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22 November 2007

Mr. David Spooner
Assistant Secretary
Import Administration
U.S. Department of Commerce
Central Records Unit
Room 1870, 14th Street and Constitution Ave.,
NW., Washington, DC, 20230

Re. Response to Request for Comments on Antidumping Methodologies in Proceedings Involving Certain Non-market Economies: Market-oriented Enterprise

Dear Mr. Spooner,

On behalf of Huanzhong & Partners, a law firm registered in Beijing, China, we hereby file these comments in response to the request for comments by the US Department of Commerce on anti-dumping methodologies in proceedings involving certain non-market economies: market-oriented enterprise, which is dated October 25, 2007.

We note that comments have been requested with respect to the following four issues:

- A. Whether there is a legal basis for a Market-oriented Enterprise (MOE) test for individual respondents of Non-market Economy (NME) countries;
- B. Administrative feasibility in proposing how the Department could identify an MOE operating within a broader NME environment;
- C. To what extent, and under what conditions, the Department should rely on an MOE's prices and costs, particularly for those inputs that are inextricably linked to the broader operating economic environment, i.e. labor, land and capital; and
- D. Administrative feasibility in proposing the extent and conditions under which a finding of an MOE might be limited.

We will make comments on these issues respectively.

A. Whether there is a legal basis for a Market-oriented Enterprise (MOE) test for individual respondents of Non-market Economy (NME) countries

We think there is a legal basis under the US antidumping law for an MOE test for individual respondents of NME countries.

Determination of normal value for the subject merchandise from Non-market Economy Countries is regulated under Section 773(c)(1) of the Tariff Act of 1930, which provides for two conditions for the recourse to factors of production of surrogate countries: (A) the subject merchandise is exported from a nonmarket economy country; **and** (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined as is done for respondents of market economy countries. The use of the conjunction word “and” means that both conditions must be met before resorting to factors of production of surrogate countries. It follows that NME does not necessarily leads to the use of factors of production of surrogate countries; rather, the administering authority should further determines that the situations of a given case warrant the surrogate-country approach. In other words, even in the case of exports from an NME country, if the administering authority finds the situations do permit the normal value to be determined as is done for respondents of market economy countries, the surrogate-country approach should nevertheless not be taken. In such situations, even if the country remains to be an NME country, the respondent of that country will be essentially market-oriented.

Therefore, there is a legal basis under Section 773(c) of the Tariff Act of 1930 to treat respondents of NME countries as MOEs.

B. Administrative feasibility in proposing how the Department could identify an MOE operating within a broader NME environment

In our view, it is feasible to identify an MOE operating within an NME country.

The US Department of Commerce (“USDOC”) could establish a set of criteria to assess whether a firm in an NME is nonetheless market-oriented, as the European Communities (“EC”) has done. The EC basic regulation for anti-dumping establishes 5 criteria to determine whether to grant Market Economy Treatment to a respondent of a non-market economy country:

- (1) decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values;
- (2) firms have one clear set of basic accounting records which are independently

- audited in line with international accounting standards and are applied for all purposes;
- (3) the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts;
 - (4) the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and
 - (5) exchange rate conversions are carried out at the market rate.

(Article 2.7(c) of EC Regulation 384/96)

Although the US antidumping law does not have existing criteria for determining an MOE status, we note Section 771(18)(B) of the Tariff Act of 1930 provides for the factors to be considered for determining whether or not a country is an NME:

- (i) the extent to which the currency of the foreign country is convertible into the currency of other countries;
- (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
- (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
- (iv) the extent of government ownership or control of the means of production;
- (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and
- (vi) such other factors as the administering authority considers appropriate.

Although these factors are for the determination of the market-economy status for a country rather than for individual companies, they could be adapted for individual companies. Indeed, some factors listed in the US statute appear to be more suitable for individual companies rather than for a country, such as determination of wage rates, government ownership or control of production means, government control over price and output decisions, etc. In the case of China, particularly, it is acknowledged that China has made remarkable progress towards market economy, and situations vary significantly from company to company in those aspects, therefore those factors can only be assessed on the basis of individual companies, rather than on the basis of the country as a whole.

Even for some factors that appear to be relating to the overall pattern of a country, situations may vary from industry to industry. It seems feasible to determine the market-economy status of a company through assessing some factors that relate to the company itself, and, at the same time, assessing some other factors that relate to the industry in which the company is located.

Therefore, we suggest the factors provided for in Section 773(c) of the Tariff Act of 1930, with appropriate adjustments, could be applied to determine the market economy status of

individual companies. Even if USDOC considers such approach inappropriate, USDOC could make a new set of criteria for individual respondents of NME countries, like EC has done.

As described in the Request for Comments by the Department, some parties argue that it would be difficult to identify market-based prices within an NME, because prices within an economy are interconnected, and even if the Department could identify which companies manage their operations on a market basis, these firms would still operate in a broader NME environment, in particular firms' input prices could be affected by non-market considerations; and that such a distortion of an otherwise market-oriented firm's acquisition prices could happen either directly, if these firms purchase inputs from non-profit maximizing SOEs, or indirectly, if macroeconomic NME distortions relating to land or capital affect the relevant input market; and that it would be impossible to parse out the numerous distortions that could affect each input price.

We think these arguments are flawed. While it would be reasonable to assess whether a country is a market economy country, or whether a firm is a market-oriented firm, it is unjustifiable to deny the market economy status of a firm that has already demonstrated its market-oriented features, just for the reason that the firm is operated in a "broader NME environment". Nowadays, economy is not only interconnected within a country, but also may be interconnected internationally. As a result, an economic policy of a country will not only affect industries within that country, but the effect may also spill over across the boarder. Therefore, if a Chinese market-oriented firm is considered nonetheless operating in a "broader NME environment" because it purchases an input at "a distorted price", firms in market economy countries will also be operating in an NME environment if they purchase that input from China at a similar price. Thus distortions of acquisition prices may exist even for firms in market economies. However, USDOC has never tempted to assess whether or not input prices of firms in market economies are affected by distortions spilled over from non-market economies, let alone to "parse out" the distortions.

C. To what extent, and under what conditions, the Department should rely on an MOE's prices and costs, particularly for those inputs that are inextricably linked to the broader operating economic environment, i.e. labor, land and capital

First, the Department should establish a clear set of criteria for determining the MOE statues of NME respondents, as proposed in part B above. Second, based on those criteria, the Department could assess each input employed by an NME respondent to produce the subject merchandise, so as to determine whether the acquisition of the input is market-oriented. Third, if all inputs acquisitions are substantially market-oriented, the respondent should be considered an MOE, and the prices of the subject merchandise sold in the domestic market should be used in dumping margin calculation; or costs and prices of the inputs should be used, in cases where constructed normal value is applied.

If, however, a respondent generally qualifies as an MOE, but distortions of prices or costs are found with part of the inputs, adjustments with regard to such prices or costs could be made to the normal value. Or, if constructed normal value is applied, relevant data from surrogate countries may be used jointly with actual prices and costs of those inputs on which no distortion is found. Actually, such practice has been used by USDOC, in circumstances where an NME respondent purchases inputs from market economy countries.

As stated in the Georgetown Memo, based on the development China has made towards market economy, the situation is that “the subsidy can be identified and measured”. If the subsidy can be “identified” and “measured” for the purpose of applying the anti-subsidy duty, the subsidy can also be identified and measured to make adjustments to the normal value in the anti-dumping proceeding.

D. Administrative feasibility in proposing the extent and conditions under which a finding of an MOE might be limited

As described in part C above, it would be feasible to make a finding of a “limited MOE”, i.e. most input prices are found market-oriented, and a minor part of input prices are found distorted. In such cases, a finding of an MOE may be limited to the extent that consideration is taken with regard to those inputs the acquisition of which is found distorted. However, it should be emphasized that, as explained in part B above, in determining whether the price of a single input is distorted, assessment should be based on the firm itself, rather than on the country as a whole for “a broader operating environment”.

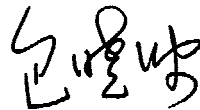
We thank you for your consideration.

Yours sincerely,



Wang Xuehua

Partner



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