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January 16, 2007

Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, NW
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:

On behalf of NewPage Corporation, we hereby file comments in response to the Department's *Federal Register* notice requesting comments on the applicability of the U.S. countervailing duty law to imports from the People's Republic of China. *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).

Sincerely,

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Michael P. Mabile, Esq.
Cris R. Revaz, Esq.
Bonnie B. Byers, Consultant

Counsel to NewPage Corporation

UNITED STATES DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION
Washington, D.C.

Comments Of NewPage Corporation In Response To The Department's December 15, 2006 Federal Register Notice

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

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I. INTRODUCTION

The comments are filed on behalf of NewPage Corporation ("NewPage") of Dayton, Ohio. NewPage strongly urges the Department to make a finding that the countervailing duty ("CVD") law applies to China, and to impose duties accordingly in the current countervailing duty investigation of Coated Free Sheet Paper from China.

As a general matter, the CVD remedy should be available to U.S. producers and workers for imports of products from any country. Proscribing the law's application for any reason would unfairly limit the tools domestic industries have to address unfair and injurious trade practices.

As discussed in greater detail below, there is nothing in U.S. law or in the World Trade Organization ("WTO") agreements that prohibit or limit the application of the countervailing duty law to China and any other nonmarket economy ("NME"). Moreover, although the application of the CVD law to nonmarket economies such as China would represent a change from the Department's past practice, the Department has the authority to make such a change when it provides a reasoned analysis for doing so.

In this instance, a change is clearly warranted. Increasingly, national and provincial governments in China have adopted a policy of guiding economic policy objectives through the provision of subsidies to favored industries. To some extent, government subsidies have supplanted directly-mandated pricing and production quotas. As these subsidy practices have proliferated and as Chinese exports have skyrocketed, the negative impact on producers in

importing countries has reached a critical juncture. This is particularly true in the paper industry, where the Chinese government has targeted the expansion and modernization of the industry as a top economic priority.

The growth in size of China's exports and the important position that China now has within the international trading system, combined with the fact that China is now a member of the WTO and has accepted all the obligations in that Agreement, including application of the CVD laws of other member countries, compels the Department to depart from its prior interpretation of not applying the CVD law to NMEs.

II. THE U.S. COUNTERVAILING DUTY STATUTE APPLIES FULLY TO IMPORTS FROM CHINA

A. The Statute And The Department's Regulations Make No Exception For Non-Market Economy Countries

The starting point for interpreting a statute is the statutory language, and where the language is clear and unambiguous, the statute should be applied in accordance with its terms.[1] The U.S. countervailing duty law 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

[1] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *See also Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

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.[2]

In addition, the statute defines a countervailable subsidy without limiting its application to any particular set of countries or any type of foreign economy. A "countervailable subsidy" is generally defined as one that is specific and confers a benefit by means of a financial contribution, any form of income or price 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.[3]

In fact, nowhere does the statute, including the provision for the initiation of a CVD investigation, 19 U.S.C. § 1671a, 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.

Where the language of a statute is unambiguous, that ends the inquiry, and resort to external aids to interpretation is unnecessary.[4] Nevertheless, it is significant that there is nothing

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[2] 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).

[3] This definition is based upon the definition of a subsidy in Article 1 of the WTO Subsidies and Countervailing Measures Agreement ("SCM Agreement"), which, as discussed below, contains no language differentiating between market economies ("MEs") and NMEs.

[4] *United States v. Gonzalez*, 520 U.S. 1 (1997).

in the legislative history of the statute to contradict its plain meaning. When the statute was originally enacted as part of the Trade Agreements Act of 1979, the legislative committee reports were silent with respect to the applicability of CVD remedies to NME countries.[5] Once again, if Congress had intended to exclude NME countries from the broad scope of the statute, it would have made this intent explicit. Notably, in amending the law repeatedly since 1979, including two major revisions (the 1988 Omnibus Trade Act and the 1994 Uruguay Round Agreements Act), Congress has never once indicated that the law does not apply to NME countries, nor has it suggested that the straightforward language of the statute should apply differently to such countries.[6]

In addition, the Department has promulgated extensive and detailed regulations regarding the identification and measurement of countervailable subsidies. 19 C.F.R. §§ 351.501-527. Despite the Department's practice of not conducting CVD investigations of imports from NME countries, the Department has never issued any regulation restricting -- or even addressing -- the

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[5] *See* S. Report 96-249 (1979); H.R. Rep. 96-317 (1979).

[6] Opponents of applying CVD remedies to NME countries often cite a reference to the Federal Circuit's decision in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), in the Statement of Administrative Action ("SAA") that accompanied the 1994 Uruguay Round Agreements Act ("URAA"). There is no indication, however, that the Administration meant to suggest that the statute prohibits the application of the CVD statute to NMEs. Rather, the SAA addresses a decision by a NAFTA binational panel that cited *Georgetown Steel* for the proposition "that in order to find certain government practices to be subsidies, Commerce must determine that the practice has an effect on the price or output of the merchandise under investigation." H. Doc. 103-316, Vol. 1, at 926 (1994). The Administration disagreed, noting that the panel's "majority misinterpreted the holding in *Georgetown Steel* . . ., which was limited to the reasonable proposition that the CVD law cannot be applied to imports from nonmarket economy countries." *Id.* Thus, the Department's statement plainly was made only for the purpose of contradicting the NAFTA panel decision. The SAA nowhere directly addresses the issue of whether to apply CVDs to imports from NME countries, which is hardly surprising given that the purpose of the URAA was to implement the Uruguay Round Agreements, which themselves did not explicitly address the applicability of CVDs to NMEs.

application of such cases to NMEs.[7] Thus, the regulations implicitly recognize the lack of any statutory prohibition on CVD cases against China.[8]

B. *Georgetown Steel* Does Not Restrict The Department's Authority To Conduct CVD Investigations Of Imports From China

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.* For a number of reasons, however, that case 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

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[7] The Department, in fact, has stated that, if it applies the CVD statute to China, its regulations provide the authority for it to use external benchmarks for purposes of identifying or measuring a subsidy. GAO Report, Appendix III, citing 19 C.F.R. § 351.511.

[8] Opponents of applying CVDs to NME imports have cited the Department's preamble to its CVD regulations issued to implement the results of the Uruguay Round negotiations, which states that "it is important to note here our practice of not applying the CVD law to non-market economies. The CAFC upheld this practice in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). . . . We intend to continue to follow this practice." *Countervailing Duties*, 63 Fed. Reg. 65348, 65360 (Nov. 25, 1998). The fact that Commerce articulated its practice in the preamble to the CVD regulations, however, does not elevate that statement to that of a binding rule or regulation. The preamble is not part of the governing regulations set forth in the CFR. *Tung Mung Dev. Co. v. United States*, 25 C.I.T. 752 (Ct. Int'l Trade 2001). The preamble is merely a policy statement. *Id.* Moreover, all the preamble indicates is that the Department, as of 1998, intended to retain its practice of not applying CVDs with respect to NME imports. Significantly, the Department recognized that *Georgetown Steel* merely approved this practice and did not hold that the Department was precluded from applying CVDs to such imports. Just as importantly, because this is only a practice, the Department is free to change the practice at any time, as long as it provides a sufficient explanation. *See British Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997). As discussed herein, the post-URAA change in the CVD law and changes in the Chinese economy since *Georgetown Steel* provide ample reason for a change in the Department's practice.

of 1930. Section 303 provided that, where merchandise from a country that was not a signatory to the GATT Subsidies Code was involved, a countervailing duty should be levied:

> {w}henever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government . . . .

In its final determinations in the carbon steel wire rod investigations, the Department "concluded that bounties or grants, within the meaning of section 303, cannot be found in nonmarket economies."[9] In doing so, however, the Department first noted that, in light of the statutory language applying section 303 to "any country, dependency, colony, province, or other political subdivision," no "political entity is exempted *per se* from the countervailing duty law."[10]

The Department further stated, however, that this conclusion did not address "the additional jurisdictional question" of "whether government activities in an NME confer a 'bounty or grant' within the meaning of section 303."[11] It reasoned that bounties or grants could not be found in NMEs, because a bounty or grant is an "action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth." Because resources are not allocated on a market basis in an NME, "{t}here is no market process to distort or subvert."[12] Thus, "{i}t is this fundamental distinction -- that in an NME system the government does not interfere in the market process, but supplants

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[9] *Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19370 (May 7, 1984); *Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19374 (May 7, 1984).

[10] 49 Fed. Reg. at 19371, 19375.

[11] *Id.*

[12] *Id.*

it -- that has led us to conclude that subsidies have no meaning outside the context of a market economy."[13]

In addition, the Department observed that Congress had not "confronted directly the question of whether the countervailing duty law applies to NME countries."[14] Rather, the Department "tried to determine as best we can what Congress would have said if it had dealt with the question of application of the countervailing duty law to NME's."[15] In the absence of clear Congressional direction, the Department exercised its discretion to determine that, because of the difficulty of identifying or measuring subsidies in an NME, a "bounty or grant" could not be found in an NME within the meaning of section 303. On the basis of its determinations in the carbon steel wire rod cases, the Department also rescinded its initiation of the CVD investigations on potassium chloride from the Soviet Union and the German Democratic Republic.[16]

The domestic industries appealed the Department's determinations to the U.S. Court of International Trade ("CIT"), which rejected the Department's view that it had discretion under section 303 to determine that a bounty or grant could not be found in an NME. Among other things, the court found "that the countervailing duty law makes no distinctions based on the form of any country's economy. Its language and purpose allow no such distinctions to be made."[17] In addition, the court rejected at length the Department's reasoning with respect to the inability

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[13] *Id.*

[14] *Id.* at 19373, 19377.

[15] *Id.*

[16] *Potassium Chloride from the Soviet Union*, 49 Fed. Reg. 23428 (1984); *Potassium Chloride from the German Democratic Republic*, 49 Fed. Reg. 23429 (1984).

[17] *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 550 (Ct. Int'l Trade 1985).

to determine the existence of a subsidy in an NME, finding that the premise "that a subsidy can only exist in a market economy" was "fundamental error."[18]

On appeal to the Federal Circuit, the issue remained whether the Department had discretion not to apply section 303 to merchandise imported from an NME country or, as held by the CIT, the statute required the Department to conduct CVD investigations regarding such merchandise.[19] The Federal Circuit 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.[20]

The court did not address the language of section 303 applying countervailing duties broadly to "any country, dependency, colony, province, or other political subdivision of government." Instead, it found that "Congress has not defined the terms 'bounty' and 'grant' as used in section 303. We cannot answer the question whether that section applies to nonmarket economies by reference to the language of the statute."[21] The court further found that the statute, which was originally passed in 1897, had no reference to NMEs at the time of its enactment and that there was no evidence that Congress over the intervening years had intended any change to its scope.[22] In the absence of Congress having specifically addressed the issue, the court

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[18] *Id.*

[19] *Id.* The court dismissed the domestic carbon steel wire rod producer's appeal regarding imports from Czechoslovakia and Poland on the ground that it was untimely filed, leaving only the appeal filed by domestic producers regarding imports of potassium chloride from the Soviet Union and the German Democratic Republic. *Id.* at 1311-13.

[20] 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.

[21] 801 F.2d at 1314.

[22] *Id.*

concluded that it was a permissible construction of the statute for the Department to find "that the economic incentives and benefits that the {exporting countries} provided . . . do not constitute bounties or grants under section 303 of the Tariff Act of 1930, as amended."[23] 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,"[24] the court held:

> We cannot 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." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 81 L.Ed. 2d 694, 104 S. Ct. 2778 (1984).

The citation to *Chevron* makes it clear that the Federal Circuit, in the absence of an explicit Congressional intent, merely 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.[25]

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[23] *Id.*

[24] *Id.* at 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).

[25] In *dicta*, the Federal Circuit reviewed other trade legislation that was enacted after section 303, stating that "Congress elected to deal with the problem {of unfairly traded imports from NMEs} under the antidumping law and not under the countervailing duty law." *Id.* at 1318. Opponents of applying CVDs to NME countries frequently cite this portion of the court's decision. The fact is, however, that the only issue before the court was whether the CIT should have deferred to the Department's discretion in construing the statute in the absence of clear Congressional direction, *not* whether the statute prohibited the Department from applying CVDs to NMEs. This is clear, among other things, from the court's ultimate holding that it could "not say that the Administration's conclusion "that the economic incentives and benefits that the {exporting countries} provided . . . do not constitute bounties or grants under section 303 of the Tariff Act of 1930, as amended, were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion." *Id.*

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.[26] 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.[27] 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 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.[28] 19 U.S.C. § 1677(5). The current

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[26] Opponents of applying CVDs to imports from China often argue that Congress has "acquiesced" in *Georgetown Steel*'s ruling regarding the applicability of the CVD law to NMEs or even that Congress has in some way affirmatively "embraced" the purported holding of *Georgetown Steel* that the Department is prohibited from considering the application of CVDs to imports from China. In none of the post-*Georgetown Steel* trade legislation, however, has Congress even addressed the applicability of the CVD law to NMEs. Moreover, given that *Georgetown Steel* dealt solely with a statute that has since been repealed, this argument makes no sense. Congress cannot possibly have acquiesced in or embraced any position with respect to the scope of the current CVD law, which was not at issue in *Georgetown Steel*. Moreover, any arguable acquiescence could only involve the actual holding in *Georgetown Steel*, *i.e.*, that the Department had discretion under section 303 not to apply CVDs to NME imports, *not* that the Department was barred from doing so under that statute (much less under the current statute).

[27] As discussed above, the Federal Circuit's discussion of Congressional enactments since section 303, including the Trade Agreements Act of 1979, was *dicta* and not essential to the court's holding that the Department properly exercised its discretion in not applying section 303 to NME imports.

[28] 19 U.S.C. § 1677(5).

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 ("ME") or an NME. This new language also clarifies that "the determination of whether a subsidy exists shall be made without regard to whether the recipient of the subsidy is publicly or privately owned."[29] In addition, the Department "is not required to consider the effect of the subsidy in determining whether a subsidy exists . . . ."[30] This new languages changes the factors that the court looked at in *Georgetown Steel*, which turned significantly on the ownership of the companies by the government and the "effects" of the subsidies. The statute now indicates that those factors are not relevant to the definition of a subsidy.

The Department's practice regarding NME countries has not been reexamined for 20 years and, as discussed below, does not reflect current reality with respect to China. China's economy has been in transition for many years and central planning is less pervasive in controlling investment, production, and pricing. Decisions by the Department not to conduct CVD investigations of NME imports since *Georgetown Steel* have not re-examined the bases for the Department's practice, nor have they considered whether it is practicable today to identify and measure government subsidies in China in particular.[31] A re-examination would clearly show that the Department should change its practice.

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[29] 19 U.S.C. § 1677(5)(C). This provision makes a major change in the statute.

[30] *Id.*

[31] *See, e.g.*, *Sulfanilic Acid from Hungary*, 67 Fed. Reg. 60223 (2002); *Chrome-Plated Lug Nuts and Wheel Locks from the People's Republic of China*, 57 Fed. Reg. 10459 (1992) (pre-URAA decision); *Oscillating and Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24018 (1992) (pre-URAA decision).

III. THE SCM AGREEMENT AND CHINA'S WTO ACCESSION PROTOCOL INDICATE THAT WTO MEMBERS MAY APPLY COUNTERVAILING MEASURES TO CHINA

The applicability of the U.S. CVD law, which was enacted to conform to WTO requirements, to imports from NME countries is plainly established by reference to the WTO SCM Agreement. The Agreement permits the imposition of CVDs on subsidized imports and nowhere exempts imports from an NME country (or even addresses NME country imports). The language defining a subsidy essentially is the same as that of the current U.S. law, as described above.[32] In the absence of any distinction between MEs and NMEs, the SCM Agreement plainly applies to both types of economies.

Moreover, under Article 15 of its WTO Accession Protocol, China agreed to subject itself to subsidies and antidumping disciplines. Article 15(b) of China's WTO Accession Protocol specifically permits the application of third-country information in CVD determinations. It states:

> In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.[33]

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[32] *See* SCM Art. 1.

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

Article 15(b) is not tied to a particular expiration date, unlike a comparable provision in the Accession Protocol that allows for the application of third country information in antidumping cases until December 2016.[34] Nor is it premised on China having achieved ME status; therefore, there can be no issue that application of the CVD law against China, although it continues to be designated an NME, somehow nullifies or impairs China's rights under the Accession Protocol.[35]

Upon China's accession to the WTO, Congress authorized permanent normal trade relations (PNTR) between the United States and China, and this legislation states that "the United States Government must effectively monitor and enforce its rights under the agreements on the accession of the People's Republic of China to the WTO."[36] Moreover, the PNTR legislation includes a provision authorizing additional appropriations for the Department to, *inter alia*, "[defend] United States antidumping and *countervailing duty* measures with respect to products of the People's Republic of China,"[37] thus indicating Congressional awareness that the SCM Agreement and China's Accession Protocol would permit the United States to impose countervailing duties against Chinese imports.

Under Article 10.2 of its Accession 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

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[34] *Id.* at Art. 15(d).

[35] *See* Position Paper of the Ministry of Commerce, People's Republic of China, Bureau of Fair Trade for Imports and Exports, Concerning the CVD Petition Against Imports of Coated Free Sheet Paper from China (Nov. 20, 2006), at 18.

[36] P.L. 106-286, §411(5) (October 10, 2000), codified at 22 U.S.C. § 6941.

[37] P.L. 106-286, §413(a)(1) (October 10, 2000), codified at 22 U.S.C. § 6943.

provision allows WTO members to regard such subsidies as specific without regard to the particular sector in which they operate.

In addition, under Article 10.3, 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. This commitment expressly applies throughout China's customs territory, including special economic zones and other special economic areas. Further, China agreed not to invoke certain articles that make the determination of actionable subsidies more difficult to establish against developing countries.[38]

China also agreed to fully notify the WTO of all subsidies as required under Article 25 of the SCM Agreement. In fact, in April 2006, China issued its notification of subsidies pursuant to this obligation, and specified a number of programs that NewPage included in its CVD petition, including: (1) preferential tax breaks for foreign invested enterprises that buy domestically-produced manufacturing equipment; (2) other preferential tax policies for foreign-invested enterprises (3) income tax exemptions for foreign-invested enterprises located in certain geographic regions; (4) preferential tax policies for foreign-invested enterprises that export; (5) preferential tax policies for foreign-invested enterprises engaged in agriculture, forestry or animal husbandry and foreign-invested enterprises established in remote underdeveloped areas; (6) preferential tax policies for enterprises engaged in forestry; (7) a special fund for projects regarding the protection of natural forestry; and (8) cash subsidies for returning cultivated land to forests.[39]

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[38] *See* Report of the Working Party on the Accession of China, WT/MIN(01)/3, Nov. 10, 2001, at para. 171.

[39] *See* "New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement," G/SCM/N/123/CHN, April 13, 2006.

The conclusion is inescapable that China is covered by the disciplines and remedies of the SCM Agreement. None of the foregoing provisions of the Accession Protocol would have been negotiated and agreed upon if China had been considered incapable of bestowing countervailable subsidies as defined in Article 1 of the SCM Agreement. The absence of any WTO impediment to a CVD case against imports from China is further demonstrated by the fact that other WTO member countries, for example Canada, have conducted CVD investigations of imports from China and have imposed CVDs. Thus, it makes no sense that the U.S. CVD law, which was drafted to conform to the SCM Agreement, should be construed as not applying CVD remedies to imports from China.

IV. CHANGES IN THE STATE OF THE LAW, ECONOMIC CONDITIONS AND OTHER FACTORS SINCE *GEORGETOWN STEEL* MAKE APPLICATION OF THE COUNTERVAILING DUTY STATUTE TO CHINA APPROPRIATE AND NECESSARY

Since the mid-1980s when *Georgetown Steel* was decided, there have been a number of changes that render application of the CVD law to China appropriate and necessary. The two most important changes have occurred with respect to the state of the law. First, as discussed above, the countervailing duty statute has changed, particularly the definition of subsidy that was considered by the CAFC in *Georgetown Steel.* Second, also as discussed above, when China acceded to the WTO, it agreed that it would be subject to the subsidy disciplines of other WTO members.

In addition, there have been a number of important economic and other changes since *Georgetown Steel* that now warrant application of the countervailing duty statute to China. The most obvious factor is that Chinese subsidy practices and other trade distortive measures have greatly proliferated across China's rapidly expanding economy. In its 2006 Report to Congress

on China's WTO Compliance, the Office of the U.S. Trade Representative ("USTR") made the following findings:

- "China continues to pursue problematic industrial policies that rely on trade-distorting measures such as local content requirements, import and export restrictions, discriminatory regulations and prohibited subsidies, all of which raise serious WTO concerns...."[40]

- "{S}erious disagreements over a number of other industrial policies remain, including China's continued use of prohibited subsidies."[41]

Other recent studies and reviews of China's economic and political system have drawn the same conclusions. For example, one of the key findings of the 2006 Report to Congress of the U.S.-China Economic and Security Review Commission was that

> China has a centralized industrial policy that employs a wide variety of tools to promote favored industries. In particular, China has used a range of subsidies to encourage the manufacture of goods meant for export over the manufacture of goods meant for domestic consumption, and to secure foreign investment in the manufacturing sector. [42]

It also found:

> The banks, which are predominately state-owned or state-controlled themselves, often are called on to make loans to other state-owned enterprises without attention to creditworthiness, collateral, or other typical lending requirements of banks operating in real market-driven economies. Instead, Chinese banks often are expected to grant low interest loans, carry large amounts of defaulted loans on their books, or forgive such debts held by government-owned enterprises. In a centrally planned economy such as China's, these loans are a device for subsidizing various

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[40] 2006 Report to Congress on China's WTO Compliance, the Office of the U.S. Trade Representative ("USTR Report"), at 3.

[41] USTR Report at 7.

[42] 2006 Report to Congress of the U.S.-China Economic and Security Review Commission, November 2006, U.S. Government Printing Office ("U.S.- China Commission Report"), at 27.

activities and specific industries that China's power structure favors. [43]

Even Federal Reserve Chairman Ben Bernanke has noted the existence of subsidies in China and the need for further reform of the financial sector to address continuing Chinese government intervention.[44]

Clearly, then, China heavily promotes certain industries through industrial subsidies. In addition, as documented by NewPage's petition in the Department's CVD investigation of coated free sheet paper from China, the Chinese government has extended a particularly large number of pernicious subsidies to its paper industry. Thus, Chinese subsidies in general, and to the paper industry in particular, have become a very important trade issue.

The Chinese government's intervention in the economy has not only become more widespread; it now reflects government interventionist practices that are more subtle and dangerous than those typically witnessed in centrally-planned economies. For example, the U.S.-China Economic and Security Review Commission found that Beijing employs "administrative guidance" to banks to direct loans and favorable terms to certain businesses and industries.[45] It also found that there are a plethora of indirect subsidies: preferential tax policies, government funds for state-owned enterprises, double-bookkeeping by such enterprises,

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[43] *Id.* at 45.

[44] Prepared Remarks of Federal Reserve Chairman Ben S. Bernanke at the Chinese Academy of Social Sciences, Beijing, China: "The Chinese Economy: Progress and Challenges," Dec. 15, 2006.

[45] U.S.- China Commission Report at 29. The WTO has found that in the past, such "guidance" resulted in the rapid development of key industries. *See* Trade Policy Review, Report by the Secretariat, People's Republic of China," World Trade Organization, WT/TPR/S/161, February 28, 2006 ("WTO Trade Policy Review"), at xiii.

subsidized inputs for such enterprises, "give-away" prices on energy and land, sectoral credit allocation, loan extensions, debt forgiveness, wage ceilings, and the undervalued *renminbi*.[46]

Further, as Chinese subsidy practices have become more pervasive and sophisticated, their trade-distorting effects have become more widely felt. In its 2006 Report on China's WTO Compliance, USTR found:

- A number of U.S. industries, including the steel, paper, and textile industries, among others, expressed increasing concern in 2006 about the injurious effects of China's subsidies in the U.S. market as well as China and third country markets.[47]

- The subsidies at issue benefit a wide range of industries in China and include both export subsidies, which make it more difficult for U.S. manufacturers to compete against Chinese manufacturers in the U.S. market and third country markets, and import substitution subsidies, which make it more difficult for U.S. manufacturers to export their products to China. To date, although the negotiations have made some progress, China has been unwilling to commit to the immediate withdrawal of the subsidies in question. [48]

- "U.S. industry traces many of the United States' most difficult trade issues with China to excessive Chinese government intervention in the market through policy directives and the actions of individual officials." [49]

The widespread and distortive trade effects from foreign government subsidies, such as those emanating from China, are no less problematic to U.S. producers because they originate in an NME. In testimony before the U.S. Economic and Security Commission in April 2006, Assistant USTR Timothy Stratford explained:

> We have also seen China increasingly resort to industrial policies that limit market access by non-Chinese origin goods or services or rely on government resources to support increased exports. The objectives of these policies are to protect less-competitive domestic

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[46] U.S.-China Commission Report at 31; *see also* WTO Trade Policy Review at 60.

[47] USTR Report at 42.

[48] *Id.* at 42-43.

[49] USTR Report at 3.

> industries and support the development of Chinese industries higher up the economic value chain than those industries that currently make up China's labor-intensive base....We believe that such policies not only harm U.S. and third-country competitors, they redound to China's detriment as well. Moreover, some of these policies appear to conflict with China's WTO commitments.[50]

Assistant USTR Stratford added that USTR had heard from "a range of industries," including steel and paper, about the problems that Chinese government subsidization creates for them.[51]

Thus, China's subsidy practices have not only proliferated; they have become a more prominent trade problem in recent years, particularly in the context of the commitments China made when it acceded to the WTO. At that time, China agreed to terminate all subsidies on exports and subsidies conditioned upon the use of either domestic goods or export performance. USTR annually reviews and reports on China's commitments to end prohibited subsidies and notify other WTO members of its subsidy practices. However, USTR has found:

> Although [China's WTO subsidy] notification is lengthy, with over 70 subsidy programs reported, it is also notably incomplete, as it failed to notify any subsidies provided by China's state-owned banks or by provincial and local government authorities. In addition, while China notified several subsidies that appear to be prohibited, it did so without making any commitment to withdraw them, and it failed to notify other subsidies that appear to be prohibited.[52]

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[50] Testimony of Assistant U.S. Trade Representative Timothy Stratford, Hearing before the U.S. Economic and Security Commission April 4, 2006, 109th Congress, Second Session, at 14.

[51] *Id.* at 15.

[52] USTR Report at 42.

USTR thus set as one of its top negotiation priorities the "elimination of subsidies, industrial policies and preferences for state-owned enterprises, including state-owned banks, that may be inconsistent with China's WTO obligations."[53]

Further, in its 2006 review, USTR pledged that it would continue to pursue its own research and analysis of possible Chinese subsidy practices and would continue to raise its concerns at the WTO and in bilateral meetings with China.[54] In addition, Assistant USTR Stratford has testified that: "The Administration will not hesitate, when appropriate, to use all tools at our disposal to ensure that China lives up to its commitments, including dispute settlements at the WTO or the use of trade remedies within our own legal system."[55] The CVD case on coated free sheet paper from China represents a significant test of U.S. resolve in this regard.

The proliferation of subsidies in China in recent years has occurred concurrently with China's efforts to move towards a more market-oriented economy. These economic reform efforts should also be considered in connection with the Department's rationale for application of the CVD law to China. In adopting its practice back in the mid-1980s, the Department reasoned that, in market economy countries, markets generate prices that can be used to measure the impact of government subsidies. It further reasoned that in an NME country, government intervention in the economy is so pervasive that it is not possible to find meaningful benchmarks

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[53] U.S.-China Trade Relations, Entering a New Phase of Greater Accountability and Enforcement; Top-to-Bottom Review," Office of the U.S. Trade Representative, Feb. 2006, at 15.

[54] USTR Report at 43.

[55] Testimony of Assistant U.S. Trade Representative Timothy Stratford, Hearing before the U.S. Economic and Security Commission April 4, 2006, 109th Congress, Second Session, at 18.

for subsidization. This conclusion, however, was made in a different context than applies today with respect to China. The Eastern European economies at issue in *Georgetown Steel* were fully centrally planned and their trade with the United States was limited. That is not true today with respect to China and its impact on U.S. trade and the economy.

Because of economic reforms adopted since the mid-1980s, central planning is less pervasive in controlling investment, production, and pricing. Therefore, as a general rule, valid and usable benchmarks should be more available.[56] In addition, China is now a major global actor in terms of trade, and has experienced explosive growth in recent years. China has become the world's third largest trader, surpassed only by the European Union and the United States.[57] Total trade in goods alone accounted for 64 percent of China's GDP in 2005.[58] Since joining the WTO in 2001, China has seen the dollar value of its exports grow at an average rate of approximately 30 percent per year, compared with annual growth of about 12.5 percent over the five years before gaining WTO membership.[59] In addition, China's current trade surplus with the United States is now the largest in history. Over the past 10 years, it has increased fivefold, with the surplus for 2006 expected to be roughly 230 billion dollars.[60] China is also actively pursuing regional and bilateral free trade agreements. It has signed Closer Economic Partnership

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[56] However, as discussed above, Article 15(b) of China's WTO Accession Protocol makes clear that in any given case, if internal benchmarks are not "practicable," a WTO member may resort to external benchmarks for assessing the benefit of a subsidy.

[57] WTO Trade Policy Review at 1.

[58] *Id.* at ix.

[59] Prepared Remarks of Federal Reserve Chairman Ben S. Bernanke at the Chinese Academy of Social Sciences, Beijing, China: "The Chinese Economy: Progress and Challenges," Dec. 15, 2006.

[60] U.S. Census Bureau, Foreign Trade Division, Data Dissemination Branch.

Agreements with the Special Administrative Regions of Hong-Kong and Macao, a Framework Agreement with ASEAN countries, a free-trade agreement with Chile, and a preferential trade agreement with Pakistan, and is currently negotiating bilateral agreements with a number of other countries.[61] In addition, China has entered into bilateral investment treaties with 108 countries, surpassing any other country at a similar stage of economic development, according to the U.N. Conference on Trade and Development.[62]

Further, since 2001, real GDP growth in China has averaged almost 9 percent annually, driven primarily by exports and investment.[63] Proposals for the 11th Five-Year Plan National Economic and Social Development, approved in October 2005, seek to double GDP per capita by 2010 relative to 2000.[64]

These changes in China's economy reflect different facts and circumstances than Commerce faced when the *Georgetown Steel* case arose, and oblige Commerce to reconsider the exercise of its discretionary authority to apply the CVD law to China. Moreover, as noted above, China *agreed* to be subject to the SCM Agreement when it joined the WTO, and therefore China is covered by U.S. law reflecting implementation of that agreement, the Uruguay Round Agreements Act.

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[61] WTO Trade Policy Review at x.

[62] Memorandum from Office of Policy, Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Antidumping Investigation of Certain Lined Paper from the People's Republic of China, --China's Status as a Non-Market Economy, August 30, 2006 ("Lined Paper NME Memo"), at 78, *citing* "Country Commercial Guide: China," (Washington, D.C., U.S. Department of State, 2005), ch.6.

[63] WTO Trade Policy Review at ix.

[64] *Id.* at xiv.

In addition, at least partly due to certain commitments China made upon accession to the WTO, the country has moved towards greater transparency, thereby facilitating scrutiny of its subsidy practices. In its Accession Protocol, China undertook commitments towards greater transparency in three areas: obligations relating to public availability of trade-related laws, uniform administration of the laws, and the existence of an independent and impartial system for the review of administrative decisions.[65] These commitments parallel certain obligations in the WTO Agreement relating to transparency.[66] While much more progress needs to be made, China's ongoing efforts in this regard should facilitate the Department's and U.S. industries' ability to scrutinize and measure China's subsidy practices.

Transparency is also substantially enhanced by a wealth of information now available on the internet on China's legal, economic, and political infrastructure. By the end of 2004, more than 16,000 official websites had been launched by ministries, commissions, and other departments under the State Council as well as of local governments.[67] The internet also allows access to information regarding the operation and financial condition of numerous industries and companies.

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[65] WTO Protocol on the Accession of the People's Republic of China, WT/L/432, Nov. 23, 2001, pt. I, para. 2, incorporating commitments in, *inter alia,* paras. 331-334 and 336 of the Report of the Working Party on the Accession of China, WT/MIN(01)/3, Nov. 10, 2001.

[66] These provisions are Article X of GATT 1994, which requires that all trade-related laws, regulations and rulings be promptly published and administered in an "impartial and uniform" manner; the TRIPS Agreement, which includes a chapter on enforcement obligations, and the GATS, which features publication and notification requirements, as well as implementation of "enquiry points" to provide information at the request of any member. *See* K. Halverson, "China's WTO Accession: Economic, Legal and Political Implications," available at http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bciclr/27_2/06_TXT.htm

[67] WTO Trade Policy Review at 39.

In addition, many Chinese companies are now publicly traded. As a result, they are required to meet financial reporting requirements that provide significant economic and financial data that Commerce can use to measure the extent to which they are subsidized.

Thus, China has undergone significant economic changes that render application of the countervailing duty law both appropriate and feasible. There should also be little question that the Department is now better equipped to address any complex methodological issues that may arise in applying the countervailing duty statute to China than it was at the time of *Georgetown Steel.* As indicated above, the United States is already very familiar with many of China's most intractable subsidy practices, particularly through discussions and review led by the Office of the U.S. Trade Representative. In addition, since joining the WTO, China is now obliged to notify the WTO of its subsidy programs and terminate certain prohibited subsidies. This process provides an additional forum for U.S. scrutiny. Further, from 1986 to the present, the Department has handled well over 150 antidumping cases involving NMEs, with the vast majority of these cases involving China.[68] These cases typically involve complex "factors of production," benchmark, and other legal and methodological issues that have built up the Department's expertise in understanding China's economy and the operation of numerous industrial sectors, including paper. Such expertise will undoubtedly enhance the Department's internal capability to accurately identify and measure the pervasive subsidies that the Government of China has bestowed on its paper industry.

While the Department may find that changes in the state of the law, economic conditions, and other factors now warrant application of the CVD law to China, this does not also imply that

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[68] *See* U.S. Department of Commerce, Import Administration website, Antidumping and Countervailing Duty Statistics," "AD/CVD Investigations Federal Register History," http://ia.ita.doc.gov/stats/iastats1.html

the Department must reverse its prior finding that China remains an NME.[69] The Department clearly has the discretion to apply the CVD law against China, notwithstanding that the country may remain an NME, whenever it finds that the subsidy meets the three statutory elements of a financial contribution, specificity, and benefit. As discussed above, the Department has the statutory and regulatory authority to apply the law to China, and China's WTO Accession Protocol reflects its agreement that other countries may impose subsidy disciplines against China.

V. MEASURING THE BENEFIT FROM SUBSIDIES IN CHINA

As noted above, significant changes have occurred since the last time the Department considered whether it should apply the CVD law to NMEs such as China. Among these changes have been some market-based reforms within the Chinese economy. While government involvement in the economy in China is still pervasive, markets for some goods and services have been liberalized, and access to foreign inputs and capital is possible. Consequently, measuring subsidies in an NME like China has become more straightforward. Market-based benchmarks are more prevalent now within China. Moreover, benchmarks outside of China, including international prices for capital, services, and inputs, are more readily available. In the coated free sheet industry in China, for example, the largest exporters to the United States, are large and sophisticated conglomerates that have access to foreign markets for sourcing inputs.

In addition, the Chinese government itself has agreed to measures that will aid the Department in measuring the benefit from subsidies in China. As noted above, in Article 15(b)

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[69] The Department has treated China as an NME in all past antidumping duty investigations and administrative reviews. In fact, just last year, the Department issued a particularly detailed memorandum in its antidumping investigation of *Certain Lined Paper from the People's Republic of China,* A-570-901, reiterating its view that China is an NME. Lined Paper NME Memo, August 30, 2006.

of China's WTO Accession Protocol, China agreed that provisions of Article 14 of the SCM (the provisions that specify how Member countries should calculate the benefit from subsidies) apply to cases involving Chinese exports. However, China also agreed that if there were "special difficulties" in the application of the methodologies outlined in Article 14 of the SCM, "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."[70] This language specifically authorizes WTO members to use benchmarks from outside China when in-country benchmarks are not available or not suitable.

The United States Trade Representative commented on the ability of WTO members to use external benchmarks in a background paper it issued at the time that China entered into the Accession Protocol in 2001. Specifically, USTR stated:

> When seeking to enforce subsidies disciplines against Chinese enterprises, either in individual WTO members' countervailing duty proceedings or in WTO enforcement proceedings, WTO members can identify and measure Chinese government subsidies using alternative methods in order to account for the special characteristics of China's economy. For example, when determining whether preferential government benefits in the form of, for example, equity infusions or loans have been provided to a Chinese enterprise, WTO members can use foreign or other market-based criteria rather than Chinese government benchmarks.[71]

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

[71] Background Information on China's Accession to the World Trade Organization, December 11, 2001 at http://www.ustr.gov/Document_Library/Fact_Sheets/2001/Background_Information_on_China's_Accession_to_the_World_Trade_Organization.html?ht=

As noted above, the provision in China's Accession Protocol permitting external benchmarks has no expiration date and does not differentiate between China as a market or a nonmarket economy.

Moreover, the Department itself has noted that it needs no special authority to use third-country benchmarks to identify or measure benefits in CVD cases. Specifically, in its response to the GAO report on the application of the CVD law to China, the Department noted

> The draft report states that Commerce "has never applied third country information in CVD cases, and moreover does not have clear legal authority to do so." This statement should be revised to reflect Commerce's' practice prior to issuance of the final report. In particular, Commerce has the authority to use external benchmarks under 19 CFR §351.511 of the CVD regulations in certain circumstances for purposes of identifying or measuring a subsidy. (*See, e.g.,* Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,545 (Apr. 2, 2002), and accompanying Decision Memorandum); and Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada, 69 Fed. Reg. 75,917 (Dec. 20, 2004). Commerce has successfully defended this methodology at the WTO with respect to the first lumber CVD case cited above. Commerce has also used international lending rates, such as LIBOR, to measure the benefit from government provided foreign-currency denominated loans or where no comparable domestic lending rates are available in accordance with 19 CFR §351.505 of the CVD regulations.[72]

Thus, the Department has considerable flexibility in finding and measuring subsidies in CVD cases involving China.

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[72] 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), at 45.

VI. THERE IS NO ISSUE RELATED TO DOUBLE COUNTING STEMMING FROM THE DEPARTMENT'S SURROGATE METHODOLOGY IN NME CASES

Some have suggested that, if the Department does calculate countervailable subsidies, it must adjust dumping margins if NME surrogate methodologies are used in a companion antidumping case, in order to avoid "double counting." Such concerns are unfounded. First, nothing in the statute or the regulations requires, or even permits, the Department to make such an adjustment for domestic subsidies. In fact, the only adjustment to antidumping duties that the Department is required to make relates to export subsidies, when antidumping and CVD measures are pursued concurrently.[73]

Moreover, the Department itself recognizes that there is no reason to assume that such double counting would even exist. In response to the GAO Report's suggestion that the Department consider legislative action to make corrections to avoid double counting domestic subsidies when applying CVDs and antidumping duties to the same product, the Department stated:

> We do not believe that this legislative action is either warranted or would be appropriate. First, given that the Department has not yet undertaken concurrent CVD and antidumping cases against China, there is no reason to assume that such double-counting would even exist. Second, because U.S. law does not currently allow for any adjustment to be made to the export price in an antidumping case for the amount of any countervailing duties collected to offset domestic subsidies (*see*, Section 772 of the Trade Act of 1930, as amended), the proposed change would put China into a special category distinct from all other countries when subject to concurrent antidumping and countervailing duty investigations. *Such a change seems wholly inappropriate*. Finally, we would like to point out that making any such adjustments would raise complex

[73] 19 U.S.C. §1677a(c)(1)(C). The WTO similarly requires adjustments in combined duty rates to avoid double counting of export subsidies, but makes no mention of adjusting for domestic subsidies. WTO General Agreements on Tariffs and Trade, art. VI.5.

> methodological issues, the costs of which may far outweigh the purported equity gains of any such adjustment.[74]

We also note that there is no assurance that the third country values that the Department employs in calculating cost of production in NME case are free from subsidies provided by governments in those third countries.[75] The Department is not required to ensure that third country input values and cost of capital are free from government subsidies when it utilizes those costs in calculating surrogate costs of production. In fact, the only requirement is that the inputs be valued in a country at a level of economic development comparable to that of the nonmarket economy country.[76] Thus, the factor prices themselves could well be affected by domestic or export subsidies.

VII. CONCLUSION

NewPage appreciates the opportunity to provide these comments. The issue of subsidies in China is a very important one, and NewPage looks forward to working with the Department to gather and assess the necessary information to identify and countervail subsidies provided to the paper industry in China.

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[74] GAO Report, Appendix III (DOC Response to GAO Report on China and CVD), at 45-46. (emphasis added).

[75] *See, e.g., id.* at 28.

[76] 19 U.S.C. §1677b(c).