

December 2014

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### Repository Citation

David P. Vincent, *The Global Cost of Green: Recent Trade Issues and Litigation Between the United States and China May Dissolve Global Green Cooperation*, 39 Wm. & Mary Envtl. L. & Pol'y Rev. 141 (2014), <https://scholarship.law.wm.edu/wmelpr/vol39/iss1/5>

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# THE GLOBAL COST OF GREEN: RECENT TRADE ISSUES AND LITIGATION BETWEEN THE UNITED STATES AND CHINA MAY DISSOLVE GLOBAL GREEN COOPERATION

DAVID P. VINCENT\*

## INTRODUCTION

In the late 1980s and early 1990s, the National People's Congress adopted a collection of environmental laws, which attempted to reduce pollution while protecting the natural environment.<sup>1</sup> Additionally, China's government enacted more than one hundred national laws and regulations aimed at environmental protection during this period.<sup>2</sup> Despite the legislative actions, by 2006 China had surpassed the United States as the world's largest emitter of greenhouse gases.<sup>3</sup> That same year, the Renewable Energy Law of the People's Republic of China took effect, and the Chinese government implemented one of the largest state-sponsored commitments toward renewable energy, imposing a national renewable energy requirement that is expected to boost the use of renewable energy capacity up to 10 percent by the year 2020.<sup>4</sup>

China's growing support for renewables and green technology has sparked a growing number of trade concerns abroad. A group of U.S. solar companies vocalized their concerns in late 2011 by filing a petition with the United States International Trade Commission ("USITC") and the United States Department of Commerce ("Commerce"), claiming that the Chinese government's support for renewables (specifically solar panels) actually consists of unfair subsidies.<sup>5</sup> In addition, growing animosity in the European Union ("EU") toward Chinese solar panel manufacturing

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<sup>1</sup> Robert V. Percival, *China's "Green Leap Forward" Toward Global Environmental Leadership*, 12 VT. J. ENVTL. L. 633, 639 (2011).

<sup>2</sup> *Id.* at 639–40.

<sup>3</sup> *Id.* at 634.

<sup>4</sup> Joel B. Eisen, *China's Greentech Programs and the USTR Investigation*, 11 SUSTAINABLE DEV. L. & POL'Y 3, 3 (2011) [hereinafter Eisen, *China's Greentech Programs*].

<sup>5</sup> INT'L TRADE ADMIN., COMMERCE PRELIMINARY FINDS DUMPING OF CRYSTALLINE SILICON PHOTOVOLTAIC CELLS, WHETHER OR NOT ASSEMBLED INTO MODULES FROM THE PEOPLE'S REPUBLIC OF CHINA (2012) [hereinafter PETITION], available at <http://ia.ita.doc.gov/download/factsheets/factsheet-prc-solar-cells-ad-prelim20120517.pdf>.

and subsidies may very well spur a similar investigation with the European Commission.

As a result of the recent investigations and actions aimed directly at China, the Chinese government has criticized the United States as being overly protectionist and possibly behaving in direct violation of World Trade Organization (“WTO”) rules.<sup>6</sup> After recent court decisions involving trade between the United States and China, paired with a new American law, China’s assertions may be correct.

This Article begins by looking at how China has moved forward in embracing green technology development, the government’s role in that growth and whether its support is truly harmful on a global scale. It highlights key laws in the United States and the WTO involving trade—specifically subsidies, countervailing duties and anti-dumping regulations. An examination of recent trade cases involving the United States and China is followed by an analysis of America’s recent trade-oriented actions and legislation. Lastly, this Article will consider the legal implications of recent trade developments between these countries as well as policy implications, including the effect on the green and renewables industry.

## I. CHINA’S AMBITIOUS GREEN TECHNOLOGY DEVELOPMENT

Although the Chinese government’s attitude toward climate change and the environment has shifted in the past few years, China still ranks as one of the most polluting countries in the world.<sup>7</sup> China’s environmental problems are severe,<sup>8</sup> as it still struggles with poor air and water quality<sup>9</sup> and growing greenhouse gas emissions.<sup>10</sup>

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<sup>6</sup> Robert Plummer, *Protectionism: Is It on the Way Back?*, BBC NEWS (Sept. 17, 2012), <http://www.bbc.com/news/business-18104024>, archived at <http://perma.cc/XC8E-V2LU>.

<sup>7</sup> JOHN W. EMERSON ET AL., 2012 ENVIRONMENTAL PERFORMANCE INDEX AND PILOT TREND ENVIRONMENTAL PERFORMANCE INDEX: SUMMARY FOR POLICYMAKERS 4, 6 (Yale Ctr. for Envtl. Law & Policy ed., 2012), available at <http://sedac.ciesin.columbia.edu/downloads/data/epi/epi-environmental-performance-index-pilot-trend-2012/summary-for-policy-makers.pdf> (ranking China 116 out of 132 for overall environmental performance).

<sup>8</sup> Joel B. Eisen, *China’s Renewable Energy Law: A Platform for Green Leadership?*, 35 WM. & MARY ENVTL. L. & POL’Y REV. 1, 7 (2010) [hereinafter Eisen, *China’s Renewable Energy Law*]; see generally Christina Larson, *The Great Paradox of China: Green Energy and Black Skies*, YALE ENV’T 360 (Aug. 17, 2009), [http://e360.yale.edu/feature/the\\_great\\_paradox\\_of\\_china\\_green\\_energy\\_and\\_black\\_skies/2180/](http://e360.yale.edu/feature/the_great_paradox_of_china_green_energy_and_black_skies/2180/), archived at <http://perma.cc/FY4N-9CCH>.

<sup>9</sup> Larson, *supra* note 8.

<sup>10</sup> See JOHN W. EMERSON ET AL., 2012 ENVIRONMENTAL PERFORMANCE INDEX AND PILOT

China's electric power sector contributes a large portion of the nation's greenhouse gas emissions, with over 70% of China's electricity still generated from coal.<sup>11</sup> China's coal production has more than doubled since 2000.<sup>12</sup> However, with the nation's energy consumption expected to nearly triple by 2035, China has set its ambitions to greatly increase the share of electricity generated from non-fossil fuel sources.<sup>13</sup>

China's national government has made a commitment to renewable energy.<sup>14</sup> As a basis of its policy intended to combat its current environmental state, China is making extensive investments in solar and wind power technology.<sup>15</sup> For example, installed renewable electricity capacity (not including hydro) was all but non-existent just a few years ago, but has since doubled every year starting in 2005.<sup>16</sup> As part of its movement toward becoming more environmentally conscious, China has also become the home for a growing green technology industry. In less than five years, China became a major player in the global market for wind turbines and now Chinese companies have grown to play a dominant role in the manufacture of solar technology as well.<sup>17</sup> China is now a world leader for solar photovoltaic ("PV") cells and modules.<sup>18</sup> In 2010, China and Taiwan accounted for 53% of global PV shipments.<sup>19</sup> In addition to its growth in manufacturing, China ranks in the top five PV markets, growing four hundred and seventy percent year over year ("Y/Y") in 2011.<sup>20</sup> Chinese manufacturers make about fifty million solar panels a year and include four of the top five solar-panel manufacturers in the world.<sup>21</sup> China's

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TREND ENVIRONMENTAL PERFORMANCE INDEX: FULL REPORT 56 (Yale Ctr. for Env'tl. Law & Policy ed., 2012), available at [http://epi.yale.edu/files/2012\\_epi\\_report.pdf](http://epi.yale.edu/files/2012_epi_report.pdf).

<sup>11</sup> Kat Cheung, *Integration of Renewables: Status and Challenges in China* 7 (Int'l Energy Agency, Working Paper, 2011), available at [http://www.iea.org/publications/freepublications/publication/integration\\_of\\_renewables.pdf](http://www.iea.org/publications/freepublications/publication/integration_of_renewables.pdf).

<sup>12</sup> *China*, U.S. ENERGY INFO. ADMIN. 29 (Feb. 4, 2014), <http://www.eia.gov/countries/analysis/briefs/China/china.pdf>.

<sup>13</sup> Cheung, *supra* note 11.

<sup>14</sup> Eisen, *China's Renewable Energy Law*, *supra* note 8, at 10.

<sup>15</sup> *Id.* at 1.

<sup>16</sup> Cheung, *supra* note 11.

<sup>17</sup> Eisen, *China's Greentech Problems*, *supra* note 4, at 4.

<sup>18</sup> *Id.*

<sup>19</sup> U.S. DEPT. OF ENERGY, SUNSHOT VISION STUDY 26 (Robert Margolis et al. eds., 2012), available at <http://www1.eere.energy.gov/solar/pdfs/47927.pdf>.

<sup>20</sup> *World Solar Photovoltaic Market Grew to 27.4 Gigawatts in 2011, Up 40% Y/Y*, NPD SOLARB Buzz (Mar. 19, 2012), <http://www.solarbuzz.com/news/recent-findings/world-solar-photovoltaic-market-grew-274-gigawatts-2011-40-yy-0>, archived at <http://perma.cc/EDL9-6NAV>.

<sup>21</sup> Kevin Bullis, *The Chinese Solar Machine*, MIT TECH. REV. (Dec. 19, 2011), <http://www>

twelfth Five-Year Plan approved in March of 2011, also illustrates the change in the country, calling for uncompromising environmental and energy initiatives.<sup>22</sup> The plan seeks to dramatically change China's energy portfolio by building 235 gigawatts of power generation capacity from clean energy sources, including a goal of 40 new gigawatts of nuclear capacity and 5 gigawatts of solar power capacity by 2015.<sup>23</sup>

## II. CHINA'S POLICIES AND GOVERNMENT SUBSIDIES MAY BE HARMFUL

China's now established dedication to renewable energy embraces significant "governmental laws, policies and incentives to promote renewables."<sup>24</sup> China's procedure for developing and implementing these laws, however, is different than those of countries such as the United States, where state or local governments have large roles. China is a one-party state with centralized power in the national government.<sup>25</sup> China has an economic system different from the United States; a "non-market economy with a top-down, command-and-control energy planning process that is often nontransparent."<sup>26</sup> Due to the construction of China's economy, it is difficult to discern whether the country is following international trade rules or not.<sup>27</sup>

"[S]tate-owned energy companies in China also" have "considerable power in decision-making."<sup>28</sup> China's electricity utility sector was made up of one state-owned monopoly until 2002, when the State Council Electricity Reform Plan broke the monopoly into two grid companies and five generating companies.<sup>29</sup> The five generating companies are still controlled by the state, as is one of the grid companies.<sup>30</sup> At a more local level,

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.technologyreview.com/featuredstory/426393/the-chinese-solar-machine, archived at <http://perma.cc/Q9CQ-DG55>.

<sup>22</sup> Percival, *supra* note 1, at 649–50.

<sup>23</sup> *Id.* at 650–51.

<sup>24</sup> Eisen, *China's Renewable Energy Law*, *supra* note 8, at 16.

<sup>25</sup> *Id.* at 16–17.

<sup>26</sup> Melanie Hart, *What Does the Solar Trade Dispute Mean? Shining a Light on U.S.-China Clean Energy Cooperation*, THINK PROGRESS (Feb. 9, 2012), <http://thinkprogress.org/romm/2012/02/09/422282/solar-%20trade-us-china-clean-energy-cooperation/?mobile=nc>, archived at <http://perma.cc/36NG-DWTK>.

<sup>27</sup> *Id.*

<sup>28</sup> Eisen, *China's Renewable Energy Law*, *supra* note 8, at 21.

<sup>29</sup> *Id.*

<sup>30</sup> Chun Chun Ni, INST. ENERGY ECON., JAPAN, *China's Electric Power Industry and Its Trends* 19–20 (Apr. 2006), <http://eneken.ieej.or.jp/en/data/pdf/326.pdf>.

some provincial governments have initiated “policies under the central government’s legal framework” to also promote renewables.<sup>31</sup>

China’s twelfth Five-Year Plan clearly illustrates the country’s economic policy relating to green energy.<sup>32</sup> China’s Ministry of Industry and Information Technology announced, in February of 2012, its goal of reducing the cost of solar power to 0.8 yuan (or 12 U.S. cents) per kilowatt-hour by 2015 and 0.6 yuan (9 U.S. cents) by 2020.<sup>33</sup> These targets are meant to reduce the cost of domestic solar power and continue the expansion of the domestic market for the photovoltaic industry.<sup>34</sup> The plan also requires China’s top polysilicon manufacturers to achieve annual production capacities of 50,000 tons by 2015, with solar panel makers required to reach 5 gigawatts of annual production capacity also by 2015.<sup>35</sup>

China has numerous policies which are in place to encourage innovation of other clean energy technologies including solar, and in fact, green energy is one of the “seven strategic industries” that Beijing supports with state funds and various other preferential policies, such as by issuing tax breaks.<sup>36</sup> Because Beijing makes clean energy development a priority, governments at the provincial and local levels “have a strong incentive to develop their own support policies.”<sup>37</sup> Some local governments have turned their provinces into clean manufacturing centers by going above and beyond the national policy requirements, while other areas have chosen to adopt the national directives from the Ministry of Finance, which call upon “local financial bureaus to raise” and dispense “green energy development funds.”<sup>38</sup> Some local governments view clean energy as an excellent opportunity for provincial growth.<sup>39</sup> One example of these practices can be found in Jiangsu Province. In 2009, Jiangsu created a three-year solar PV development plan, which requested that “local officials cultivate name-brand products and internationally competitive

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<sup>31</sup> Eisen, *China’s Renewable Energy Law*, *supra* note 8, at 22.

<sup>32</sup> See generally Percival, *supra* note 1, at 649 (discussing the role of energy in Chinese economic policy).

<sup>33</sup> Du Juan, *China’s Domestic Solar Market to Expand*, PEOPLE’S CHINA DAILY ONLINE (Feb. 26, 2012), <http://english.people.com.cn/90778/7740243.html>, archived at <http://perma.cc/5JU9-E78G>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Hart, *supra* note 26.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

enterprises by providing state assistance for product development and supply-chain verticalization.”<sup>40</sup> This province manufactured two-thirds of China’s total solar PV equipment in 2010 and around ninety percent of that equipment was exported to foreign markets.<sup>41</sup>

China’s welcome of green energy technology occurred so quickly and on such a large scale that this shift even brought about a complaint by the United Steelworkers of America (“USW”), which was then accepted by the United States government in October 2010.<sup>42</sup> USW claimed that China was engaging in protectionist and predatory practices in the following areas: 1) restrictions on access to important materials; 2) performance requirements for investors; 3) discrimination against both foreign firms and goods; 4) prohibition of export subsidies and domestic content subsidies; and 5) domestic subsidies which distorted trade.<sup>43</sup> In that case, the United States challenged the Special Fund for Wind Power Equipment Manufacturing subsidies at the WTO after completing an investigation.<sup>44</sup> Here the subsidies were actual “grants to Chinese wind turbine manufacturers [who] agreed to use . . . parts . . . made in China rather than [using] imports.”<sup>45</sup> As a result, China formally revoked the legal measure that created this subsidy program, making this the third successful challenge for the United States at the WTO against Chinese government subsidies.<sup>46</sup>

As a member of the WTO, China is required to submit information about all of its subsidies regularly; however, China never notified the WTO about the wind power subsidy.<sup>47</sup> In actuality, as of June 2011, “China ha[d] submitted only one subsidies notification since becoming [a] [m]ember in . . . 2001.”<sup>48</sup>

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<sup>40</sup> *Id.* (footnote omitted).

<sup>41</sup> *Id.*

<sup>42</sup> Percival, *supra* note 1, at 646.

<sup>43</sup> Press Release, United Steelworkers, United Steelworkers’ Section 301 Petition Demonstrates China’s Green Technology Practices Violate WTO Rules (on file with author), *available at* <http://assets.usw.org/releases/misc/section-301.pdf>.

<sup>44</sup> Press Release, Office of the U.S. Trade Rep., China Ends Wind Power Equip. Subsidies Challenged by the U.S. in WTO Dispute (June, 2011), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2011/june/china-ends-wind-power-equipment-subsidies-challenged>, *archived at* <http://perma.cc/Y7JR-JR96>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*; Agreement on Subsidies and Countervailing Measures art. 25, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, 1869 U.N.T.S. 14, 255, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](http://www.wto.org/english/docs_e/legal_e/24-scm.pdf) [hereinafter Agreement].

<sup>48</sup> Office of the U.S. Trade Rep., *supra* note 44.

### III. THE UNITED STATES/CHINA TRADE CASE

#### A. *U.S. Solar Market*

The solar market in the United States has grown rapidly over the past few years due to falling prices and its own government subsidies.<sup>49</sup> However, more recent expiration of key government subsidies and expansion of the natural gas market have caused uncertainty in the marketplace.<sup>50</sup> As a result of recent trade issues with China, solar companies have changed their contracts to purchase solar panels and cells from other countries besides China.<sup>51</sup> But while solar manufacturers are feeling the most pain, these lower prices and government subsidies have led to a boom in solar power development and investment.<sup>52</sup>

In 2011, the U.S. solar energy industry installed 1,855 megawatts (“MW”) of photovoltaic capacity, which is more than double the record of 887 MW in 2010.<sup>53</sup> The American share of the global solar PV market also grew quite a bit in 2011, from 5% to 7%, and is predicted to continue growing.<sup>54</sup> The U.S. solar market growth is owed to a few different causes. First, the government’s 1603 Treasury Program, which provides additional liquidity in the marketplace by allowing solar project developers to more easily monetize existing tax incentives, ended December 31, 2011, causing many developers to commission projects before the end of the year.<sup>55</sup> Second, a shift toward large systems nationwide improved installation efficiency and more financing options contributed to the growth. Third, and maybe most importantly, the huge drop in solar panel prices contributed greatly to the boom in the solar industry.<sup>56</sup>

American solar manufacturing declined in 2011 for a few reasons, namely global oversupply of panels and the declining prices of solar panels,

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<sup>49</sup> Cassandra Sweet, *Solar-Panel Users Prepare for Tariffs on Chinese Imports*, WALL ST. J., (Mar. 19, 2012), <http://online.wsj.com/news/articles/SB10001424052702304724404577291970158018242>, archived at <http://perma.cc/YV4J-7BMN>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Zachary Shahan, *2011 U.S. Solar Market Report—Top 7 Findings & Chart*, CLEAN TECHNICA (Mar. 15, 2012), <http://cleantechnica.com/2012/03/15/us-solar-facts-charts/>, archived at <http://perma.cc/N3P7-D6FB>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> SOLAR ENERGY INDUS. ASS’N & GTM RESEARCH, U.S. SOLAR MARKET INSIGHT REPORT: 2011 YEAR-IN-REVIEW: EXECUTIVE SUMMARY, available at <http://www.seia.org/sites/default/files/resources/2011%20Q4%20SMI%20ES.pdf> (last visited Oct. 27, 2014) [hereinafter SEIA].



solar cells and solar wafers in China.<sup>57</sup> In 2011, for example, the United States imported \$3.1 billion worth of solar cells and panels from China.<sup>58</sup>

*B. United States vs. China Silicon Solar PV Subsidies*

Solar energy subsidies in the United States mostly “focus[] on stimulating demand for solar energy systems” by “provid[ing] incentives for ‘consumers’ to invest” in purchasing the systems and “having them installed.”<sup>59</sup> These types of subsidies do not give domestic manufacturers an advantage; the origin of the solar panels does not factor into the subsidy at all.<sup>60</sup> On the other hand, China’s subsidies are mostly aimed at stimulating China’s domestic manufacturers and the production of silicon solar PV cells and panels.<sup>61</sup> Subsidizing the export of these panels appears to be harming U.S. industry and businesses, which is expressly prohibited by WTO rules and other member country legislation.<sup>62</sup>

There are arguments that China’s trade policies are not just harming the United States, but also clean energy exporters in many other countries—particularly in Europe.<sup>63</sup> Recent accusations stemming from trade issues between the countries include statements that China’s lenient labor, safety, health, and environmental standards, as well as generous government subsidies, assist the country in driving down prices and essentially price other manufacturers out of business.<sup>64</sup> Lower-cost Chinese manufacturing may play a substantial role in undercutting some American and European manufacturers, leaving many manufacturers claiming that the “China Price” is really due to Chinese government involvement, not natural market forces.<sup>65</sup>

But government subsidies are not only a practice in China. The United States also has supported the development of solar energy with

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<sup>57</sup> *Id.*

<sup>58</sup> Zhang Yuwei, *US Sets New Duties on Chinese Solar Imports*, CHINA DAILY (Mar. 21, 2012), <http://newamericamedia.org/2012/03/us-sets-new-duties-on-chinese-solar-imports.php>, archived at <http://perma.cc/9AWH-DQ73>.

<sup>59</sup> Andrew, *Dumping Solar: CASM’s Case Against Chinese Subsidies & Manufacturers Part III*, CLEANTECHNICA (Jan. 22, 2012), <http://cleantechnica.com/2012/01/22/dumping-solar-casms-case-against-chinese-subsidies-manufacturers-pt-iii/>, archived at <http://perma.cc/G2KS-MT7Y>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Hart, *supra* note 26.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

financial incentives to companies and households.<sup>66</sup> An important difference is that China initially focused on developing large-scale manufacturing of solar panels only for export, and only very recently did the government begin to subsidize the installation of panels in China.<sup>67</sup>

### C. Section 301 Petitions

Section 301 of the U.S. Trade Act of 1974 (the “Act”) is the primary statutory authority under which the United States may bring about trade sanctions on foreign countries that breach trade agreements or participate in other unfair trade activities.<sup>68</sup> The Act authorizes the President to take all appropriate action, including retaliation, to achieve removal of any act, policy, or practice of a foreign government that violates an international trade agreement or is unjustified, unreasonable, or discriminatory and burdens or restricts American commerce.<sup>69</sup> This law does not require the U.S. government to wait until it receives permission from the WTO in order to move forward with enforcement actions.<sup>70</sup> Cases under Section 301 may be initiated by the United States Trade Representative (“USTR”) on its own or as the result of a petition filed by a company or industry.<sup>71</sup> If the USTR decides to move forward with an investigation, it must attempt to negotiate a settlement with the foreign country and for cases involving trade agreements, the USTR must request formal dispute proceedings as outlined in the specific trade agreement.<sup>72</sup>

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<sup>66</sup> Keith Bradsher & Matthew L. Wald, *A Measured Rebuttal to China Over Solar Panels*, N.Y. TIMES, Mar. 20, 2012, at B1, available at <http://www.nytimes.com/2012/03/21/business/energy-environment/us-to-place-tariffs-on-chinese-solar-panels.html?pagewanted=all&module=Search&mabReward=relbias%3Ar&r=0>, archived at <http://perma.cc/F9AR-URU5>.

<sup>67</sup> *Id.*

<sup>68</sup> INT’L TRADE ADMIN., *Section 301*, [http://www.trade.gov/mas/ian/tradedisputes-enforcement/tg\\_ian\\_002100.asp](http://www.trade.gov/mas/ian/tradedisputes-enforcement/tg_ian_002100.asp) (last visited Oct. 27, 2014), archived at <http://perma.cc/LKQ2-58B4>.

<sup>69</sup> Trade Act of 1974 § 301, 19 U.S.C. § 2411(a)(1) (2012).

<sup>70</sup> *Section 301 of the Trade Act of 1974*, CYCLOPAEDIA, [http://www.cyclopaedia.de/wiki/Section\\_301\\_of\\_the\\_Trade\\_Act\\_of\\_1974](http://www.cyclopaedia.de/wiki/Section_301_of_the_Trade_Act_of_1974) (last visited Oct. 27, 2014), archived at <http://perma.cc/A6F8-BYTT>; see also 19 U.S.C. § 2411(a)(1) (2012).

<sup>71</sup> *Section 301 of the Trade Act of 1974*, *supra* note 70.

<sup>72</sup> JASPER WOMACH, CONG. RESEARCH SERV., AGRICULTURE: A GLOSSARY OF TERMS, PROGRAMS, AND LAWS, 2005 EDITION 233 (2005), available at <http://www.cnre.org/NLE/CRSreports/05jun/97-905.pdf>.

D. *"Dumping" and Subsidy Allegations Under U.S. Law and WTO Laws*

1. U.S. Law

"Dumping" is a kind of predatory pricing, especially in international trade.<sup>73</sup> It occurs when manufactures export a product to another country either below the price charged in the home market or in amounts that cannot occur through normal market competition.<sup>74</sup> "The United States International Trade Commission ('USITC') and the U.S. Department of Commerce ('Commerce') are responsible for conducting antidumping and countervailing duty (subsidy) investigations under . . . Title VII of the Tariff Act of 1930."<sup>75</sup> "Under this law, United States industries may petition the USITC and Commerce" for assistance regarding imported goods, which are sold in the United States at less than fair market value, or goods resulting from countervailable subsidies from foreign governments.<sup>76</sup> Commerce decides whether the alleged dumping or subsidizing is truly occurring, and if so, the amount of the subsidy or the margin of dumping.<sup>77</sup> The USITC, on the other hand, determines whether the American industry is seriously injured or threatened with serious injury from the imports.<sup>78</sup> If both agencies answer their questions positively, then Commerce will issue an anti-dumping duty order to offset the dumping or a countervailing duty order to offset the subsidy.<sup>79</sup>

The United States Court of International Trade ("CIT") hears "disputes relating to determinations made by the United States International Trade Commission and [Commerce's] International Trade Administration regarding anti-dumping and countervailing duties."<sup>80</sup>

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<sup>73</sup> *Antidumping and Countervailing Duty Investigations*, U.S. INT'L TRADE COMM'N, [http://www.usitc.gov/trade\\_remedy/](http://www.usitc.gov/trade_remedy/) (last visited Oct. 27, 2014), *archived at* <http://perma.cc/N2LY-PMQS>.

<sup>74</sup> *Dumping Definition*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/dumping.html> (last visited Oct. 27, 2014), *archived at* <http://perma.cc/54JZ-2ATN>.

<sup>75</sup> *Antidumping and Countervailing Duty Investigations*, *supra* note 73.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *United States Court of International Trade Jurisdiction*, U.S. CT. INT'L TRADE, [http://hausmieten.potiori.com/United\\_States\\_Court\\_of\\_International\\_Trade.html](http://hausmieten.potiori.com/United_States_Court_of_International_Trade.html) (last visited Oct. 27, 2014), *archived at* <http://perma.cc/3X57-B7A7>.

## 2. WTO Law

The World Trade Organization “allows governments to act against dumping where there is” a real “injury to the competing domestic industry.”<sup>81</sup> The government must “show that dumping is taking place, calculate the extent of the dumping,” and show the resulting injury.<sup>82</sup> The WTO General Agreements on Tariffs and Trade (“GATT”) (Article 6) and the Anti-Dumping Agreement work together to allow countries to “act in a way that would normally” violate “the GATT principles of binding a tariff and not discriminating between trade partners.”<sup>83</sup> The usual action taken against dumping is “charging [an] extra import duty” on the product in order to “bring its price closer to the ‘normal value’ or to remove the injury to the domestic industry.”<sup>84</sup> A country may “use the WTO’s dispute settlement procedure to seek the withdrawal of the subsidy” “[o]r the country can launch its own investigation and ultimately charge [an] extra duty.”<sup>85</sup> If the investigation results in a showing that dumping is taking place, and the domestic industry is experiencing injury, the exporting company can raise its price to avoid an import duty.<sup>86</sup>

The Agreement on Subsidies and Countervailing Measures “disciplines the use of subsidies” and controls “actions countries can take to [deal with] the effects of subsidies.”<sup>87</sup> The agreement allows a country to “use the WTO’s dispute settlement procedure to [obtain] withdrawal of the subsidy or removal of [the subsidy’s] adverse effects.”<sup>88</sup> As an alternative, the country can initiate “its own investigation and . . . charge an extra duty (countervailing duty) on subsidized imports that are . . . hurting domestic producers.”<sup>89</sup> “The agreement defines two [types] of subsidies: prohibited and actionable.”<sup>90</sup> Prohibited subsidies compel “recipients to meet certain

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<sup>81</sup> *Understanding the WTO: The Agreements—Anti-Dumping Actions*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) (last visited Oct. 27, 2014) [hereinafter *Anti-Dumping Actions*], archived at <http://perma.cc/F5VE-5H72>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Understanding the WTO: The Agreements—Subsidies and Countervailing Measures*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) (last visited Oct. 27, 2014) [hereinafter *Subsidies and Countervailing Measures*], archived at <http://perma.cc/MQU9-2NJC>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

export targets or to use domestic goods rather than imported goods”; “they are prohibited because they are [meant] to distort international trade.”<sup>91</sup> These types of subsidies may “be challenged in the WTO dispute settlement procedure” and if confirmed to exist, “must be withdrawn immediately” or the harmed “country can take counter measures.”<sup>92</sup> On the other hand, an actionable subsidy requires a “complaining country . . . to show that the subsidy has an adverse effect on its interest”; otherwise, the subsidy is allowed to continue.<sup>93</sup> If the WTO Dispute Settlement Body finds that an actionable subsidy does have a harmful effect, the subsidy must be eliminated or its effects removed.<sup>94</sup> Similar to prohibited subsidies, if domestic producers are harmed, countervailing duties are permitted.<sup>95</sup>

*E. Necessary Showing of Harm*

Under the WTO Anti-Dumping Agreement, a government may take action “against dumping where there is . . . a material injury to the competing domestic industry,” but the government must “show that the dumping is causing injury or threatening to do so.”<sup>96</sup> Just “calculating the extent of dumping” in the country is not enough to be actionable under the agreement; a detailed investigation must be conducted to “evaluate all relevant economic factors that [impact] the state of the industry in question.”<sup>97</sup> Similarly, countervailing duties are only permitted under WTO rules if the “importing country has conducted [a] detailed investigation” and shown a causal link between the subsidies and the harm alleged.<sup>98</sup> Under U.S. law, “the petitioners have to show that . . . U.S. manufacturers have been harmed as a result of [the] subsidies” and dumping actions.<sup>99</sup> Essentially, there must be a direct link between the foreign country’s action and the domestic harm for causation to exist and for a remedy to be afforded.

Evidence of harm regarding trade of solar panels between China and the United States includes an increase in Chinese exports to the United States, which jumped up 350 percent from 2008 to the end of

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Subsidies and Countervailing Measures*, *supra* note 87.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Anti-Dumping Actions*, *supra* note 81.

<sup>97</sup> *Id.*

<sup>98</sup> *Subsidies and Countervailing Measures*, *supra* note 87.

<sup>99</sup> Andrew, *supra* note 59.

2010.<sup>100</sup> Additionally, Chinese manufacturers secured “48 percent of both the U.S. and global markets”<sup>101</sup> by 2010. “Imports of Chinese silicon solar PV [panels] in the first eight months of 2011” surpassed all of the exports in 2010 by 157%.<sup>102</sup>

On top of the tremendous growth in imports from China, the number of domestic manufacturers that have declared bankruptcy or are close to ceasing operation continues to multiply.<sup>103</sup> One prominent example is Solyndra, a U.S.-based developer of “concentrated PV technology that declared bankruptcy” in August of 2011.<sup>104</sup> Another company, SolarWorld Industries America, the face of the USITC and Commerce’s petitions, is also feeling the pain, having “closed down its manufacturing facility in . . . California.”<sup>105</sup>

Just in 2011 alone, the price of silicon solar PV panels dropped about 50%, a change that coincided perfectly with the flood of inexpensive Chinese silicon solar PV panels.<sup>106</sup> Chinese bankers and executives of solar panel manufacturing companies deny that government loans “were made at subsidized rates” but “[a] few Chinese companies have [already] acknowledged receiving . . . government assistance.”<sup>107</sup> “Executives at Hunan Sunzone Optoelectronics, a [Chinese] solar panel manufacturer located in . . . South-Central China,” stated in 2010 that they were able to purchase valuable land close to the downtown area “for a third of the city-wide rate for industrial land.”<sup>108</sup> They further stated that “Chinese bankers offered large loans” at a below market rate, a mere 6% interest, with the government of the province paying a large portion of the interest.<sup>109</sup>

#### F. *WTO Dispute Settlement*

WTO members “have agreed that if they believe fellow members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally.”<sup>110</sup> “The Uruguay Round

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Andrew, *supra* note 59.

<sup>106</sup> *Id.*

<sup>107</sup> Bradsher & Wald, *supra* note 66.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Understanding the WTO: Settling Disputes—A Unique Contribution*, WORLD TRADE

agreement . . . made it impossible” for the losing country in a dispute “to block the adoption of the ruling”; a country now wishing to block a ruling must “persuade all other WTO members . . . to share its view.”<sup>111</sup> Once a case has been decided, the first priority is for the losing country to bring its policy in accordance with the ruling.<sup>112</sup> If the country targeted by the complaint loses, it has to “follow the recommendations of the panel report or the appeals report.”<sup>113</sup> If for some reason the country fails to act within a reasonable time, it is then required to “enter negotiations with the complaining country” to decide on “mutually-acceptable compensation.”<sup>114</sup> If another twenty days have passed with no agreement, “the complaining side may ask the Dispute Settlement Body” for authority to impose trade sanctions.<sup>115</sup>

#### G. *SolarWorld Case: Dumping and Subsidy Allegations*

In a recent Section 301 Petition, seven U.S. solar companies (fronted by SolarWorld Industries) are “claim[ing] that the Chinese government unfairly subsidizes Chinese solar panel manufacturers.”<sup>116</sup> They argue that this subsidization is allowing the Chinese manufacturers to “sell their products at below-market prices,” and therefore driving American competitors out of the solar panel market.<sup>117</sup> SolarWorld Industries America Inc. had the support of the seven U.S. companies in its filing of subsidy and dumping petitions against Chinese solar imports in October of 2011.<sup>118</sup> In its petition, SolarWorld asks the U.S. Department of Commerce to “levy [large] tariffs on solar cells and modules” coming from China.<sup>119</sup>

The petition asserts that the “Chinese government unfairly subsidizes Chinese solar panel manufacturers by providing land, electricity, material inputs, and financing below-market rates, as well as direct financial support and [further] preferential policies.”<sup>120</sup> SolarWorld claims that

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ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited Oct. 27, 2014), archived at <http://perma.cc/5UUL-N5LD>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Hart, *supra* note 26.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*; PETITION, *supra* note 5.

the government subsidies are specifically created to artificially restrain Chinese manufacturing costs and effectively “drive foreign competitors out of the market.”<sup>121</sup> Government subsidy programs are not always anti-competitive, but what the petition argues is that China’s subsidies are not designed to support an up-and-coming industry, but rather to give China an unfair advantage.<sup>122</sup> SolarWorld claims that the subsidies allow Chinese companies to sell their products at prices that U.S. companies cannot hope to match.<sup>123</sup> If the Chinese government is actually engaging in the types of unfair trade practice that the U.S. petition claims, then China may not be violating not only WTO subsidy rules, but also domestic trade laws in the United States.

The SolarWorld petition includes “allegations that China is ‘dumping’ in the U.S. market.”<sup>124</sup> Chinese analysts maintain that China’s lower prices on PV panels “are due to . . . China’s comparative advantages in manufacturing,” paired with its “excess capacity and market induced inventory clearing.”<sup>125</sup> The market for solar panel manufacturing slowed down significantly in 2011, which Chinese firms claim caused an excess amount of products, forcing manufacturers to sell at very low prices to clear out inventory.<sup>126</sup>

These arguments are exactly what Commerce has been investigating. “Commerce investigators [have been] tracing financial and policy support the Chinese government [gives] to solar manufacturers.”<sup>127</sup> On March 20, 2012, Commerce issued the highly anticipated decision.<sup>128</sup> The Department has imposed countervailing duty tariffs, which will be applied on three levels.<sup>129</sup> “Suntech Power Holdings Co. (‘STP’), [which] is the world’s largest solar panel maker, was told to pay a 2.9% tariff, and Trina Solar Ltd. (‘TSL’) will pay 4.73% to make up for the subsidies they received from the Chinese government.”<sup>130</sup> The solar industry is still awaiting

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<sup>121</sup> Hart, *supra* note 26.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Hart, *supra* note 26.

<sup>128</sup> Steve Leone, *Update: U.S. Commerce Imposes Tariffs on Chinese Solar Panels*, RENEWABLEENERGYWORLD.COM (March 20, 2012), <http://www.renewableenergyworld.com/rea/news/article/2012/03/its-official-us-commerce-imposes-tariffs-on-chinese-solar-firms>, archived at <http://perma.cc/R35Z-7NRD>.

<sup>129</sup> *Id.*

<sup>130</sup> William McQuillen & Eric Martin, *U.S. Sets Duties as High as 4.73% on China Solar Equipment*, BLOOMBERG (Mar. 20, 2012), <http://www.bloomberg.com/news/2012-03-20/u-s>



the second of two tariffs—the anti-dumping duty<sup>131</sup> as well as the final determination of the subsidy investigation.<sup>132</sup>

“Commerce preliminarily determined that Chinese producers/exporters have received countervailable subsidies,” which have harmed the domestic solar industry.<sup>133</sup> If Commerce and the USITC “make[] an affirmative final determination that imports of solar cells from China materially injure, or threaten material injury, to the domestic industry,” then Commerce will issue a final countervailing duty (“CVD”) order.<sup>134</sup> The determination that subsidies from China have harmed the U.S. solar industry comes as a result of a detailed investigation by Commerce and the USITC, in line with the WTO requirements under the Anti-Dumping Agreement.<sup>135</sup> In accordance with the WTO Agreement on Subsidies and Countervailing Measures, the United States chose to launch its own investigation,<sup>136</sup> rather than use the WTO’s dispute settlement procedure, and may choose to charge a countervailing duty. The United States will justify imposing these duties on Chinese imports by citing the exponential increase in imports from China, the numerous bankrupt and struggling domestic manufacturers, and dropping prices as clear evidence of harm.

#### IV. IS THE UNITED STATES PLAYING BY THE RULES?

In November of 2011, the Chinese government criticized the demand of the American solar panel industry for sizeable “tariffs on solar panels shipped to the United States from China.”<sup>137</sup> “China accused the

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-sets-duties-of-as-much-as-4-73-on-china-solar-gear-imports.html, archived at <http://perma.cc/U37A-XZMM>.

<sup>131</sup> Leone, *supra* note 128.

<sup>132</sup> *SolarWorld: U.S. Solar Industry Awaits Preliminary Ruling on Chinese Subsidies*, SOLARWORLD (May 28, 2014), <http://www.solarworld-usa.com/newsroom/news-releases/news/2014/solar-industry-awaits-prelim-ruling-chinese-subsidies>, archived at <http://perma.cc/D9YG-8LMN>.

<sup>133</sup> Int’l Trade Admin., *Fact Sheet: Commerce Preliminarily Finds Countervailable Subsidization of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from China*, U.S. DEPT. COM., available at <http://enforcement.trade.gov/download/factsheets/factsheet-prc-crystalline-silicon-photovoltaic-prod-cvd-prelim-060314.pdf>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Keith Bradsher, *China Charges Protectionism in Call for Solar Panel Tariffs*, N.Y. TIMES, Oct. 21, 2011, at B6, available at [http://www.nytimes.com/2011/10/22/business/global/china-warns-of-bad-effects-if-us-turns-protectionist.html?\\_r=0](http://www.nytimes.com/2011/10/22/business/global/china-warns-of-bad-effects-if-us-turns-protectionist.html?_r=0), archived at <http://perma.cc/4526-B5Z3>.

[U.S.] solar industry of protectionism that could” actually undermine not only the global economy but also “international efforts to [fight] global warming.”<sup>138</sup> Officials called the result a “lose-lose situation,” which would cause “an adverse impact on the bilateral trade interests of the two countries.”<sup>139</sup> Similar to the USW case against China, subsidies referenced in the latest Section 301 Petition are also trade-distorting domestic subsidies.<sup>140</sup> The USW petition claimed that the large subsidies to green technology help Chinese producers increase production, “seize market share, drive down prices, and put [international] competitors out of business.”<sup>141</sup> As a result of these subsidies, USW claimed that American companies and firms suffered from their exports being displaced, domestic market share eroding, prices plummeting, and jobs being lost.<sup>142</sup> This prejudice makes the subsidies actionable at the WTO under Articles 5 and 6 of the Agreement on Subsidies and Countervailing Measures.<sup>143</sup> Chinese officials point to Congress’s action as inconsistent with U.S. laws and out of line with WTO rules.<sup>144</sup>

A. *Fair Trade?* GPX International Tire Corp. v. United States

Chinese reports are claiming that the level of bilateral trade has somewhat increased the number of trade disputes, but the adjustment of the U.S. trade strategy is what has caused many of the trade issues with China. Another, and maybe more important, accusation from China claims that the United States is using “fair trade” as a ruse to bypass multilateral trade rules.<sup>145</sup>

In December 2011, a federal court ruled in *GPX International Tire Corp. v. United States* that existing U.S. law does not allow American companies to seek relief in the form of duties or tariffs against imported goods from China, which benefit from subsidies from the Chinese government.<sup>146</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> United Steelworkers, *supra* note 43.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Agreement, *supra* note 47, at 233–35.

<sup>144</sup> *See id.*

<sup>145</sup> *See id.*

<sup>146</sup> David J. Levine & Raymond Paretzky, *New Court Ruling Renders U.S. Anti-Subsidy Law Inapplicable to China*, MCDERMOTT WILL & EMERY (Dec. 20, 2011), <http://www.mwe.com/publications/uniEntity.aspx?xpST=PublicationDetail&pub=6566&PublicationTypes=0c37aff3-0fa4-487b-ae40-09ee0164a996>, archived at <http://perma.cc/88DX-L7S3>.

This ruling would make it difficult, if not impossible, for Chinese government subsidies to be addressed under existing U.S. law. In *GPX Int'l Tire*, the court examined the Tariff Act of 1930, which provides for two types of duties on imports that injure domestic industries:<sup>147</sup> first, Congress imposed anti-dumping duties on goods “sold in the United States at less than . . . fair value”<sup>148</sup> and second, countervailing duties are imposed on goods which receive “a countervailable subsidy” from a foreign government.<sup>149</sup>

“U.S. law allows for the imposition of both” types of duties: anti-dumping duties, “which are imposed on goods . . . sold by exporters at less than fair value,” and countervailing duties, “which are imposed on goods benefited from certain kinds of government subsidies,” goods exported from countries with market economies (non-communist countries; i.e., EU members, Australia).<sup>150</sup> But, for years, Commerce “refused to apply [countervailing duty] law to [non-market economy] countries” (i.e., China), arguing that “subsidies by definition do not exist in economies . . . not controlled by market forces.”<sup>151</sup> In 1986, the Court of Appeals for the Federal Circuit upheld Commerce’s approach in *Georgetown Steel Corp. v. United States*, but “the agency reversed its position in 2007” under pressure from American companies and industries.<sup>152</sup> That year, Commerce issued a statement that it would “continue to treat China as a [non-market economy] for purposes of the [anti-dumping] law,” but stated that it would treat China as a market economy for purposes of countervailing duties.<sup>153</sup> Commerce reasoned that China’s economy actually differed from Soviet-style “economies at issue in *Georgetown Steel*,” and the differences made it possible for the agency “to calculate whether the Chinese government” did in fact subsidize specific goods.<sup>154</sup> The Court of International Trade ruled in *GPX Int'l Tire* in 2010 that subsidy investigations of non-market economies are permissible, but not in conjunction with dumping investigations.<sup>155</sup>

On appeal, the Court of Appeals for the Federal Circuit in *GPX Int'l Tire* confirmed the ruling of CIT (but on different grounds) and invoked

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<sup>147</sup> *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732, 734 (Fed. Cir. 2011).

<sup>148</sup> 19 U.S.C. § 1673 (2006).

<sup>149</sup> 19 U.S.C. § 1671 (2006).

<sup>150</sup> Levine & Paretzky, *supra* note 146.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*; see also *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1309 (Fed. Cir. 1986).

<sup>153</sup> Levine & Paretzky, *supra* note 146.

<sup>154</sup> *Id.*

<sup>155</sup> See *GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337, 1345 (Ct. Int'l Trade 2010).

the principle of “legislative ratification,” concluding that Commerce is barred by statute from applying countervailing duty law to non-market economy goods.<sup>156</sup> The court held that when amending the countervailing duty law in 1988 and 1994, Congress confirmed earlier interpretations that countervailing duty law does not apply to non-market economy countries, such as China.<sup>157</sup> *GPX Int’l Tire* essentially put an end to Commerce’s application of both types of duties to cases involving China in its ruling that Commerce may not apply countervailing duty law to non-market economies.

*B. China’s Recent WTO Actions*

China consolidated complaints regarding the final Commerce determinations in four different anti-dumping/countervailing duty investigations (including those involved in the GPX case) into one WTO complaint.<sup>158</sup> China appealed decisions related to “anti-dumping duties and countervailing duties imposed by the United States” on four different products from China (steel pipes, rectangular pipes and tubes, laminated woven sacks, and certain off road tires).<sup>159</sup> “In each of the four . . . investigations, . . . Commerce treated China as a non-market economy” in order to “calculate[] the margins of dumping.”<sup>160</sup> In addition, Commerce decided “that various [state-owned enterprises] (‘SOEs’) that supplied” the goods and provided loans to the companies were public bodies.<sup>161</sup> China claimed that Commerce’s use of its non-market economy methodology to determine the value in anti-dumping investigations at the same time as imposing countervailing duties on the same products was double and inconsistent with the Agreement on Subsidies and Countervailing Measures.<sup>162</sup> China also argued that Commerce’s “determinations that certain SOEs” were “‘public bodies’ were inconsistent” with the same agreement.<sup>163</sup>

China chose not to directly appeal any of the determinations of the U.S. Court of International Trade from the *GPX Int’l Tire* case in

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<sup>156</sup> See *GPX Int’l Tire Corp.*, 666 F.3d at 745.

<sup>157</sup> *Id.* at 734.

<sup>158</sup> See Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 1, WT/DS379/AB/R (Mar. 11, 2011).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* ¶ 2.

<sup>161</sup> *Id.* ¶ 3.

<sup>162</sup> See *id.*

<sup>163</sup> *Id.*

United States court.<sup>164</sup> “The only objection raised regarding the . . . anti-dumping . . . determinations was that Commerce was double-counting remedies,” basically “applying duties twice on the same cost or expense.”<sup>165</sup> As discussed previously, the CIT “ruled that Commerce could not investigate” both anti-dumping and subsidy allegations at the same time for the same period, “because applying a non-market economy methodology in the anti-dumping” portion results in a double remedy.<sup>166</sup> The CIT did not tell Commerce it cannot “conduct subsidy investigations of non-market economies,” but rather ruled that “Commerce would have to figure” out a way “to avoid double counting.”<sup>167</sup>

The Appellate Body decision on March 11 also handed the Chinese a more impactful victory than the double-counting decision.<sup>168</sup> Commerce has treated “all Chinese state-owned enterprises” automatically “as public bodies,” which are directed and controlled by the government.<sup>169</sup> By operating under this assumption, Commerce has considered inputs in the manufacturing process from SOEs as financial contributions because they came from the government. To measure the subsidy, “Commerce only had to show that the price of the input . . . compared to a price from outside China was less.”<sup>170</sup>

The Department of Commerce was already undertaking the analysis to determine “whether SOEs provided inputs at prices that would make them countervailable,” but “[t]he Appellate Body decision will require a more complete analysis every time.”<sup>171</sup> Commerce will not be able to assume government control any longer; instead it will have to collect “evidence that the provision of the input is not a purely economic or commercial act.”<sup>172</sup> The Uruguay Round Agreements had already “recognized that [SOEs] could be commercial” and therefore must “be treated without assumptions about state direction or control.”<sup>173</sup> The Appellate Body adjusted

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<sup>164</sup> Elliot J. Feldman, *Unless It's All Politics, China and the United States Should Tone It Down*, CHINA-U.S. TRADE LAW (Apr. 25, 2011), <http://www.chinaustradelawblog.com/2011/04/articles/trade-disputes/wto/unless-its-all-politics-china-and-the-united-states-should-tone-it-down/>, archived at <http://perma.cc/4AMY-P3UQ>.

<sup>165</sup> *Id.*; Appellate Body Report, *supra* note 158, ¶ 4, 7.

<sup>166</sup> Feldman, *supra* note 164.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Feldman, *supra* note 164.

<sup>173</sup> *Id.*

Commerce's course by directing it to recognize and accept that "state-owned enterprises are legitimate entities in the world trading system."<sup>174</sup>

### 1. Implications

The United States will likely continue to treat SOEs as state controlled (although SOEs exist in the U.S. (e.g., GM, Chrysler)). If the United States continues to treat SOEs in this manner, it will make subsidy investigations much simpler, essentially allowing Commerce to assume that government control in those foreign countries equals excessive government funding. This methodology would be in direct violation of the recent WTO decision. If the United States were to be more accepting of the definition of an SOE as a non-public body, the report of the WTO Appellate Body could impact how the global economy is viewed and trade is executed, but legally the report is limited to trade and subsidy disputes only.<sup>175</sup>

The United States holds that its domestic law supersedes WTO law and often treats its defeats at the WTO as "applicable to the immediate case" only.<sup>176</sup> The Chinese victory may be short-lived due to its decision to rely on the WTO rather than appealing the decision directly in United States court. Additionally, the WTO has a clear institutional weakness, "it is limited only to prospective and indirect enforcement," and even then it only functions "with the cooperation of the parties."<sup>177</sup>

### C. *The New Statute Conflicts with the GPX International Tire Case Decision*

The United States currently has anti-subsidy duties on twenty-four goods from China and Vietnam,<sup>178</sup> but the recent court ruling in *GPX Int'l Tire* put those duties in jeopardy. In response to the December ruling, on March 13, 2012, President Obama signed an amendment to the Tariff Act of 1930 into law (H.R. 4105), which will allow Commerce to impose countervailing duties on imports from China and Vietnam.<sup>179</sup> H.R. 4105 (112th Congress) supports Commerce's rationale from 2007 "for finding subsidies in China," that "there is enough of a market in China" "to find

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Feldman, *supra* note 164.

<sup>179</sup> See H.R. 4105, 112th Cong. § 1 (2012).

subsidies but not enough to treat China as a market economy” or “find any sector sufficiently market-based to be treated as ‘market oriented.’”<sup>180</sup> Previously this rationale may have seemed illogical, but now it has clear statutory support.

This law guarantees that the current countervailing duty orders against China and Vietnam remain in effect, while also “overturning the December 19, 2011 decision of the Court of Appeals for the Federal Circuit.”<sup>181</sup> The new law was also worded in a way meant to “overcome adverse World Trade Organization . . . and Court of International Trade . . . decisions,” which found that U.S. law “did not prevent double counting and was therefore” unreasonable and inconsistent with the WTO.<sup>182</sup> “*GPX Int’l Tire* litigation will continue,” as plaintiffs have “raised the constitutionality of the new provision” in their latest appeal, arguing that the newest statute violates due process.<sup>183</sup>

#### D. Possible U.S. Protectionism

Chinese reports argue that through green and technological barriers, anti-dumping, and other non-tariff barriers, the United States is using “new protectionism aims to bypass established multilateral trade institutions to protect domestic jobs and repulse threatening competition from other countries.”<sup>184</sup> Protectionist practices are employed typically by taking advantage of the WTO trade rules claiming to be “free trade,” which is exactly what China has accused the United States of labeling its own actions.

The current world multilateral trade system is not without holes, so countries can find legal grounds for additional protectionist practices.

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<sup>180</sup> Elliot J. Feldman, *Nothing Unites the United States Congress Like China (And Not in a Good Way): Treating China Like Canada (Maybe Even Worse)*, CHINA-U.S. TRADE LAW (Mar. 20, 2012), <http://www.chinaustradelawblog.com/2012/03/articles/cvd/nothing-unites-the-united-states-congress-like-china-and-not-in-a-good-way-treating-china-like-canada-maybe-even-worse/>, archived at <http://perma.cc/HF3M-XZLW>.

<sup>181</sup> Claire Rickard Palmer, *New U.S. Law Ensures Countervailing Duties Continue to Apply to Chinese Imports*, MILLER CHEVALIER, (March 31, 2012), <http://www.millerchevalier.com/Publications/PublishedArticles?find=77203>, archived at <http://perma.cc/3BHZ-7JZQ>; see Doug Palmer, *Senate Oks Bill Aimed at China Subsidies*, REUTERS, (Mar. 5, 2012), <http://www.reuters.com/article/2012/03/05/us-usa-china-trade-idUSTRE8241KV20120305> [hereinafter Palmer, *Senate Oks Bill*], archived at <http://perma.cc/767W-JSLV>.

<sup>182</sup> Rickard Palmer, *supra* note 181.

<sup>183</sup> *Id.*

<sup>184</sup> Zhang Monan, *US Seeks Unfair Advantage*, CHINA DAILY, [http://usa.chinadaily.com.cn/business/2012-04/17/content\\_15070109.htm](http://usa.chinadaily.com.cn/business/2012-04/17/content_15070109.htm) (last visited Oct. 27, 2014), archived at <http://perma.cc/GR9A-3X43>.

An important question that remains is to examine whether the conduct of the United States is in fact contravening WTO rules and whether the United States is exercising super-protectionist behavior.

The WTO anti-dumping clauses may actually be employed as a protectionist tool. According to the Anti-Dumping Agreement as part of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”), the decision whether to impose an anti-dumping duty is to be made by the authorities of the importing member.<sup>185</sup> Because the importing member country makes the decision, the anti-dumping clauses easily lend countries a legal leg to stand on to implement protectionist conduct. Commerce is set to decide in May whether China is “dumping” solar panels into the United States at prices below their actual cost, in the recent SolarWorld case.<sup>186</sup> A product is considered to be dumped, under the GATT agreement, when it is “introduced into the commerce of another country at less than” its normal value or if the export “price of the product exported from one country to another is less than the comparable price.”<sup>187</sup> However, there must be a real injury to the competing domestic industry.<sup>188</sup> Although a decision has yet to be issued, the United States could easily use these WTO provisions to carry out a protectionist agenda regarding solar panel importation. As previously explained, imports of Chinese solar panels to the United States have skyrocketed, and they are offered at a seemingly much lower price than those manufactured in America.<sup>189</sup> But it could be wrong for Commerce to assess any anti-dumping tariffs on Chinese solar panels in May, because Chinese officials argue that “panel prices are even lower in China than in the U.S.”<sup>190</sup> Excluding regional factors such as direct government subsidies, income taxes, inflation, and investment risk factors, China’s direct manufacturing cost benefits for solar PV panels without shipping are only one to two percent compared to the United States, and with the enormous cost of shipping, China may actually suffer a 5% cost disadvantage.<sup>191</sup>

There is really no argument that manufacturers of solar panels in the United States have suffered recently, but causal links between China’s

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<sup>185</sup> General Agreement on Tariffs and Trade, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 [hereinafter GATT].

<sup>186</sup> See SOLARWORLD, *supra* note 132.

<sup>187</sup> GATT, *supra* note 185, art. VI(A)(1).

<sup>188</sup> *Id.*

<sup>189</sup> See ALAN GOODRICH, TED JAMES & MICHAEL WOODHOUSE, SOLAR PV MANUFACTURING COST ANALYSIS: U.S. COMPETITIVENESS IN A GLOBAL INDUSTRY 5 (Stanford University: Precourt Institute for Energy ed., 2011), available at <http://www.nrel.gov/docs/fy12osti/53938.pdf>; see also SEIA, *supra* note 56.

<sup>190</sup> Bradsher & Wald, *supra* note 66.

<sup>191</sup> GOODRICH, JAMES & WOODHOUSE, *supra* note 189, at 26.



prices and the harm to American industries must be real and material for anti-dumping duties to be permitted under U.S. and WTO law.<sup>192</sup> As previously stated, Chinese officials argue that the lower prices on PV panels are due to comparative manufacturing advantages as well as an excess capacity.<sup>193</sup> With the governmental encouragement to enter renewable energy, many companies have jumped into manufacturing and may have flooded the market with inventory. If this is the case, as Chinese analysts claim, then anti-dumping duties against China may not be proper.

Additionally, the United States may be employing protectionist and actually illegal practices in its decision to impose countervailing tariffs on Chinese imports in the SolarWorld case.<sup>194</sup> This argument mostly depends on the outcome of the *GPX Int'l Tire* case. If the final decision in that case is that the new statute allowing countervailing duties against non-market economies is unconstitutional, then the already-imposed countervailing tariffs on China would clearly be against the law. Commerce stated that it planned to continue treating China as a non-market economy for purposes of anti-dumping laws, so it is incongruent to treat China as a non-market economy simply to allow countervailing duties to be imposed. If China is truly a non-market economy, and the law is found unconstitutional, then the countervailing duties already imposed in the SolarWorld case are illegal. "Notably, the Federal Circuit stated in its original decision in the *GPX Int'l Tire* case that the only legal way to permit Commerce to apply the [countervailing duty] law to [a non-market economy] was to change the statute."<sup>195</sup>

When Commerce did change its policy in the mid-2000s to impose countervailing duties on non-market economies, "China contested the policy change both at the [WTO] and through the U.S. court system."<sup>196</sup> "At the WTO, [China] won a decision that the [U.S.] was 'double counting' many Chinese subsidies when it applied both countervailing and antidumping duties on the same good."<sup>197</sup> As mentioned above, the new statute allowing countervailing duties was worded in a way intended to overcome the adverse WTO and CIT trade decisions, which found the practice of assessing both countervailing duties and anti-dumping duties to offset the

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<sup>192</sup> GATT, *supra* note 185, art. VI(A)(1).

<sup>193</sup> See *supra* Part III.G.

<sup>194</sup> Leone, *supra* note 128.

<sup>195</sup> Rickard Palmer, *supra* note 181.

<sup>196</sup> Doug Palmer, *U.S. Lawmakers Agree on Bill to Fight China Subsidies*, REUTERS (Feb. 29, 2012), <http://www.reuters.com/article/2012/02/29/us-usa-trade-china-idUSTRE81S1F620120229> [hereinafter Palmer, *U.S. Lawmakers*], archived at <http://perma.cc/B827-TZ7M>.

<sup>197</sup> Rickard Palmer, *supra* note 181.

same unfair trade practice objectionable.<sup>198</sup> “The United States ha[d] until April 25, 2012 to implement the decision in the WTO dispute brought by China.”<sup>199</sup> Unless a change is made regarding U.S. trade laws, it is likely that China will continue to litigate the Department of Commerce’s decisions at the WTO, as it has done in the past. China may even bring new countervailing duty cases against American products, which China has done in the past to retaliate against U.S. trade actions. If Commerce decides to impose anti-dumping duties in addition to the countervailing duties already announced in March 2012 for solar PV panels, the United States would be assessing both countervailing duties and anti-dumping on the same trade practice, which is exactly what the WTO and CIT found unacceptable. China will have every right to bring a case before the WTO, as this would not be consistent with the Appellate Body’s decision in the previous WTO dispute.

## V. POTENTIAL LEGAL IMPLICATIONS

### A. *Legal Implications of H.R. 4105*

It appears that the new legislation, in fact, does not comply with WTO obligations. H.R. 4105 instructs Commerce, when finding dumping and subsidies, to “reduce the antidumping duty by the amount of the increase in the weighted average dumping margin estimated by the administering authority. . . .” (i.e., Department of Commerce).<sup>200</sup> Commerce must “reasonably estimate the extent to which the countervailable subsidy, . . . in combination with the use of normal value [from the antidumping calculation], has increased the weighted average dumping margin for the class or kind of merchandise.”<sup>201</sup> So if Commerce is unable to make that estimate, it cannot make the adjustment, but according to the statute, it must still calculate countervailing duties.<sup>202</sup>

The House Ways and Means Committee Chairman, Dave Camp, voiced concerns that the statute would violate WTO obligations announced in the March 2011 Appellate Body decision, which warned against double-counting.<sup>203</sup> “The United States Court of International Trade . . . struck down subsidy finding[s] of [Commerce] on GPX tires twice before” and

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<sup>198</sup> Palmer, *U.S. Lawmakers*, *supra* note 196.

<sup>199</sup> Rickard Palmer, *supra* note 181.

<sup>200</sup> H.R. 4105, 112th Cong. § 2(f)(1) (2012).

<sup>201</sup> *Id.* § 2(f)(1)(C).

<sup>202</sup> *See id.*

<sup>203</sup> *See* Palmer, *U.S. Lawmakers*, *supra* note 196.

explicitly recognized that countervailing duty and anti-dumping cases could potentially “lead to a double-counting that unlawfully would exaggerate remedies.”<sup>204</sup> The CIT held that Commerce may not assess both at the same time without employing “a methodology to solve the double-counting problem.”<sup>205</sup> The Court of Appeals in the *GPX* case did not even address the double-counting problem, so it seems that nothing has been done to address the problem. Although the CIT had ordered Commerce to find a solution to the double-counting problem before finding subsidies, H.R. 4105 orders Commerce to do just the opposite—find subsidies and then figure out a solution.<sup>206</sup> Commerce is essentially instructed to double-count, with companies in non-market economies left to contest the illegal double-counting on a case-by-case basis.

Even worse, the law contains a provision which allows it to apply to all proceedings initiated “on or after November 20, 2006.”<sup>207</sup> Commerce must take a second look at all countervailing duty petitions filed against China since November 2006 and assess subsidies without considering double-counting or the decisions of the CIT and the Court of Appeals. Petitioners from 2006 to the present then gain a substantial benefit, which did not exist when they originally filed their petitions. Herein lies the problem; typically legislation may be general or prospective, not retrospective, as retrospective statutes may violate the due process clause. Retrospective legislation must still meet the test of due process: a legitimate legislative purpose furthered by rational means.<sup>208</sup> In line with this, the Supreme Court has recognized that although there are serious objections to retroactivity, not all retroactive statutes are unconstitutional, but rather only those that, after a balancing of the considerations on both sides, are unreasonable.<sup>209</sup> On March 5, 2012, the U.S. Department of Justice filed a petition asking all nine judges of the U.S. Court of Appeals for the Federal Circuit to rehear *en banc* the original decision in *GPX Int'l Tire*.<sup>210</sup> Court-ordered briefs were filed on March 23, 2012 and raised the question of whether the statute’s retroactive nature violated due

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<sup>204</sup> Feldman, *supra* note 180.

<sup>205</sup> *Id.*

<sup>206</sup> See H.R. 4105 112th Cong. (2012).

<sup>207</sup> *Id.* § 1(b)(1).

<sup>208</sup> See U.S. CONST. amend. V; see also *Pension Benefit Guaranty Corp v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

<sup>209</sup> See *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315–16 (1945).

<sup>210</sup> *Congress Acts to Reverse Court Ruling Barring Application of U.S. Anti-Subsidy Law to China*, MCDERMOTT WILL & EMERY (Mar. 7, 2012), <http://www.mwe.com/Congress-Acts-to-Reverse-Court-Ruling-Barring-Application-of-US-Anti-Subsidy-Law-to-China-03-07-2012/>.

process.<sup>211</sup> If the Court of Appeals vacates its earlier decision, the case “could be remanded to the lower court (the CIT) for Commerce to recalculate the [countervailing duty] margin based on the new” law.<sup>212</sup>

If the case gets taken up by the Supreme Court, one possible outcome could be that the law is found to be unconstitutional as violating due process. Another possibility is that the Court will rule that only the retroactive provision is unconstitutional. However, if the law is struck down, Commerce will not be able to assess both countervailing duties and anti-dumping duties on non-market economy products, especially those from China. The agency will be limited to the decision in the *GPX Tire* case. The most controversial part of the legislation is the effective date of its reversal of the *GPX Int'l Tire* decision, which applies retroactively to all proceedings initiated on or after November 20, 2006.<sup>213</sup> Seemingly, the entire purpose of the effective date is to maintain the two dozen CVD orders Commerce has initiated in the last few years, each of which would be invalid unless the GPX decision is overturned by legislation or by an appeal.<sup>214</sup> The Court may hold that the retroactive aspect of the law (applying it back to 2006) violates due process in the sense that foreign entities involved in these previous investigations will have no notice and no involvement in the investigation or decision, and duties may be applied to products where it was previously not allowed by law (non-market economies).

To determine whether retroactive legislation is permissible, the Court must look to whether there is a legitimate legislative purpose furthered by rational means.<sup>215</sup> This legislation’s main purpose appears to be an effort to maintain the twenty-four existing countervailing duty orders against non-market economy imports (“23 on Chinese products, 1 on Vietnamese plastic bags”<sup>216</sup>). But the statute is also worded in a way meant to overcome the issues presented by the WTO and CIT regarding double-counting. If the Court finds that these two purposes reflect legitimate governmental purposes and are rationally related to achieving those purposes, the law may be held constitutional and allowed to exist.

A more difficult argument against H.R. 4105 would involve its purported violation of WTO rules. “Congress approved and implemented the WTO Agreement and other agreements” from “the Uruguay Round in the

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<sup>211</sup> Rickard Palmer, *supra* note 181.

<sup>212</sup> *Id.*

<sup>213</sup> Feldman, *supra* note 180.

<sup>214</sup> Rickard Palmer, *supra* note 181.

<sup>215</sup> See *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

<sup>216</sup> Rickard Palmer, *supra* note 181.

Uruguay Round Agreements Act.”<sup>217</sup> In ratifying the Uruguay Round Agreements Act (“URAA”), Congress examined the legal effect of WTO agreements and dispute settlement results in the United States.<sup>218</sup> This act states that “domestic law prevails over conflicting provisions of WTO agreements”; therefore, “provisions of WTO agreements,” as well as WTO panel and Appellate Body reports which conflict with U.S. federal law, do not have any domestic legal effect unless Congress or the executive branch “take[] action to modify or remove the conflicting statute” or regulation.<sup>219</sup> Although United States courts have recognized WTO decisions as persuasive, they have held that they are “not binding on the United States, government agencies, or the judiciary.”<sup>220</sup> This means that it is left to the executive branch to decide whether and how the United States should comply with particular WTO proceedings. Section 102(a)(1) of the URAA states that “[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”<sup>221</sup> Additionally, Section 102(a)(2) provides that nothing in the statute will be “construed . . . to amend or modify any law of the United States . . . or . . . to limit any authority conferred under any law of the United States . . . unless specifically provided for in this Act.”<sup>222</sup>

WTO panel findings at times have been brought to the attention of federal courts, most often as challenges to agency determinations in countervailing duty and anti-dumping proceedings. Commerce and USITC examine adverse WTO and Appellate Body reports and make determinations under Section 129 of the URAA.<sup>223</sup> Section 129 determinations are then reviewable under this statute, with the U.S. Court of International Trade having exclusive jurisdiction over civil actions.<sup>224</sup> The CIT’s decision “may be appealed to the U.S. Court of Appeals for the Federal Circuit, whose decisions are then reviewable by the U.S. Supreme Court.”<sup>225</sup> This is exactly the chain of events in the *GPX Int’l Tire* case.

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<sup>217</sup> Jeanne J. Grimmer, *World Trade Organization (WTO) Decisions and Their Effect in U.S. Law*, CONGRESSIONAL RESEARCH SERVICE (Feb. 4, 2011), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1812&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1812&context=key_workplace).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at i.

<sup>220</sup> *Id.* at 8–9.

<sup>221</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(a)(1), 108 Stat. 4809, 4815 (1994).

<sup>222</sup> Uruguay Round Agreements Act § 102(a)(2).

<sup>223</sup> Grimmer, *supra* note 217, at 5.

<sup>224</sup> *Id.* at 8.

<sup>225</sup> *Id.* at 7–8.

Because Federal Courts have consistently found WTO decisions to be persuasive, but not binding,<sup>226</sup> it is likely that China will have little traction in arguing that H.R. 4105 is breaking WTO rules. Even if China is correct in claiming that the new legislation does break WTO rules, U.S. federal law will reign supreme, especially as President Obama gave his approval in signing the bill.<sup>227</sup>

The legal and economic implications of this new legislation could be monumental. The United States government will undoubtedly continue to collect money on imports of the non-market economy products currently from the twenty-four existing orders, which the new legislation explicitly protects, as long as the law is permitted to remain in effect. But now, American industries will likely continue to bring new anti-dumping and countervailing duty petitions against more and more products from non-market economies, especially as countervailing duties were once prohibited on these products. Numerous parties will commence litigation regarding Commerce's decisions in non-market economy cases where this new methodology and litigation is employed. Based on its history, China will likely litigate Commerce's decision at the WTO, but because of the lengthy dispute process, it will likely take years to complete.

#### B. *Possible Retaliation by China*

On top of the litigation, China may bring additional countervailing duty cases against U.S. products as well. China already retaliated with its imposition of anti-dumping and countervailing duties on imports of American automobiles in late 2011.<sup>228</sup> Chinese officials have called the duty on American cars a “‘proper and equal’ counterattack to U.S. trade investigations aimed at China.”<sup>229</sup> Chinese officials believe that “[a]n eye for an eye is a sound way for China to face trade disputes with the United States under WTO regulations.”<sup>230</sup>

China's commerce minister Chen Deming argued that because the new U.S. trade bill violates WTO rules, his country was not obligated to follow the mandate.<sup>231</sup> Deming stated that China would abide by the rules

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<sup>226</sup> *Id.* at 8–9.

<sup>227</sup> *See id.* at 2–3.

<sup>228</sup> Li Fangfang & Ding Qingfen, *US Auto Imports Face Anti-Dumping Duties*, CHINA DAILY (Dec. 15, 2012), [http://usa.chinadaily.com.cn/us/2011-12/15/content\\_14268625.htm](http://usa.chinadaily.com.cn/us/2011-12/15/content_14268625.htm), archived at <http://perma.cc/8M9B-K9DS>.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Cary Huang & Lulu Chen, *US Trade Bill Breaks WTO Rules*, S. CHINA MORNING

of the WTO, but that China has “no obligation to follow domestic laws or regulations in any specific country that are not in line with the rules of international organisations.”<sup>232</sup> There is a danger that if China refuses to follow or abide by U.S. laws and decisions, other countries may fall in line with China and refuse to follow the U.S. trade laws, but that has yet to be seen.

Although China recently won an important decision in the WTO involving state-owned enterprises and double-counting, a January 2012 appeal decision involving rare mineral exports delivered a major blow to China.<sup>233</sup> China was directed to decrease its duties and “dismantle its export quota system.”<sup>234</sup> As petitioners to the action, “the U.S. and the [EU] have threatened to bring” another action in the WTO as follow up if China does not act according to the orders.<sup>235</sup> Opinions from the Chinese government and general business commentators seem to come to the same conclusion that China has no intent to comply with the terms of the latest decision.<sup>236</sup> This recent WTO decision is in fact bad for both the U.S. and China, and may actually be an omen of what may happen with current litigation involving solar cells. If China has no intention of following this decision, then China will not view itself as bound by any future decision in the WTO.

### C. *Dangers of U.S. Actions*

The United States cannot continue to expect that China will accept the kind of international trade treatment that the United States has employed in the past with other countries.<sup>237</sup> The most recent legislation, paired with the duties imposed on solar panels and cells from China, may very well stir up a trade war and years of animosity from China. A possible implication of the backlash against China could be that China may bow

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POST (Mar. 8, 2012, 12:00 AM), <http://topics.scmp.com/news/china-news-watch/article/US-trade-bill-breaks-WTO-rules>, archived at <http://perma.cc/EN96-DQBP>.

<sup>232</sup> *Id.*

<sup>233</sup> Dan Harris, *Another China WTO Loss, Another Nail in the Coffin of World Trade*, CHINA LAW BLOG (Feb. 6, 2012), [http://www.chinalawblog.com/2012/02/another\\_china\\_wto\\_loss\\_another\\_nail\\_in\\_the\\_coffin\\_of\\_world\\_trade.html](http://www.chinalawblog.com/2012/02/another_china_wto_loss_another_nail_in_the_coffin_of_world_trade.html), archived at <http://perma.cc/759L-M7HE>.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> See Elliot J. Feldman, *Lessons For China From Canada*, CHINA-US TRADE LAW, (Apr. 8, 2012), <http://www.chinaustradelawblog.com/2012/04/articles/trade-disputes/wto/lessons-for-china-from-canada/>, archived at <http://perma.cc/RW2C-4Z76>.

out of the judicial processes and give up on the rules. Or even worse, China may begin thinking of ways to retaliate against the United States or directly mimic its conduct.

*D. Implications in the WTO*

The WTO's decision for China will likely have little effect, as the United States generally treats every defeat as applicable to the immediate case only and to no others. The United States may ignore the WTO decision on double remedies. The WTO has a blaring institutional weakness: it is limited to prospective and indirect enforcement, and depends entirely on the cooperation of the parties.<sup>238</sup> The competitiveness between China and the United States could undermine the very institution upon which both countries, for political, economic, and legal reasons, have decided to rely.<sup>239</sup>

The result of this WTO litigation is a foreshadowing for what is likely to happen in the latest solar litigation and trade issues between China and the United States (and likely the EU). But China is not alone in its potential choice to ignore the decision; the WTO can determine that a member has violated the rules and sanction retaliation, and then the violator can basically ignore the consequences or just put up with them.<sup>240</sup> China's latest losses in the WTO empower the U.S. and other countries to impose trade-related sanctions against China, but because no actual sanctions have even been enforced, China can assume that no such sanctions will ever really be enforced.<sup>241</sup> China essentially believes that it can afford to ignore adverse WTO decisions. This type of behavior has the unfortunate implication of progressively weakening the WTO trade system. Although the WTO is "rules-based," its rules are negotiated agreements and it is member driven, with decisions made by consensus among all member governments.<sup>242</sup> In order for the WTO to function properly, members have to follow the rules they agreed to enact. If member countries choose to repeatedly ignore the rules and decisions of the WTO, or behave as if their rules are above WTO reproach, the system will be continually weakened.

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<sup>238</sup> See Harris, *supra* note 233.

<sup>239</sup> See Feldman, *supra* note 237.

<sup>240</sup> Although the 1994 Dispute Settlement Understanding ("DSU") strengthened the enforcement capabilities of the WTO system, countries still have the option to ignore WTO rulings (although they do face retaliatory measures).

<sup>241</sup> Harris, *supra* note 233; see also *Map of Disputes Between WTO Members*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_maps\\_e.htm?coun%20try\\_selected=CHN&sense=r](http://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm?coun%20try_selected=CHN&sense=r) (last visited Oct. 27, 2014), archived at <http://perma.cc/7UQB-MXSQ>.

<sup>242</sup> *Understanding the WTO*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/tif\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm) (last visited Oct. 27, 2014), archived at <http://perma.cc/JG63-KDNM>.



*E. Is an EU Investigation Imminent?*

SolarWorld is also considering opening a second portion of its fight against Chinese solar manufacturers in Europe. It appears that the low-cost Chinese PV modules may have been even more disastrous for European manufacturers, as evidenced by many plants shutting down over the past year and thousands of jobs gone.<sup>243</sup> The European Union is expected to join the United States in the fight, backing German solar panel producers.<sup>244</sup> In March 2012, a coalition of German manufacturers asked Brussels to launch an anti-dumping and anti-subsidy investigation for imports of Chinese PV solar panels.<sup>245</sup> “China has sent a delegation to consult with the EU in an attempt to convince the body that Chinese companies” have not in fact “been dumping goods in Europe,” but even the Chinese government recognizes that if an EU investigation is implemented, it would be a hit to Chinese manufacturers.<sup>246</sup>

VI. POTENTIAL POLICY IMPLICATIONS

*A. Global Implications*

India has already “latch[ed] on to the issue and is threatening to” now “investigate imports from the U.S. and China.”<sup>247</sup> Additionally, Germany has brought an anti-dumping claim, but the impact is likely not to be experienced for months.<sup>248</sup> More importantly, Chinese companies may receive a heavy blow if final U.S. tariffs and duties turn out to be as high as SolarWorld requested.<sup>249</sup> China’s major solar PV companies have already begun focusing on coping strategies.<sup>250</sup> Additionally, many companies in

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<sup>243</sup> Karl-Erik Stromsta, *SolarWorld May Take Chinese “Unfair Trade” Fight to Europe*, RECHARGE (Nov. 25, 2012), <http://www.rechargenews.com/solar/article1295188.ece>, archived at <http://perma.cc/6KV9-ZYQA>.

<sup>244</sup> Andrew, *Dumping Solar: The Case for CASE, Solar Growth and China’s Subsidies*, CLEANTECHNICA (Jan. 26, 2012), <http://cleantechnica.com/2012/01/26/dumping-solar-the-case-for-case-solar-growth-and-chinas-subsidies/>, archived at <http://perma.cc/BWH6-QQFC>.

<sup>245</sup> Keith Bradsher, *Europe Investigates Chinese Solar Panels*, N.Y. TIMES (Sept. 6, 2012), [http://www.nytimes.com/2012/09/07/business/global/eu-investigates-chinese-solar-panels.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/09/07/business/global/eu-investigates-chinese-solar-panels.html?pagewanted=all&_r=0), archived at <http://perma.cc/7778-RAN7>.

<sup>246</sup> *PV Outlook Darkens in Europe*, CHINA DAILY (Mar. 7, 2012), [http://www.china.org.cn/business/2012-03/07/content\\_24828510.htm](http://www.china.org.cn/business/2012-03/07/content_24828510.htm), archived at <http://perma.cc/VT7Z-BV8S>.

<sup>247</sup> Andrew, *supra* note 244.

<sup>248</sup> *See id.*

<sup>249</sup> *See Sweet, supra* note 49.

<sup>250</sup> *See id.*

China have already reported excess inventory<sup>251</sup> and if these tariffs or duties cause Chinese solar products to be too expensive, smaller companies may have to shut down. Final decisions on tariffs and duties on Chinese solar panels are not expected for several years, but based on the current situation some “solar-power developers have already changed their supply contracts from [solar] panels made in China to those made” in countries such as Taiwan and South Korea.<sup>252</sup> Even more developers may change their contracts based on the outcome of the investigations, which could be potentially very costly for China in the end.<sup>253</sup>

China’s advantage may not be sustainable in the long run regardless of the outcome. Factors such as inflation, growing importance of shipping costs, reliance on massive government subsidies, and lack of technological diversification are potential downsides for the Chinese solar PV industry.

*B. Implications in the U.S.*

1. U.S. Jobs

The rise of solar energy has created many jobs in the United States, during this particularly difficult economic situation.<sup>254</sup> As of early 2012, more than 100,000 Americans were employed in the domestic solar energy industry, and industry employment is expected to grow 24 percent in 2012.<sup>255</sup> But some experts worry that the trade issues with China will weaken this much needed job growth.<sup>256</sup> Kevin Lapidus, the senior vice president of legal and government affairs for MEMC SunEdison recently expressed that the solution for further progress in the solar industry is to keep “reduc[ing] the price of solar [PV] cells, modules and panels, . . . manufacturing and balance of systems costs.”<sup>257</sup> Countervailing duties on Chinese-made silicon PV panels may actually “increase the cost of solar

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<sup>251</sup> See Hart, *supra* note 26.

<sup>252</sup> Sweet, *supra* note 49.

<sup>253</sup> *Id.*

<sup>254</sup> Andrew, *supra* note 244.

<sup>255</sup> *Id.*

<sup>256</sup> Eric Wesoff, *CASE Responds: Spiraling Solar Trade War “Hurts Everyone, Everywhere,”* GREENTECH MEDIA (Nov. 22, 2011), <http://www.greentechmedia.com/articles/read/coalition-for-affordable-solar-spiraling-trade-war-hurts-everyone-everywher>, archived at <http://perma.cc/82GZ-C5V5>.

<sup>257</sup> Andrew, *supra* note 244.

PV modules and panels,” meaning that the “overall cost of installing solar energy systems will increase.”<sup>258</sup> With increased prices of the entire system, cancellations of many U.S. projects will likely follow, which in turn would repress job creation.<sup>259</sup> Installation jobs make up 52% of the U.S. solar industry.<sup>260</sup> Only 17% of jobs in the U.S. solar industry are in sales and distribution, and only 24% are in manufacturing, including manufacturing of all components of the systems.<sup>261</sup> The trade case is attempting to protect a small percentage of the solar job market, while possibly harming a large majority of the industry and its employees.

## 2. Undermining U.S. Public Interest

U.S. trade law does not contain a public interest exception; therefore, courts and agencies do not have a direct method for considering the competing interests of related industries. American solar manufacturers want the price of solar cells and panels to go up, but the companies installing solar systems prefer the trend in declining prices.<sup>262</sup> The lower price is attractive to installers because their job of selling individuals and companies full systems and installations is easier as compared to a few years ago, when the price of a solar system was out of reach for many people.<sup>263</sup>

In cases such as solar panels, the U.S. trade law appears to be directly opposing the public interest. On first glance, more affordable solar power is in the best interest of the public. Currently, however, U.S. trade law requires that an industry-filed petition showing material injury or threat of material injury from dumped foreign imports has to result in duties, raising the price of imports or excluding them from the United States market altogether. The public interest cannot stand up to the requirement in the current laws to provide a remedy to the injured party based on their proper petition, so in many cases the public may actually be harmed by government action to protect domestic industry.

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> See Ryan Koronowski, *It Keeps Getting Cheaper to Install Solar Panels in the U.S.*, CLIMATE PROGRESS (Aug. 13, 2013, 4:44 PM), <http://thinkprogress.org/climate/2013/08/13/2455121/solar-getting-cheaper/>, archived at <http://perma.cc/MF5J-BLVB>.

<sup>263</sup> See Ann Tatko-Peterson, *Solar Panels: Installation a Lesson in Patience*, SAN JOSE MERCURY NEWS (Jan. 9, 2014, 12:00 PM), [http://www.mercurynews.com/ci\\_24855585/solar-panels-installation-lesson-patience](http://www.mercurynews.com/ci_24855585/solar-panels-installation-lesson-patience), archived at <http://perma.cc/3HLB-RSN2>.

### 3. Undermining U.S. Clean Energy Policy

The most recent presidential administration and many U.S. states have been strong advocates of solar and renewable energy. If the cost of modules and solar energy go up, the growth of the industry and the viability of solar energy will be damaged. Solar energy has been criticized for being too expensive, but now costs have steadily dropped and the latest trade case with China may reverse this trend, making solar energy once again a point of contention. The drop in solar PV and polysilicon prices, resulting from increasing Chinese production, has ironically led governments in countries at the forefront of solar power and technology growth to cut back and possibly eliminate or hold off on subsidies and other incentives—as one report put it, “killing the goose that lays the golden eggs, so to speak.”<sup>264</sup>

### CONCLUSION

While China has made large strides in improving its environmental and energy laws and policies, there are unfortunate side effects to its quest for green growth. Some policies and laws are actually harmful to the international market, the most affected being the United States and European Union. However, the United States is not without fault. It too has been engaging in murky practices, and possibly even exercises in protectionism. The most unfortunate result of the growing trade tension revolving around solar panels and other green technology is that the world could actually benefit greatly from a more cooperative approach to tackling energy issues.

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<sup>264</sup> Andrew Burger, *Silicon, Solar Power & Manufacturing: China Continues to Play by Its Own Rules, Threatening All Comers*, CLEAN TECHNICA (Feb. 29, 2012), <http://cleantechnica.com/2012/02/29/silicon-solar-power-manufacturing-china-continues-to-play-by-its-own-rules-threatening-all-comers/>, archived at <http://perma.cc/8ASW-4J45>.