July 12, 2010

Polyethylene Retail Carrier Bags: Non-Market Economy Status and U.S. Unfair Trade Actions against Vietnam

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Abstract:

Like China, Vietnam was required as a condition of WTO accession to accept that other WTO Members would be able to use non-market-economy methodology for an extended period (2018 in the case of Vietnam) when bringing antidumping actions against Vietnamese producers. Vietnam also agreed to the use of special non-national “benchmarks” for calculating the benefits derived from certain government subsidy programs when those programs were challenged under national countervailing duty actions. In 2009, the U.S Department of Commerce brought its first CVD action against Vietnam, Polyethylene Retail Carrier Bags. This article reviews the history of such actions against Vietnam (and to a lesser extent, China), with particular emphasis on the PRCB action and its implication for future U.S. unfair trade actions against Vietnam.

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I. Introduction

Vietnam agreed in its Protocol of Accession to the WTO (incorporating the Working Party Report)\(^1\) that WTO Members could use the generally unfavourable non-market economy (“NME”) methodology when conducting anti-dumping (“AD”)\(^2\) and countervailing duty (“CVD”)\(^3\) investigations, including but not limited to the use of factor of production data from “surrogate” countries in substitution for action Vietnamese production data. (The NME authorization for AD actions continues for twelve years after WTO accession (January 2007); there is no expiry date for CVD actions.)

This unavoidable concession results in a continuing risk of anti-dumping and, recently, countervailing duty, actions against Vietnamese exports, particularly those actions brought in United States and the European Union. The methodology has typically resulted in exaggerated dumping margins, as in Frozen Fish Fillets where the margins were in excess of 44%\(^4\) but not always; the Vietnamese margins in the initial investigation in Shrimp\(^5\) were in the 6% range, i.e., near normal. In the CVD area these methods relate primarily to the use of non-national “benchmarks” when calculating the “benefit” from certain government subsidy programs, permitting the rejection of national data when those data are considered distorted by government control of financial institutions or property leasing.\(^6\)

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2. Under WTO Rules, GATT Art. VI and the Anti-dumping Agreement, antidumping duties may be imposed where export products are sold at less than fair value and cause material injury or threat of material injury to producers in the importing country.
3. Under GATT arts. VI and XVI and the Agreement on Subsidies and Countervailing Measures, countervailing duties may be imposed when the subject imports are show to enjoy government subsidies that confer a benefit, and such subsidies cause material injury or threat of material injury to producers in the importing country.
In April and May 2009, Commerce initiated AD and CVD actions against Vietnam relating to Polyethylene Retail Carrier Bags (“PRCBs”), the plastic bags used for packaging dry cleaning and other consumer products. The action against Vietnamese producers followed a number of CVD actions against China beginning in 2006 and the two earlier AD actions against Vietnam as mentioned above. In August 2009, the Department of Commerce (“DOC” or “Commerce”) preliminarily determined the existence of actionable subsidies, albeit at relatively low sub-3% rates in most instances.\(^7\) These findings were essentially confirmed in the final CVD determination, with CVD margins ranging from 0.44 percent (de minimis) to 5.28 percent except for one firm for which “adverse facts available” (“AFA”) were used, resulting in much higher margins.\(^8\) The preliminary AD determination led to considerably higher margins, from 52.3% to 76.11%, with those results confirmed without change in the final AD determination, since none of the parties participated further in the proceedings. In the AD proceedings, the magnitude of the margins was exaggerated by Commerce’s use of AFA,\(^9\) explained in Part VI(B), infra, with the result that the AD case is of little use in further illuminating Commerce practice in this third AD action against Vietnam.

The NME approach, particularly as it is applied in CVD actions, will likely continue to bedevil both the Vietnamese Government and Vietnamese exporters to the United States unless and until the United States follows the lead of New Zealand and Australia\(^10\) and decides to afford Vietnam market economy treatment for some or all manufacturing sectors. Such action seems highly unlikely at the present time. Moreover, while there have been no EU CVD actions to date brought against Vietnam, the EU


recently initiated its first such action against China, relating to alleged Chinese subsidies of glossy paper.\textsuperscript{11} The risks of similar EU proceedings against Vietnam, although perhaps not immediate, are obvious.

In many respects the NME issue, at least from an economic point of view, is not really whether the Chinese and Vietnamese WTO Accession Protocols legally permit such countries as the United States and the European Union, to treat those countries differently in AD and CVD actions. (The answer is “yes” as discussed \textit{infra}.) However, it makes little economic sense to contend that there is a clear, economy-wide divide between NMEs and MEs in such circumstances, even if the level of government involvement in the economy in MNEs such as China and Vietnam remains considerably greater than in most so-called market economies. As the discussion below of \textit{Georgetown Steel} indicates, the traditional distinction between NMEs and MEs in U.S. CVD practice, precluding the use of CVD actions against the former, evolved more than 25 years ago when a sharp division did exist between centrally-planned economies such as the Soviet Union, and those in which factors of production and selling prices are determined by market forces. This distinction has been greatly blurred in recent years.\textsuperscript{12}

Clearly, the Chinese and Vietnamese governments continue to play major roles in their economies. Many government decisions and policies distort the market system, as with government control of commercial banking and land use prices in Vietnam and favoring certain industries (such as plastics in Vietnam) over others. But many other governments have been interfering extensively in major sectors of the economy, such as banking, mortgage loans, health care and the auto sector, among others, in the case of the United States.\textsuperscript{13} The major world economies may well be entering an era that portends a shift away from the “laissez faire” approach to government regulation of and participation in the economy that began during the Reagan era in the United States and

\textsuperscript{11} Joe Kirwin, \textit{EU Investigates Chinese Glossy Paper, Marks First-Ever China Anti-Subsidy Probe, 27 INT’L TRADE REP. (BNA) 580 (Apr. 22, 2010).}
\textsuperscript{13} See \textit{Auto Industry Crisis}, \textit{N.Y. TIMES}, May 6, 2010 (discussing the history of the bailout and the funds provided by the U.S. government to General Motors and Chrysler),
the Thatcher era in the United Kingdom, and spread elsewhere. In any event, governments’ reactions to the “Great Recession” of 2009 suggest that efforts to characterize economies as NME or ME is likely to make progressively less economic sense for purposes of applying national unfair trade laws.

Be that as it may, Vietnam and China must deal with the realities of U.S. law and practice, and with the language the two governments accepted when acceding to the WTO in 2007 and 2001, respectively, for some years to come. Moreover, since the United States, EU and other WTO Members are much more concerned about China’s exports than Vietnam’s, any major change in treatment of Vietnam, such as abandonment of NME treatment, likely depends on a policy change with regard to China, since the rationale for NME treatment is similar for both nations. Because relatively few WTO Members except the United States, the European Union and Canada, commonly bring CVD actions, the threat of trade disruption from AD actions probably remains a more serious concern for both Vietnam and China, except by the United States.

The focus of this article is on the PCRB CVD action brought in the United States against Vietnam. (CVD actions against China have been discussed elsewhere.) Part II discusses the WTO requirements for applying NME methodology to WTO Members in both AD and CVD actions, as reflected in the Chinese and Vietnamese WTO accession agreements. Part III addresses U.S. MNE law and practice, focusing on the determination that Vietnam is a NME for antidumping actions in Frozen Fish Fillets. Part IV briefly reviews the methodology used by the United States authorities in bringing CVD actions against China beginning in 2006. Part V addresses key aspects of the U.S. agency determinations – CVD, AD and injury—in PRCBs, with emphasis on the groundbreaking CVD analysis. Part VI reviews a key CVD action against a market economy (Canada), Softwood Lumber, which was unsuccessfully challenged in the WTO’s Dispute

14 Of 215 CVD investigations reported to the WTO between Jan. 1, 1995 and Dec. 31, 2008, 179 were brought by five Members, the United States (88), EU (48), Canada (23), South Africa (11) and Australia (9). WTO, CVD Investigations by Reporting Member, available at http://www.wto.org/english/tratop_e/scm_e/cvd_init_rep_member_e.xls (last visited Jun. 26, 2009).

Settlement Body, a case that blurs the distinction between ME and NME distinctions in critical aspects of U.S. CVD practice. The article also discusses briefly, in Part VII, the prospects for questioning the United States’ NME practices “as applied” in the Dispute Settlement Body\(^\text{16}\) of the World Trade Organization, as with recent Chinese challenges to U.S. and EU practices.\(^\text{17}\) Part VIII is a brief summary and conclusion.

For the time being at least, the analysis of Commerce’s methodology as revealed in *PRCBs* is likely to remain relevant as a predictor of methodology in the inevitable future CVD actions against Vietnam.

II. WTO Requirements Governing MNE Treatment for China and Vietnam

Both China and Vietnam were effectively required as a condition of accession to accept special and less favorable treatment with regard to AD and CVD actions brought by other Members against them. Thus, the use of NME methodology will be virtually impossible to challenge successfully “as such” before the Dispute Settlement Body; whether challenges to such legislation “as applied” will be feasible remains to be seen and are discussed briefly below. However, also as discussed below, there may be other avenues which would permit challenges in Geneva.

A. China’s Accession Agreement

In 2001, China, upon entering the WTO, accepted the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”)\(^\text{18}\), and the applicability of its provisions, *inter alia*, relating to CVD actions (Part V). Also, China agreed in its WTO Accession Agreement to the following language:

> 15. Price Comparability in Determining Subsidies and Dumping
> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in

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\(^{16}\) Created by the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Agreement Establishing the World Trade Organization, Apr. 15, 1994 [hereinafter “Dispute Settlement Understanding” and “WTO Agreement,” respectively].

\(^{17}\) Cite to December 2008 and July 2009 requests.

\(^{18}\) Annex 1A of the WTO Agreement.
proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(d) 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 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. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-
market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.\textsuperscript{19}

It is clear from the above that the effective waiver by China applies to CVD (paragraph 15(b)) as well as AD actions (paragraph 15(a)). Thus, in AD actions, a “strict comparison with domestic prices or costs in China” will not be required. The SCM Agreement, Article 14 (“Calculation of the Amount of Subsidy in Terms of the Benefit to the Recipient”) lacks an explicit bar to determining the “comparable commercial loan” rate through the use of non-national benchmarks; thus, such benchmarks explicitly may be used pursuant to paragraph b). The only requirements are coverage in national legislation regulations and transparency when such methods are used, although the latter issue is among those before a panel in the case brought by China. As an additional hurdle, the burden assigned by the Accession Agreement is very much on the foreign producers (in paragraph 175a) (i)) to “clearly show” that market economy conditions exist. Otherwise, the investigating authorities are permitted to continue using NME analysis. While the authorization for use of MNE methodology with regard to AD actions (paragraph (a) above) expires after 15 years, the use of NME methodology for subsidy actions carries no such expiration date.

Apart from the accession agreement, the SCM Agreement, Article 27 (“Special and Differential Treatment for Developing Country Members”) will not likely assist China (or Vietnam) in avoiding the impact of the NME methodology in either AD or CVD cases. The United States does not recognize China as a developing country that is subject to the 2% de minimis requirement for subsidy margins, in contrast to the 1% applicable to WTO developing country Members under the SCM Agreement. However, Commerce has not fully rejected the possible treatment of Vietnam as a developing country for this purpose.\textsuperscript{20}

\textsuperscript{19} Accession of the People’s Republic of China, Nov. 10, 2001; emphasis supplied.
\textsuperscript{20} See PRCB Preliminary CVD Determination, 74 Fed. Reg. at 45820 (treating only margins below 1% as de minimis; developing countries are entitled to a 2% de minimis limit under art. 27.10 of the SCM Agreement.) In the final determination, the only de minimis rate was 0.44 percent, which would have qualified as such regardless of whether the rate was 1 percent or 2 percent. See U.S. Dept. of Commerce, Issues and Decision Memorandum for Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, Mar. 25, 2010, at 15, available at
B. Vietnam’s WTO Accession

The Working Party Report relating to Vietnam’s WTO accession, incorporated by reference into the Protocol of Accession, reflects the WTO’s experience with China five years earlier, and largely tracks the language in China’s WTO Accession Agreement. The Working Party Report provides in pertinent part:

254. Several Members noted that Viet Nam was continuing the process of transition towards a full market economy. Those Members noted that under those circumstances, in the case of imports of Vietnamese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those Members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in Viet Nam might not always be appropriate.

255. The representative of Viet Nam confirmed that, upon accession, the following would apply -Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving exports from Viet Nam into a WTO Member consistent with the following:

(a) In determining price comparability under Article VI of the GATT 1994 and the Antidumping Agreement, the importing WTO Member shall use either Vietnamese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Vietnamese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in Viet Nam if the producers under investigation cannot clearly show that market economy

conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies, the relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use alternative methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in Vietnam may not be available as appropriate benchmarks.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(d) Once Vietnam 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 national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire on 31 December 2018. In addition, should Vietnam establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

The Working Party took note of these commitments.21

It is on this language, tracking parallel provisions in China’s WTO Accession Agreement, that the United States (and other WTO Members) rely when they use a surrogate country approach in antidumping actions against Vietnam or choose non-Vietnamese “benchmarks” in CVD actions for determining the benefit extended to Vietnamese producers when loans are extended at “preferential” rates and are challenged through national countervailing duty actions. The bulk of the language deals with AD actions, but paragraph 254 explicitly applies to both, and as with China puts the onus on Vietnam and Vietnamese enterprises to demonstrate ME status in a particular industry sector. With regard to CVD actions, the national authorities have considerable discretion in deciding whether there exist “special circumstances” justifying the use of non-national

benchmarks in measuring the benefit of a government subsidy to Vietnamese producers. With Vietnam, as with China, the expiration date for the use of NME methodology in AD actions (2018) does not apply to CVD actions. As with Softwood Lumber, discussed in Part VII, *infra*, the use of external benchmarks to calculate subsidy benefits is not totally dependent on the Vietnamese and Chinese accession agreements, but is independently authorized in Article 14 of the SCM Agreement.

Nevertheless, it may be feasible, depending on the facts and circumstances of particular cases, for China or Vietnam to challenge the EU or United States AD laws in the Dispute Settlement Body “as applied” for failure to use the market-oriented industry approach “if the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product,” as set out above. However, to date no such challenges have been lodged.

By analogy, use of non-national data in CVD actions may also be vulnerable, again if independence of relevant agencies, such as government-owned or controlled commercial banks, from the government can be supported. It also seems reasonable to speculate that the Appellate Body would not permit the United States or other WTO Members to ignore the market-oriented economy exception to NME treatment in AD actions. If, for example, Vietnam could show that some commercial banks operating in Vietnam are free of government controls when interest rates are determined, the use of a pool of foreign bank interest rates for CVD benefit calculations in lieu of Vietnamese commercial bank rates could be challenged.\(^{22}\)

III. U.S. NME Law

Paragraphs 255(c) and (d) of Vietnam’s Working Party Report, quoted above, indicate that where NME methodologies are used by WTO Members those methodologies effectively must be incorporated in national laws and regulations, as well

\(^{22}\text{At present there is little evidence of the independence of government-owned commercial banks from government influence over the setting of interest rates.}\)
as notified to the WTO. For example, once Vietnam was to establish “under the national law of the importing WTO Member” that it is a market economy, it must be treated as such. Under such circumstances, national law is controlling assuming of course that it is consistent with WTO rules.

A. U.S. Antidumping Law and NMEs

Certain aspects of the AD laws are relevant as well to an understanding of the new CVD policy relating to NMEs. U.S. antidumping law as it applies to NMEs\(^23\) (EU law is similar but will not be discussed here) defines a non-market economy country as”any foreign country that the administering authority (Department of Commerce) determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” Based on this statute, Commerce in general refuses to calculate dumping margins based on selling prices in the home market (their normal approach for market economy countries) when those prices and related selling costs are determined not by market factors but through central planning. Instead, Commerce looks to a “surrogate” country such as India or Bangladesh (as in Frozen Fish Fillets and Shrimp for Vietnamese normal value), where Commerce believes production and selling costs are determined by market forces in a nation or nations at a similar level of development. The labor, materials and other costs associated with the production and sale of the same or similar products in those countries are effectively substituted in making the calculations.

The factors to be considered by Commerce in deciding whether a country should be treated as an NME for antidumping purposes are:

i) Extent to which the currency is convertible;
ii) Extent to which wage rates are determined by free bargaining between labor and management;
iii) Extent to which joint ventures or other investments by foreign firms are permitted;
iv) Extent of government ownership or control of the means of production;

v) Extent of government control over allocation of resources and the pricing and output decisions of enterprises; and
vi) Such other factors that Commerce considers appropriate.\textsuperscript{24}

These factors, particularly the catchall paragraph vi), provide the Commerce Department with broad discretion, which Commerce has not been reluctant to utilize, in analyzing NME issues.

The analysis used and conclusions reached by Commerce in its decision to utilize NME methodology for Vietnam in the initial U.S. AD action against Vietnam, \textit{Frozen Fish Fillets} in 2002, are instructive. Commerce concluded that while Vietnam had made significant progress implementing a variety of reforms, Commerce’s analysis indicated that Vietnam had not successfully made the transition to a market economy. Commerce noted that prices and costs were central to the Department’s dumping analysis and calculation of Normal Value. Commerce saw the following evidence of a market-driven economy:

a) Wages are largely determined by free bargaining between labor and management; and
b) Various legal reforms have led to the “marked and sustained growth” of the private sector.

However, Commerce also determined that:

c) Government intervention in the economy is “such that prices and costs are not a meaningful measure of value;”
d) The dong is not fully convertible, and is less so than in countries which have recently been determined to be market economies;
e) Foreign direct investment is still controlled by regulation, limitations on corporate form and the flow of the investment throughout the economy, depriving Vietnam of the competitive benefits of FDI;
f) Government pricing committees maintain discretionary control over prices in certain sectors, including those which are not natural monopolies; the government dominates 70-80% of the commercial banking sector;
g) The private sector is excluded from access to resources, because SOEs and the banking sector remain insulated from competition, and are not being privatized; the state sector still accounts for 40% of GDP and 42% of industrial output, and the “socialist-oriented market economy" with an active role for SOEs is to be preserved;

\textsuperscript{24} 19 U.S.C. § 1677(18)(B).
h) Private land ownership is prohibited and the government is not taking any steps toward a land privatization program; and

i) The rule of law is weak, laws are vague, the judiciary lacks independence, there are few lawyers and trial procedures are “rudimentary”; FIEs prefer arbitration in Singapore.\(^{25}\)

There had clearly been substantial progress in Vietnam toward more free market orientation in many of these categories in recent years, particularly e) and h), but full satisfaction of the technical economic requirements is probably some years away.

Notably, many of the steps Vietnam would be required to implement to convince Commerce on legal grounds to graduate Vietnam to market economy status for anti-dumping actions are similar to those that Vietnam must take to comply fully with its WTO obligations and to assure that the current rapid rate of economic development, job creation and eradication of poverty continues. Interestingly, in the preliminary CVD determination in *Polyethylene Retail Carrier Bags*, Commerce effectively reassessed the statutory NME factors in the Vietnam context, but as the basis for rejecting Vietnamese “commercial” bank loans as a benchmark for calculating the subsidies. (Since the producers had not requested a review of Vietnam’s NME status in the AD action, no such review was conducted there.)

The NME or market-economy determination is political as well as economic in the United States, as suggested above. It would likely be politically difficult for the U.S. to graduate Vietnam before it graduates China. China is some years ahead of Vietnam in developing a vibrant private sector, but China’s enormous trade surplus with the United States is such that any action to reduce the level of protection provided by U.S. antidumping laws against China is unthinkable. Although the order of magnitude of the U.S. trade deficit is much smaller with Vietnam (which enjoyed a trade surplus with the United States of $8.7 billion on total trade of $12.5 billion in 2007) the same rationale is applicable to Vietnam. This is reflected in the communiqué issued by President George

Bush and Prime Minister Dung in Washington D.C. in June 2008. Prime Minister Dung had requested that Vietnam be accorded NME status in antidumping actions. President Bush simply “acknowledged” the Vietnamese request; he made no promise to study or review the request as was done with other issues raised by Vietnam.26

Review and change of practice by the United States regarding NME treatment has often been affected by political as well as economic considerations. In what is perhaps the most relevant recent action, in 2002 the United States agreed that Russia had made the transition to market economy nation and accordingly determined that from that time forward Russian costs and prices instead of surrogate country prices would be used in antidumping actions against Russia. Because at the time the United States did not at that time follow a practice of bringing CVD actions against NMEs, the U.S. decision to treat Russia as a market economy for AD purposes also meant that CVD actions could be brought against Russia.27 This determination was legally based on the requirements of the statute,28 discussed in Part IV(A), infra, but undoubtedly had a political overtone, as it took place during a period in which the Bush Administration was strongly seeking better economic and political relations. Presumably, a decision to afford market economy status to China or Vietnam, when and if it occurs, will also be affected by factors beyond the statutory criteria as well.

Recent actions Mexico, Australia and New Zealand also demonstrate that the WTO time periods for applying NME methodology are not immutable. In Mexico, a substantial number of the antidumping duties applied to goods imported from China based in part on NME analysis were terminated or scheduled for termination over a three-year period beginning in October 2008. These actions were taken in accordance with a

26 Joint Statement between the United States of America and the Socialist Republic of Vietnam, Jun. 24, 2008, at 1. In the same statement, in contrast, President Bush stated that the United States was “seriously reviewing” Vietnam’s request for beneficiary developing country status under the Generalized System of Preferences.
bilateral agreement between Mexico and China concluded in June 2008 and approved by the Mexican Senate.\(^{29}\) However, the affected list of products was incorporated in China’s WTO Accession Protocol, which permitted Mexico to depart from WTO rules with respect to restrictions on those products for a period of six years, which expired in 2007. The accord does not prevent Mexico from continuing to treat China as an NME with regard to other products subject to antidumping investigations for the remainder of the 15 year period specified in China’s Accession Protocol,\(^{30}\) although such a change in policy is not inconceivable. Nor is there any provision of in Mexico’s Foreign Trade Law that would prevent Mexico from using NME methodology for antidumping actions against other nations such as Vietnam, but there have been no Mexican unfair trade actions against Vietnam to date. Since Mexico rarely initiates CVD actions NME treatment by Mexico is not a significant issue for China (or Vietnam).

With Australia (and New Zealand), the decision to revert to market economy status analysis for Vietnam (but not, apparently, for China) recognized that “Vietnam has made substantial market access commitments under AANZFTA [ASEAN-Australia-New Zealand Free Trade Agreement].” That determination was not made in isolation but, as the Australian ministry observed, in the context of these FTA negotiations, and applies both to AD and CVD actions.\(^{31}\) This suggests, among other things, that it may be useful for Vietnam to continue participating in the U.S.-sponsored Trans-Pacific Partnership (“TPP”) negotiations of an FTA with Australia, Brunei, Chile, New Zealand, Peru and Singapore,\(^{32}\) although it is questionable whether the United States would agree to change NME treatment of Vietnam in a multilateral FTA.


\(^{30}\) See China’s Accession Protocol, para. 15, and Annex 7 (Mexico).

\(^{31}\) Australian Press Release, \(supra\).

\(^{32}\) See Amy Tsui, Negotiators Discuss How to Start Drafting Texts for Next Round of TPP Talks in October, \(Int’t Trade Daily\) (BNA), Jun. 16, 2010 (discussing procedures and various issues relating to the TPP). As of June, Vietnam was participating in the negotiations on a provisional basis, and the government had not decided whether to endorse fully the negotiations. A U.S. – ASEAN FTA, like that negotiated with the participation of Australia and New Zealand, is not currently politically feasible for the United States because of Burma’s membership in ASEAN, although closer relations in other aspects of international trade
Market-oriented Industry: Commerce has the authority to treat a particular industry or enterprise (as distinct from the economy as a whole) in accordance with market principles even if those principles are not applied to other sectors of the economy, as reflected in the discussion of Vietnam’s working party report commitments discussed in Part II, above. Commerce requires for purposes of the affected sector a showing that there is no government involvement in determining prices or production quantities; there is private or collective (rather than full government) ownership; and that all significant inputs are subject to market-determined prices. This “MOI” treatment has not been granted in NME situations affecting Vietnam, China or any other country, in large part because, as discussed below, Commerce has not yet promulgated the necessary regulatory procedures for assessing such situations on an enterprise by enterprise basis. This contrasts with the practice of the EU, affording producers of a 2000 case relating to CD boxes market economy treatment under EC regulations first published in 1999.

Nevertheless, when Vietnamese industries are faced with antidumping actions in the future, it will be well worth providing factual data that demonstrate that the particular industry under investigation should be treated under market principles, to the extent such data is persuasive. Eventually this is an area where Commerce could become vulnerable in the WTO’s Dispute Settlement Body (as well as to domestic court challenge) with regard to Commerce’s refusal to date to find any MOIs in any case involving either China or Vietnam. Although there is an important legal issue of the producers meeting their burden of proof when seeking to demonstrate that their industry follows market economy principles, the adverse results of NME treatment should make this effort a priority in appropriate cases. There is little doubt that in most instances NME treatment are contemplated. See Amy Tsui, U.S., ASEAN Officials Discuss Customs, Financing, Environment Under ASEAN TIFA, INT’L TRADE DAILY (BNA), May 6, 2010


results in much higher dumping margins. For example, in an investigation relating to imports of color television receivers from both China and Malaysia concluded in 2004, essentially identical products produced in China and Malaysia, the dumping margins for Malaysian firms were *de minimis* (0.47%)\(^{35}\) while those for China were predominantly in the 22% range.\(^{36}\) While other factors, including the willingness and ability of the respondents to provide accurate data, may have affected the end results, the difference in results more or less speaks for itself.

**Separate rates**: The presumptive approach for NME producers in Commerce’s AD investigations is to apply a country-wide dumping margin to all of them, on the ground that all are government-controlled. However, if an NME producer can demonstrate that it is not government-controlled, both as a matter of law and in practice, Commerce will apply a separate, individual rate in determining that producer’s export price.\(^{37}\) (Separate rates do not apply to the determination of normal value, to which export price is compared to determine whether there are dumped sales, i.e., sales in the export market at less than normal value.)

Commerce has developed a “separate rates” test for determining when such separate treatment is warranted.\(^{38}\) This test focuses whether the company is a *de jure* or *de facto* government-controlled entity. A lack of *de jure* governmental control is indicated by (a) an absence of restrictions on its business operations and exports; (b) any governmental legislation that illustrates a lack of governmental control (for example, privatization legislation); and (c) other governmental actions that indicate that the company is not controlled by the government. Whether the NME government exercises

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\(^{35}\) Commerce, Amended Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia, 69 FR 25561, (May 7, 2004).


de facto control is indicated by (a) whether the company’s export prices are set by the government; (b) whether the company is free to sign negotiate and sign contracts without government involvement or approval; (c) whether the company retains its export sales revenue and makes its own decisions regarding how to use its profits or finance its losses.39

Separate rates were granted to many Vietnamese producers in Frozen Fish Fillets and Shrimp and, as discussed in Part VI(B), infra, in the preliminary determination in PRCBs,40 Separate rates have also been granted to certain Chinese producers in U.S. AD actions against China on a regular basis. This approach provides cooperating and qualifying respondents an opportunity to reduce substantially the uncertainties and inaccuracies on the export price side of the equation, since by definition such respondents have control over the prices at which they market their products abroad.

B. Application of U.S. CVD Laws to NMEs

A closely-related matter is treatment of Vietnam under the U.S. countervailing duty laws, directed at foreign imports that benefit from actionable government subsidies.41 Here, the law itself is silent on treatment of NMEs. In effect Commerce has discretion either to refrain from bringing CVD actions against NMEs, as was the practice from the mid-1980s until 2006, or to bring such actions, as is current practice. Until 2006, Commerce took the position that under U.S. law countervailing duty actions were not intended to apply to NMEs, a position that had been upheld by U.S. courts.42 The essence of the Commerce rationale was that it was impossible to determine the extent to which a “bounty or grant” (subsidy) existed because the government rather than market forces determined the costs of various inputs used in the production of goods, and subsidies could not be separated from other government directives and controls. Under

40 PRCB Preliminary AD Determination, 74 Fed. Reg. at 56816.
41 These are authorized by the WTO’s Agreement on Subsidies and Countervailing Measures, Part V.
42 Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).
such circumstances, a NME country risked a methodology for determining the existing of dumping that tended to exaggerate actual dumping margins, but was essentially insulated from CVD actions designed to offset government subsidies.

However, in 2006 Commerce changed its policy and initiated a CVD investigation against coated paper from China. While that particular case was ultimately terminated for lack of a demonstration of material injury to U.S. producers, countervailing duties (at rates of up to 615%) were applied to imports of line pipe into the United States in a 2008 determination. At least nine CVD duty orders against China have been issued and others pending before Commerce. Also, Commerce is being strongly urged by Congress to make the new NME CVD policy applicable to all NMEs. China has challenged various aspects of the United States’ imposition of AD and CVDs against China in the WTO, as applied in specific cases.

There are obvious conceptual inconsistencies between the use of NME methodology in an anti-dumping case (relying on surrogates because various input costs are not based on market-determined prices), and the assertion that “private industry now dominates many sectors of the Chinese economy” with a much smaller role of government planners, so that government subsidies can be accurately measured, although to some extent Commerce relies on surrogates to determine subsidy benchmarks as well. However, Commerce’s requirement that “significantly all” factor input prices must be market driven is ambiguous and may almost guarantee that no such industries will be

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45 See Commerce Dept., AD/CVD Orders in Place as of May 10, 2010, available at http://info.usitc.gov/oinv/sunset.nsf/0a915ada53e192cd8525661a0073de7d/96daf5a6c0e5290985256a0a04de7d/SPFILE/orders%20May%202010%202010.xls (last visited Jun. 23, 2010).
Consequently, a strict market-oriented industry test as applied by Commerce virtually guarantees that a market orientated industry will not be found in AD actions against NMEs. Logically, under such circumstances CVD law should not apply because of the lack of market determination of the price of inputs that might be considered government subsidies. This disconnect is illustrated when noting that some of the factors cited to justify treating Vietnam as subject to CVD laws directly in PCRBs in 2009 because Vietnam is now considered a mixed economy contrast with Commerce’s NME determination in the AD proceeding concerning Frozen Fish Fillets in 2002.

A more immediate threat to Commerce’s methodology relates to allegations that by imposing both AD and CVDs against NMEs, Commerce is double-counting, in contravention of GATT 1994. The GATT provides that “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.” In theory at least, there is no potential double counting with regard to domestic subsidies, since domestic subsidy provided to an enterprise should benefit both domestic and export sales in the same manner. Commerce generally avoids the double-counting problem in parallel AD/CVD actions against market economy nations by adjusting for the possible overlap of a benefit calculated as a result of a government export subsidy and sales at less than fair value (dumping) to the extent the dumping margins result from that same situation, with a setoff in appropriate circumstances. The problem is more complex in an NME situation where the distinctions between dumping and subsidization on exported goods are more

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50 See LE, Double Counting, op. cit.

51 GATT 1994, art. VI.5.

52 Typically, the benefit from a domestic subsidy is allocated by Commerce over all production, whether it is exported or sold domestically. An export subsidy by definition benefits exports alone. See SCM Agreement, art. 3.

53 See 19 U.S.C. § 1677a(c)(1)(C);
difficult to distinguish,54 and where the magnitude of dumping and the amount of benefit are not based on actual prices and commercial loan rates in the NME home market but on surrogate values (dumping) and non-national benchmarks (subsidies), often based on entirely different surrogate countries.

Because of the likelihood of double-counting, the U.S. Court of International Trade ("CIT") recently reversed and remanded Commerce parallel AD/CVD findings against China.55 The court reasoned that unlike the situation in which the dumping duties in parallel AD and CVD proceedings in a market economy are calculated based on normal value and export price, in NME actions the export price is not being compared with the price of the good in the domestic market, but rather, in a surrogate country market which is presumably subsidy-free. Without adjustment the court reasoned, such a situation could result in double-counting. The Court, mindful as well of the conceptual inconsistency, held that “If Commerce now seeks to impose CVD remedies on the products of NME countries as well [as AD duties], Commerce must apply methodologies that make such parallel remedies reasonable, including methodologies that will make it unlikely that double counting will occur.”56 If the CIT decision after remand to Commerce is ultimately upheld by the U.S. Court of Appeals for the Federal Circuit ("CAFC"), some modification of Commerce’s methodology in numerous simultaneous AD/CVD proceedings against China and Vietnam is inevitable.

China is also challenging the double-counting in an “as such” claim before the WTO,57 which may provide alternative relief even if the CAFC ultimately reverses the CIT.

The CIT decision if sustained on appeal could also require Commerce to quickly develop procedures for analyzing requests for individual market-oriented industry

56 GPX Tire, 645 F.Supp.2d. at 1243.
treatment, so that the firm could be analyzed under market economy procedures, a
deficiency that was also challenged in *GPX Tire*. Commerce conceded that it had not yet
developed the necessary procedures for analyzing such requests from individual
enterprises. The court found “that Commerce’s failure to address GPX’s request for
MOE status because it had no policies, procedures, or standards for evaluating MOE
status was arbitrary and capricious and unsupported by substantial evidence.”58 Even if
Commerce prevails in the U.S. courts, it may be less successful at the WTO, meaning
that an articulation of procedures will inevitably be needed.

The pursuit of CVD cases with the use of surrogate country methodology
(particularly for determining “benchmark” rates) is permitted by the WTO’s SCM
Agreement59 and under at least one Appellate Body ruling, in *Softwood Lumber*, as
discussed in Part VII. Nor is there any apparent WTO bar to simultaneous AD/CVD
actions against NMEs, despite the economic inconsistency of such actions. Rather it is
the double-counting problem that makes Commerce most vulnerable to challenge in such
situations.

IV. U.S. NME CVD Methodology and Practice – China

This article does not discuss NME CVD practice with regard to China in detail.
However, given the parallel approach to Vietnam, a basic understanding of the development of
Commerce’s policy regarding China is instructive.

From 1984 to at least until the mid-1990s, Commerce generally followed a practice of not
initiating CVD actions against NMEs, based on the *Georgetown Steel* case noted above.
However, in the so-called Georgetown Steel memorandum in 2007,60 Commerce justified its
change in practice with respect to China. In the memorandum, Commerce analyzed the rationale
for excluding NMEs from CVD actions in the 1980s (continuing into the 1990s). Commerce
noted that in 1984 it had concluded that:

58 *GPX Tire*, 645 F.Supp.2d. at 1246.
59 *See SCM Agreement*, art. 14(d).
60 Memorandum for David M. Spooner, CVD Investigation of Coated Free Sheet Paper from the People’s
Republic of China – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to
China’s Present-Day Economy, Mar. 29, 2007 [hereinafter “China DVD Applicability Memo”].
[T]he nature of the Soviet-style economies in the mid 1980s made it impossible for the Department to apply the CVD law. To determine that a countervailable subsidy had been bestowed, the Department needed to establish that: (a) the NME government had bestowed a “bounty or grant” on a producer; and (b) that the bounty or grant was specific. The Soviet-style economies at the time made it impossible to apply these criteria because they were so integrated as to constitute, in essence, one large entity. In such a situation, subsidies could not be separated out from the amalgam of government directives and controls.\(^{61}\)

However, China (in 2007) is different:

The current nature of China’s economy does not create these obstacles to applying the statute. As noted above, private industry now dominates many sectors of the Chinese economy, and entrepreneurship is flourishing. Foreign trading rights have been given to over 200,000 firms. Many business entities in present-day China are generally free to direct most aspects of their operations, and to respond to (albeit limited) market forces. The role of central planners is vastly smaller. . . Given these developments, we believe that it is possible to determine whether the PRC Government has bestowed a benefit upon a Chinese producer (i.e., the subsidy can be identified and measured) and whether any such benefit is specific. Because we are capable of applying the necessary criteria in the CVD law, the Department’s policy that gave rise to the \textit{Georgetown Steel} litigation does not prevent us from concluding that the PRC Government has bestowed a countervailable subsidy upon a Chinese producer.\(^{62}\)

Thus, Commerce determined that it sufficient discretion to apply CVDs to NMEs under applicable U.S. law (although it was not required to do so), and that it was appropriate to use the CVD laws against China, despite its NME status for AD purposes. This approach has been followed in subsequent cases against China. Commerce reached similar conclusions when it conducted a similar analysis of Vietnam in \textit{PRCBs} and is following the same general approach to CVD cases as with China, as discussed in Part V, \textit{infra}.

Judging by the actions brought against China, the methodology used by Commerce to determine whether a benefit is conferred by a particular subsidy uses a mix of methodologies applied to market economies and special rules designed for NMEs, in contrast to its all or nothing approach in AD actions. For example, in \textit{Coated Free Sheet Paper},\(^ {63}\) Commerce calculated the benefit for certain tax reductions provided to producers by simply comparing the normal tax rate with the preferential tax rate, and

\(^{61}\) \textit{Id.}, at 10.

\(^{62}\) \textit{Ibid.}


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treat the difference as the benefit, as would have occurred in a normal ME CVD analysis.

However, in certain areas, Commerce, as authorized in the WTO Accession Agreement, rejected the use of Chinese benchmarks because of alleged Chinese intervention in the markets. For example, in determining the benefit for allegedly preferential loan rates afforded to producers or exporters, Commerce determined that there was no commercial, non-preferential interest rate available in China. Instead, to create a benchmark rate, Commerce analyzed the commercial interest rates in 33 developing countries with per capita GDPs similar to China’s, with the composite interest rate being determined to be 7.56% (2005). The concept of rejecting national benchmark rates is not confined to market economies, although it is explicit in China’s WTO Protocol of Accession. In its analysis of alleged Canadian subsidies of softwood lumber, Commerce rejected the use of Canadian commercial rates for the sale of standing timber, and relied instead on timber charges in the United States as the benchmark, as discussed in Part VI, infra.

In Coated Free Sheet Paper, Commerce also considered as subsidies various Chinese Government policies, such as providing preferential financing for the paper industry through a ten-year plan and other mechanisms. Commerce concluded that such provisions “explicitly detail [ ] an active role for the State in implementing industrial policies, whether though industrial policy coordination or through the guidance of financial resources towards those industries that the State favors (such as large integrated paper companies) and away from those the state considers outmoded.”

The investigation also gave particular attention to special benefits conferred on foreign invested enterprises (FIEs), which receive tax subsidies under Chinese law according to Commerce. Despite the fact that FIEs in China cut broadly across industry sectors, Commerce determined that the tax subsidies they receive, despite their broad

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64 Coated Free Sheet Paper Decision Memorandum, at 6.
65 Coated Free Sheet Paper Decision Memorandum, at 56.
applicability and transparent nature, are specific under the SCM Agreement, and are thus countervailable.\textsuperscript{66}

In dealing with upstream subsidies, in this case pulp log producers, Commerce essentially followed its practice of attributing such subsidies to downstream producers (in this case of paper), as it has in similar cases involving market economies such as Indonesia.

The general approach of \textit{Coated Free Sheet Paper} has been followed by Commerce in other Chinese cases, as in the September 2009 preliminary determination and December 2009 final determination in \textit{Oil Country Tubular Goods}.\textsuperscript{67} There, Commerce reiterated its policy of applying the CVD laws to China and again used a non-Chinese interest rate derived from market-based interest rates observed in a pool of lower-middle income countries, also citing the methodology used in \textit{Softwood Lumber}.\textsuperscript{68} As stated by Commerce in the Decision Memorandum, “The Department continues to find that loan benchmarks must be market-based and that Chinese interest rates are not reliable as benchmarks because of the pervasiveness of the GOC’s intervention in the banking sector.”\textsuperscript{69}

\section*{V. U.S. Methodology and Practice – Vietnam: Polyethylene Retail Carrier Bags (PRCBs)}

\textit{PRCBs} is important because it is to date (July 2010) the only proceeding seeking the imposition of CVDs against Vietnamese producers, and just the third seeking antidumping duties.\textsuperscript{70} The AD proceedings broke no new ground, in significant part because Commerce was not required to review whether the Vietnamese producers constitute a market-oriented industry, or re-evaluate its application of NME criteria to Vietnam for the first time since \textit{Frozen Fish Fillets}. (Once a non-market economy determination is made it remains in effect until revoked, \textsuperscript{70}

\textsuperscript{66} Id., at 92.
\textsuperscript{68} Preliminary OCTG, 74 Fed. Reg. at 47212, 47216.
\textsuperscript{69} Final OCTG, Decision Memorandum, at 103.
\textsuperscript{70} Petition filed by King & Spaulding, Mar. 31, 2009.
and no effort was made to revoke that status in PRCBs.\(^\text{71}\) While the subsidy rates were low, ranging from 0.20% to 4.24% for the three firms specifically reviewed, and a rate of 2.97% applied to other manufacturers in the preliminary determination\(^\text{72}\) and 0.44 percent to 5.28 percent in the final,\(^\text{73}\) and the import volume less than 1% of U.S. imports from Vietnam ($79 million).\(^\text{74}\) Still, the precedent will likely be applied to more economically important proceedings in the future.

A. **PRCBs – CVD Action**

1. **Applying CVD Law to Vietnam**

Since Commerce had not initiated CVD actions against Vietnam (unlike China) in the past, Commerce was effectively required to determine whether U.S. CVD law applies to Vietnam.\(^\text{75}\) In this case, as in initial CVD actions against China, the U.S. petitioners argued that the conditions which led Commerce over 20 years ago to decline to initiate CVD investigations against the Soviet Union but to abandon with regard to China in 2006 are analogy applicable to Vietnam. As the notice in PRCBs observes:

The petitioners argue that the Vietnamese economy, like China's economy, is substantially different from the Soviet-style economy investigated in Georgetown Steel and that the Department should not have any special difficulties in the identification and valuation of subsidies involving a non-market economy like Vietnam. Finally, the petitioners contend that Vietnam's economy significantly mirrors China's present-day economy and is at least as different from the Soviet-style economy at issue in Georgetown Steel, as China's economy was found to be in 2007. The petitioners also argue that Vietnam's accession to the World Trade Organization (WTO) allows the Department to apply countervailing duties on imports from that country. The WTO Subsidies and Countervailing Measures Agreement (SCM Agreement), similar to U.S. law, permits the imposition of countervailing duties on subsidized imports from member countries and nowhere

\(^{71}\) See PRCB Preliminary AD Determination, 74 Fed. Reg. at 45820; Memorandum for Ronald K. Lorentzen, “Countervailing Duty Investigation of Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam – Whether the Countervailing Duty Law is Applicable to Vietnam’s Present Day Economy (copy on file with author) [herein “Vietnam CVD Applicability Memo”] (asserting that the AD NME status issue is “separate and distinct” and that NME status will remain in effect for Vietnam until a review is requested). (Copy on file with author.)

\(^{72}\) PRCB Preliminary CVD Determination, 74 Fed. Reg. at 56813, 56815.

\(^{73}\) PRCB Final CVD Determination, 75 Fed. Reg. at 16430.


exempts non-market economy imports from being subject to the provisions of the SCM Agreement. As Vietnam agreed to the SCM Agreement and other WTO provisions on the use of subsidies, the petitioners argue Vietnam should be subject to the same disciplines as all other WTO members.\textsuperscript{76}

Petitioners alleged as well that various Vietnamese government programs constituted countervailable subsidies. These included preferential lending for exporters; preferential lending for the plastics industry; export promotion programs, export bonus program; new product development program; various income tax benefits for exporters, FIEs, FIEs operating in encouraged industries; and various import tax and VAT exemption programs.\textsuperscript{77} All of these were addressed in the preliminary determination.

In the Preliminary determination of subsidies (and again in the final), Commerce essentially agreed with the petitioners, but only after a relatively thorough analysis of Vietnam’s present-day economy, with emphasis on the increased economic power of domestic private and foreign invested enterprises while the number of state-owned enterprises (“SOEs”) had been reduced from 12,000 to about 1,800 and correspondingly reduced employment and total economic output.\textsuperscript{78} Commerce also noted significant reforms in SOEs, but with limits on privatization suggesting that the SOE sector will continue indefinitely. Among other factors cited by Commerce as justification for applying CVD laws to Vietnam were the partial deregulation of prices and production inputs and increased participation of Vietnam in the world economy.\textsuperscript{79}

The result was a conclusion that Vietnam’s economic space today is a mixed landscape of public, private and foreign ownership. The non-State sector has grown rapidly and accounts for an increasing share of production, investment employment and trade, although SOEs continue to play a significant role in the economy. However, the economic reforms are incomplete and structural and institutional legacy problems remain.\textsuperscript{80}

While the conclusions are to a considerable degree supported by Commerce’s careful analysis, they appear to reflect as well an effort to provide a colourable basis for applying

\textsuperscript{76} 74 Fed. Reg. at 19067.
\textsuperscript{77} 74 Fed. Reg. at 19066-67.
\textsuperscript{79} Id., at 8-9.
\textsuperscript{80} Id., at 11.
CVD laws while at the same time avoiding to the extent possible erosion of the rationale for treating Vietnam as an NME in antidumping cases.

This determination to apply the CVD laws to Vietnam was unchanged in the final CVD determination, with Commerce noting Congressional support for Commerce’s decision to apply the CVD laws in a situation parallel to China’s, and concluding that “The clear implication of these Congressional Statements is that the CVD law can be applicable to NMEs” and that “these [Congressional] statements contemplate that the Department’s application of the CVD law to NMEs would take place simultaneously with the continued application of the Department’s NME antidumping methodology.”

2. Key Issues in the CVD Determination

In its preliminary and final determinations Commerce for the most part followed the same approach as in CVD actions against China, including that in Coated Free Sheet Paper. Thus, Commerce decided that it would apply CVD law to Vietnam only as of Vietnam’s accession to the WTO in January 2007, on the ground that such limitation was “appropriate and administratively desirable” and because Commerce concluded that Vietnam’s accession agreement “contemplated application of the CVD law.” Commerce also found general support for bringing CVD actions in the discussion of benchmarks in Vietnam’s working party report, as quoted above. This timing issue did not arise with regard to China, since China became a WTO Member nearly five years before Commerce brought the first CVD action against China, instead of barely fifteen months in the case of Vietnam.

As in Coated Free Sheet Paper, the choice of “benchmark” rates for calculating the benefit from government loans was a central issue in Polyethylene Retail Carrier Bags. The general “basket” approach was similar but only after Commerce extensively reviewed Vietnam’s banking sector to justify rejecting Vietnamese lending rates as market-based and corresponding use of an external benchmark. In the memorandum, Commerce reviewed various legal and banking reforms and for banks “substantial flexibility in setting interest rates since 2002, although

81 PCRB Final CVD Decision Memo, at 14. Facts available were used for on participant, API, for lack of cooperation.
82 PRCB Preliminary CVD determination, 74 Fed. Reg. at 45814.
83 Ibid.
such flexibility is limited . . . .”\textsuperscript{85} Perhaps inevitably, Commerce found it appropriate to begin its analysis of the banking system with its non-market economy status determination in \textit{Frozen Fish Fillets} in 2002, setting forth its view of the changes in the ensuing seven years. However, despite the changes, Commerce found, \textit{inter alia}, many “institutional weaknesses” as well as lack of transparency and continued \textit{de facto} benefits enjoyed by state owned commercial banks, and observed that the reforms “continue to lag and remain incomplete.”\textsuperscript{86}

In deciding to use a commercial benchmark, Commerce again went beyond the borders of Vietnam. For dong-denominated loans, Commerce put together a basket of currencies relying with some exceptions on the World Bank’s list of 54 “lower middle income” countries.\textsuperscript{87} In doing so, Commerce preliminarily rejected both the “low income” countries for a variety of reasons, even though Vietnam with its $890 per capita gross national income (“GNI”) is near the boundary between low income and lower middle income, with the latter showing a per capita GNI of $975.\textsuperscript{88} Once adjustments were made to exclude any NMEs in the World Bank grouping and others that had not reported local currency lending rates, Commerce used a regression analysis to determine a rate of 7.385\% for 2007 and 4.165\% for 2008 as the applicable benchmark.\textsuperscript{89} For dollar-denominated loans, Commerce used LIBOR rates with some adjustments.\textsuperscript{90}

The determination that the plastics industry in Vietnam receives preferential lending was based on an analysis of “targeted” actions taken by state owned commercial banks (“SOCBs”) and coordinated by the State Bank of Vietnam rather than on more direct government support. Commerce determined that “the merchandise under investigation is part of a state targeted, or encouraged, industry or project, and there is evidence that loans from SOCBs are a designated means for developing that industry or project,” despite the lack of a “single policy document directing preferential lending . . . .”\textsuperscript{91} Since SOCBs were determined to be public entities on the basis of their majority ownership by the government, the loans provided by SOCBs were

\textsuperscript{85} \textit{Id.}, at 5.
\textsuperscript{86} \textit{Id.}, at 7.
\textsuperscript{87} Memorandum through Mark Hoadley, “Countervailing Duty Investigation of Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam – Preliminary Determination Calculations Loan Benchmark Analysis (Aug. 28, 2009), at 9 [hereinafter “Vietnam Loan Benchmark Memo”]. (Copy on file with author.)
\textsuperscript{88} PRCB Preliminary CVD Determination, 74 Fed. Reg. at 45815.
\textsuperscript{89} Vietnam Loan Benchmark Memo, at 2.
\textsuperscript{90} PRCB Preliminary CVD Determination, 74 Fed. Reg. at 45815
\textsuperscript{91} \textit{Id.}, 74 Fed. Reg. at 45816-17.
considered government financial contributions. Because it was the plastics industry that was allegedly targeted, the loans were considered specific under U.S. CVD laws in the preliminary determination. However, in the final determination Commerce concluded that plastics industry subsidized loans were not available to PCRB products.

Commerce’s calculation of whether land was provided to PCRB manufacturers at preferential rates so as to afford a benefit was complicated by its conclusion that “the purchase of land use rights is not conducted in accordance with market principles.” This conclusion was based in part on the observation that the land leased by the government to intermediaries and then subleased by intermediaries to producers had been expropriated from farming interests and the prices charged by the government and then by the intermediaries “are based on low-priced agricultural land tariffs determined without reference to what is allegedly to most market-oriented portion of the commercial land market” or to lease prices by brokers to subleasing tenants.

Accordingly, and again using a methodology borrowed from CVD actions against China, Commerce used as an external benchmark “comparable market-based prices in a country at a comparable level of economic development that is within the geographic vicinity of Vietnam.” However, Commerce rejected the use of Thailand and the Philippines as benchmark (as with China) because of their relatively high per capital GNIs ($2,840 and $1,890 respectively). Rather, Commerce relied instead relied on rental data from a country with a per capita GNI more similar to Vietnam’s. Commerce chose to use average rental rates for two cities in India, Pune and Bangalore, noting that the per capita GNI for India is $1,070, compared to $890 in Vietnam, even thought the population density in the Philippines was said to be a closer match to Ho Chi Minh City, Vietnam’s than with the two Indian cities. Using the Indian (Pune) rates as the benchmark, Commerce found a land rental subsidy of 3.86%.

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92 Id., 74 Fed. Reg. at 45817.
94 PCRB Final CVD Decision Memo, at 18.
95 Id., 74 Fed. Reg. at 45815.
96 PCRB Final CVD Decision Memo, at 27.
100 Id., 74 Fed. Reg. at 45818.
Commerce also countervailed one producer, Fotai, which as a Foreign Invested Enterprise (“FIEs”) received certain income tax preferences from the Vietnamese government that were limited to FIEs. Here, Commerce ultimately calculated the amount of the subsidy (0.21%) based on a comparison of the normal tax rate with the preferential tax rate.\textsuperscript{101} Another producer, Chin Shen, was also determined to benefit from other tax reduction programs.\textsuperscript{102} Finally, Commerce determined subsidies of 2.17% and 0.02% for Fotai based on exemption of raw materials and certain imports of spare parts and accessories from import duties if the importer is located in an industrial zone.\textsuperscript{103}

Commerce determined that the remission of the value added tax on equipment at the time of importation was not countervailable, and that a number of export promotion and tax benefit programs were not actionable because the respondents had not used them.\textsuperscript{104}

Whether Vietnam is to be treated as a developing country for purposes of Article 27 of the SCM agreement, eligible to receive a 2 percent \textit{de minimis} rate rather than the developed country 1 percent \textit{de minimis} rate was not definitively resolved by Commerce in the proceeding. While the preliminary CV D determination treated only the one CVD rate below 1 percent as \textit{de minimis} (with the 1.69 percent rate not so treated), but without comment by Commerce, in the final determination the only CVD rate below 2 percent was also below 1 percent. Consequently, Commerce formally treated the issue of how to treat rates between 1 percent and 2 percent as moot,\textsuperscript{105} leaving that determination to the next CVD action but with a strong implication that the more beneficial 2% rate will not likely be applied to Vietnam.

B. The Determination of Dumping

Unfortunately, the preliminary AD determination in \textit{PRCBs} provided no discussion of such key issues as choice of surrogate country for factors of production because of the decision to use adverse facts available (AFA). Nor was there any further analysis of such issues in the final determination; the punitive AFA was the basis of the final margins there as well.\textsuperscript{106} As Commerce noted in the final determination, “Because no party submitted case briefs and there are

\textsuperscript{101} \textit{Id.}, 74 Fed. Reg. at 45818; \textit{PRCB Decision Memorandum} at 7.
\textsuperscript{102} \textit{PRCB Decision Memorandum} at 6-7.
\textsuperscript{103} \textit{PRCB Decision Memorandum} at 9-10.
\textsuperscript{104} \textit{Id.}, 74 Fed. Reg. at 85819.
\textsuperscript{105} \textit{PRCB Decision Memorandum}, at 15; \textit{see PRCB Preliminary CVD Determination}, 75 Fed. Reg. at 45820.
\textsuperscript{106} Telephone discussion with senior analyst Zev Primor, Nov. 9, 2009.
no other circumstances which warrant the revision of the Preliminary Determination, the Department has not made changes to its analysis, or the dumping margins calculated, with respect to the Preliminary Determination.”  

However, Commerce confirmed in the preliminary determination its willingness to use “separate rates” for calculating export price for many Vietnamese respondents. Otherwise Commerce provided little new guidance as to how it will be administering AD actions against Vietnam. As is normal practice when there are numerous foreign producers, Commerce selects a small number of major producers as mandatory respondents, in this case API and Fotai Vietnam. Given that both withdrew abruptly from the proceeding in September and October 2009, Commerce used as the margin data provided by the petitioners, as the AFA rate. Thus, dumping margins of 76.11%, the highest rate alleged in the petition was assigned to these two firms and for a number of others that did not complete “quantity and value” questionnaires sent to them.

For the group of respondent enterprises that both completed Q&V questionnaires and made proper requests for separate rate status, the margins were set at 52.3%. In reviewing separate rate requests, Commerce divided the requesters into three groups: producers that were totally foreign owned; joint ventures of foreign and local enterprises or those locally owned by private groups; and those wholly owned or partially owned by the state. With the group of wholly-foreign owned producers, and in the absence of any evidence to the contrary, Commerce effectively presumed that the firms determined prices freely of Vietnamese government control. For the separate rate applicants that were joint ventures with Vietnamese owned companies or wholly-Vietnamese owned companies, Commerce analyzed the relevant de jure and de facto criteria for separate rates. In finding an absence of de jure government control, Commerce determined that all had demonstrated a lack of restrictive stipulations in the individual exporters’ business and export licenses and legislation as well as formal measures decentralizing control of the Vietnamese companies.

107 PRCB Final AD Determination, 75 Fed. Reg. at 16434.
110 Id., 74 Fed. Reg. at 56818.
112 Id., 74 Fed. Reg. at 56816.
Commerce also determined that the applicants had demonstrated the absence of *de facto* control, through showing that each set export prices without government approval, possessed the authority to negotiate and sign contracts and other agreements, made autonomous decisions in selecting management and in disposition of profits or financing of losses.\textsuperscript{113} For the applicants that were wholly or partially state-owned, Commerce determined a similar absence of government control justifying the use of separate rates. Only those companies not seeking separate rates were assigned the Vietnam-wide government rates.

Unfortunately for the enterprises that qualified for separate rates for determining export price, Commerce determined to use AFA, choosing the margin rates specified in the petition. However, Commerce effectively rewarded those who had applied for separate rates by setting their margin rates at a simple average of the rates alleged in the petition (52.3\%) instead of the highest petition rate (76.11\%) assigned as the Vietnamese-wide rate and the rate given to the non-cooperating enterprises.\textsuperscript{114} The proceeding again demonstrates that despite the lack of treatment of industry sectors as market economy industries, Commerce remains open to approving separate rate treatment of export price in appropriate circumstances.

C. The USITC’s Material Injury Analysis

As might have been expected, the USITC found in its preliminary determination that imports of PRCBs from Vietnam (along with those from Indonesia and Taiwan) evidenced a “reasonable indication” of material injury to U.S. producers.\textsuperscript{115} More than 90\% of the USITC’s preliminary injury findings are positive, a not surprising result given the low threshold for a preliminary injury finding. However, several factors in the preliminary finding suggested that a final injury finding was not certain. The cumulation of imports from the three foreign sources is standard practice. In this instance, the volume of imports did not increase consistently over the three years of the investigation, but declined from 2007-2008, although the import market share rose slightly.\textsuperscript{116} Capacity utilization for the U.S. domestic industry declined slightly, but remained relatively high, at 82.4\% in 2008. Although it found causation of injury as a result of imports, the USITC also noted that there was a 7\% decline in overall U.S. consumption during

\begin{itemize}
  \item \textsuperscript{113} *Ibid.*
  \item \textsuperscript{114} *Id.*, 74 Fed. Reg. at 56817.
  \item \textsuperscript{115} USITC, *Polyethylene Retail Carrier Bags from Indonesia, Taiwan, and Vietnam*, Inv. Nos. 701-TA-462 and 731-TA-1156-1158 (Preliminary) (May 2009), at 25.
  \item \textsuperscript{116} *Id.*, at 20.
\end{itemize}
the period, which “may have had a role in the domestic industry’s deteriorating performance during the period of investigation.”

There also remained questions as to the impact on the domestic industry of “nonsubject imports,” those not subject to antidumping or CVD investigations.

Nevertheless, in the final determination the USITC found by a vote of 5-1 that imports of PRCBs constituted a threat of injury to domestic producers. In reaching this conclusion the USITC cumulated imports from Vietnam, Taiwan and Indonesia, although Taiwan and Indonesia had been subject only to antidumping investigations. The Commission’s analysis was complicated by the fact that the industry is a flat or declining one due to a variety of factors, including environmental laws and increased use of reusable bags, as well as a weak economy, increasing costs and consumer perceptions. Moreover, some of the U.S. PRCB producers were themselves importing bags; the Commission refused to discount those volumes. Evidence of price underselling was mixed; in some categories imported PRCBs were higher in price than domestic products, and the Commission found no evidence of price depression during the period, but concluded that price depression was likely in the future because of the substitutability of imported product. Because of the many factors other than imports affecting the health of the domestic industry, the Commission could not “conclude that subject imports contributed more than marginally or tangentially to any material injury suffered by the domestic industry over the period.”

As is often the case in threat determinations, the Commission also concluded that the principal foreign producers had both the ability and incentive to increase exports to the United States, as they were heavily dependent on the U.S. market. Relying on evidence of excess capacity and the “vulnerability” of the domestic industry, the Commission concluded that foreign producers were likely to fill excess capacity by increasing exports to the United States, and would

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117 Id., at 25.
118 USITC, Polyethylene Retail Carrier Bags from Indonesia, Taiwan, and Vietnam, Inv. Nos. 701-TA-462 and 731-TA-1156-1158 (Final) (Apr. 2010), at 38 [hereinafter “USITC Final PRCB Determination”].
119 Id., at 20.
120 Id., at 23.
121 Id., at 30.
122 Id., at 31.
123 Id., at 36.
124 Id., at 26.
have to undersell domestic producers in order to do so.\textsuperscript{125} Also, according to the Commission, predicted flat or declining U.S. demand would not “break the causal link” between imports and the “imminent” threat of material injury.\textsuperscript{126}

One commissioner dissented, concluding that imports from producers not subject to the investigations were taking market share not from domestic producers, but from producers in China, Malaysia and Thailand that had been subject to antidumping orders since 2004, who had redirected production to Taiwan, Indonesia and Vietnam.\textsuperscript{127} The dissent also noted, \textit{inter alia}, the correlation between domestic production and changing U.S. demand, reduced capacity utilization as a result of increased domestic production capacity, and the improvement in the domestic industry’s operating margins in 2009.\textsuperscript{128} Under these circumstances, in his view there was “no likelihood of any imminent significant negative impacts on the domestic industry from subject imports.”\textsuperscript{129}

Given that the USITC finds material injury or threat of material injury in a substantial majority of the cases before it, it was unlikely from the outset that Vietnam would avoid antidumping and countervailing duties as a result of a negative injury finding, despite the weaknesses in the domestic PRCB producers’ case for injury. Accordingly, antidumping and countervailing duty orders, ordering the collection of cash deposits on imports after May 4, 2010 in the amounts of 52.30 percent (76.11 percent for firms treated in the aggregate as Vietnam-wide entity) for antidumping duties and from 5.28 percent to 52.45 percent for countervailing duties (with one Vietnamese respondent, Chin Sheng Company, Ltd., exempted from the order because of a de minimis 0.44 percent margin).\textsuperscript{130} There is no indication that Commerce made any effort to avoid double counting of elements in AD and CVD martins, making a WTO challenge likely.

\textsuperscript{125} Id., at 36.
\textsuperscript{126} Id., at 37.
\textsuperscript{127} Dissenting Views of Vice Chairman Daniel, R. Pearson, at 41-42.
\textsuperscript{128} Id., at 50.
\textsuperscript{129} Ibid.
VI. U.S. Methodology and Non-National Benchmarks in Market Economy Situations: Canadian Softwood Lumber

One of the most significant (of many) DSB challenges of U.S. CVD laws is the softwood lumber dispute with Canada. It represents the longest-running (since 1982) and perhaps most bitter trade dispute ever between the United States and Canada. Unlike some others, the lumber dispute also affects a substantial volume of trade. For many years Canada has been the major source of lumber imported into the United States, 18 billion board feet (BBF) in 2000 worth $7 billion, accounting for roughly 33% of the U.S. lumber market. Antidumping and countervailing duty deposits worth approximately $5 billion were collected on U.S. lumber imports from 2002-2006. Lumber production has been a major part of the economies of British Columbia (from whence about 60% of Canadian exports originate), Ontario, Washington and Oregon, among other Canadian and U.S. states and provinces. Some 70% of Canada’s softwood lumber is exported to the United States, and the United States is the only major market for Canadian lumber.

Softwood Lumber is relevant to the other issues discussed in this article because with regard to the most significant element the CVD action the United States used a non-national benchmark, effectively treated the Canadian lumber sector as subject to NME rules because the Canadian provinces effectively control the market and set prices for standing timber sold to the industry, to the virtual exclusion of commercial sources of standing timber. Such treatment, as discussed below, is authorized under Article 14 of the SCM agreement. The proceeding also demonstrates that the key “benchmark” issue is analogous to those raised in CVD actions against China and Vietnam.

Accordingly, this section discusses only the CVD aspects of the “Lumber IV” phase of the proceedings before the Commerce Department that began 2001, and only

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131 This section is adapted in part from GREGORY W. BOWMAN, NICK COVELLI, DAVID GANTZ & IHN HO UHM, TRADE REMEDIES IN NORTH AMERICA, Ch. 12 (Kluwer Int’l, 2010).
134 The proceeding also resulted in several WTO rulings on the AD case and on the threat of material injury determination by the U.S. International Trade Commission, as well as series of NAFTA, Chapter 19 and U.S. federal court determinations.
the non-national benchmark issue. Lumber IV was initiated following the expiration of a settlement agreement\textsuperscript{135} concluded in 1996 that expired March 31, 2001. The U.S. lumber industry, supported by various environmental and aboriginal interests, wasted no time after the expiration of the 1996 SLA; petitions were filed on April 2, 2001, as had been promised a few weeks earlier.\textsuperscript{136}

A. Commerce’s CVD Investigation

The most significant aspect of Commerce’s final CVD determination,\textsuperscript{137} more so than the initial subsidy margins of 18.79\%, was the position of Commerce on the issue of whether a cross-border price comparison could be used to determine the “benchmark” commercial price for harvested timber to be compared against the allegedly subsidized Canadian provincial government stumpage. The essence of Commerce’s position was as follows:

In light of the objective [of the laws and regulations], we agree that a market benchmark prices chosen from the exporting country is preferable to a price chosen from outside the country because it is more likely that such a benchmark will more closely reflect, or be more easily adjusted for, prevailing market conditions in the country of provision in terms of overall price, quality, availability, marketability, transportation and other conditions of sale.

However, if there is no market benchmark price available in the country of provision, it is obviously impossible to determine adequacy of remuneration except by reference to sources outside the country.\textsuperscript{138}

Commerce concluded that there were no market-based internal Canadian benchmarks because of the dominance of government timber sales in the various provincial markets; under such circumstances “true market prices may not exist in the


\textsuperscript{138} CVD Decision Memorandum, op. cit.
country or it may be difficult to a [sic] find a market price that is independent of the distortions caused by the government’s action.” American stumpage (selling price for standing timber), in contrast, is a reasonable benchmark. It is available to Canadian as well as U.S. producers and some Canadian producers have purchased U.S. stumpage. Also, the timber stands are comparable.

*Softwood Lumber* demonstrated that Commerce is prepared to exercise considerable discretion in making CVD determinations, regardless of the exporting country, even if that means in essence that a market economy such as Canada is treated otherwise in particular circumstances and with regard to specific determinations of benefits.

**B. The WTO Appellate Body Decision**

Of the multiple challenges to U.S. administrative decisions Canada’s WTO challenge to Commerce’s final CVD determination produced the most significant victory from the United States’ point of view in terms of confirming, at least in principle, the right of the United States to use a non-national benchmark. For Canada, there was little to welcome. First, the Appellate Body (like the Panel) rejected Canada’s challenge to Commerce’s conclusion that when a province provides standing timber to a timber harvester in a stumpage program, is a “good” that when provided by the government constitutes a “financial contribution” within the definition of a subsidy in the SCM Agreement. More significantly (and highly relevant for U.S. CVD actions against China and Vietnam), the Appellate Body explicitly confirmed that despite the directive in SCM Agreement Article 14(d) that “the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase. ..” The United States, said the Appellate Body, could “use a benchmark other than private prices in the country of provision, when it has been established that private prices of the goods in question in that country are distorted,

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139 Ibid.
141 Id., para. 76; SCM Agreement, art. 1.1(a)(1)(iii).
because of the predominant role of the government as a provider of the same or similar goods.” 142

However, the Appellate Body did not “complete the analysis” (due to lack of sufficient facts in the record before the panel and transmitted to the Appellate Body) and determine whether or not Commerce’s use of U.S. stumpage was an appropriate benchmark under the circumstances of the present case. One can speculate that in the pending WTO action by China against the United States, noted earlier, the United States will point to Softwood Lumber as evidence that the United States is not discriminating against China in its CVD methodology (at least regarding this issue).

In the only other issue of major importance, the Appellate Body upheld Canada’s demand that when considering whether alleged subsidies affect certain log and lumber producers it must do a pass-through analysis. Where a timber harvester sells some logs to unrelated sawmills, the Appellate Body concluded that Commerce had improperly failed to conduct a pass-through analysis to determine whether the subsidy to the timber harvesters was passed through to the unrelated purchasers of the logs. However, where the timber harvester process the logs it purchases into softwood lumber, and sells that lumber to other mills for further processing, no pass-through analysis is necessary. In the latter situation, the products of both the timber harvesters and remanufacturers were subject to the investigation, and there is thus no need to analyze pass-through between producers of products subject to the investigation. 143 This reflects treatment of the “upstream subsidies” issue that has been a factor in several Chinese cases, but not in PCRBS.

The United States purported to comply with the WTO determination when it issued its compliance determination 144 but Canada objected that Commerce had failed to carry out the pass-through analysis properly, and had failed to apply that analysis to the first administrative review of the CVD order. The Appellate Body upheld the panel

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142 Id., para. 103.
143 Id., paras. 159, 165.
determination that the first review was required to incorporate the pass through analysis and thus was within the scope of the 2005 (Article 21.5) proceedings. With the 2006 settlement agreement, all pending WTO actions concerning softwood lumber were discontinued by consent of both Canada and the United States.

VII. WTO Challenges to U.S. Methodology

While China is not effectively able to attack U.S. NME methodology in AD and CVD cases in principle, it has recently filed a broad challenge to such methodology “as applied” in four AD/CVD actions. The issues raised include the treatment of SOEs as public bodies that provided goods at less than adequate remuneration; provision of land rights at concessional rates; treatment of commercial banks as “public bodies” that are “entrusted and directed” to provide loans [at preferential rates] to specific industries; the use of benchmark rates outside of China for determining benefits; and failure to provide proper consultation with the Chinese government. (A similar challenge was lodged in July 2009 against the EU Commission’s actions.) Many of these same objections are likely to be present when CVD actions are eventually challenged in the DSB by Vietnam.

One of the areas in which the United States may ultimately be vulnerable relates to para. 15(a)(i) of the Accession Agreement, which appears to contemplate an analysis by the investigating authority as to whether market conditions may prevail in the specific industry under investigation. It is telling that Commerce has never found this to be the case in any of the dozens of antidumping actions brought against Chinese producers, although the burden of proof is not with Commerce but with the Chinese producers to demonstrate ME status in their industry sector. Commerce continues to take the position, despite its change in policy with regard to CVD actions that China (like Vietnam) remains an NME. Thus, in a recent case, Commerce stated that “The limits the

145 Appellate Body Report, United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada, Recourse to Article 21.5, WT/DS257/AB/RW, adopted Dec. 20, 2005, paras. 90-92. DSU, art. 21.5 provides the opportunity for further panel/Appellate Body review when Members disagree on whether the measures taken to comply with a WTO agreement by the responding party are consistent with the recommendations and rulings of the original panel/Appellate Body reports.
147 European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China.
GOC [Government of China] has placed on the role of market forces are not consistent with recognition of China as a market economy under the U.S. AD law.”

Independently of this issue is the question of double counting of AD and CVD margins, given the difficulty of determining in an NME situation the extent to which a domestic subsidy may also be reflected in dumping margin analysis, discussed in Part III(A), supra.

As with China, it remains extremely difficult because of the WTO Accession Agreement for Vietnam to challenge “as such” the application of CVDs to Vietnam and its producers. Rather, Vietnam will choose to focus on “as applied” issues when and if the appropriate Commerce action is presented. This limited opportunity for challenge is reflected in Vietnam’s first request for consultations relating to U.S. AD (but not CVD) practice. In US – Shrimp (Vietnam), Vietnam has restricted itself to challenging the U.S. practice of “zeroing,” already the subject of nearly a dozen successful WTO challenges by market economies, and to raising a number of technical issues.

IX. Conclusion

The CVD action against Vietnamese PRCB producers furnishes considerable insight as to the precise methodology Commerce will likely use in future CVD investigations against Vietnamese producers. Not surprisingly that methodology closely tracks that used with regard to China, both with regard to the initial decision to apply the U.S. CVD laws to Vietnam, and in determining which alleged subsidies are actionable and what benchmarks to use in calculating the benefit, if any, conferred, particularly with regard to interest rates. As with China, Commerce will likely use a mix of Vietnamese

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148 Coated Free Sheet Paper, Decision Memorandum at 37, discussed infra.
149 For a detailed discussion of the double-counting issue, see LE Thi Anh Nguyet, Double Counting in U.S. Legislation against Non-Market Economies – “As Such” and “As Applied” Analysis (Apr. 2010 (unpublished manuscript, copy on file with author) [hereinafter “LE, Double-Counting”].
150 PRCBs will likely not be such a case as the Vietnamese respondents appear to have abandoned efforts to defend their interests against U.S. authorities.
and surrogate data for the determination, perhaps with greater reliance on surrogate data for dealing with possible subsidies in real estate. *Softwood Lumber* nevertheless remains the first major use by Commerce of non-national (surrogate) data for determining benchmarks in U.S. CVD actions.

The dumping determination in *PRCBs* provides no useful indication of the extent to which Commerce is willing to recognize Vietnam’s movement toward market economy status, since the existing NME status was not challenged by respondents in the proceeding. Ironically, only the discussion of the use of CVD actions against Vietnam reflects recognition by Commerce, albeit indirectly, reflect, albeit grudgingly, the progress Vietnam is making toward market economy status. That determination also leaves open the logical economic disconnect between AD actions using NME surrogate country methodology and CVD actions based in part on the use of national data to calculate the benefits derived from government subsidies. Notwithstanding this dichotomy one can be reasonably sure that parallel AD/CVD actions will be the rule rather than the exception with U.S. unfair trade actions against both China and Vietnam until the Accession Agreement authorization for such treatment expires in 2015 and 2018, respectively, despite the possible success of “as applied” WTO challenges to subsidiary issues such as double-counting.

June 24, 2010