국제학석사학위논문

Legal Analysis of the Application of the Countervailing Duty Rules on the Nonmarket Economy

비시장경제국에 대한 상계조치상 법적쟁점연구

: 베트남 사례를 중심으로

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서울대학교 국제대학원

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Abstract

Countervailing measures, which aim to offset injury from the import of foreign subsidized goods, are governed by the WTO *Agreement on Subsidies and Countervailing Measures*. However, the Agreement has a constitutional limitation of having difficulties in dealing with nonmarket economy issues as the norms are established on the premise of a market economy. The point is nonmarket economies not only have structural problems of creating a subsidy effect by controlling domestic prices, but also have high incentives to grant subsidies to attract more foreign investments nowadays.

Controversies over countervailing duty laws against nonmarket economies continue from 'whether they could be applied to the nonmarket economy' to 'how to interpret the specific laws to fit them'. Therefore, the research fundamentally aims to examine whether the current GATT/WTO system can regulate nonmarket economy issues within its framework by identifying which aspects of current rules make both exporting and importing countries complain.

First, the research analyzes the evolution of the US countervailing rules, which well explains why members have started to apply the measures to nonmarket economies only after 2007. Then, the study examines legal controversies on interpreting and applying specific rules. The analysis focuses on how to interpret the financial contribution of 'public body' and whether foreign market economy prices can be used as a 'benchmark' for calculating margin in nonmarket economies. The WTO dispute cases well explained the development of legal standards in NME and struggling points between countries and between the dispute settlement bodies.

Finally, a case study on countervailing measures against Vietnam will focus on which legal points are discussed and what are the characteristics of subsidy programs. This will also give significant legal implications as global discussion on industrial subsidies, foreign subsidies, and anti-trade circumvention becomes more mature.

Keywords: WTO, Nonmarket Economy, Subsidy, Countervailing Duty, Trade remedy, Vietnam
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List of Abbreviation

AB	Appellate Body
AD	Anti-dumping
AFA	Adverse Facts Available
CAFC	Court of Appeals for the Federal Circuit
CBSA	Canada Border Service Agency
CIT	Corporate Income Tax
CPV	Communist Party of Vietnam
CVD	Countervailing Duty
DOC	Department of Commerce
FIEs	Foreign-Invested Entities
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GOC	Government of China
GOI	Government of India
GOV	Government of Vietnam
IMF	International Monetary Fund
LTAR	Less than Adequate Remuneration
NME	Nonmarket Economy
POI	Period of Investigation
REER	Real Effective Exchange Rate
SBV	State Bank of Vietnam
SCM	Subsidies and Countervailing Measures
SOCBs	State-Owned Commercial Banks
SOEs	State-Owned Enterprises
USCIT	United States Court of International Trade
USDOC	United States Department of Commerce
WTO	World Trade Organization

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Chapter I. Introduction

1.1 Nature of Issue

1.1.1 Systematic Challenges of Applying CVD rules to NME

The problem of applying CVD rules in a Nonmarket Economy (NME) ultimately begins with GATT/WTO's insufficiency to regulate these countries under the current system. When the GATT system was established in 1947, there was no distinction between market and nonmarket economies within the provisions.[1] However, the increasing trade with former communist countries after the post-cold war raised the necessity to establish separate rules. As the multilateral trading system has been built based on a market economy structure, accommodating NME countries inside the system has become a significant challenge.[2]

The first norm related to NME in GATT/WTO provisions was the *Interpretative Note of GATT Article VI* in 1955 (so-called "*1955 Interpretative Note")*. Article VI of the GATT 1947 had initially stipulated that if in-country price is absence, "(i) the highest price of any third country in the ordinary course of trade, or (ii) the cost of production of the product plus a reasonable addition for selling cost and profit" could

[1] Snyder (2001) argued that "the legal concept of nonmarket economy" has been socially constructed in the context of political, economic, and social power. And it was originally rooted in the early Cold War and these countries joined the GATT as a part of détente.

[2] *See* Jackson, J.H. (1997), pp. 325-332. Jackson also pointed out the post-WWII international trading system is based on free-market-oriented economies, yet significant parts of the world have non-market-oriented features. Therefore, how to accommodate those countries without increasing tension is questionable.

be used as an alternative.[3] In addition, the second Supplementary Provision to Paragraph 1 of *1955 Interpretative Note* give further explanation that:

> "It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1 (emphasis added)."[4]

Therefore, it may not always be appropriate for importing parties to find strict comparable prices inside the importing country.

As the GATT was indeed a diplomatic organization, this note allows alternative interpretations other than the explicit languages specified in Article VI. Therefore, it opened broad discretion to investigating authorities on finding comparable prices in NME.[5] Also, the WTO rulings questioned that whether it is reasonable to infer this Ad note as a definition of NME. For example, the Appellate Body (AB) of *EC-Fasteners* case found that other forms of NMEs can also exist because the second Ad note only describes a certain type of NME.[6]

In 1979 Tokyo Round, unlike members failed to make much progress in NME issues of Anti-dumping measures, they succeed to introduced price comparison standards for NME in Article 15 of the *Subsidies Code*, noting that:

> "In cases of alleged injury caused by imports from a country described in NOTES AND SUPPLEMENTARY PROVISIONS to the General Agreement (Annex I, Article VI, paragraph 1, point 2) the importing signatory may base its procedures and measures either… (emphasis added)".[7]

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[3] *See* 1955 Interpretative Note of GATT Article VI.
[4] *Ibid*.
[5] *See* Snyder, F. (2001), pp. 383.
[6] *See* WTO Appellate Body Report, *EC-Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted on 15 July 2011, para.284-286.
[7] Article 15 of the *Subsidies Code.*

The success was in line with the ultimate goal of negotiation that removes trade distortions like government interventions. Later, the Panel of *US-Antidumping and Countervailing Duties* case also understood that "the Tokyo Round *Subsidies code* explicitly addresses the concurrent use of NME methodologies in AD and CVD investigations."[8] Nevertheless, as Article 15 was not reflected into WTO agreement, current system has little legal basis for distinguishing 'nonmarket economy' from 'market economy' and allows extensive discretions to the investigating authorities.

The NME issue in the GATT/WTO became more problematic after China joined the WTO. Whether granting "market economy status" to China was one of the most controversial points during the 15-year-long negotiation period. Members such as the US continuously argued the planned economic system still remained in China, and the laws and practices were different from those of WTO. Interestingly, before China, all other NME countries[9] had committed to changing their economic structure to a market economy and abiding by WTO rules. However, China became the first hybrid economy[10] to join the WTO, adding special rules on trade remedy sectors. They reached an agreement to classify China as a nonmarket economy for the next 15-year and apply special methods to them. And this decision is also reflected in China's *WTO Accession Protocol* Article 15, as follows:

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[8] *See* Panel Report, *United States-Antidumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted on 22 October 2010, para.14.119.

[9] These countries are Poland (1967), Romania (1971), Hungary (1973), Bulgaria (1996), Mongolia (1997), Kyrgyz Republic (1998), Latvia (1999), Estonia (1999), Georgia (2000), Albania (2000), Croatia (2000), Lithuania (2001), Moldova, Republic of (2001).

[10] *See* WTO, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, adopted on October 2001, para. 4. The Working Party Report refers Chinese economies model is in a transition towards a 'Socialist market economy' which bears characteristics of both market and non-market economies

"(a)(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.

(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 (emphasis added)."[11]

However, as the current multilateral trading system was established based on the premise of a "market economy" in the first place, the NME issues led to ongoing controversies. Nowadays, countries unilaterally have developed special NME methodologies for imposing higher tariffs. Additionally, countries such as the US, EU and Japan claim that the current rules of the *SCM Agreement* are insufficiently regulating the market and trade-distorting subsidization; therefore, new rules are needed.[12]

1.1.2 The Framework of Subsidies and Countervailing Measures

The rules for subsidies and countervailing measures have started to be stipulated in GATT 1947 Article XVI, entitled "Subsidies". However, the provision even did not define what constitutes a "subsidy", but simply required a contracting party shall notify subsidies to other CONTRACTING PARTIES.[13] To overcome this poor rule

[11] *See* WTO, Accession of the People's Republic of China, WT/L/432, adopted on 23 November 2001, Article 15(a)(ii) and (d).

[12] *See* Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States, and the European Union, adopted on 14 January 2020.

[13] *See* Article XVI Section A of the GATT 1947.

and bring more uniformity and better implementation, members of Tokyo Round introduced new plurilateral agreement, which called Tokyo Round *Subsidies Code (Agreement on Interpretation and Application of Article VI, XVI and XXIII of the General Agreement)*[14]. Nevertheless, only less than twenty-five members signed this agreement and it still failed to bring clear concept on how to deal with subsidies and countervailing measures.

In the Uruguay Round, WTO members concluded a multilateral agreement on these issues in the form the *WTO Agreement* Annex 1A, which is the *Agreement on Subsidies and Countervailing Measures* (so-called "*SCM Agreement")*. Article 1.1 of the *SCM Agreement* detailed that "subsidy is a financial contribution by a government of any public body within the territory and it shall be deemed to exist when a benefit is thereby conferred".[15] In addition, Article 1.2 noted that a subsidy shall be ruled by the WTO rules only if it is "specific to an enterprise or industry or group of enterprises of industries within the granting authority".[16]

More specifically, the *SCM Agreement* categorized subsides into prohibited, actionable, and non-actionable ones.[17] And Article 3 of the *SCM Agreement*, entitled "*Prohibition*", clarified the rules on prohibited subsidies into export subsidies[18] and import substitution subsidies, as follows:

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[14] *See* BISD 26S/56.

[15] *See* Article 1.1 of the *SCM Agreement.*

[16] *See* Article 1.2 and 2 of the *SCM Agreement.*

[17] The *SCM Agreement* indicates the third category of subsides in Article 8.2. The subsides noted in this Article (research and development subsidies, regional subsidies, and environmental subsidies) were under a 5-year provisional application beginning with the date of entry into force of the WTO. As extending provisional application failed, these subsidies are now become actionable.

[18] *See* Appendix 1. It includes "(a) direct export subsidies, (b) currency retention schemes and similar practices, (e-i) the full or partial exemption, remission, deferral on direct and indirect taxes, social welfare charges, and import charges, (j-k) export financing program of credit guarantee and insurance guarantee".

> "Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
> (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;
> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods (emphasis added)."[19]

The agreement details that export subsidies are "subsidies contingent upon export performance", and the dispute settlement bodies in *Canada-Aircraft* (1999) and *Australia-Automotive Leather II* (1999) cases have interpreted the meaning of 'contingent' in the agreement as "conditional or dependent for its existence on something else".[20] Also, the ruling forbids both *de jure* and *de facto* contingency as the footnote 4 in the Agreement requires elements for satisfying *de facto* contingency, as follows:

> "the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings (emphasis added)."[21]

When subsidies are deemed as prohibited or actionable according to this *Agreement*, a member whose domestic industry is harmed by foreign subsidization has two choices. First, it can directly challenge the subsidy at issue to the WTO dispute settlement body pursuant to Article 4 or 7 of the *Agreement*. Alternatively, it can also unilaterally impose the countervailing duties (CVD) measures on the subsidized products following necessary steps regulated at part V of the *Agreement*. About this unilateral approach, a member imposing CVD shall verify three conditions: first, existence of "subsidy" (Article 1, 2 and 14), second existence of

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[19] Article 3.1 of the *SCM Agreement.*

[20] WTO Appellate Body Report, *Canada-Measures Affecting the Export of Civilian Aircraft*, WT/D70/AB/R, adopted 2 August 1999, para.166; WTO Panel Report, *Australia-Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, adopted 25 May 1999, para. 9.55.

[21] Footnote 4 of the *SCM Agreement.*

"injury" (Article 15 and 16), and lastly *a causal linkage* between the existence of subsidized imports and alleged injury (Article 10 and 32.1).[22]

1.2 Research Question

The research ultimately aims to examine whether NME issue can be handled within current WTO system. Identifying which aspects of current countervailing rules in the *SCM Agreement* make both exporting and importing countries complain will be a major clue to solving the problem. Why did the US start to apply CVD rules on NME only after 2007? What led to the endless controversy of applying CVD rules to NME? What are the primary legal disputes between countries? How have CVD rules actually been applied in NME investigations? These are the questions that will be addressed in this research.

As the US's CVD measures on China in 2007 were a trigger to investigate NME in all other countries, the research will first address the question by analyzing the history of CVD rationale in the U.S, focusing on *Georgetown Steel* Case. Then, the study will examine the principal legal controversies that reflect problems of CVD rationale directly: 'Public Body' and 'Benchmark' jurisprudence using WTO dispute cases. Although current discussions on NME are still highly targeted in China due to its significant share in the global economy, other NME countries, including Vietnam, are already subject to the same methodologies in CVD investigations. In addition, as Vietnam play a significant role in the global value chain after supply chain diversification, trade remedy measures against Vietnamese goods become

[22] *See* Article 11 of the *SCM Agreement* which stipulates investigating authorities shall include sufficient evidence of these three conditions for initiation and subsequent investigation.

more frequent. Therefore, the study will identify the different perspectives of exporting and importing countries using the Vietnamese case.

Chapter II. Evolution of the US CVD rules to NME

2.1 Statutory Interpretation of Section 303 and Inapplicability of CVD rules to NME

The US started to impose anti-dumping measures on NME immediately after the very first AD case, *Bicycles from Czechoslovakia,* in 1960.[23] On the other hand, DOC has long kept the position that CVD laws could not be applied to NME as there was no adequate method to measure market distortion in those countries, reflecting the *Statutory Interpretation of Section 303* in 1984.

The US initially had two different countervailing duties statutes in the T*ariff Act of 1930 ("the Act")*: Section 303 and 701. First, Section 303 applied to:

> "Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government (emphasis added)."[24]

[23] Under the US *Antidumping Act of 1921*, there was no evidence of how NME dumping practices should be treated because market sales of NME did not qualify the §205(a) of the Act requiring "in the ordinary course of trade". In *Bicycles from Czechoslovakia,* the first NME dumping case ever in 1960, Treasury instead relied on the methodology of using the market-based prices of West-European countries. Nevertheless, NME dumping cases were not significant in terms of overall trade volume. Thus, it became a huge concern only after negotiating the MFN agreement with the Soviet Union after détente. As a result, congress acted Trade Act of 1974 which has provisions dealing with NME imports. *See* Horlick, G.N. & Shuman, S.S (1984), "Nonmarket Economy Trade and U.S Antidumping/Countervailing Duty Laws", *International Lawyer*, Vol.18, no.4, pp. 807-810. *See* also Smith, J.M. (2013), "U.S Trade Remedy Laws and Nonmarket Economies: A Legal Overview", *Congressional Research Service*, pp. 1-2.

[24] Tariff Act of 1930 §303 (a)-(b), amended as 19. USC §1303(a)-(b)

And Section 303 did not require the United States Department of Commerce (USDOC) to determine whether a subsidy program at issue caused 'injury' in domestic industries.[25]

On the other hand, Section 701 of the Act applies to "a country under the Agreement". As this section was enacted to comply with the *Subsidies Code* and GATT Article VI, XVI, and XXIII, '*a country*' in this Section refers to the parties of *Subsidies Codes* or any other agreements concluded with the US.[26] And this Section required the Department of Commerce (DOC) to determine whether a subsidy at issue either "caused or threatened to cause injury, material injury or material retardation of establishing domestic industry".[27]

In *Carbon Steel Wire Rod From Czechoslovakia (Case Number: C-435-001) and Poland (Case Number: C-455-003)* case, neither Czechoslovakia nor Poland was parties of *Subsidies Codes* and the USDOC conducted the investigations based on Section 303 of the Act. On its preliminary determination, the USDOC explained its conclusion that '*any country*' in Section 303 means that any single government could not be excluded from the CVD laws *per se*.[28] However, the final determination failed to verify whether the "government activities confer a bounty or grant", which is the second legal element of section 303. As a result, the DOC justified its decision resorting on the rationale that subsidy is a free-market phenomenon which has no meaning in the NMEs, stating that:

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[25] *Ibid*, *See* also Smith, J.M. (2013), pp.5.

[26] *See* Smith, J.M. (2013), pp.5.

[27] *See* Tariff Act of 1930 §701.

[28] *See* United States Department of Commerce, Carbon Steel Wire Rod From Czechoslovakia; Final Negative Countervailing Duty Determination, *Federal Register*, Vol.49, no. 89,1 May 1984, at.19371.

> "In such a situation, we could not disaggregate government actions in such a way as to identify the exceptional action that is a subsidy. Because the notion of a subsidy is, by definition, a market phenomenon, it does not apply in a nonmarket setting. To impose that concept where it has no meaning would force us to identify every government action as a subsidy (or a tax). We are not prepared to do this-we will not impose the market-based concept of a subsidy on a system where it has no meaning and cannot be identified or fairly quantified (emphasis added)."[29]

Also, the USDOC pointed out that Congress kept silent on whether CVD laws could apply to these countries even though DOC was required to amend the Act in 1974 and 1979. Therefore, with its statutory interpretation of NMEs, the USDOC concluded it has wide discretion on determining "whether a countervailable subsidy could exist in NMEs".[30]

However, when the US Court of International Trade (USCIT) in *Continental Steel Corp. v. United States* case reviewed DOC's negative final determination on *Carbon Steel Wire Rod From Czechoslovakia and Poland,* it concluded to reverse the rulings and remand the case to DOC, stating that:

> "The fundamental error of the Commerce Department is its premise that a subsidy can only exist in a market economy…The position taken by Commerce is at odds with the plain meaning and purpose of the law. It contradicts judicial interpretations of the law. It is inconsistent with past administration of the law. It also appears to be self-contradictory from its inception (emphasis added)." [31]

About DOC's interpretation of 'subsidy is a market phenomenon,' the USCIT criticized adopting of *per se* rule. Also, it indicated that as AD law allowed the use of surrogate or other foreign alternative prices to calculate dumping margins in NME, it also does not deter DOC from using the same methodology.[32]

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[29] *Ibid*, at 19372.
[30] *Ibid*, at.19374. The USDOC sited decision on *United States v. Zenith Radio Corp* (1978).
[31] United States Court of International Trade, *Continental Steel Corp. v. United States,* 614 F.Supp.548 (Ct. Int'l Trade 1985), decided 30 July 1985, at 550.
[32] *Ibid.*

2.2 *Georgetown Steel Corp. v. United States case* and "Sufficiently market-oriented"

On the other hand, the US Court of Appeals for the Federal Circuit (CAFC) in *Georgetown Steel Corp. v. United States* case reversed the ruling of USCIT's rulings. The Court put more attention on the terms "bounty and grant" and understood that Section 303 was not meant to apply to NME.[33] Also, CAFC noted that there were no distinctions between market and nonmarket economies when the statutes were acted.[34] Unlike anti-dumping laws that had been revised to allow AD measures in NME, Congress's silence on this Section infers that it did not intend to deviate from the first enacted version. As a result, Congress had intended to handle NME issues with AD rules, not CVD rules. In conclusion, CAFC upheld the DOC's determination, citing other previous cases that:

> "We cannot say that the Administration's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion."[35]

And after this decision, there was no other CVD investigation from NME until 1992.

In 1992, the petitions of *Oscillating and Ceiling Fans From the People's Republic of China* case brought new arguments that even though China has been considered a nonmarket economy, the fan industry itself was "*sufficiently market-oriented"* to calculate the subsidy margin.[36] It means if the industry is verified as sufficiently

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[33] *See* United States Court of Appeals, *Georgetown Steel Corp. v. United States,* 801 F.2d, determined 18 September 1986, at 1308.

[34] *Ibid.* at 1314.

[35] *Ibid.* at 1318. CFAC cited *United States v. Zenith Radio Corp, USA., Inc. v. Natural Resources Defense Council,* and *Chemicals, Inc. v. United States.*

[36] *See* United States Department of Commerce, Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans From the People's Republic of China, *Federal Register*, Vol. 57, no.109, 5 June 1992, at 24018.

market-oriented, the DOC can use CVD measures on the products. To determine whether the industry is indeed market-oriented, the USDOC presented the following part test. First, whether there is no entanglement from government in determination of the prices of goods or amount of production. Second, whether the industry can be distinguished as private or collective ownership. Third, whether all major inputs such as labor and overhead are appropriately paid.[37]

After reviewing the fan industry according to this part test, the Department finally concluded the industry is not sufficiently market-oriented. The DOC explained that as the significant portions of the inputs were not from market sources, the industry as a whole does not meet the third criteria, noting that:

> "Verification confirmed that most of the companies under investigation source significant inputs in the PRC. We also established that some of the products included within the PRC's mandatory plan are used as inputs for fans and that for certain inputs, in-plan production was a significant proportion of all PRC production of those inputs. Verification also established that certain PRC fan input suppliers have both in-plan and out-of-plan production. Finally, we learned at verification that some of the state- and collectively-owned enterprises producing fans purchase inputs at state-mandated prices (emphasis added)."[38]

After USDOC's determination, some criticized that the test was too strict that almost no industries could be deemed market-oriented, and requirements on 'all significant' inputs in the third criteria were too ambiguous to lead to arbitrary determination.[39] After this conclusion, the DOC decided not to accept any other countervailing duty petitions over nonmarket economy until 2006.

2.3 Deviation from Soviet-style Economies and Application of CVD rules to NME after 2007

[37] *Ibid*.
[38] *Ibid*.
[39] *See* Smith, J.M. (2013), pp.9.

In October 2006, the USDOC received petitions filed by NewPage Corporation, arguing Coated Free Sheet Paper industries in the PRC, Indonesia, and Korea received "countervailable subsidies within the meaning of Section 701 of the Act, and the imports are materially injuring, or threatening material injury to U.S industries".[40] The Department published an announcement that it will initiate a CVD investigation on Coated Sheet Paper in November 2006.[41]

The government of the People's Republic of China (GOC) sought the USCIT an injunction to block USDOC's CVD investigations arguing that:

> "Commerce does not have the discretion to apply countervailing duty law to NMEs because the CAFC 'definitively ruled' that the countervailing duty statute 'may not be applied to imports from NME countries."[42]

Hence, the GOC argued that applying countervailing duty rules to NME was prohibited by the *Georgetown Steel* case; therefore, the USDOC is required an explicit allowance by Congress.[43] On the other hand, the Department responded that the court did not have jurisdiction until its final determination on the case and pointed out the decision only applied to the *Georgetown Steel* case, not intending CVD rules could never apply to any NME cases.[44] Consequently, the USCIT declined the injunction and held to seek judicial review only after DOC completed the investigations.

After that, in its affirmative preliminary determination in April 2007, the USDOC explained it could apply CVD laws to PRC, explaining that:

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[40] *See* United States Department of Commerce, Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper From the People's Republic of China, Indonesia, and the Republic of Korea, Federal Register, Vol. 71, no. 227, 27 November 2006, at 68546.
[41] *Ibid*.
[42] United States Court of International Trade, *Government of the People's Republic of China v. United States,* 483 F.Supp.2d (Ct. Int'l Trade 2007), at 1278.
[43] *Ibid*.
[44] *Ibid*, at 1279-1280.

> "Informed by those comments and based on our assessment of the differences between the PRC's economy today and the Soviet and Soviet-style economies that were the subject of *Georgetown Steel Corp*. v. *United States*, 801 F.2d 1308 (Fed. Cir. 1986), we preliminarily determine that the countervailing duty law can be applied to imports from the PRC (emphasis added)."[45]

The Department published a separate memorandum, explaining that the present Chinese economy does not block applying CVD rules as it has different characteristics compared to traditional Soviet-style economies.[46] The memorandum acknowledged that there was no change in China's status as an NME, rather "major areas in the Chinese economy (wages and prices, access to foreign currency, personal property rights and private entrepreneurship, foreign trading rights, and allocation of financial resources)" no more prevent DOC from applying CVD rules to NME.[47] Consequently, the USDOC calculated the net subsidy rate from 10.9% (Shandong Chenming Paper Holdings Ltd.) to 20.35% (Gold East Paper Co., Ltd.) in April 2007.[48] Although, it failed to impose CVD measures as the United States International Trade Commission concluded a negative determination on injury by Coated Free Sheet Paper imports,[49] other seven petitions succeeded in imposing CVD measures on NME products. As a result, CVD order in nonmarket economies begins in earnest from July 2008 on the *Chinese Carbon Quality Steel Pipe* case.

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[45] United States Department of Commerce, Coated Free Sheet Paper From the People's Republic of China, Indonesia, and the Republic of Korea: Amended Preliminary Affirmative Countervailing Duty Determination, *Federal Register*, Vol.72 no.67, 9 April 2007, at.17486.

[46] *See* United States Department of Commerce, Lee-Alaia, S & Norton, L, *Countervailing Duty 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*, 29 March 2007.

[47] *Ibid*. at 2-4.

[48] *Ibid*, at 17498.

[49] *See* United States International Trade Commission, Coated Free Sheet Paper from China, Indonesia and Korea, *Federal Register*, Vol.72, no.239, 13 December 2007, at. 70892.

Chapter III. Legal Controversies over Applying CVD rules

3.1 Public Body Jurisprudence

3.1.1 Definition in the WTO Agreement

Article 1.1 (a)(1) of the WTO *SCM Agreement* presents "a financial contribution by *a government or any public body"* as one of three constituent elements to be deemed as a subsidy.[50] Although the negotiation history did not clearly explain why the expression of "*any public body*" is added to "*a government"*, it is roughly inferred by Michael D. Cartland's explanation, the chairman of Uruguay Round Negotiating Group, that the members try to block easy circumventions of the CVD rules using other non-governmental channels.[51]

The fundamental problem starts with clear definition of "public body" is not provided neither in the *SCM Agreement* nor any other WTO Agreements. Apparently, "public entity" in the *General Agreement on Trade in Services (GATS)* Annex on Financial Services shows similar concept:

> "(c) 'Public entity' means:
> (i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
> (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions (emphasis added)."[52]

[50] Article 1.1 (a)(1) of the WTO *SCM Agreement* notes as follows: "(a)(1) there is a financial contribution by a government or any public body within the territory of a Member…"

[51] *See* Cartland, M., Depayre, G. & Woznowski, J. (2012) "Is Something Going Wrong in the WTO Dispute Settlement?", *Journal of World Trade*, 46 (5), pp. 1002.

[52] Paragraph 5(c) of Annex on Financial Services of the *General Agreement on Trade in Services*

The definition infers that the concept of 'public entity' is determined by 1) ownership, 2) control by a government, and 3) governmental function. However, it is also unclear that the definition of a public entity specifically for financial services can also be stipulated in CVD rules. In particular, controversies over the concept of 'public body' continued in NME, in which the government plays the role of the market. The main arguing point is whether an entity at issue constitutes a 'public body' under the scope of the SCM Agreement when the entity mostly or entirely owned by the government provides the goods and services cheaper than the market price.

3.1.2 Government Control

In the *US-Anti Dumping and Countervailing Duties* (DS379) case, USDOC determined that "certain State-Owned Commercial Banks (SOCBs) are 'public bodies' within the meaning of Article 1.1(a)(1) of the SCM Agreement". China argued that state-owned enterprises (SOEs) should be recognized as private enterprises unless they "were vested with and exercised government authority."[53] On the other hand, the US Department of Commerce quoted the Panel's ruling in the *Korea-Commercial Vessels* case, stating that:

> "In our view, an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)."[54]

And the USDOC agreed with the Panel's conclusion that public body status can be regulated based on "*government control"* over that body.[55] For the United States,

[53] *See* WTO Panel Report, *US-Anti Dumping and Countervailing Duties*, para. 8.3.
[54] WTO Panel Report, Korea –Measures Affecting Trade in Commercial Vessels, WT/DS273/R, adopted 7 March 2005, para. 7.50.
[55] Ibid, para. 8.30.

the expansion of government ownership is highly relevant and decisive to control over the entity at issue. Additionally, China has considerable ownership or a significant share of the entity to appoint the leader of the entity. In conclusion, the USDOC regarded SOCBs constitute 'public bodies' within the meaning of the *SCM Agreement*. And the Panel found that there is no legal error in the USDOC's methodology of using 'ownership' as a criterion to measure a government control over a particular entity, mentioning that:

> "This then brings us to the legal question of whether the evidence of government ownership of the SOE input producers was a sufficient basis on which to conclude that they were government controlled and thus public bodies…We recall, however, our conclusion that a public body is any entity controlled by a government, and in this regard we consider government ownership to be highly relevant (indeed potentially dispositive) evidence of government control…We see no reason to consider that the concept that 'control' of a company resides with its majority owner, which is uncontested in the private sector, would be inapplicable to government-owned companies…We find no legal error, in analyzing whether an entity is a public body, in giving primacy to evidence of majority government-ownership...(emphasis added)."[56]

3.1.3 Possess, Exercise or vested with governmental authority

However, the Appellate Body of *US-Anti Dumping and Countervailing Duties* case rejected the Panel's conclusion of using 'ownership' as evidence of governmental control. The AB first pointed out that the *SCM Agreement* did not explicitly include preamble, object, and purpose in its language. However, at the same time, previous rulings have continuously clarified that the object and purpose of the Agreement are to "increase and improve GATT disciplines relating to subsides and CVD measures."[57]

[56] Ibid, paras. 8.133-8.136.

[57] WTO Appellate Body Report, *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, para. 301.

Therefore, the AB of this dispute understood that the question of "whether an entity constitutes a public body" does not equivalent to the question of "whether the measures by the entity within the meaning of the Agreement".[58] Also, the mere fact that entities do not constitute a public body itself could not immediately exclude them from the Agreement.

As a result, the AB finally decided that the Panel had not fully reviewed the object and purpose of the *SCM Agreement*. The AB instead presented another interpretation of public body that "A public body within the meaning of Article 1.1. (a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority".[59] And it stated that "the evidence of the government exercising meaningful control over the entity" could be used as relevant evidence to identify the government authority.[60] In addition, the it pointed out that as no single government, entity, and state are alike, Panels or investigating authorities need careful evaluation and due consideration when confronting the questions of whether the entity falls within the scope of Article 1.1(a)(c).[61]

Since then, the criteria of a public body proposed by the AB have become embroiled in considerable controversy. Eleven out of Fourteen third-party members[62] of this case submitted their own views on this issue. Also, key drafters of the Agreement raised the concerns of AB made an arbitrary interpretation without grounds in the text of the WTO Agreement.[63]

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[58] *Ibid*, para. 302.
[59] *Ibid*, para. 317.
[60] *Ibid*, para. 318.
[61] *Ibid*, paras. 318-319.
[62] These countries are Argentina, Australia, Canada, Mexico, and Turkey (supported US), Brazil, India, Norway, and Saudi Arabia (supported China), Japan (supported both), Bahrain, Chinese Taipei, and Kuwait (no submission)
[63] *See* Cartland, M., Depayre, G. & Woznowski, J. (2012), pp. 991.

3.1.4 Meaningful Control

Based on the *US-Anti Dumping and Countervailing Duties* case AB's ruling, China brought seventeen CVD measures grounded on majority-ownership by the USDOC to the WTO. The previous interpretation of the AB on the public body issues also continued in the Panel ruling in the *US-Countervailing measures* (DS437) case, and the US even did not appeal this decision. However, during the recourse to Article 21.5 of the DSU, the US Department of Commerce proposed another methodology, which was *'meaningful control'* by the government as a key evidentiary element[64] for considering the public body, but still following the original Panel's interpretation of the public body.[65] And the USDOC gave the following observations on 'meaningful control':

> "The USDOC sought to assess 'the manifold indicia of government control over the state sector, certain industrial sectors and the enterprises that comprise these sectors' in order 'to determine whether the government's control is such that the relevant entities can be said to possess, exercise or be vested with governmental authority.' The government maintains a primary focus on economic actions in the state sector as a means by which to fulfil the identified government function. Various 'benefits and protections' granted to the state sector 'can be considered one of the manifold indicia of control, as they may lead to behind-the-scenes quid pro quo.' 'Perhaps the strongest indicia can be found where the state can control SIEs' behaviors and incentives in order to achieve outcomes that would not have occurred without such government intervention and control.' In this regard, the USDOC considered the 'manifold indicia or levers of control by the government over the state sector' to include the application of industrial plans, government management of competition, and supervision of the state sector through the appointment of management and directors (emphasis added)."[66]

[64] *See* WTO Panel Report, *US-Countervailing measures (Article 21.5)*, para. 7.65. The Appellate Body has referred "a variety of criteria for determining whether an entity possesses, exercises or is vested with governmental authority". And the DOC relied on 'meaningful control' as a key evidentiary element.

[65] *Ibid*. para. 7.66

[66] *Ibid*.

This indicates that if the Chinese government gives meaningful control to the entity in question, the entity should be considered as a bested with government authority.

Based on this criterion, the USDOC relied on 1) Public Bodies Memorandum and 2) Public Body Questionnaire[67] as relevant evidence on the record. Significantly, the USDOC sent questionnaires related to twelve cases and applied “adverse facts available (AFA)” to seven cases as they did not submit a response. Also, they applied "adverse reference" to five cases as they did not do their best in responding. As a result, USDOC concluded that the entity that is actually “owned or controlled” by the GOC are public body. The Panel of the recourse concluded that the US Department of Commerce's ‘meaningful control’ logic meets the standards of the public body of the AB’s decision in the *US-Anti Dumping and Countervailing Duties*.[68]

China argued in its appeal that there should be “a clear logical connection between the function of the government and the entity’s conduct”.[69] However, the AB concluded that the core focus of inquiry on public body is not identifying whether there is a connection between government function and the conduct. Instead, it should specify “whether the entity engaged in the conduct”, “what is the core characteristic of the entity”, and “what is the relationship with the government”.[70] In conclusion, the AB upheld the Panel’s conclusion that the legal criteria for determining a public body within the meaning of Article 1.1(a)(1) does not stipulate any specific degrees for identifying “a connection between governmental function and financial contribution”, and China did not success to verify that USDOC’s

[67] *Ibid*. paras. 7.80-7.90.
[68] *Ibid*. para. 7.72. The Panel pointed out that China failed to demonstrate whether the USDOC unproperly constructed the concept of ‘meaningful control’.
[69] *See* WTO Appellate Body Report, *US-Countervailing measures (Article 21.5)*, para. 5.77.
[70] *Ibid*, para.5.100.

conclusion on the public body issue is inconsistent with the WTO Agreement.[71] On the contrary, one Division member gives a separate opinion on public body issues that:

> 'An entity may be found to be a public body when the government has the ability to control that entity and/or its conduct to convey financial value. There is no requirement for an investigating authority to determine in each case whether the investigated entity "possesses, exercises or is vested with governmental authority (emphasis added).'[72]

Also, he pointed out that the AB should not elaborate specific meaning of the "public body", but rather AB should give more room to investigating authorities.

3.1.5 Exercise of Governmental Function

In the *US-Carbon Steel* case, the USDOC determined National Mineral Development Corporation (NMDC) of India comprises a 'public body' under the meaning of Article 1.1. (a)(1) of the Agreement. The Department relied on the legal standard of whether the NMDC was "vested with governmental authority". And this standard was supported by the evidence of "whether NMDC performed 'governmental function'" and "whether the Government of India (GOI) performed 'meaningful control' over the entity".[73] Indeed, NMDC shared core features with Chinese SOEs in the sense that 1) GOI owns 93.38% of the entity, 2) GOI nominates most of the board of directors, and 3) GOI possesses every mining-related resources in the country and has final approval on mining leases and so on.[74]

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[71] *Ibid*, para.5.105.
[72] *Ibid*, para.5.247-248.
[73] *See* WTO Panel Report, *United States-Countervailing Measure On Certain Hot-rolled Carbon Steel Flat Products From India*, WT/DS436/RW, adopted 15 November 2019, para. 7.33.
[74] *Ibid*, para. 7.34.

Interestingly, the panel confirmed the 'public body' decision of the USDOC, clarifying the legal standard as follows:

> "In view of these remarks, we recognize that it is not sufficient for an investigating authority to show than an entity is "meaningfully controlled" by a government for the purposes of a "public body" finding. Rather, it must also be shown that the entity is performing a governmental function, such that the entity is vested with, exercises, or possesses governmental authority (emphasis added)."[75]

The Panel concluded the USDOC found sufficient evidence that NMDC performed "governmental function" and GOI has "meaningful control" over NMDC by setting annual parameters and regular monitoring.[76] This Panel ruling shows how easily the USDOC can hurdle over AB's decision on the public body. As most Chinese SOEs are also under regulations of the State-owned Asset Supervision and Administration Commission (SASAC), they might be considered to "perform a governmental function" as well.[77]

Although the Panel's ruling was in favor of the USDOC's determination, the US appealed into the void opposing to the Panel's legal criteria for a public body. Because the US prefers simply finding a public body based on its initial approach, *control or ownership*, rather than more burdensome proof on the basis of the governmental function.

In conclusion, controversies over interpreting 'public body' in the *SCM Agreement* started with its ambiguity in the Agreement and were accelerated by struggling rulings between the Panel and Appellate Body. Nowadays, countries which prefer a simplified CVD process based on ownership-standard and are

[75] *Ibid*, para. 7.22.
[76] *Ibid*, para. 7.54.
[77] *See* Ahn D., "Why Reform is Needed: WTO 'Public Body' Jurisprudence" Global Policy 12: Supplement 3, 2021, pp. 67.

dissatisfied with WTO rulings, try to reverse the burden of proof by setting public body status as a rebuttable presumption that SOE must challenge. At the same time, countries find an easier way, which is regulating SOEs directly rather than Public Body itself.[78]

3.2 Market Benchmark Jurisprudence

3.2.1 The Concept of "benefit" and Market Benchmark

Article 1.1 (b) of the WTO *SCM Agreement* provides the "existence of benefit" as other constituent elements deemed a subsidy.[79] The panel of the *Canada-Aircraft* case decided on the concept of benefit for the first time in the history that it encompasses advantage, stating that:

> "Thus, leaving aside situations of alleged 'income or price supports' within the meaning of Article 1.1(a)(2), we consider that a 'financial contribution' by a government or public body confers a 'benefit', and therefore constitutes a 'subsidy' within the meaning of Article 1 of the SCM Agreement, when it confers an advantage on the recipient relative to applicable commercial benchmarks, i.e., when it is provided on terms that are more advantageous than those that would be available to the recipient on the market (emphasis added)."[80]

And the Appellate Body ruled that the concept of "benefit" accompanies the concept of comparison as it is not considered to be exist unless the beneficiary is more advantageous due to the financial contributions.[81] Also, the AB mentioned that Article 14 supports the AB's view that this comparison should be based on the marketplace.[82] Consequently, the WTO rulings understood that the Agreement

[78] For example, CPTPP has a chapter for SOEs.
[79] The original text of Article 1.1(b) is "(b) a benefit is thereby conferred".
[80] WTO Panel report, *Canada-Aircraft*, para. 9.120.
[81] *See* WTO Appellate Body Report, *Canada-Aircraft*, para. 157.
[82] *Ibid*, para. 158.

stipulated a 'market benchmark' rules that find the most relevant market, seek comparative criteria within it, and determines the existence of benefits.

Article 14, entitled "*Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient"*[83], indicates how to compare the benefits of four types of financial contribution under Article 1.1(a)(1). However, the Article does not specify the definite meaning of the relevant market or how to find the relevant market. And the problems become even worse when finding an alternative marketplace for comparison where distortion occurs. The main arguing point is how much distortion should happen in the in-country market to use foreign market benchmarks.

3.2.2 Predominant role

In the *US-Softwood Lumber IV* case, there was debate on whether investigation authorities may apply foreign benchmarks other than domestic private prices. The Panel found that Article 14(d) requires to use domestic private prices in exporting county whenever they exist. At the same time, it acknowledged that situations of using in-country prices might become impossible.[84] The Panel presented two exemplary circumstances: 1) when the government is the only supplier, and 2) when the government controls all prices for the products.[85]

The United States appealed this ruling, pointing out that the Panel erred in its interpretation of Article 14(d) by excluding another possible situation of private prices are "sufficiently influenced" or "effectively determined" by the government.[86]

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[83] *See* Appendix II

[84] *See* WTO Appellate Body Report, United States-Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada, WT/DS257/AB/R, adopted 19 January 2004, para.98.

[85] *Ibid*.

[86] *Ibid*, para.99.

In response to this point, the AB interpreted the language of "sufficiently influenced" or "effectively determined" as the government has a "*predominant role"* in the marketplace. Also, the AB elaborated that, in terms of market distortion, the government can play a "predominant role" in the market even if it is not a sole provider. As a result, the AB reversed the Panel's ruling and determined the investigation authorities may apply foreign benchmarks when "private prices in the exporting country are distorted because of the *predominant role* of the government due to its overwhelming influence as a provider of the same or similar goods".[87]

In the *US-Anti Dumping and Countervailing Duties* case, China argued that the USDOC's exclusion of domestic private prices such as input prices, land prices, and interest rates during its CVD investigations violated Article 14 *SCM Agreement*. China noted that the AB's ruling in the *US-Softwood Lumber IV* case suggested that an investigation authority can determine based on the fact whether the government's predominant role led to other private providers to 'align their prices' at a 'significantly low' level.[88] China pointed out that although AB's ruling in *US-Softwood Lumber IV* presented no quantitative threshold to determine the predominance of the government, the US misunderstood this ruling by an economic theory called the 'dominant firm' model and solely relying on the evidence of market shares of the government suppliers.[89]

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[87] *Ibid,* para.103. This ruling also reflected on DDA amendment on Article 14(d), that "when there is no unregulated price, or such unregulated price is distorted because of the *predominant role* of the government in the market as a provider of the same or similar goods, the adequacy of the remuneration may be determined by reference to the export price for these goods or services, or to a market-determined price outside the country of provision".

[88] *See* WTO Appellate Body Report, *US-Anti Dumping and Countervailing Duties*, paras. 61-72.

[89] *Ibid.*

In response to this point, the AB viewed the mere fact of government is the "predominant supplier *per se"* does not allow investigating authorities to reject domestic private prices. However, at the same time, the AB acknowledged that other evidence plays only limited weight in case the government plays a "predominant role".[90] As a result, the AB concluded that the Panel's interpretation on Article 14(d) of the *SCM Agreement* is consistent with WTO rules. It requires the rejection of in-country prices should be based on a case-by-case by considering all other evidence in principle. And this shall be applied even when the suppliers plays a predominant role, therefore, applying *per se* rule is inconsistent with WTO rules.[91]

3.2.3 Widespread Government Intervention

In the *US-Countervailing measure* case, the USDOC maintained the position that all private prices in China were distorted by GOC's widespread interventions in the market. The US did not even review the individual prices for the products. In response to this methodology, the AB rejected DOC's insufficient and problematic determination on denying in-country prices without analyzing each price for the related inputs in steel and polysilicon sectors, referring to the Panels' finding that:

> "the Panel emphasized the importance of ensuring 'that a decision to reject in-country prices as a benchmark be supported by a reasoned and adequate explanation as to how government intervention distorts the price of the inputs at issue,' as opposed to merely relying on 'evidence of widespread government intervention in the economy' (emphasis added)."[92]

In conclusion, the Panel and AB of the *US-Countervailing measure* case regarded it as not adequate to determine rejecting the prices solely relying on the government

[90] *Ibid*, para. 446.
[91] *Ibid*, para. 447.
[92] WTO Appellate Body Report, *US-Countervailing measures*, paras. 5.168-178

has a widespread intervention on the economy without explaining how the involvement actually influences the actual pricing decision. Therefore, the rulings disagree with the USDOC's decision to ignore Chinese private prices. On the other hand, one Division member gives a separate opinion pointing out that the rulings can be interpreted as only quantitative analysis can be accepted, noting that:

> "The majority said it accepted that different methods – including a qualitative analysis – may serve as a basis for a domestic authority to explain how government intervention results in distortion of in-country prices, but in fact, the majority rejected the USDOC's extensive qualitative analysis and wrote an opinion that, in my view, can only be read as requiring a quantitative analysis in all cases involving resort to out-of-country prices (emphasis added)."[93]

Nowadays, the Joint Statement of the Trilateral Meeting indicates countries are dissatisfied with insufficient rules in the *SCM Agreement* and WTO rulings for determining proper benchmark when the domestic market of the exporting country is distorted.[94] Therefore, it requires the amendment of the Agreement to suggest specific circumstances "when domestic prices can be rejected" and "how to establish a proper foreign benchmark".[95]

[93] *Ibid*, para. 5.251.
[94] *See* Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States, and the European Union, adopted on 14 January 2020, para.5.
[95] *Ibid*.

Chapter IV. Case study: CVD Measures on Vietnam

4.1 Introduction

Vietnam has remarkably succeeded in climbing on the Global Value Chain (GVC) and attracting FDIs. Its open policy was grounded in the *Doi Moi* policy in 1986 and became robust by the Trade Agreement with the United States in 1997. After joining WTO in January 2007, it has continued to sign free trade agreements (FTAs) with countries to promote active market-opening policies.[96] The recent movement of decoupling from China after the trade war and COVID 19 make Vietnam a more attractive for production and investments. For Korea, Vietnam has emerged as the third-largest export destination after China and the US, and the number of enterprises making a foray into Vietnam (3,234) market exceeds that in China (2,223).[97]

However, in terms of trade, rapid market opening and increasing export surplus led to tougher regulations by its trading partners. For example, the Trump administration has pointed out a continuous trade surplus with the US due to the Vietnamese government's intervention in the exchange rate market. As a result, in 2020, the US Department of the Treasury's report on "*Macroeconomic and foreign exchange rate policies of Major Trading Partners of the United States"* pointed out

[96] Vietnam has signed FTA with Japan (December 2008), Chile (November 2011), South Korea (May 2015), CPTPP (March 2018), Cuba (November 2018), EU (June 2019), RCEP (November 2020), UK (December2021) and as a member of ASEAN, signed ATIGA (February 2009), China (February 2002), South Korea (December 2005), Japan (April 2008), Australia-Newland (February 2009), India (August 2009), Hongkong (November 2017).

[97] 이유진, 김혜림, "공급망 다변화의 수혜주 베트남, 기회와 리스크는?",「통상리포트」, 11 호, 한국무역협회(2021), pp. 13-14.

that Vietnam meets every three standard under the *Trade Facilitation and Trade Enforcement Act of 2015* to be determined as Currency Manipulating countries.[98] Since then, the US Department of Commerce has also revised its rules on exchange rate undervaluation, and for the first time, it has conducted a countervailing duty investigation on currency undervaluation and imposed countervailing tariffs on Vietnam.[99] Hence, recent trends of increasing trade remedy measures against Vietnam highly also imply that Korean enterprises currently foray into or likely to be under high trade risks.

Additionally, Vietnam adopts a state-capitalism system, and the state controls all prices, costs, rents, and benefits in principle. As the Vietnamese government is estimated to supply goods and services directly or through state-owned enterprises (SOEs) at prices lower than market-determined prices, most industrial policies automatically fall under the scope of subsidies in the SCM Agreement. In fact, Vietnam has decided to fall under a nonmarket economy as a condition of joining the WTO as China did and investigating authorities have imposed high tariffs by rejecting Vietnam's in-country prices. Based on the same legal logic for China as discussed in Chapter II, the USDOC decided to apply CVD rules against Vietnam after 2010 and this decision is followed by Canada, India, Australia, and the EU.[100] The list of countervailing duty measures as of May 2022 are as follows:

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[98] *See* United States Department of the Treasury, Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States, 2020. pp.3-4.

[99] *See* United States Department of Commerce, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, 2021, pp. 7-9.

[100] *See* United States Office of the Federal Register, Federal Register Vol.74, No.171, pp. 45813, 2009.

Table 4.1. List of CVD measures on Vietnam

Country	Case Number	Product	Effective Date	Rate (%)
US	C-552-805	Polyethylene Retail Carrier Bags	4 May 2010	5.28~ 52.56
US	C-552-813	Steel Wire Garment Hangers	5 Feb 2013	31.58~ 90.42
US	C-552-819	Certain Steel Nails	14 Jul 2015	288.56~ 313.97
Canada	CPF2 2017 IN	Certain Copper Pipe Fittings2	10 May 2018	30.6
Canada	CRS 2018 IN	Cold-Rolled Steel	31 Oct 2018	6.5
US	C-552-824	Laminated Woven Sacks	4 Jun 2019	3.02~ 198.87
India	OI-08/2018	Welded Stainless Steel Pipes and Tubes	17 Sep 2019	10.33~ 11.96
India	OI-04/2018	Continuous Cast Copper Wire Rods	16 Nov 2019	7.13
US	C-552-826	Utility Scale Wind Towers	26 Aug 2020	2.84
US	C-552-829	Passenger Vehicle and Light Truck Tires	27 May 2021	6.23~ 7.89

Source: Published Decisions of US Department of Commerce, Canada Border Services Agency, India Department of Commerce

4.2 Legal Valuation Information

4.2.1 Proper Benchmark

The USDOC rejected all domestic private prices in a CVD investigation of Vietnam as did in Chinese case. Regarding the interest rate benchmark, it stated that it is inappropriate to apply domestic interest rates as the GOV exercised *predominant influence* on domestic interest rates through “direct and indirect ownership, interest rate control, policies, and plans”. As a result, short-term interest rates, long-term interest rates, exchange rates, and discount rates were calculated by applying the

same methodology based on regression analysis used in the Chinese CVD investigations.

With regards to land prices, the USDOC followed 19 CFR § 351.511(a) of the Act for finding proper benchmark.[101] First, the DOC found no domestic market prices exist because all land is possessed by the Vietnamese government, and the government sets land prices and rents. Second, it is not possible for Vietnamese to use world market prices. As a result, the DOC concluded to use geographically similar foreign market prices as a comparison standard. Accordingly, in the investigation of *Certain Steel Wire Garment Hangers* Pune and Bangalore in India

[101] The original text of 19 CFR § 351.511 (a) Benefit are as follows:

"(1) *In general.* In the case where goods or services are provided, a benefit exists to the extent that such goods or services are provided for less than adequate remuneration. *See* §771(5)(E)(iv) of the Act.

(2) '*Adequate Remuneration' defined* -

(i) *In general.* The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.

(ii) *Actual market-determined price unavailable.* If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.

(iii) *World market price unavailable.* If there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

(iv) *Use of delivered prices.* In measuring adequate remuneration under paragraph (a)(2)(i) or (a)(2)(ii) of this section, the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties".

were used. In the case of *Passenger Vehicle and Light Truck Tire,* Kolkata in West Bengal was used as a benchmark for Fotai.

4.2.2 Application of Facts Available (FA)

After investing authority initiates the investigation, it sends questionnaires to respondents and exporting country government for demanding various information and data. If there is an error or omission in submitted information, the authority may calculate the subsidy margin using "facts available" including the information from its own domestic companies. Facts available, which is stipulated in the *SCM* agreement Article 12.7,[102] was initially good means for inducing cooperation from respondents, but nowadays authorities often overuse this norm to excessively expand the margin. In case of the US, Section 776 of the *Tariff Act of 1930* regulates the Department shall use "facts otherwise available" when a party fails to provide the information, impedes the proceedings, or provide the information that cannot be verified.[103] Also, the Department may use "an adverse inference" in applying the FA if a respondent fails to cooperate by not acting best on their reply.[104]

During CVD investigations by US, withdrawal of the mandatory respondent from the investigation was the main reason for applying FA. API in *Polyethylene Retail Carrier Bags,* Infinite in *Certain Steel Wire Garment Hangers*, Region and United in *Certain Steel Nails*, and Xinsheng in *Laminated Woven Stacks* withdrew from the investigation. USDOC also applied FA when the department cannot verify the

[102] The original text is as follows:
"In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available".

[103] *See* §776(a)(2) of the *Tariff Act of 1930*

[104] *See* §776(b) of the *Tariff Act of 1930*

submitted information from Fotai in *Polyethylene Retail Carrier Bags* and when GOV did not provide requested information. Consequently, the DOC applied the highest rate from the proceeding countervailing duty investigations.

4.2.3 State-Owned Enterprises (SOEs)

As an NME country, the investigating authorities should determine whether SOEs and SOCBs in Vietnam fall into the scope of Article 1.1(a)(1) 'Public Body'. In a CVD investigation on *Polyethylene Retail Carrier Bags* and *Certain Steel Wire Garment Hangers,* USDOC determined whether VietinBank, a commercial bank in Vietnam, falls into the scope of Article 1.1(a)(1) solely based on the government ownership. The GOV contended export loans program from VietinBank, one of the state-owned banks in Vietnam, does not constitute a financial contribution. Also, the GOV emphasized that it does not exercise control, influence, or intervene in VietinBank's individual lending decisions and operations and actions of the bank are independent from the SOCB or the GOV. In fact, the export loan program during period of investigation (POI) was an individual financial product from VietinBank, and SBV did not involve any part of the program.[105] However, the Department

[105] United States, Issues and Decision Memorandum for the Final Determination of the Countervailing Duty(CVD) Investigation: Certain Steel Wire Garment Hangers from the Socialist Republic of Vietnam, 2012, pp.24-25.
The original text are as follows:
"The GOV does not exercise control, influence or intervene in VietinBank's individual lending decisions that benefitted the mandatory respondents during the POI. Distinctions exist between the operations of the state-owned banks (SOCBs) and commercial banks, such as VietinBank, in terms of the Export Loan program. The operations and actions of VietinBank are independent from the SOCBs and the GOV. VietinBank was one of four SOCBs that were privatized and all of its operations, loan decisions and investments are done according to its own criteria independent of SOCBs and the GOV. The Export Loan Program in 2010 was an individual product of VietinBank and the State Bank of Vietnam affirmed that it did not have any involvement in the program".

agreed with the petitioners' position and regarded VietinBank as government authority because the GOV owned about 80 percent of the Bank during the POI.[106]

However, in the investigation *on Passenger Vehicle and Light Truck Tires*, the USDOC presented different positions on public body issues of SOCBs following the Panel and AB rulings. It found that VietinBank and VietcomBank constitute public bodies because the GOV dispatches high-ranking officials to manage the bank's daily activities. Additionally, the GOV could manage the decisions of SOCBs through appointed leaders and those banks are "vested with government authority" because it owns of 64.64 percent and 73.8 percent, respectively [107]

4.3 Programs Determined to be Countervailable

4.3.1 Direct Export Subsidies

Since most direct export subsidies are granted directly through individual contracts between enterprises and local governments, it is hard for the central government to recognize the program in the first place. Although there were cases in which the US Department of Commerce found local level direct subsidies through surveys during the CVD investigation against China[108], no single discussion has been made in the Vietnam cases. Instead, in Vietnam, as following Table 3.1. shows, national-level programs such as *Export Promotion Program*, and *Investment Support Program* (including *Grants to Firms that Employ More than 50 Employees)* were discussed.

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[106] *Ibid*.

[107] United States Department of Commerce, Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, 2021, pp. 20-21.

[108] Representative example of local level direct export subsidies found in CVD investigation is *Steel Grating from the People's Republic of China* (US Case Number: C-570-948).

Table 4.2 Direct export subsidies programs determined as countervailable

Subsidy program	Case Number		
	US	**Canada**	**India**
Export Promotion	C-552-813 C-552-819 C-552-824	CRS 2018 IN	OI-04/2018 OI-08/2018
Investment Support	C-552-819	CRS 2018 IN	OI-04/2018 OI-08/2018
⌊employees over 50	-	CPF2 2017 IN	-

Source: Published Decisions of US Department of Commerce, Canada Border Services Agency, India Department of Commerce

The Export Promotion Program is regulated in *Decision No. 279/2005/QD-TTg (Promulgation the Regulation on Elaboration and Implementation of the 2006-2010 National Trade Promotion Program)*. Article 1 notes that Export Promotion Program, or National trade promotion program, is a state-funded program that aims to "enhance trade activities, develop export markets, create business conditions, raise business capacities, and associate trade with investment and tourism". Article 9 of Decision 279 details ten categories of support targets for trade promotion, and Article 10 indicates the level of support accordingly. Some of the clauses pointed out by the investigation authorities were as follow:

> **"**Article 9. -Program's contents eligible for supports
> 2. Hiring domestic and foreign experts to advise on the development of export and designing of models and products to raise the quality of goods and services.
>
> Article 10.- Support levels
> 1. To support 50% of expenses for the contents specified in Clauses 2, 3 and 6, Article 9 of this Regulation."[109]

[109] Article 9.2 and 10.1 of Vietnam Decision No. 279/2005/QD-TTg

The USDOC found that the program at issue constitutes a financial contribution by direct transfer. And it is contingent upon export as subsidy is specific to a certain group of enterprises and industries, as regulated in Article 9. Specifically, during the investigation on *Certain Steel Wire Garment Hangers (Case Number: C-552-813)*, one of the respondents, Infinite Industrial Hanger Limited and Supreme Hanger Company Limited (collectively "the Infinite Companies"), withdrew from the investigation on August 2012. Thus, the Department decided to use "facts otherwise available and adverse inferences" in calculating the benefits for each of the programs of the Infinite Companies following Section 776(a)(1) and (2) of the *Tariff Act of 1930*. As the other respondent, the Hamico Companies, didn't use the Export Promotion Grant Program during the POI, the Department used the highest calculated subsidy rate for Hamico Companies, which was 25.41 percent ad Valorem rate under the Land LTAR program.[110] Similarly, when the respondents of *Certain Steel Nails (Case Number: C-552-819)*, Region and United, and respondent of *Laminated Woven Sacks (Case Number: C-552-824)*, Xinsheng, again withdrew from the investigation, the Department assigned the same rate after finding the respondents used and benefited from the program.[111]

The investment Support Program is regulated in *Decree No. 51/1999/ND-CP (Detailing the Implementation of Law No. 03/1988/QH10 on Domestic Investment Promotion)*. Article 1 indicates that this Decree regulates investment activities such as establishing a new production line, R&D, and purchasing shares of SOEs. Article

[110] *See* United States, Issues and Decision Memorandum for the Final Determination of the Countervailing Duty (CVD) Investigation: Certain Steel Wire Garment Hangers from the Socialist Republic of Vietnam, 2012, pp.10.

[111] The program also determined as countervailable Canada Cold-Rolled Steel Case (Case Number: CRS 2019 IN), India Welded Stainless Steel Pipes Tubes (Case Number: OI-08/2018) and Continuous Cast Copper Wire Rods Case (Case number: OI-04/2018) with similar reasoning.

8 of the Decree notes that the government will support infrastructure development like electricity, water supply and drainage in the regions with socio-economic difficulties and special socio-economic difficulties for investors' production improvement. Article 30 indicates the case of preferential treatment, forms, and levels of investment support for better exporting performances.[112]

During the U.S investigation on *Certain Steel Nails*, the Department requested the Government of Vietnam (GOV) to reply the Standard Question Appendix, including describing the purpose, establishment date, and responsible government agencies. However, GOV failed to provide that information, claiming that Decree 108 has replace Decree 51. Additionally, as both respondents withdrew from the investigation, the Department cannot establish whether they benefited from Decree

[112] The original text of Article 8 and 30 of Vietnam *Decree No. 51/1999/ND-CP*

"Article 8.- Support in form of infrastructure development investment

1. On the basis of the development planning and demand in each period in the regions meeting with socio-economic difficulties and regions meeting with special socio-economic difficulties, the State shall invest in the construction of small- and medium-sized industrial parks, ensuring the technical infrastructure regarding electricity and water supply, water drainage, communication and waste treatment so that the investors may use them in service of their production and business with preferential terms.
2. In the regions meeting with socio-economic difficulties and regions meeting with special socio-economic difficulties, the State shall invest in the construction or support the investment in the construction of infrastructure projects outside the industrial parks, export-processing zones and hi-tech parks (including: traffic roads, bridges, sewers, water supply and drainage system, waste treatment system), so as to create favorable conditions for the investors' investment, production and business activities.
3. The State encourages and creates favorable conditions for investors to set up production and business establishments in industrial parks, export-processing zones and hi-tech parks or relocate the production establishments from urban areas to industrial parks or export-processing zones through the supportive policies on preferential investment loans and tax preferences.

Article 30.- Cases of preferential treatment, forms and levels of investment support

1. Investors having investment projects eligible for preferences prescribed in this Decree shall be considered by the competent State agencies for investment support under the legislation on development investment.
2. Investors having investment projects eligible for preferences prescribed in this Decree, if directly engaged in export activities, shall not only enjoy the respective support from the Development Support Fund but also be considered by the National Export Support Fund for export credit loans with preferential interest rates to meet the demand for up to 70% of the total credits to be used for the performance of their respective signed export contracts or shall be considered by this Fund for the guaranty of up to 80% of the total credits needed for the performance of such contracts".

51 programs or not. Therefore, DOC sent another supplemental questionnaire to clarify the companies continue to receive benefits under Decree 108 programs. Still, GOV answered it couldn't distinguish whether all the companies continue receiving the benefits as benefits are entitled specifically on their certificates. The Department decided that the GOV did not act best in responding to the request; therefore, to use "facts otherwise available and adverse inferences" in calculating the benefits with respect to this program.[113] As a result, DOC assigned a net subsidy rate of 25.41 percent ad valorem for Article 8, the Infrastructure Development Investment Support program, and 1.17 percent ad valorem for Article 30, which is the Investment Support program.

The decision of DOC was referred by the petitions of the Canada *Cold-Rolled Steel Case (Case Number: CRS 2018 IN)*. The Canada Border Service Agency (CBSA), the investigating authority of Canada, also determined these programs as countervailable because the recipient received an extra amount of support from the government, which constitutes a financial contribution. Also, the beneficiary of these programs is specified in Appendix I and II that the government will give investment incentives to some geographical regions.[114]

Grants to Firms that Employ More than 50 Employees program is stipulated pursuant to *Decree No. 51/1999/ND-CP* above mentioned. Article 15 of the Decree noted that businesses that employ an average of at least 100 laborers in urban areas, 20 laborers in areas defined in List B or C of the Appendix, and 50 laborers in other

[113] *See* United States Department of Commerce, Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Steel Nails from the Socialist Republic of Vietnam, 2015, pp.9-10.

[114] *See* Canada Border Services Agency, Statement of reasons: Concerning the final determinations with respect to the dumping and subsidizing of Cold-Rolled Steel from China, South Korea, and Vietnam, 2018, pp.83.

areas in a year should be entitled to investment preferences. And Article 16 specifies the regions eligible for the preferential treatment, and Article 27 notes the additional tax preferences for investors producing export goods. The program was determined as countervailable by CBSA in *Cold-Rolled Steel (Case Number: CRS 2018 IN)* and *Certain Copper Pipe Fittings2 (Case Number: CPF2 2017 IN)* Cases. Canada considered the program at issue to constitute a financial contribution by the government and benefit the recipient equivalent to the grant. At the same time, the program satisfies the specificity requirements by limiting the recipient according to the enterprise labor size and regions.[115]

4.3.2 Currency Schemes

For the first time in the history, U.S DOC determined that currency undervaluation is a countervailable subsidy program in the Passenger Vehicle and Light Truck Tires Case (Case Number: C-552-829) case and calculated a net subsidy rate of 1.69 and 1.16 *ad valorem* for the respondents: KTV and Sailun. DOC pointed out that GOV has predominant influence and control over the supply and demand of the Vietnamese exchange market. This is because the GOV presents specific rules and guidelines that credit institutions should follow. Also, the State Bank of Vietnam (SBV) act as a leading authority handles the exchange activities. For example, when the SBV determined the USD/VND exchange rate, only authorized credit institutions were permitted to join the market with a rate within the small band of +/-3 percent to +/-1percent of the SBV established one.

[115] *Ibid*, pp.84.

Regarding the state-owned commercial banks (SOCBs), where the government owns the majority (74.8 percent of Vietcombank and 64.46 percent of Vietinbank), it dispatches numerous high-ranking governments or Communist Party of Vietnam (CPV) officials or even appoints board members to manage banks' activities to be consistent with government policies. In this case, the Commerce found that these credit institutions directly constitute an "authority" under section 771(5)(B) of the Act. On the other hand, regarding to private banks, the Commerce regarded the GOV supported domestic exporters through various policies that private banks must follow. For instance, pursuant to *Ordinance No. 28/2005/PL-UBTVQH11(On Foreign Exchange Control)*, Chapter I General Provisions Article 3 notes as follows:

> "Article 3 Policy of Vietnam on foreign exchange control
> The State of Socialist Republic of Vietnam shall implement its policy on foreign exchange control in order to facilitate the participation of organizations and individuals in foreign exchange activities and in order to protect the legitimate interest of such participants, contributing to further economic development, achieving the objectives of the national monetary policy, raising the convertibility of the Vietnam dong, achieving the objective of using only Vietnamese dong in the territory of Vietnam, fulfilling the commitments of the Socialist Republic of Vietnam in the schedule for international economic integrations, enhancing the effectiveness of the State management of the foreign exchange and perfecting of foreign exchange control system in Vietnam."[116]

And Article 39 requires credit institutions to meet domestic demand for their payment in foreign transactions.

The Commerce explained no rules under the US law or the IMF Articles prevent analyzing whether currency undervaluation constitutes a countervailable subsidy. Also, Annex I "Illustrative List of Export Subsidies" (b) of the *SCM agreement*

[116] Article 3 of Vietnam Ordinance No. 28/2005/PL-UBTVQH11

explicitly includes 'certain currency-related practices.[117] The US Department of Commerce determined currency undervaluation as specific because the predominant user of this subsidy is the group of enterprises that trade goods. According to the Initial Questionnaire provided by the GOV and IMF data later considered, four major channels for total USD inflow to Vietnam are: (a) goods export, (b) services export, (c) FDI, and (d) overseas remittance. And 71.94 percent of total inflow comes from (a) goods export. DOC explained the program as *de facto* specific by making enterprises that "buy and sell goods internationally" a predominant program user. And calculated the benefit of undervalued currency using the difference between the country's real effective exchange rate (REER) and REER that achieved the balance (equilibrium REER). Vietnam's currency was determined as undervalued by 4.7 percent during the POI. Based on these facts, the Department calculated a net countervailable subsidy rate of 1.69 percent *ad valorem* for KTV and 1.16 percent *ad valorem* for Sailun.[118]

4.3.3 Less than Adequate Remuneration (LTAR)

In a state-capitalism country where the government controls the overall price in principle, the government can provide the goods and services lower than the market-formed price, and this causes the problem of so-called Less than Adequate Remuneration (LTAR). As following Table 3.2**.**, LTAR of land rent, water, wire rods, and natural rubber were discussed in the Vietnam CVD investigation.

[117] *See* United States Department of Commerce, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, 2021. pp. 5-9.

[118] *See* United States Department of Commerce, Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, 2020, pp.20-25.

Table 4.3 LTAR programs determined as countervailable

Subsidy Program		Case Number		
		US	**Canada**	**India**
Land	Exporters	C-552-805 C-552-813 C-552-819	-	-
	FIEs	C-552-813	-	-
	Encouraged Industries or Industrial zones	C-552-813 C-552-819 C-552-824	CPF2 2017 IN	OI-04/2018 OI-08/2018
	Special Zones	C-552-824	-	-
	Difficult Socio-Economic Conditions	C-552-819 C-552-829	CPF2 2017 IN	-
	Non-agriculture land	-	CPF2 2017 IN CRS 2018 IN	-
Water		C-552-813	-	-
Wire rod		C-552-813 C-552-819	-	-
Natural rubber		C-552-829	-	-

Source: Published Decisions of US Department of Commerce, Canada Border Services Agency, India Department of Commerce

In particular, Vietnam's land regime, where the state owns all and leases the right to use, is the most representative example of generating subsidy effects. The reduction and exemption of land rent for exporters, Foreign-Invested Entities, encouraged industries or Industrial Zones, and certain goods production (e.g. Plastic) were determined as subsidies subject to CVD in all investigations in the three countries.

Pursuant to *Decree No. 46/2014/ND-CP (Regulations on collection of land rent and water surface rent)*, Article 4 explains the annual unit price of leased land equals a specific rate multiplied by land price (Annual unit price = rate (%) x Land price).

The rate is generally calculated as 1% except for the certain cases.[119] During the US investigation on *Polyethylene Retail Carrier Bags*, the Fotai provided the documents that land rent with Bing Doung Province for administrative office which is located in Plant 1[120] or that remains empty was exempt until March 2011. This was because the export goods produced by Fotai were on the special encouragement list, and it achieved an export value of 90 percent. The Department determined that exemption of land rental fees for exporters is an export subsidy and calculated the benefit by multiplying the benchmark land rental rate by exempt land and then dividing by Fotai's export sales. Therefore, it concluded the countervailable subsidy rate for Fotai as 0.71 percent ad valorem.[121]

Similarly, in *Passenger Vehicle and Light Truck Tires* case, KTC rented land for the head office and tire production plant from SOCB, owned mainly by Binh Duong Provincial People's Committee, and land for producing natural-rubber from the Natural Resources and Environment Department of the Province. Also, Sailun rents land located in Tay Ninh Province from SOCB, which is owned mainly by the

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[119] Article 4.1.a) of the Vietnam *Decree No. 46/2014/ND-CP;*

"- Land in the urban areas, commercial centers, traffic hubs, residential areas which is extremely profitable to build business premises, the People's Committees of central-affiliated cities and provinces (hereinafter referred to as the People's Committees of provinces) shall provide the rates (%) of the land prices to identify the annual unit prices not more than 3% according to the current conditions of such provinces.

- Land in remote and mountainous areas, islands, regions facing socio-economic difficulties or facing extreme socio-economic difficulties; land used for agricultural production, forestry, aquaculture, salt making; land used as production and business premises of the projects on investment promotions and special investment promotions under the regulations of the laws, the People's Committees of provinces shall provide the rates (%) of the land prices to identify the annual unit prices but not less than 0,5% according to the current conditions of such provinces.

The specific rate (%) is issued according to each area, route conformable with each land use purpose and published by the People's Committee of such province during the implementation"

[120] DOC determined the contract between Fotai and Bind Doung Province for Plant 1 before cutoff date cannot be analyzed, though the renegotiation for extending the terms by an additional 30 years in May 2007 falls into the scope of potential countervailable subsidies.

[121] *See* United States, Issues and Decision Memorandum for Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 2010, pp.7-8.

Vietnam government. The GOV explained land preferences based on the Vietnamese land regime according to Decree 46. However, DOC rejected this explanation pointing out that the Decree was issued after the land rent contract entered into force. Instead, DOC referred to *Ministry of Finance Decision 189/2000/QD-BTC* provides that the rate shall be equal to 50 percent of the normal rate in areas with difficult socio-economic conditions. Further, Article 3.1.2 notes that the applicable rate shall be the minimum rate, not the *co-efficients* rate.[122] On this basis, DOC determined that GOV provided preferential rent for the areas "with difficult socio-economic conditions" and benefited the respondents equal amount to the gap between the market and the actually paid rate. Therefore, a net countervailable subsidy rate of 5.16 percent and 2.14 percent *ad valorem* for KTV and Sailun respectively were determined.[123]

4.3.4 Tax Benefits

Tax benefits are a typical form of subsidies preferred in countries where fiscal policies have not been advanced as extra budget allocations do not accompany them. As following Table 3.3., 1) Income Tax Preferences and Import Duty Exemption for Encouraged industries, Foreign-Invested Entities (FIEs), enterprises in Export Processing Zones or Industrial Zones, and Newly established investment projects

[122] Decision 189 provides applicable rent rate applicable to types of land and indicated multipliers, so-called '*co-efficients*', which is similar to ratios mentioned in Decree 46.

[123] *See* United States Department of Commerce, Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, 2020, pp. 25-27.; *See* also United States Department of Commerce, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam, 2021. pp.4.

and 2) Import Duty Exemption on raw materials, spare parts and accessories, and equipment and machinery were determined as countervailable.

Table 4.4. Tax benefit programs determined as countervailable

Subsidy Program		Case Number		
		US	**Canada**	**India**
Corporate Tax	Encouraged Industries	C-552-805 C-552-819	CPF2 2017 IN	-
	FIEs	C-552-805 C-552-813 C-552-824	CPF2 2017 IN	-
	Industrial Zones	C-552-813	CPF2 2017 IN CRS 2018 IN	-
	Difficult Socio-Economic Conditions	C-552-819	CPF2 2017 IN CRS 2018 IN	-
	Special Zones	C-552-824	CPF2 2017 IN CRS 2018 IN	-
	Exporters	C-552-819 C-552-824	-	-
	SMEs	C-552-819 C-552-824	-	-
	Business Expansion and Intensive Investment	C-552-819 C-552-824	CPF2 2017 IN	-
	Investors producing/dealing exports goods	C-552-819	CPF2 2017 IN	-
	New Investments	C-552-813 C-552-829	-	-
	Accelerated depreciation of fixed assets	-	CPF2 2017 IN CRS 2018 IN	-
	Establishment dealing with exported goods	-	CPF2 2017 IN CRS 2018 IN	-

Subsidy Program		Case Number		
		US	Canada	India
Import Duty	Raw materials for exported goods	C-552-805 C-552-813 C-552-819 C-552-824 C-552-829	-	OI-04/2018
	Spare parts and Accessories	C-552-805 C-552-824	-	-
	Machinery to create fixed assets	C-552-819	CPF2 2017 IN	OI-08/2018
	FIEs	C-552-824	-	-
	Raw materials for export processing	C-552-824	-	-
	Industrial Zones	C-552-829	-	-
	Difficult Socio-Economic Conditions	-	CRS 2018 IN	-
	Encouraged Industries	-	CRS 2018 IN	-

Source: Published Decisions of US Department of Commerce, Canada Border Services Agency, India Department of Commerce

Vietnam Ministry of Planning and Investment Foreign Investment Agency (FIA) indicates that although the current CIT rate is 20 percent, tax incentives are granted to encouraged sectors (e.g., education, healthcare, sport/culture, high-tech, environmental protection, infrastructure, etc.), encouraged locations (e.g., economic and high-tech zones, industrial zones, difficult socio-economic areas etc.), and sized of the project (e.g., business expansion projects, newly invest projects) as following Table 3.4. Additionally, import duty exemptions are granted pursuant to Decree 87/2010/ND-CP on goods temporarily imported then re-exported, goods imported to form fixed assets (including machinery and equipment, raw materials not produced in Vietnam), goods for oil and gas activities, and goods for direct use in scientific

research and technology development (including documents, books, newspapers, journals, and electronics information sources).

Table 4.5. CIT Incentives and criteria for eligibility

Rates	Encouraged Sectors		Encouraged locations
10%	**Operational period** . Education and training . Occupational training . Healthcare . Culture . Sports and environment	**Within 15 years** . high technology . scientific research . important infrastructure facilities . production of software . products support garment, textile and footwear, IT, automobiles assembly, mechanics	**Within 15 years** . difficult socio-economic conditions . economic zones . high-tech zones .
15%	-	**Within 10 years** . Farming . Breeding . Processing of agriculture products and aquaculture products	-
17%	**Operational period** . agricultural service co-operatives and to people's credit funds . manufacturing projects with investment capital of VND6,000 billion	-	**Within 10 years** . difficult socio-economic conditions

Source: Vietnam Foreign Investment Agency (FIA)

Regarding tax preferences, during the investigation of Canada's *Certain Copper Pipe Fittings2* and *Cold-Rolled Steel* case, accelerated depreciation of fixed assets was discussed. According to *Circular 45/2013/TT-BTC*, companies are allowed to choose their preferred method for "depreciation and period of depreciation" and just

notify the authority before implementation. And Law No. 59/2005/QH11 limits the beneficiary of the investment incentives in some geographical regions and business projects. As a result, CBSA concluded this program constitutes a financial contribution by the government and satisfies specificity elements.[124] In the *Polyethylene Retail Carrier Bag* case, DOC determined a countervailable subsidy rate of 0.21 percent *ad valorem* for Fotai as the company enjoyed the tax benefits in the corporate income tax during POI because of its Foreign-invested enterprises status and 0.44 percent ad valorem for Chin Sheng as the company enjoyed the benefits because the product was included in 'the new investment project (plastic doors and plastic bags).'[125]

With regards to import duty exemptions, DOC in the *Polyethylene Retail Carrier Bags* case asked both respondents to report how many imported 'raw materials' and 'other materials,' including accessories and spare parts, are used in producing export goods. Chin Sheng answered they did not grant any benefits from the program, and Fotai reported that they received an exemption in both raw and other materials. DOC recognized that the GOV did not have a system to calculate precisely how much imported goods are used as inputs during verification. The government officials of Bing Doung province stated that although customs check exports against imports, they do not check how much is accurately consumed in producing one unit of export goods. For this reason, DOC concluded that the import duty exemption on all raw

[124] *See* Canada Border Services Agency, Statement of reasons: Concerning the final determinations with respect to the dumping and subsidizing of Cold-Rolled Steel from China, South Korea, and Vietnam, 2018, pp. 82.

[125] *See* United States, Issues and Decision Memorandum for Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 2010, pp.6-7.

materials was a countervailable subsidy program and a calculated subsidy rate of 2.17 percent *ad valorem* for Fotai.[126]

4.3.5 Export Financing

Investigating authority of the U.S, Canada, and India regarded the exporting financing policies of the Vietnamese State-owned bank or State-owned commercial banks (SOCBs) as a financial contribution within the meaning of *SCM Agreement* Article 1.1. As following Table 3.5. shows, *Export Credits, Preferential Lending (Interest rate support), Export Factoring,* and *Financial Guarantees for Export Activities* were determined countervailable.

Table 4.6. Export Financing programs determined as countervailable

Subsidy program	**Case Number**		
	US	**Canada**	**India**
Export Credits	C-552-819 C-552-824	CRS 2018 IN	OI-04/2018 OI-08/2018
Interest rate support	C-552-819 C-552-824	-	OI-04/2018 OI-08/2018
Export Factoring	C-552-819 C-552-824	CRS 2018 IN	-
Financial Guarantees	C-552-819 C-552-824	CRS 2018 IN	OI-04/2018 OI-08/2018

Source: Published Decisions of US Department of Commerce, Canada Border Services Agency, India Department of Commerce

Specifically, pursuant to *Decision. 108/2006/QD-TGG (Establishing the Vietnam Development Bank)*, Article 1 indicates that Vietnam Development Bank (VDB) is established to implement state policies such as investment credits, export credits, and

[126] *Ibid*, pp.8-9.

post-investment credit assistance, which are managed by *Decree No.75/2011/ND-CP(On state investment credit and export credit)*. Chapter II of the Decision 75 stipulates eligible borrowers, lending conditions, Loan amount, term and interest rate, and post-support levels for investment credit. Similarly, specific terms and conditions for export credit are stipulated in Chapter III. Article 16 notes that eligible borrowers for export credits are exporters who have export contracts or overseas importers who have import contracts for the goods listed in the Appendix of the Decree.

The US Department of Commerce determined export financing programs by Vietnamese SOCBs constitute a financial contribution by a public body. For example, regarding financial guarantee issues, as SOCBs grant guarantees for foreign currency transactions, receiving the grant itself is contingent on export performance. As a result, it calculated a net subsidy of 1.17 percent *ad valorem* for Region and United in the *Certain Steel Nails* case.[127]

4.4 Closing Remarks

CVD against Vietnam implies the country is also under the same trade risk as China. Subsidy programs determined to be countervailable are closely related to its economic structure, and the investigating authorities applied the same legal logic as did in China. However, applying CVD rules in Vietnam comes to the fore only after the US started to blame Vietnam's trade surplus. Now, it is time for enterprises to foray into or likely to realize the problem's magnitude. The example of Korean

[127] *See* United States Department of Commerce, Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Steel Nails from the Socialist Republic of Vietnam, 2015. pp.19-22.; DOC determined a subsidy rate for the *Interest rate support program* under the SBV using AFA as the GOV did not provide the requested documents and explanation about Circular 21.

company called CS wind, a respondent of US *Utility Scale Wind towers*, which moved their production base from China to Vietnam to avoid high AD tariffs but also under the CVD tariff shows the reality.

The countervailing investigation is notorious for requiring burdensome information and data. If a country or respondents fail to respond appropriately, high CVD rates will be calculated using FA. In addition, if the program is once determined as a countervailable, petitions and investigating authorities can raise the same programs in other cases. Although Vietnam has high strategic value in the Biden administration's Indo-Pacific policy, the high possibilities of cascading trade remedy measures cannot be ruled out.

Chapter V. Conclusion

Countervailing duty issues in the Nonmarket economy continued endlessly from whether it could be applied in the first place to how to interpret the specific rules to fit on NME. As discussed above, the root of the problem starts with the 1947 GATT system because it was formed without considering NME. As subsequent negotiations failed to regulate the issues sufficiently, the system gave broad discretion in its interpretation. Legal controversies over interpreting the public body and finding foreign benchmarks show the issues start with insufficient legal provisions and worsen with struggling between the panel and the Appellate Body.

Subsidy programs determined as countervailable show its inherent state-capitalism economic structure and well explain why both exporting and importing countries have severe complaints about the current system. Exporting countries blame practices of excessive margin calculation using NME-specific methodologies. On the other hand, importing countries contend that current rules cannot perfectly regulate trade distortions of NME.

The failure of negotiating the Doha Round and the paralyzing of the Appellate body might infer it is challenging to handle the issue inside the system shortly. Nowadays, like-minded countries such as the US, EU and Japan are making a ‘block’ for forming new trade orders on subsidy issues such as industrial subsidies, foreign subsidies, and anti-trade circumventions.

The point is trade remedy measures become only effective when conducted on a multilateral level and with rule-based methodologies. Unilateral approaches

eventually lead to furious disputes, which are moving toward tariff war by beggaring own neighbors. Members should keep in mind that the reason why the WTO system allows FTAs, the separate economic block, was to facilitate trade with lower tariffs and develop better norms for free trade. However, now it is questionable that norms developed in different ideology blocks can be developed at a multilateral level with integrated forms under this much controversy.

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Appendix I

ANNEX1. ILLUSTRATIVE LIST OF EXPORT SUBSIDIES[128]

(a)The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b)Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d)The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

(e)The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.

(f)The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g)The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h)The exemption, remission or deferral of prior-stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). This

[128] WTO, Agreement on Subsidies and Countervailing Measures

item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i)The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j)The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k)The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

Appendix II

Article 14

Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient[129]

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. 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 (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

[129] Article 14 of the WTO *SCM Agreement*

Abstract

보조금을 지원받은 상품의 수입으로 인한 자국의 피해를 구제하기 위한 수단인 상계조치는 WTO 보조금 및 상계조치에 관한 협정에서 규율 되고 있다. 그러나 해당 협정은 시장국가를 전제로 하여 규율이 형성되어 비시장경제 문제를 다루기 어렵다는 구조적인 한계점을 가지고 있다. 게다가 비시장경제국가들은 정부가 생산요소를 통제하고 있어 보조금 효과를 창출할 수 있는 요인이 기저에 존재하고, 추가적인 투자유치를 위해 산업보조금 정책을 더욱 적극적으로 활용할 유인이 존재하는 등 현재 그 문제가 더욱 심각하다.

이에 본 연구는 현행 GATT/WTO 시스템이 비시장경제를 체제 내에서 규율할 수 있는지 알아보기 위하여 비시장경제국에서의 상계조치부과와 관련한 법적쟁점들을 분석한다. 애초에 비시장경제국에 대해 상계조치가 가능한 것인지가 모든 논의의 시작점이었음을 고려하여 본 연구는 미국 상계조치법의 발전과정과 실제 사례를 통해 국가들이 어떻게 비시장경제에 상계조치법을 적용하게 되었는지 살펴본다.

비시장경제에 상계조치가 적용되고 난 이후에도 구체적인 법률의 적용과 그 해석을 두고 논란은 지속되었다. 가장 대표적 예는 재정적 기여의 주체인 공공기관을 어떻게 해석해야 하는지, 비시장경제의 국내가격이 아닌 해외 시장경제국의 가격을 마진 상정을 위한 비교기준으로 삼을 수 있는 지 등이다. 이에 본 연구는 WTO

분쟁해결사례를 통해 해당 쟁점들의 법리가 어떻게 발전되어왔는지 살펴보고, 이에 대한 국가들의 대응을 분석한다.

마지막으로 베트남에서의 상계조치부과 사례분석을 통해 실제 비시장경제국의 상계조사 과정에서 무엇이 논의되고 상계조차 가능하다고 판정된 보조금정책이 어떠한 특징을 가지고 있는지 살펴본다. 이는 최근 국제사회에서 활발히 논의되고 있는 산업보조금, 역외보조금, 우회방지 등 새로운 규범의 도입과 관련하여도 유의미한 법적 함의를 줄 것으로 보여진다.

주제어: WTO, 비시장경제, 보조금, 상계관세조치, 무역구제, 베트남

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