

KING & SPALDING

1700 Pennsylvania Avenue, N.W.
Washington, DC 20006-4706
Fax: 202/626-3737
www.kslaw.com

December 10, 2007

HAND DELIVERY

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

PUBLIC DOCUMENT

**Re: Comments Regarding Antidumping Methodologies In Proceedings
Involving Certain Non-Market Economies: Market Oriented
Enterprise**

Dear Mr. Spooner:

These comments are being filed in response to the Department's second request for comments on its proposal to grant market-oriented status to individual companies, as opposed to industries, in non-market economy ("NME") antidumping proceedings.¹ *Antidumping Methodologies In Proceedings Involving Non-Market Economy Countries: Market-Oriented Enterprise; Request for Comment*, 72 Fed. Reg. 60649 (October 25, 2007) ("*Second Request For*

¹ The Department originally requested comments by November 26, 2007, but extended the deadline on November 20, 2007. The comment period was extended until December 10, 2007. See <http://ia.ita.doc.gov/ia-highlights-and-news.html>.

The Honorable David Spooner
December 10, 2007
Page 2

Comments”).² These comments are filed by King & Spalding LLP on behalf of the American Furniture Manufacturers Committee For Legal Trade, Appleton Papers, Inc., the John Maneely Company; New Page Corporation; the Polyethylene Retail Carrier Bag Committee; the Southern Tier Cement Committee; and US Magnesium LLC.

In its *Second Request For Comments*, the Department asked parties (1) to further consider whether there is a legal basis for a market-oriented enterprise (“MOE”) test, (2) to consider administrative feasibility in proposing how the Department could identify an MOE operating within a broader NME environment, (3) to consider to what extent, and under what conditions, the Department could rely on an MOE’s prices and costs, particularly for those inputs that are inextricably linked to the broader operating economic environment. *i.e.*, labor, land, and capital, and (4) to consider administrative feasibility in proposing the extent and conditions under which a finding of an MOE might be limited, *e.g.*, how appropriate and feasible it would be to consider using a respondent's own prices and costs within China in conjunction with certain surrogate prices and costs in the antidumping duty calculations. *Id.* at 60650.

As we discussed in our previous comments, the creation of a wholesale exception to the application of the non-market economy for an individual enterprise would contravene U.S. law and undermine the agreement negotiated at the WTO with respect to China’s accession. The granting of MOE status would weaken the trade laws to the detriment of U.S. domestic

² The Department previously requested comments on these issues on May 25, 2007. *Antidumping Methodologies In Proceedings Involving Non-Market Economy Countries: Market-Oriented Enterprise*, 72 Fed. Reg. 29302 (May 25, 2007) (“*First Request for Comments*”). Numerous parties, including the parties listed here, filed comments on June 25, 2007. See <http://ia.ita.doc.gov/download/nme-moe/nme-moe-cmt-20070625-index.html>.

industries. For the reasons explained below, the domestic industries and producers listed above oppose the Department's proposal to grant market-oriented enterprise status to individual companies within a non-market economy country.

I. THE DEPARTMENT DOES NOT HAVE LEGAL AUTHORITY TO DESIGNATE MARKET-ORIENTED ENTERPRISES

As we explained in our MOE comments on June 25, 2007, there is no basis under U.S. law or China's WTO accession protocol to support the Department's proposal to designate individual entities as market-oriented enterprises. In fact, such a proposal is contrary to the express statutory scheme enacted by Congress regarding non-market economies. No provision in the statute grants authority to the Department to accord market-oriented status to an individual enterprise within a country designated as a non-market economy under the statute. *See* 19 U.S.C. §§ 1677(18) and 1677b(c). The statutory language states that, if the exporting country is a non-market economy, "the valuation of the factors of production *shall* be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1) (emphasis added). The Congressional intent is clear that when the exporting country is designated a non-market economy country, the Department must use the non-market economy methodology. Where Congressional intent is clear on the issue in question, an agency may not "fill in the blanks." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 US 837, 843 (1984). The Department's regulations relating to the non-market economy methodology also do not permit the designation of individual enterprises as market-oriented. *See* 19 C.F.R. 351.408.

Moreover, the institution of a wholesale exception to non-market economy treatment for an individual enterprise undermines the agreement negotiated by the WTO Members with respect to China's accession protocol at the WTO, which permits China to be treated as a non-market economy for 15 years (or until 2014). *See Accession Of The People's Republic of China*, WT/L/432, 10 November 2001, at paras. 15(a) and (d) *available at* http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm. The protocol contemplates the abandonment of the non-market economy provisions when market economy conditions prevail in a particular "*industry or sector.*" *See id.* at paras. 15(a) and (d). There is no reference to Chinese "enterprises" in the relevant portion of the protocol. The granting of MOE status would undermine the position that the United States negotiated to account for the NME forces prevalent in China. These NME forces are still recognized as prevalent under U.S. law, under which China is still designated an NME and a market-oriented industry has never been found to exist.

Accordingly, consistent with China's accession agreement at the WTO and U.S. law, the United States should reject an exception to the application of the non-market economy provisions for market-oriented enterprises.

II. IT IS NOT ADMINISTRATIVELY FEASIBLE FOR THE DEPARTMENT TO IDENTIFY MARKET ORIENTED ENTERPRISES

Even assuming, *arguendo*, that the Department has the legal authority to grant MOE status in a trade remedy proceeding involving an NME country, it would not be administratively feasible to do so. For an entity to prove that it operates as an MOE within an industry and a macro-economy marked by non-market conditions, it would have to demonstrate that it sources all of its inputs (which are likely the same inputs used by other entities in the

industry) outside of the industry's normal supply chain and that it does use any inputs that are tied to the general economy, *e.g.*, land, labor, and energy, which are affected by non-market forces. Thus, for an entity in an NME country to provide sufficient evidence to demonstrate its complete independence and insulation from the non-market forces within the industry and the economy as a whole would require the submission of voluminous, detailed information, including information concerning every factor of production. In turn, the Department would be required to review and analyze all of the evidence concerning market-oriented status that is submitted by each entity, in addition to the economic structure and pricing behavior of the industry and economy as a whole. Such a process would be excessively time-consuming and would create an additional burden on scarce resources that are better used elsewhere, particularly in light of the tight statutory and regulatory deadlines under which the Department conducts its antidumping proceedings, and the increasing number of companies applying for separate-rate status.

The Department's resources already are over-extended. It simply does not have the time or resources to add a market-oriented enterprise analysis in the timeframe provided by the statute and regulations. The Department already must consider large amounts of information at the outset of antidumping proceedings in the form of quantity and value questionnaires, separate rate applications, product characteristic comments, scope comments, and comments on respondent selection.³ If the Department must analyze and determine whether each individual company that

³ In fact, the Department recently announced its intention to abandon its practice of collecting quantity and value data from potential respondents due to resource and time constraints. *See, e.g.*,

applies for MOE status actually qualifies as an MOE, the selection of mandatory respondents and every other aspect of the proceeding would be delayed. The Department also would then have to consider other issues, such as whether it must select a balanced group of mandatory respondents that includes MOEs and non-MOEs.

Moreover, as explained in our previous comments and in this submission, any application for MOE status by an entity would be futile. As the Department recently concluded in an 80-page memorandum, China's economy has not yet attained market-economy status for purposes of the U.S. antidumping law. *Certain Lined Paper from the People's Republic of China - China's Status As A Non-Market Economy ("NME")*, Memorandum from Office of Policy for David M. Spooner (Aug. 30, 2006). In particular, the Department stated that "market forces in China are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis." *Id.* at 4 ("*China's NME Status Memo*"). The Department cannot reconcile its recent, exhaustive analysis determining that the Chinese economy is still subject to pervasive non-market conditions that distort the production experience in China with a claim that an entity, operating in that environment, can remain untouched by such distortions. An entity operating in an economy and industry that is not subject to market conditions cannot be considered a market-oriented entity, because the non-market conditions within the industry and the economy as a whole inescapably affect the individual entities within. In the 15 years that the Department has employed a market-oriented industry ("MOI") test, it has

Lightweight Thermal Paper from the People's Republic of China, 72 Fed. Reg. 62430, 62435 (Nov. 5, 2007) (Notice of Initiation). The Department should not add a complex MOE analysis when it claims to have insufficient resources to maintain a more accurate respondent selection practice.

never determined that a Chinese industry is market-oriented. *First Request For Comments*, 72 Fed. Reg. at 29303. Thus, it is not credible to suggest that, although an industry is not market-oriented, an individual entity can be so isolated within that industry that it can be considered to be an MOE. Thus, the introduction of an MOE test would divert valuable resources for an analysis that can only result in a negative determination by the Department.

III. THE DEPARTMENT CANNOT RELY ON PRICES AND COSTS IN CHINA

The Department cannot rely on prices and costs in China, because it has been determined that the prices and costs are still affected by the non-market condition of the economy. The Department has stated that

prices and costs are central to the Department's dumping analysis and calculation of normal value. Therefore, the prices and costs that the Department uses must be meaningful measures of value. NME prices cannot be relied upon as meaningful measures of value because they do not, as a general rule, reflect the relative scarcity of resources used in production.

China's NME Status Memo. at 6. The Department also found in its analysis of the Chinese economy that the government, at all levels, remains "deeply entrenched in resource allocation" and, in particular, the allocation of financial resources. *China's NME Status Memo* at 77. The government's interference distorts financial resources, but it also distorts the allocation of other resources, *e.g.*, labor, material inputs, capital, and energy. *Id.* Moreover, as the Department correctly noted, certain factors of production that are used by virtually all manufacturers, *e.g.*, labor, land, capital, and energy, are indisputably "linked to the broader operating economic environment." *Request For Comments*, 72 Fed. Reg. at 29303. No Chinese company is

insulated from the pervasive non-market conditions that affect the prices and costs of material inputs in China.

For example, with respect to labor, the Department found that “there are a number of important institutional constraints on the extent to which market forces can act upon the formation of wages.” *China’s NME Status Memo.* at 22. In particular, the legal relationship between the government and trade unions “signals a significant reluctance on the part of the PRC government to allow the workers’ collective strength to come to bear on the negotiation of wages and working conditions. In addition, the restrictions on labor mobility serve to inhibit and guide workforce flows and seriously distort the supply side of the labor market.” *Id.* Furthermore, as the *Business Week* article attached to King & Spalding’s June 25, 2007 comments explains, many Chinese companies maintain multiple sets of books or falsify records relating to labor and wage issues.

The Department also noted that private land ownership is prohibited in China and that only land use rights can be owned by individuals and firms. *Id.* at 41 (citing to Article 9 of the *Constitution*). The Department found that

laws and regulations are regularly violated by individuals and local governments. While the private market for land-use rights has grown, SOEs own a significant amount of land-use rights that they received free of charge. Also, commercial land sales are often conducted illegally. In short, property rights remain poorly defined and weakly enforced.

Id. at 46. Furthermore, the Chinese government continues to provide land grants for free or at fractions of market value for companies eligible to locate in special economic zones. *See*

Laminated Woven Sacks from the People's Republic of China, 72 Fed. Reg. 67893, 67905 (Dec. 3, 2007).

Similarly, the Department found that the Chinese government determines electricity prices. The Department stated that “there is no direct correlation between electricity costs and prices; the latter are apparently determined as much by political and macroeconomic factors.” *China's NME Status Memo* at 50.

The Department also cannot use Chinese respondents' financial statements to calculate financial ratios. Although China has made reforms to Chinese GAAP in an attempt to bring it into conformity with international accounting standards, this reform is in transition (the new standards were only introduced in February 2006). The announcement of new standards does not necessarily translate into practice absent strict enforcement of the standards and an independent audit environment. As reported in a recent *Business Week* article (**attached** to King & Spalding's June 25, 2007 MOE comments), many Chinese companies maintain multiple books and records designed to evade audits. Thus, Chinese financial statements are not a reliable source for the calculation of financial ratios.

IV. IT IS NOT ADMINISTRATIVELY FEASIBLE TO USE AN ENTITY'S OWN PRICES AND COSTS IN CHINA IN CONJUNCTION WITH SURROGATE PRICES AND COSTS

As explained above, the Department cannot use prices and costs in China because they are affected by the non-market distortions still present in China's economy. Furthermore, an approach using prices and costs in China in conjunction with surrogate prices and costs is not permitted by the statute or regulations. In an NME antidumping proceeding, the statute and

regulations prescribe an NME methodology that permits the Department to use (1) surrogate prices and (2) market economy prices, if a respondent demonstrates that the input is purchased from a market economy supplier and paid for in a market economy currency. *See* 19 U.S.C. §§ 1677(a) (the methodology used in market economy cases) and 1677(b) (the methodology applicable to non-market economy cases); 19 C.F.R. § 351.408(c)(1). There is no legal basis for the approach suggested by the Department's question, *i.e.*, combining the non-market and market economy methodologies in the same proceeding.

Even if the Department could use prices and costs in China, however, it would not be administratively feasible. Such an approach would be highly burdensome and impracticably complex from an administrative perspective. It would require the Department to conduct an in-depth analysis of every factor of production (which can number into the hundreds depending on the subject merchandise).

Predictability is one of the Department's stated goals in administering the antidumping law and, specifically, the non-market economy provisions. *See Antidumping Duties; Countervailing Duties; Preamble To The Proposed Rule*, 61 Fed. Reg. 7308, 7344 (Feb. 27, 1996); *Lasko Metal Prods. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994); *Creatine Monohydrate From the People's Republic of China*, 64 Fed. Reg. 71104, 71106 (Dec. 20, 1999). The hybrid approach suggested by the Department would remove all predictability from, and increase uncertainty in, antidumping proceedings. Respondents and petitioners would be unable to predict what treatment respondents would receive or what methodology would be applied. For petition purposes, the dumping calculation would become even more complex if petitioners

The Honorable David Spooner
December 10, 2007
Page 11

were forced to guess which individual companies may be treated as market economy enterprises by the Department.

V. CONCLUSION

For the reasons explained above, the domestic industries and individual companies listed above that are represented by King & Spalding LLP oppose the Department's proposed market-oriented enterprise framework. Such a policy would be contrary to the statute. Furthermore, China's economy is still marked by pervasive non-market economy conditions. An individual enterprise operating in that economic environment cannot shield itself from the distortions, and prices and costs in China continue to be unreliable as a basis to calculate normal value.

Please contact us if you have any questions about this submission.

Respectfully submitted,



Joseph W. Dorn
Gilbert B. Kaplan
Stephen A. Jones

King & Spalding LLP

cc: Lawrence Norton