

PUBLIC DOCUMENT

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Susan H. Kuhbach
Senior Office Director
Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Ave. & 14th S., N.W.
Washington, D.C. 20230cc: Callie Conroy
David Layton**Re: Application of the Countervailing Duty Law to Imports from the
People's Republic of China: Request for Comment**

Dear Ms. Kuhbach:

The following comments are filed on behalf of MAN Ferrostaal Incorporated in response to the Department's *Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment*, 71 Fed. Reg. 75,507 (Dec. 15, 2006), concerning the potential application of countervailing duties to imports from the People's Republic of China, which the Department currently considers to be a non-market economy ("NME").

There are numerous conceptual problems with the question of applying the CVD law to NMEs, and no doubt other comments being submitted will address these thoroughly. The comments submitted herein focus on one of the conceptual

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problems, of which the U.S. Court of Appeals for the Federal Circuit took notice in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). In that case, the Court observed that the Department's considered position was that the countervailing duty ("CVD") law is inapplicable to nonmarket economies as a matter of law. *Id.* at 1310. In affirming the Department's dismissal on that basis of the countervailing duty investigation then at issue, the Court stated that the "statutes indicate that Congress intended that any selling by nonmarket economies at unreasonably low prices should be dealt with under the antidumping law." *Id.* at 1316. Congress . . . has decided that the proper method for protecting the American market against selling by nonmarket economies at unreasonably low prices is through the antidumping law." *Id.* at 1318. The Court's observation is correct; subsidies to the extent that they exist are accounted for within the antidumping methodology for NMEs, and applying the CVD law to a country that is considered an NME for antidumping purposes would result in double-counting and essentially an illegitimate doubling of duties.

To understand the double-counting problem, it is easiest to start with a situation in which the simultaneous use of antidumping and countervailing duty calculations is permissible, *i.e.*, where the application of both calculations will not result in a double-count – in the context of proceedings concerning a product from a market-economy country. For example, suppose a market-economy company

receives a loan that the Department considers to be subsidized. The Department calculates a countervailing duty as a result. In the cost calculation on the dumping side, the Department takes the company's financing costs as it finds them -- even though those costs may be considered subsidized; the Department does not gross them up to an unsubsidized level, since doing so would create a double-count of the unfair trade advantage that the company is receiving, once by way of the countervailing duty calculation, once by way of the antidumping duty calculation. But if we now change the example so that the product for which the antidumping and countervailing duty calculations are being made originates in an NME, such as China is currently considered to be, a double-counting problem automatically arises. The antidumping methodology for NMEs requires that costs (and profits) be restated on a market-economy basis (based on information from a selected surrogate market economy, rather than using the actual costs), and as a result a countervailing duty simply cannot be calculated for the subsidized loan without generating a double-count.¹ As the U.S. Court of Appeals for the Federal Circuit correctly observed,

¹ The recent proceedings in *Softwood Lumber from Canada* provide a concrete example of market-economy calculations, as opposed to NME calculations. The Department determined that countervailable subsidies existed based on its conclusion that Canadian provincial governments charged companies less than adequate remuneration for the harvest of trees, and determined countervailing duties on the basis of what the Department considered to be correct market benchmarks. In the concomitant antidumping proceedings, the Department calculated the respondents' cost of production, but in no instance did it adjust the respondents' harvest costs to be equal to the higher commercial benchmark that the Department considered appropriate; instead, harvest costs were taken as they were found on the companies' books for purposes of calculating the antidumping duties. *See, e.g., Notice of*

problems of countervailable subsidies for NMEs are properly addressed through the antidumping duty law.

The reason that a double-count would arise in the case of NMEs is that the NME antidumping methodology mandated by U.S. law requires that the antidumping duty calculation measure the same economic behavior as the countervailing duty calculation:

The antidumping duty calculation measures the difference between U.S. price and normal value. To obtain the latter for an NME, the Department uses constructed value based upon data from market-economy surrogates, replacing the company's manufacturing costs, general expenses, and financial expenses with those observed in the surrogate market economies.

Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products From Canada, 66 Fed. Reg. 56,062, 56,070 (Nov. 6, 2001) (“We relied on the COP data submitted by each respondent in its cost questionnaire response, except in specific instances where the submitted costs were not appropriately quantified or valued, or otherwise required adjustment, as discussed below”). Consequently, no double-counting problem arose. But in an NME antidumping proceeding, the Department is required by the antidumping duty law provisions on NMEs to restate the respondents' costs based on a commercial market-economy benchmark. In the *Softwood Lumber* example, the harvest costs of an NME producer would be required by law to be grossed up to a market-economy benchmark amount in the dumping calculation. The antidumping and countervailing duty calculations would then necessarily attack the same alleged unfair trade advantage twice.

The countervailing duty calculation measures the difference between the cost to the company of a good, a service, or financing, and what the company would pay for the same in an open market. . This simultaneously covers reductions in company costs and enhancements to company profits.

In both antidumping and countervailing duty cases against NMEs, an NME company's costs would be measured against commercial benchmarks. The higher the commercial benchmark, the higher the antidumping or countervailing duty that can result from the calculation. The very same instance of incurring costs below a commercial benchmark would contribute to both countervailing and antidumping duties. If the requirement of meeting a market benchmark were applied twice, once for antidumping purposes and once for countervailing duty purposes, a double penalty would result, which obviously could not be justified on economic grounds and would not be in accordance with law.

As an illustration, consider a Chinese company that exports all of its production to the United States with a net selling price equal to its cost of production as measured by its own records. The company is making payments on loans received from an entity considered to be a part of the Chinese government. If we

assume that the interest component of these payments equals 6% of cost of production:

In the NME antidumping calculation, the company's own financing costs would be replaced by market surrogates. Suppose that the surrogate financing costs total 10% of the cost of production. The difference between the actual and the surrogate costs would increase cost of production by 4%. After application of a profit multiplier, normal value (all other things being equal) would exceed U.S. price by 4% or more, since U.S. prices equal the company's own costs, leading to a dumping margin of 4% or more. Of course, all other elements of company costs, as well as company profits, are replaced by market benchmarks as well.

A parallel countervailing duty investigation would consider the total interest paid to the Chinese government and measure it against what the company would pay in an open market. Notably, this is exactly what the dumping calculation is doing. If the countervailing benchmark were the same market rate as reflected in the dumping surrogate value, the total amount that the company "should" have paid would be the same as the dumping surrogate,

and the resulting countervailing duty calculated by the Department would also be around 4%.

If 4% antidumping duties and 4% countervailing duties were applied, duties would obviously be over-collected. The unfair trade advantage is corrected in full by the NME antidumping methodology, meaning that an additional countervailing duty calculation addressing this same advantage would over-remediate the unfair trade advantage.

In the above example, both the antidumping and countervailing duty calculation reflect the difference between market benchmarks and the costs incurred by the company. The actual details of the antidumping and countervailing duty calculations are very different, of course, and the difference between market and actual costs would in general play out in different ways in the antidumping and countervailing duty calculations – but addressing the perceived unfair trade advantage through the NME antidumping methodology will fully account for the unfair trade advantage. Addressing it one more time through the CVD law would double-count the perceived unfair trade advantage.

For this reason alone, the Department should recognize the potential for double-counting that would result from application of the CVD law to NMEs, and should re-affirm its position, of which the U.S. Court of Appeals for the Federal

Circuit took note in *Georgetown Steel*, that the CVD law does not apply to NMEs, as a matter of law. The double-counting problem arises when there are simultaneous investigations and reviews, or when a petitioner files one type of case that results in an order, and then later files the other type of case. The way to avoid the double-counting problem is to find – as the Department already correctly did before – that the CVD law does not apply to NMEs. Countervailable subsidies for NMEs, to the extent that they exist, are accounted for through the antidumping duty law’s provisions on NMEs. The Department should also re-affirm its position that the CVD law does not apply to NMEs on the basis of the other conceptual difficulties that arise from attempting to apply the CVD law to NMEs, which we are sure will be brought to the Department’s attention in comments submitted by others in this proceeding.

For the record, we wish to make clear that in submitting these comments, MAN Ferrostaal Incorporated is in no way endorsing or acquiescing in the

Department's current position that the People's Republic of China constitutes an NME.

Sincerely,



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