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DELIVERY BY HAND

Ms. Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Re: Application of Countervailing Duty Law to China

Dear Ms. Kuhbach:

This letter is submitted on behalf of

- The Fresh Garlic Producers Association ("FGPA");[1]
- Sioux Honey Association ("SHA");[2]
- The American Honey Producers Association ("AHPA");[3]

[1] The FGPA members are: Christopher Ranch L.L.C.; The Garlic Company; Valley Garlic; and Vessey and Company, Inc. The FGPA and its members are petitioners in connection with the antidumping order on Fresh Garlic Imports from China (A-570-831).

[2] SHA is the largest honey-producing cooperative in the United States, with 309 members in 27 states, and is also the largest commercial honey packer in the United States, with three honey packing facilities in each of Sioux City, IO, Anaheim, CA, and Waycross, GA.

[3] The AHPA is the largest U.S. trade association for independent commercial honey producers, and has 182 members from 35 states. Both SHA and the AHPA are petitioners in connection with the antidumping duty orders on Honey Imports from Argentina and China (A-357-812 and A-570-863), and the countervailing duty order on Honey Imports from Argentina (C-357-813).

- The Coalition for Fair Preserved Mushroom Trade ("FPMT Coalition");[4] and
- each association's respective members.

These organizations and their members are collectively referred to herein as the "Domestic Agricultural Producers." This letter is filed in response to the U.S. Commerce Department's request for comments on the applicability of the countervailing duty ("CVD") law to imports from the People's Republic of China ("China").[5]

The Domestic Agricultural Producers believe that the Department can and should apply the CVD law to imports from China. Clearly, China continues to provide its huge agricultural sector with enormous amounts of subsidies on an annual basis. For example, over one-third of the 78 subsidy programs listed by the Chinese Government in its WTO Subsidies Notification last spring are expressly designed to benefit China's agricultural producers.[6] If the Department continues its current policy of not applying the CVD law to imports from China, our country's agricultural producers will continue to have no protection against the Chinese government's injurious agricultural subsidies.

The Department clearly is *not* prohibited from applying the CVD law to imports from China by the Federal Circuit's 20-year-old Georgetown Steel decision. The court in that case

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[4] The FPMT Coalition's members are L.K. Bowman Company, a division of Hanover Foods Corporation; Mushroom Canning Company; and Monterey Mushrooms, Inc. The FPMT Coalition and its members are petitioners in connection with the antidumping duty orders on Certain Preserved Mushrooms from Chile, China, India and Indonesia (A-337-804, A-570-851, A-533-813, A-560-802).

[5] Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment, 71 Fed. Reg. 75,507 (December 15, 2006).

[6] See People's Republic of China – New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and article 25 of the SCM Agreement, G/SCM/N/123/CHN (Apr. 13, 2006) ("Subsidies Notification").

held that, considering the inherent ambiguity of the term "bounties or grants" – which was then was the focal point of the CVD law – the Department had the discretion to reasonably determine, as it had below, that the CVD law could not be applied to imports from so-called non-market-economy ("NME") countries (a term that then included, and still includes, China). Georgetown Steel Corp. v. United States, 801 F.2d 1308,1314, 1318 (Fed. Cir. 1986) ("Georgetown Steel").

The Department has not applied the CVD law to imports from any NME country since the Georgetown Steel decision. However, two important events have occurred since that decision that indicate that the Department now is *required* to apply the CVD law to imports from China.

First, in 1995 Congress amended the CVD law by replacing "bounties or grants" with "countervailable subsidy," a term which has the same unambiguous definition in both the CVD law and the WTO's Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), which codifies the definitions and standards that must be followed by all WTO Members' CVD laws.[7] By replacing in the U.S. CVD law the ambiguous term "bounties or grants" with the unambiguous term "countervailable subsidies," Congress eliminated most, if not all, of the Department's discretion to determine whether the CVD law may be applied to imports from NME countries.

Second, in joining the WTO in 2001, China expressly agreed that "imports of Chinese origin into a WTO Member" would be subject to that Member's CVD law (provided that the Member's CVD law were consistent with the SCM Agreement).[8] There is no reference in

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[7] SAA, 1994 U.S.C.C.A.N. at 4238.

[8] See Protocol on the Accession of the People's Republic of China, WT/L/432 at Annex 5A, at Part I, Sec. 15 (69-89) (Nov. 23, 2001) ("China's WTO Accession Protocol").

China's WTO Accession Protocol, the SCM Agreement, or elsewhere that suggests that China conditioned its agreement to be subject to CVD laws of fellow WTO Members on China's not being treated as an NME country under the relevant Member's antidumping law.

At the time Georgetown Steel was decided, the Department was concerned about its ability to appropriately detect and measure unfair subsidies in NME countries using the same analyses it then used in CVD investigations of market-economy countries. However, over the past 20 years, the Department has developed substantial expertise through the large volume of CVD investigations and reviews it has conducted in detecting and measuring many types of complex economic distortions similar to those presented by the provision of subsidies in NME countries. As a result, the Department is today much better equipped to resolve the subsidy detection-and-measurement problems presented by NME countries such as China.

Indeed, China's WTO Accession Protocol indicates that both China and the multitude of WTO Members who agreed to China's accession understood and intended that WTO Members would likely have to develop and use innovative analytical tools for detecting and measuring Chinese subsidies. That agreement states that if an importing WTO Member encounters "special difficulties" in applying one or more of the provisions of the SCM Agreement to imports from China, that Member

> may then use methodologies for identifying or measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks.[9]

In negotiating China's terms of accession to the WTO, the United States clearly bargained for and won the ability to use its CVD law to protect its entire range of industries from

[9] Id. at Part I, Sec. 15(b).

the injurious effects of unfairly subsidized imports from China. A decision now by the Department not to apply the CVD law against imports from China would essentially abandon this hard-won concession.

For the foregoing reasons, the Domestic Agricultural Producers respectfully request that the Department determine, in the context of the ongoing CVD investigation of Lined Paper from China, that it has the authority to apply the CVD law against imports from China.

Respectfully submitted,

MICHAEL J. COURSEY

Counsel to The Fresh Garlic Producers Association
The American Honey Producers Association
Sioux Honey Association
Coalition for Fair Preserved Mushroom Trade