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PUTTING THE SPECTER OF DOUBLE COUNTING TO REST: HOW PUBLIC LAW 112-99 RESOLVES THE ISSUE OF DOUBLE COUNTING IN CONCURRENT COUNTERVAILING AND NON-MARKET ECONOMY ANTIDUMPING INVESTIGATIONS

Stephanie E. Hartmann

I. INTRODUCTION

The U.S. Department of Commerce (the DOC) has faced considerable criticism for the way it implements trade remedies. Although U.S. trade laws are almost identical to the texts of the most important international agreements, the DOC’s implementation of the laws differs from most countries. The DOC’s implementation processes that lead to so-called “double counting,” are some of the most controversial.

Double counting arises in the market economy (ME) context when countervailing duties (CVDs) and antidumping duties (ADs) are concurrently applied to remedy an export subsidy. The concurrent application of these two duties causes double counting because the calculation of the dumping margin in the AD investigation also incorporates the impact of an export subsidy. This process assumes that the subsidy is passed through the recipient manufacturer to reduce export prices, rendering at least part of the concurrent AD duties double counted.

In the ME context, double counting is only problematic if the

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4 See PHILIP BENTLEY & AUBREY SILBERSTON, ANTI-DUMPING AND COUNTERVAILING ACTION: LIMITS IMPOSED BY ECONOMIC AND LEGAL THEORY 8 (2007) (“Diversity is a prevalent characteristic of the way anti-dumping and countervailing action is taken by different WTO member countries.”); McDaniel, supra note 1, at 742.

5 See BENTLEY & SILBERSTON, supra note 4, at 31.

6 Id.

7 Id.
subsidy is an export subsidy. This is because a domestic subsidy affects export and domestic pricing equally. As a result, the subsidy should not give rise to a difference between export prices and domestic prices.

The phenomenon of double counting in the ME context, where there are concurrent AD and CVD investigations involving export subsidies has long been recognized, is addressed in Article VI:5 of the GATT 1994. This Article prohibits the concurrent application of ADs and CVDs that compensate for the same situation of dumping or export subsidization.

Double counting arises in the non-market economy (NME) context when there is a domestic subsidy, as opposed to an export subsidy. This is attributable to the unique nature of the NME AD methodology the DOC applies, which uses either surrogate country factors of production or prices to estimate the normal value of a similar product. The development of a double counting issue in the NME context is a relatively recent and controversial phenomenon. Historically, the DOC did not conduct CVD investigations when the exporting country was a NME country. This was a result of the difficulties involved in isolating countervailable subsidies from general economic central planning.

The policy of not applying CVDs to NME countries changed, with respect to the People’s Republic of China (China), in 2006. That year the DOC determined that China’s economy was sufficiently market-like to apply CVDs. In spite of this transition to treating China as a ME country for the purpose of CVD investigations, the DOC has persisted in applying the NME AD methodology in investigations and administrative reviews involving China. It is this inconsistent treatment that potentially gives rise to duplicative remedies for which the DOC is

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8 Id.
9 Id.
10 GATT 1994, supra note 3; see BENTLEY & SILBERSTON, supra note 4, at 30–31. The DOC makes an automatic adjustment for double remedies in concurrent investigations of export subsidies in ME countries, because an export subsidy is assumed to result in a lower export price, because it creates an incentive for export sales over domestic sales. GPX Int’l Tire Corp. v. United States, 645 F. Supp. 2d 1231, 1241 n.9 (Ct. Int’l Trade 2009); see 19 U.S.C. § 1677(2006).
11 See 19 U.S.C. § 1677. The NME AD methodology is itself controversial because it typically results in duties that are significantly higher than those calculated using the ME methodology, thereby incentivizing overuse in the interest of protectionism. See generally BENTLEY & SILBERSTON, supra note 4, at 19. This incentive is due to the use of surrogate country data, the application of the country-wide rate of facts available and the drawing of adverse inferences in choosing among the available facts. See U.S. GOVT ACCOUNTABILITY OFFICE, GAO-06-231, U.S.-CHINA TRADE: ELIMINATING NON MARKET ECONOMY METHODOLOGY WOULD LOWER ANTIDUMPING DUTIES FOR SOME CHINESE COMPANIES 12–13, 22 (2006).
12 Id.
14 Id.
15 See GPX, 645 F. Supp. 2d at 1237.
16 Id.
17 See, e.g., Certain New Pneumatic Off-the-Road Tires From the People’s Republic of China, 72 Fed. Reg. 43,591(Dep’t of Commerce Aug. 6, 2007) (initiation of AD invest.).
routinely criticized.\textsuperscript{18}

While the DOC has been heavily criticized for its concurrent application of CVD and NME AD remedies with respect to China, the statute Congress passed authorizing the DOC to apply CVDs to NME countries and requiring the DOC to consider the potential for duplicative remedies effectively addresses the problem of double counting. However, the potential for duplicative remedies in concurrent NME AD and CVD investigations depends entirely on whether the NME AD methodology fully accounts for both dumping and the impact of a domestic subsidy.\textsuperscript{19} This is highly dependent on whether the recipient of the countervailable domestic subsidy, typically a foreign manufacturer, uses the subsidy to lower prices.\textsuperscript{20} Additionally, the DOC’s implementation of the statute demonstrates that the hotly contested issue of duplicative remedies is a nullity in terms of the scope of remedies applied.

Antidumping laws address price discrimination by providing relief to domestic industries that have been or are threatened by the adverse impact of imports sold in the U.S. market at prices shown to be less than fair market value.\textsuperscript{21} U.S. AD laws\textsuperscript{22} permit the DOC to impose duties if the International Trade Administration (ITA) of The DOC determines that foreign merchandise is being, or is likely to be, sold in the U.S. at less than fair value.\textsuperscript{23} Furthermore, the U.S. International Trade Commission (ITC) considers whether an industry\textsuperscript{24} in the United States is materially injured, threatened with material injury, or that the establishment of an industry is materially retarded due to non-negligible imports of the subject merchandise.\textsuperscript{25}

Countervailing duty laws combat subsidization by providing relief to domestic industries that have been or are threatened with the adverse impact of illegally subsidized imported goods that can be sold at lower prices than similar goods produced in the United States.\textsuperscript{26} These laws\textsuperscript{27}

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18 See, e.g., McDaniel, supra note 1, at 742.

19 See GPX, 645 F. Supp. 2d at 1236. (“The NME AD statute overlaps with the functioning of the CVD statute . . . Thus, the AD and CVD law when applied to NME countries both work to correct government distortion of market prices”).

20 Id.

21 Vivian C. Jones, Trade Remedies: A Primer, in Trade Remedies 1, 3 (Alan B. Tipton & Charles M. Roylton eds., 2008).


23 Dumping or selling at less than fair value is defined as selling a product in the U.S. at a price that is less than the price for which a like product is sold in the home market, the normal value, after adjustments for differences in merchandise, quantities purchased, and circumstances of sale. 19 U.S.C. §§ 1673, 1677 (2006).

24 The ITC must first define the domestic like product and the domestic industry. Id. § 1677

25 Id. § 1673. See Jones, supra note 21, at 1. Negligible imports are imports from the country subject to investigation that account for less than 3% of the volume of all such merchandise imported into the U.S. in the most recent 12-month period. 19 U.S.C. § 1677.

26 See Richard Diamond, A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law, 21 LAW & POL’Y INT’L BUS. 507, 533-534 (1989-1990); Jones, supra note 21, at 3. This is referred to as the ‘entitlement’ model. Diamond, supra, at 517. Alternative theories on the justification for countervailing duties include deterrence (see id. at 525)

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authorize The DOC to impose duties if the ITA finds that the government, or any public entity of a foreign country, has provided a countervailable subsidy for the manufacture, production, or export of the merchandise, and if the ITC determines that a U.S. industry has suffered injury as a result. Both AD and CVD investigations may be initiated by interested parties, either on behalf of a domestic industry, or by the ITA on its own initiative.

This paper discusses how the issue of double counting has been addressed in U.S. case law and at the WTO. This paper also evaluates whether, under The DOC’s current implementation of U.S. trade law, the U.S. is in compliance with its international obligations. Section II explains the background and implementation of the U.S. AD and CVD statutes. Section III examines the treatment of double remedies in U.S. case law. Section IV analyzes the WTO panel and Appellate Body (“AB”) decisions in US–AD/ CVD. Section V addresses the statute recently passed by Congress following the GPX case and U.S. AD and CVD cases, and explains how The DOC’s implementation of the statute adequately addresses potentially duplicative remedies. Finally, Section VI discusses the relevance of the sun setting provision in China’s Accession Protocol to the WTO and the impact it has on the issue of double counting.

and the correction of market distortions. See id. at 515–516; see also Zenith Radio Corp. v. United States, 437 U.S. 443, 445 (1978). It is not clear that any of these models adequately explain the DOC’s methodology of enforcing U.S. CVD laws. See Diamond, supra, at 532–533, 540.


28 A subsidy is countervailable if there is a financial contribution that confers a benefit to the specific enterprise or industry under investigation. 19 U.S.C. § 1677 (2006); see also SCM Agreement, supra note 3, at 14. There are three types of countervailable subsidies: export, import substitution, and domestic. The first two categories are defined by statute as being specific, and therefore countervailable; for domestic subsidies the DOC must apply a ‘specificity’ test to determine if the subsidy is countervailable. 19 U.S.C. § 1677 (2006).

29 Jones, supra note 21, at 1. The injury determination is only necessary if the exporting country is a party to the WTO Subsidies Agreement or has entered into a similar agreement with or assumed similar obligations with respect to the U.S. id. at 7.

30 See 19 U.S.C. §§ 1671, 1673 (2006). Interested parties are defined as a manufacturer, producer, or wholesaler in the U.S. of a domestic like product; a certified or recognized union or group of workers that is representative of the industry engaged in the manufacture, production, or wholesale in the U.S. of a domestic like product; a trade or business association, a majority of whose members manufacture, produce, or wholesale a domestic like product in the U.S.; an association of firms, unions, or trade associations; and, in cases involving processed agricultural products, a collation or trade association representative of processors, or processors and producers, or processors and growers. Id. § 1677.

31 The petition must be supported by a majority of the domestic industry, such that the workers or producers supporting the petition represent at least 25% of the total production of the domestic like product and account for more than 50% of the production of the domestic like product produced by that portion of the industry supporting or opposing the petition. Id. §§ 1671, 1673. If the petition to initiate antidumping or countervailing duties does not establish support of domestic producers or workers accounting for more than 50% of total production of the domestic like product, the DOC is to poll the industry to establish support. Id. §§ 1671, 1673.

32 See id. §§ 1671, 1673.
II. BACKGROUND: HOW THE AD AND CVD STATUTES WORK

Trade remedy laws are intended to ensure that domestic industries are not injured by unfair foreign competition in the domestic market. The DOC applies ADs and CVDs to offset unfair competitive advantages attributable to foreign price discrimination and subsidization. Advocates of the United States’ trade remedies policy claim these measures are necessary to mitigate the adverse impact of various trade practices on domestic industries and workers. On the other hand, opponents allege ADs and CVDs are little more than poorly disguised acts of protectionism.

In initial AD investigations and subsequent administrative reviews, the DOC utilizes different methodologies depending on whether the exporting country is a ME country or a NME country. Under the ME AD methodology, The DOC calculates the dumping margin by comparing the like product when destined for consumption in the home market to the export price.

19 U.S.C. § 1677 (2006). The International Trade Administration (ITA) is responsible for designating countries as NME countries, and any determination that a foreign country is a NME country remains in effect until specifically revoked by the ITA. JONES, TIPPTON & ROYLTON, supra note 21, at 46–47. A NME country is defined as any foreign country that the administering authority determines does not operate according to market principles. A NME designation is based on the extent to which (1) the country’s currency is convertible; (2) its wage rates result from free bargaining between labor and management; (3) joint ventures or other foreign investments are permitted; (4) the government owns or controls the means of production; (5) the government controls the allocation of resources and price and output decisions. 19 U.S.C. § 1677 (2006). The following countries are designated as NME countries: Armenia, Azerbaijan, Belarus, China, Georgia, Kyrgyz Republic, Moldova, Tajikistan, Uzbekistan, and Vietnam. Any determination that a foreign country is a NME country remains in effect until revoked by the ITA. 19 U.S.C. § 1677 (2006).

ADA Art. 2.1. If there is not a sufficient volume of home market sales to calculate the normal value, if home market sales by the exporter account for less than 5% of the quantity of the sales by the exporter to the U.S. market, normal value is based on the price for which the product is sold in a surrogate third country. Id. § 1677 (2006); Statement of Administrative Action on the Uruguay Round, H.R. Doc. No. 103–316 (1994). If there is not a viable third country, normal value may be based on constructed value, which is calculated by adding manufacturing costs of the merchandise in the home market country, selling, general and administrative expenses and profits, and packaging costs. 19 U.S.C. § 1677 (2006).

33 IMPORT ADMINISTRATION, INT’L TRADE ADMIN., DEP’T OF COMMERCE, IMPORT ADMINISTRATION ANTIDUMPING MANUAL 3 (2009).

34 Id. at 3–4.


37 See 19 U.S.C. § 1677 (2006). The International Trade Administration (ITA) is responsible for designating countries as NME countries, and any determination that a foreign country is a NME country remains in effect until specifically revoked by the ITA. JONES, TIPPTON & ROYLTON, supra note 21, at 46–47. A NME country is defined as any foreign country that the administering authority determines does not operate according to market principles. A NME designation is based on the extent to which (1) the country’s currency is convertible; (2) its wage rates result from free bargaining between labor and management; (3) joint ventures or other foreign investments are permitted; (4) the government owns or controls the means of production; (5) the government controls the allocation of resources and price and output decisions. 19 U.S.C. § 1677 (2006). The following countries are designated as NME countries: Armenia, Azerbaijan, Belarus, China, Georgia, Kyrgyz Republic, Moldova, Tajikistan, Uzbekistan, and Vietnam. Any determination that a foreign country is a NME country remains in effect until revoked by the ITA. 19 U.S.C. § 1677 (2006).

38 ADA Art. 2.1. If there is not a sufficient volume of home market sales to calculate the normal value, if home market sales by the exporter account for less than 5% of the quantity of the sales by the exporter to the U.S. market, normal value is based on the price for which the product is sold in a surrogate third country. Id. § 1677 (2006); Statement of Administrative Action on the Uruguay Round, H.R. Doc. No. 103–316 (1994). If there is not a viable third country, normal value may be based on constructed value, which is calculated by adding manufacturing costs of the merchandise in the home market country, selling, general and administrative expenses and profits, and packaging costs. 19 U.S.C. § 1677 (2006).
methodology, The DOC uses surrogate country factors of production to calculate the normal value. It then compares normal value to the export price to derive the dumping margin. The factors of production used include: (a) hours of labor required, (b) quantities of raw materials employed, (c) amounts of energy and other utilities consumed, and (d) representative capital cost, including depreciation. The surrogate country methodology that the DOC uses in NME AD cases fully incorporates the impact of a domestic subsidy provided by the foreign government, assuming the subsidy affects export prices. This is because the surrogate country value approximates the unsubsidized price of goods in the NME domestic market, while the export price reflects the impact of the domestic subsidy.

The assumption that a domestic subsidy is entirely passed on to export prices is a major assumption, and one that is strongly disputed by The DOC. The DOC maintains that the existence of a double remedy depends on whether subsidies pass through, pro rata, to U.S. (export) prices. An adjustment for duplicative remedies is only necessary for countervailable subsidies, which are passed-through to lower export prices. If a subsidy does not lower export prices it will not affect the dumping margin, and therefore it will not give rise to a double counting problem in concurrent AD and CVD investigations.

Economic theory suggests that any domestic subsidies that impact marginal cost could be passed on to export prices. Any subsidy that varies with the amount of units produced will affect marginal cost. Similarly, subsidies that make production more efficient, such as a grant to build a new plant or facility that is more efficient than the old facility, would reduce marginal cost. Assuming that at least some degree of subsidies lower marginal costs and export prices, when The DOC conducts concurrent AD and CVD investigations and accounts for domestic subsidies they are essentially double counting the effect of such

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39 The price at which a product is sold in the U.S. is called the export price (EP) if the first sale in the U.S. is to a non-affiliated entity. Id. § 1677. If the first sale in the U.S. is to an entity that is affiliated with the exporter, a constructed export price (CEP) is used where the CEP is the price of the first sale to a non-affiliated entity in the U.S. Id. § 1677.

40 See id. § 1677. The surrogate country must be a market economy country that is at a comparable level of economic development to the NME country and a significant producer of comparable merchandise. Id. § 1677.

41 See id. § 1677. If the normal value cannot be determined based on a valuation of the factors of production in a surrogate country, the DOC can use the market price of merchandise comparable to the subject merchandise in the surrogate country. See id. § 1677.

42 Id. § 1677.

43 There is no double remedy problem for domestic subsidies in ME AD cases, because the foreign producer's or exporter's own prices, however they may be affected by such subsidies, are used to calculate the AD margins. See GPX, 645 F. Supp. 2d at 1241 n.9.


45 See Diamond, supra note 26, at 538–539.

46 Id.

47 Id.
Unlike the AD laws that specifically include a methodology for investigations of imports from NME countries through their various iterations, the CVD laws have never referenced investigations of imports from NME countries. Prior to 2007, the U.S. did not apply CVDs to NME countries as a matter of policy. In a 1984 determination resulting from two investigations of steel wire rod from Czechoslovakia and Poland, the ITA determined that there is no adequate way to disaggregate government actions in centrally controlled economies. Therefore, the ITA has no way to measure subsidies or the market distortions caused by subsidies. The Court of International Trade (CIT) reversed the ITA’s decision and held that CVD law can be applied to NME countries. However, the CIT decision was subsequently overturned in Georgetown Steel where the Court of Appeals for the Federal Circuit (CAFC) ruled that The DOC’s original position taken from the ITA was reasonable and supported by substantial evidence.

In 2007, the ITA reversed its position on the application of CVDs to NME countries in a CVD investigation that dealt with paper imported from China. In its preliminary investigation, the ITA concluded that

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51 Vivian C. Jones, Trade Remedy Legislation: Applying Countervailing Action to Nonmarket Economy Countries, in TRADE REMEDIES 43, 43 (2008). As a result, the administering authorities have no specific statutory factors to consider or methodologies to use when identifying subsidies in NME countries. Id. at 63. See GPX, 645 F. Supp. 2d 1231, 1236 (“Congressional silence regarding the application of the CVD law to NME countries may indicate that Congress never anticipated that the CVD law would be applied while a country remained designated as an NME country.”).


53 In Carbon steel wire rod from Czechoslovakia and Carbon steel wire rod from Poland, the ITA concluded that a “bounty or grant” within the meaning of the CVD law cannot be found in a NME country. See Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,370 (May 7, 1984); Carbon Steel Wire Rod from Poland: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,374 (May 7, 1984).

54 Cont’l Steel Corp. v. United States, 9 C.I.T. 340, 342 (1985). The CIT held that the ITA had misinterpreted the CVD law by concluding it did not apply to NME countries. The court noted an absence of clear legislative intent, and emphasized the plain language of the statute that applies to any country, regardless of political or economic status. Id. at 347-50.

55 See Memorandum from Shauna Lee-Alaia, et al., Office of Policy, Import Administration, to David M. Spooner, Assistant Secretary, Import Administration, on Whether the Analytical Elements...
Putting the Specter of Double Counting to Rest

while China should still be considered a NME country, its economy was significantly different from the Soviet-style economies analyzed in Georgetown Steel where central planners dictated prices, investment decisions, credit availability, wage rates, and also restricted foreign currency and private ownership of property. As a result, the ITA concluded that the current state of the Chinese economy was sufficiently market-like to permit the agency to determine whether the Chinese government had bestowed a benefit on a Chinese producer and whether such a benefit was a specific countervailable subsidy. The ITA justified this policy change in part because of China’s accession to the WTO and the numerous economic reforms undertaken by China pursuant to its accession. As a result of the ITA’s decision, numerous CVD investigations on products exported from China have been initiated since 2007. This phenomenon has precipitated vociferous accusations from the Chinese government that the DOC is imposing duplicative remedies by simultaneously treating China as a ME country for CVD purposes and as a NME country for AD purposes.

III. DOUBLE COUNTING IN U.S. COURTS: GPX INT’L TIRE CORP. V. UNITED STATES

The issue of duplicative remedies in concurrent AD and CVD investigations first arose in U.S. courts in 2009 with GPX International Tire Corp. v. United States. The case followed an investigation of new pneumatic off-the-road tires imported from China. The DOC initiated the investigation in 2007 after several U.S. tire manufacturers and a trade association filed petitions seeking the imposition of ADs and CVDs on

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57 The DOC determined that China should be considered a NME country in Preliminary Determination of Sales at Less than Fair Value, Greige Polyester Cotton Print Cloth from China. 48 Fed. Reg. 9897 (March 9, 1983).
58 Georgetown Steel Memorandum, supra note 56 at 10. According to the DOC, the Government of China acknowledges that the changing nature of its economy justifies the application of CVD remedies even though China is still considered a NME country. See Protocol of Accession of the People's Republic of China, WT/L/432 (November 23, 2001), at section 15(b), available at http://www.wto.org; see also Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, 72 Fed. Reg. 71,360 (Dep't of Commerce Dec. 17, 2007) (prelim. affirm. determination).
59 Coated Free Sheet Paper from the People's Republic of China, 72 Fed. Reg. 60,645 (Dep't of Commerce October 25, 2007) (final affirm. determination) and the accompanying Issues and Decision Memorandum, at 10.
61 See Lauren W. Clarke supra note 1, at 823 n.10 (2011).
62 Because the only two NME countries currently recognized by the ITA that have significant volumes of trade with the U.S. are China and Vietnam, the scope of this issue is primarily limited to exports from those two countries. See Jones, supra note 51, at 63.
63 645 F. Supp. 2d at 1231.-
tire export companies. The DOC pursued concurrent AD and CVD investigations. It selected, as mandatory respondents, the three largest Chinese producers and exporters of OTR tires: Guizhou Tire Co., Ltd. (Guizhou), Hebei Starbright Tire Co., Ltd. (Starbright), and Tianjin United Tire & Rubber International Co., Ltd. (TUTRIC). The ITC made an affirmative material injury determination in both the AD and CVD investigations. In the CVD investigation, the DOC determined that several of the alleged subsidies were countervailable, including: the receipt of certain loans from Chinese banks; government provision of rubber inputs; government forgiveness of debt; government provision of land for less than adequate remuneration; and certain tax subsidies. The Department also made a positive determination of sales at less than fair value.

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67 19 U.S.C. § 1677f-1 (e) stipulates that the DOC calculate an individual countervailing subsidy rate for each exporter or producer investigated. The subsidy rate is found by dividing the weighted-average net amount of the subsidy conferred on a particular company by the company’s total sales in the case of domestic subsidies or the firm’s total exports in the case of export subsidies. However, if a large number of exporters or producers are involved, the DOC is permitted to select a limited number of mandatory respondents and calculate individual rates for these exporters/producers and apply an estimated rate for all exporters/producers not individually investigated. 19 U.S.C. § 1671 (2006); see also THE ECONOMIC EFFECTS OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS AND SUSPENSION AGREEMENTS 2–9 (U.S. International Trade Commission ed., 1995).
70 The loans, some of which were issued by state-owned commercial banks, were allegedly granted on a preferential, non-commercial basis. To calculate the benefit of the subsidy provided by the loans, the DOC compared the amount paid for the loans by the recipients with a benchmark interest rate calculated using a regression-based methodology based on the inflation-adjusted interest rates of countries with similar per-capita gross national incomes as China. Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, 72 Fed. Reg. 71,360, 71,367 (Dep’t of Commerce Dec. 17, 2007) (prelim. affirm. CVD determination). In most CVD investigations, the DOC uses comparable commercial loans reported by the respondents as a benchmark to measure the benefit, if any, conferred by the loan in question. See 19 C.F.R. § 351.505 (2012). However, in this case the only loans reported by the respondents were provided by state-owned commercial banks as part of the Government Policy Lending program. Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, 72 Fed. Reg. at 71,364. Because the DOC does not treat loans as commercial if they are received from a government bank as part of a government program, it determined in this case that it was appropriate to use a national interest rate for comparable commercial loans. Id.; see 19 C.F.R. § 351.505 (2012). However, the DOC does not consider the Chinese national interest rate to be reliable as a benchmark because of the pervasiveness of government intervention in the Chinese banking sector. Certain New Pneumatic Off-the-Road Tires from the People's Republic of China, 72 Fed. Reg. at 71,364 (prelim. affirm. CVD determination) and accompanying Issues & Decisions Memorandum 9–23.
value in the AD investigation. The AD margins applied to the mandatory respondents were: 29.93% for Starbright, 8.44% for TUTRIC, and 5.25% for Guizhou. The CVD margins applied were: 14% for Starbright, 6.85% for TUTRIC, and 2.45% for Guizhou. GPX International Tire Corporation, Ltd. (GPX), the parent company of Starbright, challenged the final results of the AD and CVD investigations in the CIT.

A. CIT Decision in GPX International Tire Corp. v. United States

In the CIT, GPX alleged that the application of both CVDs and ADs using the NME AD methodology resulted in double counting of duties and punished the Chinese companies twice for the same allegedly “unfair” trading practice. The alleged double counting resulted from the DOC applying CVDs to offset domestic subsidies and then comparing a subsidy-free constructed normal value (calculated by using either surrogate country prices or factors of production) with the original subsidized export price to calculate the dumping margin. GPX argued that domestic subsidies in the NME context should be given the identical treatment as export subsidies in the ME context when the DOC is conducting concurrent CVD and AD investigations using the NME AD methodology. The CIT held that while the DOC can apply CVD to NME countries, if it does so in conjunction with the NME AD methodology the DOC has to apply methodologies that make the parallel remedies reasonable and double counting unlikely to occur.

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72 The DOC assigned separate rates to the twenty-three entities that demonstrated eligibility for separate-rate status and a PRC-wide rate to all other exporters of the subject merchandise. See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China, 73 Fed. Reg. 40,485, 40,487–88, (Dep't of Commerce July 15, 2008) (final affirm. determination of sales at LTFV and partial affirm. determination of critical circumstances). In determining the PRC-wide rate, the DOC applied facts available and used adverse inferences in choosing among the available facts because the ‘PRC-wide entity’ failed to respond to a request for information. Id. at 40,488. The DOC defined the ‘PRC-wide entity’ as all exporters other than those that qualified for separate rate status. Id. The DOC determined that the ‘PRC-wide entity’ failed to respond because there were actually more exporters of off-the-road tires from the PRC than the number of PRC exporters that responded to the Quantity & Value Questionnaire and full antidumping questionnaire. Id. As a result of the application of adverse facts available (AFA), while the separate rate weighted average dumping margins applied ranged from 0-29.93%, the PRC-wide rate applied was 210%. Certain New Pneumatic Off-the-Road Tires From the People's Republic of China, 73 Fed. Reg. 51,624-01, 51,626, (Dep’t of Commerce September 4, 2008) (notice of amend. final affirm. determination of sales at LTFV and AD order).
73 GPX, 645 F. Supp. 2d at 1236.
74 Id.
75 Id.
76 Id. at 1240.
77 Id. at 1241.
78 Id.
79 Id. at 1240.
80 Id. at 1243. Due to the difficulty of calculating the exact effect of subsidies on prices, the court held that it was unreasonable for the DOC to place the burden of proof of showing double counting on the respondent during the investigation. Id.
reasoned that because the CVD statute is ambiguous,81 and therefore susceptible to multiple reasonable interpretations,82 and the DOC has broad discretion in determining the existence of a subsidy under the CVD law.83 Hence, it was reasonable for the DOC to apply the CVD statute to a NME country.84 However, given the high likelihood of double counting85 and the fact that the DOC can reasonably remedy domestic subsidies using only the NME AD methodology,86 the CIT concluded that it was not reasonable for the DOC to apply CVDs without adjusting for duplicative remedies.87 Significantly, the court did not say that the DOC must make an automatic adjustment in any instance of concurrent ADs and CVDs, but instead stated that the DOC must only make an attempt to determine if double counting is occurring and then remedy it if necessary.88

B. CAFC decision in GPX International Tire Corp. v. United States

The United States government appealed the CIT decision89 to the CAFC.90 The CAFC reversed the CIT decision and held that The DOC

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81 See id. at 1238–39.
83 See Magnola Metallurgy, Inc. v. United States, 508 F.3d 1349, 1355 (Fed. Cir. 2007).
84 GPX, 645 F. Supp. 2d at 1240.
85 See id. at 1242–43; see, e.g., GAO REPORT, supra note 48, at 28.
86 GPX (2009), 645 F. Supp. 2d at 1243.
87 Id.
88 Id.
89 See GPX Int’l Tire Corp. v. United States, 715 F. Supp. 2d 1337, 1343 (Ct. Int’l Trade 2010) (vacated by GPX Intern. Tire Corp. v. U.S., 678 F.3d 1308, 1310 (Fed. Cir. 2012)). In the initial CIT decision in GPX (2010), the court remanded the case to the DOC to either not apply CVD or to attempt to eliminate duplicative remedies. See id. at 1343. The DOC decided to continue applying CVD but offset the amount of CVDs against the calculated AD deposit rates. See id. The CIT held that this methodology was not reasonable because the language of the then-existing CVD statute did not permit such an offset and because of “the expense associated with conducting an additional investigation that is essentially useless.” See id. at 1345. The DOC had considered three alternatives to avoid double counting: not applying CVDs; treating the respondents as market-oriented enterprises (MOEs); or offsetting the CVDs against the NME ADs after using its regular methodologies to calculate the CVDs and NME AD margins. Final Results of Redetermination Pursuant to Remand 8 (Dep’t Commerce Apr. 26, 2010) [hereinafter Remand Results]. The DOC chose the offsetting methodology as the ‘least objectionable,’ Remand Results at 8, implementing it by offsetting a respondent’s calculated export subsidy rate against its calculated AD margin for purposes of determining the AD cash deposit rates. Remand Results at 12 n.3; see also Dupont Teijin Films USA, LP v. United States, 407 F.3d 1211, 1212 (Fed. Cir. 2005). The court noted that with this offset methodology, the combination of the CVD margin and the NME AD cash deposit rate will always equal the unaltered NME AD margin, rendering concurrent CVD and AD investigation unnecessary, “because the same remedial price adjustment can otherwise be obtained by merely conducting an NME AD investigation.” See GPX, 715 F. Supp. 2d at 1345. Given the time and expense of a CVD investigation, the court held it was not reasonable to “force[ ] foreign parties to spend many months and large sums of money to go through an investigation, the end result of which is to calculate a CVD margin, but then to eliminate that CVD [margin] because it has been offset by some parallel investigation.” See id. The government and U.S. manufacturers favoring the imposition of CVD remedies appealed this decision to the CAFC. GPX Int’l Tire Corp. v. United States, 666 F.3d 732, 737 (Fed. Cir. 2011).
90 GPX, 666 F.3d at 732. The CAFC reheard the case following the passage of the statute. See GPX Int’l Tire Corp. v. U.S., 678 F.3d 1308, 1310 (Fed. Cir. 2012).
may not apply the CVD statute to NME countries. The CAFC based its decision on the theory of legislative ratification established in a previous CAFC case, Georgetown Steel. In Georgetown Steel, the CAFC held that it was reasonable for The DOC to conclude that CVD law does not apply to NME countries because economic incentives and benefits provided by a centrally planned government cannot be considered a “bounty” or “grant” under the meaning of the CVD statute.

Subsequently, Congress amended and reenacted the CVD statute in 1988 and 1994 without incorporating language applying it to NME countries, thereby demonstrating both that it was aware of the judicial interpretation and accepted it by reenacting the statute without change. In response to the CAFC’s decision in GPX, Congress passed a statute in 2012 specifically authorizing the application of CVDs to NME countries.

IV. DOUBLE COUNTING AT THE WTO: UNITED STATES – DEFINITIVE ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS FROM CHINA (US-AD/CVD)

The issue of duplicative remedies, as applied in concurrent AD and CVD investigations, has been litigated at the Dispute Settlement Body (DSB) of the WTO. In 2008, in response to the increasing number of concurrent AD and CVD investigations, China requested consultations with the United States through the DSB. Despite the fact that the consultations proved unsuccessful and the United States blocked China’s first request for a panel, a panel was eventually convened in 2009 following China’s second request. Among other issues, China alleged that the concurrent U.S. countervailing and antidumping duty measures

91 GPX, 666 F.3d at 739.
92 Id.
93 Georgetown Steel Corp. et al. v. United States, 801 F.2d 1308, 1314 (Fed. Cir. 1986).
95 See GPX, 666 F.3d at 739–40, 745.
96 Id. at 745.
100 AD/CVD Panel Report, supra note 99, ¶¶ 1.1-1.3.
imposed on four Chinese products\textsuperscript{101} were inconsistent with Articles VI:3 and I:1 of the GATT 1994 and Articles 10, 12.1, 12.8, 19.3, 19.4 and 32.1 of the SCM Agreement.\textsuperscript{102}

V. Panel Ruling in US-AD/CVD

China argued that because of the surrogate, market-determined NME AD methodology, simultaneous application of U.S. CVD law resulted in domestic subsidy being offset twice.\textsuperscript{103} China noted the longstanding U.S. policy of not applying CVD to NME countries\textsuperscript{104} and that the DOC recognizes that its methodology of calculating ADs can offset domestic subsidies in the ME context.\textsuperscript{105} The United States strongly disputed that the DOC’s NME AD methodology precisely offsets subsidization.\textsuperscript{106} The United States claimed it was not clear that subsidies reduced the cost of production on a \textit{pro rata} basis, and therefore would be fully accounted for in a dumping margin.\textsuperscript{107} Nor that the substitution of actual, subsidized values of factors of production with surrogate, unsubsidized values inflates the normal value in an amount equal to the subsidy.\textsuperscript{108} The United States also claimed that the covered agreements did not prohibit the imposition of double remedies in the case of domestic subsidies.\textsuperscript{109}

The Panel ruled in favor of the United States with respect to every major issue raised, dismissing China’s “as-applied” claims\textsuperscript{110} under Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.\textsuperscript{111} While the Panel reaffirmed the basic precept that concurrent use of AD and CVD laws may result in double remedies,\textsuperscript{112} it concurred with the United State’s assertion that the existence of double remedies in any given case depends on the facts, specifically whether the subsidy in question results in the reduction of the export price.\textsuperscript{113} The Panel then determined that none of the provisions of the SCM Agreement or the GATT 1994 cited by China\textsuperscript{114} prohibited the

\textsuperscript{101} The four products covered in the investigations were: (i) Circular Welded Carbon Quality Steel Pipe; (ii) Certain New Pneumatic Off-the-Road Tires; (iii) Light-Walled Rectangular Pipe and Tube; and (iv) Laminated Woven Sacks. AD/CVD Panel Report, supra note 99, ¶ 2.2.

\textsuperscript{102} Id. ¶ 14.44.

\textsuperscript{103} Id. ¶ 14.47.

\textsuperscript{104} Id. ¶ 14.48.

\textsuperscript{105} Id. ¶ 14.49.

\textsuperscript{106} See id. ¶¶ 14.54-14.59.

\textsuperscript{107} Id. ¶ 14.55.

\textsuperscript{108} Id.

\textsuperscript{109} Id. ¶ 14.86.

\textsuperscript{110} The Panel found that the ‘as such’ claims made by China with respect to SCM Articles 10, 19.3, 19.4, and 32.1 and Articles I:1 and VI of the GATT 1994 were outside its terms of reference because China had failed to include them in its request for consultations. Id. ¶¶ 14.11, 14.12, 14.36.

\textsuperscript{111} See Pablo M. Bentes et al., International Trade, 45 INTL LAW, 79 (2011).

\textsuperscript{112} AD/CVD Panel Report, supra note 99, ¶¶ 14.70-14.72.

\textsuperscript{113} Id. ¶ 14.71.

\textsuperscript{114} The Panel declined to take account of the CIT decision, GPX (2009), which concluded that U.S. law required the DOC to avoid offsetting the same subsidies twice when it uses its NME methodology in countervailing duty and antidumping investigations. See Bentes, supra note 112.

The Panel relied heavily on the fact that the SCM provisions\footnote{The only provision cited by China that does reference concurrent AD and CVD remedies is GATT Article VI:5, which the Panel interpreted narrowly to apply only to concurrent remedies in cases involving export subsidies, not domestic subsidies. See id. ¶ 14.117.} cited by China did not reference concurrent remedies or antidumping duties, and therefore concluded that the provisions should be read narrowly to only impose limitations on the application of countervailing duties.\footnote{See id. ¶ 14.112.} The Panel focused particularly on Article 19.4, which prohibits countervailing duties in excess of the amount of existing subsidy.\footnote{The text of Article 19.4 reads: “No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.” SCM Agreement, supra note 3, at Article 19.4; see also Dukgeun Ahn, United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, 105 Am. J. Int'l L. 761, 765 (2011). Appellate Body Report, supra note 100.} The Panel looked to the ordinary meaning of the text\footnote{AD/CVD Panel Report, supra note 98, ¶ 14.108.} and concluded that the terms of the provision referred only to the amount of existing subsidy in a countervailing duty investigation.\footnote{Id. ¶ 14.112.} The Panel reasoned that the concurrent application of ADs and CVDs by the Department did not violate Article 19.4 because China failed to demonstrate that the application of NME AD duties affected the amount of existing subsidy in CVD investigations.\footnote{Id. ¶ 14.112.} Similarly, when the Panel considered Article 19.3, which requires that subsidies be levied “in the appropriate amounts,”\footnote{Id. ¶ 14.139.} it interpreted the provision to mean that the DOC imposes countervailing duties in the appropriate amounts if the duties do not exceed the amount of existing subsidy.\footnote{Article 19.3 reads: “When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury.” SCM Agreement, supra note 3.} Thus, China failed to prove that the DOC violated the SCM provisions governing those issues\footnote{AD/CVD Panel Report, supra note 99, ¶ 14.128.} because China did not demonstrate that the imposition of NME ADs, in the context of a concurrent CVD investigation, affects the existence of a subsidy, the amount of existing subsidy, or the appropriate amounts of countervailing duties.\footnote{Id. ¶ 14.139.}

Additionally, the Panel took a contextual approach to interpreting the relevant agreements, noting that AD and CVD are regulated under two
separate and distinct agreements\(^{126}\) as well as two separate and distinct paragraphs of Article VI of the GATT 1994.\(^ {127}\) The provision that references the application of ADs and CVDs, GATT Article VI:5, only applies to export subsidies,\(^ {128}\) which the Panel interpreted as inapplicable to domestic subsidies.\(^ {129}\) The Panel also found it significant that a prior agreement on subsidies and CVD, the Tokyo Round Subsidies Code, explicitly provided for the concurrent application of ADs and CVDs to NME countries.\(^ {130}\) The Panel interpreted the prior existence and termination of this provision to mean the drafters of the SCM Agreement were aware of the issue and chose not to address it in Article 19.4.\(^ {131}\) The Panel also rejected China’s claims under Article I:1. In its view China failed to establish that the DOC “maintains a consistent ‘policy’ or ‘practice’ of taking all necessary steps to avoid the imposition of double remedies,”\(^ {132}\) in investigations of ME countries, and therefore the U.S. does not confer an advantage on ME countries with respect to NME countries.\(^ {133}\)

VI. Appellate Body Ruling in US-AD/CVD

China appealed to the Appellate Body,\(^ {134}\) which substantially reversed the Panel findings.\(^ {135}\) The Appellate Body focused on Article 19.3 of the SCM Agreement,\(^ {136}\) which requires that subsidies be levied “in the appropriate amount.”\(^ {137}\) While the Panel interpreted Article 19.3 in light of Article 19.4 to mean that the amount of subsidies levied must not exceed the amount of subsidies found to exist,\(^ {138}\) the Appellate Body determined that this approach would be too restrictive and would render 19.3 redundant.\(^ {139}\) Instead the Appellate Body looked to other provisions of the SCM Agreement. It noted the causal link made between the injury suffered and

\(^{126}\) These are the Agreement on Implementation of Article VI of GATT 1994 (Antidumping Agreement) and the Agreement on Subsidies and Countervailing Measures, respectively.


\(^{128}\) Article VI:5 of the GATT 1994 (“No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.”).


\(^{130}\) Id. ¶ 14.119.

\(^{131}\) Id.

\(^{132}\) Id. ¶ 14.181.

\(^{133}\) See id. ¶¶ 14.168, 14.182.


\(^{135}\) See Bentes, supra note 112.

\(^{136}\) AD/CVD AB Report, supra note 135, ¶¶ 547–58.

\(^{137}\) SCM Agreement, supra note 3, at Article 19.3.


\(^{139}\) AD/CVD AB Report, supra note 135, ¶¶ 555–56.
the amount of subsidies levied in Article 19.2, as well as the GATT 1994, and determined that the SCM Agreement and the Antidumping Agreement must be read together in context. The Appellate Body concluded that it would effectively circumvent the rules of both agreements to permit “the levying of a total amount of anti-dumping and countervailing duties which, if added together, would not be appropriate and would exceed the combined amounts of dumping and subsidization found.”

The Appellate Body also rejected the Panel’s reliance on both the exclusion argument that GATT Article VI:5 references only export subsidies and therefore excludes domestic subsidies. Additionally, the Panel disregarded the omission argument that the concurrent AD-CVD provision in the prior Tokyo Round Subsidies Code was not included in the SCM Agreement.

After concluding that Article 19.3 prohibits double counting, the Appellate Body determined that the investigating authority, the U.S., has an obligation to investigate and establish that subsidies are not being offset twice by concurrent ADs and CVDs. However, the Appellate Body did not say that the investigating authority must make an adjustment in any instance of concurrent ADs and CVDs, only that the investigating authority must conduct an investigation to ascertain if an adjustment is necessary. In this instance, the DOC failed to investigate whether double remedies arose from the concurrent NME AD and CVD investigations. Therefore, the Appellate Body found that the U.S. had violated its obligations under Article 19.3 of the SCM Agreement.

VII. P.L. 112-99: CONGRESS’S RESPONSE TO GPX INTERNATIONAL TIRES AND US-AD/CVD

In response to both the CAFC decision in GPX International Tires and the Appellate Body decision in US-AD/CVD, the U.S. Congress

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140 SCM Agreement, supra note 3, at Article 19.2 (“The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that . . . the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry.”).
141 Id. at ¶ 772.
142 Id. at ¶ 590.
143 Id. at ¶ 581.
144 Id. at ¶ 590.
145 Id. at ¶ 602.
146 Id.
147 Id. at ¶¶ 603–05.
148 Id. at ¶ 606.

P.L. 112-99 also amended § 777A of the Tariff Act of 1930 to allow the DOC to adjust AD duties in cases involving concurrent application of CVD. The DOC can make these adjustments when a subsidy has reduced the average export price of the subject merchandise and the DOC can reasonably estimate the extent that a countervailable subsidy increased the weighted average dumping margin of the subject merchandise.

There are two forums in which this statute, or the DOC’s implementation of it, can be challenged. A respondent in a concurrent AD/CVD investigation, to whom the DOC applies § 1677(f)(1), can challenge the DOC’s final determination in U.S. court by bringing a claim to the Court of International Trade. Alternatively, China, or any

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151 The CAFC ruled on GPX Tires in December 2011; Public Law 112-99 was passed in early March 2012. See Beattie, supra note 150; Application of Countervailing Duty Provisions To Nonmarket Economy Countries, Pub. L. No. 112-99, § 1(b), 126 Stat. 265 (2012). The legislative history of the statute suggests it had bipartisan support and legislators believed the statute was necessary to protect U.S. manufacturers from China’s unfair trade practices. See 158 Cong. Rec. H1165-02 (daily ed. March 6, 2012); see also Frank Vargo, NAM Welcomes Quick Fix to Offset China’s Subsidies, SHOPFLOOR.ORG (March 1, 2012), http://shopfloor.org/2012/03/nam-welcomes-quick-fix-to-offset-chinas-subsidies/24178.


153 See 19 U.S.C. § 1671(f)(1) (“Except as provided in paragraph (2), the merchandise on which countervailing duties shall be imposed under subsection (a) includes a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country.”). The statute also includes a retroactive provision making it applicable to all proceedings initiated on or after November 20, 2006. See Application of Countervailing Duty Provisions To Nonmarket Economy Countries, Pub. L. No. 112-99, § 1(b), 126 Stat. 265, supra, note 151.

154 The amended language also introduces an exception in cases where the DOC is unable to determine the amount of the subsidy. See 19 U.S.C. § 1671(f)(2) (2006) (“A countervailing duty is not required to be imposed under subsection (a) on a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country if the administering authority is unable to identify and measure subsidies provided by the government of the nonmarket economy country or a public entity within the territory of the nonmarket economy country because the economy of that country is essentially comprised of a single entity.”).


157 Id.

158 The NME CVD statute has already been challenged as unconstitutional. See Pl.’s Rule 56.2 Mot. for J. on the Agency R. at 2, GPX Int’l Tire Corp. v. U.S., No. 08-00285 (Ct. Int’l Trade Aug. 17, 2012) (No. 366) [hereinafter Plaintiff’s Brief – GPX]; Pl.’s Rule 56.2 Mot. for J. on the Agency R. at 2, GPX Int’l Tire Corp. v. U.S., No. 08-00285 (Ct. Int’l Trade Aug. 17, 2012) (No. 367) [hereinafter Plaintiff’s Brief – Tianjin]. The plaintiffs in GPX, GPX Int’l Tire Corp. and Tianjin, filed CIT Rule 56.2 motions for judgment on the agency record to challenge its final AD and CVD determinations in Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China. See Pl.’s Br. – GPX, at 2; Pl.’s Br. – Tianjin, at 2. The United States and Titan Tire Corp. had petitioned the CAFC to rehear its December 19, 2011 decision, GPX Int’l Tire Corp. v. U.S., 666 F.3d 753 (Fed. Cir. 2011); GPX Int’l Tire Corp. v. U.S., 678 F.3d 1308, 1310 (Fed. Cir. 2012). Following the enactment of P.L. 112-19, the CAFC requested briefing on the new legislation and its impact on the proceedings. Id. at 1311. The CAFC then remanded the proceedings to the CIT for
other NME country to which the DOC applies § 1677(f)(1), can make a request for consultations at the DSB of the WTO.\textsuperscript{159}

A. Consistency of P.L. 112-99 Under U.S. Law

1. Text of P.L. 112-99

Public Law 112-99 is facially consistent with U.S. law. Proponents of the House bill (H.R. 4105) in the Ways and Means Committee went to great lengths to demonstrate that the language of the bill would overturn the CAFC decision in \textit{GPX} and that it would be consistent with U.S. obligations under the WTO.\textsuperscript{160} Section 1(a), which provides a statutory basis for the application of CVD to NME countries, addresses the concerns of the CAFC in \textit{GPX} and is also consistent with U.S. law.\textsuperscript{161} With respect to the CAFC decision in \textit{GPX}, which held that there was no statutory basis for the DOC to apply CVD to NME countries, the statutory language explicitly authorizes the imposition of CVD in investigations of exports from NME countries.\textsuperscript{162}

Section 2(a) addresses the concerns of the lower court in \textit{GPX}.\textsuperscript{163} Specifically, the CIT held that the DOC must, when it chooses to adjust, make a reasonable effort to adjust for duplicative remedies in concurrent consideration of the constitutional issues raised. \textit{Id.} at 1313. \textit{GPX}. Tianjin also alleged that P.L. 112-99 is unconstitutional because the retroactive provision of Section 1(b) violates the Ex Post Facto Clause of the Constitution and the discrepancy in effective dates between Section 1 and Section 2 violates the guarantees of due process and equal protection of the 5th Amendment. \textit{See Pl.'s Br. –\textit{GPX}, at 2, Pl.'s Br. – Tianjin, at 3. The CIT rejected both of these arguments. The CIT held that the Ex Post Facto Clause does not apply to P.L. 112-99 because the Ex Post Facto Clause applies only to retroactive penal legislation, and trade remedies laws are remedial, not punitive in nature. GPX Int'l Tire Corp. v. U.S., No. 08-00285, Slip Op. 13-2, at 16, 18 (Ct. Int'l Trade Jan. 7, 2013). The CIT also held that the law is consistent with due process and equal protection. Id. at 23–25. The Court upheld the law as consistent with due process because the law is rationally related to legitimate state interests, maintaining administrative efficiency and the finality of the 24 investigations affected by the retroactivity provision. \textit{Id.} at 30–31.

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AD/CVD investigations. The court also explained that the burden of calculating such duplication rests with the DOC. The statute states that the DOC is to determine whether a countervailable subsidy reduced the average price of imports and thereby increased the dumping margin. The statute further instructs the DOC to make adjustments as necessary, provided that it can reasonably estimate the extent to which the subsidy increased the dumping margin.

On its face, the statute adequately addresses the issue of double counting. It does so by requiring the DOC to avoid duplicative remedies by adjusting the dumping margin in investigations where a countervailable subsidy is passed through to lower export prices. To date, the methodology the DOC has used to implement Section 2(a) is somewhat problematic. However, given the deference accorded federal agencies in implementing their authorizing statutes, the methodology meets the standard of “reasonable or in accordance with law.”

2. **Offsetting Methodology of P.L. 112-99**

The DOC’s methodology for avoiding duplicative remedies in concurrent AD and CVD meets the standard of “reasonable and in accordance with law.” Section 2(a) of P.L. 112-99, codified as 19 U.S.C. § 1677f-1(f)(1), requires that a subsidy be offset if the DOC finds the subsidy reduced the average price of imports of the class or kind of merchandise and if the DOC can reasonably estimate the extent to which the subsidy increased the weighted average dumping margin for the class or kind of merchandise. In GPX, the CIT assumed that all domestic subsidies received would be passed-through to reduce the export price. However, the DOC asserts that the effect of domestic subsidies on export price in a NME country is too uncertain to support this precept. The concurrent AD/CVD investigations the DOC has

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165 Id.
167 Id.
168 See Issues and Decision Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, for the Final Determination in the Antidumping Investigation of Drawn Stainless Steel Sinks from the People’s Republic of China (Feb. 19, 2013) (Dep’t of Commerce) [hereinafter Final Determination – Drawn Stainless Steel Sinks].
170 The standard of review in a case challenging a CVD determination is that the court “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).
174 See GPX, 645 F. Supp. 2d at 1242; Issues and Decision Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado,
conducted thus far support the conclusion that respondents cannot demonstrate that the domestic subsidies they receive are passed-through pro rata to reduce export prices.

The DOC has conducted several concurrent AD/CVD investigations since implementing P.L. 112-99. It has used a methodology that was initially developed in the Section 129 reviews, which were conducted after the US-AD/CVD decision to root out duplicative remedies. Following the Appellate Body ruling in US-AD/CVD, the DOC conducted Section 129 reviews of the four challenged AD/CVD investigations to bring them into compliance with the Appellate Body ruling.

Section 129 reviews provide some insight into the reasoning behind the DOC’s current methodology for mandating the estimation of duplicative remedies. However, the DOC was facing a strict deadline when it conducted the Section 129 reviews and has since refined its methodology in several significant ways.

a. Offsetting Methodology Used in Section 129 Reviews. As stated earlier, the DOC conducted Section 129 determinations on four non-
compliant AD/CVD investigations. In each of these reviews, the DOC used the same methodology to estimate the extent the subsidies lowered the respective export price of the applicable goods. Rather than requesting data from the individual mandatory respondents, the DOC looked at industry-level data and concluded that manufacturers in China changed prices in response to increases in input costs over the previous month.

The DOC found that the increases in input costs were related to changes in variable cost. Additionally, it determined that in the case of input price subsidies, the only evidence that connected a subsidy with lower export prices was the subsidy-variable cost link. However, the DOC could only estimate the extent of subsidy pass-through for subsidies that were likely to have impacted variable costs. Therefore, the DOC excluded from its investigation all subsidies other than those related to input production costs.

This severely limited the scope of the DOC’s determinations. For instance, in the Section 129 determination covering certain pneumatic off-the-road tires, the DOC determined that it could only be demonstrated that one type of subsidy reduced the average cost of imports, per 19 U.S.C. § 1677f-1(f)(1)(B), input subsidies. In the off-the-road tires CVD investigation, input subsidies only accounted for one of the countervailable subsidies in the original investigation, namely the government provision of rubber for less than adequate remuneration. The DOC thereby excluded all the other types of subsidies in the original investigation from its pass-through estimation. The exclusions include: government policy lending, government debt forgiveness, the provision of land, stamp tax exemption on share transfers, tax subsidies and local

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181 See Section 129 Determination – Laminated Woven Sacks, supra note 177; Memorandum from Christopher Mutz, Office of Policy, Import Administration, & Daniel Calhoun, Office of the Chief Counsel, Import Administration, to Paul Piquado, Assistant Secretary, Import Administration, on Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China: “Double Remedies” Analysis Pursuant to the WTO Appellate Body’s Findings in WT/DS 379 (May 31, 2012); Memorandum from Christopher Mutz, Office of Policy, Import Administration, & Daniel Calhoun, Office of the Chief Counsel, Import Administration, to Paul Piquado, Assistant Secretary, Import Administration, on Section 129 Determination of the Countervailing Duty Investigation of Light-Walled Rectangular Pipe and Tube from the People’s Republic of China: “Double Remedies” Analysis Pursuant to the WTO Appellate Body’s Findings in WT/DS 379 (May 31, 2012); Section 129 Determination – OTR Tires, supra note 177.

182 Section 129 Determination – OTR Tires, supra note 177, at 8.
183 Id. at 9.
184 Id.
185 Id.
186 Id.
187 Id.
income tax exemption and reduction programs, VAT and tariff exemptions, and the State Key Technology Renovation Project Fund.\footnote{See id.}

The DOC also estimated the extent its proxy for subsidies affected export prices. To accomplish this estimation the DOC used the following: the average ratio of rolling monthly, year-on-year changes in production input costs; changes in an aggregate production input price index as a proxy for input costs to monthly, year-on-year changes in ex-factory prices; changes in an aggregate producer price index as a proxy for ex-factory prices; and data for the manufacturing sector in China available through Bloomberg’s electronic terminal database.\footnote{Section 129 Determination –– OTR Tires, supra note 165, at 9–10.} This ratio of price-cost changes “estimates the extent of price responsiveness during the period of investigation to changes in variable cost for producers in China.”\footnote{Id. at 10.}

Because the DOC relied on data from the entire manufacturing sector, its estimate of the extent subsidies impacted export prices was identical in all four determinations and “approximately 63.07 percent of the value of the subsidies that . . . impacted variable costs . . . were ‘passed through’ to export prices.”\footnote{Id.} In the off-the-road tires investigation, this estimation resulted in an average reduction of the cash deposit rate.\footnote{Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary, Import Administration, on Final Determinations: Section 129 Proceedings Pursuant to the WTO Appellate Body’s Findings in WT/DS 379 Regarding the Antidumping and Countervailing Duty Investigations of Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China, at 38–41 (July 31, 2012) [hereinafter Final Determination Section 129 –– OTR Tires].} In other words a correction of approximately .08\% applied to the original AD.\footnote{Id. at 7.} This low percentage is representative of the results of the few investigations conducted to date. It demonstrates the limited practical effect of requiring the DOC to investigate and make an adjustment for duplicative remedies in concurrent AD/CVD investigations. The DOC qualified its determinations in the Section 129 reviews, stating that the analysis was limited by a short timeline and that the agency’s methodology might evolve over time.\footnote{Preliminary Determination –– Stainless Steel Sinks, supra note 163, at 21.}

\subsection*{b. Offsetting the Methodology Used in Subsequent Investigations.}

In the investigations conducted after the Section 129 reviews, the DOC improved its methodology for implementing 19 U.S.C. § 1677f-1(f). It did so while reiterating that its application of the law will continue to be refined.\footnote{Id.} In the investigations since the first four, the DOC changed its approach by sending questionnaires to respondents to find which countervailable subsidies reduced the respondents’ cost of manufacturing.
In both the Drawn Stainless Steel Sinks and the Hardwood and Decorative Plywood investigations, the respondents indicated that there were cost-to-price linkages for certain countervailable subsidies that impact COM.\footnote{Id. at 22.} After verifying the information submitted by the respondents, the DOC determined that an adjustment was warranted for the identified subsidies that demonstrated cost-to-price linkages that affect COM.\footnote{Id.; Decision Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, for the Preliminary Determination in the Antidumping Investigation of Hardwood and Decorative Plywood from the People’s Republic of China, at 32 (Apr. 29, 2013) [hereinafter Preliminary Determination – Hardwood and Decorative Plywood], available at http://enforcement.trade.gov/fm/summary/prc/2013-10532-1.pdf.} In the Hardwood and Decorative Plywood Investigation, the DOC declined to make an adjustment. The DOC declined the adjustments after determining that the respondents had not provided sufficient evidence to demonstrate cost-to-price linkages for the subsidies identified.\footnote{Final Determination – Stainless Steel Sinks, supra note 155, at 4.}

Another potentially significant difference between the Section 129 reviews and the subsequent investigations is that in the former, the DOC assumed that only input subsidies lower export prices.\footnote{Preliminary Determination – Hardwood and Decorative Plywood, supra note 199, at 32.} This was due to time constraints and a lack of responsiveness from the GOC.\footnote{According to the DOC, the record in the Section 129 reviews lacked any evidence that any type of subsidy other than input subsidies affects variable cost. Id. at 22. The DOC also stated that the GOC failed to provide evidence to support its claim that the pass-through effect was not just limited to input subsidies. Id. In GPX (2009), the CIT held that it was unreasonable for the DOC to place the burden of showing double remedies on the respondent due to the difficulty of measuring the exact effect of a subsidy on price. 645 F. Supp. 2d 1231, 1242–43 (Ct. Int’l Trade 2009). If the DOC conducted a concurrent AD/CVD investigation and placed the burden of proof of showing that subsidies other than input subsidies affected variable cost, the court would likely find that the resulting determination was unreasonable. The DOC relied on a Credit Lyonnais Securities Asia (CLSA)-Market monthly China PMI report on Manufacturing, which found that Chinese manufacturers changed output prices in response to increases in input costs over the previous month and that only part of the cost increases were passed on to customers in the form of higher selling prices. Id. at 22. As a result, the DOC determined that the only domestic subsidies that reduce import prices, per 19 U.S.C. § 1677f-1(1)(B), are ones that affect variable cost, namely input subsidies, and therefore the DOC excluded all other subsidies from its analysis. Section 129 Determination – OTR Tires, supra note 165, at 9. The CLSA Report did not analyze the relationship between changes in other types of costs and changes in output prices. See Final Determination Section 129 – OTR Tires, supra note 179, at 22.} In the subsequent investigations the DOC solicited information regarding any subsidies that lower respondents’ COM,\footnote{Id.} including subsidies other than input subsidies.\footnote{Preliminary Determination – Stainless Steel Sinks, supra note 163, at 22; Preliminary Determination – Hardwood and Decorative Plywood, supra note 199, at 32.}

The second half of the adjustment methodology, in which the DOC attempts to reasonably estimate the extent of subsidy pass-through to

\footnote{However, the onus is on the respondent to identify which of the countervailable subsidies reduce its COM, which could include a subsidy other than an input subsidy, and assuming the DOC is able to verify the cost-to-price linkage identified by the respondent, could result in an adjustment for a subsidy other than an input subsidy.}
export price, remains problematic due to the DOC’s reliance on manufacturing sector data rather than firm-specific data. After determining that a respondent has adequately demonstrated a cost-to-price linkage for a countervailable subsidy, the DOC must estimate the extent of pass-through in order to make an adjustment to the applied antidumping rate.\textsuperscript{206} In the Section 129 reviews, the DOC used data from the Chinese manufacturing sector as a whole to estimate the extent of pass-through.\textsuperscript{207} The DOC did this because it could then match price and cost to the subject merchandise and pair cost and price series from the same group at the sector level.\textsuperscript{208} While the DOC acknowledged that export prices and U.S. import prices of subject merchandise may be a more appropriate price measure than manufacturing sector data,\textsuperscript{209} data constraints prevented them from disaggregating U.S. import data in order to match the price and cost series under a subset of the manufacturing sector.\textsuperscript{210}

Additionally, the DOC also used input price inflation to estimate pass-through, which it acknowledged is an inexact proxy for the extent of subsidy pass-through.\textsuperscript{211} Similarly, in the Drawn Stainless Steel Sinks investigation, the DOC determined that the respondents failed to provide sufficient information to calculate company-specific estimates to determine the extent of subsidy pass-through. Consequently, the DOC declined to utilize the information supplied by respondents regarding cost-linked price changes.\textsuperscript{212} Instead the DOC applied a ‘documented ratio of cost-price changes for the Chinese manufacturing sector as a whole’ to estimate the extent of subsidy pass-through.\textsuperscript{213} The documented ratio used in the initial determination was approximately 61\%,\textsuperscript{214} similar to the approximately 63\% calculated in the Section 129 reviews.\textsuperscript{215}

3. Reasonableness of Offsetting Methodology

The estimation methodology the DOC developed in the Section 129 determinations and refined in subsequent investigations are reasonable implementations of 19 U.S.C. § 1677f-1(f) because of three factors: the

\begin{itemize}
\item \textsuperscript{206} 19 § U.S.C. 1677f-1(f)(1)(C).
\item \textsuperscript{207} See Final Determination Section 129 – OTR Tires, supra note 179, at 22. The DOC compared the rate of change of an aggregate input index and of an aggregate price index to determine how much of each CVD rate increased the AD cash deposit rate. Section 129 Determination – OTR Tires, supra note 165, at 9. The DOC relied on the record evidence to estimate that 63.07\% of the subsidies were passed through to export prices and to identify the portion of each CVD rate estimated to have increased the AD cash deposit rate.
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Final Determination Section 129 – OTR Tires, supra note 179, at 29.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id. at 26.
\item \textsuperscript{212} Preliminary Determination – Stainless Steel Sinks, supra note 163, at 21–22.
\item \textsuperscript{213} Id. at 22.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Section 129 Determination – OTR Tires, supra note 165, at 10.
\end{itemize}
deferential standard of review applied to the DOC’s implementing methodologies; the burden of proof of showing duplicative remedies allocated to the respondent; and the applicability of available adverse facts.

a. Standard of Review. The standard of review in a case challenging an AD or CVD determination is that the court, “shall hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” The two-step framework provided in *Chevron* governs judicial review of the DOC’s interpretation and implementation of the CVD statute. Under *Chevron*, the court first determines whether Congress has directly spoken to the precise question at issue. If so, the unambiguously expressed intent of Congress governs. If Congress has not spoken directly on the issue, the court must determine whether the agency responsible for filling a gap in the statute has rendered an interpretation that is based on a permissible construction of the statute. If the DOC’s interpretation is reasonable, albeit not the only or even preferred reasonable interpretation, it will withstand judicial scrutiny. This standard reflects the legislative intent that the courts afford considerable deference to the DOC administration and methodology.

b. Burden of Proof. The deferential standard of review is most relevant because 19 U.S.C. § 1677f-1(f)(1)(B) does not affirmatively allocate the burden of proof of demonstrating duplicative remedies. According to the DOC, the burden of proof is on the respondent because, in a case where a respondent seeks an adjustment of an antidumping duty, the burden of proof is on the respondent seeking the adjustment. The DOC considers a calculation to avoid duplicative remedies in a concurrent AD-CVD investigation to be an ‘adjustment’ to an antidumping duty. Consequently, the respondent alleging duplicative duties has the burden to show that a subsidy reduced the average price of imports.

The statute does not state which party bears the burden of proof.

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222 See Statement of Administrative Action on the Uruguay Round, H.R. Doc. No. 103-316, at 829 (1994); 19 C.F.R. § 351.401(b)(1) (2012); Fujitsu Gen. Ltd. v. U.S., 88 F.3d 1034, 1040 (Fed. Cir. 1996) (“[The DOC] ... reasonably placed the burden to establish entitlement to adjustments on . . . the party seeking the adjustment and the party with access to the necessary information.”).
223 Section 777A(f)(1) of the Tariff Act of 1930, 19 U.S.C. § 1677f-1(f)(1), states that the DOC is to reduce the antidumping duty if it finds that the countervailable subsidy has been demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period. 19 U.S.C. § 1677f-1(f)(1)(B) (2006).
However given the DOC’s interpretation that the initial burden of showing pass-through of a countervailable subsidy to lower export prices is on the respondent, they should be accorded deference. This interpretation is also consistent with other aspects of an AD or CVD investigation where respondents have the burden of proof of demonstrating facts for which they have greater access to the relevant evidence. For example, demonstrating the absence of central government control in order to receive a company-specific rate in a NME AD investigation.\textsuperscript{224} It is reasonable to require a respondent to demonstrate that a subsidy is passed through to lower export prices, rather than assume that all domestic subsidies are passed through and require the DOC to make an automatic adjustment for all countervailable subsidies in concurrent AD/CVD investigations. The investigations that the DOC has conducted demonstrate that not all subsidies received are used to lower export prices. Those subsidies, which do not lower export prices, do not implicate a double counting problem necessitating an adjustment to the dumping margin.\textsuperscript{225}

Considering the extreme difficulty of measuring the price effect of domestic subsidies,\textsuperscript{226} it could be argued that it is not reasonable to place the burden of proof on the respondent. However, this argument ignores the fact that the burden of proving the difficult portion of the estimation methodology is actually borne by the DOC. The DOC has the burden of reasonably estimating the extent to which the subsidy increased the weighted average dumping margin.\textsuperscript{227}

Based on investigations concerning implementing 19 U.S.C. § 1677f-1(f), it is reasonable to allocate the initial burden of proof to respondents. Respondents should show that a countervailable subsidy has a demonstrable cost-price linkage because they are in the best position to identify which of the countervailable subsidies affect their COM. Moreover, putting the burden of proof on respondents does not impose unreasonable hardship above and beyond what is already required of them in an ordinary AD or CVD investigation.

In cases where a respondent fails to provide adequate evidence to allow the DOC to verify that a countervailable subsidy is passed-through to lower export prices, it is reasonable for the DOC to decline to make an adjustment under 19 U.S.C. § 1677f-1(f)(1)(C). The party that has the burden of proof must create an adequate record,\textsuperscript{228} and it is not the DOC’s obligation to “seek out” information from the respondent.\textsuperscript{229} If a respondent only meets its burden of demonstrating that a subsidy reduced the average import price with respect to certain types of subsidies, the DOC is not obligated to seek out information showing what effect the

\textsuperscript{225} See Preliminary Determination – Stainless Steel Sinks, supra note 163, at 22.
\textsuperscript{226} See GPX, 645 F. Supp. 2d at 1243.
\textsuperscript{229} See id. at 936.
other subsidies had on average import price.

The weakest aspect of the methodology the DOC uses to make adjustments under 19 U.S.C. § 1677f-1(f) is a portion of the estimation methodology, § 1677f-1(f)(1)(C), where the DOC attempts to reasonably estimate the extent of subsidy pass-through. This estimation methodology the DOC has used in this phase of the adjustment process is may not be reasonable because it utilizes manufacturing sector-wide data as opposed to firm-specific data. This results in an estimation based on aggregate price indices rather than the effect of the actual subsidy received by the respondent. In the Section 129 reviews, the DOC did not consider the actual effect of a specific subsidy, looking instead to average changes in an input price index. Additionally, the DOC did not limit its analysis to the impact on import prices of like merchandise. Instead it looked to changes in an aggregate producer, post-factory price index comprised of data from all manufacturing sectors in China.\(^{230}\) The DOC used a similar methodology in the Stainless Steel Kitchen Sinks investigation, when it applied a Chinese manufacturing sector-wide ratio to estimate the extent of subsidy pass-through.\(^{231}\)

Courts have found that the use of aggregate estimates is unreasonable in the face of clear legislative intent to the contrary in other circumstances, for example in valuing the labor factor of production in NME AD investigations.\(^{232}\) In *Dorbest v. United States*, the CAFC held that the DOC’s methodology of valuing the labor factor of production under 19 U.S.C. § 1677b(c)(4) using a regression-based wage rate calculated with data from market economy countries was not reasonable.\(^{233}\) The statute demonstrates Congress’s clear intent to require the use of data solely from economically comparable countries\(^{234}\) that are significant producers of comparable merchandise,\(^{235}\) which the regression methodology failed to do.\(^{236}\)

Similarly, 19 U.S.C. § 1677f-1(f)(1)(B) states that a subsidy must be demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period. This shows clear legislative intent to have the relevant reduction in average prices be caused by a subsidy and limited to imports of like merchandise. The methodology the DOC used was overly broad because it used an input price index as a proxy for a subsidy. Moreover, it used cost and price data for the entire manufacturing sector as a proxy for the average price of the like product produced by individual respondents. Therefore, this methodology likely underestimated the impact of the relevant subsidies.


\(^{231}\) Preliminary Determination – Stainless Steel Sinks, *supra* note 163, at 22.


\(^{234}\) *Dorbest Ltd. v. U.S.*, 604 F.3d 1363, 1372 (Fed. Cir. 2010).


\(^{237}\) *Dorbest*, 604 F.3d at 1371–72.
on import prices.\textsuperscript{237}

c. \textit{Applicability of Facts Available}. The DOC could justify its pass-through estimation methodology as reasonable and in accordance with law by relying on the facts available. The DOC may use “facts otherwise available” to make a determination if necessary information is not available in the record or if an interested party withholds or fails to provide such information.\textsuperscript{238} In the Stainless Steel Kitchen Sinks investigation The DOC stated that the respondents failed to provide adequate information to calculate company-specific estimates of the extent of subsidy pass-through.\textsuperscript{239} This suggests that the application of facts available is reasonable and justifies the use of an aggregate manufacturing sector proxy. This conclusion is supported by the text of the statute, which only requires that the DOC make an adjustment if it can reasonably estimate the extent to which a countervailable subsidy has increased the weighted average dumping margin.\textsuperscript{240} In light of the text, the DOC could have declined to make an adjustment altogether after concluding the information provided by the respondents was inadequate to reasonably estimate the extent of subsidy pass-through.

B. WTO Consistency of P.L. 112-99

1. \textit{Text of P.L. 112-99}

Public Law 112-99 could alternatively be challenged at the DSB of the WTO, however, a challenge in this forum would likely be unsuccessful. The statute is ‘as such’ consistent with the WTO Agreements and the Appellate Body decision in US-AD/CVD. Section 2(a), which requires the DOC to make reasonable efforts to determine if a subsidy reduced the export price and then reduce the weighted average dumping margin by the amount of the subsidy, is consistent ‘as such’ with Article 19.3 of the SCM Agreement. The Appellate Body stated that in order to be consistent with Article 19.3, the DOC must attempt “to

\textsuperscript{237} If the reduction in import prices resulting from the subsidies is underestimated, the amount by which the subsidies increase the weighted average dumping will also be underestimated. This results in less than the full amount of duplicative remedies being adjusted for. \textit{See} 19 U.S.C. § 1677f-1(f)(2) (2006).

\textsuperscript{238} \textit{See} Gerber Food (Yunnan) Co., Ltd. v. United States, 31 C.I.T. 921, 937–38 (2007). Pursuant to 19 U.S.C. § 1677e(a), the DOC may use facts otherwise available if, (1) necessary information is not available on the record, or (2) an interested party or any other person - (A) withholds information that has been requested by the administering authority or the Commission under this subtitle, (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, (C) significantly impedes a proceeding under this subtitle, or (D) provides such information but the information cannot be verified as provided as provided in section 1677m(i) of this title. If the DOC finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the DOC may use adverse inferences in selecting from among the facts available. 19 U.S.C. § 1677e(b) (2006).

\textsuperscript{239} Preliminary Determination – Stainless Steel Sinks, \textit{supra} note 177, at 22.

\textsuperscript{240} \textit{See} § 777A(f)(1)(A)–(C) of the Act.
establish whether or to what degree it would offset the same subsidies twice by imposing antidumping duties calculated under its NME methodology, concurrently with countervailing duties.\textsuperscript{241} Section 2(a) directs the DOC to reduce the AD by the amount that a countervailable subsidy, that has been demonstrated to reduce the average price of imports of like merchandise, has increased the weighted average dumping margin. The investigation provided for in Section 2(a) is consistent with the type of inquiry the Appellate Body concluded that the DOC should have undertaken in US-AD/CVD.\textsuperscript{242} However, the DOC’s implementation of Section 2(a) is more susceptible to challenge as inconsistent with GATT Article 19.3.

2. \textit{Offsetting Methodology of P.L. 112-99}

While the DOC’s offsetting methodology would likely be upheld both in U.S. court and in WTO dispute settlement, several factors make the latter determination a much closer call. These factors include a standard of review that accords no deference to the investigating authority, the allocation of the burden of proof between the investigating authority and the respondent, and the potential applicability of the doctrine of facts available.

a. \textit{Standard of Review}. The standard of review under the Anti-Dumping Agreement is more stringent than that applied under U.S. law. It asks whether a national authority’s establishment of facts was proper and unbiased and whether the investigating authority’s interpretation of the relevant WTO provision was permissible.\textsuperscript{243} Similar to \textit{Chevron} deference, this standard suggests that even if the panel would have reached a different decision from that reached by the investigating authority, it could still find that the standard is met. However, in practice panels tend to find there is only one possible interpretation of the Agreement, giving no deference to Member interpretations with which they disagree.\textsuperscript{244}

\textsuperscript{241} AD/CVD AB Report, \textit{supra} note 98, ¶ 604.
\textsuperscript{242} See \textit{id.}
\textsuperscript{243} Anti-Dumping Agreement Article 17.6.
\textsuperscript{244} In \textit{United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan}, the Appellate Body found that Article 17.6(iii) of the Anti-Dumping Agreement’s reference to ‘permissible interpretation’ refers to interpretation of the relevant provisions of the Anti-Dumping Agreement, which is permissible under the rules of treaty interpretation of the Vienna Convention on the Law of Treaties, Report of the Appellate Body, \textit{United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan}, ¶¶ 59–60 (July 24, 2001). In practice, applying the pertinent rules of the Vienna Convention, panels have consistently found there is but one way to interpret the text. See Appellate Body Report, \textit{US-Stainless Steel (Mexico)}, ¶ 136, WT/DS344/R (Dec. 20, 2007) (“In our analysis, we have been mindful of the standard of review provided in Article 17.6(ii) of the Anti-Dumping Agreement. However, we consider that Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement, when interpreted in accordance with the customary rules of interpretation of public international law as required by the first sentence of Article 17.6(ii) of the Anti-Dumping Agreement, do not admit of another interpretation as far as the
b. **Burden of Proof.** A WTO panel or the Appellate Body would likely allocate the burden of showing whether a subsidy reduces import price to the United States. The Appellate Body in US-AD/CVD did not specifically address which party, the investigating authority or the respondent, has the burden of showing that a subsidy reduces import price, but its analysis suggests it would place the burden of proof on the investigating authority.\(^{245}\) The Appellate Body stated that the investigating authority has an affirmative obligation to ascertain the precise amount of the subsidy and to establish the appropriate amount of the duty under Article 19.3:

This obligation encompasses a requirement to conduct a sufficiently diligent "investigation" into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record . . . [including] evidence of whether and to what degree the same subsidies are being offset twice when anti-dumping and countervailing duties are simultaneously imposed on the same imported products.\(^{246}\)

This statement can be interpreted as putting the burden of soliciting evidence of the subsidy-import price link on the investigating authority and the burden of providing that evidence on the respondent, as the DOC alleges.\(^{247}\) However, a panel or the Appellate Body would likely place the ultimate burden of demonstrating that a subsidy reduced the average import price and therefore resulted in duplicative remedies on the investigating authority, using the evidence provided by the respondent.

The standard for whether the DOC’s offsetting methodology is consistent with Article 19.3 is whether the DOC has taken the necessary corrective steps to adjust for duplicative remedies\(^{248}\) by conducting a sufficiently diligent investigation and soliciting evidence.\(^{249}\) In the Section 129 reviews in US-Softwood Lumber IV,\(^{250}\) the Appellate Body upheld a Panel decision finding that the U.S. had failed to conduct an adequate pass-through analysis of subsidies in transactions involving unrelated parties.\(^{251}\) This reasoning was justified because the DOC solicited company-specific, transaction-by-transaction information from the Canadian respondents with respect to some transactions\(^{252}\) but not

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\(^{245}\) See AD/CVD AB Report, *supra* note 98, ¶ 602.

\(^{246}\) See *id.*

\(^{247}\) Final Determination Section 129 – OTR Tires, *supra* note 194, at 18.

\(^{248}\) See AD/CVD AB Report, *supra* note 98, ¶ 599.

\(^{249}\) See *id.* ¶ 602.


\(^{251}\) See *id.* ¶¶ 4.58–4.62.

\(^{252}\) See *id.* ¶ 4.83.
The Panel held that the DOC’s failure to investigate the pass-through in respect of all the relevant transactions, specifically those transactions for which no data was requested, was a failure to properly implement the rulings of the Dispute Settlement Body. Interestingly, the Panel resisted making categorical statements as to the sufficiency of using aggregate data versus company-specific or transaction-specific data to analyze the pass-through effect of a subsidy. Similarly, in the Section 129 reviews conducted following US-AD/CVD, the DOC’s investigation was not sufficient because its attempts to solicit evidence of duplicative remedies were not specific to the firms that received the subsidies. After failing to receive satisfactory responses from the GOC, the DOC failed to make additional requests for information and instead relied on a publicly-available report that did not address the price effect of subsidies other than input subsidies. In contrast, in the Drawn Stainless Steel Sinks and Hardwood and Decorative Plywood investigations, the DOC did request information from the individual mandatory respondents regarding which of the subsidies under investigation impacted their cost of manufacturing and the cost-linked price changes resulting from the subsidies under investigation. As a result, the investigations conducted subsequent to the Section 129 reviews meet the standard of a sufficiently diligent investigation, at least with regard to the initial burden of demonstrating that the countervailable subsidies reduce export prices.

As previously discussed, this phase of the offsetting methodology, involving the use an estimate as a proxy for subsidy pass-through, is more problematic. In order for the DOC’s implementation of Section 2(a) of P.L. 112-99 to comply with US-AD/CVD, The DOC must investigate the price-effect of each subsidy under investigation and thereby determine whether an adjustment for duplicative remedies is necessary. By applying an aggregate price proxy for the countervailable subsidies and only considering manufacturing sector level data, the DOC arguably did not adequately account for the pass-through.

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253 See id. ¶ 4.104. The Canadian respondents provided aggregate data for the transactions for which data was requested. Id. ¶ 4.83. Canada alleged that the DOC presumed pass-through for the transactions for which no data was requested. Id. ¶¶ 4.93–4.94.

254 The Panel’s Article 21.5 Report was appealed to the Appellate Body by the U.S. The appeal challenged whether the Panel’s First Assessment Review was within the scope of Article 21.5. However, it did not challenge the substance of the pass-through analysis in the First Assessment Review. Article 21.5 Appellate Body Report, ¶ 96. The Appellate Body upheld the Panel’s determination that the First Assessment Review fell within the scope of Article 21.5. Id. ¶ 95.

255 Id. ¶ 4.106.

256 See id. ¶¶ 4.88–4.89.

257 Section 129 Determination – OTR Tires, supra note 194, at 8.

258 Id. at 9.

259 Preliminary Determination – Stainless Steel Sinks, supra note 163, at 22.

260 Under US-Softwood Lumber IV, the aggregate data methodology utilized by the DOC might have been sufficient had it specifically accounted for each challenged subsidy; however, the conclusion that only input subsidies impact average import prices is not supported by record evidence.
through of each challenged subsidy and potentially applied duplicative remedies. However, as in the analysis under U.S. law, the DOC’s estimation methodology for subsidy pass-through could be consistent with Article 19.3 and the Appellate Body decision in US-AD/CVD if the doctrine of facts available applies.

c. Applicability of Facts Available. The second phase of the offsetting methodology is consistent with Article 19.3 and the AB decision in US-AD/CVD due to the applicability of facts available. Neither US-AD/CVD nor Canada-Softwood Lumber IV addressed the issue of when a Member may resort to using aggregate or proxy data when the information provided by respondents is not deemed sufficient to estimate the extent of subsidy pass-through. The relevant provision of the Antidumping Agreement is Article 6.8, which states:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II(402) shall be observed in the application of this paragraph.

The applicability of facts available is narrower under WTO jurisprudence than it is under U.S. law. For example, under U.S. law, the DOC may find that a respondent who failed to provide information that was not specifically requested but which the respondent should have known was necessary to an investigation impeded that investigation, thereby justifying the application of facts available.261 In contrast, in Argentina-Ceramic Tiles, the Panel held that, “an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit.”262

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262 Panel Report, Argentina — Definitive Anti-Dumping Measures on Carton-Board Imports from Germany and Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy, ¶ 6.54 (Sept. 28, 2001) [hereinafter Argentina-Ceramic Tiles]. See also id. ¶ 6.55 (“Paragraph 1 of Annex II of the [Anti-Dumping] Agreement on the ‘Use of Best Information Available in Terms of Paragraph 8 of Article 6’ reiterates the obligation of Article 6.1. It states that: 1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.’ Thus, the first sentence of paragraph 1 requires the investigating authority to ‘specify in detail the information required,’ while the second sentence requires it to inform interested parties that, if information is not supplied within a reasonable time, the authorities may make determinations on the basis of the facts available. In our view, the inclusion in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are not entitled to resort to best information available in a situation where a
Due to the DOC’s inadequate efforts to solicit information, the DOC could not justify the results of the Section 129 reviews based on facts available. However, the DOC’s efforts in the subsequent investigations do meet the standard necessary for applying facts available. In the Section 129 reviews, the DOC requested industry-level information from the GOC, but concluded that the responses were inadequate.\textsuperscript{263} Due to time constraints, rather than make additional requests for information, the DOC based its determination on other information on the record, akin to invoking facts available.\textsuperscript{264}

In contrast, in the Drawn Stainless Steel Sinks investigation, the DOC requested information from the individual respondents and made subsequent requests for information in an attempt to calculate company-specific pass through rates before resorting to applying the manufacturing sector-wide rate to estimate subsidy pass through.\textsuperscript{265} Given that the DOC investigated manufacturers individually, requested information relating to specific subsidies, and chose to utilize an aggregate estimate, the application of facts available is reasonable. Consequently, the investigation in Drawn Stainless Steel Sinks is more likely to meet the standard of sufficiently diligent than that conducted in the Section 129 reviews, regardless of the fact that the DOC eventually resorted to utilizing the same imprecise proxy mechanism to estimate pass-through in both investigations.

VIII. IMPACT OF SUNSETTING PROVISION IN CHINA’S ACCESSION PROTOCOL

It is also worth noting that the issue of double counting will likely become moot with respect to China in 2016 when, under the terms of China’s accession to the WTO, China’s non-market economy status is set to expire. Article 15 of China’s Accession Protocol permits importing Members to treat China as a non-market economy in antidumping and countervailing duty investigations if certain conditions are met.\textsuperscript{266} Article 15(d) of the Accession Protocol states:

\begin{quote}
Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member’s party does not provide certain information if the authorities failed to specify in detail the information which was required.
\end{quote}

\textsuperscript{263} Section 129 Determination – OTR Tires, \textit{supra} note 165, at 7-8.
\textsuperscript{264} \textit{Id.} at 8–9.
\textsuperscript{265} Issues Final Determination – Drawn Stainless Steel Sinks, \textit{supra} note 177, at 5.
national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.\textsuperscript{267}

However, the obligation under Article 15 is not as all encompassing as some commentators have suggested. Article 15(d), the provision in China’s Accession Protocol that provides for China’s NME status to expire in 2016, refers specifically to another provision, Article 15(a)(ii), which by its own terms applies only to AD investigations. In practice this means that Article 15 will eliminate the DOC’s flexibility in AD investigations to select a surrogate country benchmark. This resolves the double counting problem that arises due to the calculation of a dumping margin using a surrogate country. However, the provision does not require the United States to fully recognize China as a NME country. Consequently, the decision whether to alter China’s NME status will remain subject to the discretion of the DOC,\textsuperscript{268} which is unlikely to elect to alter China’s NME status without significant evidence of relevant reform.\textsuperscript{269}

Given the applicability of Article 15, the issue of double counting due to concurrent application of CVDs and NME ADs with respect to China could be moot as of 2016. However, this assumes that the DOC ceases utilizing the NME AD methodology, based on surrogate country values, and does not replace it with a methodology that gives rise to the same issues. It should also be noted that the DOC has begun conducting concurrent CVD and NME AD investigations with respect to products from Vietnam.\textsuperscript{270} Since Vietnam did not negotiate a comparable provision to Article 15 in China’s Accession Protocol when it acceded to the WTO, there is no restriction on the DOC’s continued application of its concurrent CVD-NME AD methodology to Vietnam, or any other

\textsuperscript{267} Id.


\textsuperscript{269} The DOC reviewed China’s NME status in 2006 and determined that while China has implemented significant economic reforms with respect to some of the factors, the market forces in China were not yet sufficiently developed for the DOC to change its status as a NME country. Id. at 5. The DOC focused particularly on the fifth factor, government control of the allocation of resources, concluding that the GOC was still deeply entrenched in resource allocation, particularly in the banking sector. Id. at 77. Based on its 2006 analysis, the DOC would likely require evidence of significant economic and legal reforms in order to reach a different conclusion with respect to China’s NME status. Id. at 81 (“Firms in industries that are dominated by the private sector also operate in a business environment distorted by state presence and the weakness—or absence—of the legal and institutional factors that underlie functioning markets, e.g., rule of law and property rights, and meaningful bankruptcy laws.”); see Kimberly A. Tracey, Non-Market Economy Methodology under U.S. Anti-Dumping Laws: A Protectionist Shield from Chinese Competition, CURRENTS: INT’L TRADE L.J. 81, 87 (2006).

NME countries, post-2016. Consequently, double counting will continue to be an issue of contention when the DOC conducts concurrent AD and CVD investigations involving products from NME countries.

IX. CONCLUSION

Avoiding duplicative trade remedies in the concurrent application of NME AD and CVD is a complicated issue. Public Law 112-99 adequately addresses the issue of double counting by requiring the DOC to determine in concurrent AD/CVD investigations whether or not countervailable subsidies are passed through to reduce export price and adjust the dumping margin accordingly. This resolves the issue of double counting because only subsidies that are passed through to reduce export price have an impact on the dumping margin and consequently would give rise to duplicative remedies.

The statute also satisfies the standards laid out in both the U.S. court decisions in the GPX cases and the WTO Appellate Body decision in US-AD/CVD, ensuring that the United States is in compliance with its international obligations under the GATT and its associated agreements. Depending on how the DOC chooses to implement the obligation in the sunsetting provision in China’s Accession Protocol to stop applying the NME AD methodology after 2016, the double counting issue may disappear with respect to China. However, the DOC is likely to take a narrow approach in interpreting the extent to which the sunsetting provision limits its ability to utilize NME methodologies. For example, calculating the normal value based on a surrogate country factors of production, such that there will still be a potential for duplicative remedies. Additionally, the DOC has already begun applying CVD duties to the other major U.S. trading partner currently treated as a NME country, Vietnam. This means it is all the more important for the DOC to improve its adjustment methodology. More specifically, in order to remain in compliance with the United States’ WTO obligations, the methodology can be improved by refining the estimating subsidy pass-through to allow for the calculation of firm-specific pass through rates of individual firms for individual subsidies.