SAILING THE SEAS OF PROTECTIONISM: THE SIMULTANEOUS APPLICATION OF ANTIDUMPING AND COUNTERVAILING DUTIES TO NONMARKET ECONOMIES—AN AFFRONT TO DOMESTIC AND INTERNATIONAL LAWS

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I. INTRODUCTION

No one likes to be treated unfairly. This fact is no less true in the context of international trade. As it stands, the United States’ response to the so-called unfair trade practices of China not only appears to be unfair, but may also be violating U.S. and international law. This is due in no small part to the U.S. Department of Commerce’s (DOC’s) recent willingness to impose countervailing duties (CVDs) on nonmarket economies.\(^1\) This practice stands in direct contrast to the DOC’s longstanding policy of refraining from applying CVDs to nonmarket economies.\(^2\) This change in policy presents opportunities for abuse by the DOC, which finds itself using this new application of an old trade regulation in a thoroughly protectionist manner, especially in combination with antidumping duties (ADs). In particular, the DOC’s method of calculating both duties (ADs and CVDs) takes subsidies into account twice—creating an inherent danger of possible double-counting of these subsidies. The use of these duties as a protective mechanism is inconsistent with U.S. and international law, as these duties are meant to be remedial, not punitive.\(^3\) These are only a few of the many issues inherent in the nonmarket economy classification system. The DOC should reconsider its current position on AD and CVD regulations with regard to nonmarket economies or, at the very least, use extreme caution when applying these duties to prevent the occurrence of such abuses.

In Part II, this Note will first examine how ADs and CVDs operate by exploring the applicable U.S. laws and international agreements under the World Trade Organization (WTO), showing their development and their application to nonmarket economies prior to the recent policy change. Part III will cover the regulatory process, how an application for ADs and CVDs is processed, and what recourse is available to the target of ADs and CVDs, both under the WTO and in the U.S. Part IV of this Note will describe the DOC’s

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\(^2\) See Application of the Countervailing Duty Law to Imports from the People’s Republic of China, 71 Fed. Reg. 75,507, 75,507 (Dec. 15, 2006) (request for comments) (noting the absence of a CVD against China due to the 1986 determination that the DOC “has the discretion not to apply the [CVD] law to non-market economy countries,” as affirmed in Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986)).

\(^3\) See 25 C.J.S. Customs Duties §§ 136, 146 (2009) (discussing the remedial nature of ADs and CVDs) [hereinafter C.J.S. Customs Duties].
recent change of course regarding the application of CVDs to nonmarket economies, along with the dispute surrounding the DOC’s coated free-sheet paper investigation and the AD and CVD cases currently pending against China. Part V will analyze the economics and implications of simultaneously applying ADs and CVDs, with particular emphasis on double counting, and will explore the inconsistencies between United States and international law. Part VI will outline the potential remedies that are appropriate and feasible. Part VII will conclude with a determination of the current best solution to the inequities of double counting under the DOC’s current policy.

II. TRADE DUTIES AND THE REGULATORY REGIME

Trade restrictions may be imposed for many reasons, from national security to consumer protection to environmental concerns. The regulatory instruments covered by this Note are AD and CVD laws. These laws aim to correct any injury to domestic firms caused by foreign unfair pricing or government subsidies, which create distortions in international trade. As such, the duties imposed by these regulations are meant to correct, such distortions, not to punish the traders. The following Part gives an overview of AD and CVD regulations under U.S. law and under WTO agreements, historically and as they stand currently.

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6 See, e.g., Belina Anderson, Unilateral Trade Measures and Environmental Protection Policy, 66 TEMP. L. REV. 751, 754 (1993) (purporting to justify the use of trade restrictions to promote environmental protection).
7 See International Trade Administration, Import Administration, http://www.trade.gov/ia/ (last visited Aug. 1, 2010) (stating that this agency’s objective is to enforce trade laws and to mitigate unfair trade practices and protect U.S. industry).
8 See Tariff Act of 1930, 19 U.S.C. §§ 1671, 1673 (2006) (noting that a CVD should be assessed “equal to the amount of the net countervailable subsidy” and mandating that ADs be imposed in “the amount by which the normal value exceeds the export price . . . for the merchandise”).
A. Antidumping Duties

An AD is a tariff imposed on imports "to protect domestic companies" from the domestic sale of foreign goods at less than fair market value. For AD purposes in the United States, fair market value is determined by the producer's domestic profit margins—the amount of money a producer makes from its product in the domestic market—or the cost of producing the product. If the profit in the exporting country is larger than the profit in the importing country, then "dumping" has occurred. An AD acts to prevent price discrimination between foreign and domestic markets. Dumping also occurs when the sales price in the importing country is "less than fair value," or the cost of production. The determination that dumping has occurred is the first step toward the imposition of ADs under United States law. Under U.S. AD law, an AD may not be imposed until it is determined that the imported foreign goods "are being, or are likely to be, sold ... at less than fair-market value." There must also be a determination that a domestic industry is or is likely to be materially injured, or that an industry's establishment in the domestic market is "materially retard[ed]," before an AD can be imposed on an imported good. Before damages can be assessed, there must be proof of present or potential, material injury to a "'domestic like product.'" Further, such injury, or threat thereof, must be shown to be directly caused by imports that are the subject of the investigation by the U.S. authorities, though "it is not necessary that imports be the sole cause, or even a major cause, of the injury as long as [they are] more than a de minimis factor." If these

11 See id. (noting how profit margins are used to determine whether dumping has occurred).
12 See id. (stating that AD laws amount to "anti-profit-discrimination laws").
15 Id.
16 Id.
17 C.J.S. Customs Duties, supra note 3, § 151.
18 Id.
19 Id. § 152.
requirements are satisfied, then damages are assessed. The amount of damages, which takes the form of a duty, is the difference between the “normal value,” or fair market value, and the export price. United States customs officers levy these damages against the importer of the infringing goods. ADs are remedial, not punitive in nature; accordingly, ADs are not meant to grant an unfair advantage to domestic industries. Thus far the description of this framework does not capture the legal nuances that have created a situation ripe for abuse; in order to reach the heart of the problem, one must examine the DOC’s imposition of ADs on nonmarket economies.

Though the imposition of ADs may seem fairly straightforward, the process becomes complicated when the exporting country has a centralized, or “command,” economy. A command economy exists where a central authority maintains control over the means of production. Complications arise when evaluating countries with centralized economies because government control of supply and demand makes price levels difficult to ascertain. The United States classifies these types of economies, generally found in former and current communist countries, as nonmarket economies. If a country is classified as a nonmarket economy and the normal value of a good cannot be determined within that market, a constructed value is calculated using the

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21 Id.
22 Id.; see also C.J.S. Customs Duties, supra note 3, § 146 (noting that the duty’s remedial purpose is defeated when it is paid by the exporter rather than the importer).
23 C.J.S. Customs Duties, supra note 3, § 146.
24 See id. (noting that AD provisions are meant to “level[ ] the playing field”).
value of the inputs for production of the good found in a surrogate country.\(^{28}\) Such a surrogate country should operate, to the extent possible, as a market economy at a comparable level of development, with "significant producers of comparable merchandise."\(^{29}\) Some illustrative factors, or inputs, of production are labor hours; quantity of raw material; utilities; and the cost of capital.\(^{30}\) Also incorporated into the factors of production are approximate expenses and profits.\(^{31}\) The constructed value is then used to determine whether foreign goods are being sold in the United States at less than fair market value.\(^{32}\) If so, and if the other factors for imposition of an AD are met, then a duty, or tax, may be imposed on the goods at a value no greater than the difference between the constructed value of the good and the amount at which it is sold in the United States.\(^{33}\)

China's status as a nonmarket economy makes its firms easy targets for ADs.\(^{34}\) Chinese and domestic producers are likely to disagree over the appropriate surrogate markets to be used for comparison, with the outcome typically favoring U.S. producers.\(^{35}\) The constructed value of goods also fails to properly account for any comparative advantage of Chinese firms in relation to the firms of the surrogate country used for valuation.\(^{36}\) Comparative advantage is a benefit of one country over another in the production of a good

\(^{28}\) See Tariff Act of 1930, 19 U.S.C. § 1677b(c) (2006) (noting that "the valuation of the factors of production shall be based on the best available information . . . in a market economy country").

\(^{29}\) Id. § 1677b(c)(4).

\(^{30}\) Id. § 1677b(c)(3).


\(^{32}\) See 19 U.S.C. § 1677b(a) (illustrating the construction of normal value in order to make a "fair comparison . . . between the export price or constructed export price and normal value").

\(^{33}\) Id. § 1671(a); see also Peele, supra note 10, at 125 (noting that the amount of the duty should not exceed the damages).


\(^{35}\) See id. (providing the example of the use of labor costs from Singapore to show the disparate results reached by using market and nonmarket economy valuation methods); see also Charlene Barshefsky, Non-Market Economies in Transition and the US Antidumping Law: Remarks on the Need for Reevaluation, 8 B.U. Int'l L.J. 373, 375 (1990) (noting that AD margins are typically higher in surrogate-country cases than in other AD cases).

\(^{36}\) See Barshefsky, supra note 35, at 375 (discussing problems with the nonmarket economy valuation method).
or goods as a result of lower opportunity costs (i.e., the lower cost of an input). China has comparative advantages in "flexible regulations, low-cost labor, low trade barriers, highly skilled labor, and good transportation and logistics." The use of comparative advantage has been demonstrated to increase world production through specialization, which is beneficial to all parties involved. This inequity that results from use of a surrogate occurs because there is no provision for the consideration of lower input costs, even if these costs were discernable. Another problem with the surrogate valuation system is that when the surrogate does not voluntarily disclose its input costs, the DOC may use the surrogate country's import prices. The lack of predictability associated with using a surrogate's value leaves producers in nonmarket economies to speculate how to appropriately price their products so as to avoid ADs.

The United States updated its AD laws in 1995 to bring them into general compliance with the WTO Agreement on Interpretation of Article VI. However, some issues are not resolved by this Agreement, leaving the door open for U.S. interpretation, which may lead to disputes in the WTO.

B. Countervailing Duties

A CVD, or a tax based on a countervailable subsidy, is levied to protect domestic industries from unfair competition created by foreign subsidies on imported goods. Subsidies distort markets, and the imposition of a duty is

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38 See Barshefsky, *supra* note 35, at 375 (noting that a lower input cost is a comparative advantage).
40 See Ghei, *supra* note 37, at 121 (discussing the traditionally held belief, advanced by Adam Smith and David Ricardo, that international trade liberalization results in a net increase in output).
41 See Barshefsky, *supra* note 35, at 375 (noting that the AD law does not allow for the consideration of lower input costs in a nonmarket economy).
42 *Id.*
43 *Id.*
45 *Id.* at 35.
47 Letter from Patricia Mears, Director, Nat'l Ass'n Mfr., to Susan H. Kuhbach, Senior
meant to rebalance the market. A subsidy is "[a] grant, usu[ally] made by the
government, to any enterprise whose promotion is considered to be in the
public interest." Under U.S. law, an industry is considered subsidized when an
authority:

(i) provides a financial contribution,
(ii) provides any form of income or price support within the
meaning of Article XVI of the [General Agreement on Tariffs
and Trade] 1994, or
(iii) makes a payment to a funding mechanism to provide a
financial contribution, or entrusts or directs a private entity to
make a financial contribution, if providing the contribution would
normally be vested in the government and the practice does not
differ in substance from practices normally followed by
governments, to a person and a benefit is thereby conferred.

Overall, the substance of this definition is consistent with that embodied in
the WTO Agreement on Subsidies and Countervailing Measures, though the
terminology within each definition differs to some degree. U.S. authorities
determine the existence of a subsidy without regard to whether the beneficiary
is a public or private entity. To be countervailable, a subsidy must be made
to a specific industry, but may be direct or indirect. Classes of subsidies
that are not countervailable are generally referred to as "green light"
subsidies. Actionable subsidies, on the other hand, can be divided into two


49 BLACK'S LAW DICTIONARY 1469 (8th ed. 2004).
51 Gantz, supra note 44, at 49.
53 See Peter D. Ehrenhaft, Remedies Against "Unfair" International Trade Practices-2008, SN 056 ALI-ABA 131, 154–55 (2008) (noting that a subsidy "must specifically aim to aid identifiable firms or industries and not at [sic] a region or the country as a whole").
55 Id. § 1677(5)(B).
56 See Irene Ribeiro Dubowy, Subsidies Code, TRIPS Agreement, and Technological
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categories: “red light”—strictly prohibited subsidies—and “amber light”—subsidies that are not prohibited, but may be actionable.57

CVD laws are administered similarly to AD laws.58 In order to warrant the application of CVDs, an actionable subsidy must cause or be likely to cause material injury to or materially retard the establishment of domestic industry.59 If this test is satisfied, the Tariff Act mandates that a duty be assessed on the merchandise, “equal to the amount of the net countervailable subsidy.”60 The purpose of this provision, like the AD provision, is only to protect domestic firms from unfair competitive advantage.61 However, material injury was not always required for the imposition of CVDs: prior to 1995, a separate provision in the Tariff Act of 1930, Section 303, did not require material injury as a prerequisite to the imposition of CVDs.62 This provision was repealed to bring United States CVD laws into compliance with WTO requirements.63 As with ADs, the United States negotiated fervently with other nations to make many of its practices count as the norm by WTO standards.64 The concessions made by the U.S. were generally codified in to U.S. law as the Uruguay Round Agreement Act after the Uruguay Round of WTO negotiations.65

Unlike ADs, CVDs have not always been applied to nonmarket economies.66 This was made clear in Georgetown Steel Corp. v. United States (Georgetown Steel), a case in which the Fourth Circuit upheld a determination by the DOC that CVDs cannot be applied to nonmarket economies.67 Though the holding could be interpreted to state that CVDs can never be applied to

Development: Some Considerations for Developing Countries, 8 J. TECH. L. & POL’Y 33, 43 (2003) (discussing the three types of subsidies under the WTO Agreement on subsidies and Countervailing Measures, and noting that “green light” subsidies are “nonspecific” and “nonactionable”).

57 Id.
58 Lantz, supra note 48, at 1009.
60 19 U.S.C. § 1671(a)(2).
61 C.J.S. Customs Duties, supra note 3, § 136.
62 See Lantz, supra note 48, at 1020 (discussing the history of CVD law and the repeal of section 303).
63 See id. at 1021 (noting that the United States decided to repeal Section 303 and administer CVD laws based on the Uruguay Round Agreements Act).
64 See Gantz, supra note 44, at 48 (discussing acceptance of U.S. trade practices by WTO parties).
65 C.J.S. Customs Duties, supra note 3, § 25.
66 See Lantz, supra note 48, at 1023–28 (discussing Georgetown Steel and other reasons why the United States historically has not applied CVDs to nonmarket economies).
67 801 F.2d 1308 (Fed. Cir. 1986).
nonmarket economies, precedent existed showing the application of CVDs to centralized economies (e.g., Nazi Germany and Tsarist Russia). Problems with applying CVDs to nonmarket economies arise because CVDs require an internal "market-oriented benchmark," or, in other words, an unsubsidized comparison.

There are also differing views on the ability of governments in nonmarket economies to grant subsidies. One view is that these governments can grant subsidies, but they must be measured in terms of "preferential treatment" by the government toward a particular industry or organization, rather than as just a benefit from the government. The problem with this theory is that "a great deal of government subsidization would not be countervailable" because of difficulties in identifying market-oriented benchmarks. A second view is that it is impossible for the government in a nonmarket economy to grant countervailable subsidies because subsidies are too prevalent through the governmental allocation of funds within the market and thus no particular subsidy can be qualified. Additionally, if the means of production are publicly owned, there is no "commercial benchmark"—the measure typically used by the DOC to determine CVDs. The Georgetown Steel decision may have seemed to prohibit the practice of applying CVDs to nonmarket economies, but the DOC indicated as early as 1992 that Georgetown Steel may not be a complete bar to such a practice. Furthermore, a 2006 DOC determination in regard to coated free-sheet paper imported from China effectively overturned the DOC’s longstanding policy, thus allowing the application of CVDs to industries within nonmarket economies the DOC deems to be sufficiently "market oriented."

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68 Lantz, supra note 48, at 1029 (discussing the Court of International Trade determination that Section 303 applies to "any country," including those with nonmarket economies).
69 Barshefsky, supra note 35, at 374.
70 See Lantz, supra note 48, at 1021 (noting that "disagreement has existed" over the issue and "two schools of thought" have emerged).
71 Id. at 1021–22.
72 Id. at 1022.
73 Id. at 1022-23.
74 Id.
75 Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).
76 See Laroski, supra note 31, at 376–77 (commenting that the Georgetown Steel decision may allow CVDs if merchandise is exported from a "market-oriented" industry).
77 Zhao & Wang, supra note 27, at 3, 20 (noting the use of "an internal market-oriented benchmark" in determining subsidization).
C. Nonmarket Economy Status

Because duties are imposed differently according to a nation's economic classification, the classification of a nation as a nonmarket economy is likely to be a point of contention. The definition of "nonmarket economy" status was first codified in the Omnibus Foreign Trade and Competitiveness Act of 1988, though the classification itself existed long before. Some critics contend that the 1988 definition was not very helpful, noting that it did little more than provide that a nonmarket economy is not, in fact, a market economy. Current U.S. law classifies a country as a nonmarket economy if "the administering authority determines [that the country] 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." This provision also indicates factors to be considered in determining nonmarket economy status, including, but not limited to, the convertibility of the foreign currency, the extent that wages reflect the free bargaining position of the parties involved, the extent that joint ventures and investment by foreign firms are permitted, the amount of government control or ownership over the means of production, and how much control the government has over the allocation of resources. The nonmarket economy system, however, has been described as arbitrary at best. There are manifest improprieties with both the classification system and the valuation system for nonmarket economies.

On September 17, 2001, after almost fifteen years of negotiations, China succeeded in its bid to join the WTO. During the process of accession to the WTO, China...
WTO, China had to enter into negotiations with member states, often conceding more than it was getting.\(^7\) Specifically, one of China’s concessions was that it agreed to be treated as a nonmarket economy for fifteen years, after which it would automatically acquire market economy status in regard to ADs.\(^8\) This bargain for nonmarket-economy classification has been criticized as a representation of the “unfair results” reached by unequal bargaining power.\(^9\) However, the agreement does not act as a bar to the earlier classification of China as a market economy if other countries so choose; in fact, the bilateral agreement between the United States and China allows for the use of Chinese industry prices in the determination of duties if the investigated firm can show that it operated in a free-market environment.\(^9\)

This is consistent with the “industry-by-industry” approach to reclassification that is also available to the DOC.\(^9\) The factors involved in the DOC’s approach are minimal government involvement in the determination of price and output quality, private rather than public ownership, and that the prices of inputs are determined by the market.\(^9\) Though the DOC may apply market economy status to Chinese industries individually, it is not mandatory that it do so.\(^9\) In fact, the DOC has said that overcoming the requirements of proof that a firm operates in a free-market environment would likely be difficult.\(^9\)

There are many problems associated with the United States’ use of nonmarket-economy status in addition to those already listed. For one, the laws can be traced back to Cold War policies,\(^9\) with the inequitable outcome of treating former and current Communist countries rigidly, while some developing and more heavily regulated economies are treated as market

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\(^{87}\) See id. at 91–92 (discussing the market-oriented industry approach in both the WTO and the DOC).

\(^{88}\) See id. at 84, 88 (noting that the DOC need not grant market economy status without a showing that the industry satisfies the requisite factors but that, in 2016, all members of the WTO will be required to recognize China as a market economy)

\(^{89}\) See id. at 84.
economies.96 Further problems are associated with economies in transition.97 Despite significant market-oriented reforms in historically nonmarket economies, it remains difficult to determine when a nonmarket economy has transitioned into a market economy.98 Though the DOC could evaluate industries individually, it has historically refused to do so.99 As a result, the DOC evaluates each country as a whole—an even more nebulous process that is less likely to result in a determination of market-economy status. This problem is especially true for those industries that are substantially market driven, but that exist within a nonmarket economy.100 These problems—combined with those presented herein—present a compelling case for reform of the United States’ combined AD and CVD policy toward nonmarket economies in general, and China in particular.

III. Initiating Antidumping and Countervailing Duties and Recourse

The procedure behind applying ADs and CVDs can be divided into two parts based on the regulatory body governing the procedure. First, there is the procedure under U.S. law that includes the process of initiating and reviewing duties.101 Second, there is the WTO procedure, which lays out a process for remedying unfair trade practices and a process for reviewing the fairness of applied ADs and CVDs under domestic laws.102 The WTO also has an appeals
This Part will focus on providing a cursory understanding of these procedures under U.S. law and within the WTO system.

A. Initiation of Duties

Under U.S. law, the procedures involved in initiating and reviewing both ADs and CVDs are remarkably similar. An investigation leading to the imposition of type of duty must be commenced upon the initiative of the Secretary of Commerce (the Secretary) or upon petition by an "interested party" on behalf of the domestic industry, filed with the Secretary and the International Trade Commission (ITC). Once a petition has been filed, the DOC notifies the foreign governments involved and makes a determination as to whether the petition alleges all necessary elements of the claim under U.S. law for imposing an AD or CVD. If the DOC makes an affirmative determination that the petition is sufficient and was filed by an interested party, the Secretary initiates an investigation into whether any unfair dumping or subsidy has occurred. The Secretary must notify the ITC of its determination, whether affirmative or negative, and, in the event of an affirmative preliminary determination, provide the relevant support so that the ITC can initiate its own investigation. The purpose of the ITC's investigation is "to determine whether there is a reasonable indication of injury." If either the DOC or the ITC makes a negative determination, then the investigation is terminated with no duties imposed. If the DOC determines that dumping has occurred or that there is a countervailable subsidy

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103 To e/whatis_e/tif_e/disp1_e.htm (last visited Aug. 1, 2010) (describing the WTO dispute-settlement process, including review of unfair trade practices and the appellate process).

104 Compare Tariff Act of 1930, 19 U.S.C. § 1671(a) (2006), with 19 U.S.C. § 1673(a) (both providing that the duty in question be imposed in an amount "equal to the amount of the net countervailable subsidy").

105 AM. JUR. 2D Customs Duties, supra note 101, §§ 210–211.

106 Id. § 213.

107 See id. (providing that the Secretary of Commerce must determine "whether a countervailable subsidy is being provided or if the subject merchandise is being, or is likely to be sold in the United States at less than its fair value").

108 Id.

109 Id. § 214.

110 Id. § 216.
and the ITC makes an affirmative determination of a reasonable indication of material injury, then duties will be imposed.\textsuperscript{111}

During the investigations, the ITC and the DOC must grant a hearing at the request of "any party to the investigation" before it makes a determination.\textsuperscript{112} However, the ITC is only required to state the facts and conclusions of law in its determination\textsuperscript{113}; therefore, it need not respond directly to any arguments that were brought by the parties during a hearing.

The WTO provides another means of recourse to perceived unfair trade practices through the imposition of duties. The WTO settles disputes that arise between member governments when one government believes that another has violated a WTO agreement or commitment.\textsuperscript{114} In fact, when an issue is covered by an agreement or commitment entered into with the WTO, member states have agreed to use the WTO's dispute resolution system to settle any disputes arising from those issues.\textsuperscript{115} The WTO Dispute Settlement Body is responsible for the dispute resolution process, with its basis in the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes, also known as the Dispute Settlement Understanding (DSU).\textsuperscript{116} This process first calls for consultation, with an emphasis on a mutual resolution between parties when possible.\textsuperscript{117} This method has been successful to a large extent, with more than half of the disputes either being resolved at the consultation stage, or remaining "in a prolonged consultation phase."\textsuperscript{118} If the dispute is not resolved at this initial stage, or consultation is denied, then the DSU allows the complainant to request the establishment of a panel.\textsuperscript{119} The panel is "normally [composed] of three persons . . . from countries not party

\textsuperscript{111} \textit{Id.}


\textsuperscript{113} \textit{Id.} § 1671b(f).


\textsuperscript{115} World Trade Organization, Legal Texts: The WTO Agreements, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm (last visited Aug. 1, 2010) ("One of the central provisions of the [Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)] reaffirms that Members shall not themselves make determinations of violations or suspend concessions, but shall make use of the dispute settlement rules and procedures of the DSU.").

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.} ("The DSU emphasizes the importance of consultation in securing dispute resolution . . .").

\textsuperscript{118} World Trade Organization, A Unique Contribution, \textit{supra} note 102 ("By July 2005, only about 130 of the nearly 332 cases had reached the full panel process.").

\textsuperscript{119} World Trade Organization, Legal Texts: The WTO Agreements, \textit{supra} note 115.
to the dispute." The panel then renders a report on its determinations. If one party is found to be in violation of a WTO agreement, all attempts are made to allow that member to comply within a reasonable period of time as determined by the Dispute Settlement Body in the WTO. If that party fails to comply within a reasonable period of time, sanctions must be authorized within thirty days thereafter, "unless there is a consensus against the request" for sanctions. These sanctions are meant to be remedial rather than punitive, and in the best circumstances should be mutually agreed upon by the interested parties. An attempt is also made to direct the sanctions toward the same sector of the economy harmed by the offending unfair trade practice.

These are the ways in which ADs and CVDs may be initiated under U.S. law and WTO agreements. In the case of coated free-sheet paper, as well as the more recent cases of trade sanctions against Chinese firms, the U.S. initiated proceedings only under United States law, which is in violation of its agreements with the WTO. The remedies available to a party subjected to U.S. duties in such cases are addressed below.

B. Challenging the Imposition of Duties

There are two ways for an interested party (typically a foreign producer) to challenge the United States' imposition of duties: (1) the interested party can challenge a final administrative determination in U.S. courts and seek periodic administrative review; or (2) the interested party can challenge the fairness of the duty, or the fairness of an adverse panel ruling, through the Dispute Settlement Body in the WTO.

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120 Id.
121 Id.
122 World Trade Organization, A Unique Contribution, supra note 102.
123 Id.
124 See C.J.S. Customs Duties, supra note 3, § 136 (indicating that duties are "intended to remedy disparities").
125 World Trade Organization, A Unique Contribution, supra note 102.
126 See supra note 115 and accompanying text (discussing the WTO requirement to use its dispute resolution system).
127 See C.J.S. Customs Duties, supra note 3, §§ 167, 186 (noting the availability of appeal in the Court of International Trade and the U.S. Court of Appeals for the Federal Circuit).
128 See World Trade Organization, A Unique Contribution, supra note 102 (describing the availability of review of unfair trade practices by the WTO Dispute Settlement Body, including review of the unilateral imposition of duties as well as an appeals process for review of duties authorized by the Dispute Settlement Body).
In the U.S., an adversely affected party may appeal the final determination of the ITC to the Court of International Trade (CIT) and, barring a favorable resolution, thereafter to the U.S. Court of Appeals for the Federal Circuit. At least once every twelve months, “beginning on the anniversary of the date of publication of [the] countervailing duty order,” there must be a review of, inter alia, the amount of the duty imposed, upon request by a party. Every five years both the ITC and the DOC must review the imposition of duties to determine whether the dumping or subsidy would continue to occur upon revocation of the duty, and whether there would continue to be material injury to a domestic industry. This five-year review process is often referred to as a “sunset” review, because the duty would otherwise expire automatically. Additionally, review may be granted based on a change in circumstances, but the burden of persuasion in such a case lies with the party seeking a termination or suspension of the investigation.

The WTO’s process for addressing a grievance of one member against another in regard to ADs or CVDs is essentially the same as the process for handling other unfair trade practices—it begins with consultation. Similarly, if consultation does not lead to a mutually agreeable solution, then a three-person panel is established. The panel’s determination in either case may be appealed by either party within a specific time frame. The panel report or the appellate body report, whichever is final, is then adopted and parties are expected to comply with the recommendations therein. However, the parties may still come to a mutual agreement that has the effect of circumventing the panel or appellate body’s determination. If the report is not complied with,
sanctions against the offending party may be authorized (again, barring consensus to the contrary).  

There are some problems with these review processes. Review in the United States is limited and may carry, or be seen to carry, some bias toward domestic producers for the same reasons behind potential bias in the initial determination. The WTO, on the other hand, has no enforcement capabilities and can only sanction retaliatory measures that undermine one of the fundamental purposes of the organization: to reduce barriers to international trade. Additionally, United States courts have held that WTO decisions are not binding domestically. Moreover, only governments can avail themselves of the WTO’s dispute settlement procedures; in other words, there is no private right of action. Additional problems could arise if parties decide not to comply with the resolution or to retaliate outside of the WTO process, which could result in increased barriers to trade—contrary to the spirit of the WTO agreements. Despite the flaws within these systems, they may be the only legal recourse for a nation confronted with the imposition of ADs or CVDs by the United States.

140 Id.
141 See supra Part II (identifying the problems with U.S. AD and CVD law).
145 See DSU, supra note 142, art. 1 (noting that the dispute settlement process is only available for “disputes between Members” of the WTO).
146 See supra note 143 and accompanying text (discussing the trade objectives of the WTO).
147 Some nations may have access to only limited review if they are not part of the WTO, while other nations may have additional options if they are parties to other multilateral or bilateral trade agreements that allow for alternative forms of dispute settlement. See, e.g., Certain Softwood Lumber from Canada, Secretariat File No. USA-CDA-2002-1904-07 (Apr. 19, 2004) (remand decision), available at http://www.worldtradelaw.net/nafta19/lumber-injury-remand-nafta19.pdf (providing a ruling on a trade dispute in a forum other than the domestic U.S. and WTO dispute settlement regimes).
IV. CHARTING A NEW COURSE

In 1986, the DOC seemingly decided that CVDs, as provided for by domestic law, were not applicable to nonmarket economies.\textsuperscript{148} The DOC has since reversed this policy, stating instead that CVDs not only may be applied to nonmarket economies, but further that CVDs are to be valued at a third or (surrogate) country's market price, as with ADs.\textsuperscript{149} The DOC thus set the stage for the application of both ADs and CVDs to imports from a nonmarket economy—a situation which was almost brought to fruition in the investigation into the importation of coated free-sheet paper.\textsuperscript{150} The decision to make CVD law applicable to nonmarket economies was affirmed by the Court of International Trade on March 29, 2007.\textsuperscript{151} CIT's affirmation seemed to seal the fate of the legality of applying CVDs to nonmarket economies under U.S. law.\textsuperscript{152} The process was, however, cut short when the ITC determined that neither the AD nor the CVD investigation showed that a domestic industry had suffered material injury from the importation of coated free-sheet paper.\textsuperscript{153} Before the investigation was terminated, China had already begun to seek recourse through the WTO by requesting an initial consultation.\textsuperscript{154}

\textsuperscript{148} Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1316–18 (Fed. Cir. 1986).
\textsuperscript{150} Id.; Coated Free Sheet Paper from the People's Republic of China, 72 Fed. Reg. 30,758 (June 4, 2007) (postponement of final determination).
\textsuperscript{152} See Press Release, Commerce Applies Anti-Subsidy Law to China, supra note 151 (stating that on March 29, 2007, the Court of International Trade held that Georgetown Steel was not a bar to the application of CVDs to nonmarket economies and that the DOC had "broad discretion in this area").
\textsuperscript{153} Coated Free Sheet Paper from China, Indonesia, and Korea, 72 Fed. Reg. 70,892, 70,892 (Dec. 13, 2007) (final determination) ("[A]n industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from China, Indonesia, and Korea of coated free sheet paper . . . .").
request, China alleged: (1) failure of the U.S. to allege specificity of the countervailable subsidies; (2) failure "to make a proper determination of benefit" to the Chinese producers from the subsidy; (3) failure to make a proper determination of the value of the subsidy; and (4) failure to make a proper determination of the amount of dumping that was alleged to have occurred.\textsuperscript{155} With the discontinuance of the investigation in the U.S., this case lies dormant.\textsuperscript{156}

Since the March 29, 2007 determination by the DOC that CVD law is applicable to nonmarket economies there have been no fewer than twenty-four investigations initiated for the purpose of applying CVDs to Chinese imports to date.\textsuperscript{157} These investigations pertain to a variety of goods, ranging from citrate salts to pipes.\textsuperscript{158} Of those investigations, twelve have resulted in final determinations of countervailable subsidies; all of those cases that reached a determination of countervailable subsidies, have resulted in the imposition of duties.\textsuperscript{159} This occurred despite the fact that these issues had not been brought

\textsuperscript{155} Id.
\textsuperscript{156} See World Trade Organization, United States—Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds368_e.htm (last visited Aug. 1, 2010). The site states that this is current as of February 24, 2010 and allows for a more recent documents search, which confirms the dormant state of this case.
\textsuperscript{158} See Citric Acid and Certain Citrate Salts From the People’s Republic of China, 73 Fed. Reg. 26,960 (May 12, 2008) (notice of investigation) (indicating the initiation of investigations into subsidies to the Chinese citrate salts industry); Light-Walled Rectangular Pipe and Tube From the People’s Republic of China, 72 Fed. Reg. 40,281 (July 24, 2007) (notice of investigation) (indicating the initiation of investigations into subsidies to the Chinese light-walled rectangular pipe industry).
before the WTO for consultations on the determination that ADs and CVDs were warranted.\textsuperscript{160}

Though the remedies available to China under the U.S. regulatory regime seem to have been exhausted, at least for China’s claim that the DOC was precluded from applying CVDs to nonmarket economies, the Court of International Trade noted in 2008 that the issue of applying CVDs to nonmarket economies had not been addressed in \textit{People's Republic of China v. United States.}\textsuperscript{61} The court also did not make a determination in \textit{GPX Int'l Tire Corp. v. United States}, denying the plaintiff’s motion for other reasons.\textsuperscript{62} The court did indicate, however, that the holding in \textit{Georgetown Steel} does not act as a bar to the new interpretation of the Tariff Act of 1930 that allows for these duties, deciding only that the previous interpretation was consistent therewith.\textsuperscript{63} The court intimated that there must be a new inquiry into whether the statute is ambiguous and, if so, whether the new interpretation is reasonable.\textsuperscript{64} The issue has not yet been decided and is not likely to come before the court until the duties come into effect and foreign firms have exhausted all administrative remedies.

On September 19, 2008, just one year and one day after its request in regard to coated free-sheet paper, China again filed a request for consultation with the United States.\textsuperscript{65} This time, the case will likely be resolved, or at the very least, a panel or appellate body report will be issued, because duties have

\textsuperscript{160} Request for Consultations by China, \textit{United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China}, WT/DS379/1, para. 7(a) (Sept. 22, 2008) [hereinafter Request for Consultations by China, WT/DS379/1], available at http://www.worldtradelaw.net/cr/ds379-1 (circulating a request by China dated September 19, 2008).

\textsuperscript{161} 483 F. Supp. 2d 1274 (Ct. Int'l Trade 2007); \textit{see also} \textit{GPX Int'l Tire Corp. v. United States}, 587 F. Supp. 2d 1278, 1290 & n.8 (Ct. Int'l Trade 2008) (noting that the holding in \textit{People's Republic of China v. United States} “in no way resolves the matter” as to whether the DOC had the authority to apply CVDs to nonmarket economies).

\textsuperscript{162} \textit{See id.} at 1283 (dismissing the plaintiff’s claims for lack of jurisdiction).

\textsuperscript{163} \textit{Id.} at 1279–80.

\textsuperscript{164} \textit{See id.} (“\textit{Georgetown Steel} did not hold that the CVD law could never apply to NMEs . . . but only that [the DOC’s] decision not to apply it in that case was reasonable.”).

\textsuperscript{165} Request for Consultation by China, WT/DS379/1, \textit{supra} note 160.
already been assessed.\textsuperscript{166} China’s most recent request for consultation is significantly more elaborate than its previous request, alleging thirty separate grievances.\textsuperscript{167} Among these grievances, in addition to those found in its previous request a year before, were the “failure to inform interested parties of . . . whether” there was a “double remedy” for the same harm in the “simultaneous application” of both ADs and CVDs,\textsuperscript{168} failure to use the WTO’s consultation process,\textsuperscript{169} “resort[ing] to a benchmark outside of China” for the valuation of a subsidy,\textsuperscript{170} and generally an alleged lack of proof behind the determination that duties were warranted.\textsuperscript{171} These grievances all drive to the heart of the problems with the simultaneous application of ADs and CVDs against nonmarket economy classified countries, which will be discussed in the next Part.

V. A PROTECTIONIST SHIP THAT DOES NOT FLOAT

Having examined the substance and procedure behind the ADs and CVDs, as well as the history and current status of such actions pending against China, this Note will now turn to an analysis of the inequities created when these measures are used jointly against a nonmarket economy. In particular, this Part will focus on double counting. This must be done with less-than-perfect information about the prior and current cases because, as was alleged in China’s second request for consultation in the WTO, there is a lack of disclosure of the evidentiary basis upon which the duties were calculated.\textsuperscript{172} However, it can be shown that the method chosen by the DOC for the application of both ADs and CVDs to nonmarket economies is very likely to be inequitable, illegal, and, in trying to adjust for fairness, inefficient.


\textsuperscript{167} Compare Request for Consultation by China, WT/DS379/1, \textit{supra} note 160 (with each subparagraph a separate grievance), \textit{with} Request for Consultation by China, WT/DS368/1, \textit{supra} note 154.

\textsuperscript{168} Request for Consultation by China, WT/DS368/1, \textit{supra} note 154, at (7)(g).

\textsuperscript{169} See id. at (7)(a) (noting “the US authorities’ failure to invite China for consultations”).

\textsuperscript{170} \textit{Id.} at (4).

\textsuperscript{171} \textit{Id.} at (7)(b).

\textsuperscript{172} See id. at (7)(g) (noting that the DOC did not provide enough information to determine whether double counting had occurred).
Article VI, paragraph five of the General Agreement on Tariffs and Trade 1947 (GATT), an international agreement on trade normalization, states that no product “shall be subject to both [ADs] and [CVDs] to compensate for the same situation of dumping or export subsidization.” This provision is a means of preventing the double counting of subsidies. While U.S. law includes a provision that should eliminate double counting in the application of both ADs and CVDs, it is limited to offsetting “export subsidies,” those paid “only on products that are exported,” rather than a “domestic subsidy,” or “production subsidy,” which is paid “regardless of whether [those] products are exported,” though the effects of both types on an importing country are the same: the importing country’s producers face a loss. Since many of the subsidies at issue are China’s domestic subsidies, it is possible that a legitimate application of U.S. law could allow for double counting. This distinction will be elaborated upon in this Part.

As discussed above, in determining the fair market value in a nonmarket economy for AD purposes, the DOC uses a constructed value based on the input costs from a similar country. Not only does this method unfairly ignore any comparative advantage of the nonmarket economy country over the surrogate country (e.g., cheap labor), it also ignores any domestic subsidy the nonmarket economy may be giving to that industry. In other words, assuming the only difference between the nonmarket economy and the surrogate economy is that the surrogate country does not have the same domestic subsidies as the nonmarket economy country, then the fair market value, or normal value, would be equal to the cost of production in the

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174 Zhao & Wang, supra note 27, at 34.
175 See Tariff Act of 1930, 19 U.S.C. § 1677a(c)(1)(C) (2006) (requiring that, in calculating a constructed export price, the export price be increased by the amount of any CVD); see also Marguerite Trossevin, U.S. Wakes Up to the Changed Chinese Marketplace But the New View Won’t Necessarily Lower Duties Against “China Inc.,” 29 NAT’L L.J. 47 (2007) (noting that the purpose of the law is “to avoid double counting”).
177 Zhao & Wang, supra note 27, at 8–9.
178 See id. at 11 (“The effect of the production subsidy on the importing country is the same as that of the export subsidy . . . .”).
179 See supra note 159 (discussing Chinese subsidies in various cases).
180 19 U.S.C. § 1677b(c)(2).
181 See Barshefsky, supra note 35, at 374–75 (discussing problems with the nonmarket economy valuation method).
nonmarket economy country plus the domestic subsidies to that industry. This creates a higher AD than would exist if the normal value was determined by values from the nonmarket economy, because a domestic subsidy results in a lower normal value.\textsuperscript{182}

Theoretically, this imposition of a duty would not result in inequity, as it takes into account the unfair practices of the nonmarket economy in order to “level[] the playing field.”\textsuperscript{183} The trouble arises when a CVD is also imposed on the nonmarket economy: in the case of an export subsidy, the amount of the subsidy would effectively be subtracted from the AD, but in the case of a domestic subsidy, U.S. law may not explicitly require this action.\textsuperscript{184} This anomaly occurs in part because, in the case of a market economy, the subsidy would have been factored into the determination when the normal value was determined domestically.\textsuperscript{185}

Such a result would be strictly prohibited under the GATT, as this would be considered the same case of subsidization.\textsuperscript{186} Though not strictly prohibited, this situation would violate the remedial spirit of U.S. trade law as well.\textsuperscript{187} Despite the possible illegality of its occurrence, the likelihood of

\textsuperscript{182} An illustration of this principle is as follows: Country A is a nonmarket economy and because of a government domestic subsidy of $1 per unit, it can produce and sell Good X for $4 per unit. Good X is imported from Country A into Country B for sale at $3 per unit. Country B imposes ADs against Good X imported from Country A. Because Country A is a nonmarket economy, Country B uses the industry of Country C, a similar market economy, for determination of the normal value. All else being equal, because there is no subsidy in Country C, the good costs $5 per unit to produce and sell. Country B thus imposes an AD in the amount of $2 per unit on Good X coming from Country A.

\textsuperscript{183} See C.J.S. Customs Duties, supra note 3, § 146 (discussing the remedial nature of ADs).

\textsuperscript{184} See 19 U.S.C. § 1677(c)(1)(C) (requiring an increase in the export price in the amount of any CVD when calculating ADs, the resulting effect being a decrease in ADs, with the intention of offsetting any export subsidy, though there is no mention of intention to offset domestic subsidies).

\textsuperscript{185} See supra note 182. Notice that in the illustration, had Country B valued its AD using Country A’s domestic price (inclusive of the domestic subsidy), the AD would have been $1 instead of $2, but in the original illustration, if Country B also imposes a CVD on Good X from Country A in the amount of $1 per unit, then the total duties on Good X from Country A are now $3 per unit. This raises the price per unit in Country B to $6 per unit, higher than the price per unit in Countries A and C. The price is higher in Country B because the domestic subsidy in Country A is being accounted for twice, or double counted. It is counted first in the application of ADs, because of the determination at a surrogate country’s price, and again in the CVD itself.

\textsuperscript{186} GATT, supra note 173, art. VI.

\textsuperscript{187} See C.J.S. Customs Duties, supra note 3, §§ 136, 146 (discussing the remedial nature of both ADs and CVDs).
situations such as this reinforce the view that the United States is veering towards an increasingly protectionist trade policy.\textsuperscript{188}

VI. REMEDYING THE SITUATION

There are a number of potential ways to resolve the problem of double-counting inherent in the current method of applying ADs and CVDs to China. First, the DOC could change China's classification from a nonmarket economy to a market economy. Second, individual industries could be evaluated as market economies in situations where the DOC deems it necessary to impose both ADs and CVDs. Third, when the DOC applies both ADs and CVDs to a Chinese industry, it could factor out the amount of any existing subsidy from the calculation of the AD. Lastly, a fourth option would be for the duties applied to Chinese industries to be limited to ADs only.

Again, the DOC has the option to reclassify China as a nonmarket economy. As discussed above, neither U.S. law nor WTO agreements would bar such a change.\textsuperscript{189} Though China has not officially requested a change of status from the DOC, the DOC has repeatedly denied industry-specific requests,\textsuperscript{190} thus making it unlikely that it would approve a change of classification of China itself. One reason for the DOC's refusal is the difficulty of determining certain economic factors needed for an accurate measurement of fair market value, due to the lack of transparency in China's economy.\textsuperscript{191} Another, perhaps more pragmatic, factor concerns the impact of decreasing duties in industries currently subject to tariffs following such a reclassification.\textsuperscript{192} Without regard to the merits of this reasoning, and without

\textsuperscript{188} See, e.g., N. Gregory Mankiw & Phillip L. Swagel, Antidumping: The Third Rail of Trade Policy, FOREIGN AFF., July–Aug. 2005, at 107, 111–12 (discussing the transition of U.S. trade policy from guarding against unfair trade practices to protectionism, and noting that “an unintended consequence of this evolution is that modern antidumping practice actually facilities the kind of unfair and anticompetitive behavior it was intended to prevent . . . . Allowing domestic firms to threaten foreign competitors with antidumping action makes it easier for them to keep prices high.”).

\textsuperscript{189} See Tracey, supra note 34, at 84 (noting that U.S. law and WTO agreements allow China to change its classification if China can satisfy the DOC's requirements).

\textsuperscript{190} See id. at 88 (stating that the DOC maintains a whole-country classification approach).

\textsuperscript{191} See Eid, supra note 26, at 66 (discussing the difficulties of assessing “import relief” against nonmarket or communist economies).

a change in circumstances, such as increased economic transparency, a
different outcome is unlikely in the near future.

Market-economy status could also be granted on an industry-by-industry
basis. Again, the DOC has repeatedly denied requests for market-economy
classification made by individual Chinese industries. The same factors—a
lack of transparency and lower resulting duties from reclassification—are
also likely influential in the DOC’s decision not to change China’s status to a
market economy. Though it may be prudent to begin the process of giving
Chinese industries market-economy classification to ease into the mandated
market classification of China by 2016 for AD purposes, without a change
in circumstance (such as an increase in transparency), this approach also seems
unlikely.

The DOC could also choose to maintain its current policy of applying ADs
and CVDs to nonmarket economies and simply offset one in the amount of the
other. The DOC is currently purporting to address the potential for double-
counting based on the facts presented in each case. If the DOC uses this
method of offsetting, an adjustment to the AD would be needed in order to
avoid double-counting. This adjustment would need to be in the amount of any
subsidy that is countervailed. Such an adjustment, though effective, is
redundant because it simply calls for the valuation of something that is already
taken into account. Not only is it redundant, but it also has the potential to
waste time and money, not to mention legal resources and fees due to disputes
like the one currently pending in the WTO. This waste is exacerbated by the

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GAO, U.S.-CHINA TRADE REPORT] (discussing the likely result of “reduce[ing] the duty rates
applied to some Chinese companies” after a reclassification of China to a market economy).
193 See Tracey, supra note 34, at 88 (commenting on the country-wide nonmarket
determination rather than a separated analysis of industries).
194 See Eid, supra note 26, at 66 (discussing the difficulties of assessing import relief against
nonmarket or communist economies).
195 GAO, U.S.-CHINA TRADE REPORT, supra note 192, at 28 (discussing the likely result of
lower import duties from a reclassification of China as a market economy).
196 Accession Protocol, supra note 88, § 15.
197 See Press Release, Commerce Applies Anti-Subsidy Law to China, supra note 151 (noting
that the DOC “will have to respond to . . . concerns” of double-counting during the course of
its investigation).
60,632 accompanying Issues and Decision Memorandum at cmt. 2 (Oct. 25, 2007) (final
determination (discussing an alternate view that domestic subsidies might not be passed down
into price and ADs should not automatically be adjusted to take them into account).
difficulty in ascertaining the amount of the subsidy itself, as well as the necessity of using a surrogate country for this type of valuation. 199

Lastly, the United States could return to its policy of applying only ADs to nonmarket economies. This option may not be the most equitable, but it is a method that has a history of moderate success such that it is not as contentious as other options, it is relatively easy to administer, it does not require a second valuation, and it does not violate U.S. law or WTO agreements—at least not until China's accession protocol mandates that China be considered a market economy for the application of ADs. 200

VII. CONCLUSION

Though ideally the valuation of ADs and CVDs would be more equitable if China were classified as a market economy, such a classification may not be practicable for valuation purposes because, as discussed above, many of the business and bureaucratic practices in China remain non-transparent. However, the alternative of factoring out subsidies from AD valuations is an arduous and redundant task. The most practical solution to the problem of double counting is simply to return to the previous DOC policy of applying ADs, and only ADs, to nonmarket economies. This regression, though perhaps not the most equitable, would yield a result that stays within the bounds of both U.S. law and the WTO agreements, as discussed above. In any case, in an effort to resolve the inequities caused by double counting, the DOC should reconsider its use of the surrogate valuation system in applying both ADs and CVDs to nonmarket economies such as China.


200 Accession Protocol, supra note 88, § 15.