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The Hon. David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
14th Street & Pennsylvania Avenue, NW
Washington, DC 20230

Re: *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*

Dear Assistant Secretary Spooner:

On behalf of Ames True Temper, Inc. ("ATT"), a U.S. manufacturer of hand and gardening tools, I would like to respond to the Department's request for comments regarding whether and under what circumstances it should consider granting market-economy treatment to individual respondents in antidumping cases involving China.[1] The Department identified three particular issues for commenters to consider: (1) the Department's legal authority to create a market-oriented enterprise test, (2) the administrative feasibility of such a test, and (3) to what extent the Department can rely on non-market economy costs and prices in calculating the dumping margin for individual entities in non-market economies. ATT's experience as a domestic interested party in the antidumping duty order on heavy forged hand tools from China leads it to vigorously oppose any attempt to create a market-oriented enterprise test would be ill-advised.

ATT has experience with the Chinese market through its participation in the yearly reviews of the antidumping duty order on heavy forged hand tools from China. That order, now in its sixteenth year, has featured consistently high margins for a variety of Chinese manufacturers – nearing 200% in some years. Despite these high margins, ATT must go head-

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[1] *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 60,649 (Dep't Commerce Oct. 25, 2007) (request for comments).

to-head with the distorted prices of these manufacturers in seeking to obtain business from large U.S. retailers such as Lowe's, Home Depot, and Wal-Mart. Even with the orders in effect, Chinese hand tool companies compete easily in the U.S. market, due to the many benefits they receive from operating in China's command economy. For example, they are able to purchase their inputs – from steel to labor – at abnormally low costs, and benefit from China's refusal to float its currency. If Chinese hand tool producers were able to apply for market-oriented status, it is ATT's belief that all of the producers active in the hand tools orders would apply. Not only would this be unfair to ATT and other U.S. hand tools producers, it would place heavy burdens on the Department, increasing the cost and complexity of all trade cases.

As such, ATT opposes any plan to extend market treatment to individual Chinese producers. As discussed below, China's economy renders any such plan irrational. Moreover, such a test is contrary to law, would not be administratively workable, and would be futile due to economy-wide distortions created by governmental control over land, labor, and capital. Accordingly, the Department should not institute a "market oriented" enterprise test.

I. THE CHINESE ECONOMY DOES NOT PERMIT THE RATIONAL APPLICATION OF A TEST FOR MARKET ORIENTED ENTERPRISES

China's economy is not sufficiently marked-based for any market-based companies to exist there. Not until China auctions off its state-controlled means of production, and frees land, labor, and capital from government control, will there be any "market-oriented" enterprises in that country. As the Department itself has recognized, "the {Chinese government} still reserves for itself considerable levers of control over the economy and its direction."[2]

Many companies in China are owned outright by the government, or are subject governmental control. Even those companies that have no government ownership are affected by significant, economy-wide distortions caused by governmental interference and control in the economy at large. For example, such companies must rely on non-market inputs and non-market output prices. This, along with the distorting influence of government ownership and control over capital, land, and labor would render the company's information completely unsuitable for calculating a dumping margin.

Nor is China likely to resolve these issues quickly. In fact, the U.S.-China Economic and Security Review Commission has concluded that China's efforts to liberalize its economy are slackening, rather than increasing.[3] While the country has made some limited market reforms, the Chinese government appears poised to retrench from even those limited reforms that it has undertaken. In circumstance such as these, not only would a market-oriented economy test be unsuitable at this time, it appears unlikely that such a test could be rationally applied any time in the foreseeable future.

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[2] Memorandum from Shauna Lee-Alaia et al., Office of Policy, Import Administration, to David M. Spooner, Assistant Sec'y, Import Administration, re: *Anti-Dumping Investigation of Certain Lined Paper Products from the People's Republic of China ("China") – China's status as a non-market economy ("NME")* at 5 (Aug. 30, 2006) ("Lined Paper NME Memo").

[3] U.S.-China Economic and Security Review Commission, 2007 Annual Report to Congress , Introduction at 2 (November 19, 2007) ("USCESRV Report").

A. The Chinese Government Owns the Country's Key Enterprises

Government ownership of individual companies and industries is pervasive throughout China. Through its five year plans, the Chinese government has recently recommitted itself to maintaining heavy ownership and control over "core" industries. As a result, dozens of industries are under direct government ownership.[4] ATT itself has, during the course of numerous antidumping duty administrative reviews covering heavy forged hand tools from China, seen the deleterious effects of such ownership and control on Chinese company autonomy. The fact that the Chinese government, at all levels, can direct companies and industries to act in ways that maximize tax revenue or employment, rather than further market aims, provides an almost insurmountable hurdle to the application of a market oriented enterprise test.

B. The Chinese Government Exercises Control Over Domestic Enterprises

The Chinese government does not own the means of production passively. Rather, it exercises overt control over those enterprises in which it holds a stake, and exercises significant amount control even over those enterprises not subject to state ownership. This level of control essentially precludes the rational application of a market-oriented enterprise test to individual Chinese companies.

1. The Chinese Government Controls Industrial Development Through Five-Year Plans

Industrial policy in China is governed by "Five-Year Plans," issued by the Central Committee of the Communist Party of China. These plans set forth which industries, enterprises, and products should be targeted for preferential government support. According to the Chinese

4 Lined Paper NME Memo at 38; USCESRV Report (Executive Summary) at 2.

government, Five-Year Plans aim to "arrange national key construction projects, manage the distribution of productive forces and individual sector's contributions to the national economy, map the direction of future development, and set targets."[5] In December of 2006, the Chinese government explicitly identified seven strategic industries designated for absolute state control and five heavyweight industries targeted for extensive state involvement.[6] As a result of this web of government direction, China's domestic producers operate in an environment where basic market forces—supply, demand, and comparative advantage—do not exist or apply.

2. Chinese Government Officials Often Act as Senior Officers and Directors of Chinese Companies

The Chinese government also exercises influence and control over domestic companies and industries by installing party members or other government officials as senior officers and directors of Chinese companies. For state-owned enterprises in particular, the Communist Party appoints the majority of the managers,[7] and the State-owned Asset Supervision and Administration Committee ("SASAC") appoints the chairman and vice-chairman from among the state-owned enterprises' boards.[8] This ensures that the Chinese government will have effective control over the individual companies through direct participation in company management.

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5 *See* What is the Five Year Plan, *available at* http://www.china.org.cn/english/MATERIAL/ 157595.htm.

6 USCESRV Report (Executive Summary) at 3.

7 Lined Paper NME Memo at 38-39.

8 *Id.* at 37.

3. The Chinese Government Influences Company Decision-Making Through an Extraordinary Range of Subsidies

Further, application of an extraordinary range of subsidies essentially eliminates an individual company's ability to make decisions regarding price, output, sales, and investment in response to market signals. These subsidies are used as (1) vehicles to carry out government policy, (2) equity infusion and/or debt-to-equity swaps, (3) land-use discounts, (4) incentives for government-mandated mergers and transfers of ownership, (5) tax incentives, and (6) direct cash grants. The Chinese government has lavished subsidies on numerous domestic industries, including textiles, petrochemical, high technologies, forestry and paper products, steel, auto parts, machinery, and copper and other non-ferrous metals.[9] The world trading system is based on the principle that trade must be governed by market forces, not government fiat. The Chinese government, however, has spurned this notion by consciously funneling resources to particular industries and enmeshing itself in the economy as a whole.

C. <u>Chinese Government Control Over Capital, Land, and Labor Distorts the Entire Economy</u>

Above and beyond governmental ownership control over individual manufacturing industries, governmental control over capital, land, and labor serve to render the entire economy's factors of production unrepresentative of their true value. With regard to capital, the government's control over banking and finance permit it to offer subsidized loans and loan forgiveness to favored companies in a manner that does not reflect market principles. Similarly, the government is able to enforce currency controls that distort monetary transactions throughout

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9 United States Trade Representative, *2006 National Trade Estimate Report on Foreign Trade Barriers* 120 (Mar. 2006).

the entire economy. With respect to land, the government's ownership of all land throughout the country permits it to offer land and buildings at no cost to favored businesses and industries, while simultaneously restricting the free and efficient movement of business. Finally, all labor in China is subject to government control, leaving China with no real labor market, and severely restricting the rights of both workers and employers to freely and efficiently enter into labor contracts. This permits the government to further subsidize favored industries and businesses while depriving others of access to needed resources.

As a result of significant economy-wide distortions in the Chinese markets for capital, land, and labor, there cannot be a "market-oriented" enterprise in China. The Department's own recent analysis of China's economy confirms this.[10] As the Department has found, the Chinese government has control over (1) currency rates, (2) resource allocation, and (3) labor costs, along with the means of production. China also faces institutional weaknesses regarding property rights, bankruptcy, and the rule of law that further distort costs and prices for all businesses participating in the Chinese economy.

D. <u>China is Not Accelerating Market Reforms</u>

The Chinese economy presently lacks indicia of market pressures. Large sectors of the economy are owned and controlled by the government, and government ownership and control over capital, land, and labor affect every company operating in China. Nor is this changing. While China has made limited attempts at market reform, it has not done so quickly, and appears to be retrenching from even those limited reforms that it has made. Rather, as the U.S.-China

10 *See generally* Lined Paper NME Memo.

Economic and Security Review Commission has concluded, "China is unwilling to embrace market-oriented mechanisms, because it maintains a preference for authoritarian controls over its economy."[11] Further, the Chinese government has expressed great hesitancy over those reforms that it had enacted, and has only made reforms under pressure from other players in the global economy.[12]

In fact, the central government has recently recommitted itself to continued ownership and control over "pillar" industries.[13] Over 150 of China's largest companies, including nearly all large banking institutions, remain squarely under the control of the government.[14] China continues to grant extensive subsidies to such countries, as well as granting export rebates, tax holidays, and lax enforcement of environmental regulations for favorite industries and enterprises.[15] Finally, the government continues to refuse to permit its currency to fluctuate in accordance with market principles.[16]

The Department has found that the government of China controls the course of the entire Chinese economic environment.[17] No company in China is free of the effects of this control. Until China engages in significant and meaningful economic reforms – including auctioning of

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11 USCESRV Report (Executive Summary) at 2.

12 *Id.*

13 *Id.* (Introduction) at 2.

14 *Id.*

15 *Id.* at 1-2.

16 *Id.* at 3.

17 Lined Paper NME Memo at 4.

state assets, floating its currency, ending pervasive subsidization, and establishing free and open markets for labor and land– no "market-oriented" enterprise test can be worth the Department's time and attention.

China appears unlikely to engage in meaningful market liberalization any time in the foreseeable future. Until it does so, the government's stringent control of China's economy will render the Department unable to find a "market-oriented" Chinese enterprise, just as the Department has been unable to find a "market-oriented" Chinese industry at any time in the past. Further, as explained below, such a "market-oriented" enterprise test would be contrary to the Tariff Act, would be administratively unworkable, and would be of dubious utility, given the non-market nature of China's economy.

II. THERE IS NO AUTHORITY FOR A MARKET-ORIENTED ENTERPRISE TEST, SUCH A TEST WOULD BE UNWORKABLE, AND SUCH A TEST WOULD BE OF DUBIOUS USEFULNESS GIVEN CHINA'S ECONOMY

In its October 25, 2007 request for comments, the Department asked commenters to focus address three issues. First, the Department asked commenters to address the legal authority for a market-oriented enterprise test. Second, the Department asked commenters to consider whether such a test would be administratively feasible. Third and finally, the Department asked commenters to discuss the extent to which the Department can rely on non-market economy costs and prices in calculating the dumping margin for individual entities in non-market economies. ATT comments in detail on these issues below, and submits that careful consideration of each issue demonstrates that a market-oriented enterprise test is ill-advised.

A. U.S. Law Does Not Permit a "Market-Oriented" Analysis of Individual Chinese Companies

The Department's proposal to grant market status to individual Chinese companies is contradicted by the plain language of the 19 U.S.C. § 1677b, as well as by Tariff Act of 1930's overarching command that the Department calculate the most accurate dumping margins possible. First, 19 U.S.C. § 1677b clearly lays out the methodologies that the Department must use to calculate individual margins in a non-market economy, and does not permit the use of market economy methodologies for individual non-market economy respondents. Second, given the economy-wide cost and price distortions present in China, the Department cannot hope to calculate accurate dumping margins based on the costs and prices incurred by individual Chinese producers.

1. Title 19 U.S.C. § 1677b Does Not Permit a Market-Oriented Enterprise Analysis

Title 19 U.S.C. § 1677b sets forth the permissible methods of calculating normal value in antidumping investigations. Subsection (c) of the provision discusses, in particular, the calculation methods appropriate with respect to respondents in non-market economy countries. The law, as written, focuses on a methodology that changes only with the market or non-market nature of each country, and not on the nature of a company or individual respondent. There is nothing in the statute to suggest that the Department is permitted to indulge in a respondent-by-respondent analysis of market orientation.

In fact, Congress, in drafting the Tariff Act, recognized that such a course of action would be futile. The statute's very definition of "non-market economy country" reflects the fact

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that all sales within such a country are tainted, such that an accurate normal value cannot be calculated on the same basis as in a market economy country:

> The term "non-market economy country" means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structure, so that sales of merchandise in such country do not reflect the fair value of the merchandise.[18]

As the language indicates, once the Department has determined that a country is a non-market economy country, then all sales of merchandise in that country are tainted. A respondent-specific market-oriented enterprise analysis would therefore be useless; all sales in a non-market economy are tainted by the general character of the economy, and the individual purchaser/seller in such an economy cannot change this.

2. A Market-Oriented Enterprise Analysis Would Not Comport with the Department's Mandate to Calculate the Most Accurate Margins Possible

As both the courts and the Department itself have explained on numerous occasions, the overarching purpose of the Tariff Act requires the Department to calculate antidumping margins as accurately as possible.[19] Such accuracy cannot possibly be achieved by application of a market-oriented enterprise test. As the statutory definition of "non-market economy country" makes clear, in such a country, the costs and prices of individual producers are affected by the entire economy's general lack of market values. Even if a producer in a non-market economy purchased all its raw materials from a market economy, and only sold its production in export

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18 19 U.S.C. § 1677(18) (emphasis added).

19 *See, e.g., Lasko Metal Products v. United States*, 43 F.3d 1442, 1446 ("The Act sets forth procedures in an effort to determine margins 'as accurately as possible.'"); Issues and Decision Memorandum accompanying *Glycine from the People's Republic of China*, 72 Fed. Reg. 58,809 (Dep't Commerce Oct 17, 2007) (final results of antidumping duty administrative review and rescission, in part) at cmt 3.

sales to market economies, the lack of market forces with respect to labor, land, financial institutions, and capital in general would render that company's costs and prices unusable. Simply put, there is no way to accurately calculate dumping margins for a non-market economy producer using market-economy methodologies. The only rational and consistent way to ensure accuracy in the calculation is by resort to the statutorily mandated procedures for non-market economy dumping calculations.

B. A Market-Oriented Enterprise Test is Not Administratively Feasible

In response to its May request for comments on a market-oriented enterprise analysis, the Department received a number of comments from entities in favor of such a test. To the extent that such commenters furnished proposals for such a test, these proposals fell into two camps. First, a number of commenters proposed that the Department create a rebuttable presumption that all enterprises in China are market-oriented, and require U.S. industry participants to furnish the Department with information rebutting that presumption. Such a "test," if it can even be designated as such, would be completely indistinguishable from granting China market economy status as a whole. The Department has already clearly stated that it does not intend to do this; indeed, China's protocols of accession to the WTO do not envision even the possibility of market-economy status until 2014. It is clear, therefore, that a "test" based on a rebuttal presumption of market orientation is out of the question.

Other commenters in favor of a market-oriented enterprise analysis provided frameworks for tests based on modified versions of the Department's market-oriented industry and/or separate rates tests. However, each of these multi-factor tests would require the Department to invest significant resources in investigating factors of production, indicia of government control, and accuracy and independence of financial reports for what are likely to be multitudes of applicants in every antidumping duty proceeding. The International Trade Administration simply cannot, with the budget, staff, and other resources currently at its disposal, handle such an enormous additional burden. The ITA already has been forced to significantly narrow the number of respondents in administrative reviews and to decline to conduct verifications.

In short, it would be nearly impossible to fashion a market-oriented enterprise test that was streamlined enough so as not to consume significant Departmental resources, and yet expansive and encompassing enough to represent a test that was politically viable and would pass judicial scrutiny. Any market-oriented enterprise test that represented a real attempt to come to grips with the degree to which a particular Chinese company was affected by market, rather than non-market forces, would necessarily be complex and difficult to administer. Compound this by the sheer number of Chinese companies likely to apply for such treatment, and you have all the makings of an administrative nightmare.

C. <u>A Market-Oriented Enterprise Test Would Be of Dubious Utility</u>

Since instituting the "market oriented industry" concept at the time of China's accession to the WTO, the Department has been unable to find a Chinese industry that meets the test's criteria. Given that no market-oriented industries exist within China, it is highly unlikely that any individual company operating within the industry could operate on market principles. Simply stated, no individual producer can function as an island. It must obtain inputs, and it must sell its product. If neither its suppliers nor its home-market purchasers are operating under market forces, the producer's costs and prices will fail to reflect fair value. Even if such a producer purchased all raw materials from a foreign, market economy source, and only sold for export to market economy purchasers, that company would be too enmeshed in the overall Chinese economy to be validly considered market-oriented. The company's access to and use of labor, land, electricity, water, and capital and financial services would all be controlled by the government.

In its October 25, 2007 request for comments, the Department asked specifically that commenters discuss the Department's ability to use individual company information for those inputs that are not "inextricably linked to the broader operating economic environment, *i.e.*, labor, land and capital." In essence, it appears that the Department is suggesting a hybrid approach in which a respondent's own inputs are used for those inputs that are market-based, while surrogates are retained for all non-market inputs. ATT believes that this "hybrid" approach is not permitted by the statute, would be administratively unworkable, and is of doubtful utility given the Chinese government's control over finance and capital in China.

First, as described above, the Tariff Act provides a methodology for calculating margins in a market economy, and a methodology for calculating margins in a non-market economy. It does not condone or permit the Department to either adopt a company-by-company analysis, or to use the market-economy methodology with regard to enterprises located in non-market economies. It certainly does not provide the Department with discretion to "mix-and-match" market and non-market methodologies. Any attempt to do so would violate the scheme laid out by the statute.

Second, the Department could not use such a "mix-and-match" strategy without analyzing, on a producer-by-producer basis, which inputs were market based and which were not. It is insufficient to simply declare certain inputs to be "inextricably linked to the broader operating environment," while declaring all other inputs to *not* be so inextricably linked. The Department would, in fact, have to analyze all factors of an individual producer's production, and determine which inputs were market based and which were not. Given the number of Chinese companies who would likely attempt to take advantage of any market-oriented enterprise test, this would quickly swamp the Department's resources. It would be impossible, given the International Trade Administration's personnel and budget, to fairly, thoroughly, and consistently engage in this kind of investigation and analysis.

Third, and perhaps most importantly, *all factors* in a non-market economy are enmeshed due to government influence and control over capital and finance. This is particularly true in the case of China. The central government retains tight controls over foreign exchange and over the banking and financial sectors in China. As a result, no transactions involving the change of currency in China – and thus no transactions whatsoever – are free of the distorting influence of a governmentally controlled economy. Even if a Chinese company were to purchase certain inputs from a market economy source, the prices for these goods would be distorted by the Chinese government's control over the flow of capital. Even were the Department to attempt to determine exactly which inputs of every applicant were "market-based" and which were not, it would not be possible to entirely remove the distortions caused by an applicant's mere presence in a non-market economy.

III. <u>CONCLUSION</u>

The Department should not institute a "market-oriented enterprise" analysis of individual companies in non-market economies. The level of government control over China's economy as a whole means that no "market-oriented" enterprise can exist in China. The Tariff Act of 1930

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does not permit the Department to analyze individual companies in a non-market economy using either a market methodology or a hybrid methodology that pulls from elements of both the market economy and non-market economy dumping methodologies. A "market-oriented enterprise" test would require a significant outlay of time and resources that the Department does not have. Even if such a test were permissible and easy to apply, the test would be of limited utility, because of economy-wide distortions created by governmental control over land, labor, and capital.

On behalf of ATT, I therefore advise the Department to decline to institute and administer a "market-oriented enterprise" analysis for non-market economy producers.

Sincerely,

Duane R Greenly

Duane R. Greenly

President, Ames True Temper – U.S.