



WILLIAMS MULLEN

Direct Dial: 202.2983.8123  
jcannon@williamsmullen.com

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The Honorable David Spooner  
Assistant Secretary for Import Administration  
U.S. Department of Commerce  
14<sup>th</sup> Street & Constitution Avenue, NW  
Washington, DC 20230

Dear Mr. Spooner:

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

On behalf of ICL Performance Products, LP and Innophos, Inc., and in response to the Department of Commerce's request,<sup>1</sup> we herein comment "...on the conditions under which the Department might grant market-economy treatment to individual Chinese respondents, and, if so, how this might affect...antidumping duty calculations for such enterprises." ICL and Innophos previously commented on June 25, 2007, concerning "Market-Oriented Enterprises," or "MOEs." The second invitation to comment identifies three issues for comment, as follows: (1) "whether there is a legal basis for a MOE test;" (2) whether it is "administrative{ly} feasib{le}" to "identify an MOE operating within a broader NME environment;" and (3) "to what extent, and under what conditions... should {the Department} rely on an MOE's prices and costs,

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<sup>1</sup> Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 Fed. Reg. at 60,650 (October 25, 2007).

*A Professional Corporation*

particularly for those inputs that are inextricably linked to the broader operating economic environment.”<sup>2</sup>

1. There Is No Legal Basis for an MOE Test

The June 25 comments of ICL and Innophos addressed the first issue at length. To summarize, the antidumping statute and the Department’s regulations do not authorize market-oriented treatment of individual Chinese respondents in antidumping duty proceedings. Section 771(18)(A) of the Tariff Act of 1930 defines a “nonmarket economy” (NME) country, not an NME industry or enterprise.<sup>3</sup> The rationale for Commerce past practice is that the market itself is distorted by government control of the factors of production. The China Accession Agreement indicates that a market-oriented “industry or sector” might be excluded from the NME provision.<sup>4</sup> The Accession Agreement does not contemplate that an individual enterprise could be treated as if it were market-oriented.

In each case, the law incorporates fundamental principals of market economics. Whether prices are market-based is determined by examining supply and demand conditions in the market—not by examining the individual experience of a single enterprise in the market. State differently, the law does not provide for the separate

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<sup>2</sup> 72 Fed. Reg. at 60,650.

<sup>3</sup> 19 U.S.C. § 1677(18)(A).

<sup>4</sup> World Trade Organization, Accession of the People’s Republic of China, Decision of 10 November 2001, WT/L/432, at 8-9 (2001), available at <[http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm)>, (“Accession Agreement”).

identification of a market-oriented enterprise because such an enterprise is only meaningful in the context of a free market. In short, the statute and Accession Agreement focus on the market (or country) itself and not the individual enterprise because an examination of a single enterprise will not reveal whether prices are set by free-market forces or not. For the same reason, as explained below, simply asking individual Chinese enterprises to describe their own operations will not allow the Department to determine whether prices or costs are established by market forces.

2. Is It Administratively Feasible to Identify MOEs?

Notwithstanding the statute and prior precedent, the invitation to comment states that Commerce “agrees that to the extent that market-based prices exist in China that might be useable in the AD calculation, it would be appropriate to find a way to identify them through an MOE test.”<sup>5</sup> The crux of the problem is not whether market-based prices to exist, but whether it possible to identify such prices. More specifically, is it possible to analyze whether market-based price exist from the books and records of individual enterprises in the market? An MOE test must be sufficiently rigorous to determine whether supply and demand forces operate freely, not merely whether a given enterprise is independently able to set prices or the volume of its output.

It is important to recognize that an individual company may be free to establish its own prices and desired output, yet operate in a non-market economy in which overall prices are not market-based. For example, government policy or state-owned enterprises

may distort the supply of subject merchandise within the home market with the result that prices are either higher or lower than market-based prices. Knowing that a single producer is freely able to sell into that market does not establish that the prices at which it sells are free-market prices. Likewise, if government policies or state-owned enterprises distort the demand side of the equation, price levels are not market-based. Whether caused by a Five Year Plan, differential VAT taxes, the policies of a state-owned enterprise, or other government policy, if demand is increased or decreased through state action, prices in the market for the subject merchandise are not free-market prices. Indeed, even if a U.S. or other market-economy company is permitted to export products to China, the fact that the U.S. company is not state-controlled does not mean that its export prices are market-based prices.

It follows that Commerce cannot determine whether sales prices are market-based by examining only the seller; Commerce must examine the market for the subject merchandise.

For this reason, it is incorrect to draw a simple analogy between the issues addressed in Section A of the questionnaire or in the market-oriented industry (MOI) test.<sup>6</sup> In practical terms, Section A of the questionnaire would have to be expanded to address whether home market prices are set in a free market for the subject merchandise.

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<sup>5</sup> 72 Fed. Reg. at 60,650 (emphasis added).

<sup>6</sup> Several commentators rely upon analogies to the separate-rates test or the MOI test, proposing to add a few criteria that might be addressed by an individual company. *See, e.g.*, Comments of Chutex Group at 6-8.

Such an inquiry would encompass the structure of the home market, the number of suppliers, whether such suppliers are themselves MOEs, whether price levels are de facto or de jure established by the Chinese government or a state-owned or state-controlled enterprise, and other macroeconomic conditions that impact the market. Similarly, it would be necessary to examine whether government policies distort demand in the domestic market.

In this respect, the majority of the proposals to create an MOE test are inadequate because the proposed MOE tests would not lead to the collection of adequate information for the task at hand. For example, Chutex Group identifies four criteria.<sup>7</sup> Yet, the proposed criteria only reveal information about the operations of a particular company that participates in the market (e.g., degree of independence, accounting principles, depreciation and payment practices, ability to set wages). Knowing all of these facts about a given enterprise does not establish whether the prices charged by that enterprise reflect free-market prices.

Even worse is the suggestion that by showing that a single seller is independent, a rebuttal presumption should be established treating the company as a MOE.<sup>8</sup> To the contrary and given the repeated determinations that China is an NME for purposes of the antidumping law, Commerce would need to establish a presumption that the NME

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<sup>7</sup> Comments of Chutex Group at 7-8 (June 25, 2007).

<sup>8</sup> Comments of Baosteel at (June 25, 2007).

methodology would be applied.<sup>9</sup> In *Coated Free Sheet Paper*, Commerce found that “it would not be appropriate to presume that firms’ business decisions and domestic prices and costs are not distorted by government inference, given the Department’s extensive recent documentation of this interference in the August 30th Memorandum.”<sup>10</sup> Chinese producers must bear the burden to submit adequate information to show that the domestic market for the subject merchandise is in fact a free market (in terms of supply and demand). It is manifestly unfair to expect domestic interested parties that may not even participate in the Chinese market to have access to evidence in China concerning supply and demand conditions in a specific market.

Similarly, the June 25 Comments by CITAC suggest that Commerce could make a determination of market-orientation based on one or a few responses by the mandatory respondents. Ignored by CITAC, however, is the fact that Commerce selects major exporters to the United States as “mandatory” respondents. Within the home market (or third-country markets), however, there may be other (far larger) sellers whose sales have a far more substantial impact on supply conditions in the Chinese market and, therefore, home market prices. In fact, the major state-owned enterprise in China typically refuse to

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<sup>9</sup> Currently, for example, it is presumed that every Chinese respondent is state-controlled. To obtain a separate antidumping rate, therefore, each respondent must establish that it is de jure and de facto independent by reference to the ability to control decisions regarding investment, output and pricing. *See, e.g., Coated Free Sheet Paper from the People’s Republic of China*, 72 Fed. Reg. 30,758 (June 4, 2007) (Prelim. LTFV Deter.).

<sup>10</sup> *Coated Free Sheet Paper from the People’s Republic of China*, 72 Fed. Reg. 60,632 (October 25, 2007), Issues and Decision Memorandum, Comment 1 (October 17, 2007) (emphasis added).

respond to the Commerce questionnaires because they are unable to establish that they qualify for a separate rate. Hence, in many cases, the seller with the greatest impact on the domestic market do not participate in the investigation. Also, as noted above, an adequate analysis of the market requires evidence concerning both supply and demand.

In short, determining that Chinese price levels are set by a market would require an investigation with a substantially greater scope than is currently undertaken. Without obtaining responses from every Chinese producer, and without any leverage over producers that do not export to the United States, Commerce cannot build an administrative record sufficient to establish that a given product market is somehow insulated from the pervasive effects of state-control. Indeed, to determine whether demand for the subject merchandise is distorted, Commerce would need to collect evidence from and concerning customers in China.

In addition, following a determination that prices for the subject merchandise were set by market forces, Commerce must then implement Section 773 (b)(1). That is, sales at less than the cost of production must be disregarded.<sup>11</sup> It follows, therefore, that Commerce would have to separately collect cost of production information. Yet, the price of every raw material, energy input or other factor of production would have to be tested to determine if the producer's costs are market-based. Before Commerce could rely upon such cost data, it would need to collect evidence showing that both the supply

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<sup>11</sup> It is beyond the scope of these comments whether domestic interested parties should be required to allege below-cost sales. Suffice it to note that such a requirement

and demand conditions in the market were free from state control. Such evidence would require verification. In sum, the exercise would multiply the number of product markets to be examined and the number of producers and consumers involved in submitting information.

Finally, to complete the investigation within the statutory time limits, Commerce also would very likely need to obtain factors of production data and surrogate value data so that the normal NME methodology could be used in the event that the MOE test was not satisfied. Thus, conducting an MOE test with respect to prices and costs would not reduce any of the existing burdens of reporting, analyzing submissions or verifying data. In effect, an MOE test would greatly expand the nature and scope of the information collected and compiled during an investigation.

3. Should Commerce Rely Upon MOE Prices and Costs that Are Linked to the Broader Economic Environment?

Apart from the foregoing considerations, Commerce asks generally whether it is ever appropriate to rely upon actual Chinese costs for labor, land, and capital. If not, the request for comments then asks whether normal value might be based upon some mixture of actual Chinese costs and surrogate costs. First, Commerce recognizes that the supply and demand of labor, land and capital in China are “inextricably linked” to the broader economy.<sup>12</sup> Pursuant to Section 771(18)(B), Commerce analyzes various factors to

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would be inconsistent with the (rebuttable) presumption that any producer operating in an NME is state-controlled, until and unless it establishes independence.

<sup>12</sup> 72 Fed. Reg. at 60,650.



determine whether China is an NME. Having determined that China continues to be an NME, Commerce cannot at the same time find that these factors of production are market-based.

Second, in the course of determining that China continues to be an NME, Commerce has already concluded “there are still important restrictions on workers’ freedom of movement, as well as on bargaining between labor and management.”<sup>13</sup> As such, actual labor costs in China do not reflect market-based values. Similarly, Commerce found that state-owned enterprises (“SOEs”) play a leading role throughout the economy, the banking system does not operate in a genuinely open market, and the government continues to preserve its ability to direct the economy. These conclusions indicate that China controls the financial markets, the means of production, the allocation of resources to particular sectors and industries, and, consequently, the risk anticipated by investors. Given state control of these factors, capital costs in China are not market-based but are distorted by government policies and practices.<sup>14</sup>

Third, the suggestion that Commerce might mix surrogate values for labor and capital with actual Chinese costs for raw materials, energy or other inputs would create a normal value that is a hodge-podge of unrelated factor values. Labor and capital costs in a market economy are inevitably impacted by the costs of raw materials and energy and vice versa. The statute requires the selection of a surrogate country that is both a

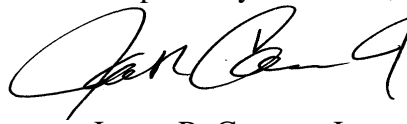
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<sup>13</sup> *Coated Free Sheet Paper, supra*, Issues and Decision Memorandum, Comment 1 (October 17, 2007).

<sup>14</sup> *See* 19 U.S.C. § 1677(18)(B).

comparable economy and a producer of comparable products.<sup>15</sup> The fact that production of comparable products exists at all in a particular surrogate country reflects the overall cost structure of companies in that surrogate country. Logically, then, Commerce will calculate an overhead rate (including depreciation) based upon data from surrogate producers. That rate is calculated as a percentage of raw materials, labor and energy costs. The ratio therefore depends not only on the level of overhead costs, but also on the level of material, labor and energy costs. If actual Chinese costs for materials, labor and energy are substituted, the surrogate overhead rate is divorced from its context in a particular market. Mixing surrogate and actual values is essentially arbitrary not accurate. For this reason, Commerce should not resort to a blend of actual Chinese values and surrogate values.

Respectfully submitted,



James R. Cannon, Jr.  
WILLIAMS MULLEN

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<sup>15</sup> 19 U.S.C. § 1677b(c)(4).