

CHINESE UNFAIR TRADE PRACTICES

THE US APPROACH

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ABSTRACT

There are three basic types of remedies against unfair trade practices: anti-dumping; anti-subsidies and safeguards. The remedy is usually a measure taken at the border to stop or tax products which are benefiting from the unfair practices and are causing injury to the domestic producers of those products.

The incidence of unfair practices is increasing. In particular many governments seek to foster industries by means of subsidies or to encourage certain types of activities. These practices can kill off established industries or inhibit their start up or growth in the export market.

A particular problem today concerns the subsidisation of a whole range of Chinese products. These range from steel to toys to food. Dealing with the idea of subsidies in a non market economy has causes some difficulties. However the US is leading the way in showing how trade defence measures can be applied to protect the domestic industry against Chinese subsidies. The question now is whether the EU will follow on and, if so, will it use the same solutions to many of the technical issues raised as have been used in the US.

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INTRODUCTION

Under US law,² countervailing duties (hereinafter, CVDs) may be imposed against subsidized imports from other WTO members when a US industry is materially injured or threatened with injury or the establishment of an industry in the US is materially retarded.³ The International Trade Commission (hereinafter, ITC) and the Department of Commerce (hereinafter, DoC) share investigative and decision-making powers in CVD cases.

The ITC determines whether there is material injury or threat thereof to the domestic industry by reason of the investigated imports.

The DoC determines whether the foreign country is providing a countervailable subsidy, and, if so, the size of the subsidy and (consequently) the size of the duty (CVD) that should be imposed. To make these determinations, the DoC solicits information from exporting country governments and from individual producers and exporters of the subject merchandise and applies this information to establish appropriate duty rates for each known exporter or producer.⁴

CVD Duties Usually Applied in Tandem with Antidumping Duties

Unlike the EU, US has imposed CVDs, with some regularity, on a variety of products from a variety of countries.⁵ From 1995 through 2004, US domestic industries petitioned for 72 CVD investigations against 43 different products from 25 countries.⁶ Thirty-six of these investigations (50 percent) resulted in application of CVDs.⁷

² 19 USC. §1671 and following.

³ US law requires an injury test when the exporting country is a WTO member or meets certain other criteria. 19 USC. §§1671(b) and (c).

⁴ Individual company rates can vary a great deal, depending upon the facts in each case. In one recent case, for example, the Commerce Department applied a CVD of about 17 percent to one Indian exporter of carbazole violet pigment, but a rate of about 34 percent to another Indian exporter of this product. 69 Fed. Reg. 77995 (Dec. 29, 2004).

⁵ US has more CVDs in place than any other country. According to the WTO, US had 57 CVD measures in place as of June 2004. The next highest reported totals were for the ECropean Community (18) and Canada (10). See WTO, *Report (2004) of the Committee on Subsidies and Countervailing Measures*, G/L/711 (Geneva, Nov. 9, 2004).

⁶ The Department of Commerce declined to initiate investigations in 4 of the 72 cases, involving certain crude petroleum oil products from Mexico, Iraq, Saudi Arabia, and Venezuela, because of insufficient US industry support for the petition. 64 Fed. Reg. 44480 (Aug. 16, 1999).

⁷ Twenty-three of these 36 cases (64 percent) involved steel products. Other products included pasta, honey, softwood lumber products, low enriched uranium, and semiconductors. India was the country most petitioned against (10 out of the 72 investigations), while Italy faced the most positive determinations. (All six of the investigations against Italy resulted in CVDs.)

Generally, when petitioners seek imposition of CVDs, they also seek imposition of antidumping duties on the same product from the same country. In 69 of the 72 CVD cases, petitioners also requested a parallel antidumping investigation.⁸

At the same time, petitioners requesting antidumping investigations do not always request CVD investigations, and CVDs are, in fact, sought and imposed much less frequently than are antidumping duties. From 1995 through 2004, US industry groups petitioned for nearly five times as many antidumping as CVD duty investigations (354 compared with 72). Similarly, the US put in place over four times as many antidumping duty orders (156) as it did CVD orders (36).

The emphasis on AD investigations is the same in the EU. Two simple reasons for this can be suggested. Firstly, psychologically, both the Commission and the complaining industry are more familiar with AD and tend to use AD as the port of first call when seeking a remedy. Secondly it is easier to build an AD complaint. In AD cases the necessary factual elements (import prices, cost of production and injury indicators) are usually in the hands of the complaining industry. Determining whether or not subsidies have been granted can be more difficult and requires investigation outside the market place or the normal pool of knowledge of the complaining industry.

SUBSIDIES IN NON MARKET ECONOMIES?

Georgetown Steel

US trade law never contained any explicit prohibition against the application of CVDs to non market economy (NME) countries.⁹ Nonetheless, in 1984 the Department exercised its “broad discretion” to conclude that “a ‘*bounty or grant*,’ within the meaning of the CVD law, cannot be found in an NME.” The DoC set out its position in a number of rulings denying CVD protection against carbon steel wire rods from Poland and Czechoslovakia (which were then considered NME countries) in the so called “Wire Rod cases”.¹⁰ The US Court of Appeals for

⁸ The three cases in which petitioners requested CVDs but not antidumping duties involved laminated and hardwood flooring from Canada (1996), carbon and certain alloy steel wire rod from Turkey (2001), and D-RAMS (a type of semiconductor) from Korea (2002). The Department of Commerce did order assessment of antidumping duties against Korean DRAMS beginning in 1993. However, this order was revoked approximately two years prior to initiation of a CVD action against these products.

⁹ See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People’s Republic of China, 17 October 2007, p. 20.

¹⁰ Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 FR 19374 (May 7, 1984); and Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination, 49 FR 19370 (May 7, 1984).

the Federal Circuit upheld the DoC's decision in *Georgetown Steel Corp. v. United States*.¹¹

In *Georgetown Steel* domestic producers had filed CVD petitions in 1983 against imports of carbon steel wire from Czechoslovakia and Poland and potash from the Soviet Union and the German Democratic Republic. The DoC determined that the US CVD law did not apply to NME countries and therefore dismissed the petitions.¹²

More specifically, the DoC concluded that it could not measure the benefit of the subsidy in NMEs: in market economy countries, markets generate prices that can be used to measure the impact of government subsidies. However, in NMEs government intervention in the economy is so strong that one cannot make meaningful comparisons between market-determined prices and those that have been distorted by government intervention. The DoC thus decided that: “[t]his is the background that does not allow us to identify specific NME government actions as bounties or grants.”¹³

The DoC findings were reversed on appeal to the US Court of International Trade (ICT). However this ruling was again reversed by the US Court of Appeals for the Federal Circuit (hereinafter the Court of Appeals) in 1986.¹⁴ The Court of Appeals noted that since no NMEs existed at the time the first US CVD statute was enacted in 1897; the US Congress had no occasion to address whether the CVD law applied to NMEs. Since the law was substantially unchanged in later enactments, the Court of Appeals reasoned that the congressional intent at the time of enactment of the original CVD law must prevail.¹⁵

The Court of Appeals discussed DoC's interpretation that a subsidy necessarily entails a distortion of a market economy. The court observed that, according to the DoC, a subsidy is defined as “any action that distorts or subverts the market process and results in misallocation of resources” and therefore cannot exist in an NME country since there is no market to be distorted. The Court noted that the Congress has not defined the terms “bounty” and “grant”- the statutory terms used at that time in US CVD proceedings. The Court of Appeal then considered the definition adopted by the DoC in the absence of a statutory definition and decided that DoC's determination that benefits granted by the NME governments were not bounties or grants was not unreasonable nor was a violation or abuse

¹¹ 801 F.2d 1308 (Fed.Cir. 1986). In upholding the Department of Commerce's position, the Court of Appeals overruled an earlier ruling in the same case by the Court of International Trade, which had reversed the department. See *Continental Steel v. United States*, 614 F. Supp. 548, 550 (C.I.T. 1985).

¹² See H.L.Clark, K.M.Dempsey and J.C.Koo, Movements toward a US Countervailing Remedy For Chinese Goods that are Found to be Subsidised, *International Trade Law Review*, Iss.6, 2007, pp.136-143.

¹³ 49 Fed. Reg. 19370, 19374 (May 7, 1984).

¹⁴ *Georgetown Steel*, 801 F.2d at 1318.

¹⁵ *Georgetown Steel Corp*, fn 11.

of discretion.¹⁶ The Court of Appeal finally concluded that the DoC acted within its discretion when it decided not to apply AD law to NMEs. The Court therefore upheld DoC's dismissal of the CVD petitions regarding NME countries by vacating and reversing the CIT's orders.¹⁷

Impact of Georgetown Steel

In the period between Georgetown Steel (1984) and Coated Free Sheet Paper (2007, hereinafter CFS paper), the DoC repeatedly dismissed petitions filed against products from countries designated as NMEs.¹⁸ In the period up to 1992 some consideration was given to developing criteria for individual industries which might be considered market-oriented.¹⁹ However this approach was rejected in 1992 in relation to two specific CVD cases against China.²⁰

Change of law or change of approach?

Recent concerns in the Congress regarding the mounting US trade deficit with China, combined with China's alleged foreign exchange-rate manipulation (which some regard as a subsidy) and other unfair trade practices, led to calls for the application of CVD laws applicable to NMEs.

The DoC could have acted in two distinct ways. First, the DoC could use its administrative authority to change China's NME status in whole or in part²¹. This

¹⁶ Georgetown Steel Corp, fn 11.

¹⁷ Georgetown Steel Corp, fn 11.

¹⁸ See, e.g., Oscillating and Ceiling Fans from the People's Republic of China, 57 Fed. Reg. 24,018, 24,019 (Dep't Commerce Jun. 5, 1992) (final negative countervailing duty determination) ("[W]e have determined that the PRC fans industry is not a [market-oriented industry]. As a result, we determine that the countervailing duty law cannot be applied to the PRC fan industry. Therefore, [Commerce] is issuing final negative determinations in these proceedings."); Chrome-Plated Lug Nuts and Wheel Locks from the People's Republic of China ("PRC"), 57 Fed. Reg. 877, 878 (Dep't Commerce Jan. 9, 1992) (initiation of countervailing duty investigation) (declining to "initiate an upstream subsidies investigation of the steel and chemical suppliers to the PRC lug nuts industry" because "there is a significant degree of state control in these sectors").

¹⁹ See *Government of People's Republic of China, Gold East Paper (Jiangsu) Company, limited, and Global paper Solutions, Incorporated v. United States*, case before the US Court of International Trade, Opinion published on 29 March, 2007, p.4, available at: http://www.insidetrade.com/secure/pdf10/wto2007_1498.pdf

²⁰ See *Chrome-plated lug nuts and wheel locks from the PRC*, 57 Fed. Reg. 10,549 (Department of Commerce, March 26, 1992); *Oscillating and Ceiling Fans from the PRC* (57 Fed. Reg. 24,018 (Department of Commerce, June 5, 1992)).

²¹ DoC officials explained that countries classified as NMEs may ask that their status be reviewed either within the context of an ongoing import relief case or as an independent matter. Commerce has responded to a number of requests for such reviews, granting some countries (such as Russia and Estonia) market economy status while classifying others (such as Vietnam) as non-market economies. For details on these decisions see, for Russia, a DoC memorandum available at <http://ia.ita.doc.gov/download/russia-nme-status/russia-nme-decision-final.htm>; for Estonia, 68 Fed. Reg. 10445 (Mar. 5, 2003); and for Vietnam, 68 Fed. Reg. 4986 (Jan. 31, 2003).

would allow the DoC to apply US CVD law to China on a country or industry basis. However, DoC's officials observed that it may be currently difficult for China to meet the MES criteria. Second, the DoC could reverse its 1984 position and decide that CVD law could be applied to individual companies within China while the country as a whole remains classified as an NME.

Change of approach: procedural issues

In March 2007 the DoC published the "Georgetown Memo", stating that it always had the authority to impose CVD duties on NMEs, but decided not to exercise them against Soviet-style NMEs.²²

The Georgetown Memo explained that the DoC reached its 1984 conclusions in large part because both output and input prices were centrally administered which in turn resulted in administered profits²³. According to the DoC, this determination was based on the economic realities of Soviet-bloc economies. The DoC contrasted this with the current situation in China and judged that "*although price controls and guidance remain on certain 'essential' goods and services in China, the PRC Government has eliminated price controls on most products . . .*"²⁴ Because of that, the main concern about the application of the CVD law to NMEs first articulated in Georgetown steel case is not a major factor with respect to China's present-day economy. Thus, the DoC has concluded that it is now able to determine whether subsidies benefit imports from China.

The DoC view that the Georgetown Steel case did not prevent it changing its practice was confirmed in a recent decision of the US Court of International Trade (ITC) in the CFS paper case. The CIT found that:

*"the Georgetown Steel court only affirmed the Department's decision not to apply CVD duty law to the NMEs in question in that particular case and recognized the continuing 'broad discretion' of the agency to determine whether to apply CVD duty law to NMEs."*²⁵

²² See Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China - Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy (Georgetown Memo), available at: <http://ia.ita.doc.gov/download/nme-sep-rates/prc-cfsp/china-cfs-georgetown-applicability.pdf>

²³ See Georgetown Memo, fn 21, p. 7.

²⁴ See Georgetown Memo, fn 21, p.5.

²⁵ Government of the People's Republic of China v. United States, 483 F. Supp. 2d at 1282 (citing Georgetown Steel, 801 F.2d at 1318).

Therefore the CIT declined to find that the Department's investigation of subsidies in China was *ultra vires*.²⁶

Change of approach: merits

The Georgetown Memo also sets out why the Georgetown Steel considerations do not hold against modern day China.

The DoC compared the Soviet-style economies at issue in Georgetown Steel with China's present-day economy using a number of factors such as wages and prices generation, entrepreneurship, the conduct of foreign trade, and resource allocation.

- 1) **Prices and wages:** in Soviet-style economies the government directly set nearly all prices and wages; the government in China neither directly sets prices nor wages; however, both prices and wages are influenced indirectly, given the fact that prices are formed in an economy where the state has not ceded fundamental control.²⁷
- 2) **Currency:** even though *renminbi* remains insulated from market forces, its access to foreign exchange is still much greater than in the traditional command economies.²⁸
- 3) **Private enterprise:** in Soviet-style economies entrepreneurship was banned in most sectors, in China, private enterprise is encouraged in some areas of the economy and limited in others.²⁹
- 4) **Foreign trade:** state trading enterprises controlled exports in the Soviet-style economies; in China, individual firms now have significant discretion in these business decisions.³⁰
- 5) **Allocation of financial resources:** the governments of Soviet-style economies generally allocated resources directly, often through the central bank; in China, the banking sector is much more developed and nominally operates independently of the government, even if it remains overwhelmingly state-owned and controlled what is affecting the flow of credit disproportionately to the state sector.³¹

²⁶ "Although Plaintiffs alleged that "[t]he CAFC has definitively ruled that the CVD law was not intended to be applied against NMEs" (Pls.' Prelim. Inj. Mem. 14), the Georgetown Steel court did not go as far as Plaintiffs claim and find that the countervailing duty law is not applicable to NMEs, Georgetown Steel, 801 F.2d at 1318. Rather, the Georgetown Steel court only affirmed Commerce's decision not to apply countervailing duty law to the NMEs in question in that particular case and recognized the continuing "broad discretion" of the agency to determine whether to apply countervailing duty law to NMEs." See, CIT Decion in the Coated Free Sheet Paper case, p. 16, available at: http://www.insidetrade.com/secure/pdf10/wto2007_1498.pdf

²⁷ See Georgetown Memo, fn 21, p.5.

²⁸ See Georgetown Memo, fn 21, p.6.

²⁹ Id.

³⁰ See Georgetown Memo, fn 21, p.7.

³¹ See Georgetown Memo, fn 21, p.8.

On the basis of the above considerations, the DoC considers that while China's economy still features extensive state intervention and control, it is nevertheless more flexible than traditional command economies. The Georgetown Memorandum found that the PRC government has limited the role of the state in some areas while preserving it in others. The Chinese state has never ceded fundamental control over the economy to market forces. However, because some market forces are present in China and because firms have some autonomy from the government, firms in China (unlike in traditional command economies) are able to respond to the incentives that subsidies provide.³²

The DoC then drew a line between centrally planned economies (as analysed in Georgetown Steel) where output and input prices were centrally administered, thereby effectively administering profits and China, in which the price controls have been eliminated on most products.³³ While market forces were absent in the traditional command economies, China's economy is a mix between constrained market mechanisms and government planning.³⁴

The Georgetown Memo concluded that, given the substantial difference between the Soviet-style economies and China's economy today, the Department's previous decision not to apply the CVD law to these Soviet-style economies does not apply to proceeding with a CVD investigation involving products from China.³⁵

NMEs in AD proceedings

Earlier in 2006 the DoC decided not to grant to China Market Economy Status for the purpose of the AD proceedings. The DoC explained the reasoning behind this decision in the so called August 30th Memorandum.³⁶

The DoC considers that in making a NME country determinations under section 771(18)(A) of the US Tariff Act³⁷, section 771(18)(B) requires that the

³² See Georgetown Memo, fn 21, p.10.

³³ Id. The Department explained that : "[t]his is the background that does not allow us to identify specific NME government actions as bounties or grants." Id. Thus, the Department based its decision upon the economic realities of Soviet-bloc economies. In contrast, the Department has previously explained that, "although price controls and guidance remain on certain 'essential' goods and services in China, the PRC Government has eliminated price controls on most products ... See (Georgetown Memo).

³⁴ See Georgetown Memo, fn 21, p.9.

³⁵ See Georgetown Memo, fn 21, pp. 10-11.

³⁶ Memorandum for David M. Spooner, Assistant Secretary for Import Administration, Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China's Status as a Non-Market Economy (August 30, 2006) ("August 30th Memorandum").

³⁷ US Tariff Act of 1930. Section VII of the Tariff Act regulating the imposition of the CVD and AD duties is available under:

<http://ia.ita.doc.gov/regs/title7.html>

Department examine an economy as a whole, and not just individual industries or companies, and take into account 6 criteria set out below:

1. the extent to which the currency of the foreign country is convertible into the currency of other countries;
2. the extent to which wage rates in the foreign country are determined by free bargaining between labour and management;
3. the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
4. the extent of government ownership or control of the means of production;
5. the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and
6. other factors which the administering authority considers appropriate.³⁸

In conducting its 2006 review of China's status as an NME for purposes of the US AD law, the DOC considered the totality of China's economic reforms, both as executed through changes in law and policy and as evidenced by the behaviour of commercial, financial, and political actors. The DoC concluded that despite the significant progress that China has made in transiting away from a traditional command economy, the extent of ongoing government control and direction over the country's economy warrants the continued designation of China as an NME for the purpose of the antidumping law.³⁹

The DoC then gave examples of the PRC's government intervention in the economy: insulation of *renminbi* from market forces, restrictions on workers' freedom of movement, or on bargaining between labour and management.

The August 30th Memorandum assessed that even though China has attracted an enormous amount of foreign direct investment, it continues to guide and constrain this investment in line with governmental policy objectives⁴⁰. According to the DoC's analysis, State-owned enterprises (hereinafter, SOEs) are still a crucial part of Chinese economy and remain many of the largest enterprises in the country. The government supports SOEs through a complex web of regulatory restrictions, control over the allocation of land-use rights, and the continued dominance of state-owned banks in the financial sector.⁴¹ According to the DoC's findings, despite ongoing reforms, there is no compelling evidence that Chinese banks act as genuine commercial entities⁴²:

³⁸ See section 771(18)(A) of the Tariff Act of 1930.

³⁹ See August 30th Memorandum, fn 35, pp. 80-81.

⁴⁰ See August 30th Memorandum, fn 35, pp. 22-27.

⁴¹ See August 30th Memorandum, fn 35, pp 36-40.

⁴² See August 30th Memorandum, fn 35, pp. 50-61.

- credit in China still flows primarily to state-owned firms, large enterprises, and enterprises favoured by the state for development;
- after amassing huge volumes of non-performing loans to SOEs, banks have been repeatedly bailed out by the government and shielded from both foreign and domestic competition;
- the central government still imposes administrative measures to control the lending growth that had been spurred, in part, by local governments.

Finally, a reliable set of laws and procedures for judicial redress is absent in China. That is actively used to preserve the role of the state in the economy, rather than simply being a feature of a period of transition.⁴³

Because of the limits the PRC government has placed on the market forces, the DoC decided that China cannot qualify as a market economy under the US AD law. That, however, according to the DoC, doesn't contradict DoC's decision to apply the CVD law to China⁴⁴. According to DoC, since a firm in China may have the discretion to change its export and/or production decisions in response to the incentive provided by, for example, a subsidized input price, it is possible to measure the benefit provided by this subsidy. However, If the price is set in an environment distorted by significant government interference, this price cannot form the basis of normal value in an AD proceeding.⁴⁵

At the same time, the DoC proposed recently an application of a market-oriented enterprise (hereinafter, MOE) test in AD cases against China⁴⁶. The consultations with interested parties are still ongoing.⁴⁷ The MOE test would grant market-oriented status to individual companies in a NME country in AD cases, which could result in lower AD duties for companies that receive such status. The MOE status would be thus equivalent to the MET test in EC AD law.

The Non-Market Economy Trade Remedy Act

⁴³ See August 30th Memorandum, fn 35, pp 63-66.

⁴⁴ See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China, 17 October 2007, pp. 19-23.

⁴⁵ Ibid.

⁴⁶ The EC Market Economy Treatment (MET) is an equivalent of such status.

⁴⁷ See US, China Industry Groups, MOFCOM Clash Over Commerce MOE text, Inside US Trade, 21 December 2007, available at: http://www.insidetrade.com/secure/dsply_docnum_txt.asp?f=wto2002.ask&dn=INSIDETRADE-25-50-17

See also Senators Urge Commerce Against Using MOE Test For Chinese AD, CVD Cases, Inside US Trade, 20 January 2008, available at: http://www.insidetrade.com/secure/dsply_docnum_txt.asp?f=wto2002.ask&dn=wto2008_0506

On 17 July 2008, House Ways and Means Chairman Charles Rangel and Sander Levin introduced a trade enforcement bill that would codify the application of CVD law to non-market economies and would require a stronger congressional oversight over a number of administration-proposed changes to US methodology used in AD and CVD cases.⁴⁸

The bill would require Congress approval for any DoC decision to change the status of a country from non-market to a market economy for purposes of trade remedy calculations. In advance of the bill's introduction, Rangel acknowledged that congressional action on the bill was unlikely this year but he did not explicitly rule it out.⁴⁹

⁴⁸ See House Democrats Introduce Enforcement Bill, Action Unlikely This Year, Inside Us Trade, 18 July 2008, available at: http://www.insidetrade.com/secure/dsply_docnum_txt.asp?f=wto2002.ask&dn=INSIDETRADE-26-29-3

⁴⁹ Ibid, fn 47.

US CVD CASES AGAINST CHINA: OVERVIEW

List of CVD cases against China

There have been 13 US CVD investigations against China initiated since the 2007 Georgetown Memo (chronological order):

1. Coated Free Sheet Paper
2. Circular Welded Carbon Quality Steel Pipe
3. New Pneumatic Off-The-Road Tires
4. Light-Walled Rectangular Pipe and Tube
5. Laminated Woven Sacks -
6. Lightweight Thermal Paper
7. Raw Flexible Magnets
8. Sodium Nitrite
9. Circular Welded Austenitic Stainless Pressure Pipe
10. Circular Welded Carbon Quality Steel Line Pipe
11. Citric Acid And Certain Citrate Salts
12. Tow-Behind Lawn Groomers -
13. Kitchen Appliance Shelving & Racks -

Sectors involved

Paper industry (nos 1, 6); steel industry (nos 2, 4, 7, 9, 10); chemicals (nos 8, 11); other/consumer goods (nos 3, 5, 12, 13).

Out of the 13 cases mentioned in all of them CVD proceedings were coupled with AD proceedings.

Overview of the Subsidies found

So far, the DOC made final determinations in 8 cases (nos 1 to 8 above). In another 3 cases (nos 9 to 11 above), the DOC has made provisional determinations. In all cases in which the DoC made final determinations, both dumping and subsidies were found. The ITC found injury in 5 out of 6 cases in which it has already published its final determination.

In total, in all the above cases, 84 types of subsidies were analysed in the following categories:

1. Financing Programmes (Loan and Equity) – 16 types of subsidies analysed; among the subsidies found were:

- government policy lending programme (countervailed in 7 cases)
- debt forgiveness (countervailed so far in 2 cases)
- debt forgiveness pursuant to change in ownership (countervailed in 1 case)

2. Provision of Goods and Services for Less Than Adequate Remuneration: 12 types of subsidies analysed, among the subsidies found were:

- Hot-rolled steel (countervailed in 3 cases)
- Stainless steel coil (countervailed in 1 case)
- Rubber (countervailed in 1 case)
- BOPP (countervailed in 1 case)
- Land (countervailed in 3 cases)
- Provision of land pursuant to change in ownership (countervailed in 1 case)

3. Tax Programmes: 24 types of subsidies analysed, among the subsidies found were:

- Preferential Tax policies for Foreign Investment Enterprises (FIEs) (countervailed in 4 cases)
- Reduced tax income rates for FIEs based on location (countervailed in 6 cases)
- Reduced Income tax rate for technology and knowledge intensive FIEs (countervailed in 1 case)
- Income tax reduction under “torch” programme (countervailed in 1 case)
- Reduced income taxes based on location (countervailed in 1 case)
- Local income tax exemption and reduction program for “productive” FIEs (countervailed in 4 cases)
- Income tax credits on purchases of domestically produced equipment by FIEs (countervailed in 1 case)
- Income tax credits on purchases of domestically produced equipment by domestically owned companies (countervailed in 1 steel case)
- Stamp tax exemption on share transfers under Non-Tradeable Share Reform Plan (NTSR) (countervailed in 1 case)

4. VAT programmes: 8 types of subsidies were analysed, among the subsidies found were:

- VAT rebates for FIEs on purchases of domestically produced equipment (countervailed in 2 cases)
- VAT and tariff exemption on imported equipment (countervailed in 4 cases)
- Domestic VAT refunds for companies located in Hainan Economic Development Zone (countervailed in 1 case)

5. Grants: 24 types of subsidies analysed, among the subsidies found were:

- State key technology renovation project fund (countervailed in 1 case)
- Export assistance grants (countervailed in 1 case)
- Funds for “Outward Expansion” of industries in Guangdong (countervailed in 1 case)
- Export interest subsidy fund (countervailed in 1 case)
- Local direct grant programs (countervailed in 1 case)
- Five Points One Line program (Liaoning Province grants) (countervailed in 1 case)
- Famous Brands Award (countervailed in 1 case)
- Super Star Enterprise award (countervailed in 1 case).

Overview of the duties imposed

The US cases in which the DoC has already published its final determinations show that CVD duties tend to be, on average, lower than AD duties. Having said that, in many cases the level of the CVD duties was close to the level of AD duties and the highest CVD duties reached as much as:

- 616.83% (Circular Welded Carbon Quality Steel Pipe, CVD duty imposed on the Shuangjie Group; the respective AD duty was 85.55 %)
- 200.58 % (Light-Walled Rectangular Pipe and Tube, CVD duty imposed on Qingdao Xiangxing Steel Pipe Co., Ltd., the respective AD duty was 264.64%)
- 352.82%, 304.40%, 226.85% and 223.74 % (Laminated Woven Sacks, CVD duties imposed on the Shandong Shouguang Jianyuanchun Co. Ltd./Shandong Longxing Plastic Pack Co. Ltd., Shandong Qilu Plastic Fabric Group, Ltd., “Separate Rate” Respondents and Other Exporters and Han Shing Chemical Co. Ltd. With Ningbo Yong Feng Packaging Co., Ltd. Respectively; the AD duties were on average 2.5 times lower than the CVD duties at 91.73% and 64.28%)

- 137.25% and 123.65% (Lightweight Thermal Paper, CVD duties imposed on Shenzhen Yuanming Industrial Development Co., Ltd, MDCN Technology Co., Ltd and Xiamen Anne Paper Co., Ltd.; the respective AD duties were 115.29%)

FINAL REMARKS

The United States is leading the way in dealing with unfair trade practices in China. Europe lags behind. There are various reasons for this. European industry prefers to seek anti dumping relief rather than anti subsidy relief. Secondly, historically, it has been much harder to bring anti subsidy applications as the level of investment needed to investigate the practices in third countries is much higher.

But the main concern in Europe with the US approach is with the proper application of the WTO rules on subsidies. Three particular problems need highlighting.

For a subsidy to be actionable it must be more than just a general government service to the economy. There must be something specific to the enterprise or group of enterprises receiving the benefit. In practical terms, for example, a road between two cities from which everyone benefits cannot be considered a subsidy: this is considered a generally available service. However monies to build a road (or more often a railway siding) between a specific enterprise and the general road (or rail) network might well be specific.

The Chinese subsidies countervailed by the US are described very generally. They include tax measures and financial engineering. To make them specific it appears that the US is marrying general government programmes to which all enterprises can benefit (non-specific) with sector specific government plans to develop a specific industry or group of enterprises. In other words if use is made of a generally available measure within the context of a specific government plan then the subsidy can be specific.

A second problem relates to double counting. If there are both anti dumping and anti subsidies in place, how does the regulator ensure that the subsidy is not a contributor to the dumping or vica versa, thus making it unfair to place both anti dumping and anti subsidy duties on the same product. The US has solved this problem by stating that it is up to the exporting industry in China to show where double counting might be occurring and to request a remedy. In the absence of such proof, the US is entitled to consider that there is no double counting. This seems to be a rather expansive interpretation of the notion of proof in trade remedy cases. It is a solution that is only made possible by the absence of provisions in the US anti subsidy rules which do not have a prohibition on double counting (the anti dumping rule do have such a prohibition). The EU rules on

subsidies and dumping do have such rules prohibiting double counting. The US approach could not be followed in the EU.

Another issue concerns benchmarking. For many subsidies where it is hard to determine the level of the benefit recourse is had to benchmarking. For example if a Chinese enterprise gets a cheap loan from the government paying, let us say, only 3% interest on the capital, how does the investigating authority work out where this interest is subsidised and if so at what level. This requires the investigator to determine the proper interest rate in a free market. China is not a free market and the four biggest banks are government controlled. Thus use of the generally applicable interest rate will not work. In this situation the US investigating authorities have established 'international' benchmarks as to what is an equivalent free market interest rate for China. The methods used are complex (although logical in themselves). For example using this method the US has been able to determine a benchmark interest rate for equivalent free market lending should be 8% in China. As the enterprise is only paying 3% then the 5% not paid is a subsidy (revenue foregone by the state).

It is clear that unfair trade practices emanating from China are widespread and increasing. The United States, using existing rules, is attempting to deal with these. If the EU is to preserve its manufacturing industry it will have to do the same. The only open question is how will the EU overcome some of the technical problems that arise in addressing the problem.

End