. 57616 (1991). The petitioner claimed that China's fans sector was a market-oriented industry (MOI) and the CVD law should be applied. However, the ITA concluded that the PRC fans industry was not a MOI, and issued final negative determination in the case. See 57 Fed. Reg. 24018 (1992).

<sup>52</sup> Commerce News, United States Department of Commerce, "China CVD Fact Sheet," March 30, 2007.

<sup>53</sup> DOC, *Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper from the People's Republic of China, Indonesia and the Republic of Korea*, 71 Fed. REG. 68546 (November 27, 2006).

<sup>54</sup> ITC, *Coated Free Sheet Paper China, Indonesia, and Korea*, 71 Fed. Reg. 78464 (December 29, 2006).

<sup>55</sup> Commerce News, United States Department of Commerce, "Commerce Applies Anti-Subsidy Law to China," March 30, 2007.

legislation to cement the department's authority to impose countervailing duties on all non-market economies, not just China.<sup>56</sup> Changing the law will remove any doubt or court challenge to make certain that every industry can file a case if they have been harmed.<sup>57</sup>

Even the industries have been supportive of the DOC's preliminary announcement. The National Association of Manufacturers says that it is great news and an important step toward balancing trade with China. The Blue Green Alliance, Sierra Club, and the United Steelworkers have been supported as well.<sup>58</sup> The American Forest and Paper Association (AF&PA) is the most supportive of the DOC's preliminary decision in this case. AF&PA also endorses its continued support for legislation that would make the application of CVD against China and other non-market economies. NewPage Corporation is a member of AF&PA, however AF&PA was not a petitioner in the CFSP case.<sup>59</sup> However, the Printing Industries of America (PIA), the primary consumer of glossy paper in the United States, opposed the paper producer's petition.<sup>60</sup>

On October 18, the U.S. Department of Commerce announced its affirmative final determinations in the countervailing and antidumping duty investigations on coated free sheet paper from China, Indonesia, and Korea. The final determination reaffirmed the March 30th preliminary decision. The DOC determined that Chinese producers/exporters received countervailable subsidies ranging from 7.40 percent to 44.25 percent, and sold CFS paper in the United States at 21.12 percent to 99.65 percent less than fair value (Table 6).

A tariff order will be issued only if the ITC will have a final affirmative determination in injury investigation. However, on November 20, 2007, United States International Trade Commission finally determined that the U.S. industry is neither materially injured nor threatened with material injury by reason of imports of coated free sheet paper from China, Indonesia, and Korea that the U.S. Department of Commerce has determined are subsidized and sold in the United States at less than fair value. As a result of the Commission's negative determinations, no antidumping or countervailing duties will be imposed on imports of this product from these countries.<sup>61</sup>

While the U.S. ITC has made a negative final determination, the affirmative determination of the U.S. DOC in the countervailing and antidumping duty investigation on CFSP from China has opened the gate to apply the countervailing duty law to non-market economies.

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<sup>56</sup> "Baucus Applauds Commerce Decision to Fight Chinese Subsidies," March 30, 2007.

<sup>57</sup> "Rangel and Levin Respond to Commerce Subsidy Investigation," March 30, 2007.

<sup>58</sup> "Administration Responds to China Trade Subsidies, Fair Trade Advocates Welcome First Step, Call for Further Action," March 30, 2007.

<sup>59</sup> "American Forest and Paper Association Announcement," March 30, 2007.

<sup>60</sup> PIA Comments to Application of the Countervailing Duty Law to Imports from the People's Republic of China submitted to US Department of Commerce, January 16, 2007.

<sup>61</sup> The US ITC, Coated Free Sheet Paper from China, Indonesia, and Korea (Investigation No. 701-TA-444-446 (Final) and 731-TA-1107-1109 (Final), USITC Publication 3965), December 2007.

## B. Subsidies Existence and Calculation

In this section, we discuss in detail how the DOC determined the existence of a subsidy and calculated the scale of subsidies in CFS paper imports from China. This is a summary of documentation based on what the DOC published in its memorandum on the preliminary affirmative countervailing duty determination in March 30, 2007. From learning point of view, a summary of how subsidies are determined and calculated is useful. We provide no judgment or discussion on whether these subsidies exist or not, and if they are actionable subsidies or non-actionable.<sup>62</sup>

**Existence of Countervailable Subsidies.** In the original filed petition, NewPage Corporation alleged that 13 Chinese CFSP producers/exporters have received countervailable subsidies from the Government of China (GOC). The DOC selected the two largest of them, Gold East Paper (Jiangsu) Co., Ltd. (Gold East) and Shandong Chenming Paper Holdings Ltd. (Chenming) as mandatory respondents. The alleged subsidies include government grants, policy loans, tax exemption, export refunds, equity infusion, currency manipulation, and others, which number more than 17 kinds of subsidies. The DOC has denied the investigation on the currency manipulation program from the very beginning. Instead, it found that there are six kinds of programs to be countervailable in its preliminary determination:

**1. Grant Program:** There are two grant programs that relate to this allegation: the State Key Technology Renovation Fund (“Key Technology Program”), and the Clean Production Technology Fund. The DOC has identified that the former program provides countervailable subsidies, and the latter not to be used.

1.1. The Key Technology Program was created by the former State Economic and Trade Commission (SETC) in 1999 and aimed to promote: (1) technological renovation in key industries, key enterprises, and key products; (2) facilitation of technology upgrade; (3) improvement of product structure; (4) improvement of quality; (5) increase of supply; (6) expansion of domestic demand; and (7) continuous and healthy development of the state economy. The recipients of these funds will mainly be selected from large-sized state-owned enterprises and large-sized state holding enterprises. While this program has not operated since 2003 due to the Administrative system reform, the DOC finds that these grants are a direct transfer of funds providing a benefit in the amount of the grant. These grants are specific because the program is limited to certain enterprises. Chenming applied and was approved to have funding under the Key Technology Program in 2000, and that the funds were disbursed in 2001. The DOC used the standard grant methodology determining the countervailable subsidy to be 1.28 percent *ad valorem* for Chenming.

1.2. The Clean Production Technology Fund is a program to provide incentives and rewards (monetary or non-monetary) to encourage enterprises to conduct clean

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<sup>62</sup> In the following discussion, all materials come from *Coated Free Sheet Paper from the People’s Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination*, Department of Commerce, March 31, 2007.

production inspections, with the goal of protecting the environment. The program entered into force in October 2004, and any payments under this program are made at the local level. Chenming did not receive any grants under this program during 2004 and 2005. Gold East reported that it received a grant under this program, but any potential benefit to Gold East under this program is less than 0.005 percent. Where the countervailable subsidy rate for a program is less than 0.005 percent, the program is not included in the total countervailing duty rate.

**2. Government Policy Lending Program.** In order to determine whether the policy lending program alleged by the petitioner confers countervailable subsidies on the producers and exporters of the subjected merchandise, the DOC ascertains first that the GOC has a program in place to support the development of the paper industry, and then these policies were carried out by the central and local governments through the provision of loans extended by GOC policy banks and state-owned commercial banks (SOCBs).

The DOC preliminarily determined that the GOC has a specific and detailed policy to encourage and support the development of the domestic forestry and paper industry-based on the following GOC documents: (1) “The Outline of the 10<sup>th</sup> National Economic and Social Five-Year Plan.” One of the goals of 10<sup>th</sup> Five-Year Plan is to “accelerate reform and renovation” of certain industries, including the “wood pulp, high quality paper and paperboard” industry; (2) “The 10<sup>th</sup> Five-Year and 2010 Special Plan for the Construction of National Forestry and Papermaking Integration Project.” In this plan, the GOC established specific pulp production capacity targets of “more than 2.15 million ton” after 2010, and policy measures to provide “appropriate financial support to the construction of forestry and papermaking integration in its early phase by ways of infusing capital in cash or loans with discount;” (3) “The 10<sup>th</sup> Five-Year Plan in the Paper Production Industry” released by the SETC. A key policy recommendation is to increase the industry’s access to financial resources; and (4) other administrative measures of the GOC.

The DOC determined that the above policies were carried out by the central and local governments through the provision of loans extended by GOC policy banks and SOCBs. (1) According to the 1979 *Law of Local People’s Congresses at Various Levels and Local People’s Government at Various Levels of the PRC*, as amended, local governments must follow the laws and regulations made by the central government, and Five-Year Plans should be considered a central government policy or program that local government adopt and implement through SOCBs; (2) Loans provided by government policy banks are considered government loans, and constitute direct financial contributions; (3) Loans by SOCBs are also government loans in China, because of: a) the current law, Article 34 of the *Commercial Bank Law of the People’s Republic of China* states that banks are required to adhere to the PRC’s “national industrial policies;” b) the near-complete state ownership over these banks enables the GOC to utilize SOCBs as policy instruments; c) local governments continue to guide and direct the allocation of credit through their local bank branches; and d) the chief executives of the head offices of the SOCBs are government appointed and the party retains significant influence in their

choice; and (4) the above-mentioned Five-Year Plans are implemented by paper companies. Chenming's 2005 Annual Report states that, "all of the projects the Company had launched were those which satisfying the national industrial policy," and will keep studying "to make sure the Company's development is complying with the national policy on the industry."

Chenming, Gold East, and a certain number of Gold East's cross-owned companies had outstanding loans under this program during the period of investigation. The DOC preliminarily determined that a countervailing benefit of 3.15 percent ad valorem exists for Chenming and 14.02 percent for Gold East for this program.

**3. Income Tax Programs.** Four tax exemption programs are related to this allegation, which are considered as countervailable subsidies by the DOC's preliminary determination.

3.1. The "Two Free, Three Half" Program. According to Article 8 of the *Foreign Invested Enterprises and Foreign Enterprise Income Tax Law*, FIEs that are "productive and scheduled to operate not less than 10 years are exempt from income tax in their first two profitable years and pay half of their applicable tax rate for the following three years." The intent of this law is to attract foreign investment to China. The DOC determined this program is a subsidy and specific as the program is limited to certain enterprises, "productive" FIEs.

3.2. Reduced Income Tax Rates for FIEs Based on Location. FIEs located in the designated coastal economic development zones, special economic zones, and economic and technology development zones pay corporate income tax at a reduced rate either 15 or 24 percent in China.<sup>63</sup>

3.3. Local Income Tax Exemption and Reduction Program for "Productive" FIEs. The governments of the provinces, the autonomous regions, and the centrally governed municipalities have been delegated the authority to provide exemptions and reductions of local income tax for FIEs.

3.4. Income Tax Credits on Purchases of Domestically Produced Equipment by FIEs.

**4. VAT and Duty Exemptions.**<sup>64</sup> Two programs are related to this allegation, which are considered as countervailable subsidies by the DOC's preliminary determination.

4.1. VAT Rebates on Purchases of Domestically Produced Equipment.

4.2. VAT and Tariff Exemptions on Imported Equipment.

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<sup>63</sup> A new Enterprise Income Tax Law will come into effect on January 1, 2008, in which the income tax will be levied at the same rate of 25% regardless of domestic or foreign owned enterprises.

<sup>64</sup> It is well accepted that VAT refunds to exporters are trade neutral and non-distortionary in the economic literature. See Grossman, Gene M. 1980. "Border Tax Adjustments: do they distort trade?" *Journal of International Economics*, 10 (1980) 117-128.

**5. Domestic VAT Refunds for Companies Located in the Hainan Economic Development Zone.** One of Gold East’s cross-owned companies was a qualifying manufacturing enterprise in the Economic Development Zone of Hainan.

**6. Other Subsidies.** Chenming reported four additional programs in which it participated. Due to Chenming’s request that the DOC treat information about these four programs as business proprietary, and determine that these four programs constitute countervailable subsidies.

**Benchmark and Subsidies Calculation.** As discussed in the proceeding section, the DOC determined that loans received by the paper industry from Chinese banks, either policy bank, SOCBs, or foreign banks, constitute countervailable subsidies. According to U.S. law, the benefit for a preferential loan is the “difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market.” Normally, the DOC uses comparable commercial loans reported by the company for benchmarking purposes. However, the DOC argued that the Chinese banking sector does not operate on a commercial basis, and that the interest rates of the Chinese domestic banking sectors do not provide a suitable basis for benchmarking. Then the DOC created a market-based benchmark outside of China by a simple average of the national lending rates for countries with comparable gross national income with China.

**1. Domestic Benchmark.** The DOC determined that the Chinese domestic banking sector does not provide an appropriate benchmark because the Chinese banking sector does not operate on a commercial basis and is subject to significant distortions, primarily arising out of the continued dominant role of the government in the sector. (1) The GOC’s ownership: the GOC continues to control the vast majority of financial intermediation in the banking sector; (2) SOCBs: they continue to be plagued by functional and operational problems, and funds continue to be allocated in a manner consistent with the government policy; (3) Foreign banks: foreign investment in banking sector is tightly constrained, and foreign banks are subject to the same restrictions as the SOCBs. Therefore, foreign bank lending does not provide a suitable benchmark.

**2. External Benchmark.** The DOC uses a cross-country average lending rate as the external benchmark in this proceeding. The countries are selected based on similar income levels to China: (1) China is a lower-middle income country according to the country classification of the World Bank, 37 countries have been selected; (2) The DOC computed a simple average of these 37 lending rates from *International Financial Statistics* in 2005, as the external benchmark for short-term loans; (3) The DOC developed a ratio of short-term and long-term lending for 2005, by using the short-term lending drawn from London Interbank Offered Rate (LIBOR) data and long-term interest rate from the interest rate swap market reported by the Federal Reserve, to transfer the short-term lending rate into long-term one.

**3. Subsidies Calculation.** Once a subsidy identified in each program, the DOC calculated its impact on the firms' sales and translated this into a countervailable benefit. Add them all up, and one gets an individual final duty rate for each exporter of the subject merchandise. In total, the countervailing duty is 10.90% for Chenming, and 20.35% for Gold East. The all other rate is 18.16%, computed by a weighting average (see Table 7).

**Final Determination.** The preliminary determination brings several dispute issues between the Government of China (GOC) and the United States. Some major issues will be discussed in the following:<sup>65</sup>

**1. The Authority to Apply the CVD Law to China.** The GOC argues that the US DOC does not have the authority to apply the CVD law to China as long as the DOC continues to consider China as a NME country, since *Georgetown Steel* remains a controlling precedent. The GOC also claims that the US Congress made it clear that its intention of using the NME methodology for calculating AD duties is to fully cover the distortionary effect of subsidies. The Uruguay Round Agreements Act (URAA) contained eight major changes to the AD law and six changes to the CVD law, but no changes to the rules applying the CVD law to NMEs.

The US DOC insists that Congress granted to it the legal authority to apply the CVD law to any country, which is not limited only to market economies. In 1984, the Department first addressed the issue of the application of the CVD law to NMEs. The Department's previous policy of not-applying the CVD law to NMEs is not a "rule" but a practice. In the *Georgetown Steel* case, the court did not prohibit that the CVD law be applied to NMEs, but it was the Department's decision not to apply the law to NMEs based upon the language of the statute and the facts of the case. In contrast to the case of Soviet-bloc economies where both output and input prices were centrally administered, China has eliminated price controls on most products, and therefore the Department is able to determine whether subsidies benefit imports from China.

**2. Countervailability of Bank Loans in China.** The US Department found in its Preliminary Determination that loans from Chinese Policy Banks and state-owned commercial banks (SOCBs), and even foreign currency-denominated loans from domestic and foreign banks constitute countervailable subsidies. The GOC argued that information on the record does not support a conclusion that loans from Policy Banks and SOCBs constitute a financial contribution or that lending by these banks is specific to the forestry and paper industries. First, China established Policy Banks in the mid-1990's to carry out government industrial policy, but by the year 2000, most of the lending from Policy Banks had shifted from policy loans to commercial loans. Even now in making policy loans, these banks are operating on a commercial basis. Second, China's SOCBs function essentially as commercial banks, independent from government influence. The banks must make their decisions based on commercial considerations, and government's industrial policy is simply one factor that banks may take into consideration in analyzing

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<sup>65</sup> The US DOC, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China," October 17, 2007.

risk. The detailed loan application and approval processes are similar to those in the United States and other countries. Third, SOCBs Loans do not constitute a financial contribution although the GOC does have a majority stake in SOCBs. Fourth, Lendings of SOCBs and Policy Banks in China is not specific. The five-year plans and other related government documents do not serve as mandated preferences in relation to lending to the forestry and paper industries.

However, the US DOC disagreed with GOC's responses. As discussed in the Preliminary Determination, the DOC continues to find that the GOC has a policy in place to encourage and support the growth and development of the paper industry through preferential financing initiatives, as illustrated in the five-year plans and industrial policies. In the DOC's view, loans provided by Policy Banks and SOCBs in China constitute a direct financial contribution from the government.

**3. Appropriateness of the Benchmarks.** The GOC disagrees with the benchmark used by the DOC in the Preliminary Determination to calculate the benefit of the Government Policy Lending Program. The GOC argues that the DOC should use the appropriate commercial benchmarks from China in the benefit calculation. After the gradual liberalization of the financial markets in China, domestic interest rates can serve as an appropriate benchmark. If the DOC continues to reject interest rates in China as appropriate benchmarks, then it should consider more than one factor in selecting "surrogate" countries. In addition to gross national income (GNI), other factors should be taken into account such as national savings rate and inflation, as China is a country with a high savings rate and low inflation, as compared to countries in the same income group.

The US DOC argues that no interest rate in China could be used as a suitable benchmark for measuring the benefit of bank loans, and that it is appropriate to resort to an external benchmark. The DOC continues to construct a benchmark by using data from a group of lower-middle income countries, but agrees to change the method of calculation. Instead of a simple average from these countries, the DOC used a more complex method to take into account other factors that may drive interest rate variation across income levels, including institutions, level of savings, market risk, and transaction costs. Benchmarks for loans denominated in foreign currencies and Chinese currencies were determined separately by using a regression of inflation-adjusted interest rate on a composite index of certain governance indicators that apply to all of these countries. These indicators reflect the quality of each country's institutions across several dimensions, including political stability, government effectiveness, regulatory quality, rule of law, and control of corruption.

**4. Application of Adverse Facts Available to Chenming.** During the final stage, Shandong Chenming Paper Holdings Ltd. (Chenming) withdrew from the investigation as one of the mandatory respondents due to reasons unknown to us. The US DOC based the net countervailable subsidy rate for Chenming on adverse facts available (AFA) methodology in the final determination. Since the AFA is not available, the DOC applied the highest calculated final subsidy rates for income tax, VAT and policy lending programs of all the other producers/exporters in this investigation. That is why Chenming

received the highest CVD duty rate of 44.25 percent in the final DOC determination (Table 8).<sup>66</sup>

### **C. Implications for China and Other NMEs: A Preliminary Discussion**

Even though the US ITC found that no injury has been caused by imports of CFSP from China, the US DOC CVD decision has opened a flood gate of CVD petitions by U.S. manufacturing firms. By the end of 2007, there were eight CVD and AD cases against imports from China. Other NME countries will face broad challenges.

**1. Expanding CVD to Other Industries?** The application of CVD duties to CFS paper is likely to be followed by other companies and industries to litigate the imports from China. The sectors that the US has highlighted as a concern on the subsidy front include steel, petrochemicals, high technology, forestry and paper products, textile, hardwood and plywood, machinery and other non-ferrous metal industries.<sup>67</sup> The American Iron and Steel Institute (AISI) and the Steel Manufacturers Association (SMA) stressed their continued strong support for legislation that would require the DOC to apply CVD law fully to China and other NMEs. With regard to steel, they said that China has the world's most heavily subsidized steel industry.<sup>68</sup>

Another possible sector is textile and apparel industry. According to Inside US-China Trade report, the National Council of Textile Organizations (NCTO) is having active discussions with lawyers about the possibility of filing its own countervailing duty case against imports of Chinese apparel. NCTO believes it is possible that a CVD case on apparel might lead to even higher margins than the 10 to 20 percent Commerce found in CFS paper case.<sup>69</sup>

U.S. Department of Agriculture has recently released a Global Agriculture Information Network (GAIN) Report. The report argues that China has implemented a variety of VAT exceptions for Chinese farmers and agricultural processors. China's applied VAT rate to farmers and processors is 13 percent; the effective VAT actually collected is 5.8 percent, or less than half the official rate. There appears to be "a disparate impact" on imports. They also argue that China's agricultural exporters are offered an effective export subsidy between 7.2 and 9.77 percent through VAT rebates. The report says that these policies will continue to hurt U.S agricultural exports and are inconsistent with the WTO principles of "National Treatment."<sup>70</sup>

**2. Is Everything a Subsidy?** Since 1978, China has undertaken comprehensive reforms, which have progressively transformed the central planned economy into a market

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<sup>66</sup> Ibid.

<sup>67</sup> US Trade Representative's Office, "National Trade Estimate Report on Foreign Trade Barriers," 2007.

<sup>68</sup> AISI, "AISI and SMA Welcome Commerce Ruling against Chinese Subsidies; But Groups Say next Step Must be Prompt Passage of CVD/NME Legislation." March 30, 2007. American Iron and Steel Institute.

<sup>69</sup> Pete Kasperowicz, "NCTO Actively Talking to Lawyers about CVD Cases against China," Inside US-China Trade, April 25, 2007.

<sup>70</sup> USDA, "People's Republic of China Trade Policy Monitoring VAT Protections: The Rest of the Story 2007," GAIN Report CH7018, March 19, 2007.

economy. However, the government is still playing a very important role in the economic and social development. In order to achieve industrial and social goals, China has adopted various incentive policies to introduce foreign direct investment, which support the new and high technology innovation and industrial development in various development zones. Western regions will enjoy preferential tax policy in the newly passed Enterprise Income Law. Some of these policies may be subjected to U.S. countervailing duty investigations.

The second CVD case jointly filed recently by six U.S. steel tube companies and the United Steelworkers (USW) identifies two “new types of Chinese subsidies” in addition to those cited in the first CVD case, according to the June 7 petition. One new subsidy cited is the downstream export tax rebate program under which China gives companies a rebate on taxes paid for upstream goods if these are used to produce downstream goods for export, which encourages the production and export of goods like steel pipe. The second new subsidy is the provision of raw materials by government steel mills to Chinese makers of circular welded carbon quality steel pipe (CWP) at a cost less than adequate remuneration. In addition to the hot-rolled steel which was provided at low cost, national and local governments offer electricity, natural gas, water and land at subsidized prices to CWP companies, according to the petition.<sup>71</sup>

**3. Is the Exchange Rate Countervailable?** In the original filed petitions, the US petitioners all argue that the Chinese Government provided countervailable subsidies by “currency manipulation”. The DOC has rejected the investigation on “currency manipulation” in the case of CFS paper. However, there are two bills from the Senate Financial Committee (S. 1607) and the Senate Banking Committee (S. 1677) trying to connect currency issues with trade remedy laws. They would target the alleged “undervalued Yuan” as a subsidy for purposes of the US CVD law or would use the “corrected” value of the Yuan to calculate the dumping margin in an AD case. This is a potential challenge facing China in the near future.

## **VII. Policy Implications: A Preliminary Discussion**

### **A. Reviewing and Adjusting Domestic Subsidy Policies**

Since China and Vietnam are both transition economies, there is a need to review their domestic policy regarding subsidies from a social welfare point of view: that is, who are the beneficiaries of these subsidies; how benefits are distributed across income groups. There is a need to conduct an incidence analysis to see if this particular subsidy is pro-poor or benefiting the rich; and whether they compete with other pro-poor subsidies for budgetary resources. In the light of increasing environmental pressure, and degradation in some areas, there is a need to examine the environmental impact of these subsidies and tax exemptions to see whether they have provided incentives for energy-intensive industrial development, wasteful use, or depletion of natural resources. This review

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<sup>71</sup> Eric Nelson, “China Steel Pipe CVD Case Cited Two New Subsidies, Largely Follows Paper Case,” *Inside US-China Trade*, June 13, 2007.

would be good for re-balancing the domestic economy and improving the quality and sustainability of growth.

China's system of subsidies is in the process of dramatic transition. A recent study on China's subsidies (Wang, Yan 2007) examined three categories of subsidies, and found that: (1) Category I subsidies –including price subsidies and support to the state enterprises –rose in quantity, but the share in GDP has declined dramatically from a high level of 8 percent of GDP in 1985 to 0.7 percent in 2005. This represents a significant reduction in policy distortions, which may have contributed to rapid growth; (2) Among Category II -quantifiable subsidies reported by the government to the WTO,<sup>72</sup> poverty reduction and the environment received greater attention in recent years. However, if one examines the duration of benefiting from subsidies and tax exemptions, exporters, foreign invested enterprises have enjoyed preferential tax treatment for a longer period of time. Enterprises and workers in the coastal regions have benefited longer than those living in inland regions; (3) The size of quantifiable subsidies seems to be comparable to those of other large developing countries, but the composition is a matter of concern. Category I and II subsidies rose from 131 billion Yuan in 2001 to 132 billion in 2004, but the shares in GDP declined from 1.19 percent in 2001 to 0.82 percent in 2004; (4) Many subsidies are not quantifiable. Among 80 kinds of both quantifiable and non-quantifiable subsidies, about 26 percent out of 80 seems to be discriminatory /inconsistent with WTO principles and hence, are likely to be challenged by trading partners. However, this is from an economic point of view, not from a legal perspective.

In the literature, it is quite clear that the VAT tax rebate has been considered *trade-neutral* as VAT is designed to tax final output, so that taxes paid on intermediate transactions are rebated. According to Gene Grossman who analyzed the European VAT using the “destination principle” concluded “According to current GATT rules the destination principle applies to all indirect taxes. The European VAT as administered is, therefore, trade-neutral. All producers, whether producing for domestic sale or for export, claim credit for any taxes paid on inputs. A tax liability is calculated for domestic sales, while export sales are exempt. This exemption is the adjustment requested by the destination principle of taxation. On balance, goods are exported completely tax free. Imports are taxed, but if they are used as intermediate goods they qualify for the same tax credit as do domestically produced intermediates” (Grossman, 1980 page 126).

Nonetheless, the US government made a request to WTO for consultation regarding VAT rebates in China. The US request to the WTO for consultation stated that these measures “appear to be inconsistent with Article 3 of the SCM Agreement”. And “to the extent the measures accord imported products treatment less favorable than that accorded “like domestic products”, they appear inconsistent with Article III: 4 of the GATT 1994 and Article 2 of the TRIMS Agreement” (USA, 2007). So, this debate is not going to go away.

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<sup>72</sup> People's Republic of China, 2006. “Subsidies: New and Full Notification Pursuant to Article XVI: 1 of the GATT 1994 and Article 25 of the SCM Agreement.” WTO Doc. G/SCM/N/123/CHN, 13 April 2006.

There is a need for the government of China to review all the subsidies based on the economic and social welfare point of view, and to make them comply with WTO rules. This includes how VAT rebate is administered, and whether it is based on universal principles or discriminatory conditions.<sup>73</sup> Recently, the corporate income tax has been unified for domestic and foreign firms, so the issue related to tax exemptions has been largely resolved. In June 2007, the government has also eliminated the tax rebate for exporters in steel and other resource intensive industries. Furthermore, an export tax is levied on exports of steel, in order to limit over-expansion in that industry and reduce resource depletion. It is perhaps the right time to re-evaluate all these policy measures (tariffs, subsidies and export taxes) affecting prices and incentives, and reform them in a comprehensive manner.

## **B. Using the WTO Dispute Settlement System**

While the first US CVD case on China was concluded with no CVD order, the disputes still exist between the Chinese government and companies and the US. There are usually two options for the Chinese government and Chinese companies to deal with the US CVD cases: they may sue the US DOC on its determination in the U.S. Court of International Trade, or file a complaint for consultation with the US to the WTO Dispute Settlement Body. Issues that can be resolved in the CIT are only those related to the U.S. trade law, such as, if the DOC's findings are fair and in line with the U. S. trade law, and so on. If China files a complaint to the WTO Dispute Settlement Body to ask a consultation with the U.S. government, the WTO can then establish a panel to examine the DOC's findings and methodology, the consistency with WTO Agreements, U.S. commitments, Chinese commitments, and other issues.

The likelihood of one or both of these happening is high. We think the second option – consultation in the WTO DSB is a better channel to solve this dispute, because: (1) lots of issues are related to the WTO agreements; and (2) the implications of CVD cases are significant for development policies in China, Vietnam, and other developing countries. Indeed as we argued, the Chinese Government raised the consultation request to the WTO DSB in September 14 on the US decision regarding charging antidumping and countervailing duties on CFS paper. China charged that the U.S. determination violated the SCM Agreement on three counts and the Antidumping Agreement on one count.<sup>74</sup> Consultations were held on October 12, 2007. However, because the International Trade Commission issued a negative injury determination in the glossy paper investigation, it is unlikely that this matter will be pursued.

However, several CVD methodology issues are still disputable.

1. The DOC preliminarily determined that the GOC has a specific policy to support the paper industry based on the GOC's documents: "The Outline of the 10<sup>th</sup> National

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<sup>73</sup> A recent joint study by US ITC and Chinese researchers found that this tax rebate for exports has induced a "round-tripping of exports" and that is, Chinese firms "exports" to China itself. This is highly inefficient from China's own development point of view (Ferrantino, et al 2007).

<sup>74</sup> WTO, WT/DS368/1, September 18, 2007.

Economic and Social Five-Year Plan,” “The 10<sup>th</sup> Five-Year and 2010 Special Plan for the Construction of National Forestry and Papermaking Integration Project,” “The 10<sup>th</sup> Five-Year Plan in the Paper Production Industry,” and other administrative measures of the GOC. Is this method reasonable to use for further CVD investigations?

2. Loans received by the paper industries from Chinese banks, either policy banks, state-owned commercial banks, or foreign banks in China, are all considered government loans, constitute direct financial contributions, and considered subjects to countervailing duties.

3. The DOC determined that the Chinese domestic banking sector can not provide an appropriate benchmark because the Chinese banking sector doesn't operate on a commercial basis, and a cross-country average lending rate was used as the external benchmark. In Article 15 (b) of China's Protocol on the Accession, it requests that “the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.” Is the DOC's methodology consistent with this provision?

4. In Article 10 of the Protocol on the Accession of the People's Republic of China, it declared that “China shall eliminate all subsidy programs falling within the scope of Article 3 of the SCM Agreement upon accession,” but it is not clear if it is countervailable if China had abolished such a program after its accession.

5. The application of both antidumping and countervailing duties to China's coated free sheet paper creates concerns about double counting using current rules. Article VI paragraph 5 of the GATT 1947 requests that members cannot subject an export subsidy to both AD and CVD duties, but it is not clear if a domestic subsidy can be double counted. This issue needs to be clarified.

Several recent studies point out that American trade remedy laws have strayed far away from their original purpose, becoming little more than an excuse for special interests to shield themselves from competition at the expense of both American consumers and other American companies. Harvard University Professor Gregory Mankiw, former Chair of the President's Council of Economic Advisers from May 2003 to February 2005, has said, “Antidumping is the ‘third rail’ of U.S. trade politics, with few politicians of either party willing to point out its broadly negative impact.”<sup>75</sup> Countervailing measures will be even worse than antidumping, because it is more easily abused due to the ambiguous WTO rules. If the Chinese government will file a complaint with the WTO Dispute Settlement System to consult with the United States on these trade remedy issues, it will be possible to form a WTO panel to judge the disputed issues.

Fair and free trade is beneficial and will continue to benefit the majority of consumers and companies in the United States. In contrast, trade remedy laws cover a small part of trade flows, and protect a small group people at the cost of both consumers and other

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<sup>75</sup> Mankiw, N. Gregory and Phillip L. Swagel, “Antidumping: The Third Rail of Trade Policy,” *Foreign Affairs*, July/August 2005.

companies. In the current CVD case, the petitioner, NewPage Corporation, which was founded in 2005, has 4000 employees, and \$2 billion output per year.<sup>76</sup> However, the primary paper consumers, the U.S. printing industry is composed of approximately 40,000 plants employing 1.1 million workers and producing approximately \$170 billion of output per year. The industry is primarily domestic, with exports exceeding imports on an annual basis.<sup>77</sup>

According to Mankiw and Swagel, the US steel industry has long been the leading user of antidumping procedures: nearly half of antidumping tariffs imposed since 190 have been on steel imports, and 158 of the 294 antidumping orders in force as of April 2005 were on steel products. Such tariffs continue despite strong performance by U.S. steel firms and a 45 percent jump in steel prices between December 2003 and March 2005. These higher steel prices help steel producers, but they hurt the much larger number of firms and workers that use steel. Whereas steel producers employed just under 160,000 workers in early 2005, more than 1.5 million employees worked at firms that manufacture metal products, more than 1.1 million at firms that manufacture machinery, and nearly 1.8 million at firms that produce transportation equipment such as cars and parts. One recent study found that each job saved by steel tariffs came at the cost of three jobs in steel-using industries and caused economic distortion equal to some \$450,000.<sup>78</sup>

### **C. Participating in the Rules Negotiation in the Doha Round**

While the WTO SCM Agreement contains a delicate balance of subsidy definitions and disciplines that were intended to be clear, predictable and enforceable, the application and enforcement of the SCM Agreement since 1995, however, has not been a resounding success. In the ongoing Doha Round Negotiations, most developing country members are very focused on agricultural issues, but we think the rules negotiation is also very important. China, Vietnam, and other NME WTO members, might work together with other developing countries to use the Doha Round Negotiations to further clarify the coverage of government subsidies, trade remedy rules, preferential treatment to developing countries, NME and other related issues.

1. Subsidies and development policies. There are a number of proposals in discussion in the current Doha Round Negotiations on SCM Agreement. Some proposals are about prohibited subsidies. The United States has proposed to expand the existing category of prohibited subsidies, and has suggested including the “dark amber” category. Some developing countries have proposed major reforms to Article 27 of the SCM Agreement and to provide special and differential treatment to developing countries.

2. Procedures for countervailing measures. Besides the categories of subsidies, it is very important to make clear procedures for imposing countervailing duty measures, and to

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<sup>76</sup> James C. Tyrone, Senior Vice President of Sales and Marketing, NewPage Corporation, Testimony before the Trade Subcommittee of the Ways and Means Committee of the United States House of Representatives, February 15, 2007.

<sup>77</sup> PIA, *supra* note 61.

<sup>78</sup> Mankiw, N. Gregory and Phillip L. Swagel, *supra* note 78.

prevent abuses in the administration of countervailing duty laws. The United States proposed to strengthen and expand the application of the CVD rules.

3. NME status for China and Vietnam. In regards to China's NME status, the Article 15 (d) of the Protocol on the Accession of the People's Republic of China declared clearly that China will be treated as a market economy on December 11, 2016 for antidumping investigations without any conditions. However, there is no such clear language written for countervailing duty investigations.<sup>79</sup> Vietnam has the similar situation about its NME status in the Report of the Working Party on the Accession of Vietnam. It is good for China and Vietnam to make the provision more clear in this Doha round negotiation.<sup>80</sup> Furthermore, it would be better if China and Vietnam can negotiate an expedited entry to "market economy" status.

## VIII. Conclusion

Development experiences in the recent years clearly show the welfare-improving benefit of freer international trade. The world benefits from developing countries like China, India, Brazil and Vietnam becoming more significant trading nations. The ostensible purpose of trade remedy policies is to help ensure competition by punishing exporters of various unfair trade practices, and to lessen the adverse impact on an importing country's industries, producers and workers. In practice, however, trade remedy measures have been increasingly used not only as trade policy instruments to mitigate the adverse impact of unfair trade, but also as the preferred means by which industries in many countries seek and obtain protection from their governments. Today, most development practitioners have realized that antidumping has been a growing problem in international trade instead of dumping.

Countervailing duty is often considered as a less-evil brother to antidumping. In fact it is not the case -- as it is more easily abused due to ambiguous WTO rules. CVD cases are costly and ineffective. For example, between 1980 and 2003, the US steel industry filed 241 CVD cases with 78 cases (32 percent) considered affirmative and countervailing duties charged. However, these duties only affected a small percentage of the total imports to the US steel market (Blonigen and Wilson 2007). The March-30th decision by the US DOC opened the gates for more CVD cases against NMEs.

This study provides an examination on the first CVD case on coated free sheet paper from China, and finds that this case has strong implications for transition economies and developing countries. Extreme caution must be used when designing industrial policy and development policies to achieve economic and social objectives. Some subsidies may distort international production and trade patterns, and reduce efficiency and world welfare. Some subsidies in sectors where the country does not have a comparative advantage, for example, a resource-intensive product in a resource-scarce country, may lead to over-exploitation of nature resource and rapid depletion. Many subsidies simply compete for scarce budgetary resources that could be better used in areas where there is a

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<sup>79</sup> W/L/432, Article 15 on page 8-9.

<sup>80</sup> WT/ACC/VNM/48, paragraph 255 on page 66.

market failure, such as in rural primary education and basic health; or where there is an urgent need for providing public services to the poor and vulnerable. More studies are needed on who benefits from subsidies and tax exemptions, and whether these are consistent with the objective of building a “harmonious society”.

China, Vietnam and other transition economies should review their domestic policies on subsidies from the perspectives of economic and social welfare and ensure that they comply with WTO rules. They could resort to the WTO Dispute Settlement System to ensure that the applications of US CVD and AD applications are fully consistent with WTO Agreements, as they deem appropriate. And they could participate actively in the rules negotiations on the use of trade remedy measures in the WTO Doha Round. Trade remedies for non-market economies have become more complex and challenging. In addition to complying with WTO Agreements and dealing with the technicalities of AD and CVD measures for them, non-market economies would be even better off if an expedited entry to the “market economy” status could be negotiated under WTO.

## References

Alexander Polouektov, “*The Non-Market Economy*” *Issue in International Trade: In the Context of WTO Accessions*, United Nations Conference on Trade and Development, UNCTAD/DITC/TNCD/MISC.20, October 9, 2002.

Barshefsky, Charlene. “Non-Market Economies in Transition and The US Antidumping Law: Remarks on the Need for Reevaluation,” *Boston University International Law Journal* v.8 (Fall 1990) p.373-80.

Baylis, Kathy. 2005. “Countervailing Duty: Economic Theory and Legal Practice,” Draft, University of British Columbia, Vancouver, BC, Canada. Available on website at [www.landfood.ubc.ca/research/documents/baylis/CVD%20chapter%20Baylis.pdf](http://www.landfood.ubc.ca/research/documents/baylis/CVD%20chapter%20Baylis.pdf).

Blonigen, Bruce and Wilson, Wesley W. 2007. “Foreign Subsidization and Excess Capacity”. –focusing on the US steel Industry. Working paper presented at the World Bank.

Ferrantino, Michael; Koopman, Robert; Wang, Zhi, and Yinug, Falan; Chen, Ling; Qu, Fengjie; and Wang, Haifeng. 2007. “Classification and Statistical Reconciliation of Trade in Advanced Technology Products: *The Case of China and the United States*” Working paper at U.S. International Trade Commission.

Finger, J. Michael, and Julio J. Nogues, eds. 2005. *Safeguards and Antidumping in Latin America Trade Liberalization: Fighting Fire with Fire*. Palgrave Macmillan.

GAO, *US-China Trade: Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies*. GAO-06-231, Report to Congressional Committees, Washington, D.C.: January 2006.

Grossman, Gene M. 1980. “Border Tax Adjustments: do they distort trade?” *Journal of International Economics*, 10 (1980) 117-128.

Ianchovichina and Will Martin. 2004. “Economic Impact of China’s Accession to the WTO”, in Battasali, Li and Martin, eds *China and the WTO: Accession, Policy Reforms and Poverty Reduction Strategies*. Oxford University Press.

Ianchovichina, Elena 2005. “Duty Drawbacks, Competitiveness and Growth: should China reform its duty drawback system? World Bank working paper 3498, Washington DC.

John H. Jackson, *World Trade and the Law of GATT*, Indianapolis: Bobbs-Merrill, 1969.

“Countervailing Duties and Non-Market Economies: the Case of the People’s Republic of China”. *Syracuse Journal of International Law and Commerce* v. 10 (Fall/Winter 1983), p. 405-20.

Jackson, John H., *The World Trading System: Law and Policy of International Economic Relations*, Second Edition, The IMT Press, Cambridge, Massachusetts, 1997, p. 336.

Jackson, H. John, William J. Davey, and Alan O. Sykes, Jr. *Legal Problems of International Economic Relations: Cases, Materials and Text*, Fourth Edition, West Group, St. Paul, Minnesota, 2002.

Mankiw, N. Gregory and Phillip L. Swagel, "Antidumping: The Third Rail of Trade Policy," *Foreign Affairs*, July/August 2005.

National Bureau of Statistics (NBS), 2006. *China Statistical Yearbook 2006*. China Statistical Press. Beijing.

People's Republic of China, 2006. "Subsidies: New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement." WTO G/SCM/N/123/CHN, 13 April 2006.

Sykes, O. Alan. 1989. "Countervailing Duty Law: An Economic Perspective," *Columbia Law Review* Vol. 89 No. 2: 199-263.

Tatelman, B. Todd. "United States' Trade Remedy Laws and Non-market Economies: A Legal Overview," CRS Report for Congress, Order Code RL 33976, April 23, 2007.

USDA, "People's Republic of China Trade Policy Monitoring VAT Protections: The Rest of the Story 2007," GAIN Report CH7018, March 19, 2007.

USDOC, *Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination*, March 31, 2007.

USDOC, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China," October 17, 2007.

USITC, *Coated Free Sheet Paper from China, Indonesia, and Korea* (Investigation No. 701-TA-444-446 (Final) and 731-TA-1107-1109 (Final), USITC Publication 3965), December 2007.

Wang, Yan. 2007. "China's Subsidies: An Analysis on the Types and Quantity of Subsidies," Preliminary draft, World Bank.

Zanardi, Maurizio. 2006. "Antidumping: A Problem in International Trade," *European Journal of Political Economy*, 22 (2006) 591-617.

Zhao, Longyue. 2005. "The Non-Market Economy Issues under the GATT/WTO System: A Case Study on China," Seminar paper, Georgetown University.

Table 1. Global AD and CVD Initiations on Chinese products (1995-2006)

| Year  | AD initiations |               |                | CVD initiations |               |                |
|-------|----------------|---------------|----------------|-----------------|---------------|----------------|
|       | Global         | Against China | Percentage (%) | Global          | Against China | Percentage (%) |
| 1995  | 157            | 20            | 12.7           | 10              | 0             | 0              |
| 1996  | 225            | 43            | 19.1           | 7               | 0             | 0              |
| 1997  | 243            | 33            | 13.6           | 16              | 0             | 0              |
| 1998  | 257            | 28            | 10.9           | 25              | 0             | 0              |
| 1999  | 355            | 40            | 11.3           | 41              | 0             | 0              |
| 2000  | 290            | 42            | 14.5           | 18              | 0             | 0              |
| 2001  | 364            | 54            | 14.8           | 27              | 0             | 0              |
| 2002  | 312            | 51            | 16.3           | 9               | 0             | 0              |
| 2003  | 232            | 52            | 22.4           | 15              | 0             | 0              |
| 2004  | 213            | 49            | 23.0           | 8               | 3             | 37.5           |
| 2005  | 200            | 55            | 27.5           | 6               | 0             | 0              |
| 2006  | 200            | 68            | 34.0           | 9               | 1             | 11.1           |
| Total | 3048           | 535           | 17.6           | 191             | 4             | 2.1            |

Source: WTO website and authors' own compilation.

Table 2. US AD and CVD Investigations on Imports from China  
(By the end of 2007)

| Petitioner  | Filed Date         | Product                                   | DOC Initiation    | ITC Determination  |  | DOC Determination   |   | Issuance of Order   |
|---|--------------------|---|-------------------|--|--|---|---|---|
|   |                    |   |                   | Preliminary  | Final  | Preliminary   | Final   |   |
| New Page Corporation (OH)                             | October 31, 2006   | Coated Free Sheet Paper                   | November 20, 2006 | Affirmative determination voted by 4-2, on December 15, 2006 | Negative determination voted by 5-1, on November 20, 2007          | <b>CVD:</b><br>March 29, 2007<br><b>AD:</b><br>May 29, 2007         | <b>CVD:</b><br>October 17, 2007<br><b>AD:</b><br>October 17, 2007   | No AD or CVD duties will be imposed                             |
| The Ad Hoc Coalition for Fair Pipe Imports from China | June 7, 2007       | Circular Welded Carbon Quality Steel Pipe | June 27, 2007     | Affirmative vote by 5 - 1, on July 23, 2007                  | <b>CVD:</b><br>May 20, 2008<br><b>AD:</b><br>June 3, 2008          | <b>CVD:</b><br>November 25, 2007<br><b>AD:</b><br>January 4, 2008   | <b>CVD:</b><br>April 7, 2008<br><b>AD:</b><br>May 19, 2008          | <b>CVD:</b><br>May 29, 2008<br><b>AD:</b><br>June 10, 2008      |
| Titan Tire Corporation, etc.                          | June 18, 2007      | Off the Road (OTR) Tires                  | July 9, 2007      | Affirmative vote by 6 - 0, on August 20, 2007                | <b>CVD:</b><br>January 31, 2008<br><b>AD:</b><br>April 14, 2008    | <b>CVD:</b><br>October 3, 2007<br><b>AD:</b><br>December 17, 2007   | <b>CVD:</b><br>December 17, 2007<br><b>AD:</b><br>February 28, 2008 | <b>CVD:</b><br>February 7, 2008<br><b>AD:</b><br>April 21, 2008 |
| Allied Tube & Conduit Corp. Etc.                      | June 27, 2007      | Light-Walled Rectangular Pipe and Tube    | July 17, 2007     | Affirmative vote by 5 - 1, on August 10, 2007                | <b>CVD:</b><br>January 18, 2008<br><b>AD:</b><br>April 4, 13, 2008 | <b>CVD:</b><br>September 20, 2007<br><b>AD:</b><br>December 4, 2007 | <b>CVD:</b><br>December 4, 2007<br><b>AD:</b><br>February 19, 2008  | <b>CVD:</b><br>January 25, 2008<br><b>AD:</b><br>April 11, 2008 |
| The Laminated Woven Sacks Committee                   | June 28, 2007      | Laminated Woven Sacks                     | July 18, 2007     | Affirmative vote by 6 - 0, on August 10, 2007                | <b>CVD:</b><br>January 22, 2008<br><b>AD:</b><br>April 3, 2008     | <b>CVD:</b><br>September 21, 2007<br><b>AD:</b><br>December 5, 2007 | <b>CVD:</b><br>December 5, 2007<br><b>AD:</b><br>February 18, 2008  | <b>CVD:</b><br>January 29, 2008<br><b>AD:</b><br>April 10, 2008 |
| Appleton Papers Inc.                                  | September 18, 2007 | Lightweight Thermal Paper                 | October 29, 2007  | Affirmative vote by 6 - 0, on November 16, 2007              | <b>CVD:</b><br>May 1, 2008<br><b>AD:</b><br>July 15, 2008          | <b>CVD:</b><br>January 2, 2008<br><b>AD:</b><br>March 17, 2008      | <b>CVD:</b><br>March 17, 2008<br><b>AD:</b><br>June 2, 2008         | <b>CVD:</b><br>May 8, 2008<br><b>AD:</b><br>July 22, 2008       |
| Magnum Magnetics Corp.                                | September 21, 2007 | Raw Flexible Magnets                      | October 11, 2007  | Affirmative vote by 6 - 0, on November 5, 2007               | <b>CVD:</b><br>April 14, 2008<br><b>AD:</b><br>June 27, 2008       | <b>CVD:</b><br>December 17, 2007<br><b>AD:</b><br>February 28, 2008 | <b>CVD:</b><br>February 28, 2008<br><b>AD:</b><br>May 13, 2008      | <b>CVD:</b><br>April 21, 2008<br><b>AD:</b><br>July 4, 2008     |
| General Chemical Co. Inc. (Parsippany, NJ)            | November 8, 2007   | Sodium nitrite                            | November 28, 2007 | Affirmative vote by 6 - 0, on December 19, 2007              | <b>CVD:</b><br>May 30, 2008<br><b>AD:</b><br>August 14, 2008       | <b>CVD:</b><br>February 1, 2008<br><b>AD:</b><br>April 16, 2008     | <b>CVD:</b><br>April 16, 2008<br><b>AD:</b><br>June 30, 2008        | <b>CVD:</b><br>June 6, 2008<br><b>AD:</b><br>August 21, 2008    |

Source: The US Department of Commerce and authors' own compilation.

Table 3. Classification of Subsidies in the WTO SCM Agreement

| Subsidies      | Traffic term | Types  | Remedy   |
|----------------|--------------|--|--|
| Prohibited     | Red light    | - Export subsidy<br>- Import substitution  | - Withdraw without delay, or<br>- Suffer countermeasures   |
| Actionable     | Amber light  | - Exceeding 5% of a product<br>- Operating losses to an industry<br>- Operating losses to enterprise<br>- Debt forgiveness | - Expired on December 31, 1999; not yet renewed  |
|                | Yellow light | - Other subsidies causing adverse effects  |  |
| Non-Actionable | Green light  | - Research and development<br>- Disadvantaged regions<br>- Environment adaptation  | - Actionable if it causes serious adverse effects<br>- Expired on December 31, 1999; not yet renewed |

Source: Authors' own compilation based on the WTO SCM Agreement

Table 4. Comparison of legal criteria for market economy treatment in four countries

| <b>USA</b><br>(G/ADP/N/1/USA/1)<br>10.04.1995   | <b>EC</b><br>(Regulation No. 905/98)<br>27.04.1998  | <b>Mexico</b><br>(G/ADP/N/1/MEX/1/Suppl.1)<br>31.01.2001   | <b>Malaysia</b><br>(G/ADP/Q1/MYS/6)<br>11.01.2001   |
|---|---|--|---|
| 1. The extent to which the currency of the foreign country is convertible into the currency of other countries              | 5. Exchange rate conversions are carried out a market rate  | The currency of the foreign country under investigation must be generally convertible in the international currency markets  | No similar provision  |
| 2. The extent to which wage rates in the foreign country are determined by free bargaining between labor and management     | No similar provision  | Salaries in the said foreign country must be established through free negotiation between workers and employers  | Freedom to hire and fire employees and to determine their salaries  |
| 3. The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the country | No similar provision  | No similar provision   | No similar provision  |
| 4. The extent of government control over the allocation of resources and over the price and output decisions of enterprises | 1. Decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labor, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values | Decisions relating to prices, cost and supply of inputs, including raw material, technology, production, sales and investment, in the sector of industry under investigation, must be taken in response to market signals without any significant State interference | Company control over sourcing of raw materials and inputs. Freedom to determine export prices and export quantities   |
| 5. The extent of government ownership or control of the means of production   | Same as above   | Same as above  | The degree of private investment, in particular whether private companies hold the majority of shares in whether government officials are on the board or in key management positions |
| 6. Such other factors as the administering authority considers appropriate  | No similar provision  | No similar provision   | No similar provision  |
| No similar provision  | 2. Firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,   | The industry under investigation must have only one set of accounting records which it uses for all purposes and which is audited according to generally accepted accounting principles  | No similar provision  |
| No similar provision  | 3. The production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,  | The production costs and financial situation of the sector or industry under investigation must not be distorted in relation to the depreciation of assets, bad debts, barter trade and debt compensation or other factors considered relevant                       | No similar provision  |
| No similar provision  | 4. The firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms   | No similar provision   | No similar provision  |

Source: Taken from Polouektov, Alexander "Non-Market Economy Issues in the WTO Anti-Dumping Law and Accession Negotiations Revival of a Two-tier Membership?" *Journal of World Trade* 36(1): 1–37, 2002.

Table 5. The U.S. Statutory Timetables for Countervailing Duty Investigation

| Investigation Stage           | No. of Days after the petition filed | Note  |
|-------------------------------|--------------------------------------|---|
| Petition filed                | 0                                    |   |
| Initiation                    | 20                                   | After the filing of the petition by ITA   |
| ITC Preliminary Determination | 45                                   | After the filing of the petition by ITC   |
| ITA Preliminary Determination | 85                                   | This will take place only in the event of a preliminary affirmative determination from the ITC.       |
| ITA Final Determination       | 160                                  | This will take place only in the event of a preliminary affirmative determination from the ITC.       |
| ITC Final Determination       | 205                                  | This will take place only in the event of a final affirmative determination from the ITA.             |
| Publication of Order          | 212                                  | This will take place only in the event of a final affirmative determination from the ITA and the ITC. |

Source: Authors compiled based on the USITC *Antidumping and Countervailing Duty Handbook*.

Table 6. CVD and AD Duties on CFSP Imported from China

| Producer/Exporter                      | Subsidy Rate |       | Dumping Rate |       |
|--|--------------|-------|--------------|-------|
|  | Preliminary  | Final | Preliminary  | Final |
| Gold East Paper (Jiangsu) Co., Ltd.    | 20.35        | 7.40  | 23.19        | 21.12 |
| Shandong Chenming Paper Holdings, Ltd. | 10.90        | 44.25 | 48.07        | 99.65 |
| All Others                             | 18.16        | 7.40  | 99.65        | 99.65 |

Source: The United States Department of Commerce and authors' own compilation.

Table 7. Subsidies, as defined by the US Department of Commerce

| Subsidy  | Counter-veivable benefits/duties |                | Reason   | Calculation method   |
|--|----------------------------------|----------------|--|--|
|  | Company Pink                     | Company Yellow |  |  |
| Bank loans given to industries supported by government industrial policy | 14.00%                           | 3.15%          | PRC banks are still vulnerable to policy guidance, resulting in direct loan allocation to government's chosen industries at subsidised rates | Subsidy is difference between China bank loan rate and average lending rate of 37 countries with similar income level as China (13.1%, short-term rate, with long-term rate determined by swap prices) |
| Key State Technology Renovation Programme                                | N/a                              | 1.28%          | A non-recurring subsidy grant which ended in 2003 for defined technology investment  | Benefit/total sales value  |
| "Two-free, three half" income tax policy                                 | 2.88%                            | N/a            | Reduction in income tax from 30% (national standard rate) to 15% or less because FIE operates in a 'productive' sector                       | Tax saving/Total sales   |
| Location-based income tax reduction                                      | N/a                              | 0.34%          | Reduction in income tax from 30% (national) to 24% because firm located in special region  | Tax saving/Total sales   |
| Additional local income tax exemptions                                   | 0.30%                            | 0.17%          | Reduction in income tax from 3% (local) offered by locality  | Tax saving/Total sales   |
| Income tax credits   | N/a                              | 2.98%          | Up to 40% credits, offered on purchases of domestically-produced equipment   | Tax saving/Total sales   |
| VAT and duty refunds on exports  | 0.35%                            | 1.45%          | VAT refund for FIES on some equipment  | Tax saving/Total sales   |
| VAT/tariff exemption on imports  | 2.60%                            | 0.10%          | FIES working in approved industries receive some exemptions  |  |
| Domestic VAT refunds   | 0.19%                            | N/a            | Hainan province offers 25% refund on VAT paid on domestic sales given certain conditions   |  |
| Other  | N/a                              | 1.45%          | Unknown - firms asked for details to be kept confidential  | Benefit/total sales value  |
| <b>Total</b>   | <b>20.35%</b>                    | <b>10.90%</b>  |  |  |

Source: Import Administration, DoC, SCB Global Research

Source: Stephen Green, "Everything is a subsidy, Part II," Standard & Chartered, April 4, 2007.

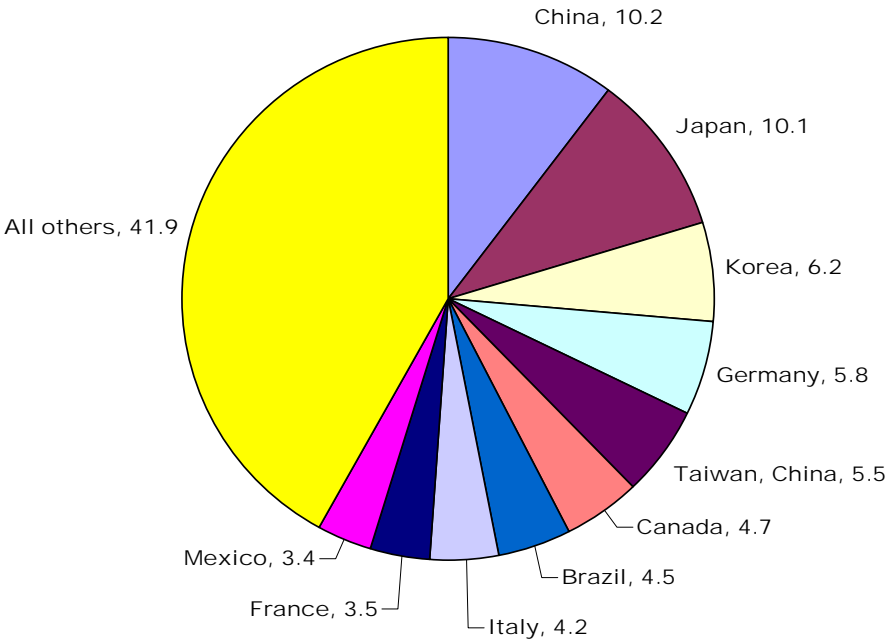
Table 8. Adverse Facts Available (AFA) Subsidy Rate for Chengming

|    | Subsidy Program  | Type       | AFA Rate |
|----|--|------------|----------|
| 1  | “Other Subsidies” for Chenming                                   | Grants     | 4.11     |
| 2  | State Key Technology   | Grants     | 4.11     |
| 3  | Clean Technology Production                                      | Grants     | 4.11     |
| 4  | Famous Brands  | Grants     | 4.11     |
| 5  | Policy Loans   | Government | 4.11     |
| 6  | The “Two Free/Three Half” program                                | Income Tax | 0.76     |
| 7  | Income tax exemptions program for FIE s located in certain       | Income Tax | 0.76     |
| 8  | Local income tax exemption and reduction program                 | Income Tax | 0.76     |
| 9  | Income Tax Credits on Purchases of Domestically Produced         | Income Tax | 0.76     |
| 10 | VAT Rebates on Purchases of Domestically Produced Equipment      | VAT        | 1.57     |
| 11 | VAT & tariff Exemptions on Imported Equipment                    | VAT        | 1.57     |
| 12 | Domestic VAT Refunds (for Companies Located in the Hainan        | VAT        | 1.57     |
| 13 | Direction Adjustment Tax on Fixed Assets                         | Income Tax | 0.76     |
| 14 | Income tax exemption program for export-oriented FIEs            | Income Tax | 0.76     |
| 15 | Corporate income tax refund program for reinvestment of FIE      | Income Tax | 0.76     |
| 16 | Preferential tax policies for FIEs engaged in forestry and       | Income Tax | 0.76     |
| 17 | Preferential tax policies for enterprises engaged in forestry    | Income Tax | 0.76     |
| 18 | Special fund for projects for the protection of natural forestry | Grants     | 4.11     |
| 19 | Compensation fund for forestry ecological benefits               | Grants     | 4.11     |
| 20 | Discounted Loans for Export-Oriented Enterprises                 | Government | 4.11     |
|    | TOTAL AFA NET SUBSIDY RATE                                       |            | 44.25    |

Source: The USDOC, “Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People’s Republic of China,” October 17, 2007.

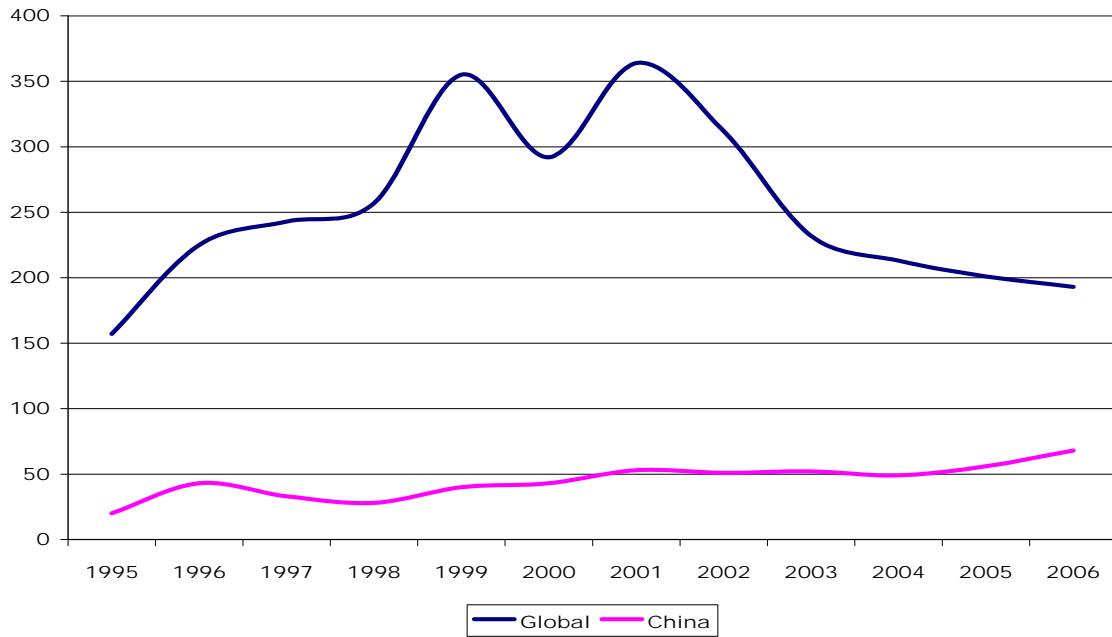
Appendix 1. Top ten countries cited in US AD cases, Fiscal years 1980-2005, cumulative

(By percentage of the total number of cases)



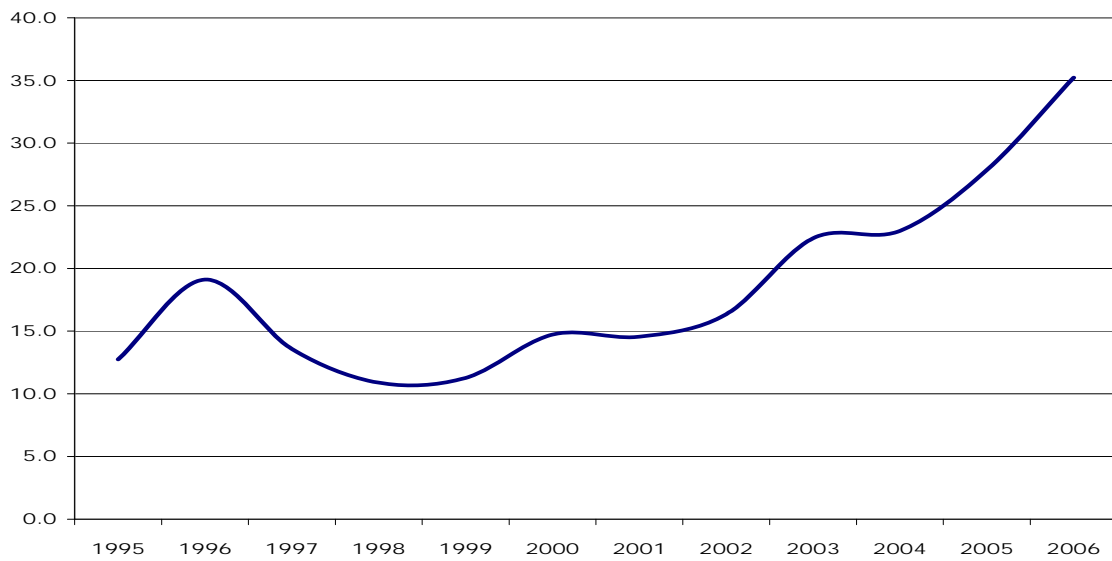
Source: The USITC and authors' own compilation.

### Appendix 2. Global AD initiations and initiations against China (1995-2006)



Source: The WTO Website and authors' own compilation.

### Appendix 3. Percentage of total initiations targeting at China (1995-2006)



Source: The WTO Website and authors' own compilation.