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Re: Application of the Countervailing Duty Law to Imports from the People's Republic of China

These comments are submitted in response to the request for comments published in the Federal Register at 71 Fed. Reg. 75,507 (December 15, 2006).[1] As explained more fully below, the countervailing duty law can and should be applied to imports from the People's Republic of China. The plain language of the statute indicates that all imports from all countries should be subject to the countervailing duty law. The statute on its face does not exclude imports from China or any other non-market economy (NME). Coupled with the fact that China is a signatory to the WTO Subsidies Agreement and has expressly acknowledged its obligations in the context of the Accession Agreement, there

[1] The comments are the views of the undersigned author and should not be attributed to companies that have been or may be represented by Williams Mullen in proceedings before the Commerce Department.

is no sound legal or policy reason to exempt China from a law that applies generally to all imports.

The arguments generally raised for exempting China from the reach of the law fall into two categories: legal and practical.[2] The legal arguments generally reply upon the decision of the Federal Circuit in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986). *Georgetown Steel*, however, addressed the application of section 303 of the Tariff Act of 1930 to imports from Eastern Europe. Imports from China are subject to a different statute entirely, enacted eight years after *Georgetown Steel*. Moreover, not only does the new statute apply to imports from any country, but the legislative history suggests that the decision in *Georgetown Steel* was a permissible, "reasonable," approach—not the only approach.

It follows that the Commerce Department has ample authority to change its practice. Faced with the question whether to apply section 701 of the Act to imports from China, Commerce is not bound to follow a policy established with respect to application of section 303. Rather, Commerce should impose on China the same obligations imposed on all other WTO members and signatories to the Subsidies Agreement.

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[2] These arguments are summarized in the testimony of Oren Yager, Director International Affairs and Trade, U.S. Government Accountability Office, "U.S.-China Trade, Challenges and Choices to Apply Countervailing Duties to China," GAO-06-608, dated April 4, 2006 (hereinafter "GAO-06-608").

I. CHINA IS NOT EXCLUDED FROM THE COUNTERVAILING DUTY LAW

A. The Plain Language of the Statute Encompasses Imports from All Countries

The current countervailing duty law makes no distinction between market and non-market economies or between China and other countries. The "general rule" set forth in Section 701 of the Act provides that countervailing duties shall be imposed if Commerce determines:

> that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States….[3]

The plain meaning of the "general rule" is that imports from any country are subject to the law, without exception. The only distinction made by Section 701 is between Subsidies Agreement countries, which are subject to the injury test requirement, and other countries, which are not.[4] However, whether or not China became a member of the World Trade Organization (WTO) and a signatory to the Subsidies Agreement, it was covered by the plain language of section 701. That China since 2001 has become a "Subsidies Agreement" country[5] only strengthens the case.

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[3] 19 U.S.C. § 1671(a).

[4] 19 U.S.C. §§ 1671(a)(2) and (b). *See also* 19 U.S.C. § 1677(30).

[5] 19 U.S.C. § 1671(b).

Section 701 does not anywhere reference the type of economy, market or non-market, in "a country." Nor does Section 771(5), defining "countervailable subsidy" make any reference to market or non-market economy countries. Instead, the definition of "countervailable subsidy" broadly includes any financial contribution by a foreign government that confers a benefit that is "specific" within the meaning of the statute.[6] The determination of a subsidy is not limited by whether "the recipient of the subsidy is publicly or privately owned…."[7] The definition thus encompasses economies in which companies are state-owned. Moreover, "financial contribution" is broadly defined without limitations regarding the type of economy. China or any other NME can bestow grants, make loans, invest in private companies, forgive debt, grant tax credits, or otherwise make any of the types of financial contributions described in the statute.[8]

China (or any NME country) can also confer a "benefit" as defined in the statute. Although Commerce may find it difficult to define, *e.g.*, "usual investment practice of private investors" or "a comparable commercial loan" within China in a given case,[9] the statute nowhere precludes Commerce from applying the definition of "benefit" in the case of China. Stated differently, the statutory scheme would permit Commerce to find that benefits were not bestowed in a particular situation because state-control made it

[6] 19 U.S.C. § 1677(5)(A).

[7] 19 U.S.C. § 1677(5)(C).

[8] 19 U.S.C. § 1677(5)(D).

[9] 19 U.S.C. §§ 1677(5)(E)(i) and (ii).

impossible to find a benchmark.[10] The statute does not, however, permit Commerce to find that no "benefit" is ever bestowed simply because the country is a non-market economy. Commerce must consider each factor and apply the statutory criteria in each case, based upon an administrative record. That record must be compiled, regardless whether the country is a market-economy or non-market-economy country.

Finally, the statute does carve out a specific group of countries for special treatment—developing countries.[11] Had Congress similarly intended to exempt China or any other NME from the countervailing duty law, one would expect the statute to be explicit.[12] Indeed, the antidumping law does include a specific provision to address NME imports. Absent such instructions in the countervailing duty statute, it follows that Congress intended for Commerce to have discretion in interpreting any ambiguity in the statute.[13]

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[10] Commerce could not reach this conclusion, however, with respect to China. Certainly in the case of China there is a well-established private equity market, and private borrowers have access to commercial sources of credit. In fact, as discussed below, the benchmarks for determining whether a benefit is bestowed can be readily identified in the regulations and current practice of the Department.

[11] *See, e.g.,* 19 U.S.C. § 1677(24)(B) (applying a higher threshold to determine "negligibility" with respect to imports from a developing country); § 1671b(b)(4)(B) (creating a different "de minimis" threshold for imports from a developing country).

[12] "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Boyer v. West*, 210 F.3d 1351, 1356 (Fed. Cir. 2000) (*quoting Field v. Mans*, 516 U.S. 59, 66 (1995)). *See also Terry v. Principi*, No. 03-7107, slip op. at 7 (Fed. Cir., May 10, 2004).

[13] The GAO turns the normal rules of statutory construction up-side down. The GAO argues that the lack of any mention of imports from NMEs in the countervailing duty law means that "Commerce lacks explicit legal authority" to apply that law to such

B. The Legislative History Does Not Betray Any Intent of Congress to Exempt NME Countries from the Countervailing Duty Law

Section 261 of the 1994 Uruguay Round Agreement Act ("URAA") repealed section 303 of the Tariff Act of 1930. Although "[i]n general," the new law was intended to have the same meaning as the old law, the URAA Statement of Administrative Action ("SAA") explicitly stated that the new definition of "subsidy" would be controlling whenever it was "inconsistent" with the old term, "bounty or grant."[14] The SAA went on to explain that the changes contained in the URAA were required in order to implement the Subsidies Agreement. It follows that the statute was intended to cover NME imports to the same extent that the Subsidies Agreement covers those imports and that the prior interpretation of "bounty or grant" was superceded by the new law.

The 1994 Act is quite different from its predecessor in establishing a definition of "countervailable subsidy." Sections 771(5) and 771(5A) require Commerce to consider enumerated factors indicating that a particular measure is (or is not) a "financial contribution" that confers a "benefit" and is satisfies the test for "specificity." The new statute does not admit of a blanket construction, as a matter of law, that NME countries

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imports. GAO-06-608T at 10. By its terms, however, the statute covers all imports from all countries. Where exceptions are made, e.g., for imports from non-signatory countries or least developed countries, the exceptions are expressed. The lack of any reference to NME imports therefore means that such imports were intended to be covered by the new law.

[14] Statement of Administrative Action, H.R. Doc. No. 103-316, Pt. 1, at 925, 1994 USCCAN at 4239.

cannot bestow countervailable subsidies. Rather, the 1994 Act requires Commerce to consider the record in each case, specifically addressing the statutory factors.

A statutory definition that enumerates specific factors for consideration is fundamentally different from a provision that merely references an illustrative list. The meaning of "bounty or grant" was not defined by reference to statutory factors. Instead, the definition evolved through practice and precedent under Section 303 over many decades. Thus, "bounty or grant" was an ambiguous term, and the agency interpretation was entitled to deference.[15] In contrast, once Congress adopted a detailed definition in 1994 and repealed Section 303, the judicial and agency precedents regarding "bounty or grant" expired with that provision.

It may be noted that the SAA references past policy with regard to NME countries and non-application of section 303 of the Act, citing "the reasonable proposition that the CVD law cannot be applied to imports from nonmarket economy countries."[16] Notably, though, the SAA does not endorse *Georgetown Steel* as establishing the definitive or the only interpretation of the statute. Nor does the SAA state that the past interpretation of Section 303, affirmed in *Georgetown Steel*, must be applied to Section 701, as amended. Indeed, the SAA goes on state that "the new definition of subsidy does not require that Commerce consider or analyze the effect (including whether there is any effect at all) of a

[15] *Georgetown Steel*, 801 F.2d at 1318.

[16] SAA at 926, 1994 USCCAN at 4240.

government action on the price or output of the [merchandise]."[17] Yet, in *Georgetown Steel,* precisely the inability to analyze whether the government action had any effect on the price or output of the merchandise justified the exclusion from the countervailing duty law.[18] Given that the new definition of "countervailable subsidy" makes this inquiry obsolete, it follows that the prior practice no longer applies under the 1994 Act.

Moreover, the SAA is careful to describe *Georgetown Steel* as a "reasonable" interpretation. The choice of "reasonable" echoes its use in cases such as *Chevron*.[19] Assuming any ambiguity in the statute (in terms of whether China should be covered by the countervailing duty law), guiding case law teaches that Commerce has discretion to resolve that ambiguity. The indication that *Georgetown Steel* was a "reasonable" interpretation of section 303 reflects Congress's intent for the Commerce Department to exercise its discretion with respect to the issue, conducting the factual analysis now required by Sections 771(5) and 771(5A).

[17] SAA at 926, 1994 USCCAN at 4240.

[18] 801 F.2d at 1315 (finding "no reason to believe" that exports from an NME would be sold "at higher prices or on different terms.").

[19] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 1984).

C. China's WTO Commitments Indicate that Subsidy Disciplines Apply, Whether or not China is Deemed a "Market" Economy

1. China acceded to the Subsidies Agreement and agreed to be subject to the countervailing duty law

By joining the WTO in 2001, China agreed to be bound by the Subsidies Agreement without restriction. The terms of the Agreement apply to China upon accession to the WTO and regardless of whether China is deemed to be a non-market economy for the purposes of the antidumping law.

Moreover, in its WTO Accession Agreement, China committed to "eliminate all export subsidies, within the meaning of Article 3.1(a) of the SCM Agreement, by the time of accession."[20] To this end China would "cease to maintain all pre-existing export subsidy programmes and, upon accession, make no further payments or disbursements, nor forgo revenue, or confer any other benefit, under such programmes."[21] By entering additional, specific commitments to eliminate export subsidies, China concedes that export subsidies can exist.

China also agreed that subsidies to state-owned companies could be "specific" in certain circumstances. In the Accession Agreement, China committed that "subsidies provided to state-owned enterprises will be viewed as specific if, inter alia, state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises

[20] Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432, 23 November 2001, Part I, ¶ 10.3 ("Accession Agreement").

[21] Working Party Report, WT/ACC/CHN/49, at 33. *See* Accession of The People's Republic of China, Decision of 10 Nov. 2001, WT/L/432.

receive disproportionately large amounts of such subsidies."[22] Again, implicitly, the Agreement contemplates that subsidies even to state-owned enterprises can be measured, regardless of whether the economy as a whole is distorted by state control.

The Accession Agreement also anticipated the use of alternative methodologies with respect to measuring subsidies on domestic production, equity infusions, grants to purchase capital equipment and other, more sophisticated forms of government largesse. The Accession Agreement recognized that the measurement of certain subsidies might be difficult because "prevailing terms and conditions in China may not always be available as appropriate benchmarks."[23] For this reason, China agreed that Members could resort to other benchmarks, including information from third countries:

> In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.[24]

In sum, China agreed explicitly to be bound by commitments under both the Subsidies Agreement and the Accession Agreement with respect to prohibited and

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[22] Accession Agreement, Part I, ¶ 10.2.

[23] Accession Agreement, Part I, ¶ 15(b).

actionable subsidies. Among other provisions, the Subsidies Agreement explicitly authorizes the use of countervailing duties to address subsidized imports. Read together with the Subsidies Agreement, China's Accession Agreement contemplated that China would be subject to the countervailing duty law. In fact, the Accession Agreement anticipated the practical difficulties presented by a non-market economy and expressly authorized the use of alternative measures to address those issues.

2. Complaints by the United States under the Subsidies Agreement establish that subsidies can be identified and benchmarked

Although Commerce has not until recently been asked to apply the countervailing duty laws to imports from China, the United States has invoked Subsidies Agreements as the basis for complaints regarding Chinese subsidies. In 2004, for example, the United States lodged a WTO complaint against China with respect to a differential VAT tax applied to Chinese-produced semiconductors but not to imported semiconductors.[25]

In April 2006, the United States and the European Union (later joined by Canada), requested consultations under the Subsidies Agreement with respect to Chinese "Measures Affecting Imports of Automobile Parts."[26] In their requests for consultations,

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[24] *Id.*

[25] USTR press release 2004-22: "U.S. Files WTO Case Against China Over Discriminatory Taxes That Hurt U.S. Exports" (March 18, 2004).

[26] *China - Measures Affecting Imports of Automobile Parts - Request for Consultations by the European Communities,* WT/DS339/1, G/L/770, G/TRIMS/D/22, G/SCM/D67/1, 3 April 2006; *China - Measures Affecting Imports of Automobile Parts - Request for Consultations by the United States,* WT/DS340/1, G/L/771, G/TRIMS/D/23, G/SCM/D68/1, 3 April 2006; *China - Measures Affecting Imports of Automobile Parts -*

the European Union and the United States alleged that China had violated Article 3 of the Subsidies Agreement, by imposing higher taxes on imported auto parts than were imposed on domestic auto parts. The effect of this policy was to subsidize the purchase of domestic auto parts versus imported parts.

These recent attempts to discipline China's use of subsidies illustrate that the principles of the Subsidies Agreement can be applied to a non-market economy. The definitions of "financial contribution" and "benefit" found in Articles 1.1 and 14 of the Subsidies Agreement call for analysis of the same factors that must be considered under Section 771(5) of the U.S. statute.[27] Given U.S. complaints regarding China's subsidies it cannot be maintained that the definition of "countervailable subsidy" excludes Chinese measures.

D. Neither *Georgetown Steel* Nor Past Commerce Practice Compels a Different Conclusion

Against the statute, its legislative history and China's WTO commitments, two arguments are most often raised: (1) the Federal Circuit indicated that Congress would need to amend the statute to apply the law to NME countries,[28] and (2) longstanding

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Request for Consultations by Canada, WT/DS342/1, G/L/774, G/TRIMS/D/24, G/SCM/D70/1, 19 April 2006.

[27] Indeed, Section 771(5) was added to the statute precisely to implement the distinction in the Subsidies Agreement between "actionable and non-actionable" subsidies. SAA at 928, 1994 USSCAN at 4242.

[28] *See* 801 F.2d at 1318.

agency practice and the contemporaneous construction of the 1994 Act indicate that Congress acquiesced in the exclusion of NME countries.

As to the first argument, *Georgetown Steel* did not interpret Section 701 as amended in 1994. The Federal Circuit in *Georgetown Steel* was faced with the Commerce Department's interpretation of Section 303 of the Act. Moreover, the precise question presented to the court was the meaning of "bounty or grant"—terms not defined by Congress in Section 303. Given than the 1994 Act explicitly added a definition of "countervailable subsidy," Commerce is not required by *Georgetown Steel* to continue its past practice under Section 303. Stated differently, in enacting Section 701, Congress did not acquiesce to a longstanding agency practice because the practice itself only existed under Section 303 of the Act.

As noted above, the 1994 Act is quite different from its predecessor in establishing a definition of "countervailable subsidy." The 1994 Act required Commerce to consider the record in each case. It follows that Congress in 1994 did not acquiesce to a blanket exclusion of all NME countries from the countervailing duty law. Rather, Congress adopted a new definition compelled by the Subsidies Agreement, leaving it to the agency to determine how the new definition should be applied in specific cases.

Even if the agency in 1994 and thereafter continued to apply the old approach to imports from NME countries, Commerce need not continue that approach indefinitely,

without regard to the facts in particular cases..[29] Rather, Commerce should follow sections 701, 771(5) and 771(5A), considering anew the statutory factors and determining on a case-by-case basis whether a "countervailable subsidy" exists.

Commerce should not bind itself to an earlier interpretation of a different statute. "An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances."[30] Recognizing the role of administrative agencies in this context, the Supreme Court has held that an agency may depart from its own prior construction of a statute, even where a reviewing court has affirmed that construction, so long as the new agency interpretation passes muster under *Chevron.*[31] Otherwise, agency interpretations once adopted would ossify, defeating the purpose of delegation to an expert agency. Here, particularly, given that the 1994 Act calls for the agency to apply a series of factors

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[29] It should be noted that the specific question whether to apply the countervailing duty law to China was not formally raised in 1994 or even in 2001, following China's accession to the WTO. It has only recently been presented in the form of a petition for consideration by Commerce. Hence, it is not clear that Commerce adopted any contemporaneous construction of Section 701 with respect to imports from NME countries.

[30] *Rust v. Sulllivan*, 111 S.Ct. 1759, 1769 (1991). Of course, when the agency does change its policy, the new policy must pass the *Chevron* test and reasons must be given for the change. *Allegheny Ludlum Corp. v. United States*, 24 C.I.T. 452, 458 (Ct. Int'l Trade 2000).

[31] *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Services*, 125 S.Ct. 2688 (2005) (holding that a prior judicial construction of a statutory provision does not foreclose *Chevron* deference with respect to a subsequent construction by the agency different from the prior judicial interpretation). *See, also, Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (9th Cir. 2005).

to determine whether "countervailable subsidies" exist, there is ample reason to reject a rule that exempts all NME countries from the statute.

II. THE TOOLS EXIST TO OVERCOME PRACTICAL DIFFICULTIES IN MEASURING SUBSIDIES

A. Introduction

In 1984, Commerce took the position that when the entire economy of a country is distorted by state control, it is impossible to determine whether trade in particular products had been distorted by subsidies.[32]

> Subsidies in market economy systems are exceptional events. They can be discerned from the background provided by the market system. No such background exists in an NME…. In such a situation, we could not disaggregate government actions in such a way as to identify the exceptional action that is a subsidy.[33]

In 2006 testimony, the GAO likewise found that Chinese subsidies would be difficult to define or quantify, citing in particular the difficulty in identifying interest rates and preferential loan programs.[34]

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[32] *Countervailing Duties; Final Rule*, 63 Fed. Reg. 65348, 65354 (Dep't Comm., November 25, 1998). *See also, e.g., Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19370 (May 7, 1984) (final negative CVD determination) and *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19374 (May 7, 1984) (final negative CVD determination).

[33] *Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. at 19,376.

[34] GAO-06-608T at 11.

At the outset, it should be emphasized that such issues should be addressed on a case-by-case basis, given the circumstances in each investigation. For the reasons set forth above, Commerce should analyze the statutory factors to determine in each case whether a "countervailable subsidy" exists. Just as Commerce in antidumping investigations determines whether individual Chinese exporters are sufficiently independent to obtain their own antidumping rate, so too in countervailing duty investigations the circumstances of each industry and company may vary.

B. Subsidies are not Necessarily Difficult to Identify in China's Economy

In the preamble to its current countervailing duty regulations, Commerce explained that, for certain types of subsidies, there is no doubt that a "benefit" is provided within the meaning of Article 1 of the Subsidies Agreement. Among those programs that conclusively bestow a benefit, Commerce identified grants and direct tax exemptions, as well as preferential loans and worker-related subsidies.[35] With respect to such subsidies, Commerce "will not seek to establish, nor entertain arguments related to, whether or how that program comports with the definition of benefit contained in this section."[36]

Likewise, whether or not state-control makes it difficult to separate some "subsidies" from the overall distortion in the economy, other subsidies are obvious. Grants, for example, need not be measured against a commercial benchmark or set in a

[35] *Countervailing Duties,* 63 Fed. Reg. at 65,359.

[36] *Id.*

market economy: "In the case of a grant, a benefit exists in the amount of the grant."[37] Debt forgiveness is similarly defined to confer a benefit: "In the case of an assumption or forgiveness of a firm's debt obligation, a benefit exists equal to the amount of the principal and/or interest (including accrued, unpaid interest) that the government has assumed or forgiven."[38]

Or, in the case of an exemption from or remission of direct taxes, "a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program."[39] In a similar manner, the United States and the European Union identified and measured alleged subsidies in the ongoing WTO dispute involving *Auto Parts* by reference to the difference between taxes imposed on imported auto parts and taxes imposed on domestically produced auto parts.[40] Neither request for consultations required resort to third-country benchmarks to measure the alleged subsidies.

With respect to the excessive remission of VAT taxes, a frequent charge against China, the Commerce regulations provide as follows:

> In the case of a program that provides for the remission of prior-stage cumulative indirect taxes on inputs used in the production of an exported product, a benefit exists to the extent that the amount remitted exceeds the amount of

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[37] 19 C.F.R. § 351.504(a).

[38] 19 C.F.R. § 351.508(a).

[39] 19 C.F.R. § 351.509(a)(1).

[40] *China - Measures Affecting Imports of Automobile Parts, supra,* G/SCM/D67/1 and G/SCM/D68/1.

> prior-stage cumulative indirect taxes paid on inputs that are consumed in the production of the exported product….[41]

In short, the existing regulations both define a benefit and provide the methodology for measuring the amount of the subsidy with respect to many of the programs that have been identified by the United States in submissions to the WTO SCM Committee. Hence, it is not at all clear that "Commerce cannot arrive at economically meaningful conclusions" regarding the levels of subsidies in China.[42]

B. Commercial Benchmarks for Chinese Companies Present the Same Challenges Faced in Market Economies and are Susceptible to the Same Approaches

With respect to the identification of commercial benchmarks for measuring allegedly preferential loans, Commerce has been able to identify benchmarks even where commercial banks in the country under investigation did not provide comparable financing. Thus, for example, in *Steel Wire Rod from Brazil,* [43] certain long-term, variable-rate financing was available only to Brazilian companies under a government program (FINAME). Lacking any comparable financing from Brazilian sources, denominated in Brazilian currency, Commerce found that the companies under investigation had obtained dollar-denominated loans from third-country institutions.

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[41] 19 C.F.R. § 351.518(a)(2).

[42] Yager Testimony, GAO-06-608T at 8.

[43] *Carbon and Certain Alloy Steel Wire Rod from Brazil,* 67 Fed. Reg. 55,805 (August 30, 2002) (final CVD deter.), Issues and Decision Memorandum dated Aug. 23, 2002 at 30.

Given that these loans were commercially available, Commerce used the interest rates on this type of financing as the benchmark.

In *Steel Beams from Korea*, Commerce noted that the Government of Korea ("GOK") had "influenced the practices of lending institutions in Korea and controlled access to overseas foreign currency loans" prior to 1991 and that "the GOK controlled directly or indirectly the lending practices of most sources of credit in Korea between 1992 and 1997."[44] Yet, Commerce was able to identify commercial benchmarks from several sources, including:

- "the company-specific weighted-average U.S. dollar-denominated interest rates on the companies' loans from foreign bank branches in Korea…";
- "the yield on long-term government bonds as reported by the International Monetary Fund's (IMF) International Financial Statistics Yearbook…";
- for one Korean producer, "a U.S. dollar loan benchmark that is not company-specific, but provides a reasonable representation of industry practice…"; and
- "{f}or those programs requiring the application of a U.S. dollar-denominated short-term interest rate, … the average interest rate on lending rate loans for the POI, as reported in the IMF's International Financial Statistics Yearbook."[45]

[44] *Structural Steel Beams from the Republic of Korea*, 65 Fed. Reg. 41,051, July 3, 2000, Issues and Decision Memorandum dated June 26, 2000.

[45] *Id.*

In a given case, Chinese exporters may likewise have dollar-denominated loans (or other loans from market-economy lenders) that can be used as commercial benchmarks. If even a few respondents in a given case have commercial loans, their experience can be extrapolated to the industry in the same manner now applied by Commerce in market economy cases. So long as the Chinese currency is tied to the U.S. dollar, other U.S.-dollar-denominated loan rates may provide "reasonable" benchmarks in lieu of actual commercial loans. And, the International Monetary Fund reports several different lending and bond rates with respect to available financing in China.

In short, in specific cases almost certainly a commercial benchmark can be determined for China by analogy to the practices and precedents already established in other cases. As such, "economically meaningful conclusions"[46] can be drawn from existing evidence using the methodologies that Commerce has adapted over many years.

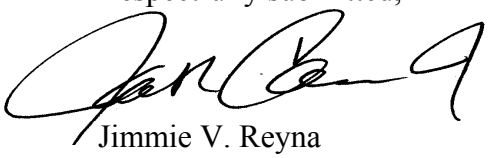
III. CONCLUSION

For all of the reasons above, the Commerce Department should not apply a policy and practice developed under Section 303 of the Act, which Congress deliberately repealed. Faced with the question of whether to apply section 701 of the Act to imports from China, Commerce should apply the definition of "countervailable subsidy" to the facts of each case. A record can be made and regulations and precedents applied with respect to the relevant benchmarks. In these circumstances, Commerce should impose on

[46] Appendix A, GAO-06-608T at 8.1

China the same obligations imposed on all other WTO members and signatories to the Subsidies Agreement.

Respectfully submitted,



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