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

Dear Mr. Spooner,

RE: Comments on Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise

On behalf of Jurisino Law Group ("Jurisino"), we file this submission in response to the request by the Department of Commerce ("Department") for public comments on the Market-Oriented Enterprise ("MOE") methodology. See Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 FR 29302 (May 25, 2007) ("Notice"). Jurisino is a Chinese law firm which was formed by a merger between the Times Highland Law Firm and the Deuho Law Firm and is also known as Times Deuho. The lawyers of Jurisino have represented many Chinese and international clients in U.S., E.U., Canadian, Chinese and other antidumping proceedings and have developed a unique comparative perspective on antidumping methodologies.

In this submission, we will comment on the following specific issues as raised in the Notice: (1) whether the Department should consider granting market-economy treatment ("MET") to individual respondents in antidumping proceedings involving China; (2) the conditions under which individual firms should be granted MET; and (3) how such treatment might affect the Department's antidumping calculation for such qualifying respondents.

A. The Department Should Consider Market Economy Treatment to Individual PRC Respondents

As discussed in the Notice, the Department has treated the People's Republic of China ("PRC") as a non-market economy ("NME") for antidumping purposes and has calculated the normal value of product from PRC based on prices and costs from a surrogate country. Such methodology may be criticized for creating exaggerative, delusive or even phantom dumping margins on imported products from PRC. Although the Tariff Act of 1930, as amended ("Act"), by sections 773(c) and 771(c), specifically allows the Department to use such methodology at its discretion, the reasonableness and fairness of exercising and continuing to exercise such discretion against individual PRC firms are always questionable, especially in light of the massive progress in PRC economic transformation. Looking into the realities of the present-day PRC economy, as noted in the Notice, the Department itself in the Georgetown Steel Memorandum also acknowledged that "the evolution of China's economy together with the features and characteristics of China's present-day economy, including a growing private sector, suggest that modification of some aspects of the Department's current NME antidumping policy and practice with regard to China may be warranted, such as the conditions under which the Department might grant an individual respondent in China market-economy treatment in some or all respects."

In our opinion, an initiative to grant individual PRC respondents MET in all respects is warranted.

First, the Tariff Act, as amended, has never precluded the possibilities of looking at each respondent separately for MET even if the country to which the respondent is related is labeled NME. Indeed section 773(c)(1) suggests that the Department look into the different situation of each respondent before applying the surrogate value methodology. This implicitly requires that the Department apply MET to proper respondents in proper cases. It is inexplicable that the Department has never found one proper case.

Second, five years after PRC's accession to the World Trade Organization ("WTO"), the PRC economy has been integrated into the global economy. With market access in numerous sectors to foreign businesses and freer crossborder movements of people, goods, services and technology, continuing to treat PRC as an NME is at minimum a confusion of history and reality. When the nerve of the New York Stock Exchange is felt in the Shanghai Stock Exchange and vice versa, it is difficult, if not awkward, to maintain that every business in PRC is an NME entity which deserves not MET but the surrogate value methodology. In fact, it is strange to treat U.S. investments in PRC, either by wholly owned operations or by joint ventures, as NME entities and apply the surrogate value methodology to their products exported to the U.S.

Third, it is simply a matter of due process, fairness, reasonableness, and the principles of the rule of law. As noted in the Georgetown Steel Memorandum, "{P}rivate industry now dominates many sectors of the Chinese economy, and entrepreneurship is flourishing. Foreign trading rights have been given to over 200,000 firms. Many business entities in present-day China are generally free to direct most aspects of their operations, and to respond to (albeit limited) market forces. The role of central planners is vastly smaller." Faced with such a vibrant and diversified economy, one should recall that substantive due process, fairness, reasonableness, and the principles of the rule of law would require that the investigating authority treat each entity separately. It is wrong to treat all PRC respondents as NME entities without distinguishing one from the other, at least when the respondent is an investment wholly owned and operated by a U.S. entity. Furthermore, the current

surrogate value methodology involves too much administrative discretion and uncertainty, making the result of a dumping investigation unpredictable to the respondent, and even the petitioner, and running afoul of fairness and the rule of law.

Finally, the market-oriented industry ("MOI") methodology developed by the Department under section 773(c)(1)(B) is inoperative and a failure. Such methodology has subtle presumptions that an industry is subject-merchandise specific and can jointly participate in the investigation. This ignores the different interests in a particular industry and somehow assumes the NME nature of an industry at issue. Given the variety of interests in an industry, it is normal that some firms may not come out for a joint defense, unless the industry involved is indeed an NME industry which may be organized by the government for such joint defense. The Department's failure to grant MOI to any PRC industry is an illustration of this point.

B. Criteria for Granting Market Economy Treatment to Individual PRC Respondents

In contrast, an MOE methodology should prove operative and reasonable, given the experience of firm-specific MET in other jurisdictions.

In the EU, the criteria used for MET are as follows: See Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community:

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.

In India, the criteria used for MET are as follows: See Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, Annexure- I, as amended:

1. The decisions of the concerned firms in such country regarding prices, costs and inputs, including 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 whether costs of major inputs substantially reflect market values;

2. The production costs and financial situation of such firms are 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;

3. Such firms are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of the firms, and

4. The exchange rate conversions are carried out at the market rate.

It should be noted that the Indian criteria are almost identical to the EU's, but the Indian criteria omit the EU requirement that "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". This is because the EU's accounting standards requirement does not address the NME issues but is rather concerned with the problem of not being able to verify the information presented by the respondent – which can be addressed by the use of facts available in a market economy situation. In practice, from our experience, the EU's demanding accounting standards requirement has often put the EU case handlers to an awkward position in that they either have to audit the respondent accounts like auditors or make bold judgments on the appropriateness of audited accounts.

It should be further noted that, in practice, the EU and India rarely fail, if at all, MET applicants from PRC citing the "bankruptcy and property laws" criterion or the "exchange rate conversions" criterion. As there are obviously bankruptcy and property laws applicable to virtually every firm, especially with the recent adoption of the new Property Law and the new Bankruptcy Law, and market rates for currency conversion, the issues contemplated by those two criteria have become moot. In other words, those two criteria have become irrelevant and useless, and it would be extremely difficult, if possible at all, to justify any attempt to fail any MET applicant on either of those two criteria.

Both the EU and India have used their respective criteria, and successfully granted MET to individual PRC respondents in some cases. The Department, of course, needs not to simply adopt the EU-India criteria as its MOE criteria. Indeed the Department may start from its MOI criteria and draw experience from the EU-India criteria.

In the Notice, the Department outlined from its own precedents three conditions that must be met in order for an MOI to exist: (1) that there be virtually no government involvement in production or prices for the industry; (2) that the industry be marked by private or collective ownership that behaves in a manner consistent with market considerations; and (3) that producers be found to pay market-determined prices for all major inputs, and for all but an insignificant proportion of minor inputs.

These three MOI conditions, when applied to an individual respondent rather than a related industry, would make sense and become useful. That is to say, while developing a more detailed set of criteria for MOE, the Department should start its MOE criteria as follows:

1. There is virtually no government involvement in production or prices for the firm;

2. The firm is marked by private or collective ownership that behaves in a manner consistent with market considerations; and

3. The firm is found to pay market-determined prices for all major inputs, and for all but an insignificant proportion of minor inputs.

Nonetheless, the Department should draw experience from EU and Indian practices in this regard, and be prepared to revise the above three criteria to meet the realities. For example, both EU and Indian MET criteria do not preclude MET for state ownership; indeed there are cases where MET was granted to state-owned firms. The Department's three MOI criteria, on the contrary, seem to be precluding MET for state ownership. This would run contrary to the economic reality in PRC, as today most state-owned firms are managed in response to market conditions, and some are even publicly traded in stock markets within and/or outside mainland China. Furthermore, many Sino-foreign joint ventures were jointly set up by state-owned firms and foreign investors. State ownership *per se* is not government involvement in the production or sale of the product of a firm; state ownership does not prevent a firm from operating as an MOE. The Department should modify its current MOI criteria, which should become the starting criteria for MOE, to reflect such reality.

C. Impact of an MOE Methodology on Antidumping Calculation

In the Notice, the Department seemed to be contemplating partial use of the surrogate value methodology even if MET is granted. This we consider unnecessary and unnecessarily complicate a process which has been criticized for complexity, unfairness and over-discretion. When the Department decides to use an MOE methodology, it is our submission that the Department use all prices and costs, subject to verification, of the firm which has been granted MET.

First of all, the grant of MET itself means to treat the firm at issue as if it were operated in a market economy. It would contradict the purpose of granting MET if the surrogate value methodology is still used in whole or in part. Upon granting of MET, it becomes irrelevant whether PRC is a market economy or an NME.

Second, in granting MET or recognizing a respondent as an MOE, the Department would have assessed if the firm has paid market prices for all major inputs (see MOI criterion 3, as discussed above). If the Department considers that "the cost of certain inputs obtained in the broader economy may necessarily be determined on a non-market basis" (see the Notice), presumably, not at market price, the Department should have not granted MET to or treated as an MOE the firm at issue. If the Department considers that the non-market impact of the broader economy is inevitable on every industry and on every firm, the MOE methodology would be a non-starter.

Third, if the Department continues to feel uncomfortable about certain inputs obtained in the "non-market" "broader economy", such uncomfortableness may be addressed by other means. Indeed, when the Department discussed about certain non-market inputs, was the Department actually thinking about potential subsidies? If yes, the proper action to take may be a countervailing investigation, the appropriateness and details of which we are not going to discuss in this submission.

Last but not least, it is not desirable to have a combination of the surrogate value methodology and an MOE methodology. The U.S. surrogate value methodology, when compared with similar methodologies in other major jurisdictions, is already a complex one and difficult for the parties to comprehend. Introducing an MOE methodology without excluding the application of the surrogate value methodology to the same firm would further complicate everything and further increase the costs of the parties involved. It may further weaken the predictability and certainty of the U.S. antidumping calculation, and fly in the face of due process, fairness, reasonableness, and the principles of the rule of law.

D. Conclusions

In conclusion, we consider that the Department should development an MOE methodology and grant MET to individual PRC respondents; that the Department should use for MOE its conditions developed for MOI at the beginning and perfect its MOE standards by drawing experience from the EU and India; and that the Department should use all prices and costs of the PRC respondent once it is granted MET or recognized as an MOE. We consider that the Department is making a historic move by contemplating an MOE methodology and are in support for fair and reasonable rules implementing such idea.

Respectfully submitted,

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