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Delivered by Express Mail

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: Request for Comments – Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market–Oriented Enterprise

Dear Assistant Secretary Spooner,

On behalf of Beijing Seafront Law Office ("Seafront"), this submission responds to the Department of Commerce's ("the DOC") request for comments regarding the methodology by which it identifies Market-Oriented Enterprises ("MOE") in proceedings involving China. Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 Fed. Reg. No. 101 (May 25, 2007). Seafront presents the following comments concerning the proposed methodologies to identify MOE in U.S. antidumping proceedings involving China.

A. Legal Basis for Establishing MOE Test

1. The U.S. Laws and Regulations Permit the DOC to Establish MOE Test

Section 773(c)(1) of the Tariff Act of 1930, as amended provides for the use of factors of production ("FOP") to determine normal value for the exporters in non-market economy countries ("NME") if two conditions are met:

(A) the subject merchandise is exported from a non-market 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 in market economy countries. (emphasis added)

The DOC Market-oriented Industry ("MOI") test is administrative discretion under section 773(c)(1)(B) to determine whether the available information permits the use of market economy antidumping methodology for the NME. The establishment of MOI test also indicates the DOC has broad discretion to establish other tests.

The Omnibus Trade and Competitiveness Act of 1988 ("OTCA") states the definition of NME. The legislative history of the OTCA seems to support the DOC's broad claims of discretion, indicating that the DOC is to determine on a case by case basis whether the available information permits the use of the standard methodology or whether a different approach is warranted.[1] The Senate Report No. 100-71, 100th Congress, 1st Session, 108 (1987) made the following statement:

"[T]he bill does not prohibit [DOC] from using its normal methodology for determining foreign market value in cases regarding non-market economy countries. If information submitted by a non-market economy country to the DOC permits foreign market value to be

[1] Page 4, CRS Report for Congress, United States' Trade Remedy Laws and Non-Market Economies: A Legal Review, April 23, 2007.

determined accurately using the normal methodology, then the committee expects such methodology to be used by the DOC"[2]

2. The WTO AD Agreement and Panel Conclusion Mandate the DOC to Find Company Specific Normal Value

The Article 6.10 of the WTO AD Agreement states that "[T]he Authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." Further, the WTO Panel in *Mexico-Rice (DS-295)* made the following conclusion to interpret Article 6.10:

In our view, in the AD Agreement the term "margin of dumping" refers to the individual margin of dumping of an exporter or producer rather than to a country-wide margin of dumping. This is evidenced by Article 6.10 of the AD Agreement which provides that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". As the text of Article 6.10 of the AD Agreement makes clear, this provision provides for the general rule of calculating an individual margin of dumping for each known exporter or producer. The exception to this rule is the case in which there are too many foreign producers or exporters so that an individual margin of dumping will only be calculated for a representative sample, while for the other non-sampled producers or exporters, Article 9.4 of the AD Agreement determines what the maximum amount of the duty is that can be applied to them. In sum, both the general rule and the exception to the rule provide for the calculation of individual margins of dumping, and do not envisage the calculation of a country-wide margin.[3]

Returning to the section 773(c)(1)(B), if the dumping margin is set to individual margin of an individual exporter, the term *"normal value of subject merchandise*" shall be construed as the normal value for an individual exporter in order to calculate dumping margin for this individual exporter, therefore, the DOC must examine individual company's submitted information to determine whether the price or cost information from that company is eligible to be normal value without regarding whether it is market economy or non-market economy.

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[2] *Id.*, footnote 18.
[3] Panel Report, Mexico-Rice, *WT/DS295*, para. 7.137.

3. The Other WTO Members' Practices Are Relevant to the Interpretation of Section 773(c)(1)(B)

We take European Commission ("EC") practice as an example. EC does not officially admit China as market economy, however, EC has been providing the opportunity for Chinese producers/exporters in antidumping cases to get individual market economy treatment ("MET") since 1998. The MET will be granted only if the individual respondents meet the five MET criteria laid down in Article 2(7)(c) of Council Regulation (EC) No. 384/96.

As a matter of fact, many Chinese producers/exporters got the MET in EC antidumping cases. Being the WTO member, China would have duly and reasonable expectation that the other WTO members grant same treatment to Chinese exporters under the WTO AD Agreement. The EC and U.S. different treatments to same company on same product under investigation create great distortion upon China's understanding of AD Agreement and the consistence of US practices under the AD Agreement. For example, the DOC has maintained antidumping duty on persulfates from China *(A-570-847)*, one of the responding companies, Degussa-AJ Initiator Co. Ltd. normal value was calculated by FOP method under NME system. EC initiated antidumping investigation on the same products in 2006[4], according to EC Regulation, EC granted MET treatment Degussa-AJ Initiator Co., Ltd., afterwards, its domestic sales price became the basis to determine the normal value.[5]

B. <u>MOE Standard</u>

[4] Persulfates from China, OJ C 162, 13.7..2006.
[5] OJ L 97/6, 11, 4, 2007.

In our view, the DOC shall refer to the current MOI test to establish MOE test to individual company for the following reasons:

1. The "industry" in MOI test means all exporters and producers, i.e., the group of individual exporters or producers. Let's assume, if all exporters or producers meet the MOI criteria, the DOC shall grant this industry market economy treatment, which means all exporters or producers' domestic sales prices or costs would become the basis for normal value. Therefore, splitting the industry and looking into the individual company situation is reasonable approach for the DOC.

2. The MOI test is not disputed among Chinese exporters and US petitioners.

3. The current DOC practice that requires all producers to respond MOI questions is out of bound of the DOC jurisdiction and is unreasonable. The antidumping investigation and measure is applying to the exporters or producers who export the subject merchandise to the importing countries during the POI. If a producer does not export to importing country and has no relations with other producers/exporters, it shall be subject to the all-others' duty and eligible for new shipper review, but it has no responsibility to answer the questions from the importing countries during the original investigation. Chinese exporters sought MOI in several antidumping proceedings, for example, *crawfish tail meat, color TV, bedroom furniture,* etc. One of the main reasons the DOC rejects to grant MOI is not all producers answer questions.[6] For example, China has more than 40,000 furniture producers, of which only more than 100 exported the subject merchandise to the U.S., to answer MOI question and obtain MOI treatment requires all 40,000 producers to answer questions, it is not reasonable.

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[6] Final determination of Sales as less than fair value, freshwater crawfish tail meat from China (August 1, 1997).

Meanwhile, for those companies which did not export to the U.S. during the POI, the DOC has no jurisdiction to request them to answer antidumping related questions.

Such requirements are also reflected in the Protocol on the Accession of the China ("Protocol"). The Protocol requires the DOC to examine "the producers under the investigation" to prove market economy prevailing, not the whole Chinese industry. The Article 15 (a) (ii) of the Protocol states:

The importing WTO member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under the investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sales of that product. (emphasis added)

Based on the above mentioned reasons, we would list the following criteria for the DOC to consider MOE test:

1. **For the merchandise under the investigation, there is virtually no government involvement in setting prices or amounts to be produced.**

Since the DOC current separate rate application has the similar examination, those companies who obtained separate rate in previous cases shall pass this test automatically.

2. **The enterprise ownership is involving private or foreign sectors.**

The collectively-owned company, private company, foreign joint venture or wholly foreign owned company and public listed company shall be presumed to be qualified this test unless the discrepancies are otherwise found. Regarding the state-owned company, the DOC shall examine whether their operations and businesses are consistent with market consideration without the distortion attributable to the state involvement.

3. **The enterprise is found to pay market-determined prices for all major inputs.**

4. The enterprise has one clear set of independently audited accounting records consistent with GAAP.

C. Margin Calculation for MOE

If the DOC finds that one company in China is MOE, the DOC must comply with the US laws and the WTO AD Agreement to calculate normal value for this company under the following situations:

1. The company's actual domestic sales price and cost: The DOC shall go through the normal proceeding for exporters from market economy to examine whether the company's domestic sales price is eligible to be normal value, which shall include 5% viability test, arm-length test, cost test, etc.

2. If the company's domestic sales prices are not permitted to calculate normal value, the DOC shall adopt the proper third country sales as normal value, and

3. If no proper third country sales exist, the DOC shall adopt constructed value as normal value which shall incorporate the cost and SG&A and profit from this MOE company.

4. There is no escape for the DOC to continue using FOP or surrogate country sales as normal value if the company received MOE treatment.

On the other hand, if the company failed to receive MOE, when adopting FOP calculation methodology, the DOC shall examine in detail for each input price and the company SG&A to find proper comparable price under the FOP system. For example, if the company failed MOE test by its ownership, however, the DOC finds that the input raw materials are market-determined prices, the DOC shall use these prices even they were paid by

Chinese currency RMB in China, or if the DOC finds that the company's financial report is consistent with the GAAP, the DOC might use this company's SG&A to calculate normal value without seeking into the information from the companies in surrogate country.

D. Miscellaneous

1. The DOC Shall Adopt Normal Value of MOE for other Chinese Respondents Surrogate Normal Value

In case the DOC accepted one company as MOE and calculated its normal value by its own sales price and cost, the DOC shall adopt this normal value to other Chinese responding companies which did not receive MOE, but pass separate rate test. The normal value from Chinese MOE company must be more appropriate than the surrogate value from surrogate country. Such approach will reflect the DOC long time objective of pursuing fairness and reasonableness of antidumping measure.

2. The DOC Shall Avoid Undue Burdensome to Chinese Exporters in Questionnaires Answer

Let's assume the MOE test is adopted by the DOC, the DOC questionnaire shall request the responding companies to prove its MOE status by providing information and evidence. Meanwhile, if the company would argue its MOE status, it shall provide the domestic sales information (Section B of the DOC questionnaire). However, since the outcome is uncertain, the responding companies are forced to answer separate rate application and the FOP (Section D of the DOC questionnaire). Such approach will duplicate the responding companies'

workload. In light of this, the DOC shall issue MOE questionnaire and separate rate application first. Within 90 days after MOE questionnaire issued, the DOC shall make decision whether the responding company received the MOE. Without prejudice the DOC timeline for an antidumping investigation, the responding company shall answer Section A and Section C of the DOC questionnaire first, after the DOC makes the determination of MOE, the responding company shall answer either Section B or Section D of the DOC questionnaire according to the DOC MOE decision.

Please contact the undersigned should you have any questions regarding this submission.

Respectfully submitted,

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