Comments of the Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the People's Republic of China on Determination and Treatment of Market Oriented Enterprises

June 25, 2007

On May 25, 2007, the U.S. Department of Commerce (DOC) gave notice in the *Federal Register* soliciting public comments on whether and how market economy treatment should be granted to individual respondent enterprises in antidumping proceedings involving China. In response to DOC's request, the Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the People's Republic of China (BOFT) hereby summits the following comments:

I. The U.S. Should Recognize China As a Market Economy.

The issue of China's market economy status in antidumping investigations involves the WTO principle of fair and non-discriminatory treatment in trade. It relates to whether China's exporting industries and related enterprises can compete as equals with the exporters of other countries, which are recognized by the United States as market economies, in a fair, equitable and non-discriminatory environment. China has followed the U.S. legal and procedural requirements and submitted applications to the United States for market economy status and market-oriented industry status in a number of cases on a number of occasions. However, the United States has persistently refused China's application on various pretexts and fully ignored the evidence and facts

that have been provided by China. Because the United States has persisted in designating China as a non-market economy country in its antidumping investigations, the result is that Chinese enterprises cannot and are not getting fair and non-discriminatory treatment in antidumping investigations.

Over more than 20 years of accelerating reforms in its economic system, China has established a market economy system. Such a market economy system has not only been written into the Chinese constitution, but is, in fact, a more developed market economy system that the system of some countries which the U.S. has actually recognized as market economies. In recent years, many other WTO Members have adjusted their designations of China's economic system to conform to present-day reality. A very good example is their modification of relevant antidumping policies towards China. Currently, many countries, including ASEAN member states, Australia, New Zealand, South Africa, Brazil, Argentina, Egypt and South Korea have formally granted China market economy status. Modifications made by these countries to their domestic antidumping rules show their active recognition of the achievements of China's reforms and market opening initiatives. This is based on fair and objective evidence. We hope that the U.S. government can also objectively see the achievements that China has

achieved in its reforms and in opening-up and becoming a true market economy.

II. Though The Current U.S. Request For Public Comments On The MOE Issue May Look Like Progress In Terms Recognition Of Chinas Movement Towards Being A Market Economy, In Reality It Is Little More Than A Formality And Is Insufficient To Address The Discrimination Of Current U.S. Policies.

The current U.S. request for comments on the issue of market economy treatment for individual respondents does not consider or solve the broader issue of market economy status for all of China's exporting industries or enterprises to the United States. Consequently, there is still a possibility that Chinese enterprises will be determined as non-market oriented enterprises and thus continue to be subject to unfair and arbitrary investigation rules, which will result in future U.S. antidumping investigations relating to China. Such an outcome is simply unacceptable to China.

The facts on which the United States based its determination in the CFS paper countervailing duty investigation clearly indicate that the United States should reevaluate and change its position on the issue of market economy status for China. Based on the United States' factual determination on China's overall economic development, we believe that if the United States continues to determine China to be a non-market economy and continues to adopt the traditional non-market economy investigation methodologies in its antidumping investigations, there are

serious legal and consistency problems with the U.S position. Recognizing China's market economy status is the only correct practice that accords with the latest U.S. determination of the current situation of development of China as a market economy. As such, while the current U.S. request for public comments on the MOE issue looks like progress towards U.S. recognitions of China as a market economy, in reality it is little more than a formality to justify application of countervailing duties. This does not represent an objective and fair evaluation of the current status of market economics in China. The United States should recognize China as a market economy rather than merely consider the situation of market-oriented operations of individual respondent enterprises in antidumping cases.

III. If The U.S. Continues To Insist On Designating China As A Non-Market Economy, It Should At Least Recognize That All Chinese Industries Are Market-Oriented Industries And That The Burden Of Proof Should Be On Petitioning U.S. Industries To Demonstrate That A Particular Industry Or Company Is Not Market Oriented.

As admitted by the DOC in its recent findings on China's economic development, the progress of China towards a market economy has been accomplished in most sectors of the economy and with respect to most cost and prices. In the past 30 years, industries in most economic sectors have become market oriented as China has carried out its market-oriented reforms. Currently, enterprises produce, sell and price

their products according to the rules of the market economy. There are no State restrictions on price or output. In particular, there is significant competition among companies participating in of Sino-U.S. trade; industries exporting to the United States have grown into vibrant fast-growing industries with competition as the motivating factor. These are market-oriented industries.

What needs to be stressed is the fact that, while some companies in an industry are fully or partially state-owned, this does not mean that their operational and commercial activities are not market-oriented. In its past antidumping investigations, DOC has also made relevant determinations in this regard by granting separate rate status to these industries. In the cases of sewed cloth hats, spring washers, fireworks and silicon carbide, DOC has specifically determined that "State-owned", be it "owned by all people" or "collectively owned" does not represent "government owned". In U.S. antidumping cases against China in the past 10 years, DOC has admitted many times that China's State-owned enterprises are neither "de facto" nor "de jure" controlled by the government. As for the requirement that all major inputs to enterprises should be purchased at a market price, China is no different than most market economies. China suffers from the very same deficiencies as so-called market economy countries, which all regulate macroeconomic developments as does China. There is no basis to deny the status of market orientation to China's exporting

industries on the pretext that the prices of the energy (power and coal) and main raw materials inputs by enterprise are controlled by the government. China does not intervene in these prices any more than do governments in countries that the U.S. considers market oriented. Market economy countries, including the United States, are no exception to selective interventions. Governments in market economies attempt to influence price trends in the same what that China attempts to influence price trends. This practice is not unique to China and not unique to non-market economies.

In fact, BOFT believes, and the United States has tacitly recognized in its decision to apply countervailing duties to China, that the criteria applicable to determining whether an industry is market orient are too severe and result in many inconsistencies. As a result, the so-called MOI test is not a real test but nothing more than a formality. Virtually all of China's industries are already market-oriented industries. If the United States refuses to recognize China's market economy status, Chinese industries should also be fully entitled to the MOI treatment in antidumping investigations. One example is Canada, also a NAFTA member, which has adjusted its policies relating to the non-market economy issue, namely assuming that all Chinese industries are market-oriented industries in its antidumping investigations. Under this assumption, the burden of proof to demonstrate that an industry in China

is not market oriented shifts to the petitioning party.

IV. When Considering The Issue Of MOE Treatment For Chinese Enterprises, The U.S. Should First Abandon The Assumption That Chinese Enterprises Are Controlled By The Government; All Chinese Enterprises Should Automatically Get MOE Treatment. And, The Burden Of Proof To Demonstrate Otherwise Should Be On The Petitioning Parties.

The recent U.S. determination to apply countervailing duties to China was largely based on the development of a market economy in China. This determination in the CFS paper investigation requires DOC to abandon both the assumption that "Chinese enterprises are controlled by the government" which it has long adhered to in its antidumping investigations and the assumption that the government controls prices and input costs.

It is the view of BOFT that according to the latest U.S. evaluation of China's non-market economy status in the 2006 lined paper antidumping case, the assumption that "Chinese enterprises are controlled by the government" is completely wrong. Similarly, the fiction that Chinese prices and, therefore, costs are controlled by the government has not been established by any facts. In fact, the substance of the preliminary determination in the CFS paper countervailing duty investigation indicates exactly the opposite.

Meanwhile, the recent U.S. decision to apply countervailing duties to China has also weakened the foundation for the applicability of the non-market economy methodology to respondent Chinese enterprises. In its preliminary determination in the CFS paper investigation, the DOC

itself pointed out that the Chinese economy is notably different from the Soviet economic model at issue in the Georgetown steel case in the 1980s and that there are no obstacles to the application of the countervailing duties to China under the current economic situation in China. DOC determined that subsidies exist in China, and subsidies are, by definition, distortions in market forces. If market forces do not determine economic behavior, then subsidies cannot distort this behavior. The DOC preliminary determination in the CFS paper investigation can only support a conclusion that the GOC intervenes only selectively in the market, the necessary prerequisite for find a countervailable subsidy, and that except for such interventions a market economy prevails.

Based on the above, DOC should abandon its presumption that Chinese enterprises are controlled by the government and that prices are somehow determined by the government. All Chinese enterprises should automatically get MOE treatment. And, the burden of proof should be on petitioning U.S. industries to demonstrate otherwise.

V. Given Chinese Enterprises' Entitlement To MOE Status, The Discriminatory Separate Tax Rate Policy Against Chinese Enterprises Should Be Abolished. In This Regard, The Same Policies For Other Market Economies Should Also Be Applied To Chinese Enterprises.

BOFT believes that there are many irrational aspects in the separate tax rate policy ("county wide rate") which the U.S. currently applies to non-market economy countries. These are specifically reflected in the following:

1. The country wide rate policy is not an issue related to domestic price comparability, which allows a distinction in the treatment of respondents in non-market economies.

Regarding the treatment to enterprises of non-market economy countries in anti-dumping, Paragraph 1 of Article 6 of the 1994 GATT and Article 15 of *the Protocol on the Accession of the People's Republic of China* only permit differential treatment in circumstances where for the problem is price comparability in non-market economy countries as compared to market economies. The core issue is whether China's domestic price or cost data can be used in antidumping investigations, but it does not involve the issue of whether Chinese exporting enterprises' export activities, including export price, are controlled by the Chinese government. Therefore, there is no justification to use a country-wide rate policy, in addition to the application of surrogate country prices, to determine the necessary remedy. After all, antidumping policies are to serve the purpose of remedy rather than punishment. Because there are no provisions allowing a country-wide rate either in the WTO Agreement or in the Protocol on China's Accession to the WTO, this is not an issue related to whether China is a market economy country or not. In fact, the U.S. only adopted the country-wide rate policy ten years after it had treated China as a non-market economy country. Given this, and considering that China is now a member of the WTO, the U.S. should grant China the same treatment as that granted to other WTO members rather than adopt differential treatment based on the pretext that China is a non-market economy.

2. The application of the country-wide rate does not comply with the provisions of the WTO Antidumping Agreement.

As for the application of the country-wide rate for exported goods by companies not selected for individual investigations and not qualifying for the "all others rate", Article 9.4 of the WTO Antidumping Agreement stipulates that the antidumping duty rate should not exceed the weighted average margin of dumping established with regard to selected exporters or producers. In determining the weighted average dumping rate, based on WTO jurisprudence, WTO members shall eliminate zero margins and negative (*de minimis* margins) as specified in Paragraph 6.8 of the AD Agreement. The rates to be excluded under Paragraph 6.8 include not only margins based on total adverse facts available, but also margins based on partial facts available. Therefore, DOC must calculate the dumping margin for Chinese companies not selected for investigation on the basis of the calculated weighted average antidumping margin found for mandatory respondents, rather than following the current practice of first requiring Chinese enterprises to undergo the separate rate application process and granting the weighted average antidumping duty rate only to those that pass the application process. Moreover, when calculating the "all others" rate, DOC cannot eliminate only the zero and *de minimis* determinations from its calculation, but must also eliminate from its calculation any rates that are based on full or partial adverse facts available. Thus, the current U.S. policies regarding application of the country-wide rate and calculation of the "all others" rate are inconsistent with the WTO Antidumping Agreement.

3. Current DOC Policy is based on a presumption that is no longer applicable to the situation in China.

From the legal perspective, China has met the three U.S. criteria to qualify for application of the "all others" rate and there is no need for each enterprise to submit proof independently in each investigation. Moreover, in the furfuryl alcohol antidumping case against China in 1994, DOC concluded, according to the laws and regulations at the time, that China's exporting enterprises were legally independent of the Chinese government. As a matter of actual fact, most Chinese enterprises today have also fully met the criteria of being independent of and not controlled by the government. Indeed, the proliferation of DOC granting separate rate status to Chinese enterprises is recognition of this fact. Based on the two factors above, it is clear that most Chinese enterprises are independent of the Chinese government legally and in actuality. It follows that if the presumption of control and consequent application of a country-wide rate is not abolished, it should at least be changed to "When making exports, China's exporting enterprises are not controlled by the government either legally or in actuality, unless the petitioning party has sufficient evidence to demonstrate otherwise".

To sum up, while the U.S. policy of applying a country-wide rate is applied to non-market economy countries; it is in fact not a problem which is related to non-market economy status itself. It is not consistent with WTO rules, nor does it reflect the reality of the current situation in China. It is the view of BOFT that the policy should be abolished and

that the United States should give fair treatment to Chinese enterprise in its investigations.

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