

Movement Towards a US Countervailing Duty Remedy for Chinese Goods That Are Found to be Subsidised*

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Introduction

The US Government has never imposed countervailing duties—duties to offset subsidies—on imports from the People's Republic of China (China). Since US court and agency decisions regarding imports from certain communist countries in the mid-1980s, it has been broadly understood that the US Department of Commerce (Commerce Department) would not recognise subsidies on merchandise from countries that, like China, are considered to have non-market economies (NMEs). Proponents of this practice have argued that the concept of a “subsidy” as a distortion of a market economy had no meaning as regards to NMEs.

But in a case involving Chinese coated free-sheet paper (CFSP), the Commerce Department has concluded that US imports of this product benefit from countervailable subsidies within the meaning of the US countervailing duty (CVD) law. According to the Commerce Department, this change in policy is grounded in changes in China's economy. While such changes have not been found to be significant enough to alter China's NME status, the Commerce Department decided that movement in China toward market economics makes it susceptible to subsidy findings. Since the April 2007 CFSP preliminary CVD determination, US domestic industries have filed six other CVD petitions against products imported from China,

* The Commerce Department has published a final affirmative CVD determination on CFSP from China in the time between the writing of this article and the finalisation of publication. For more information on the final determination, please see *Coated Free Sheet Paper From the People's Republic of China*, 72 Fed. Reg. 60,645 (Dep't Commerce, October 25, 2007) (final affirmative countervailing duty determination). See also the Commerce Department's Decision Memorandum, available at ia.ita.doc.gov.

including circular welded carbon-quality steel pipe, new pneumatic off-the-road tyres, light-walled rectangular pipe and tube, laminated woven sacks, lightweight thermal paper, and raw flexible magnets. At the same time, the US Congress is considering proposals that would expressly establish that the CVD law can apply to imports from China.

This article examines the Chinese CFSP CVD investigation and US legislative proposals regarding China and the CVD law. As to the CVD case, the Commerce Department will need to resolve issues regarding *whether* it is legally authorised to impose countervailing duties on imports from an NME country, and, to the extent that it is, *how* it should do so in compliance with US law and international trade rules. In particular, the Commerce Department needs to address: (1) the 1986 *Georgetown Steel* case, which approved the Commerce Department's practice of not applying countervailing duties to imports from NME countries; (2) whether Chinese domestic subsidies found with respect to Chinese CFSP are “specific” to a Chinese industry or group of industries, such that they are legally actionable (countervailable); (3) how to measure any subsidies that are found and, in particular, which price benchmarks it should use to do so; and (4) whether treatment of China as an NME in a concurrent anti-dumping (AD) investigation leads to a double-counting of alleged unfair trade behaviour when both countervailing and anti-dumping duties are imposed. This article also briefly addresses the Davis-English Bill currently before the House of Representatives and its Senate companion Bill, and how the Bills would affect CVD treatment of products imported from China.

CFSP case: background and analysis

On October 31, 2006, the US CFSP producer NewPage Corporation (NewPage) filed petitions alleging that Chinese CFSP is subsidised within the meaning of the US CVD law and sold for less than fair value (dumped) within the meaning of the US AD law.¹ The US International Trade Commission (ITC) soon began its preliminary investigation on whether Chinese CFSP imports materially injure or threaten material injury to the US industry,² and the

1. See *Coated Free Sheet Paper from the People's Republic of China, Indonesia and the Republic of Korea*, 71 Fed. Reg. 68,546, 68,546 (Dep't Commerce November 27, 2006) (initiation of countervailing duty investigation) (Commerce Department CVD Investigation Initiation). NewPage filed a petition for an antidumping duty investigation on coated free sheet paper from the People's Republic of China on the same day. See Fact Sheet: “Commerce Initiates Antidumping Duty Investigation on Coated Free Sheet Paper from the People's Republic of China” at pp.1–2, available at ia.ita.doc.gov.

2. See *Coated Free Sheet Paper from China, Indonesia, and Korea*, 71 Fed. Reg. 64,983, 64,983 (Int'l Trade Comm'n November 6, 2006) (initiation of injury investigation).

US Department of Commerce (Commerce Department) initiated its subsidies and dumping investigations on November 20.³ On December 15, 2006, the ITC announced its preliminary determination that Chinese CFSP imports are materially injuring the US industry.⁴ The Commerce Department published an amended preliminary determination that CFSP imports are subsidised on April 9, 2007.⁵

In its amended preliminary CVD determination, the Commerce Department decided: (1) that the CVD law can be applied to imports from China on the grounds that the *Georgetown Steel* doctrine regarding NME countries is no longer applicable to China; (2) to use data for subsidy-measurement benchmarking from outside China because Chinese data was found to be distorted; and (3) that several subsidy programmes found to benefit CFSP are “specific” and, thus countervailable.⁶ The Commerce Department did not address whether its approach to subsidy measurement would represent double-counting vis-à-vis the Chinese CFSP AD case.

Georgetown Steel question: whether the CVD law applies to NME countries

Background

In *Georgetown Steel*, domestic producers had filed CVD petitions in 1983 against imports of carbon steel wire rod from Czechoslovakia and Poland and potash from the Soviet Union and the German Democratic Republic (East Germany). The Commerce Department determined that the US CVD law did not apply to NME countries, and therefore rescinded those investigations and dismissed the petitions. The petitioners then sought review before the US Court of International

Trade (CIT). In a case consolidating the carbon steel wire rod and potash cases, the US Court of International Trade reversed and remanded the Commerce Department’s determination, finding it contrary to law and holding that the CVD law applied to NME countries. The United States appealed to the U.S. Court of Appeals for the Federal Circuit.⁷

After disposing of the carbon steel wire rod complaint for jurisdictional reasons, the US Court of Appeals for the Federal Circuit noted in its 1986 opinion that since no NMEs existed at the time the first CVD statute was enacted in 1897, the US Congress had no occasion to address whether the CVD law applied to NME countries. Since the law was substantially unchanged in later re-enactments, the court reasoned that it must decide congressional intent at the time of enactment of the original CVD law.⁸

The Federal Circuit discussed the Commerce Department’s interpretation that a “subsidy” necessarily entails a distortion of a market economy. The court observed that, according to the Commerce Department, a subsidy is defined as “any action that distorts or subverts the market process and results in a misallocation of resources”, and therefore cannot exist in an NME country since there is no market to be distorted. The court noted that “Congress has not defined the terms ‘bounty’ and ‘grant’”—the statutory terms used in the CVD law at that time.⁹ After then considering the definition adopted by Commerce in the absence of a statutory definition, the Federal Circuit held that Commerce’s determination that benefits granted by NME governments were not bounties or grants was not unreasonable, nor was it a violation of law or an abuse of discretion.¹⁰

The court sustained the Commerce Department’s dismissal of the CVD petitions regarding NME countries by vacating and reversing the CIT’s orders that reversed the agency’s final determinations. But observers have argued about the precedential status of the *Georgetown Steel* Court

3. See Commerce Department CVD Investigation Initiation, above fn.1, 68,549.

4. See *Coated Free Sheet Paper from China, Indonesia, and Korea*, 71 Fed. Reg. 78,464, 78,464 (Int’l Trade Comm’n December 29, 2006) (affirmative preliminary determination of injury). On December 22, 2006, the ITC made a preliminary affirmative determination on injury in the anti-dumping duty investigation. See *Coated Free Sheet Paper from the People’s Republic of China*, 72 Fed. Reg. 30,758, 30,758 (Dep’t Commerce June 4, 2007) (affirmative preliminary determination of sales at less than fair value and postponement of final determination) (Prelim. AD Determination).

5. See *Coated Free Sheet Paper from Indonesia, the People’s Republic of China and the Republic of Korea*, 71 Fed. Reg. 78,403, 78,403 (Dep’t Commerce December 29, 2006) (postponement of preliminary countervailing duty determination); *Coated Free Sheet Paper from the People’s Republic of China*, 72 Fed. Reg. 17,484, 17,484–17,485 (Dep’t Commerce April 9, 2007) (amended preliminary countervailing duty determination) (Amended Prelim. CVD Determination). On June 4, 2007, the Commerce Department published a preliminary affirmative determination in the anti-dumping duty investigation. See Prelim. AD Determination, above fn.4.

6. See Amended Prelim. CVD Determination, above fn.5, 17,486, 17,489, 17,491–17,497.

7. *Georgetown Steel Corp v United States*, 801 F. 2d 1308, 1317 (Fed. Cir. 1986).

8. Above fn.7.

9. The court noted that s.303 of the Tariff Act of 1930, as amended, 19 U.S.C. §1303 (1982), the authority for levying countervailing duties at that time, stated:

“Whenever any country . . . or other political subdivision of government . . . shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacturer or production or export of any article or merchandise manufactured or produced in such country . . . or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether . . . imported directly . . . or otherwise, . . . there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.” (*Georgetown Steel*, above fn.7, 1313).

10. *Georgetown Steel*, above fn.7, 1317.

of Appeals decision. While the court narrowly concluded near the end of its opinion that the Commerce Department had acted *within its discretion* when the agency decided not to apply the CVD law to NMEs, some have argued that other portions of the opinion broadly hold that the agency's rejection of CVD petitions regarding imports from NME countries was *legally mandatory*. For example, the court noted that Congress had amended the AD law in the Trade Act of 1974 to address specifically exports from NMEs, but made no analogous change to the CVD law. The court indicated this difference in treatment between the AD and the CVD law was reflected again in the Trade Agreements Act of 1979, and stated that this "strongly indicates that Congress did not believe that [CVD] law covered nonmarket economies".¹¹ It remains to be seen whether support that the Federal Circuit expressed in *Georgetown Steel* for the Commerce Department's approach to NME imports under the CVD law will be viewed as binding articulations of US law or just non-binding explanations for why it decided to sustain the outcome of the agency proceedings.

In the period between the 1986 *Georgetown Steel* decision and the 2006–07 CFSP CVD investigation, the Commerce Department considered applying the CVD law to industries in NME countries to the extent that individual industries met market-oriented industry criteria.¹² In 1992, however, the Commerce Department found that neither of the industries in the two CVD cases against imports from China met the criteria for recognition as a market-oriented industry.¹³ The "received wisdom" has been that—with the possible exception of imports from a market-oriented industry within an NME country—the Commerce Department will not find countervailable subsidies with respect to imports from China or any other country that Commerce has classified as an NME.

CFSP case

On May 15, 2006 and on August 30, 2006, the Commerce Department confirmed China's continuing status as an NME country for the purposes of the US AD law.¹⁴ Therefore, when the CFSP

CVD petition against Chinese imports was filed with the agency at the end of October 2006, the Commerce Department was squarely confronted with the need to address the legacy of *Georgetown Steel* before it could initiate a CVD investigation.¹⁵ After noting NewPage's contentions in regard to the Commerce Department's *Georgetown Steel* practice,¹⁶ the Commerce Department stated that it had been "provided sufficient argument and subsidy allegations to meet the statutory criteria" set for initiating a CVD investigation of Chinese CFSP imports.¹⁷ Also, in December 2006 the Commerce Department published a request for public comment on how it should approach NME imports from China under the CVD law.¹⁸

The Chinese Government, along with Chinese CFSP producers Gold East Paper (Jiangsu) Co Ltd and Global Paper Solutions Inc, brought an action before the CIT to try to block the CFSP CVD investigation.¹⁹ The plaintiffs alleged that the Commerce Department's initiation of a CVD investigation of Chinese CFSP imports was illegal and ultra vires²⁰ because the Commerce Department lacked the legal authority to apply the CVD law to imports from NMEs such as China.²¹ The complaint also claimed that the Commerce Department must follow Administrative Procedure Act (APA) rulemaking requirements in making any changes to what was characterised as "a binding rule that it will not conduct CVD investigations of NME countries".²² The plaintiffs requested that the

Free Sheet Paper from Indonesia, the People's Republic of China, and the Republic of Korea, 71 Fed. Reg. 68,537, 68,540 (Dep't Commerce November 27, 2006) (initiation of anti-dumping investigation).

15. See China CVD Fact Sheet: "Commerce Preliminarily Finds Countervailing Duties on Coated Free Sheet Paper from the People's Republic of China" (Dep't Commerce March 30, 2007), p.1, available at ia.ita.doc.gov (China CVD CFSP Fact Sheet). See also *Government of the People's Republic of China v United States*, 483 F. Supp. 2d 1274, 1276 (CIT March 29, 2007) (*PRC v United States*); *Application of the Countervailing Duty Law to Imports from the People's Republic of China*, 71 Fed. Reg. 75,507, 75,507 (Dep't Commerce December 15, 2006) (request for comment) (China CVD Request for Comment).

16. See Commerce Department CVD Investigation Initiation, above fn.1, 68,549.

17. See above fn.16 (internal citations omitted).

18. See China CVD Request for Comment, above fn.15, 75,507.

19. On March 22, 2007, Gold East Paper (Jiangsu) Co Ltd and Gold Huasheng Paper Co Ltd submitted to the Commerce Department a letter providing a response to petitioner's comments and including a request to either terminate the investigation or issue a negative preliminary determination. The request contained certain arguments similar to those filed at the CIT, including *Georgetown Steel* precedent and Commerce Department practice. See Letter from White & Case LLP to the US Department of Commerce, Case No. C-570-907 (March 22, 2007).

20. See *PRC v United States*, above fn.15, Pls.' Compl. ¶ 22 (2007).

21. See above fn.20, ¶24.

22. Above fn.20, ¶27.

11. Above fn.10.

12. See, e.g. *Chrome-Plated Lug Nuts and Wheel Locks from the People's Republic of China*, 57 Fed. Reg. 10,459 (Dep't Commerce March 26, 1992) (rescission of initiation of countervailing duty investigation and dismissal of petition); *Oscillating and Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24,018 (Dep't Commerce June 5, 1992) (final negative countervailing duty determinations).

13. See above fn.12.

14. See US Department of Commerce Memorandum from S. Lee-Alaia and L. Norton to D. M. Spooner, Case No.C-570-907, p.2 (March 29, 2007) (Applicability of *Georgetown Steel* to China Memo). See also *Coated*

court temporarily restrain and enjoin the “unlawful” CVD investigation.²³

At the end of March 2007, the CIT granted the US Government’s motion to dismiss this action for lack of jurisdiction. The court agreed with the Government’s argument that, as in most cases, the plaintiff could not challenge the investigation before its conclusion.²⁴ In dismissing the action, the court did not approve application of the CVD law to Chinese imports. Rather, it merely ruled that this particular legal challenge was untimely.

The CIT did make non-binding comments that tended to support the CFSP petitioner. The court opined that “it is not clear that Commerce is prohibited from applying countervailing duty law to NMEs”,²⁵ and that “the *Georgetown Steel* court did not . . . find that the countervailing duty law is not applicable to NMEs”.²⁶ Instead, the CIT continued, the “*Georgetown Steel* court . . . recognized the continuing ‘broad discretion’ of the agency to determine whether to apply countervailing duty law to NMEs”.²⁷ In addition, the court remained unconvinced that the Commerce Department had adopted a categorical rule as to non-application of the CVD law to imports from NMEs.²⁸ These observations notwithstanding, the precise parameters of the *Georgetown Steel* decision would no doubt be directly at issue in any appeal of a final Commerce Department decision in the CFSP case.

On March 29, 2007, Commerce Department staff issued a memorandum as part of the CFSP CVD investigation analysing the applicability the *Georgetown Steel* doctrine to present-day China (*Georgetown Steel* memorandum).²⁹ The Commerce Department preliminarily decided “that *Georgetown Steel* no longer applies to China because of the vast differences between the characteristics of the non-market economies of the 1980s Soviet-bloc countries and China’s economy today”.³⁰ The Commerce Department preliminarily found that because of market developments in China, and unlike with the Soviet-bloc non-market economies, it is capable of applying to Chinese imports the criteria of the CVD law, such as determining whether the Government has provided a benefit, and whether that benefit is specific.³¹ Therefore the Commerce Department concluded that the *Georgetown Steel* doctrine “does not bar the application of the CVD law to imports from

China”.³² At the same time, the Commerce Department confirmed that:

“[D]espite the significant progress that China has made away from being a traditional command economy, the extent of government control and direction over the country’s economy warrants the continued designation of China as an NME”.³³

The Commerce Department announced its preliminary affirmative CVD determination the following day.³⁴

Alleged Chinese subsidies to CFSP

The alleged Chinese subsidies in the CFSP case include:

- Grant programmes. Through the State Key Technology Renovation Fund, the Government of China (GOC) and local and provincial authorities allegedly provide grants to CFSP producers and their cross-owned companies pursuant to five-year plans for the pulp and paper industry.
- A Government policy lending programme. This programme encompasses allegedly discounted loans to the forestry and paper industry in accordance with the GOC’s industrial policy, as described in “The [Chinese] Civilian Economy and Social Development 10th Five-Year Plan

32. Applicability of *Georgetown Steel* to China Memo, above fn.14 at p.2.

33. Above fn.14 at p.4.

34. See Amended Prelim. CVD Determination, above fn.5. In its *Georgetown Steel* memorandum, the Commerce Department acknowledged that China’s current economy:

“[S]uggest[ed] that modification of some aspects of the Department’s current NME antidumping policy and practice may be warranted, such as the conditions under which the Department might grant an NME respondent market economy treatment”.

Thereafter, the agency published a request for comment concerning its NME anti-dumping methodology and the process of granting Market-Oriented Enterprise status to individual respondents from China. See *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29,302 (Dep’t Commerce May 25, 2007) (request for comment). The Commerce Department was likely anticipating objections from China concerning possible friction—such as double counting—due to the change in CVD application to NMEs without a concurrent modification of NME antidumping treatment. Indeed, China did submit comments to the Commerce Department. However, China addressed the issue from a different direction: by requesting that China’s NME status be terminated. In its May 11, 2007 comments to the Commerce Department on issues to be addressed in the CFSP from the PRC preliminary AD determination, the Bureau of Fair Trade in the Ministry of Commerce of the People’s Republic of China (BOFT) requested that the Commerce Department “terminate its NME designation for China”. Letter from Vinson & Elkins LLP to the US Department of Commerce, Case No. A-570-906 (May 11, 2007), p.3 (BOFT’s Comments on CFSP Prelim. AD).

23. See above fn.20, ¶13.

24. See *PRC v United States*, above fn.15, 1281.

25. Above fn.15, 1282.

26. Above fn.25.

27. Above fn.25.

28. See *PRC v United States*, above fn.15, 1282 n.10 (citing *SEC v Chenery Corp* 332 U.S. 194, 203 (1947)).

29. See Applicability of *Georgetown Steel* to China Memo, above fn.14. See also Amended Prelim. CVD Determination, above fn.5, 17,486 (referring to the memo).

30. China CVD CFSP Fact Sheet, above fn.15, 1.

31. See Applicability of *Georgetown Steel* to China Memo, above fn.14.

Outline” and “The Tenth Five-Year and 2010 Special Plan for the Construction of National Forestry and Papermaking Integration Project”. Policy banks and state-owned banks providing policy loans offer allegedly discounted loans, interest subsidies and debt forgiveness.

- Income tax programmes. Through the “Two Free, Three Half” programme, tax guidelines and regulations for foreign-invested enterprises (FIEs) in China were established to attract foreign businesses to China. “Productive” FIEs that are scheduled to operate not less than 10 years are reportedly exempt from income tax in their first two profitable years and pay half of their applicable tax rate for the following three years. There is also a local income tax exemption and reduction programme for “productive” FIEs, and a programme for income tax credits on purchases of domestically produced equipment by FIEs, which allegedly permits FIEs to obtain tax credits of up to 40 per cent of the purchase value of domestically produced equipment.
- Value added tax (VAT) and duty exemptions. Through VAT rebates on purchases of domestically produced equipment, the GOC reportedly refunds the VAT on purchases by FIEs of certain domestically produced equipment. Through VAT and tariff exemptions on imported equipment, FIEs and certain domestic enterprises are allegedly exempted from the VAT and tariffs on imported equipment used in their production.
- Domestic VAT refunds for companies located in the Hainan Economic Development Zone. Enterprises located in the Economic Development Zone of Hainan are allegedly accorded favourable tax treatment.³⁵

Benchmarking

Apart from simple grants of money, the Commerce Department is commonly required to determine the magnitude of subsidies by reference to price benchmarks.³⁶ A benchmark could, for example, constitute an average interest rate to assess the value of a government loan or an average price for a production input that a government bestowed on a domestic producer.

35. See Amended Prelim. CVD Determination, above fn.5.

36. See, e.g. Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber From Canada*, WT/DS257/AB/R (January 19, 2004), VII(167)(b), at p.66.

There has been much controversy about the Commerce Department’s occasional use of benchmarks from outside the country under investigation to measure subsidies. Opponents of this practice contend that out-of-country benchmarks are necessarily less accurate than in-country benchmarks and that out-of-country benchmarks contravene World Trade Organization (WTO) requirements. Use of an out-of-country benchmark was sustained, however, by the WTO Appellate Body in a CVD case regarding Canadian softwood lumber.³⁷

Understandings reached with China in connection with its 2001 accession to the WTO specifically address the question of out-of-country CVD benchmarks. They establish that:

“[I]f there are special difficulties . . . the importing WTO Member may . . . take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks”.

They add that:

“[W]here practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China”.³⁸

In the Chinese CFSP investigation, the Commerce Department preliminarily selected out-of-China loan interest rate benchmarks to evaluate whether and the extent to which Chinese banks, including state-owned commercial banks, issued loans on a preferential, non-commercial basis and therefore provided subsidies. The Commerce Department found that the:

“Chinese national interest rates are not reliable as benchmarks . . . because of the pervasiveness of the GOC’s [Government of China] intervention in the banking sector”.³⁹

In addition, the Commerce Department determined that it was impractical to adjust Chinese rates in order to benchmark loans, as mentioned in China’s WTO Accession Protocol, because the Commerce Department could not attribute such distortions “to a single factor or set of factors that the Department could account for by adjusting an internal lending figure”.⁴⁰

Specificity

Under the US CVD law and WTO requirements, a production subsidy cannot attract a countervailing

37. Above fn.36.

38. Report of the Working Party on the Accession of China: Draft Protocol on the Accession of the People’s Republic of China, Pt I, 15(b), WT/MIN(01)/3, p.81 (November 10, 2001) (Working Party Report on China Accession).

39. Amended Prelim. CVD Determination, above fn.5, 17,487.

40. Above fn.5, 17,488.

duty unless it is “specific” to an enterprise or industry or to a group of enterprises or industries within the jurisdiction of the granting authority.⁴¹ A subsidy can be found to be specific and therefore “countervailable” if, for example, benefits from the programme inure disproportionately to an industry or group of industries.⁴² Subsidies that are contingent on export performance or the use of locally produced inputs are not only specific under s.771(5A)(A) of the Tariff Act of 1930⁴³ but prohibited under WTO rules.⁴⁴

The CFSP case appears to present important questions about whether some of the alleged subsidies should be found to be specific. More particularly, treatment of specificity in the CFSP case could affect other CVD cases regarding Chinese imports that have been filed on welded carbon quality steel pipe, light-walled rectangular pipe and tube, new pneumatic off-the-road tyres, laminated woven sacks, lightweight thermal paper and raw flexible magnets. Petitioners in some of these follow-up cases have alleged a number of the same subsidies alleged in the CFSP investigation, such that disposition of the CFSP case will probably have a major impact on disposition of the other cases. For example, in *Laminated Woven Sacks from China*, subsidies at issue include:

- grant programmes, including the State Key Technologies Renovation Project Fund; export interest subsidy funds for enterprises located in Zhejiang Province; grants for high-technology equipment; a programme to rebate anti-dumping legal fees; grants to loss-making state-owned enterprises;
- preferential lending to the laminated woven sacks industry, including policy loans, loan guarantees, and loan forgiveness;
- income tax programmes, including the “Two Free, Three Half” programme;
- indirect tax programmes and import tariff programme, including tariff and import VAT exemptions for imported technology and equipment for use in encouraged industries; and
- provision of goods or services for less than adequate remuneration, including land and electricity.⁴⁵

41. See Agreement on Subsidies and Countervailing Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts—The Results of the Uruguay Round of Multilateral Trade Negotiations 275 (1999), 1867 U.N.T.S. 14 (SCM Agreement), Art.2.1.

42. See SCM Agreement, above fn.41, Art.2.1(c); 19 U.S.C. 1677(5A)(D).

43. See 19 U.S.C. 1677(5A)(A).

44. See SCM Agreement, above fn.41, Arts 2.3 and 3.

45. See Letter from King & Spalding LLP to US Department of Commerce, Inv. Nos A-570-916, C-570-917, 701-TA-450 and 731-TA-1122, pp.40–78 (June 28,

Double counting

In its May 11, 2007 comments to the Commerce Department, the Bureau of Fair Trade in the Ministry of Commerce of the People’s Republic of China (BOFT) argues that double counting of duties, or “imposing two sets of duties to compensate for the same unfair trade practice”, results from the simultaneous application of CVD and AD duties to an NME.⁴⁶ Specifically, BOFT claims that double counting occurs because the AD law, as applied to NMEs, already offsets any alleged subsidisation and eliminates any accompanying distortions from subsidies by requiring the Commerce Department to “only use [market-economy] surrogate values that are subsidy free” to construct normal value.⁴⁷ Since the AD benchmark is not affected by subsidies, it is argued, the measure of dumping accounts for any subsidies that exist. Such double counting, BOFT further argues, violates Art.9.3 of the AD Agreement to the extent that the AD duty exceeds the margin of dumping.⁴⁸

In its May 18, 2007 response to BOFT’s comments, NewPage argues that had:

“Congress intended Commerce to adjust the dumping margin to prevent alleged double-counting with respect to domestic subsidies, it would have made that intent clear”.⁴⁹

The petitioner continued that “China is not entitled to a different deal than the one it negotiated”, where it agreed that trading partners would have the right to apply the AD methodology for NMEs to Chinese imports for at least 15 years.⁵⁰ NewPage further maintains that the purpose of the Commerce Department’s AD surrogate value methodology was not to provide a remedy for subsidies in an NME, that the methodology “does not attempt to match exactly the manufacturing and financial experience of the NME producers”,⁵¹ and that there is no basis to assert that “domestic subsidies necessarily reduce export prices”.⁵²

The Commerce Department has not yet addressed the double counting issue. In its preliminary AD determination on CFSP from China, the Commerce Department noted the comments from petitioner and respondents on the possibility of double remedy occurring, observed that it was in the process of requesting comments concerning

2007) (petition for the imposition of anti-dumping and countervailing duties against laminated woven sacks from the People’s Republic of China).

46. BOFT’s Comments on CFSP Prelim. AD, above fn.34 at p.11.

47. Above fn.34 at p.12.

48. Above fn.34 at pp.23–24.

49. Letter from King & Spalding LLP to the US Department of Commerce, Case No. A-570-906 (May 18, 2007) at p.5.

50. Above fn.49 at p.7.

51. Above fn.49 at p.6.

52. Above fn.49 at p.5.

the development of market-oriented enterprise criteria that would grant “market-economy treatment to individual respondents in antidumping proceedings involving China”, and concluded that it required more time to analyse the double counting issue.⁵³ Assistant Secretary for Import Administration David Spooner of the Commerce Department testified before the Trade Subcommittee of the House Ways and Means Committee in March that the issue is “very fact-intensive” and would be addressed “case by case”.⁵⁴

Legislative developments

In February 2007, US House of Representatives members Artur Davis (D-AL) and Phil English (R-PA) introduced H.R. 1229, the Nonmarket Economy Trade Remedy Act of 2007. Committee hearings on the House Bill were held on March 15, 2007. Its Senate companion Bill, S.974, the Stopping Overseas Subsidies Act, was introduced on March 22, 2007 by Senators Evan Bayh (D-IN) and Susan Collins (R-ME). The House Bill was referred to the House Ways and Means Committee and the House Rules Committee, and the Senate Bill was referred to the Senate Finance Committee.

Both Bills (1) seek to amend the CVD law to establish that goods from NME countries can be found to be subsidised within the meaning of the law; (2) seek to require congressional approval of a Commerce Department determination to revoke a country’s NME status before such a change to market-economy status can be effected; and (3) call for a study and report on subsidies by China, to be completed nine months after enactment of the Act and updated annually thereafter through 2017.

In addition, the House Bill provides:

“When the administering authority [the Commerce Department] has determined that China is a non-market economy country under paragraph (18) of this section, the administering authority shall presume that special difficulties exist in calculating the amount of a benefit under clauses (i) through (iv) with respect to an investigation or review involving China and that it is not practicable to take into account and adjust terms and conditions prevailing in China, and the administering authority shall use terms and conditions prevailing outside of China.”⁵⁵

The Senate Bill contains a similar provision:

“If the administering authority determines that China is a nonmarket economy country under paragraph (18) of this section, the administering authority

53. See *Coated Free Sheet Paper from the People’s Republic of China*, 72 Fed Reg. 30,758, 30,760 (Dep’t Commerce June 4, 2007) (preliminary determination of sales at less than fair value and postponement of final determination).

54. BOFT’s Comments on CFSP Prelim. AD, above fn.34 at p.16.

55. H.R. 1229, Nonmarket Economy Trade Remedy Act of 2007, §2(b).

shall presume, *absent a demonstration of compelling evidence to the contrary*, that special difficulties exist in calculating the amount of a benefit under clauses (i) through (iv) with respect to an investigation or review involving China and that it is not practicable to take into account and adjust terms and conditions prevailing in China, and the administering authority shall use terms and conditions prevailing outside of China.”⁵⁶

Both Bills would legislate a presumption that the Commerce Department cannot use data from China to create benchmarks, even with adjustments. Questions have arisen about whether such a presumption would comport with the working party report in China’s WTO Accession Protocol, which provides that:

“[I]f there are special difficulties in that application [of the Agreement on Subsidies and Countervailing Measures], 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.”⁵⁷

Criticising H.R. 1229, Daniel L. Porter of Vinson and Elkins LLP testified before the Subcommittee on Trade of the House Committee on Ways and Means on March 15, 2007 that requiring use of out-of-country benchmarks for China in calculating CVD rates “is not needed, is not fair, and is contrary to the provisions of China’s WTO Accession Protocol”. Referring to the discussion of changes in China’s economy in the Commerce Department’s *Georgetown Steel* memorandum, Mr Porter argued that:

“[T]here can be little question that there are sectors in the economy that operate under market principles and therefore could provide suitable benchmarks for measuring the extent of the subsidy benefit”.

Finally, Mr Porter claimed that the:

“U.S. promised that it would only resort to surrogate country benchmarks upon a factual finding of ‘special difficulties.’ HR 1229 requires the U.S. to renege on this specific promise”.

With regard to double counting issues, Mr Porter argued that the Bill:

“[D]oes not prevent double counting of duties—that is, imposing two sets of duties to compensate for the same unfair trade practice—in those situations in which the same exporters face *both* an antidumping and a CVD case”.

56. S.974, the Stopping Overseas Subsidies Act §2(b) (emphasis added).

57. Working Party Report on China Accession, above fn.38 at p.81.

During the same hearing, Usha C. V. Haley, a professor of International Business and Director of the Global Business Center at the University of New Haven, testified in regards to benchmarks that “China’s WTO accession agreement specifically permits application of third-country information in [a] CVD determination”. Professor Haley further noted that:

“Measurement issues also arise as China’s opaque environment obstructs the identification of appropriate benchmarks. For example, China’s financial system provides many subsidies. However, governmental control over banking obfuscates market-determined rates of interest that can provide benchmarks to gauge credit subsidies’ benefits for companies or industries. Also, lack of adherence to generally recognized accounting standards and unreliable book-keeping further complicate our identifying subsidies’ benefits”.

Concerning double counting, James C. Hecht, a partner at Skadden, Arps, Slate, Meagher and Flom LLP, testified that:

“[T]he theoretical concern that has been expressed with regard to double counting is not well-founded. Specifically, it is not correct to say that the non-market economy dumping methodology corrects for domestic subsidies—rather, it corrects for price distortions that result in *both* artificially high and low input prices in a non-market economy. As such, there is no basis to conclude that domestic subsidies will be remedied through the NME dumping methodology”.⁵⁸

Conclusion

Since the initiation of CVD and AD investigations on CFSP from China, the following additional CVD cases regarding Chinese imports have emerged. The first four cases were initiated through petitions filed in June 2007.

1. The United Steelworkers and six US steel tube companies filed CVD and AD petitions regarding circular welded carbon quality steel pipe from China. The ITC has made an affirmative preliminary injury determination, and Commerce was expected to issue a preliminary subsidy finding by November 2007.⁵⁹
2. Titan Tire Corp and the United Steelworkers filed CVD and AD petitions regarding pneumatic off-the-road tyres from China.

58. US House of Representatives, the Committee on Ways and Means, Subcommittee on Trade, Hearing on the Nonmarket Economy Trade Remedy Act of 2007 (March 15, 2007) (statements of Usha C. V. Haley, James C. Hecht, and Daniel L. Porter).

59. See *Circular Welded Carbon-Quality Steel Pipe from China*, 72 Fed. Reg. 43,295, 43,295 (Int’l Trade Comm’n August 3, 2007) (determination); *Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China*, 72 Fed. Reg. 42,399 (Dep’t Commerce August 2, 2007) (notice of postponement of preliminary determination in the countervailing duty investigation).

The ITC has made an affirmative preliminary injury determination, and Commerce is expected to issue a preliminary subsidy finding by December 2007.⁶⁰

3. A group of pipe companies filed CVD and AD petitions regarding light-walled rectangular pipe and tube from four countries, including China. The ITC has made an affirmative preliminary injury determination, and the Commerce Department is expected to issue a preliminary subsidy finding by November 2007.⁶¹
4. The US Laminated Woven Sacks Committee filed AD and CVD petitions against laminated woven sacks from China. The ITC has made an affirmative preliminary injury determination, and Commerce is scheduled to issue a preliminary subsidy finding by November 2007.⁶²

Finally, Appleton Papers Inc filed a CVD petition against lightweight thermal paper from China, and filed an AD petition against the same product from China and other countries, in September 2007.

This flurry of activity regarding Chinese imports under the CVD law may or may not establish a viable CVD remedy for Chinese goods alleged to be subsidised. Application of the CVD law to Chinese imports must overcome a variety of hurdles discussed in this article. The most critical questions involve the continued validity of the *Georgetown Steel* doctrine; assuming the doctrine remains valid, its breadth; whether the *Georgetown Steel* memorandum will prove to be an enduring basis for approaching these matters; and the impact of new legislation, if any is enacted.

60. See News Release: “ITC Votes to Continue Cases on Certain Off-the-Road Tires from China”, August 20, 2007, available at www.usitc.gov; *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China*, 72 Fed. Reg. 52,859, 52,859 (Dep’t Commerce September 17, 2007) (notice of postponement of preliminary determination in the countervailing duty investigation).

61. See News Release: “ITC Votes to Continue Cases on Light-Walled Rectangular Pipe and Tube from China, Korea, Mexico, and Turkey”, August 10, 2007, available at www.usitc.gov; *Light-Walled Rectangular Pipe and Tube From the People’s Republic of China*, 72 Fed. Reg. 48,618 (Dep’t Commerce August 24, 2007) (notice of postponement of preliminary determination in the countervailing duty investigation).

62. See *Laminated Woven Sacks From China*, 72 Fed. Reg. 46,246, 46,246 (Int’l Trade Comm’n August 17, 2007) (determinations); Fact Sheet: “Commerce Initiates Antidumping and Countervailing Duty Investigations of Laminated Woven Sacks Tires from the People’s Republic of China”, p.2, available at ia.ita.doc.gov. The ITC issued a very unusual preliminary injury finding in this case, one that is based on material retardation of a US industry by reason of subject imports. The ITC injury examinations of virtually all of the other AD and CVD cases have addressed only present injury from imports or threat of injury from imports. See *Laminated Woven Sacks from the People’s Republic of China*, 72 Fed. Reg. 51,614, 51,615 (Dep’t Commerce September 10, 2007) (postponement of preliminary determination in the countervailing duty investigation).

Author's Note (December 4, 2007):

Since the writing of this article, the US Department of Commerce has published a final affirmative countervailing duty determination on coated free sheet paper from the People's Republic of China, and the US International Trade Commission has made a final negative injury determination, finding that a US industry is neither materially injured nor threatened with material injury by reason of imports of Chinese coated free sheet paper.

For more information on the final countervailing duty determination, please see Coated Free Sheet Paper from the People's Republic of China, 72 Fed. Reg. 60,645 (Oct. 25, 2007) (Final Affirmative Countervailing Duty Determination) ("CFSP from China"); "Issues and Decision Memorandum" regarding CFSP from China. For more information on the final injury determination, please see "Coated Free Sheet Paper From China, Indonesia, and Korea Does Not Injure US Industry, Says ITC," November 20, 2007, <http://www.usitc.gov/ext_relations/news_release/2007/er1120ee1.htm>.