

COMMITTEE TO SUPPORT U.S. TRADE LAWS

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VIA HAND DELIVERY

Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
International Trade Administration
Room 1870
1401 Constitution Avenue, NW
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Dear Ms. Kuhbach:

Subject: **Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comments**

I. INTRODUCTION

On behalf of the Committee to Support U.S. Trade Laws ("CSUSTL"), an organization of companies, trade associations, labor unions, workers, and individuals committed to preserving and enhancing U.S. trade laws, we hereby timely submit the following response to the Department of Commerce's ("the Department" or "Commerce") request for comments on the applicability of the countervailing duty ("CVD") law to imports from the People's Republic of China.¹ CSUSTL and its members are deeply concerned about the threat posed to U.S. production by Chinese imports, many of which continue to be subsidized by the Chinese government in violation of that country's WTO obligations. CSUSTL believes that the Department has the authority, and the obligation, to apply the CVD law to Chinese imports in order to ensure the continued effectiveness of that law as a remedy for U.S. companies and

¹ *Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment*, 71 Fed. Reg. 75,507 (December 15, 2006).

workers. The application of the CVD statute to China is consistent with the statutory language and, while it would represent a change in the Department's practice, the Department has the authority to make such a change, and would be fully justified in doing so in light of changes in the domestic and international legal context.

II. GEORGETOWN STEEL DOES NOT PROHIBIT APPLICATION OF THE CVD LAW TO CHINA

Neither the Commerce Department's 1984 determination in *Carbon Steel Wire Rod from Czechoslovakia*² nor the Federal Circuit decision upholding Commerce, *Georgetown Steel Corp. v. United States*,³ precludes the Department from now concluding that the current CVD statute permits cases to be brought against China.

A. The Court's Holding Is Limited to Upholding Commerce's Interpretation

In *Wire Rod*, the Department, interpreting the then-applicable countervailing duty statute, Section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303, concluded that "bounties or grants cannot be found in nonmarket economies."⁴ On appeal, the Court of International Trade reversed Commerce's determination, finding that the statute required Commerce to permit CVD cases to be brought against non-market economy (NME) countries. *Continental Steel Corp. v. United States*, 9 CIT 340, 614 F. Supp. 548 (1985).

The Federal Circuit then reversed the Court of International Trade in *Georgetown Steel*. The Federal Circuit first rejected the CIT's conclusion that the CVD statute applied to NMEs as a matter of law. Instead, it found the statute to be ambiguous on the point, noting that "Congress has not defined the terms 'bounty' or 'grant' as used in Section 303. We cannot answer the

² *Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination*, 49 Fed. Reg. 19,370 (Dep't. Commerce, May 7, 1984) ("Wire Rod").

³ 801 F.2d 1308 (Fed. Cir. 1986) ("*Georgetown Steel*").

⁴ *Wire Rod*, 49 Fed. Reg. at 19,370.

question whether the statute applies to non-market economies by reference to the language of the statute.”⁵ In light of this ambiguity, the court deferred to Commerce’s interpretation of the statute, holding that “[w]e cannot say that the Administration’s conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion.”⁶

It is thus crucial to understand that the Department’s practice of not applying the CVD law to non-market economies, which it has followed since the *Wire Rod* determination, is not required by *Georgetown Steel* or by the statute. All the court decided in *Georgetown Steel* was that this practice reflected a permissible interpretation of an ambiguous statute based on the record of that investigation. Commerce has recognized that *Georgetown Steel* merely upheld the agency’s interpretation at that time that the CVD statute did not apply to non-market economies. For example, in the preamble to its 1998 CVD regulations, the Department referenced its “*practice* of not applying the CVD law to non-market economies,” and noted that “[t]he CAFC upheld this *practice* in *Georgetown Steel Corp. v. United States*.”⁷ As discussed below, this practice is not the only permissible interpretation of the statute. Commerce can and should reconsider and reverse its conclusion in *Wire Rod*, and find that the current CVD statute does apply to China.

⁵ *Georgetown Steel*, 801 F.2d at 1314.

⁶ *Id.*, 801 F.2d at 1318 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-45(1984)).

⁷ Final Rule – Countervailing Duties, 63 Fed. Reg. 65,347, 65,360 (November 25, 1998) (emphasis added).

B. Commerce Has the Legal Authority to Change Its Prior Practice

The Department has acknowledged in recent correspondence with the General Accounting Office that “there is no explicit statutory bar against applying the CVD law to NME countries.”⁸ Indeed, the adoption of a new definition of “subsidy” in the 1994 Uruguay Round Agreements Act (12 years after the *Wire Rod* decision), the Chinese accession to the WTO and the PNTR legislation (subsequent to the 1998 regulations in which Commerce last addressed this issue) all compel application of the CVD law to Chinese imports.

1. The Plain Language of the Current Countervailing Duty Statute Permits, if Not Compels, its Application to China

The plain language of the current countervailing duty statute permits, if not compels, its application to China. The relevant statutory provision, 19 U.S.C. §1671(a), provides that countervailing duties shall be imposed if:

- (1) the administering authority 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, and
- (2) in the case of merchandise imported from *a Subsidies Agreement country*, the Commission determines that—
 - (A) an industry in the United States—
 - (i) is materially injured, or
 - (ii) is threatened with material injury, or
 - (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation. (emphasis added).

There is no limitation of the statute’s applicability to countries with a particular political or economic system. Rather, on its face the statute applies to all countries. The only distinction is

⁸ U.S. –China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties, GAO-05-474 at 44 (June 2005) (Letter from Timothy J. Hauser to Loren Yager commenting on draft GAO report).

between Subsidies Agreement countries, which are subject to the injury test requirement, and other countries, which are not.

Similarly, the plain language of the statutory definition of “countervailable subsidy” does not require that such a subsidy be granted by a market economy. Rather, the definition of “subsidy” merely requires that a government (or private entity funded by or under the direction of a government) make a financial contribution to a person, and thereby confer a benefit.⁹ Such subsidies are countervailable so long as they are “specific.”¹⁰ Moreover, there can be no doubt that the Chinese government can and does grant subsidies that meet this definition. As discussed in greater detail below, this statutory definition is identical to the definition of a countervailable subsidy in the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”).¹¹ China is subject to the SCM Agreement, and has identified a number of subsidy programs that are countervailable under the SCM Agreement in both its Accession Protocol,¹² and a subsequent notification to the WTO Committee on Subsidies and Countervailing Measures.¹³ Indeed, in light of the fact that the current CVD statute resulted from 1994 revisions intended to implement U.S. rights and obligations under the SCM Agreement, Commerce is arguably *required* to permit the application of the CVD law to China, which has accepted the discipline of that agreement as a condition of its entry into the WTO.

⁹ 19 U.S.C. § 1677(5)(b) (2000).

¹⁰ 19 U.S.C. § 1677(5)(a).

¹¹ Uruguay Round Agreements Act, Statement of Administrative Action, *as reprinted in* 1994 U.S.C.C.A.N at 4238 (“SAA”).

¹² Protocol on the Accession of the People’s Republic of China, WT/L/432 at Annex 5A, 69-89 (November 23, 2001) (“China Accession Protocol”).

¹³ 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 (April 13, 2006).

At the very least, there is no doubt that Commerce may exercise its discretion to permit cases to be brought against China under the statute. Where the statute is silent or ambiguous on an issue, Commerce has the authority to determine its appropriate interpretation, and reviewing courts must defer to this interpretation so long as it is reasonable.¹⁴ Moreover, court deference to Commerce regarding such interpretations is heightened because Commerce is deemed to have unique expertise with respect to the antidumping and countervailing duty laws.¹⁵

It would clearly be reasonable to interpret the CVD statute to apply to China. The CVD statute is intended to “protect American firms from {...} the unfair competitive advantage a foreign producer would have in selling in the American market if that producer’s government in effect assumed part of the producer’s expenses of selling here.”¹⁶ Given this mandate, Commerce should interpret the statute broadly to maximize its ability to remedy unfair trade. It is clear that subsidized Chinese imports pose a massive threat to U.S. production. Application of the CVD law to China is thus not just reasonable, but necessary to give full effect to the remedial purpose of that law.

Commerce is not barred from adopting this reasonable interpretation simply because it adopted a different interpretation in interpreting a different statute more than twenty years ago. It is “well-established that Commerce may depart from a prior practice” and that this departure must be upheld by the courts “so long as [Commerce] provides a ‘reasoned analysis’ for its

¹⁴ *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, (1984)). This required deference applies both to statutory interpretations adopted through formal rulemaking and to interpretations arrived at in the context of trade remedy proceedings. *Id.*, 266 F.3d at 1372.

¹⁵ *Id.* See also *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1216 (C.C.P.A. 1977), aff’d 437 U.S. 443 (1978).

¹⁶ *Georgetown Steel Corporation v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986). See also *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978).

change.”¹⁷ Indeed, Commerce’s determination in *Wire Rod* that it would not apply the CVD statute to NMEs can itself be viewed as such a change in practice. As the Court of International Trade noted in *Continental Steel*, prior to *Wire Rod*, the U.S. government had never viewed the applicability of the CVD law to a country as contingent on that country’s economic or political system, and had in the past assessed countervailing duties against countries such as Czarist Russia and Nazi Germany that were characterized by levels of state control of the economy similar to a modern non-market economy.¹⁸

The *Wire Rod* determination and Commerce’s subsequent adherence to that decision thus do not operate as a legal bar to the application of the current CVD law to imports from China. It is beyond dispute that Commerce has the authority to reconsider its practice of not applying the CVD law to NME countries. As detailed below, there is ample justification for such reconsideration with respect to China.

C. Commerce Has Ample Reason to Reconsider the Practice it Established in Wire Rod

Commerce based its decision in *Wire Rod* on its interpretation of the term “bounty or grant,” in the countervailing duty statute in effect at that time, Section 303 of the Tariff Act of

¹⁷ *Allegheny Ludlum Corp. v. United States*, 24 C.I.T. 452, 458 (2000). See also *Rust v. Sullivan*, 500 U.S. 173, 187 (1991); *Motor Vehicle Mfgs. Ass’n of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42, (1983); accord *Mantex, Inc. v. United States*, 17 C.I.T. 1385, 1399, (1993).

¹⁸ *Continental Steel*, 9 CIT at 349, 614 F. Supp. at 555. citing *Downs v. United States*, 187 U.S. 496 (1903) (upholding imposition of countervailing duties on imports of sugar from Russia); Countervailing duties -- Imports from Germany, T.D. 49878, 74 Treas. Dec. 475 (1939); Countervailing duties on imports from Germany, T.D. 49821, 74 Treas. Dec. 389 (1939), T.D. 49849, 74 Treas. Dec. 438 (1939), T.D. 49958, 75 Treas. Dec. 82 (1939), T.D. 49998, 75 Treas. Dec. 139 (1939); Countervailing duties on ethylene dibromide from Germany, T.D. 49719, 74 Treas. Dec. 192 (1938); Countervailing Duties on certain German products, T.D. 48360, 69 Treas. Dec. 1008 (1936), T.D. 48463, 70 Treas. Dec. 172 (1936), T.D. 48444, 70 Treas. Dec. 134 (1936), T.D. 48479, 70 Treas. Dec. 201 (1936); Countervailing duties -- Aluminum foil and manufacturers thereof, T.D. 47312, 66 Treas. Dec. 362 (1934); T.D. 47501, 67 Treas. Dec. 187 (1935).

1930. That interpretation was based in turn on two conclusions – one legal and one factual. First, Commerce concluded that, “while Congress never has confronted directly the question of whether the countervailing duty law applies to NME countries,” the legislative history of Section 303 indicated a lack of Congressional intent to apply the CVD laws to NMEs.¹⁹ Second, Commerce found that the nature of non-market economies precluded it from “identify[ing] specific NME government actions as bounties or grants.”²⁰ Whatever their merits at the time of the *Wire Rod* determination, neither of these justifications applies in the context of the application of the current CVD statute to China.

1. Application of the CVD Laws to China Is Required to Implement U.S. Rights and Obligations Under the WTO Agreements in Light of China’s Accession to the WTO

The current CVD statute reflects and implements a very different international legal regime with respect to subsidies than did its predecessor statute that was interpreted in *Wire Rod*. The most significant change bearing on Commerce’s analysis of whether to apply the CVD law to China is the fact that the country became a member of the WTO in 2001 and since then has been subject to the subsidies disciplines of the SCM Agreement. Indeed, China’s WTO Accession Protocol confirms that the SCM Agreement permits WTO members to impose countervailing duties against NME countries. Specifically, Article 15(b) of the Protocol provides that proceedings under Part V of the SCM Agreement (relating to countervailing duties) are applicable to China, and moreover authorizes WTO members to “use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that

¹⁹ *Wire Rod*, 49 Fed. Reg. at 19,373.

²⁰ *Id.*

prevailing terms and conditions in China may not always be available as appropriate benchmarks.”²¹

This provision was immediately applicable to China upon its accession to the WTO and applies regardless of whether the WTO member applying the countervailing measure treats China as a non-market economy for the purposes of its antidumping law. The Protocol explicitly permits WTO members to continue to treat China as an NME for dumping purposes for up to 15 years from the date of China’s accession, and there is absolutely no linkage in the terms of the protocol between China’s NME status and the applicability of countervailing measures to that country.²²

There is no doubt that Congress, in authorizing permanent normal trade relations (PNTR) with China upon its accession to the WTO, intended for the United States to obtain the full benefit of the concessions made by China as prerequisites to its accession. Section 411 of the PNTR legislation, codified at 22 U.S.C. § 6941, notes that in order to obtain these benefits, “the United States Government must effectively monitor and enforce its rights under the agreements on the accession of the People’s Republic of China to the WTO.”²³ The Report of the House Ways and Means Committee on the PNTR bill specifically noted China’s adherence to WTO rules on subsidies as one of the aspects of China’s WTO accession that would “benefit U.S. firms,”²⁴ and which therefore must be monitored and enforced. Moreover, the PNTR legislation includes a provision authorizing additional appropriations for the Department of Commerce to, *inter alia*, “[defend] United States antidumping and *countervailing duty* measures with respect to

²¹ China Accession Protocol, Article 15(b), WT/L/432 at 9.

²² *Id.*, Article 15(d).

²³ P.L. 106-286, §411(5) (October 10, 2000), codified at 22 U.S.C. § 6941.

²⁴ H.R. Rep. 106-632, 106th Cong. 2d Sess. 12 (2000).

products of the People’s Republic of China,”²⁵ demonstrating Congressional recognition that the SCM Agreement and China’s Accession Protocols would permit the imposition of countervailing duties against Chinese imports.

China’s acceptance of the disciplines of the SCM Agreement, including the potential application of countervailing duties to its imports, is an integral part of that country’s WTO Accession protocol. Application of the CVD law against China is thus necessary to fully implement the rights of the United States under the Protocol – something that Congress clearly intended the United States to do in authorizing PNTR for China.

Moreover, application of the CVD law against China is necessary to avoid a violation of the most-favored nation (“MFN”) requirement of Article I of the GATT 1994. China’s Accession Protocol explicitly confirms that Chinese imports are subject to countervailing duties regardless of whether China is treated as an NME for antidumping purposes. By continuing to exempt China from the application of its CVD law, the United States is conferring a substantial benefit on China. Moreover, there is no justification for this differential treatment in light of the fact that the Chinese Accession Protocol both expressly subjects Chinese imports to CVD measures, and permits the use of alternate methodologies to address the challenges of identifying and quantifying Chinese subsidies. Failure to apply the CVD law to China thus could potentially be found to be a violation of U.S. MFN obligations under Article I of the GATT 1994.

The accession of China to the WTO thus provides Commerce with compelling reasons to reconsider its decision in *Wire Rod* and permit CVD cases to be brought against China, both in order to fully implement U.S. rights under the Accession Protocol and to ensure that the application of the CVD law comports with U.S. MFN obligations under the GATT.

²⁵ P.L. 106-286, §413(a)(1) (October 10, 2000), codified at 22 U.S.C. § 6943.

2. Revisions to the CVD Statute Warrant Reconsideration of Commerce's Practice

Further support for reconsideration of Commerce's practice of not applying the CVD law to China is found in the fact that the statute Commerce interpreted in *Wire Rod* no longer exists. It was repealed by the 1994 Uruguay Round Agreements Act ("URAA") and replaced by the current statute, 19 U.S.C. §1671.²⁶ The current statute does not refer to a "bounty or grant," but rather to a "countervailable subsidy."²⁷ More significantly, the definition of "subsidy" at 19 U.S.C. § 1677(5) was revised by the URAA to correspond to the language of the SCM Agreement.

In *Wire Rod*, the Department focused on Congress' restructuring of the countervailing duty laws in the Trade Agreements Act of 1979 (the "1979 Act"). Commerce noted that Congress did not specifically amend section 303 to clarify its applicability to NME countries, and found this "congressional silence" to be "revealing" when viewed in conjunction with Article 15 of the Tokyo Round Subsidies Code, which permitted signatories to regulate unfairly priced imports from NME countries under either antidumping or countervailing duty legislation.²⁸ Commerce found that the fact that the 1979 Act reenacted provisions for the application of the antidumping law to NMEs, but did not specifically address the application of CVD law to such countries, indicated a choice to utilize only the antidumping law against such countries under Article 15.

²⁶ Pub. L. 103-465, title II, § 261(a), Dec. 8, 1994, 108 Stat. 4908.

²⁷ Compare 19 U.S.C. § 1671 (2006) with 19 U.S.C. §1303 (1979).

²⁸ *Wire Rod*, 49 Fed. Reg. at 19,373-74. See also *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade* at Article XV(1). ("Tokyo Round Subsidies Code").

The Tokyo Round Subsidies Code has been replaced in its entirety by the SCM Agreement.²⁹ The SCM Agreement does not contain an analogue to Article 15(1) of the Tokyo Round Subsidies Code that would restrict the application of CVD measures to NME countries. Rather, the plain language of the SCM Agreement, like the language of its U.S. implementing legislation discussed above, does not distinguish among political or economic systems.³⁰ It is universally applicable. As noted above, China's WTO Accession Protocol further confirms that the SCM Agreement permits WTO members to impose countervailing duties against NME countries.³¹

While the SAA notes 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,” this does not apply where “that practice or interpretation is inconsistent with the definition contained in the bill.”³² In that regard, it is important to note that these revisions, along with other changes in the law effected by the URAA, were intended to fully implement the rights and obligations of the United States under the SCM Agreement. Because the restrictive interpretation of “bounty or grant” found in the *Wire Rod* determination forecloses CVD cases against countries subject to such cases under the SCM Agreement, this interpretation does not fully implement U.S. rights under the agreement and is therefore inconsistent with the revised definition of subsidy enacted by the

²⁹ See, e.g., *Brazil – Measures Affecting Desiccated Coconut*, AB-1996-4, WT/DS22/AB/R (February 21, 1997) at 15-18.

³⁰ SCM Agreement at Article 1. The GAO has also concluded that the WTO Agreements do not preclude bringing CVD actions against countries that are classified as NMEs. *U.S. – China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, GAO-05-474 at 19.

³¹ China Accession Protocol, Article 15(b), WT/L/432 at 9.

³² SAA, 1994 U.S.C.C.A.N. at 4238.

URAA. As such, the SAA does not preclude the Department from reconsidering *Wire Rod* and interpreting the current CVD statute differently from Section 303 of the Tariff Act of 1930. Rather, such reconsideration is necessary in order to bring the Department's practice in line with the new international legal order reflected in the SCM Agreement and to ensure that U.S. rights under the SCM Agreement are fully exercised.³³

3. The Economic Rationale Underlying Commerce's 1984 Decision Does Not Apply to China in 2007

Regardless of the validity of Commerce's conclusion in *Wire Rod* that NMEs could not grant "bounties or grants" in 1984, it is clearly not accurate with respect to China in 2007. Indeed, China's very accession to the disciplines of the SCM Agreement would be a pointless exercise if, as Commerce asserted in *Wire Rod*, "subsidies have no meaning outside the context of a market economy."³⁴ To the contrary, it is clear that China, despite continuing to meet the criteria for classification as a non-market economy under U.S. law, can and does grant subsidies within the meaning of Article 1 of the SCM Agreement, and thus, 19 U.S.C. §1677(5). Thus, while particular CVD cases involving China may present difficulties with respect to identification and quantification of subsidy programs (as is also the case in CVD investigations involving market economy countries), it is clearly possible to identify countervailable Chinese subsidy programs. As noted above, China itself has identified a number of such subsidies both in

³³ Although the SAA describes as "reasonable" the proposition upheld in Georgetown Steel that the CVD law cannot be applied to imports from nonmarket economy countries, *id.*, 1994 U.S.C.C.A.N. at 4240, it is important to note that the SAA preceded the accession of China to the WTO by seven years. As noted above, China's WTO accession explicitly confirmed that the country was subject to CVD measures. In light of the clear Congressional intent, expressed in the PNTR legislation, that the United States enjoy the full benefits of its rights under the Chinese Accession Protocol, this proposition can no longer be viewed as "reasonable," at least with respect to China.

³⁴ *Wire Rod*, 49 Fed. Reg. at 19,371.

its Accession Protocol,³⁵ and in a subsequent notification to the WTO Committee on Subsidies and Countervailing Measures.³⁶ For example, in April 2006, the Government of China notified 78 subsidies to the WTO in accordance with the procedure required by China's Protocol of Accession to the WTO.³⁷ These subsidies include various types of tax preferences, exemptions on duties payable on imported raw materials and equipment, and various other benefits. Thus, the Chinese Government has admitted providing subsidies to its industries. This admission of subsidies by China, which, according to Commerce, did not exist in the *Wire Rod* investigation, justifies reconsideration of the application of the practice developed in *Wire Rod* to cases involving China.

III. CHINA HAS EXPRESSLY AGREED THAT IT IS SUBJECT TO COUNTERVAILING DUTY LAWS IN ITS WTO ACCESSION PROTOCOL

As discussed above, U.S. law clearly permits, if not compels, the Department to apply the CVD law to China. Moreover, such application is fully consistent with U.S. obligations under the SCM Agreement, as China has specifically agreed to be subject to countervailing duty investigations immediately upon accession to the WTO, notwithstanding the fact that WTO members may continue to treat China as an NME country for antidumping purposes. As discussed in greater detail above, Article 15(b) of the Protocol provides for the application of CVD measures against China immediately upon that country's accession to the WTO, and is in no way linked to any determination by the member imposing the measure that China is a market

³⁵ China Accession Protocol at Annex 5A, 69-89 (November 23, 2001).

³⁶ 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 (April 13, 2006).

³⁷ New And Full Notification Pursuant To Article XVI:1 Of The GATT 1992 And Article 25 Of The SCM Agreement; People's Republic Of China, G/SCM/N/123/CHN (April 13, 2006).

economy.³⁸ The Chinese government expressly agreed to adhere fully to the subsidies disciplines of the SCM Agreement as a condition of its entry into the WTO. This includes agreement to the possibility that CVD actions might be brought against Chinese imports by other WTO members. Application of the CVD law against China is thus necessary to enable the United States to fully exercise its rights under the Protocol.

IV. PRACTICAL ISSUES IN APPLYING THE CVD LAW TO CHINA ARE OVERSTATED

Finally, CSUSTL notes that the practical concerns regarding the application of the CVD law to China raised by the Chinese government and other opponents of such use of the law are overstated and do not justify a wholesale refusal to apply the law to China. We agree with the Department of Commerce that such methodological concerns are highly fact-specific and best addressed in the context of a particular case.³⁹ We note generally, however, that the principal difficulty raised by the application of CVD law to China – the need to determine appropriate benchmarks to use in the identification and quantification of subsidies – is explicitly addressed by Article 15(b) of China’s Accession Protocol, which authorizes the United States to use third-country benchmarks in CVD cases against China.⁴⁰ The use of such external benchmarks is fully consistent with U.S. law.⁴¹

³⁸ China Accession Protocol, Article 15(b), WT/L/432 at 9.

³⁹ *U.S. –China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, GAO-05-474 at 45 (June 2005) (Letter from Timothy J. Hauser to Loren Yager commenting on draft GAO report).

⁴⁰ China Accession Protocol, Article 15(b), WT/L/432 at 9.

⁴¹ *See, e.g.*, 19 C.F.R. § 351.511 (authorizing Commerce to use external benchmarks in certain circumstances for the purposes of identifying or measuring a subsidy); 19 C.F.R. § 351.505 (permitting use of LIBOR or other international lending rate as benchmark to measure the benefit from government-provided foreign currency loans or where no comparable domestic lending rates are available).

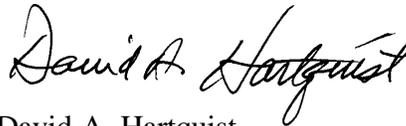
Similarly, the purported risk of “double counting” where concurrent antidumping and countervailing duty cases are brought against China is something that cannot be appropriately evaluated by the Department in the abstract, but is rather a highly fact-specific issue that must be addressed in the context of a particular case. Indeed, as the Department has recognized, “there is no reason to assume such double counting would even exist.”⁴²

The alleged difficulties regarding the practical application of the CVD law to China or other NMEs are not unique. Even with respect to market economy countries, it may be difficult in particular cases to identify or quantify subsidies, or to determine appropriate benchmarks to use in the Department’s analysis. These difficulties, however, by no means justify a wholesale abandonment of the CVD laws. There is no doubt that Commerce has the authority, competence, and expertise to develop appropriate methodologies for the application of the CVD law against China in particular cases.

V. CONCLUSION

For the reasons discussed above, CSUSTL urges the Department to reconsider its practice of not applying the countervailing duty law to non-market economy countries and to conclude that the law does apply to imports from China.

Very truly yours,



David A. Hartquist
Executive Director

⁴² *U.S. –China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, GAO-05-474 at 45 (June 2005) (Letter from Timothy J. Hauser to Loren Yager commenting on draft GAO report).