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January 12, 2007

Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Room 1870
Washington, DC 20230

Re: Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment

Dear Ms. Kuhbach:

These comments are filed on behalf of the Polyurethane Foam Association ("PFA") in response to the Department's *Federal Register* notice soliciting comments on the applicability of the U.S. countervailing duty ("CVD") law to imports from the People's Republic of China ("China").¹ The PFA is a not-for-profit trade association representing manufacturers of flexible polyurethane foam ("FPF"), both slabstock and molded, and their chemical and equipment suppliers. The mission of PFA is to educate customers and other groups about FPF and to promote its use in manufactured and industrial products. Its members have a strong interest in maintaining effective laws to ensure that imports are fairly traded. We urge the Department to determine that the CVD law requires it to conduct CVD investigations of imports from China and other NMEs to the same extent as imports from market economy countries.

¹ *Application of the Countervailing Duty Law to Imports From the People's Republic of China; Request for Comment*, 71 Fed. Reg. 75507 (Dec. 15, 2006).



I. THE SCM AGREEMENT AND CHINA'S WTO ACCESSION PROTOCOL PERMIT WTO MEMBERS TO APPLY COUNTERVAILING MEASURES TO IMPORTS FROM CHINA

The U.S. CVD statute, as amended by the Uruguay Round Agreements Act, is intended to implement U.S. obligations under the WTO SCM Agreement, and its language closely tracks that of the SCM Agreement. The Agreement permits WTO Members to impose CVDs on subsidized imports and nowhere exempts imports from an NME country (or even addresses NME country imports). In particular, the language defining a subsidy in Article 1 of the Agreement makes no distinction between market economies and NMEs and plainly applies to both types of economies.

The applicability of the SCM Agreement to China is made abundantly clear by Article 15 of China's WTO Accession Protocol, in which China explicitly agreed to subject itself to subsidies disciplines.² Among other things, Article 15(b) of the Accession Protocol permits the application of third-country information in CVD determinations. Article 15(b) is not premised on the concept that China has achieved market economy status and thus applies regardless of the nature of China's economy. Under Article 10.2 of the Protocol, China further agreed that subsidies provided to state-owned enterprises will be viewed as specific (and, thus, actionable and countervailable) if state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies. This provision allows WTO members to regard such subsidies as specific without regard to the particular sector in which they operate.

² WTO Protocol on the Accession of the People's Republic of China, WT/L/432, Nov. 23, 2001, Art. 15(b).

Under Article 10.3 of the Protocol, China agreed, among other things, to eliminate all export subsidies and subsidies that are conditioned upon the use of either domestic goods or export performance. China also agreed to fully notify the WTO of all subsidies as required by Article 25 of the SCM Agreement. In April 2006, the Government of China notified 78 subsidies to the World Trade Organization (“WTO”) in accordance with the procedure required by China’s Protocol of Accession to the WTO.³ These subsidies include various types of tax preferences, exemptions on duties payable on imported raw materials and equipment, and various other benefits. Thus, the Chinese Government has admitted providing subsidies to its industries, and it is not unreasonable to suspect that significant subsidies have been provided to Chinese producers of FPF.

Given the broad coverage of the SCM Agreement and the provisions negotiated in China’s Accession Protocol, there is no question that China is covered by the SCM Agreement’s disciplines and remedies. China would not have negotiated the terms of the Accession Protocol discussed above if it were not clearly covered by the SCM Agreement. In turn, it makes no sense that the U.S. CVD law, which was drafted to conform to the Agreement, should be construed as not applying CVD remedies to imports from China. In any event, as discussed below, it is clear that the CVD statute requires the Department to apply the CVD statute equally to imports from all countries, including China.

³ New And Full Notification Pursuant To Article XVI:1 Of The GATT 1992 And Article 25 Of The SCM Agreement; People’s Republic Of China, G/SCM/N/123/CHN (April 13, 2006).

II. THE STATUTE REQUIRES THE DEPARTMENT TO APPLY COUNTERVAILING DUTIES TO IMPORTS FROM CHINA

A. The CVD Statute Applies To Both Market And Non-Market Economies

In interpreting a statute, the starting point is the statutory language itself. Where the language is clear and unambiguous, the statute should be applied in accordance with its terms. The statute requires the Department to impose a countervailing duty if, among other things, it “determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States” 19 U.S.C. § 1671. The statute further broadly defines a “country” as “a foreign country, a political subdivision, dependent territory, or possession of a foreign country” 19 U.S.C. § 1677(3). Nothing in this provision or elsewhere in the statute qualifies or limits the broad language applying CVD remedies to every “country,” meaning that it applies equally to imports from all nations, including China.⁴ Thus, the Department is required to impose CVDs on imports from China on the same basis as for other countries.

In addition, the statute defines a countervailable subsidy without limiting its application to any particular set of countries or any type of foreign economy. In language that tracks Article 1 of the SCM Agreement, the statute generally defines a “countervailable subsidy” as one that is specific and confers a benefit by means of a financial contribution, any form of income or price

⁴ The Department itself has acknowledged that “there is no explicit statutory bar against applying the CVD law to NME countries” and that “it is inaccurate to state that the Department does not currently accept CVD petitions against China.” GAO Report 05-474, *U.S.-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties* (June 2005) (“GAO Report”), Appendix III (DOC Response to GAO Report on China and CVD).

support within the meaning of Article XVI of the GATT 1994, or a payment to a funding mechanism to provide a financial contribution. 19 U.S.C. § 1677(5)(A) & (B). This definition is not confined to activities that can be engaged in only by the government of a market economy.

In fact, nowhere does the statute mention NME countries generally or China in particular. This omission is telling. Had Congress intended to provide an exception for NME countries from the Department's broad statutory authority to conduct CVD investigations and the broad definition of a countervailable subsidy, it surely would have done so explicitly in the statute. Thus, the Department is required by the statute to treat NME imports the same as imports from all other countries.

B. The Requirement That The Department Apply The CVD Law To Imports From China Is Unaffected By *Georgetown Steel*

In arguing that the statute does not allow the Department to investigate countervailable subsidies with respect to imports from NME countries, opponents of applying CVD remedies most often rely upon the Federal Circuit's decision in *Georgetown Steel*.⁵ For a number of reasons, however, that case, decided in 1986, is no impediment to such an investigation and, in fact, is no longer applicable as precedent.

Georgetown Steel involved CVD investigations of carbon steel wire rod from Czechoslovakia and Poland and potassium chloride from the Soviet Union and the German Democratic Republic that were conducted under the since-repealed section 303 of the Tariff Act of 1930. On appeal to the Federal Circuit, the issue was whether the Department had discretion not to apply section 303 to merchandise imported from an NME country. The Federal Circuit

⁵ *Georgetown Steel Corp. v. Unites States*, 801 F.2d 1308 (Fed. Cir. 1986).

held that the statute allowed the Department the discretion not to apply CVD remedies to NMEs and deferred to the Department's decision not to do so.⁶

Noting an earlier decision that "the agency administering the countervailing duty law has broad discretion in determining the existence of a 'bounty' or 'grant' under that law,"⁷ the court held that it could "not say that the Administration's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion."

Thus, in the absence of an explicit Congressional intent, the Federal Circuit deferred to the Department's reasoning that it should not conduct a CVD investigation of NME imports. The court did *not* hold that section 303 prohibited the Department from applying CVDs to NME countries.

Moreover, the Federal Circuit's 20-year-old precedent in *Georgetown Steel* is no longer applicable, because it involved construction of a countervailing duty law that no longer exists. Section 303 of the Tariff Act of 1930 was repealed by the URAA.

No court has ever decided the issue of whether the Department is permitted by current law to conduct a CVD investigation regarding NME imports. As discussed above, in *Georgetown Steel*, neither the Department nor the court questioned that section 303's coverage of imports from "any country, dependency, colony, province, or other political subdivision of

⁶ As the Department stated in its December 15, 2006 *Federal Register* notice seeking comments on this issue, the Federal Circuit in *Georgetown Steel* affirmed that the Department of Commerce . . . has the discretion not to apply the countervailing duty (CVD) law to non-market economy (NME) countries." 71 Fed. Reg. at 75507.

⁷ 801 F.2d 1308, 1318, citing *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1219 (C.C.P.A. 1977), *aff'd*, 437 U.S. 443 (1978).

government” was broad enough to apply to an NME. Rather, the issue was whether the Department could reasonably conclude that the government of an NME was not capable of providing a “bounty or grant” within the meaning of section 303 because of the supposed impracticality of determining subsidy benchmarks in an NME. Since *Georgetown Steel*, the CVD statute has been amended to provide explicit, detailed definitions of both a subsidy and a countervailable subsidy. 19 U.S.C. § 1677(5). The current statute does not use the ambiguous “bounty or grant” language of section 303 and instead uses language that broadly defines a subsidy in terms of financial contributions and benefits that can be provided by a government in either a market economy or an NME.

III. CONCLUSION

The Department’s practice regarding NME countries has not been reexamined in light of the WTO SCM Agreement and the post-URAA statutory language that requires applying CVD remedies on the same basis for imports from China as for imports from other countries. Clearly, the Department now has a statutory mandate for investigating illegally subsidized goods imported from China. The Department’s practice is based on its conclusions with respect to the difficulty of determining subsidy benchmarks in the totalitarian economic regimes that prevailed in Eastern Europe 20 years ago and requires a thorough reconsideration. It does not reflect current reality with respect to China, which has been in an economic transition for many years and relies far less on central planning than before.

In addition, the Chinese Government in recent years has aggressively subsidized a wide variety of Chinese manufacturers to promote the development of favored industries. The unfair advantages these subsidies provide Chinese exporters are a major catalyst for China’s growing trade surplus with the United States. Subsidized imports from China distort trade and

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economically harm U.S. industries as much as, or more than, subsidized market economy imports. Under the CVD statute, they must also be remedied in the same manner as other imports.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Luedeka". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert J. Luedeka
Executive Director
Polyurethane Foam Association