

January 12, 2007

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

RE: Comments of the National Association of Manufacturers on the Application of the
Countervailing Duty Law to Imports from the People's Republic of China

Introduction

The National Association of Manufacturers (NAM) is pleased to provide comments on the application of the countervailing duty law to imports from the People's Republic of China. We would like to thank the Import Administration of the Commerce Department for providing the opportunity for public comment on this issue.

Direct and indirect industry and export subsidies are a major concern of U.S. manufacturers, particularly those who compete against Chinese-made products. Member companies and organizations have for some time told the NAM they believe that Chinese companies are receiving subsidies because they appear to be selling their products in the United States at below the cost of raw materials and shipping. The NAM has long opposed subsidies and their distortion of international trade and investment – regardless of whether they originate in market or non-market economies.

The rule of law is essential to the free flow of trade in goods and services and governments have a responsibility to adhere to their commitments under the WTO and other international agreements. When governments interfere in trade in violation of the rules, enforcement is important to prevent the growth of distortion in global markets. The NAM believes that the area of subsidies is no exception and, in 2004 and subsequently, the NAM Board of Directors has supported legislation in Congress that would state clearly that U.S. countervailing duty law should apply to both market and non-market economies.

As China's economy and export capacity have grown, the role that Chinese production plays in global trade has become very important to U.S. manufacturers. The trade relationship with China is one of the most important to the United States, presenting both opportunities and challenges. China's growing importance to global trade makes adherence to world trade rules a matter of great significance. The NAM pressed hard for China's accession to the WTO in 2001 and concurs with USTR (in the 2006 Top to Bottom Review of China trade policy) that it has now been five years since China joined the WTO and, as a mature trading partner, should be held to its commitments.

The NAM believes strongly in the rules-based trade system. As with any country, when there are violations of trade rules, U.S. companies should have recourse to WTO-consistent remedies under U.S. trade law. The use of/access to legitimate trade law in cases where it is warranted is necessary for mutually beneficial trade and is the best defense against the growth of protectionism. If affected companies have recourse when faced with unfair trade practices, there is a basic sense that trade works to their benefit.

If, however, they are faced with a situation in which the U.S. government declines to use those mechanisms designed under WTO and U.S. trade law to address unfair trade practices, frustrations grow and they will turn to remedies that can damage global trade and economic growth. We have already seen a significant growth in the United States of protectionist sentiment and the NAM believes that the use of legitimate U.S. trade law is preferable to damaging tariffs or other proposed market access barriers.

Commerce Department Decision in 1984

It should be noted at the outset that there is nothing in U.S. or international trade law that prohibits the use of countervailing duty law to offset the effects of prohibited government subsidies. When the Commerce Department made its determination in 1984 in the Georgetown Steel case that countervailing duties could not be applied to non-market economies (NME's), it did so as a matter of practice, not because the law dictated it. At that time, the situation was very different from today's. In that case, Commerce stated that:

We believe a subsidy is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth.

In NME's, resources are not allocated by a market...allocation is achieved by central planning. Without a market, it is obviously meaningless to look for a misallocation of resources caused by subsidies. There is no market process to distort or subvert.

It is this fundamental distinction – that in an NME system the government does not interfere in the market process, but supplants it – that has led us to conclude that subsidies have no meaning outside the context of a market economy.

This decision, reversed by the Court of International Trade, but upheld in a subsequent appeal to the Appellate Court, was based on the lack of effect on prices or producer behavior of a subsidy in a non-market economy due to the central planning and control of a government.

Subsequent Developments – 1994 Adoption of SCM Agreement

Since that time, there have been a number of developments that justify a change to this practice of the Commerce Department. The Uruguay Round Agreements Act, which implemented the Uruguay Round agreements and was signed into law on Dec. 8, 1994, incorporated revisions from the Subsidies and Countervailing Measures (SCM) Agreement. Most notably, Article I of the SCM Agreement for the first time explicitly defined a subsidy. It states that a subsidy exists if:

There is a financial contribution by a government or public body OR
There is any form of income or price support within the meaning of Article XVI
of GATT 1994 AND
A benefit is conferred.

The change that this reflects from the earlier GATT Article XVI and the Commerce Department judgment of 1984 is that the SCM Agreement defines a subsidy by what it *is* rather than what it *does*.

This is of fundamental importance and, in our view, nullifies the approach taken in the Georgetown Steel case, which defines a subsidy by its effects or results. Moreover, in U.S. law, Section 771(5)(C) of the Tariff Act of 1930, as amended, states that: “The administering authority is not required to consider the effect of the subsidy in determining whether a subsidy exists.” It is also important to note that the SCM Agreement is silent on the market or non-market economy status of a country; it does not

distinguish between the application of countervailing duties to market or non-market economies. Absent exceptions for non-market economies, the law clearly applies equally to all countries regardless of market orientation.

Subsequent Developments – China’s 2001 WTO Accession

In 2001, China acceded to the WTO and agreed to be bound by its provisions, expressly including the SCM Agreement. As part of China’s accession, the Chinese government acknowledged the existence of subsidies and agreed to notify its subsidies to the WTO. On April 11, 2006, after missing an earlier deadline, China finally notified WTO members of government subsidy programs, as required under Art. 25.7 of the Subsidies and Countervailing Measures Agreement (SCM). China listed 78 subsidy programs for the period 2001-04 covering a wide range of programs, from tax incentives to promote industrial development to loans to alleviate poverty and improve the environment.

China’s list, however, did not include a variety of policies and programs that NAM members believe are giving, either directly or indirectly, substantial subsidies to Chinese industrial enterprises. Most notably the list did not cover commercial banking lending policies or other financial preferences that are frequently cited as one of the biggest sources of subsidies for Chinese industry. As noted in the U.S. list of questions (Q.2-4) on the Chinese report (G/SCM/Q2/CHN/19 dated July 26, 2006), Chinese enterprises have access to: subsidized State Policy Bank loans; the automatic roll-over of unpaid principal and interest; loan forgiveness; continued borrowing despite having non-performing loans; and below-market interest rates.

Of great importance to the current CVD case before the Commerce Department, the United States, in its bilateral accession negotiations with China, negotiated specific language about methodologies for assessing subsidies in China. These were agreed to by the Chinese government and they were incorporated into China's 2001 accession agreement. Article 15 (b) of the Agreement states that:

In proceedings under Parts II, III and IV 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 dumping (AD) cases, there already are alternative methodologies used in cases involving China. It is the practice in AD cases to allow Chinese exporters to present evidence that its export activities are not under government control. If this is established, the Commerce Department assesses an "individual" rate of dumping duty. If this cannot be established, the Commerce Department uses benchmarks from a "surrogate" third country; in the case of China, this is often India.

The use of these methodologies has not affected the overall classification of China as a non-market economy for which there are distinct and specific criteria. The argument that somehow now the application of CVD law would result in granting China market economy status seems unfounded.

USTR has engaged China extensively on its subsidies, both reported and unreported, and press reports indicate that USTR may be considering a potential WTO case. It would be contradictory in the extreme to state that subsidies are not possible by definition in China when such considerable effort has been expended over the past eight years to address them. There is no doubt that, given the lack of transparency in Chinese

society, subsidies may be difficult to assess, but that does not mean that they do not exist and should not be subject to trade disciplines.

Another argument heard against the application of CVD law to China is that dumping margins could be reduced as a result. The NAM does not take a position on this particular point, except to note that industries with experience in the use of U.S. trade law support the extension of CVD law to non-market economies. They argue that companies should have access to both remedies and make decisions based on individual cases.

Conclusion

The NAM is encouraged by the high priority the Administration attaches to addressing China trade issues and the willingness of Chinese authorities to engage the U.S. government at senior levels. The recent establishment of the U.S.-China Strategic Economic Dialogue (SED) is an excellent mechanism for regular high level engagement on issues of mutual concern to our two governments. The NAM has established a Board of Directors-level task force to engage with the Secretaries of Treasury and Commerce and USTR on issues addressed by the SED.

Optimum resolution of differences on trade is through engagement in groups such as the SED and the Joint Committee on Commerce and Trade (JCCT). However, consultations cannot always resolve all issues and it is the purpose of trade remedies that have been agreed upon multilaterally to address distortions caused by unfair trade practices.

To address WTO-illegal subsidization, the SCM Agreement is clear on the definition of a subsidy. The Agreement also makes no distinction in the application of countervailing measures on goods from a country based on its market economy status. China agreed to be bound by the SCM Agreement in its accession to the WTO.

The NAM believes that, given these circumstances, the Commerce Department should follow the provisions of the SCM Agreement and apply CVD law to countries, including China, without regard to their market or non-market economy status. Failure to do so would be to deny U.S. companies access to WTO-compliant trade remedies to offset subsidies to Chinese industry that put U.S. manufacturers at a competitive disadvantage. This outcome would very likely result in a backlash of protectionist measures that would do damage to the global economy and the U.S.-China bilateral relationship.

Submitted by:

Patricia Mears
Director, International Commercial Affairs
National Association of Manufacturers
(202) 637-3141
pmears@nam.org

Addendum to NAM Comments on the Application of Countervailing Duty Law to Subsidized Imports from the People's Republic of China January 16, 2007

This action establishes important precedent on the broader issue of subsidized trade and investment.

We believe a decision by Commerce to apply the countervailing duty law to China is important not only to provide a rules-based remedy to address uncompetitive trade practices, but also to signal the resolve of the US Government to actively promote a fair and level playing field in both trade and investment. For example, US energy companies increasingly face competition, at home and abroad, from State-owned enterprises. Government subsidies for these competitors, either direct or indirect, are completely inconsistent with the concept of free market competition. It is imperative that the US Government continue its long standing efforts to promote and enforce a robust, rules-based international climate for trade and investment. One of the most important issues to consider is subsidized investment.

Subsidized foreign investment is an issue that should be addressed.

WTO agreements have long recognized that subsidies unfairly distort trade in goods. The Agreement on Subsidies and Countervailing Measures (ASCM) subjects those subsidies to disciplines and provides remedies. Similarly, governments recognize that subsidies related to trade in services distort markets and should also be addressed. Article XV of the General Agreement on Trade in Services (GATS) acknowledges that subsidies may distort trade in services. The GATS obliges WTO member countries to enter into future negotiations on the subject and to give "sympathetic consideration" to complaints.

Subsidies for the acquisition of assets distort the market for those assets in much the same manner as trade subsidies. These subsidies require disciplines too.

The subsidized acquisition of assets leads to the inefficient allocation of resources. It distorts competition, permitting less efficient operators to acquire assets over their more efficient competitors. This market distortion can lead to less efficient development and exploitation of resources and impede economic growth. The market for assets, like the market for goods, should be open and undistorted by subsidies. The free market is the best way to allocate resources

The United States has long been an advocate for increased disciplines on subsidies, including market-distorting practices that may escape the current rules (such as government-directed credit) and stricter disciplines to address certain types of adverse effects that are not adequately dealt with under the current rules (e.g., overcapacity caused by subsidies in the steel and fisheries sectors).¹

We believe that subsidized acquisition of energy assets is a new challenge of fundamental importance to the US and global economy. There is a need to develop disciplines to address investment subsidies under existing trade agreements, or to develop new disciplines. We encourage the Department to coordinate with other agencies to work toward this important goal.

¹ The U.S. Government has proposed expanding the category of “prohibited subsidies” and has addressed the need to clarify and improve provisions relating to infusions of equity capital. *See, e.g.,* World Trade Organization *Subsidies Disciplines Requiring Clarification and Improvement*, Communication from the United States to the Negotiating Committee on Rules, TN/RL/W/78 (19 March 2003). The Commerce Department’s January 2004 report on *Manufacturing in America: A Comprehensive Strategy to Address the Challenges to U.S. Manufacturers* notes that the U.S. is seeking to expand the existing subsidies prohibitions in the WTO and to strengthen the rules against government financing of the private sector, including government involvement in, or distortion of, capital markets.