

June 8, 2007

The Honorable Charles B. Rangel  
Chairman  
Committee on Ways and Means  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Jim McCrery  
Ranking Member  
Committee on Ways and Means  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman and Ranking Member McCrery:

We understand that the Committee on Ways & Means may soon mark up H.R. 1229, the Nonmarket Economy Trade Remedy Act. This legislation explicitly authorizes the Department of Commerce (DOC) to apply the countervailing duty law to nonmarket economies, such as China, Vietnam, and Armenia; sets forth methodologies for calculating subsidies; and requires Congressional approval of DOC's graduation of countries to market-economy status. While we recognize the importance of strong provisions to combat unfair subsidies, we are very concerned that some aspects of this legislation appear to violate the United States' obligations under the World Trade Organization (WTO) and the Constitutional Presentment Clause. Therefore, before the Committee considers H.R. 1229, we urge you to modify three provisions. These changes would not undermine the objective of this legislation to address directly unfair subsidies in NME countries.

First, H.R. 1229 creates the potential for inappropriate and WTO-inconsistent double remedies to be imposed for the same subsidies. WTO rules require that any countervailing duty be commensurate with the adverse effects caused by identified subsidies, and thus bar trade remedies from being applied twice for the same subsidy. When applying the countervailing duty law to products of nonmarket economy countries that are also subject to an antidumping investigation, policymakers must therefore be careful to ensure that subsidies are not double-counted under the two simultaneous proceedings. While DOC already has explicit authority not to double-count export subsidies, it does not have that authority with respect to domestic subsidies. That authority was properly included in the nonmarket economy legislation approved by the House of Representatives in 2005 (H.R. 3283) and should be included by the Committee in H.R. 1229. This modification is necessary to ensure that DOC fairly applies the antidumping and countervailing duty laws to nonmarket economies in a WTO-consistent manner and would not, in any way, undermine DOC's authority to remedy nonmarket economy subsidies not already captured by antidumping remedies.

Second, H.R. 1229 requires DOC to employ methodologies to calculate the level of subsidization that are inconsistent with WTO commitments. As part of China's accession to the WTO, all parties, including the United States, agreed that benchmark rates within China would be used to calculate subsidies, unless "special difficulties" arise and it is not practical to use and/or adjust Chinese benchmarks.<sup>1</sup> Contrary to the explicit WTO requirement creating a presumption for the use of Chinese benchmarks, H.R. 1229 makes an explicit presumption that such benchmarks cannot be used. Determinations as to subsidy benchmarks must be consistent with U.S. WTO obligations and should be left to DOC, which has the data to make the objective and accurate analyses required. Moreover, the language of the provision inappropriately provides that, even if China is determined to be a market economy, DOC must still apply special procedures in determining subsidy benchmarks. There is no basis for singling out certain market economies for such discriminatory treatment.

Finally, H.R. 1229 requires Congressional approval of any decision by DOC to grant market-economy status to a nonmarket economy country under antidumping rules. We are concerned about this provision for two reasons. First, the proposed approval process is likely unconstitutional. Under H.R. 1229, Congress' failure to pass the approval

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<sup>1</sup> Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 23 2001 (01-5996), Part I, Paragraph 15(b)

resolution would effectively veto the Administration's determination. But since this "legislative veto" would not be presented to the President, it would be contrary to the Constitution's Presentment Clause, as found in a similar situation in the Supreme Court's 1983 ruling in *Immigration and Naturalization Service v. Chadha*. Second, and equally concerning, is that the requirement of a Congressional approval undermines the objective, factual, and case-by-case analysis of the economic criteria set forth in the antidumping law that the graduation determination process demands. Requiring Congress to vote on this type of determination would send the wrong signal to China and our other trading partners, as they might seek to replicate such Congressional interventions in their own trade remedy analyses; this would have adverse effects on U.S. exporters. A more appropriate and Constitutional way to provide Congress with more oversight over these determinations would be through a consultation-and-layover requirement, similar to that required for certain Presidential proclamations.

We believe these suggested modifications would clarify the intent of Congress on applying U.S. trade remedy laws to nonmarket economy countries, thus ensuring that H.R.1229 is in conformity with U.S. legal obligations while also still providing an effective means for U.S. companies to seek relief from unfair trade practices. Without these improvements, the United States would likely expose itself to litigation and retaliatory actions from trading partners, thereby eroding public support for the WTO rules-based trading system, and send the wrong signal to our trading partners, who increasingly are using their own antidumping and countervailing duty laws against U.S. exports.

Sincerely,

Advanced Medical Technology Association (AdvaMed)  
American Apparel & Footwear Association  
American Bankers Association  
American Institute for International Steel  
American Seafood Distributors Association  
American Signature, Inc.  
AutoZone  
Bankers' Association for Finance and Trade  
Best Buy Co., Inc.  
The Bombay Company, Inc.  
Business Roundtable  
Cargill, Incorporated  
Caterpillar Inc.  
Coalition for Employment through Exports  
Computing Technology Industry Association (CompTIA)  
Consumer Electronics Association  
Consuming Industries Trade Action Coalition (CITAC)  
Dollar General Corp.  
Electronics Industries Alliance  
Emergency Committee for American Trade  
Emerson  
Federated Department Stores, Inc.  
Footwear Distributors and Retailers of America  
Furniture Retailers of America  
Gap Inc.  
GoldToeMoretz  
The Home Depot  
IBM Corporation  
Information Technology Association of America (ITAA)  
J.C. Penney Corporation, Inc  
J.C. Penney Purchasing Corporation

Kellwood Global, a division of Kellwood Company  
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Liz Claiborne Inc.  
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The McGraw-Hill Companies  
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National Fisheries Institute  
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National Retail Federation  
Newell Rubbermaid Inc.  
Nike, Inc.  
Office Depot  
Pacific Sunwear of California, Inc.  
Perry Ellis International  
Polo Ralph Lauren  
Procter & Gamble  
Retail Industry Leaders Association  
Rooms To Go  
Target  
Texas Instruments Incorporated  
Ann Taylor Stores Corp.  
Travel Goods Association  
United States Council for International Business  
US Association of Importers of Textiles and Apparel  
US Chamber of Commerce  
US-China Business Council  
US-Vietnam Trade Council-Education Forum  
VF Corporation  
Wal-Mart Stores, Inc.  
Whirlpool Corporation