PUBLIC DOCUMENT

January 16, 2007

BY HAND AND E-MAIL

Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Re: Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment

Dear Ms. Kuhbach:

In accordance with the Department's notice at 71 Fed. Reg. 75,507 (Dec. 15, 2006), please find enclosed the original and eight copies of comments being timely submitted on behalf of the Specialty Steel Industry of North America ("SSINA") regarding the application of the countervailing duty law to imports from non-market-economy countries such as the People's Republic of China. As requested, this submission is also being filed electronically.

Please contact the undersigned if there are any questions.

Respectfully submitted,

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Enclosure

I. INTRODUCTION

These comments are made on behalf of the Specialty Steel Industry of North America ("SSINA"), which is a Washington, D.C.-based trade association that includes virtually all U.S. producers of specialty steel, in response to the Department's request for comment at 71 Fed. Reg. 75,507 (Dec. 15, 2006), concerning the application of the countervailing duty law to imports into the United States from non-market-economy ("NME") countries. SSINA appreciates the opportunity to have its views considered in this matter. In SSINA's judgment, the U.S. countervailing duty law – consistent with the international legal rights of the United States – requires that subsidized, injurious imports from NME countries be subject to countervailing duties.

II. COMMERCE IS OBLIGATED TO APPLY THE COUNTERVAILING DUTY LAW TO SUBSIDIZED, INJURIOUS IMPORTS FROM NON-MARKET-ECONOMY COUNTRIES AS WELL AS FROM MARKET-ECONOMY COUNTRIES

In papers filed last week with the U.S. Court of International Trade ("CIT") concerning the Department's underlying countervailing duty investigation ("CVD") of Coated Free Sheet Paper from the People's Republic of China, the Government of the People's Republic of China ("China" or "PRC") has argued that the court in Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986) ("Georgetown Steel"), ". . . unequivocally found that the applicable statute did not allow application of the CVD law to countries that have been designated as a NME," that Congress since has "effectively affirmed" Georgetown Steel, and, alternatively, that even if the Department has discretion in this matter, the Department over the past twenty years has created "a binding rule" not to apply the CVD law against NME countries and can only

change that "binding rule" through a rulemaking under the Administrative Procedure Act, 5 U.S.C. §§ 551, et seq.[1]

On the other hand, in its response to the PRC in that appeal, the United States has contended that Georgetown Steel determined that the Department properly exercised its discretion under the statute that applied at the time (19 U.S.C. § 1303, since repealed) and has asserted that the Department may address and decide the applicability or not of the CVD law to the PRC in the context of the ongoing countervail investigation against Chinese coated free sheet paper as a proper exercise of the agency's authority to interpret the CVD law.[2]

For the reasons set forth below, SSINA respectfully submits that, under the present international and U.S. domestic legal regime governing countervailing duty proceedings, the Department is obligated to enforce the CVD statute in a non-discriminatory manner against imports whether from market-economy countries or non-market-economy countries. With respect to the countervailing of subsidies provided by NME countries' governments, the controlling law has changed since Georgetown Steel and now requires the imposition of countervailing duties against subsidized, injurious imports from NME countries such as China.

A. China Has Bound Itself to the Agreement on Subsidies and Countervailing Measures, Which Directs That Countervailing Duties Are Applicable to Imports From Non-Market-Economy Countries Such As China

Upon becoming a member state of the World Trade Organization ("WTO") on December 11, 2001, the PRC committed itself under public international law to the rights and obligations of

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[1] Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and for A Preliminary Injunction, at 13 (Jan. 9, 2007), Government of the People's Republic of China v. United States, Court No. 07-10 (CIT 2007).

[2] Defendant's Opposition to Plaintiff's {sic} Motion for Temporary Restraining Order, at 2, 7, 16-18 (Jan. 10, 2007), Government of the People's Republic of China v. United States, Court No. 07-10 (CIT 2007).

the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), one of the WTO's multilateral agreements that automatically enter into force at the time a country joins the WTO.[3]

Very importantly, the PRC's Protocol of Accession does not qualify the SCM Agreement's coverage of China's exports to the WTO's other member states in a way that would permit the United States generally not to countervail subsidized, injurious imports from China.[4] Any such substantially differential treatment favoring the PRC vis-à-vis other member states would have been a marked departure from the most-favored-nation ("MFN") principle in Article I of the WTO's General Agreement on Tariffs and Trade and certainly would have been negotiated extensively and made explicit if intended and agreed by consensus. There is nothing, however, in China's Protocol of Accession to this effect, and no negotiations on this score seem to have occurred.[5]

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[3] See, e.g., Accession of the People's Republic of China, ¶ 15, WT/L/432 (Nov. 23, 2001) (". . . the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member . . . ." (emphasis added)). Similarly and more recently, the SCM Agreement has likewise become binding upon Viet Nam, another country that has a non-market economy. See, e.g., Report of the Working Party on the Accession of Viet Nam, ¶ 255, WT/ACC/VNM/48 (Oct. 27, 2006).

[4] What rights China did reserve under the SCM Agreement, for example under Articles 27.10, 27.11, 27.12, and 27.15 concerning developing countries, actually reinforce the conclusion that the SCM Agreement generally shall apply to Chinese-origin products. See Report of the Working Party on the Accession of China, at 33-34, WT/ACC/CHN/49 (Oct. 1, 2001). This understanding is further substantiated by China's notification last year of a number of its subsidies to the WTO's Committee on Subsidies and Countervailing Measures. See People's Republic of China – New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement, G/SCM/N/123/CHN (Apr. 13, 2006).

[5] Given the absence of an express reservation on MFN treatment for China in China's Protocol of Accession, the Department should dismiss the PRC's claim that no countervailing duties should be levied on China's exports unless and until the PRC is found to be a market-economy country for the purpose of antidumping duty cases. See Position Paper of The Ministry of Commerce, People's Republic of China, Bureau of Fair Trade for Imports and Exports, Concerning the CVD Petition Against Imports of Coated Free Sheet Paper from China, at 18 (Nov. 20, 2006). As has

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The starting point, then, is that the SCM Agreement's terms and conditions clearly are binding upon the PRC under public international law. The broad scope of the SCM Agreement likewise is clear from the fact that there is no distinction made anywhere in its provisions between market-economy and non-market-economy countries regarding the SCM Agreement's operation. As long as (i) there is a governmental financial contribution, (ii) that confers a benefit upon the recipient, and (iii) that is specific, the SCM Agreement stipulates that there is a countervailable subsidy. See SCM Agreement, at Articles 1, 2, and 3. This even-handedness makes sense from the standpoint of the MFN requirement and from the vantage that NME countries' governments regularly can and do confer countervailable subsidies just as market-economy countries' governments can and do.[6]

B. In the Uruguay Round Agreements Act Congress Faithfully Incorporated in U.S. Domestic Law the SCM Agreement's Definition of A Countervailable Subsidy, So That Commerce Must Apply the Countervailing Duty Law to Imports From Non-Market Economy Countries As Well As From Market-Economy Countries

Congress executed the SCM Agreement into U.S. domestic law by means of the Uruguay Round Agreements Act of 1994. As of January 1, 1995, therefore, the definition of what

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long been true at the international and U.S. domestic legal levels, market-economy countries' exports that have been both injuriously dumped and subsidized are subject appropriately to antidumping and countervailing duties. The MFN principle calls for the same treatment for dumped and subsidized imports from NME countries, including an upward adjustment to U.S. price in dumping computations under 19 U.S.C. § 1677a(c)(1)(C) in the amount of any countervailing duty imposed on the subject merchandise to offset export subsidies. In this regard, too, the Department should reject the PRC's views on so-called double-counting. See Position Paper of The Ministry of Commerce, People's Republic of China, Bureau of Fair Trade for Imports and Exports, Concerning the CVD Petition Against Imports of Coated Free Sheet Paper from China, at 16-18 (Nov. 20, 2006).

[6] Again, if the Member States of the WTO had wanted to draw a distinction in the SCM Agreement so as to countervail subsidies by market-economy countries' governments, but preclude the countervailing of subsidies by NME countries' governments, language to that end would have been employed in the SCM Agreement.

constitutes a countervailable subsidy was established in 19 U.S.C. §§ 1677(5) and (5A) consistent with and accurately reflective of the definition of a countervailable subsidy in Articles 1, 2, and 3 of the SCM Agreement. Accordingly, as relevant, U.S. domestic law provides that a countervailable subsidy exists if (i) there is a governmental financial contribution (19 U.S.C. § 1677(5)(B)(i)), (ii) that confers a benefit upon a person (19 U.S.C. § 1677(5)(B)), and (iii) that is specific (19 U.S.C. §§ 1677(5)(A) and (5A)). Furthermore, under 19 U.S.C. §§ 1671(a) and (b), the U.S. countervailing duty law is expressly and unqualifiedly applied to a country such as China that is subject to the SCM Agreement.

Of great importance, this faithful implementation of the SCM Agreement in U.S. domestic law means that there is no differentiation between market-economy countries and non-market-economy countries. If the criteria just recapitulated are met, there is a countervailable subsidy regardless if conferred by a market-economy or non-market-economy country's government. This even-handedness satisfies the mandatory MFN standard.

In taking this position, SSINA recognizes that certain legislative history accompanying the Uruguay Round Agreements Act has been cited by the PRC as supportive of its contention that Georgetown Steel remains controlling and holds that the CVD law is not to be applied to imports from NME countries.[7] In particular, the PRC relies for this proposition upon two excerpts from the Statement of Administrative Action ("SAA") of the Uruguay Round Agreements Act. Neither of these bits of legislative history is persuasive for the PRC, however, when scrutinized and put in the broader perspective of the SCM Agreement's language and China's Protocol of Accession to the WTO.

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[7] Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and for A Preliminary Injunction, at 21-23 (Jan. 9, 2007), Government of the People's Republic of China v. United States, Court No. 07-10 (CIT 2007).

First, the PRC insists that the SAA " . . . explicitly affirmed the proposition contained in *Georgetown Steel* that the CVD law does not apply to non-market economies."[8] Nevertheless, the portion of the SAA relied upon by the PRC is not, in fact, supportive of China.

> Section 771(5)(C) provides that in determining whether a subsidy exists, Commerce is not required to consider the effect of the subsidy. In *Certain Softwood Lumber Products from Canada*, USA-92-1904-02, a three-member majority ruled that in order to find certain government practices to be subsidies, Commerce must determine that the practice has an effect on the price or output of the merchandise under investigation. In so ruling, the majority misinterpreted the holding in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), which was limited to the reasonable proposition that the CVD law cannot be applied to imports from nonmarket economy countries. Although this panel decision would not be binding precedent in future cases, the Administration wants to make clear its view 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 government action on the price or output of the class or kind of merchandise under investigation or review.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, Vol. 1 at 926 (1994).

This brief and general observation in the SAA on the reasonableness of Georgetown Steel was made in the course of emphasizing that the new definition of subsidy is not required to entail consideration of the effect of a subsidy. This remark consequently should not be seen as an explicit affirmation that the current, post-Uruguay Round CVD law does not apply to NME countries' subsidies. If anything, the omission of the factor of effect from the new definition of subsidy indicates that that new definition's articulated criteria (governmental financial

[8] Id. at 21 (emphasis in the original).

contribution, benefit, and specificity), once satisfied, require the finding of a countervailable subsidy, whether extended by a market-economy or a NME country's government.[9]

Likewise, the PRC's second citation of the SAA is misplaced, noting the SAA's comment that,

> {i}n general, the Administration intends that the definition of "subsidy" will have the same meaning that administrative practice and courts have ascribed to the term "bounty or grant" and "subsidy" under prior versions of the statute, unless that practice or interpretation is inconsistent with the definition contained in the bill.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, Vol. 1 at 925 (1994) (emphasis added). In referencing this portion of the SAA, the PRC omitted the underscored clause, which stipulates that the statute's new definition of subsidy is to override the part of the statement quoted by the PRC. Once more, therefore, the legislative history must give way to the statute's new definition of subsidy at 19 U.S.C. §§ 1677(5) and (5A) and 19 U.S.C. §§ 1671(a) and (b), which direct that all countervailable subsidies from a country bound by the SCM Agreement are subject to consideration by the U.S. countervailing duty law, whether provided by a market-economy or non-market-economy country's government.

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[9] As discussed below in Section III, there remain the questions of what benchmark to use and how to measure the benefit of a subsidy, but those tasks come after the evaluation of whether a countervailable subsidy is present under the new definition of subsidy. Significantly, in selecting a benchmark and measuring the benefit of a subsidy, the SAA indicates that the effect of a subsidy on the price or output of the subject merchandise is not required to be considered. See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, Vol. 1 at 926 (1994). Accordingly, as also is addressed in Section III below, choosing a benchmark and measuring the benefit of a subsidy are really no more problematic when the subsidy is given by a NME country's government than when the subsidy is given by a market-economy country's government.

C. Summary

Georgetown Steel's approval in 1986 of the Department's discretion not to apply the old CVD law at 19 U.S.C. § 1303 to subsidies by NME countries' governments has been superseded by the SCM Agreement, as implemented in U.S. domestic law by the Uruguay Round Agreements Act. The result is that the Department no longer has discretion in this regard and is obligated to apply the CVD law across the board to subsidized, injurious imports from both market-economy and NME countries. This conclusion is punctuated by China's Protocol of Accession to the WTO, which has committed the PRC to application of the SCM Agreement to China's subsidies found to be countervailable under the new definition of subsidy. U.S. domestic law does the same. By not distinguishing between market-economy and NME countries' subsidies, the SCM Agreement and U.S. domestic law achieve the non-discriminatory MFN treatment that is required by Article I of the General Agreement on Tariffs and Trade.

III. COMMERCE HAS THE AUTHORITY AND FLEXIBILITY TO SELECT AN APPROPRIATE BENCHMARK AND FAIRLY MEASURE SUBSIDIES CONFERRED IN NON-MARKET-ECONOMY COUNTRIES

In directing that the CVD law be applied to NME countries, the present international and U.S. domestic legal regime governing CVD proceedings provides the means for Commerce to fairly measure subsidies in NME countries. Specifically, the PRC's Protocol of Accession to the WTO supplies Commerce with the flexibility necessary to select an appropriate benchmark for its subsidy calculations. While practical difficulties may arise in performing its calculations in NME cases, Commerce has overcome similar difficulties in market-economy cases.[10]

[10] Importantly, the international and domestic legal regime does not distinguish between market-economy and NME countries. If such a distinction were intended, the SCM Agreement, the U.S. CVD statute, and the PRC's Protocol of Accession would include specific language to that effect.

Commerce's experience in market-economy cases demonstrates that it possesses the technical proficiency necessary to measure subsidies, whether in market-economy or NME cases.

The terms and conditions set forth in the PRC's Protocol of Accession provide Commerce with the necessary leeway to select an appropriate benchmark for purposes of measuring Chinese subsidies. Article 15(b) describes the procedure to be followed by the Department in its selection of a benchmark.[11] Should Commerce find in a particular case that the Chinese market is distorted to such an extent that no reasonable commercial benchmark is available within China, Commerce is expressly authorized under Article 15(b) to use third-country benchmarks.[12] Thus, Commerce is authorized to select an appropriate benchmark and, thereby, to reasonably measure subsidies conferred in China.

Additionally, while subsidy calculations are highly fact-specific and best addressed in the context of a particular case, Commerce's expertise developed in prior market-economy CVD cases will serve well in quantifying subsidies in NME CVD cases. Commerce has, for instance, devised alternative benchmarks for purposes of measuring the benefit conferred by various forms

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[11] See Accession of the People's Republic of China, ¶ 15(b), WT/L/432 (Nov. 23, 2001). A similar framework will apply to Viet Nam, another NME country, pursuant to the terms of its Protocol of Accession to the WTO. See Report of the Working Party on the Accession of Viet Nam, ¶ 255, WT/ACC/VNM/48 (Oct. 27, 2006).

[12] The U.S. CVD law recognizes that such practical difficulties will arise in cases and allows Commerce to adjust its benefit calculations as necessary in such situations. See, e.g., 19 C.F.R. § 351.511 (providing a hierarchy for selecting a benchmark price to determine whether a governmentally bestowed good or service is provided for less than adequate remuneration and permitting the use of external benchmarks in certain circumstances); and 19 C.F.R. § 351.505 (allowing recourse to international lending rates, such as LIBOR, when no reliable domestic lending rates are available to measure the benefit of a government-provided loan).

of financial contributions, including the provision of goods and services,[13] loans,[14] equity infusions,[15] and grants.[16]

In sum, Commerce's ability to adapt its subsidy calculations to varying factual situations in prior market-economy cases demonstrates that it possesses the expertise and competence to develop appropriate methodologies to quantify subsidies in NME cases. By applying this technical proficiency within the framework set out in the PRC's Protocol of Accession, Commerce will be able to apply the U.S. CVD law effectively in specific cases to imports from China.

IV. CONCLUSION

When the history and language of the SCM Agreement, China's Protocol of Accession to the WTO, and the U.S. implementing legislation in the Uruguay Round Agreements Act are taken into account, the Department should find that it is obligated to apply the U.S.

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[13] See, e.g., Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Lined Paper Products from Indonesia at 34 (Aug. 9, 2006), referenced in 71 Fed. Reg. 47,174 (Aug. 16, 2006) (selecting an "out-of-country benchmark" in the form of Malaysian log prices due to the Government of Indonesia's predominant role in the Indonesian market); Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Germany, 62 Fed. Reg. 54,990, 54,994 (Oct. 22, 1997) (explaining that "there may be no alternative market prices available in the country (*e.g.*, private prices, competitively-bid prices, import prices, or other types of market reference prices). Hence, it becomes necessary to examine other options for determining whether the good has been provided for less than adequate remuneration.").

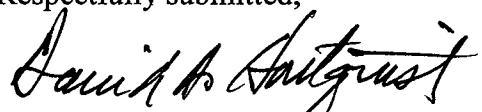
[14] See, e.g., Final Affirmative Countervailing Duty Determination: Structural Steel Beams From the Republic of Korea, 65 Fed. Reg. 41,051 (Jul. 3, 2000) (applying alternative private benchmarks for loans to account for the Government of Korea's influence over the practices of lending institutions in Korea).

[15] See, e.g., Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina; Preliminary Results of Countervailing Duty Administrative Review, 62 Fed. Reg. 38,257, 38,260 (Jul. 17, 1997) (converting equity infusions into U.S. dollars to account for hyperinflation in Argentina and changes in the Argentine currency during that time period).

[16] See, e.g., Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Mexico, 58 Fed. Reg. 37,338 (Jul. 9, 1993) (using a loan-based methodology to calculate the benefit from non-recurring grants to address distortions caused by hyperinflationary conditions in Mexico).

countervailing duty law to subsidized, injurious imports from NME countries such as China. The discretion in this area that Commerce was found to have in Georgetown Steel rested on an interpretation of 19 U.S.C. § 1303, which has since been repealed. In the place of the old law, the definition of subsidy and scope of the current U.S. statute have been modified in keeping with the SCM Agreement and China's Protocol of Accession to the WTO. The result is that the discretion that the Department formerly had has been legislatively withdrawn. The direction of the CVD statute – that subsidized, injurious imports from NME as well as market-economy countries are subject to countervailing duties – simply effects the international legal rights that the United States has bargained for and should exercise consistent with the most-favored-nation principle of non-discrimination.

Respectfully submitted,



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