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January 16, 2007

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Re: Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment: Comments from Mittal Steel USA Inc. in Response to 71 FR 75507

We submit these comments on behalf of Mittal Steel USA Inc., a major producer of steel mill products in the United States with headquarters in Chicago, Illinois and facilities in a number of states including Illinois, Indiana, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina and West Virginia. Mittal Steel USA Inc. has been involved in dozens of antidumping and countervailing duty cases in the United States and is a strong proponent of minimizing market distortions caused by government subsidization. In the steel sector in particular, for decades steelmaking capacity has been added or maintained through subsidization that creates global excess capacity which irrationally penalizes market-based producers over time. Hence, Mittal Steel USA Inc. believes that U.S. countervailing duty law should be available wherever subsidization is identified and where the statutory criteria of material injury or threat thereof are found.

These comments are in response to the December 15, 2006 Federal Register notice (71 FR 75507) requesting comments from the public on the issue of whether U.S. countervailing

duty law should be applied to the non-market economy of the People's Republic of China. For the reasons that follow, Mittal Steel USA Inc. believes that it is appropriate to apply U.S. countervailing duty law to all countries, including countries such as China that are treated as non-market economies under U.S. antidumping law.

Summary

As the Department is aware, U.S. countervailing duty law has never been facially limited to a subset of countries to which the law would apply. Over time, there have been distinctions made between countries (or products) which were entitled to an injury test [see 19 U.S.C. § 1671(a) and (b) (1979) and 19 U.S.C. § 1303 (1979)]. Despite this fact, in 1984, the U.S. Department of Commerce (Commerce) made a policy decision that, as a matter of definition of the then existing countervailing duty law and because of the economic system that existed in non-market economy countries, U.S. countervailing duty (CVD) law did not apply to non-market economies. The legal and economic bases upon which Commerce made that policy decision have changed. The WTO Uruguay Round negotiation resulted in a new Agreement on Subsidies and Countervailing Measures (SCM Agreement) that included a new and more specific definition of subsidies. This new definition of subsidies does **not** distinguish on benefits conferred based on the type of economic system involved. Thus, nothing in the SCM Agreement limits the ability of a WTO member like the United States to use a national countervailing duty law to neutralize subsidies provided by any government, including those that are viewed as subject to special rules to determine prices for dumping purposes under Ad Article VI, paragraph 1, note 2. The SCM Agreement definition of subsidies has been implemented into U.S. law. Moreover, as part of its accession to the WTO, China accepted that trading partners would be

able to use special rules for valuing prices and costs in antidumping investigations for a limited period of time and accepted special rules for valuing subsidies without time limitation. These rights were negotiated by the United States because of concerns about the nature of the Chinese economy. Trade distorting subsidies from the Chinese government were one of the specific concerns of the United States in negotiating China's accession to the WTO.

In addition to the SCM Agreement definition and implementing U.S. legislation, there have been important economic changes since the Commerce Department made this policy decision in 1984. The economic shifts are reflected in trade flows and the rapidly growing trade deficit for the U.S. with China.

Commerce will be acting within U.S. law if it determines that U.S. countervailing duty law in 2007 is properly applicable to imports from all countries, including countries that continue to be treated as non-market economies under U.S. antidumping duty law. In order to change its policy, Commerce need only provide a reasoned basis for a change in policy. The December 15, 2006 Federal Register notice providing all interested members of the public to provide comments on the topic will provide Commerce with the full range of views on the question asked. We believe that the agency can and should apply US law to all imports regardless of country of origin. An examination of relevant WTO documents and Commerce practice indicate there are no policy constraints which would make the application of both the NME antidumping methodology and U.S. countervailing duty law to China problematic. Commerce can and should change its policy and complete the current investigation on coated free sheet paper from the People's Republic of China. A statutory change, while always possible, is not needed for Commerce to better meet the statutory purposes and intent of Congress in applying the U.S.

countervailing duty law in conjunction with the U.S. NME antidumping methodology. Indeed, as reviewed in Commerce's August 30, 2006 memorandum in *Certain Lined Paper Products from the PRC* on whether China's status should be changed from a non-market economy, "A non-market economy for purposes of the U.S. antidumping law is defined in section 771(18)(A) of the Tariff Act of 1930 (the 'Act') as 'any country the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."[1] For reasons explained in the memorandum, China's economy continues to qualify as a NME under U.S. antidumping duty law. However, nothing in the basic definition or the criteria examined under 771(18)(B) of the Act requires a conclusion that a non-market economy cannot provide subsidies within the meaning of U.S. law. Using the current CVD investigation on coated free sheet paper from the PRC to change Commerce's policy is both appropriate and would provide the intended statutory benefits to U.S. businesses, their workers and the communities across the country that are impacted by foreign subsidies.

A. The Underlying Basis To Commerce's Practice Of Not Applying CVD Law To NMEs

Since 1984, Commerce has considered that, as a matter of law, countervailing duty law cannot be applied to exports from a Non-Market Economy (NME) country because subsidization is a market economy phenomenon which cannot exist in an NME.

While Commerce started looking at the question of whether NME countries were subject to U.S. countervailing duty law in 1983 after initiating an investigation into *Textiles, Apparel,*

[1] August 30, 2006 Memorandum re China's NME Status in the antidumping duty investigation of *Certain Lined Paper Products from the PRC* (A-570-901), at 2.

and Related Products from the People's Republic of China, 48 Fed. Reg. 46,600 (October 13, 1983), the petition in the textiles case was withdrawn before a preliminary determination was issued. 48 Fed. Reg. 55492 (December 13, 1983). Thus, Commerce first made this determination in 1984 in *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). Following its decisions in the *Wire Rod* cases, Commerce rescinded initiations of CVD investigations on imports of potash from the Soviet Union and the German Democratic Republic. At that time, all four countries (Czechoslovakia, Poland, the Soviet Union, and the German Democratic Republic) were considered non-market economies because each was characterized by central government control of prices and allocation of resources.

Commerce's NME classification was founded on an economic analysis that concluded that, in countries that relied on the existence of central planning to allocate resources and prices, markets did not exist. Commerce said:

> We believe a subsidy (or bounty or grant) 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. With varying degrees of control, 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. Resources may appear to be misallocated in an NME when compared to the standard of a market economy, but the resource misallocation results from central planning, not subsidies.
>
> 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.[2]

Thus, Commerce believed that, without markets, there would be no way to quantify NME subsidies. Because of pervasive control of prices and resources, Commerce said it could not disaggregate government actions in such a way as to identify the exceptional action that is a subsidy.

Commerce's decision was contested and the U.S. Court of International Trade (CIT) reversed it.[3] However, upon appeal to the U.S. Court of Appeals for the Federal Circuit (CAFC), the CIT's decision was reversed and Commerce's decision was affirmed.[4] The CAFC accepted Commerce's reasoning because it could not say that Commerce's decision was "unreasonable, not in accordance with law, or an abuse of discretion" in view of the discretion accorded administrative agencies.[5] The CAFC also agreed that subsidized unfair competition cannot exist in an NME. Quoting Commerce, the CAFC said:

> [T]he nonmarket environment is riddled with distortions. Prices are set by central planners. "Losses" suffered by production and foreign trade enterprises are routinely covered by government transfers. Investment decisions are controlled by the state. Money and credit are allocated by the central planners. The wage bill is set by the Government. Access to foreign currency is restricted. Private ownership is limited to consumer goods.[6]

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2 *Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19370, 19371 (May 7, 1984) (final negative CVD determination) (emphasis added); *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19374, 19375 (May 7, 1984) (final negative CVD determination) (emphasis added).

3 *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (CIT 1985).

4 *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

5 *Georgetown Steel Corp*., 801 F.2d at 1318, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

6 *Georgetown Steel Corp*., 801 F.2d at 1315.

Based on this understanding of the way NMEs worked at that time, and specifically with reference to "export incentives," the CAFC opined that "even if one were to label these incentives as a 'subsidy,' in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves."[7]

Thus, the bases for Commerce's policy of not applying U.S. CVD law to NMEs may be summarized as follows:

1. Definitional: a subsidy is any government action that distorts markets;

2. Economic/Factual: production and investment and prices are all controlled by central planning which results in a market that is not rational, leaving prices and costs meaningless, and subsidies impossible, as subsidies are only meaningful in market economies; and

3. Practical: there are no benchmarks in an NME with which to quantify any subsidies.

B. The Factual Circumstances Underlying Commerce's Policy Are No Longer Relevant.

It has been over 22 years since the original Commerce decisions and the CAFC's affirmance of Commerce's policy. In that time, there have been many developments relevant to the rationales relied upon by Commerce and the CAFC. In fact, based on an analysis of current factors, Commerce has changed the status of the Czech Republic and Slovakia (successor states to Czechoslovakia), Poland, and Russia from "non-market" to "market" economies. The People's Republic of China was found in 2006 to still be a non-market economy for purposes of U.S. antidumping law. A review of China's current situation and treatment by the Department under antidumping law are provided to illustrate that market conditions in NMEs do change.

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[7] *Georgetown Steel Corp.*, 801 F.2d at 1316.

1. U.S. law now defines a "subsidy" based on its characteristics, not its effects.

In 1994, the United States enacted the Uruguay Round Agreements Act, implementing the results of the Uruguay Round negotiations establishing the World Trade Organization. Revised agreements, including the Agreement on Subsidies and Countervailing Measures (ASCM) were also adopted. The original GATT Articles (including VI, XVI, and XXIII) were not amended. One of the notable features of the new SCM Agreement was that, for the first time, an explicit and expansive definition of subsidies was agreed upon. Although the prior 1979 Subsidies Code, and GATT Articles VI (Antidumping and Countervailing Duties), XVI (Subsidies) and XXIII (Nullification or Impairment of Benefits Through Government Action) provided rules for subsidies discipline and application of countervailing duties, they did not provide a definition of a subsidy. The 1979 Subsidy Code used the terms "subsidy" and "subsidize" without elaboration. GATT Article XVI, paragraph 1, referred to "any subsidy" as including "any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into" a country. The definitional gap was filled by Article 1 of the WTO ASCM, which states that a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or public body,[8]
or
(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
and
(b) a benefit is thereby conferred.[9]

[8] A "financial contribution" includes any direct or potential direct transfer of funds (e.g., grants, loans equity infusions, or loan guarantees); forgone revenue (e.g., fiscal incentives such as tax credits); provision of goods (other than general infrastructure) or purchase of goods; and payments to a funding mechanism or direction of a private body to carry out what would normally be government functions. ASCM, art. 1.1(a)(1)(i)-(iv).

Article 2 of the ASCM requires that, to be actionable, a subsidy must be given to a specific enterprise or industry or group of enterprises or industries.[10]

Significantly, the ASCM, unlike Commerce's 1984 working definition and GATT Article XVI, defines a subsidy based on what it is, instead of what it does. This approach is much more practical because a subsidy can be identified by its characteristics; it is not necessary to examine the effects of a subsidy in order to determine whether it is, in fact, a subsidy.

In view of the current WTO and U.S. statutory definition of a subsidy, Commerce's 1984 definition of a subsidy as being any action that distorts markets is outdated and no longer relevant. Absent the "economic effects" approach used by Commerce in 1984, the foundation of Commerce 's policy of non-application of CVD law to NMEs falls apart. While the result of a subsidy may be market distortion, that is not the standard by which to judge whether an action is a subsidy.

Neither the WTO SCM Agreement nor U.S. law provides for an NME exception from the application of CVD law or WTO disciplines. Interestingly, the CIT's decision in *Continental Steel* noted that the CVD law specifically applies to "any country."[11] Although Commerce recognized this, it considered that the nature of NMEs required an additional jurisdictional test to determine if NMEs could subsidize. However, the CIT said that a failure to meet this jurisdictional criteria would amount to a *per se* exemption and be in conflict with the plain

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[9] ASCM, art. 1.1. This provision is implemented in U.S. law by Section 771(5)(B) of the Tariff Act of 1930, as amended; 19 U.S.C. § 1677(5)(B).

[10] ASCM, art. 2. This provision is implemented in U.S. law by Section 771(5A) of the Tariff Act of 1930, as amended; 19 U.S.C. § 1677(5A).

[11] *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 550 (CIT 1985).

statement that the law covers *any* country.[12] The CAFC's decision did not comment on the CIT's determination that CVD law applies to subsidies in *any* country. The CAFC reversed the CIT because it determined that Commerce's conclusion that NMEs could not confer a subsidy was not unreasonable, accepting Commerce's definition of a subsidy and its characterization of non-market economies.[13]

Although the ASCM's change of subsidy definition alone would be a basis for Commerce to change its policy, an examination of the evolution of economic and factual conditions is provided to explore if, in fact, subsidies exist in China and are measurable.

2. <u>The economic rationale for not applying CVD law to China has significantly changed since 1984.</u>

Since there is now a definition of a subsidy, the current economic circumstances in China need to be examined in relation to Commerce's 1984 decisions to see if subsidies can and, in fact, do exist in China. The economic situation in China today is far different than the economic situation that existed in the four NMEs that Commerce described in 1984. China is in the process of a gradual liberalization of its markets, which was acknowledged in the Agreement on Market Access between China and the United States of November 15, 1999 (at p. 4). Now, it is <u>not</u> accurate to characterize China as having an economy totally directed by the State and one in which the State owns or controls all means of production. Currently, much of China's GNP is produced by private enterprises with a declining share produced by State-controlled enterprises. In China today, there is joint venture production by foreign firms and increasing amounts of foreign direct investment.

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[12] *Continental Steel Corp*, 614 F. Supp. at 550 (emphasis in original).

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

a. Various independent reviews of China's economy show that China has made substantial movement toward a market economy.

The transition of China from a state-directed economy was reviewed in a 1993 study published by the International Monetary Fund.[14] This study identified four phases of reform:

1. *1978-1984*: Government policies placed greater emphasis on material incentives and allowed a larger role for the market. Farming was decentralized from the cooperative to the household level. China began to experiment with allowing State-owned enterprises to retain profits. Preferential policies were conferred on special economic zones to attract foreign investment, and act as laboratories for bolder market-oriented reforms.

2. *1984-1988*: Reform in the urban industrial centers, following the success of decentralization of farming. This included the introduction of taxation of enterprises, reform of the wage system to establish a link between productivity and pay, opening of 14 major cities to foreign investment, and other market oriented reforms.

3. *1988-1991*: Retrenchment. The prior reforms spurred demand and production, leading to double-digit inflation. Some earlier reforms were reversed under a "Rectification" program which stabilized prices but caused a sharp slowdown in the economy.

4. *1992-1993*: (up to the date of the IMF report) An end to the "rectification" program and a decision to accelerate the process of reform and opening up, establishing the goal of creating a "socialist market economy system." The Chinese constitution was amended in 1992 to delete references to a planned economy and establish the new goal of creating a market system.

The economic structure of China has continued to change since 1993. For example, a PriceWaterhouseCoopers report in 2003 estimated that <u>two-thirds</u> of China's GDP was generated by the non-state sector, and around <u>half</u> was contributed by domestic private enterprises.[15] This

[14] Michael W. Bell, Hoe Ed Khor, and Kalpana Kochar, *China at the Threshold of a Market Economy* (IMF, 1993).

[15] Allan Zhang, Hidden Dragon: Unleashing China's Private Sector (PriceWaterhouseCoopers, 2003); available at http://www.pwcglobal.com/extweb/newcolth.nsf/docid/3D15C57A6D220BB985256CF6007B9607.

report also noted that registered private businesses rose from 90,000 in 1998 to over two million in 2001.

b. <u>Commerce's 2006 NME status review of China shows significant changes to China's economy since 1984.</u>

The August 30, 2006 memorandum of Commerce in the *Certain Lined Paper Products from the PRC* antidumping investigation reviewed the six statutory factors in 19 U.S.C. § 1677(18)(B) and provided the explanation for why, despite significant progress by China in many areas, the agency would still treat China as a non-market economy under U.S. antidumping law. Here are some selected excerpts from Commerce's analysis which show the substantial progress made, all of which support now using CVD law to permit the addressing of subsidies provided by the Chinese central, provincial and local governments:

(1) "{W}hile China's reforms to date cannot ensure that the *renminbi* is market-based, neither is the currency completely insulated from market forces."[16]

(2) "{T}he Department finds that wages between employers and employees appear to be largely negotiated, as opposed to government-set, as evidenced by the variability in wages across regions, sectors, and enterprises."[17]

(3) "{T}he Department notes that China permits all forms of foreign investment, e.g., joint ventures and wholly-owned companies, in most sectors of the economy. Foreign investors are free to repatriate profits and investments are protected from nationalization and expropriation. However, * * *, China still manages foreign investment to significant degree, e.g., by guiding FDI towards favored export-oriented industries and specific regions, shielding certain domestic firms from competition, and relying on industry-specific FDI rules and regulations."[18]

(4) "China has made progress in privatizing state-owned enterprises ('SOEs') and introducing limited market practices to state-owned firms. However, while the PRC government has made a decision to recede from direct state control over

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[16] August 30, 2006 Memorandum re China's NME Status in the antidumping duty investigation of *Certain Lined Paper Products from the PRC* (A-570-901), at 2.

[17] *Id.*

[18] *Id.* at 3.

certain parts of the economy, it also intends to maintain and bolster state control in other areas, especially in the 'core' or 'pillar' industries. * * * property rights remain poorly defined and weakly enforced."[19]

(5) "With regard to *** the government's control over the allocation of resources, the Department notes that the era of China's command economy has receded and the majority of prices are liberalized. There is also evidence of some market-based resource allocations. * * * Nevertheless, the PRC government, at all levels, remains deeply entrenched in resource allocation."[20]

(6) "Finally, the Department notes under factor six that China faces a myriad of major challenges in overcoming institutional weaknesses regarding rule of law, property rights and bankruptcy."[21]

"The Department recognizes the important positive changes, both *de jure* and *de facto,* that China's economy has experienced in the past 25 years. The PRC government has undertaken significant reforms to promote the introduction of market forces into the economy. However, in applying the factors required under section 771(18)(B) of the Act, we recognize that China has a dynamic (but constrained) private sector, but also find that the state retains for itself considerable levers of control over the economy."[22]

c. <u>Commerce's common practice of calculating individual dumping margins for Chinese exporters shows that Commerce itself recognizes changes in China's economy.</u>

Commerce itself recognizes the Chinese market reforms in its antidumping investigations of Chinese products. While still considering China to be a non-market economy, Commerce has recognized in practice that state control is not all-pervasive. Since 1991, Commerce has allowed Chinese exporters to receive an "individual" rate of dumping duty if the exporter can

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19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 3-4.

demonstrate in law and in fact that no level of government controls its export activities.[23] Since 1991, virtually all Chinese exporters have received individual rates, with the exception of companies who failed to provide accurate and verifiable responses to Commerce questionnaires. As facts available, these companies are given the China-wide rate, which is normally very high. The practice of calculating individual rates has become routine in Commerce's preliminary determinations of sales at less than fair value in cases concerning Chinese imports. In fact, the practice is seldom contested in final determinations. When it has been, Commerce has almost invariably concluded the subject Chinese company is free of government control of its export activities, and deserves an individual rate based on its own factors of production.

In making its decision as to whether individual companies are free of government direction and control, Commerce examines two sets of factors, neither of which existed in the NMEs described by Commerce in 1984. The first step is to examine three *de jure* factors:

1. whether there are restrictive stipulations associated with the exporter's business and export licenses;

2. legislative enactments decentralizing control of companies; and

3. other formal measures by the Government decentralizing control of companies.

The second step is that, in addition to the legal status of an exporter, Commerce examines four *de facto* items:

1. whether the export prices are set by, or subject to the approval of, a governmental agency;

2. whether the respondent has the authority to negotiate and sign contracts and other agreements;

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[23] *See Sparklers from the PRC*, 56 Fed. Reg. 20588 (May 6, 1991) (final LTFV determination).

3. whether the respondent can retain the proceeds from its export sales and make independent decisions regarding the disposition of profits or financing of losses; and

4. whether the respondent has autonomy from the government regarding the selection of management.

This set of criteria was followed in a recently-completed new shipper review of Chinese exports of honey.[24] In this particular case, both respondents preliminarily received individual rates.

None of the *de jure* and de *facto* factors Commerce now routinely examines were foreseen in 1984. Yet all go to the logic of applying CVD law to NME country producers.

The practice of granting individual rates to individual Chinese exporters has become normal; almost all respondents who ask for individual rates receive them. The very frequency of Commerce determinations that separate rates are appropriate indicates how much China differs from the typical NME conditions that Commerce examined in 1984.

d. <u>Legal changes in China show movement toward a market economy.</u>

On December 22, 2003, the Communist Party formally tabled an amendment to the Chinese Constitution to provide that "private property obtained legally shall not be violated."[25] The members of the Standing Committee of the National People's Congress (NPC) passed the draft amendments to the Constitution in Beijing on December 27, indicating that formal adoption would be in March 2004.[26] The amendment was submitted to the national legislature on March

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[24] *See Honey from the People's Republic of China: Intent to Rescind, in Part, and Preliminary Results of Antidumping Duty New Shipper Reviews,* 72 Fed. Reg. 111, 113-114 (January 3, 2007).

[25] *See* Richard Spencer, *China amends constitution to protect private property*, The Age (Dec. 24, 2003); available at http://www.theage.com.au/articles/2003/12/23/1071941725876.html.

[26] *See* Website of the Embassy of the People's Republic of China in the United States of America, http://www.china-embassy.org/eng/gyzg/t57116.htm.

8, 2004.[27] The amendment was adopted at the 2nd session of the 10th National People's Congress on March 14, 2004.[28]

3. China's WTO accession documents directly identify subsidies in China.

In the negotiations with China for accession to the WTO, the U.S. government negotiated strongly, and successfully, to impose disciplines on Chinese subsidies. These conditions for WTO membership became part of the Protocol of Accession for China. China agreed to eliminate all export subsidies.[29] China also agreed that WTO Member Authorities could use non-Chinese benchmarks for subsidy quantification if Chinese benchmarks were not available or could not be adjusted.[30]

Annex 5A to the WTO Accession Protocol for China listed 24 domestic subsidy programs which China did not agree to terminate or phase out. However, some members of the Working Party on the Accession of China to the WTO considered the list incomplete.[31] In particular, they felt that some subsidies, such as "policy" loans by State-owned banks, forgiveness of debt, and the selective use of "below-market" interest rates should have been notified.[32] There was also reference to unnotified tax subsidies, and subsidies provided by sub-national governments.

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27 *See Draft amendment to constitution submitted to NPC session*, People's Daily (March 8, 2004); available at http://english.peopledaily.com.cn/200403/08/eng20040308_136881.shtml.

28 *See Top Legislature Closes Session, Adopts Amendment to Constitution,* Xinhua News (March 14, 2004); available at http://news.xinhuanet.com/english/2004-03/14/content_1365556.htm, cited in *China's Compliance with World Trade Organization Obligations: A Review of China's First Two Years of Membership*, A Report Prepared for the U.S.-China Economic and Security Review Commission by the Law Offices of Stewart and Stewart, at 5 n.2 (March 19, 2004), Transnational Publishers (2005).

29 Protocol of Accession of the Peoples Republic of China, WT/L/432 (23 November 2001) at Item 10.3.

30 Protocol of Accession of the Peoples Republic of China, WT/L/432 (23 November 2001) at Item 15.

31 Report of the Working Party on the Accession of China, WT/MIN(01)/3 (10 November 2001) at para. 173.

32 *Id.*

In Annex 5B to the Protocol, China listed three export subsidies to be phased out, but some members of the Working Party also considered this list incomplete.[33]

Since accession, China has submitted its first report on subsidies to the WTO, undergone a number of transitional reviews and completed its first trade policy review. In China's first full subsidy submission to the WTO made in April of 2006, China identified 78 programs as subsidies, although the report as such does not constitute proof that any of the programs would themselves be actionable subsidies under the SCM Agreement.[34] The U.S. and other trading partners have raised other programs as potentially being notifiable.[35] Subsidies are also included in the 2006 Trade Policy Review on China.[36]

It is notable, when reviewing the U.S.-China Accession Agreement and the WTO Accession Protocol and Report of the Working Party, that the Members of the WTO, including the United States, developed and approved accession documents that identified Chinese domestic and export subsidies, and provided alternate methods to measure subsidies. There is no indication that any of the Members involved in the accession process, including China itself, believed that subsidies do not, or could not, exist in the present Chinese economy. It would be strangely inconsistent for the United States to negotiate disciplines for Chinese subsidies while, at the same time, adhering to a policy that subsidies could not exist in China.

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33 *Id.* at para. 166.

34 G/SCM/N/123/CHN (13 April 2006) at 1.

35 *See, e.g.*, G/SCM/Q2/CHN/23 (16 October 2006).

36 WT/TPR/G/161 (17 March 2006).

4. Subsides in China can be measured.

In 1984, Commerce believed that there could be no benchmarks in an NME with which to quantify any subsidies, due to the absence of markets. However, as evidenced by its choice of factors to examine in determining whether individual Chinese firms are free of government direction and control in their export activities, and its decisions to grant separate rates, Commerce has moved far away from its 1984 views of non-market economies.

Of course, there is still a need to quantify any subsidy in order to countervail it. A common benchmark in CVD investigations in measuring preferential loans or identifying the discount rate for grants is the market rate of interest. The International Monetary Fund publishes three interest rates for China in its *International Financial Statistics:* the Bank Rate, Deposit Rate, and Lending Rate.

It would not be unusual if practical difficulties arose in the course of investigating Chinese subsidies, but Commerce will not know if this is so unless, and until, it actually conducts CVD investigations of Chinese imports. One would not expect to find perfect markets in China, given that remnants of state control over economic activities are still in place. However, Commerce has never said that the market must be perfect in order to determine subsidy benchmarks.[37] In any event, the current economic structure in China bears no relation to the economic structure that existed in 1984. If, in investigating a Chinese subsidy, Commerce encounters practical difficulties in finding a benchmark, the default conclusion surely should not

[37] In the 1984 *Wire Rod* cases, Commerce said that few modern economies are purely market driven. *See Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. at 19371; *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. at 19375.

be that a subsidy does not exist. As noted above, in the WTO Protocol of Accession, China agreed that Members may use external benchmarks under certain circumstances.

C. There Is No Inconsistency In Applying Both Countervailing Duty And Antidumping Law To NMEs.

The application of CVD law to NMEs such as China would not result in any conflict with or affect Commerce's current application of antidumping law to NMEs.

1. Through its WTO accession, China accepted that WTO members, including the U.S., could apply both AD and CVD law to imports from China.

The most cogent demonstration that AD and CVD law do not conflict in an NME context is the text and structure of China's WTO accession protocol. Indeed, China's Protocol of Accession directly addresses the application of special rules by members in determining both dumping and the level of subsidies where imports from China are concerned and, significantly, deals with them in the same section of the Protocol. Item 15 of the Protocol, titled "Price Comparability in Determining Subsidies and Dumping," explicitly states that, consistent with certain enumerated conditions, "Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member."[38] Item 15(a) addresses the ability of WTO members to use special rules for determining normal value in antidumping investigations involving China while 15(b) addresses the ability of WTO members to use alternative valuation approaches for Chinese subsidies. Item 15(d) of the Protocol limits the special rules for antidumping to 15 years after accession, but there are no limitations on the use of alternative valuation in subsidy matters

[38] Protocol of Accession of the Peoples Republic of China, WT/L/432 (23 November 2001) at Item 15.

involving China. Certainly, China's Protocol would not have addressed both special dumping and subsidy rules in the same section if it was not expected or accepted that both remedies could and would be applied to China. The Protocol does not, in any manner, condition or constrain the application of CVD remedies on Members not invoking NME methodology for AD purposes under 15(a).

2. The application of AD law is not affected by the definition of a subsidy in either the SCM Agreement or U.S. law.

The SCM Agreement and U.S. law definitions of "financial contribution," "specificity," and "benefit,"[39] the three elements that together define an actionable subsidy, do not contain negative implications for U.S. antidumping practices regarding NMEs. Indeed, neither the SCM Agreement nor U.S. law precludes application of CVD law to NME enterprises. The only explicit relationship between AD and CVD remedies is found in GATT Article VI (paragraph 5), which prohibits the application of antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization. In U.S. law, this prohibition is implemented by adding a countervailing duty for export subsidies to the calculation of U.S. price.[40]

D. A Change In Commerce's Practice Would Likely Be Upheld By The Courts As Long As Supported By A Reasoned Explanation.

Commerce has applied the current policy of non-application of U.S. CVD law to NMEs continuously since 1984. Commerce's policy, however, is not based on, or required by statute. As reviewed above, there is good reason for Commerce to change its policy of non-application of

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[39] *See* ASCM, art. 1 (financial contribution), art. 2 (specificity), art. 14 (benefit). *See also* Section 771 of the Tariff Act of 1930, as amended, at subsections (5)(D) (financial contribution), (5A) (specificity), and (5)(E) (benefit); 19 U.S.C. § 1677(5)(D), (5A), and (5)(E)..

[40] Section 772(c)(1)(C) of the Tariff Act of 1930, as amended; 19 U.S.C. § 1677a(c)(1)(C).

U.S. CVD law to NMEs, particularly China. And, even if challenged, a change in policy by Commerce that is supported by a reasoned basis would likely be upheld by Commerce's reviewing courts.

In reviewing agency interpretations of law where the statute and legislative history are not clear and conclusive, courts normally accord deference to the agency. In *Rust v. Sullivan*, the U.S. Supreme Court said:

> When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we customarily defer to the expertise of the agency.[41]

Significantly, the Supreme Court said that this deference also extends to an agency's departure from a prior policy when the change is accompanied by a reasoned analysis. The Court stated:

> This Court has rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations" of the statute in question. * * * In Chevron,[42] we held that a revised interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." * * * 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.'"[43]

The principles enunciated in *Rust v. Sullivan* actually support a change in agency interpretations when such interpretations no longer represent the path of wisdom and changing circumstances demand adaptation. Thus, applying *Rust v. Sullivan* here, the following points are most apposite as to why a prudential change in policy would be upheld.

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41 *Rust v. Sullivan*, 500 U.S. 173, 186 (1991).

42 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

- Commerce's initial policy interpretation was "not instantly carved in stone."
- It is incumbent on Commerce to "consider varying interpretations and the wisdom of its policy on a continuing basis."
- Commerce must be afforded "ample latitude to adapt its rules and policies to the demands of changing circumstances."
- Courts will accord deference to a change in policy by Commerce even if it represents a sharp break from prior long-standing policy, as long as Commerce provides a reasoned analysis for its change in policy.

Conclusion

The People's Republic of China is an important trading nation in the global trading system. Its government provides various benefits to producers and exporters which are regularly viewed as subsidies when provided by governments in other countries to their producers and exporters. Under U.S. countervailing duty law, for a WTO member like China, an investigation is warranted where evidence of subsidies and of material injury or the threat thereof to a domestic industry are presented by or on behalf of an industry. China, in becoming a member of the WTO, accepted the full range of rights and obligations and separately accepted that there would be for its trading partners who were members of the WTO potentially special needs in valuing both prices for dumping analysis and the benchmarks used in valuing subsidies. All U.S. producers should be able to turn to the same remedies in dealing with China or other countries presently treated as NME countries for dumping purposes in the U.S., as they have for all other countries.

In reviewing the history underlying Commerce's policy decision not to apply U.S. countervailing duty law to NMEs, together with subsequent developments in international rules

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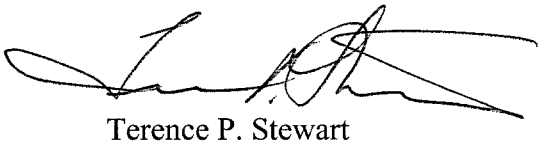
[43] *Rust v. Sullivan*, 500 U.S. at 186-87 (citations omitted).

and changes in the structure of the Chinese economy, what may have been an appropriate approach in the early 1980s is no longer so in 2007.

Commerce should use the investigation currently underway on coated free sheet paper from the PRC to modify its policy and return U.S. countervailing duty law to universal application.

Sincerely,



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