

January 16, 2007

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

RE: Application of the Countervailing Duty Law to Imports from the People's Republic of China: Comments of Norandal U.S.A., Inc.

Dear Ms. Kuhbach:

I. INTRODUCTION

On behalf of our client, Norandal U.S.A., Inc. ("Norandal"), we are pleased to have this opportunity to provide comments to the Department of Commerce ("Commerce") on the applicability of the U.S. countervailing duty law¹ to imports from the People's Republic of China ("PRC").

Established in 1979, Norandal is a wholly owned subsidiary of Noranda Aluminum, a Missouri-based primary aluminum producer accounting for about 11% of U.S. production. Norandal is a manufacturer of aluminum foil and light gauge sheet products servicing the consumer packaging, power distribution, construction, refrigeration, and automotive industries. A leader in key segments of the aluminum rolled products industry, Norandal owns and operates four rolling mills in the southeast United States – Salisbury, North Carolina, Newport Arkansas, and two in Huntington, Tennessee -- having a total annual production capacity of 495 million pounds. Since

¹ Referred to herein as the "CVD law."

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its inception, Norandal's strategy has been to invest in modern, state-of-the-art production facilities to manufacture high quality and innovative aluminum products. This strategy has placed Norandal among the world leaders in aluminum rolled products.

II. NORANDAL'S INTEREST IN THE DEPARTMENT OF COMMERCE'S REVIEW OF ITS CVD POLICY

While Norandal holds a position at the forefront of the aluminum rolled products industry, it operates in a fiercely competitive environment and faces stiff competition from both domestic and foreign manufacturers. Because aluminum is traded globally on terminal commodity markets, primary aluminum prices are generally uniform throughout the world, with any differences resulting from differentials in freight costs. In this context, the competitive position held by Norandal is vulnerable to the effects of subsidy programs offered by the governments of other countries.

In the coming years, Norandal anticipates that it will face its greatest competition from aluminum rolling mills based in the PRC. Here, market reforms and government subsidies have fueled a massive expansion of the aluminum rolled products sector with a strong focus on exports. Although much of this sector is controlled by the governmental entities in the PRC, there is an increasing degree of private ownership: for example, the China Aluminum Corporation ("Chalco"), a holding company that is the largest of the PRC government entities in the aluminum sector, is traded on the New York Stock Exchange (symbol "ACH") and Alcoa owns 8% of the outstanding share capital.

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Manipulation of export tax and export rebate regimes in the PRC's aluminum sector has provided a major subsidy to the PRC manufacturers of value-added, semi-fabricated aluminum products with whom Norandal competes. Between 2003 and 2006, the PRC government gradually removed a 15% export rebate for primary aluminum products and replaced it with a 15% export tax on these primary products. At the same time an export rebate of up to 13% has been maintained on aluminum foil and other value-added, semi-fabricated aluminum exports. The cumulative effect of these measures has been:

- To artificially depress primary aluminum prices within the PRC, thereby providing PRC manufacturers of value-added, semi-fabricated aluminum products, with cheap raw material inputs;
- To provide a strong incentive for PRC manufacturers of value-added, semi-fabricated aluminum to export their already low-priced products in order to realize the up to 13% export rebate.

Given the potential impact that subsidization of the PRC aluminum industry can have on prices in world aluminum markets, Norandal takes a strong interest in any consideration of the applicability of U.S. CVD law to imports from the PRC.

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III. NORANDAL'S POSITION – COMMERCE'S POLICY SHOULD BE RESCINDED

Norandal respectfully submits that a reconsideration of Commerce's longstanding policy of not applying the CVD law to illegally subsidized Chinese imports is long overdue. The policy, in fact, should be rescinded.

Continuation of Commerce's policy leaves a gaping hole in the U.S. trade remedies regime, one that will continue to be infiltrated by subsidized imports from the PRC if they are left unchecked. Commerce should not continue to apply an unnecessary policy that ties the hands of the domestic industry in the face of unfair and injurious trade practices. Commerce should, rather, work toward the robust application of U.S. trade remedy measures, to the full extent permitted under World Trade Organization ("WTO") rules, so that U.S. industries such as Norandal may realize the returns on the investments they have made in order to be competitive in the global marketplace.

Commerce's policy is premised on the 1986 U.S. Court of Appeals for the Federal Circuit ruling in *Georgetown Steel v. United States*.² At the time of this decision, Congress had never directly addressed whether the CVD law applied to non-market economies. It neither prohibited nor condoned such application of the CVD law. The Federal Circuit stated that its task was to therefore "discern dispositive legislative intent by projecting as well as it could how the

² 1986 U.S. App. LEXIS 20344. Hereinafter referred to as "*Georgetown Steel*."

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legislature would have dealt with the concrete situation if it had spoken."³ It found that the "concrete situation" existing in the non-market economies at issue in *Georgetown Steel* was such that their alleged subsidy programs could not result in the type of "unfair competition" contemplated by the CVD law. Essentially, a subsidy could not exist in a non-market economy:

In exports from a non-market economy, however, this kind of "unfair competition" cannot exist. Although a non-market may engage in foreign trade through various entities, the state controls those entities and determines where, when and what they will sell, and at what prices and upon what terms.

...

Unlike the situation in a competitive market economy, the economic incentives the state provided to the exporting entities did not enable those entities to make sales in the United States that they otherwise might not have made. Even if one were to label these incentives as a "subsidy" in the loosest sense of the term, the governments of those non-market economies would in effect be subsidizing themselves. Those governments are not providing...the kind of "bounty" or "grant" for which Congress...prescribed the imposition of countervailing duties.⁴

Given the situation existing in 1986, the Federal Circuit found that it was entirely reasonable for Commerce not to have applied the CVD law to non-market economies.

Norandal submits the "situation" existing in what are still considered to be non-market economies has evolved dramatically over the past twenty years, especially in the PRC.

³ *Id.* at 5.

⁴ *Id.* at 6

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Commerce's policy of not applying the CVD law to unfairly subsidized PRC imports should be rescinded because:

- A. It is out-of-step with the current economic state of affairs in the PRC.

- B. It ignores the fact that the PRC has expressly bound itself to WTO subsidies disciplines that have supplanted the CVD law in operation at the time of *Georgetown Steel*.

- C. Continuation of the policy makes no sense in light of reasonably available measures Commerce may take to stop injury to U.S. industries from the PRC's subsidy practices.

A. The Transformation of the PRC's Economy

Norandal respectfully submits that the non-market economies of *Georgetown Steel*, in which incentives offered by the central planners could not be construed as "subsidies", are simply not comparable to the PRC economy of 2007. Subsidization by the PRC government of its industries *can* (and does) translate into a benefit to the private ownership interests of many PRC exporters, and into injury to U.S. industries.

1. Market Reforms in the PRC

As a condition of its accession to the WTO on December 11, 2001, the PRC agreed to be considered a non-market economy for 15 years (until December 11, 2016). Despite this designation, however, many sectors of the PRC economy function on market principles.

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In the past thirty years, huge increases in private sector participation and competition in the Chinese economy have taken place. In its 2006 Trade Policy Review of China, the WTO observed that policies promoting foreign direct investment have "allowed the emergence alongside the public sector of a private (non-public) sector, whose contribution to the GDP reached nearly 60% in 2003."⁵ The China Trade Policy Review concludes that "China's economic reforms...have increased the market orientation of its economy"⁶ and that "all its bilateral agreement partners have recognized China as a market economy."⁷

2. The PRC's Export Orientation

As the PRC transforms from a state-controlled economy to a market-based one, it is also undergoing a dramatic shift from an economy driven by domestic economic development to one powered by exports. The following statistics bear out the incredible growth in exports from the PRC over the past 15 years:

- In 1992, the PRC's total exports amounted to US\$84.96 billion.⁸
- By 2000, PRC exports totaled US\$249.24 billion, or 23% of the PRC's GDP.⁹

⁵ Trade Policy Review: People's Republic of China, Report by the Secretariat (Revision) at ix, World Trade Organization Trade Policy Review Body, WT/TPR/S/161/Rev.1 (June 26, 2006) (hereinafter "China Trade Policy Review").

⁶ *Id.* at xiv.

⁷ *Id.* at x.

⁸ International Trade, OECD Statistics, Organization for Economic Cooperation and Development, at <http://stats.oecd.org> (last accessed Jan. 12, 2007).

⁹ *Id.*

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- By 2005, PRC exports had tripled to US\$762 billion, or 34% of its GDP.¹⁰

The increase in PRC exports to the United States is even more remarkable. Since 1989, exports from the PRC to the United States have increased by 1,931%, from US\$11.99 billion to US\$243.46 billion in 2005.¹¹ The PRC is now the second largest foreign supplier to the U.S. market, after Canada.¹² It is also now the world's third largest trader, behind only the United States and the EU.¹³ These trends are mirrored in the PRC's aluminum manufacturing sector – the PRC's aluminum foil production is forecasted to double between 2005 and 2010 and its aluminum foil exports are expected to triple during this period.¹⁴ In addition, U.S. and Canadian imports of PRC foil grew by 22 percent within the first nine months of 2006 in comparison to the same period for 2005.¹⁵

3. Implications of the PRC's Transformation

The PRC's current position in the global economy is drastically different from its global economic status when *Georgetown Steel* set U.S. CVD policy. It cannot simply be said that the PRC government dictates all aspects of the economy or that the government entities own and operate all enterprises. In the current context, a measure as simple as an export rebate, which

¹⁰ *Id.*

¹¹ U.S. General Imports for the PRC by General Customs Value, Dataweb, International Trade Commission, at <http://dataweb.its.gov> (last accessed Jan. 12, 2007).

¹² Testimony of Loren Yager, Director, International Affairs and Trade, before the U.S.-China Economic and Security Review Commission, April 4, 2006.

¹³ China Trade Policy Review at 22.

¹⁴ This is based on a report by a PRC aluminum industry expert commissioned by Norandal in May 2006.

¹⁵ This is based on data obtained from Global Trade Information Services (GTIS).

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provides a financial incentive for PRC manufacturers to export their goods, and permits them to command a lower price in doing so, must be viewed as a benefit to the investors and owners of such enterprises. Moreover, reliance on such measures can result in devastating injury to the domestic industry of other countries that engage in fair trade. The present-day state of affairs in the PRC warrants a departure from the *Georgetown Steel* approach that currently leaves U.S. manufacturers helpless against the rising tide of unfairly subsidized PRC imports.

B. The PRC's Membership in the World Trade Organization

Norandal submits that the PRC's accession to the WTO also provides justification for the U.S. CVD law to be applied to PRC imports. The PRC's accession was a monumental development in world trade as it served to hold China to the principles and obligations governing free and fair trade between and among WTO members, including the WTO disciplines governing subsidies. That the PRC could enact a measure constituting an actionable subsidy under WTO rules is contemplated by the *WTO Agreement on Subsidies and Countervailing Measures* and China's *Accession Protocol to the WTO*. As China is now a member of the WTO, Norandal sees no reason to excuse it from the subsidy obligations it has undertaken.

1. Definition of Subsidy under WTO Rules

The operative definition of "subsidy" at the time of *Georgetown Steel*, contained in GATT Article XVI, has been refined and made far more simple in the *WTO Agreement on Subsidies*

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and Countervailing Measures. Article 1.1 of the *WTO Agreement* simply requires that a subsidy shall exist if:

(a)(1) there is a financial contribution by a government or any public body ...,

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.

This "definition" was incorporated into the U.S. CVD law on December 8, 1994¹⁶ and replaced the provision at issue in *Georgetown Steel*. It is to be noted that the definition draws no distinction between market economies and non-market economies and nowhere exempts non-market economies from the obligations contained in the *Agreement*. Commerce should be able to apply this simple definition in determining whether PRC government programs, that benefit the bottom line of PRC companies, are illegal subsidies.

2. Concessions by the PRC on its WTO Accession

The fact that a subsidy may exist in the PRC is also made clear from the PRC's actions upon accession to the WTO. For example, at that time, the PRC agreed to terminate certain subsidy programs. It also agreed to the WTO Subsidies Committee reviewing its implementation of the

¹⁶ See 19 U.S.C. §1677(5).

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subsidies disciplines and the commitments it undertook in its *Protocol of Accession*. The PRC also submitted a notification of its subsidy programs.¹⁷ Similarly, the *Protocol of Accession* acknowledges the potential existence of subsidies in the PRC and states that subsidies can be accorded to state-owned enterprises.¹⁸ It also provides that where there are "special difficulties" in the application of the *Agreement on Subsidies and Countervailing Measures* to PRC subsidy programs, "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."¹⁹ Reference to this provision would appear to address the concerns that underlay the Federal Circuit ruling in *Georgetown Steel* – an inability to quantify a subsidy in a non-market economy – by permitting Commerce to use surrogate country benchmarks.

3. Implications of China's Membership in the WTO

The PRC's membership in the WTO and all of the previously noted instruments serve to acknowledge that actionable subsidies can and do exist in the PRC. Norandal submits that continued non-application of the U.S. CVD law to PRC imports simply does not make sense since the WTO *Agreement on Subsidies and Countervailing Measures* applies to all economies,

¹⁷ *Protocol of Accession of the People's Republic of China*, WT/L/432 (November 23, 2001), para. 10.3 and Annex 5B.

¹⁸ *Id.* at para. 10.2.

¹⁹ *Id.* at para. 15(b).

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whether market or non-market, and the extent to which PRC subsidy practices were addressed and negotiated leading up to the PRC's WTO accession.

C. Application of CVD Law to the PRC is Reasonable and Based on the Precedent of Other WTO Members

There would be nothing extraordinary about a Commerce decision to apply the CVD law to illegally subsidized PRC imports. Nothing in the U.S. CVD law, applicable at the time of *Georgetown Steel*, actually prohibited Commerce from applying the law in a non-market economy situation. Rather, the Federal Circuit simply found that, in light of the difficulty in quantifying a subsidy in a non-market economy, Commerce's decision not to apply the law was not unreasonable or an abuse of its discretion, *at the time*. Twenty years later, a Commerce decision *to* apply the law would be grounded on the reality of current market conditions in China and should likewise be considered as an entirely acceptable exercise of Commerce's discretion. This is especially so since the U.S. CVD law is now based on the WTO subsidies regime, which clearly applies to non-market economies, and to which China has been bound since December 2001.

Recent subsidy investigations conducted by the authorities of some of the U.S.' closest trading partners provide precedent that PRC subsidy programs can be quantified, can result in injury to industries of other countries, and are countervailable. For example, the Canada Border Services Agency has conducted three investigations since 2004 into Chinese subsidy practices. In

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Outdoor Barbeques,²⁰ *Carbon and Stainless Steel Fasteners*,²¹ and *Certain Laminate Flooring*²²

the Canada Border Services Agency examined a wide range of PRC subsidy programs, including: special economic area incentives; grants for export performance; preferential loans; loan guarantees; income tax credits, refunds and exemptions; relief from duties and taxes on inputs; reductions in land use fees; and, purchases of goods from state-owned enterprises. In two of the investigations (*Fasteners* and *Laminate Flooring*), countervailing duties were imposed on the PRC imports, which were found to have injured the respective Canadian domestic industry.²³

The non-market economy status of the PRC was not raised as a concern in these cases, nor did it affect quantification of the subsidy programs in issue or their impact on the Canadian domestic industry.

Finally, Norandal submits that the fact there may be concerns about how to quantify subsidies in certain sectors of the PRC economy should not result in a wholesale non-application of the CVD law. Commerce has successfully navigated prior cases (dealing with market economies), in which it could not find reliable, market-based prices to benchmark an alleged subsidy program. In Commerce's 2001 investigation into softwood lumber imports from Canada for example, it was alleged that the price charged by federal and provincial governments to harvest government-

²⁰ *Outdoor Barbeques*, CVD 102. Investigation commenced April 13, 2004. Notice of Termination of Investigation issued November 11, 2004.

²¹ *Carbon and Stainless Steel Fasteners*, CVD 103, Investigation commenced April 28, 2004. Statement of Reasons for Final Determination issued December 24, 2004.

²² *Certain Laminate Flooring*, CVD 104. Investigation commenced October 10, 2004. Statement of Reasons for Final Determination issued June 2, 2005.

²³ The *Outdoor Barbeques* investigation was terminated on the ground that subsidization of the PRC industry was deemed "insignificant" under Canada's countervailing duty legislation.

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owned timber (the "stumpage" fee) was tantamount to a government subsidy because it was set administratively and not through competitive auction or by some other market-based approach.²⁴

In calculating the countervailing duties in this case, Commerce chose not to use private stumpage fees in Canada, stating that there were "no useable market-determined prices between Canadian buyers and sellers. ... [T]he government-dominated market," Commerce found, "will distort the market as a whole if the government itself does not sell at market-determined prices."²⁵ As smaller sellers in such a situation often become price-takers, prices from those transactions were deemed to be unreliable for use as benchmarks in calculating unsubsidized prices. Therefore, Commerce used surrogate U.S. prices to determine reliable Canadian market-based stumpage fees. This methodology was upheld by the WTO Appellate Body on Canada's appeal of the matter to the WTO.²⁶

Should circumstances warrant, Norandal submits that it is fully within Commerce's power to subject PRC subsidy programs to the same standards that it did Canada's in the *Softwood Lumber* investigation. Where a non-market environment makes subsidy benchmarking difficult, surrogate values from market economies can be used to calculate countervailing duties, a measure that both the PRC and the United States appear to have contemplated in the *U.S.-China Accession Agreement*.

²⁴ *Certain Softwood Lumber Products from Canada*, Issues and Decision Memorandum (Department of Commerce, Import Administration), March 21, 2001.

²⁵ *Id.*

²⁶ *Certain Softwood Lumber from Canada* (Final), WT/DS257/AB/R (World Trade Organization), January 19, 2004.

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IV. CONCLUSION

In conclusion, the continuation of the current Commerce policy of not applying U.S. CVD law to illegally subsidized PRC imports would bear no relation to the present-day state of affairs in the U.S.-PRC trading relationship. Change is long overdue.

In the past twenty years, the PRC has emerged as a major force in the world trading system. Private ownership and an export-oriented focus are now hallmarks of PRC enterprises across many industry sectors, including the aluminum industry. It is this very type of PRC enterprise that is capable of deriving a real benefit from subsidy programs, and of causing injury to U.S. industries with unfairly priced product.

The PRC is also now a WTO member, and in its accession process, expressly acknowledged its capacity to enact actionable subsidies programs. No objective is served by allowing the PRC to skirt these rules. If not made to comply now with its commitment, the PRC cannot be expected to make an effort to comply in the future. Inaction may also result in other developing countries following the PRC's lead by implementing subsidy programs that violate WTO rules. Given the PRC's leadership in production and export capacity across a wide breadth of industries, and the model that it provides for other developing nations, a CVD policy that leaves the PRC's subsidy practices unchecked will eventually be devastating for U.S. industry.

Finally, application of U.S. CVD law to PRC imports is an entirely legal and practicable measure that Commerce may take to preserve the viability of U.S. industry in the face of unfairly traded

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PRC imports. Other countries have not hesitated to apply their CVD laws in similar circumstances. Where difficulties persist in quantifying a PRC subsidy, alternative methodologies may be applied to address the situation (as did Commerce in the softwood lumber investigation). In sum, there is no legal or practical barrier to Commerce applying US. CVD law to PRC imports.

We thank you for your time and consideration in reviewing Norandal's representations on an issue that is not only important to the U.S. aluminum industry, but to all industries, in the U.S. and abroad, that must deal with the dilemma of how to compete with illegally subsidized imports from the PRC.

Should you wish to further discuss our submissions, we would be pleased to do so at your convenience.

Sincerely,



Julia M. McCalmon
