

GIBSON, DUNN & CRUTCHER LLP

LAWYERS

A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

1050 Connecticut Avenue, N.W. Washington, D.C. 20036-5306

(202) 955-8500

www.gibsondunn.com

CWood@gibsondunn.com

November 26, 2007

Direct Dial

(202) 955-8595

Fax No.

(202) 530-9698

Client No.

C 68418-00004

VIA HAND DELIVERY

PUBLIC DOCUMENT

The Honorable David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

Re: *Requests for Comments on Antidumping Methodologies Involving Certain
Non-Market Economies: Market-Oriented Enterprise*

Dear Assistant Secretary Spooner:

This letter is filed on behalf of Occidental Chemical Corporation (“OxyChem”) and Clearon Corporation (“Clearon”), domestic producers of chlorinated isocyanurates, to respond to the Department’s request for comments on the legality and administrative feasibility of granting market-economy treatment to individual respondents in antidumping cases involving non-market economies. For the reasons expressed below, OxyChem and Clearon oppose the creation of a new market-oriented enterprise exception to the Department’s established methodology applied in non-market economy antidumping proceedings. The legal authority for the Department to implement such a methodology is uncertain and the administrative burdens

The Honorable David Spooner
November 26, 2007
Page 2

that would result from a market-oriented enterprise exception would substantially outweigh any merits associated the proposal.

I. The Antidumping Statute Does Not Contemplate the Creation of a Market-Oriented Enterprise Test

The introduction of a market-oriented enterprise test for individual producers in non-market economy countries would represent a departure from existing U.S. antidumping practice that is not well-supported by the statutory language. In particular, U.S. law identifies and defines non-market economies by the *absence* of usable cost or pricing information for determining normal value. Section 771(18) of the Act states that

The term “nonmarket economy country” means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.

In other words, non-market economy countries are in fact defined by the absence of available information in the particular country from which the Department could appropriately calculate normal value. The definition does not include any provision indicating that individual exporters within a non-market economy may receive specialized or individualized treatment. to the contrary, the language emphasizes “sales of merchandise *in such country*,” which implies that no such exception for individual exporters exists. Accordingly, any implementation of a market-oriented enterprise test would appear to require an amendment in the statutory definition of a non-market economy. In the absence of an express amendment permitting such treatment, the Department should defer introducing any market-oriented enterprise methodology.

The Honorable David Spooner
November 26, 2007
Page 3

It is equally clear that creation of a market-oriented enterprise test was not contemplated by U.S. negotiators as part of China's accession to the WTO Agreement. China's Protocol of Accession to the WTO provides that the United States may continue to treat China as a non-market economy at least until 2016.¹ The accession protocol does not contain any commitment to consider or grant market-economy treatment to individual exporters. While the United States and other WTO members did agree to consider whether Chinese industries, in the aggregate, could demonstrate the prevalence of market economy conditions, there is no language at all in the accession agreement indicating that similar treatment would be available for individual exporters. Because the Chinese accession agreement, in particular, represents a negotiated compromise involving multiple conflicting interests, it would be inappropriate for the Department to act unilaterally to rebalance that negotiation by instituting a new market-oriented enterprise test that would be applicable to Chinese exporters.

II. It Would Be Impracticable for the Department to Conduct an Adequate Examination of Whether Individual Respondents Satisfied a Properly Defined Market-Oriented Enterprise Test

The Department has also requested comments on the administrative feasibility of any test that could be developed to identify market-oriented industries operating within a non-market economy environment. As described below, OxyChem and Clearon believe that it would be virtually impossible for the Department to adequately examine whether an individual non-market economy producer satisfied relevant conditions to qualify as a market-oriented enterprise within

¹ Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001).

The Honorable David Spooner
November 26, 2007
Page 4

the time constraints imposed by statute and given the resource constraints under which the Department operates.

A. A Market-Oriented Enterprise Test Would Require Consideration of Direct and Indirect State Influence in the Competitive Environment in Which an Individual Firm Operates

Implementation of a market-oriented enterprise test for individual non-market economy producers would require the Department to gather and assess information concerning the degree to which the individual's producers sales and cost data could reliably be determined to reflect market prices. This would inevitably raise extremely complex issues concerning the degree to which the government of the non-market economy continued to exercise direct and indirect influence over the actions and incentives of the individual producer. As the Department noted in its recent evaluation of whether China's economy continued to reflect non-market influences, business is conducted "within the broader, distorted economic environment over which the PRC has not ceded fundamental control."² As a practical matter, it is unclear whether there is any means through which the Department could reliably establish that an individual's producers operations were independent of the economy-wide distortions in the non-market environment. At a minimum, the Department would have to account for the following problems in evaluating claims by individual producers to market-oriented enterprise status:

Access to Capital: The Department has recently cited the continuing and pervasive influence of the Chinese government in directing the flow of capital throughout its economy.

² NME Status Memo, at 5.

The Honorable David Spooner
November 26, 2007
Page 5

The "government's continued role in the allocation of financial resources indicates that it exerts significant leverage over the allocation of resources in the economy as a whole."³ Perhaps most notably, "[t]he near-complete state ownership of the commercial banking sector enable the government to use non-direct measures to guide the allocation of credit."⁴ As just one example of how this type of distortion could render market-oriented enterprise treatment inappropriate, state direction of capital can result in increased capacity that would not be constructed under market economy principles, thereby increasing supply and driving down prices. Accordingly, the Department would need to undertake a comprehensive evaluation of the sources of capital not only for the producer requesting market-oriented enterprise treatment, but for the entirety of the industry.

Upstream and Downstream Market Conditions: One of the most difficult conceptual issues in considering whether individual producers in a non-market economy can be treated as market-oriented producers is the fact that these producers will obtain key inputs and sell their productive output into a non-market environment. In order to assess whether an individual producer was in fact "market-oriented," the Department would need to evaluate not only the producer's operations, but also those of suppliers of material inputs and those industries purchasing the output of the producer. As a practical matter, it is highly unlikely that the Department could reliably assess whether the entire competitive ecosystem in which a

³ NME Status Memo, at 3.

The Honorable David Spooner
November 26, 2007
Page 6

respondent operates is sufficiently market-oriented to warrant use of prices and costs in the non-market economy within the time constraints imposed by statute for antidumping investigations and reviews.

Exchange Rate Distortions: Many non-market economies, including China, are characterized by an absence of a freely convertible currency. This factor alone makes it almost impossible to contemplate that an individual producer's prices or cost within the non-market economy could be deemed to be "market-oriented." In the case of China, the yuan is commonly considered to be undervalued as a result of intentional intervention in foreign exchange markets by the Chinese government. Identification of market-oriented enterprises therefore would have to be limited to those companies that transact their purchases and sales almost entirely in freely convertible currencies in order to be meaningful.

Land and Labor: The Department has noted that land and labor restrictions remain in effect for China, which effectively prevent these resources from being allocated efficiently among different industries and producers, as would be the case in a market economy. An assessment of market orientation for individual producers would require the Department to undertake a complicated analysis of the degree to which an individual's producers wages and access to land were compatible with standards prevailing in comparable market economies.

[Footnote continued from previous page]

⁴ *Id.*, at 9.

The Honorable David Spooner
November 26, 2007
Page 7

State-Owned Enterprises: Any assessment of market-oriented enterprises should exclude state-owned enterprises in a non-market economy. State-owned enterprises are inextricably bound with government control over non-market economies and are often a means by which the government directs the functioning of such economies. Decision making within state-owned enterprises is opaque and often not guided by the application of market principles. Accordingly, even if the Department were to create a new exception for market-oriented enterprises within a non-market economy, state ownership should be an absolute bar to qualifying as a market-oriented enterprise.

B. A Market-Oriented Enterprise Test Would Raise Extraordinarily Difficult Issues of Administration in Antidumping Investigations and Reviews

On balance, the administrative burdens, additional complexity, and likelihood that few if any non-market economy producers would qualify for market economy treatment weighs strongly against the adoption of any change to current non-market economy practice by the Department.

For the reasons cited above, examination of requests for market economy treatment by individual non-market economy producers would impose substantial burdens on the Department. In addition to the normal requirements of non-market economy cases, the Department would be required to expand the scope of its analysis to determine whether suppliers of inputs to the producer were similarly market-oriented and whether purchasers in the non-market economy of the producer's output operated according to market principles. Given that individual cases often involve multiple producers and tens of individual inputs, it would be extremely difficult for the

The Honorable David Spooner
November 26, 2007
Page 8

Department to do a meaningful analysis within statutory time limits for completing an investigation or review.

Similarly, a test for market-oriented producers would strain the Department's resources at a time when the Department already faces critical resource limitations that have resulted in the denial of verification requests in cases involving non-market economy producers.

Implementation of a market oriented enterprise test would also place additional burdens on domestic industries that would be required to respond to such claims, however unmeritorious.

Finally, past precedent suggests that the benefits of implementing a market-oriented enterprise test would be extremely limited. Throughout the period in which the Department has considered claims for "market oriented industry" treatment, no Chinese industry has successfully met the requirements. Individual producers, operating in the same distorted environment in which the Chinese government retains substantial control over capital, land, labor, and prevailing exchange rates, are equally unlikely to qualify as market-oriented. The Department's current practice already permits for market economy purchases of inputs by non-market economy producers to be used in calculations of normal value. Because this practice already adequately accounts for what market influences may fairly be assumed to coexist in a non-market economy, there is no practical need for the Department to invest in developing a new test for market oriented enterprises that will only add to the complexity and burden of current proceedings.

GIBSON, DUNN & CRUTCHER LLP

The Honorable David Spooner
November 26, 2007
Page 9

* * * *

As indicated in the Department's request for comments, we are filing an original and six copies of this submission. We appreciate the Department's consideration of these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Christopher Wood". The signature is written in a cursive style with a long horizontal stroke extending from the first letter.

J. Christopher Wood

JCW/jcw