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Non-Market Economy Status and 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 for up to twelve years after WTO accession (January 2007) WTO Members bringing antidumping actions against Vietnam could use the generally unfavourable NME methodology for calculating anti-dumping and countervailing duties. This unavoidable concession results in a continuing risk of anti-dumping and, recently, countervailing duty, actions against Vietnamese exports, particularly those 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%[2] but not always; the Vietnamese margins the initial investigation in *Shrimp* [3] were in the 6% range, i.e., near normal. Also, language in the Working Party Report provided other WTO Members with the option to bring countervailing duty actions against Vietnam (as with China) using methodologies different from those employed with regard to market economy nations. In the CVD area these 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.[4]

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[1] Protocol of Accession (Nov. 15, 2006) and Working Party Report (Oct. 27, 2006), *available at* http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#vnm (last visited Sep. 10, 2009).

[2] U.S. Dept. of Commerce, *Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 37116 (Jun. 23, 2003) [hereinafter "Frozen Fish Fillets"].

[3] U.S. Dept. of Commerce, *Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam* 69 Fed. Reg. 71005 (Dec.8, 2004) [hereinafter "Shrimp"].

[4] *See* para. 254 of the Working Party Report, quoted in Part II.

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, following 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 Commerce preliminarily determined the existence of actionable subsidies, albeit at relatively low sub-3% rates in most instances.[5] The preliminary AD determination resulted in considerably higher margins, from 52.3% to 76.11%. There, the magnitude of the margins was exaggerated by Commerce's use of "adverse facts available" (AFA),[6] which as explained in Part VI(B), *infra*, making the AD case of little use in further illuminating Commerce practice in AD actions against Vietnam.

The NME approach, in this instance as it is applied in CVD actions, will be 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 Mexico (for China)[7] and New Zealand and Australia (for Vietnam)[8] and decides to afford Vietnam market economy treatment for some or all manufacturing sectors before the 2019 WTO deadline. Such action seems highly unlikely at the present time.

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 *infra.*) But it makes little economic sense to pretend that there is a clear divide between NMEs and

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[5] U.S. Dept. of Commerce, *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 74 Fed. Reg. 45811 (Sep. 4, 2009) [hereinafter "PRCB Preliminary CVD determination"].

[6] U.S. Dept. of Commerce, *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Preliminary Determination of Sales at Less than Fair value and Postponement of Final Determination*, 74 Fed. Reg. 56813, 56819 (Nov. 3, 2009) [hereinafter "PRCB Preliminary AD Determination"].

[7] Acuerdo entre el Gobierno de los Estados Unidos de Mexico y el Gobierno del la República Popular de China en Materia de Medidas de Remedio Comercial, Jun. 1, 2008 www.apparelandfootwear.org/letters/acuerdochinmex061308.pdf , last visited Aug. 18, 2008, *Diario Oficial* Oct. 13 2008.

[8] *See* Australian Ministry of Trade Press Release, *Market Economy Status for Vietnam*, Feb. 27, 2009.

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 discussions below of *Georgetown Steel* indicate, the tradition 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 in many respects has been greatly blurred in recent years.[9]

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. The major world economies may well be entering an era that portends a major shift away from the "laissez faire" approach to government regulation of and participation in the economy (or lack thereof) that began during the Reagan era in the United States and 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 may no longer make 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. Since relatively few WTO Members except the United States, and less frequently the European Union and Canada

[9] *See* Adam McCarty & Carl Kalapesi, *The Economics of the "Non-Market Economy Issue: Vietnam Case Study*, Jan. 21, 2003, at 4.

commonly bring CVD actions,[10] the threat of trade disruption from AD actions is a more serious concern except with regard to the United States.

This article begins with a discussion in Part II of 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 arrangements. Part III demonstrates that MNE treatment until 2016 for China and 2019 for Vietnam is not immutable, reflecting on actions of Mexico and Australia. Part IV addresses U.S. MNE law and practice, focusing on the determination that Vietnam is a NME for antidumping actions in *Frozen Fish Fillets*. Part V reviews the methodology used by the United States authorities in bringing CVD actions against China beginning in 2006. Part VI addresses key aspects of the preliminary U.S. agency determinations – CVD, AD and injury—in *PRCB*s, with emphasis on the ground-breaking CVD analysis. Part VII reviews a key CVD action against a market economy (Canada), *Softwood Lumber*, which has been challenged in the WTO's Dispute Settlement Body, a case that blurs the distinction between ME and NME distinctions in U.S. CVD practice. The article also discusses briefly the prospects for questioning the United States' NME practices "as applied" in the Dispute Settlement Body[11] of the World Trade Organization, as with recent Chinese challenges to U.S. and EU practices.[12]

A caveat: this article is based on the *preliminary* AD and CVD determinations in *Polyethylene Retail Carrier Bags* at Commerce, and the preliminary material injury determination at the USITC. The final determination in the AD action is not likely to result in major changes from the preliminary, given that adverse facts available will be the margin calculation in the final determination as well. However, in the CVD and injury proceedings the final determinations could result in significant changes,

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[10] 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).

[11] 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).

[12] Cite to December 2008 and July 2009 requests.

particularly if Vietnamese interests decline to participate. In any event, the analysis of Commerce's methodology 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 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.

A. China's Accession Agreement

In 2001, China when entering the WTO accepted the Agreement on Subsidies and Countervailing Measures ("SCM Agreement")[13], 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 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;*

[13] Annex 1A of the WTO Agreement.

(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 shal1 notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shal1 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.*[14]

It is clear from the initial paragraph that the effective waiver by China applies to CVD as well as AD actions. Also, 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. The only requirements are coverage in national legislation regulations and transparency when such methods are used, although that issue is among those before a panel in the case brought by China. As an additional hurdle, the burden is very much on

[14] Accession of the People's Republic of China, Nov. 10, 2001; emphasis supplied.

the foreign producers to "clearly show" that market economy conditions exist. Otherwise, the investigating authorities are permitted to continue using NME analysis.

Apart from the accession agreement, the SCM Agreement, Article 27 ("Special and Differential Treatment for Developing Country Members") will not likely assist Vietnam (or China) in avoiding the impact of the NME methodology in either AD or CVD cases. This results from the fact that the United States does not recognize China or Vietnam as developing countries that are 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.[15]

Still, 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.[16] 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.[17]) 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), 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

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[15] *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.)

[16] Request for the Establishment of a Panel by China, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379, Dec. 12, 2008.

[17] European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China.

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 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."[18]

B. Vietnam's WTO Accession

The Working Part Report relating to Vietnam's WTO accession, incorporated by reference into the Protocol of Accession, reflect the WTO's experience with China five years earlier. It 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*.
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> 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:

[18] Coated Free Sheet Paper, Decision Memorandum at 37, discussed *infra*.

(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 Viet Nam 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 Viet Nam 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 Viet Nam 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.[19]

It is on this language, particularly the italicized sections, 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" for

[19] Report of the Working Party on the Accession of Vietnam, Oct. 27, 2006; emphasis supplied.

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 clearly applies to both, as in the parallel language accepted earlier by China, and again as with China puts the onus on Vietnam and Vietnamese enterprises to demonstrate ME status in a particular industry sector.

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 from the government can be supported. It 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 the industry can meet its *prima facie* case burden under subparagraph (a)(i), other Members are required to treat the industry as a market oriented industry. Again by analogy, if Vietnam could show that, for example, 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 could be challenged.

III. Abandonment of NME Methodology by Mexico and Australia

Recent experience with Mexico, Australia and New Zealand demonstrates that the WTO 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 beginning in October 2008. These actions were taken in accordance with a bilateral agreement

between Mexico and China concluded in June 2008 and approved by the Mexican Senate.[20] The accord provides for certain transition provisions for a phase-out over a three-year period rather than elimination of all compensatory duties immediately. Perhaps most important, Mexico agreed that in the future it would not use an NME surrogate country analysis of normal value when investigating allegedly dumped goods from China.[21] There appears to be nothing 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 there for China (or Vietnam).

With Australia (and New Zealand), the reversion to market economy status 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]." The decision 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.[22] This suggests, among other things, that it may be useful for Vietnam to continue discussing with the United States possible Vietnamese participation in the so-called "P4" agreement, in which the United States "someday" would conclude an FTA with Australia, New Zealand, Singapore and Brunei, perhaps with Chile and Peru as well, or a broader Trans-Pacific Partnership. (A U.S. – ASEAN FTA is not politically feasible for the United States because of Burma's membership in ASEAN.)

IV. Summary of U.S. NME Law

A. Antidumping Law

[20] The agreement consists of two pages of text and approximately 50 pages of annexes specifying the phase-out of the antidumping duties between 2008 and 2011.
[21] *Id.*, arts 1 and 2, the former referring to Annex 7 of China's WTO Accession Protocol which permits other WTO Members to use NME methodology when investigating allegedly dumped imports from China for a period of fifteen years from China's accession in November 2001..
[22] Australian Press Release, *supra*.

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 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 the *Frozen Fish Fillets* and *Shrimp*), where Commerce believes production and selling costs are determined by market forces. 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.

In the United States, the factors to be considered 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.[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 approach taken by the United States in deciding to use the NME methodology for Vietnam in the *Frozen Fish Fillets* in 2002 is instructive. The

[23] 19 U.S.C. § 1677(18)(A) [hereinafter "Australian Press Release"]
[24] 19 U.S.C. § 1677(18)(B).

Department of Commerce concluded that while Vietnam had made significant progress implementing a variety of reforms, their 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;
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

[25] *See* Memorandum, *Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status [Vietnam]*, at 42, Nov. 8, 2002, *available at* http://www.usvtc.org/trade/other/antidumping/catfish/vietnam-market-status-determination.pdf (last visited Sep. 10, 2009).

Commerce on legal grounds to graduate Vietnam to market economy status for anti-dumping actions are similar to those that Vietnam will need to 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 the Polyethylene Retail Carrier Bags proceeding, 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.

The NME or market-economy determination is political as well as economic in the United States. 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 issued raised by Vietnam.[26]

Market-oriented Industry: Commerce has the legal 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

[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.

is private or collective (rather than full government) ownership; and that all significant inputs are subject to market-determined prices. This treatment has not been granted in NME situations affecting Vietnam (or China), in large part because, as discussed below, Commerce has not yet promulgated the necessary procedures for assessing such situations on an enterprise by enterprise basis.

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 its adamant 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 results are occasionally troubling. For example, in an investigation relating to imports of color television receivers from both China and Malaysia concluded in 2004, products essentially identical whether produced in China or Malaysia, the dumping margins for Malaysian firms were *de minimis* (0.47%)[27] while those for China were predominantly in the 22% range. [28]

Separate rates: The presumptive approach for NME producers is to apply a country-wide dumping margin to all of them, on the basis that all are government-controlled. If an NME producer can demonstrate that it is not government-controlled, both as a matter of law and in practice, however, Commerce will apply a separate, individual rate in determining that producer's export price. (Separate rates do not apply to determination of Normal Value.)

[27] Commerce, Amended Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia, 69 FR 25561, (May 7, 2004).
[28] Commerce, Antidumping Duty Order: Certain Color Television Receivers from the People's Republic of China Thursday, 69 Fed. Reg. 31347 (Jun. 3, 2004); Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People's Republic of China, 69 Fed. Reg. 29961 (Apr. 16, 2004).

Commerce has developed a "separate rates" test for determining when such separate treatment is warranted.[29] 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 *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.[30]

Separate rates were granted to many Vietnamese producers in *Frozen Fish Fillets* and *Shrimp* and have been granted to certain Chinese producers in U.S. AD actions against China on a regular basis. Also, as discussed in Part VI(B), *infra*, separate rate status was granted to a significant number of producers in *PRCBs* in the preliminary AD determination.

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.[31] 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

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[29] Department of Commerce, International Trade Administration, Antidumping Methodologies in Proceedings Involving Non–Market Economy Countries: Surrogate Country Selection and Separate Rates, 72 Federal Register 13246, 13247–13248 (March 21, 2007); Department of Commerce, International Trade Administration, *Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China*, 61 Federal Register 19026, 19027 (April 30, 1996).

[30] Department of Commerce, International Trade Administration, Antidumping Methodologies in Proceedings Involving Non–Market Economy Countries: Surrogate Country Selection and Separate Rates, 72 Federal Register 13246, 13248 (March 21, 2007).

[31] These are authorized by the WTO's Agreement on Subsidies and Countervailing Measures, Part V.

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.[32] 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.

However, in 2006 Commerce changed its policy and initiated a CVD investigation against coated paper from China.[33] While that particular case was ultimately terminated for lack of a showing 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.[34] Other CVD actions against China have been completed or are pending before Commerce. Also, Commerce is being strongly urged by Congress to make the new NME CVD policy applicable to all NMEs.[35] China has challenged numerous aspects of the United States' imposition of AD and CVDs against China in the WTO, as applied in specific cases.[36]

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. Moreover, some of the factors cited to justify treating Vietnam as subject to CVD laws

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[32] *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

[33] Department of Commerce, *Notice of Investigation of Countervailing Duty Investigations: Coated Free Sheet Paper from the People's Republic of China, Indonesia and the Republic of Korea*, 71 Fed. Reg. 68,546 (Nov. 27, 2006).

[34] *ITC Affirmative Injury Finding in Pipe Case Is First Time CVD Duties to Apply to China*, 25 INT'L TRADE REP. (BNA) 960 (Jun. 26, 2008).

[35] Amy Tusi, *Commerce Announces Significant Shift, Applies CVD Law in Chinese Paper Case*, 24 INT'L TRADE REP. (BNA) 495 (Apr. 5, 2007).

[36] *United States – Definitive Anti-Dumping and Countevailng Duties on Certain Products from China*, WT/DS379/2, Dec. 12, 2008 [hereinafter "*US – AD/CVDs – China*"].

directly because it is now a mixed economy contrast with Commerce's NME determination in *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 U.S. Court of International Trade (CIT) recently reversed one Commerce AD/CVD finding against China.[37] 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, such a situation could result in double-counting. The Court 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."[38] If the CIT decision after remand to Commerce is 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 is inevitable.

China is also challenging the double-counting in an "as such" claim before the WTO,[39] which may provide alternative relief even if the CAFC ultimately reverses the CIT.

The court decision could also require Commerce to quickly develop procedures for analyzing requests for individual market-oriented enterprise 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

[37] GPX Int'l Tire Corp. et al. v. United States, __ F.Supp.3rd. ___ (Sep. 18, 2009) (Slip. Op. 09-103).
[38] GPX Tire, ___ F.Supp.3rd. at ____. [WL 8]
[39] United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, Request for the Establishment of a Panel by China, WT/DS379/2, Dec. 12, 2008, at 7.

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."[40]

Nevertheless, it appears that the pursuit of CVD cases with the use of surrogate country methodology (particularly for determining "benchmark" rates) is permitted by the WTO's SCM Agreement[41] and at least one Appellate Body ruling, in *Softwood Lumber*, as discussed in Part VII.

V. U.S. Methodology and Practice – China

From 1984 to at least until the mid-1990s, Commerce followed the practice of not bringing CVD actions against NMEs, based on the *Georgetown Steel* case noted above.

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[40] GPX Tire, ___ F.Supp.3rd. at ___. [WL 10]

[41] *See* SCM Agreement, art. 14(d).

[52] 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"].

However, in the so-called Georgetown Steel memorandum in 2007,[52] Commerce justified its change in practice. 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:

> [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.[53]

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 *Georgetown Steel* litigation does not prevent us from concluding that the PRC Government has bestowed a countervailable subsidy upon a Chinese producer.[54]

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 *PRCBs* and took the same general approach to CVD cases as with China.

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. For

[53] *Id.*, at 10.
[54] *Ibid.*

example, in *Coated Free Sheet Paper*,[55] Commerce calculated the benefit for certain tax reductions provided to producers by simply comparing the normal tax rate with the preferential tax rate, and treating 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).[56] The concept of rejecting national benchmark rates is not confined to market economies, although it is explicit in China's WTO accession protocol, as noted above. 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 VII, *infra.*

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."[58]

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[55] U.S. Dept. of Commerce, *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 60645 (Oct. 25, 2007), with *Decision Memorandum*.
[56] *Coated Free Sheet Paper Decision Memorandum,* at 6.
[58] *Coated Free Sheet Paper Decision Memorandum,* at 56.

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 has determined that the tax subsidies they receive, despite their broad applicability and transparent nature, are specific under the SCM Agreement, and are thus countervailable.[59]

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 *Coated Free Sheet Paper* has been followed by Commerce, most recently in the September 2009 in the preliminary determination in *Oil Country Tubular Goods*.[60] 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 *Softwood Lumber*.[61]

VI. U.S. Methodology and Practice – Vietnam: Polyethylene Retail Carrier Bags (PRCBs)

PRCBs is important for a number of reasons. First, it is to date the only proceeding seeking the imposition of CVDs against Vietnamese producers, and just the third seeking antidumping duties.[62] Secondly, in the course of the AD phase of the proceeding Commerce may be required determine whether the Vietnamese producers constitute a market-oriented industry, which in turn may require Commerce to re-evaluate at least in part its application of NME criteria to Vietnam for the first time since *Frozen Fish Fillets.* (Once a non-market

[59] *Id.*, at 92.
[60] U.S. Dept. of Commerce, *Certain Oil Country Tubular Goods from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination*, 74 Fed. Reg. 47210 (Sep. 15, 2009) [hereinafter "Oil Country Tubular Goods"].
[61] *Id.*, 74 Fed. Reg. at 47212, 47216.
[62] Petition filed by King & Spaulding, Mar. 31, 2009.
[64] *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

economy determination is made it remains in effect until revoked.[64]) Although in the preliminary determination, the subsidy rates were very low, ranging from 0.20% to 4.24% for the three firms specifically reviewed, and a rate of 2.97% applied to other manufacturers,[65] and the import volume less than 1% of U.S. imports from Vietnam ($79 million),[66] the precedent may well be applied to more economically important proceedings in the future even if the final determination is affected by lack of mandatory party participation.

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.[67] In this case, as in initial CVD actions against China beginning in 2006, petitioners argued that the conditions which led Commerce over 20 years ago to decline to initiate CVD investigations against the Soviet Union are not applicable to China, and by analogy, to Vietnam. As the notice 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 exempts non-market economy imports from being subject to the provisions of the

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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.)

[65] PRCB Preliminary CVD Determination, 74 Fed. Reg. at 56813, 56815.

[66] *See* Commerce, *Fact Sheet, Commerce Preliminarily Finds Subsidization of Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam*, Aug. 31, 2009.

[67] *See* U.S. Dept. of Commerce, *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation and Request for Public Comment on the Application of the Countervailing Duty Law to Imports from the Socialist Republic of Vietnam*, 74 Fed. Reg. 19064 (Apr. 27, 2009).

> 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.[68]

Petitioners alleged as well that various Vietnamese government programs constitute countervailable subsidies. These include 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.[69] All of these were addressed in the preliminary determination.

In the Preliminary determination of subsidies, 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") was reduced from 12,000 to about 1,800 and correspondingly reduced employment and total economic output.[70] 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.[71]

> The result is 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 fr 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.[72]

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 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.

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[68] 74 Fed. Reg. at 19067.
[69] 74 Fed. Reg. at 19066-67.
[70] CVD Applicability Memo, *supra,* at 4. Here, as with the China CVD Applicability Memo, *supra*, Commerce has made a practice of addressing such issues separately from the formal preliminary and final determinations.
[71] *Id*., at 8-9.
[72] *Id*... at 11.

2. Key Issues in the Preliminary CVD Determination

In its preliminary determination, Commerce for the most part followed the same approach as in CVD actions against China, including 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 viewed Vietnam's accession agreement "contemplated application of the CVD law."[73] Commerce also found support for bringing CVD actions in the discussion of benchmarks in Vietnam's working party report, as quoted above.[74] 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.

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 the same 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.[75] In the memorandum, Commerce reviewed various legal and banking reforms and for banks "substantial flexibility in setting interest rates since 2002, although such flexibility is limited . . . ."[76] Interestingly, Commerce found it appropriate to begin its analysis of the banking system with its non market economy status determination in *Frozen Fish Fillets* in 2002, setting forth its view of the changes in the ensuing seven years. However, despite the changes, Commerce found, *inter alia*, many "institutional weaknesses" as well as lack of transparency and continued *de facto* benefits enjoyed by state owned commercial banks, and observed that the reforms "continue to lag and remain incomplete."[77]

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

[73] PRCB Preliminary CVD determination, 74 Fed. Reg. at 45814.
[74] *Ibid.*
[75] Memorandum for Ronald K. Lorentzen, "Countervailing Duty Investigation of Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam – A Review of Vietnam's Banking Sector (Aug. 28, 2009), at 9 [hereinafter "Vietnam Banking Sector Memo"]. (Copy on file with author.)
[76] *Id.*, at 5.
[77] *Id.*, at 7.

with some exceptions on the World Bank's list of 54 "lower middle income" countries.[78] 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.[79] 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.[80] For dollar-denominated loans, Commerce used LIBOR rates with some adjustments.[81]

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 . . . ."[82] Since SOCBs were determined to be public entities on the basis of their majority ownership by the government, the loans provided by SOCBs were considered government financial contributions.[83] Because it was the plastics industry that was allegedly targeted, the loans were considered specific under U.S. CVD laws.[84] Using the interest benchmark discussed above Commerce determined that the two producers receiving loans received interest subsidies in the amount of 1.18% ad valorem (Chin Sheng) and 0.21% (Fotai).

Commerce's calculations of whether land was provided to PRCB 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."[85] Accordingly, and again

[78] 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.)
[79] PRCB Preliminary CVD Determination, 74 Fed. Reg. at 45815.
[80] Vietnam Loan Benchmark Memo, at 2.
[81] PRCB Preliminary CVD Determination, 74 Fed. Reg. at 45815
[82] *Id.*, 74 Fed. Reg. at 45816-17.
[83] *Id.*, 74 Fed. Reg. at 45817.
[84] 19 U.S.C. § 1671(5A)(D)(i).
[85] *Id.*, 74 Fed. Reg. at 45815.

using a methodology borrowed from CVD actions against China,[86] 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."[87] 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.[88]

Among the three Vietnamese PRCB producers individually subject to the investigation, only one (Fotai) leased land for its production facilities directly from the government. The other two leased from private companies (who in turn leased from the government); consequently, Commerce did not treat the latter two as countervailable, at least in the preliminary determination. Fotai had concluded a long term land lease from one of Vietnam's provinces prior to the January 11, 2007 cut-off date, but because the lease was amended in May 2007 Commerce considered it to be actionable. Using the Indian rates as the benchmark, Commerce found a land rental subsidy of 3.86%.[89]

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 calculated the amount of the subsidy (0.51%) based on a comparison of the normal tax rate with the preferential tax rate.[90] Finally, Commerce determined a subsidy of 0.20% based on exemption of raw materials from import duties if the importer is located in an industrial zone. This issue remained in dispute at the time of the preliminary determination, since respondents had alleged that the exemption was not tied to production in the zone.[91]

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[86] *See* Oil Country Tubular Goods, 74 Fed. Reg. at 47222 (determining to use Thailand as a benchmark for Chinese land use rights).
[87] PRCB Preliminary CVD Determination, 74 Fed. Reg. at 45815.
[88] *Id.*, 74 Fed. Reg. at 45816.
[89] *Id.*, 74 Fed. Reg. at 45818.
[90] *Id.*, 74 Fed. Reg. at 45818.
[91] *Id.*, 74 Fed. Reg. at 45818

Commerce determined preliminarily that the remission of the value added tax on equipment at the time of importation was not to be countervailable, and that a number of export promotion and tax benefit programs were not actionable because the respondents had not used them.[92]

All such preliminary determinations are subject to verification in Vietnam and to further analysis, so that the final margin rates are subject to change, perhaps significantly, if the CVD investigation, unlike the AD investigation is completed in the normal manner.

B. The Preliminary Determination of Dumping

Unfortunately, the preliminary AD determination in *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 is there likely to be any further analysis of such issues in the final determination; the punitive AFA will be the basis of the final margins there as well. [93] However, Commerce confirmed its willingness to use "separate rates" for calculating export price for many Vietnamese respondents but otherwise 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.[94] Given that both withdrew abruptly from the proceeding in September and October 2009,[95] 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.[96]

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

[92] *Id.*, 74 Fed. Reg. at 85819.
[93] Telephone discussion with senior analyst Zev Primor, Nov. 9, 2009.
[94] PCRB Preliminary AD Determination, 74 Fed. Reg. at 56814.
[95] *Id.*, 74 Fed. Reg. at 56815.
[96] *Id.*, 74 Fed. Reg. at 56818.

private groups; and those wholly owned or partially owned by the state.[97] 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.[98]

Commerce also preliminarily 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.[99] 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 preliminarily 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.[100] The proceeding again demonstrates that despite the lack of treatment of industry sectors as market sectors, Commerce remains open to approving separate rate treatment of export price in appropriate circumstances.

C. The USITC's Preliminary Injury Analysis

As might have been expected, the USITC found that imports of PRCBs from Vietnam (along with those from Indonesia and Taiwan) evidenced a reasonable indication of material

[97] *Id.*, 74 Fed. Reg. at 56815-18.
[98] *Id.*, 74 Fed. Reg. at 56816.
[99] *Ibid.*
[100] *Id.*, 74 Fed. Reg. at 56817.

injury to U.S. producers.[101] More than 90% of the USITC's preliminary injury findings are positive. However, several factors suggest that a final injury finding is 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.[102] 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 the period, which "may have had a role in the domestic industry's deteriorating performance during the period of investigation."[103] There also remained questions as to the impact on the domestic industry of "nonsubject imports," those not subject to antidumping or CVD investigations. All of these issues are likely to be addressed in greater detail in the USITC's final injury determination.

VII. U.S. Methodology and Practice: Canadian Softwood Lumber[104]

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.[105] 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

[101] USITC, *Polyethylene Retail Carrier Bags from Indonesia, Taiwan, and Vietnam,* Inv. Nos. 701-TA-462 and 731-TA-1156-1158 (Preliminary) (May 2080), at 25.
[102] *Id.*, at 20.
[103] *Id.*, at 25.
[104] This section is adapted in part from **GREGORY W. BOWMAN, NICK COVELLI, DAVID A. GANTZ & IHN HO UHM TRADE REMEDIES IN NORTH AMERICA,** Ch. 12 (Kluwer Int'l, forthcoming 2010).
[105] R. Yin and J. Baek., *The US—Canada Softwood Lumber Trade Dispute: What we Know and What we Need to Know*, 6 FOREST POLICY AND ECONOMICS 129-143 (2004).

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.[106]

This section discusses only the CVD aspects of the latest "Lumber IV" phase of the dispute the proceedings before the Commerce Department that began 2001.[107] Lumber IV was initiated following the expiration of a settlement agreement[108] concluded in 1996 that expired March 31, 2001, and led to the WTO's review of that CVD action. 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.[109]

Softwood lumber It is relevant to the other issues discussed in this paper because with regard to essential elements of the CVD action the United States has 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. It also demonstrates that the key "benchmark" issue is analogous to that raised in CVD actions against China and Vietnam. Review of Lumber IV under the parallel provisions of NAFTA's Chapter 19 is not analyzed.

A. **Commerce's CVD Investigation**

The most significant aspect of Commerce's final CVD determination,[110] 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"

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[106] M. Hart and B. Diamond, *The Cul-de-Sac of Softwood Lumber*, PUBLIC OPINION, Nov. 2005, at 19.
[107] 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.
[108] *Software Lumber Agreement between the Government of the United States of America and the Government of Canada*, May 29, 1996, 35 I.L.M. 1195 (1996).
[109] Rossella Brevetti & Peter Menyasz, *U.S. Lumber Producers to File CVD, AD Case April 2 When U.S.-Canada Agreement Expires*, 18 INT'L TRADE REP. (BNA) 437 (Mar. 15, 2001).
[110] U.S. Dept. of Commerce, *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,545 (Apr. 2, 2002). The detailed analysis is contained in the accompanying unpublished decision memorandum (67 ITADOC 15545).

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.[111]

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 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."[112] U.S. 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.

Several additional issues in dispute, such as Commerce's decision that standing timber is a "good" covered by the SCM Agreement, are not discussed herein. Lumber shows 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

[111] CVD Decision Memorandum, *op. cit.*
[112] *Ibid.*

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.

For Canada, there was little to welcome in the Appellate Body's *Softwood Lumber* CVD ruling.[113] 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.[114] Perhaps more surprisingly (and highly relevant for U.S. CVD actions against China and Vietnam), the Appellate Body explicitly confirmed that Commerce might "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, because of the predominant role of the government as a provider of the same or similar goods."[115] However, it did not "complete the analysis" (due to lack of sufficient facts on the panel record) 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

[113] Appellate Body Report, *United States – Final Countervailing Duty Determination With respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted Feb. 17, 2004.
[114] *Id.*, para. 76; SCM Agreement, art. 1.1(a)(1)(iii).
[115] *Id.*, para. 103.

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.[116] This reflects treatment of the "upstream subsidies" issue that has been a factor in several Chinese cases.

The United States purported to comply with the WTO determination when it issued its compliance determination[117] 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 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.[118] With the 2006 settlement agreement, all pending WTO actions concerning softwood lumber were discontinued by consent of both Canada and the United States.

VIII. Conclusion

The preliminary CVD action against Vietnamese PRCB producers furnishes considerable insight as to the precise methodology Commerce will likely use in this and in other CVD investigations against Vietnamese producers in the future, even though this proceeding seems likely to be completed without further participation by the Vietnamese respondents. Nevertheless, the PRCBs preliminary determination indicates that the methodology closely follows 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 apparently intends to use a mix of Vietnamese and surrogate data for the determination,

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[116] *Id.*, paras. 159, 165.
[117] Under sec. 129 of the Uruguay Round Agreements Act, 19 U.S.C. § 3538 (1994).
[118] 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.

but 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.

It remains extremely difficult because of the WTO Accession Agreement for Vietnam to challenge in principle the application of CVDs to Vietnam and its producers. Rather, as with China in its proceeding against the United States, and the July 2009 request for consultations against the EU, in both of which the challenges relate to the manner in which the United States has applied its CVD laws to China in specific cases, Vietnam will likely want to focus on "as applied" issues when and if the appropriate Commerce action is presented.[119] This Chinese WTO proceeding will thus bear careful monitoring by Vietnamese officials.

The preliminary dumping determination in *PRCBs* provides no useful indication of the extent to which Commerce is recognizing Vietnam's movement toward market economy status, in part because it was decided based on adverse facts available; the final determination will be based on the same approach. Rather, it is only the discussion of the use of CVD actions against Vietnam that indirectly recognizes the progress Vietnam is making toward market economy status.

December 6, 2009

[119] *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.