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November 26, 2007

BY HAND DELIVERY
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U.S. Department of Commerce
Central Records Unit, Room 1870
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Re: ***Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment*, 72 Fed. Reg. 60,649 (Oct. 25, 2007)**

Dear Mr. Assistant Secretary:

The following comments are provided to the U.S. Department of Commerce ("Department") on behalf of the Louisiana Department of Agriculture and Forestry, Bob Odom, Commissioner, and the Crawfish Processors Alliance, in response to the Department's request for comments ("RFC"), *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment*, 72 Fed. Reg. 60,649 (Oct. 25, 2007) ("Second RFC"). An earlier RFC, seeking comment on the same issues, was published in May 2007. *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29,302 (May 25, 2007) ("First RFC").

The First RFC and Second RFC have been occasioned by a crisis of the Department's own making: a perceived difficulty in reconciling the application of countervailing duty ("CVD") law to nonmarket economies ("NMEs") with the factual

basis for application of NME methodologies in antidumping ("AD") cases. This perceived conundrum does not arise from a strict reading of the relevant statutes. Rather, it arises from the Department's institutional reluctance to grapple with the possibility that elements of its conceptual approach to CVD law, as articulated in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (1986) ("*Georgetown Steel*"), are flawed or no longer relevant. Rather than concede that a rationale of long standing may be flawed, the Department now proposes to weaken the AD law in a manner that violates the terms of the relevant statute. A more reasonable approach would be to apply the AD and CVD statutes as they are written, thereby avoiding the perceived conflict.

I. THE DEPARTMENT'S PERCEIVED CONFLICT BETWEEN CVD AND AD PROVISIONS IS CAUSED BY INSTITUTIONAL INERTIA REGARDING THE *GEORGETOWN STEEL* RATIONALE

In November 1983 -- twenty-four years ago, before the Uruguay Round negotiations, before the World Trade Organization ("WTO") existed, before the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") had taken effect, and when the U.S. Court of International Trade ("CIT") was just three years old -- Georgetown Steel Corporation and other domestic producers of carbon steel wire rod filed two CVD petitions with the Department, seeking relief from imports from Czechoslovakia and Poland under section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (1982), which has since been repealed.[1] The Department initiated investigations in response to the petitions. While those cases were pending, domestic producers of potash filed CVD petitions against imports from the Soviet Union and the German Democratic Republic. In the wire rod cases, the Department held that, as a matter of law, section

[1] *See* Uruguay Round Agreements Act ("URAA"), 108 Stat. 4908, Pub. L. 103-465, Title II, sec. 261(a) (Dec. 8, 1994) (repealing 19 U.S.C. § 1303 as of Jan. 1, 1995).

303 was inapplicable to nonmarket economies; and having made that decision, the Department then rescinded the potash cases on the same grounds.

In separate cases which were later consolidated, the domestic wire rod producers and domestic potash producers sought review by the CIT, which then reversed the Department and held that the CVD law, as it then existed, applied to NMEs. *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985). The Department appealed to the U.S. Court of Appeals for the Federal Circuit ("CAFC"), resulting in the 1986 *Georgetown Steel* opinion cited above. The CAFC, applying the deferential standard of review of agency interpretations of law as enunciated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), held that the Department's interpretation of section 303 could not be deemed "unreasonable, not in accordance with law or an abuse of discretion." *Georgetown Steel* at 1318. The CAFC wrote:

> The Administration [*i.e.*, the Department] defined a "subsidy" as "any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth." The agency reasoned that the concept of subsidies, and the misallocation of resources that resulted from subsidization, had no meaning in an economy that had no markets and in which activity was controlled according to central plans. . . .
>
> In the potash cases the alleged subsidies . . . may encourage those entities to accomplish the economic goals and objectives the central planners set for them, [but] **they do not create the kind of unfair competitive advantage over American firms** against which the countervailing duty act was directed.
>
> There is no reason to believe that if the Soviet Union or the German Democratic Republic had sold the potash directly rather than through a government instrumentality, the product **would have been sold in the United States at higher prices or on different terms**. . . . Those governments are not providing the exporters of potash to the United States with the kind of "bounty" or "grant" for which Congress in section 303 prescribed the imposition of countervailing duties.

Georgetown Steel at 1310, 1315-16 (emphasis added; citations omitted).

The question of whether the Department could have interpreted section 303 differently, to permit CVD cases against NMEs, was not before the court and was therefore not decided in *Georgetown Steel*. The question of whether the Department's rationale was the best possible rationale, true in every respect, also was not before the court and was therefore not decided in *Georgetown Steel*. And most certainly, the question of whether NMEs could be subjected to CVD law under the URAA, enacted eight years later, was also not before the court and was not decided in *Georgetown Steel*. Nonetheless, it became a convenient -- and regrettably, sloppy -- habit to cite *Georgetown Steel* for the broad proposition that CVD law does not apply to NMEs.

The Department has recently recognized that *Georgetown Steel* gives it discretion to apply existing CVD law to China, despite having found that China is an NME. *Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 17,484 (Apr. 9, 2007). The Department's rationale in that case is set forth in a March 29, 2007, memorandum (the "*Georgetown Steel* Memorandum"), which leaves the Department's underlying rationale in *Georgetown Steel* untouched and unexamined, opting instead to distinguish present-day China factually from the "traditional, Soviet-style economies of the 1980s" which were at issue in the wire rod and potash cases. While factual distinctions may be important, the Department should also consider whether the 24-year-old rationale remains valid under the current statute.

As noted above, section 303 was repealed as part of the URAA, which became effective in 1995 and implemented the provisions of the new WTO SCM Agreement. Unlike the 1979 Tokyo Round Subsidies Code that it replaced, which only 24 countries joined, all countries that become WTO members are subject to the SCM. URAA Statement of Administrative Action

("SAA"), H.R. Doc. No. 103-316 (1994) at 911, *reprinted in* 1994 U.S.C.A.A.N. 3773, 4040.

The new CVD provisions of the URAA also explicitly provided:

> The determination of whether a subsidy exists shall be made without regard to whether the recipient of the subsidy is publicly or privately owned and without regard to whether the subsidy is provided directly or indirectly on the manufacture, production, or export of merchandise. **The administering authority is not required to consider the effect of the subsidy in determining whether a subsidy exists** under this paragraph.

19 U.S.C. § 1677(5)(C) (emphasis added).

In describing this provision, the SAA refers to a decision of a binational panel, under Article 1904 of the Canada-United States Free Trade Agreement, which had recognized the connection between *Georgetown Steel* and the Department's concept of a subsidy:

> Section 771(5)(C) provides that in determining whether a subsidy exists, Commerce is not required to consider the effect of the subsidy. In *Certain Softwood Lumber Products from Canada*, USA-92-1904-02 [*sic*; -01], a three-member majority ruled 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. In so ruling, the majority misinterpreted the holding in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), which was limited to the reasonable proposition that the CVD law cannot be applied to imports from nonmarket economy countries. Although this panel decision would not be binding precedent in future cases, the Administration wants to make clear its view that **the new definition of subsidy does not require that Commerce consider or analyze the effect (including whether there is any effect at all) of a government action on the price or output of the class or kind of merchandise under investigation or review.**

SAA at 926 (emphasis added).

The SAA's facile and superficial attempt to sequester *Georgetown Steel* into the box of "CVD law cannot be applied to imports from nonmarket economy countries" reflects the confusion inevitably caused by the Department's inconsistent uses of the underlying rationale.

As explained by the *Softwood Lumber* binational panel, the Department itself, in proposing its CVD regulation, had cited the *Georgetown Steel* rationale -- *i.e.*, that a subsidy cannot be exist unless there is a distortion of the market process for allocating resources -- as a key element of the Department's "conceptual model" of subsidies:

> Conceptually, the regulations are based upon the economic model articulated by the Department in its final determinations in *Carbon Steel Wire Rod from Czechoslovakia* and *Carbon Steel Wire Rod from Poland* . . . and sustained by the Court in *Georgetown Steel Corp. v. United States* . . . **This model, which generally defines a subsidy as a distortion of the market process for allocating an economy's resources, underlies the Department's <u>entire</u> methodology**.

Certain Softwood Lumber Products from Canada, No. USA-1904-01 (Canada-U.S. FTA Panel, May 6, 1993) at 47 (*reproduced at* http://www.worldtradelaw.net/cusfta19/lumber-cvd-cusfta19.pdf, visited Nov. 25, 2007) (bold emphasis added; underscored emphasis by panel). The panel went on to note that,

> when one goes back and reads *Wire Rod*, it is clear that in order to reach its specific ruling in that case, the Department had to spell out more deeply than in any decision before or since the underlying philosophy of CVD law:
>
> > In a market economy, scarce resources are channelled to their most profitable and efficient uses by market forces of supply and demand. We believe a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth.
> >
> > In NMEs resources are not allocated by a market. With varying degrees of control, allocation is achieved by central planning. **<u>Without a market, it is obviously meaningless to look for a misallocation of resources caused by subsidies</u>. <u>There is no market process to distort or subvert</u>.** Resources may appear to be misallocated in an NME when compared to the standard of a market economy, but the resource misallocation results from central

planning, not subsidies.

Id., 47-48 (emphasis added), quoting *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19,374 at 19,375 (1984).

Thus, the Department decided, long ago, under a now-repealed statute, that (a) if there is a market process to distort, there may be a subsidy, and (b) if there is not a market process to distort, there cannot be a subsidy. This assumption -- that subsidies and the existence of free markets are "definitionally" tied together -- is the source of the dilemma in which the Department now finds itself, since the application of NME methodologies in AD cases is also triggered by a determination about the existence or nonexistence of a market. But the old assumption has no validity under the current CVD statute, which straightforwardly defines a subsidy in terms of a benefit conferred by a government without respect to the nature or existence of any market effects. Congress, by adopting the SAA, has said so. The Department itself, by ruling as it did in *Softwood Lumber*, has said so. When the Department recognizes that current law does not define subsidies by reference to market effects, the Department will no longer be open to the criticism that it is making inconsistent factual findings -- *i.e.*, the existence of a Chinese free market in a CVD case and, simultaneously, the nonexistence of a Chinese free market in an AD case.

II. THE STATUTE DOES NOT PERMIT INDIVIDUAL RESPONDENTS TO BE EXEMPTED FROM NME TREATMENT IN ANTIDUMPING CASES

As noted in the *Georgetown Steel* Memorandum and in both RFCs, the Department's determination that China is an NME country was recently reexamined and reaffirmed in *Certain Lined Paper Products from China*. *Georgetown Steel* Memorandum at 2; First RFC at 29,303; Second RFC at 60,649. The Department received many comments, in response to the First RFC, explaining that (a) the antidumping statute requires that the NME determination be made on the

basis of conditions present in the economy as a whole, not on the basis of conditions faced by individual respondents, and (b) the Department's market-oriented industry ("MOI") test (not codified in regulations, and never successfully used by a Chinese respondent) requires a determination based on conditions throughout an industry, not based on circumstances of individual respondents. *See*, *e.g.*, Comments of the Committee to Support U.S. Trade Laws, June 22, 2007, at 2-5; Comments of United States Steel Corporation, June 25, 2007, at 2-4; Comments of IPSCO Inc. and the Southern Shrimp Alliance, June 25, 2007, at 6-10.

The statutes have not changed, and no purpose can be served by our repetition here of the analyses that have already been presented to the Department by other domestic parties in response to the First RFC. It should not escape the Department's notice, however, that parties with interests on the other side of the issue -- the China Chamber of Commerce of Metals, Minerals, and Chemicals Importers and Exporters; the Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the People's Republic of China; the China Chamber of Commerce for Import and Export of Foodstuffs, Native Produce, and Animal By-Products; and the Consuming Industries Trade Action Coalition -- provided no legal arguments in support of the proposition that the Department has authority to implement a "market-oriented enterprise" test in antidumping cases. Instead, each of these proponents of Chinese interests argued that, given the factual basis chosen by the Department in *Coated Free Sheet Paper* for the potential imposition of CVD remedies, the Department cannot, as a factual matter, justify the use of an NME methodology at all in AD cases against China. The ammunition for such assertions is the Department's failure to dismantle the obsolete linkage it has enshrined, under the *Georgetown Steel* decision, between the definition of a subsidy and the existence of market mechanisms.

Conclusion

The Department has decided to explore the possibility of implementing a "market-oriented enterprise" mechanism in AD cases only because of a perceived need to harmonize AD practice with the decision to apply CVD law to China. In fact, the CVD and AD laws are already harmonious as written -- with respect to China no less than any other country -- and perceptions to the contrary are fueled only by the Department's failure, thus far, to reassess its "conceptual model of subsidies" from 24 years ago. Lacking legal authority or any compelling reason to amend its NME practice toward China, the Department should desist -- or, at a minimum, should solicit comments on the more fruitful issue of whether the rationale underlying *Georgetown Steel* and the old "conceptual model" are relevant to the current statutory framework.

Respectfully submitted,

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