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## VIA HAND DELIVERY

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

**Re: Response to Request for Comments Concerning Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise**

Dear Mr. Spooner:

On behalf of Baosteel Group Corporation, Baoshan Iron & Steel Co., Ltd. and Baosteel America Inc. (Collectively "Baosteel"), this submission responds to the request for public comments by the Department of Commerce ("the Department") on whether the Department should consider granting market-economy treatment to individual respondents in antidumping proceedings involving China, the conditions under which individual firms should be granted market-economy treatment, and how such treatment might affect the Department's calculation for such qualifying respondents. *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29,302 (May 25, 2007) ("Request for Comments").

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\*Strategic Alliance  
Tokyo Office/Strategic Alliance

**I. The Department Should Grant Market Economy Treatment to Individual Respondents Under Appropriate Conditions.**

In the recent preliminary countervailing duty determination of *Coated Free Sheet Paper from China*, the Department determined that the significant evolution of China's economy leads to the conclusion that the U.S. countervailing duty law can be applied to China.<sup>1</sup> Following that decision, the Department has recognized that the same evolution of China's economy, together with the features and characteristics of China's present day economy, including a growing private sector, warrant a modification of the Department's current NME antidumping policy and practice with regard to China and, in particular, the conditions under which the Department might grant an individual respondent in China market-economy treatment in some or all aspects.<sup>2</sup>

Baosteel wholly supports the Department's initiative and submits that a development of a "market-oriented enterprise" analysis is long overdue. If the Department continues to apply CVD law to China based on the recognition of prevailing market conditions for an individual respondent, the Department must examine whether the same market conditions permit the calculation of normal value of the subject merchandise based on market economy methodology.

As the Department requested, Baosteel's comments are focused on the conditions and factors that would guide the Department's assessment of the market-orientation of individual respondents, addressing the following issues: (1) how a market-oriented enterprise should be identified; (2) to what extent the Department should rely on a market-oriented enterprise's

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<sup>1</sup> *Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 17,484 (April 9, 2007).

<sup>2</sup> See Request for Comments at 29,303.

prices and costs; and (3) to what extent, if any, a finding of a market-oriented enterprise might be limited and how a respondent's prices and costs within China could be utilized together with certain surrogate prices and costs in our antidumping duty calculations.<sup>3</sup>

## **II. The Separate Rate Analysis Can Be Applied to Determine a Market-Oriented Enterprise.**

As an initial matter, Baosteel submits that the Department's existing MOI test is not appropriate in the context of determining a market-oriented enterprise ("MOE"). As the Department recognized in the Request for Comments, the current MOI test, formulated 15 years ago, is overly strict and inapposite to the realities of the current global marketplace. For example, the third criterion of the Department's MOI test requires that the producers of the particular industry be found to pay market-determined prices for all major inputs, and for all but an insignificant proportion of minor inputs. In the 15 years since the formulation of the MOI test, China, through the explosive growth in its economy, has become a major trading partner of almost all industrialized nations. As a result, Baosteel submits that a great bulk of companies in market-economy countries would, in fact, fail the third criterion of the MOI test based on their purchase of materials from China. Given this, it would be discriminatory and inconsistent to apply such a stringent standard to only Chinese companies.

Rather, Baosteel submits that the analysis for a determination of a MOE can be developed by using the existing framework of the Department's NME practice – namely, the test for granting separate rate status. The separate rate test serves as the appropriate boilerplate for developing a MOE test because the purpose of the separate rate test is same as the test for determining a MOE -- *i.e.*, determining absence of government control to merit an exception

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<sup>3</sup> *Id.*

from the country-wide NME treatment. Moreover, the separate rate test is well-established and familiar to the Department and the public, easing the administrative burden for the Department and the parties.

As the Department explains in its boilerplate separate rate application:

The Department assigns separate rates in non-market economy (“NME”) cases only if the applicant can demonstrate an absence of both *de jure* and *de facto* governmental control over its export activities in accordance with the separate-rates test criteria. In determining whether companies should receive separate rates, we focus our attention on the exporter rather than the manufacturer. *See Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal from the People’s Republic of China*, 60 FR 56045 (November 6, 1995).

\* \* \*

To establish whether a company’s export activities are sufficiently independent of the government to be eligible for separate rate status, the Department analyzes each exporting entity under the test established in the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People’s Republic of China*, 56 FR 20588 (May 6, 1991) (“*Sparklers*”), and later expanded upon in *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People’s Republic of China*, 59 FR 22585 (May 2, 1994) (“*Silicon Carbide*”). Under this analysis, exporters of subject merchandise are accorded separate, company-specific margins if they can provide sufficient proof of an absence of government control, both in law and in fact, with respect to export activities. Evidence supporting, though not requiring, a finding of *de jure* absence of government control over export activities includes: 1) an absence of restrictive stipulations associated with an individual exporter’s business and export licenses; 2) any legislative enactments decentralizing control of companies; and 3) any other formal measures by the central and/or local government decentralizing control of companies. *See Sparklers*, 56 FR at 20588.

Our analysis of absence of *de facto* government control over exports is typically based on the following four factors: 1) whether each exporter sets its own export prices independent of the government and without the approval of a government authority; 2) whether each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses; 3) whether each exporter has the authority to negotiate and sign contracts and other agreements; and 4) whether each exporter has autonomy from the

government regarding the selection of management. *See Silicon Carbide*, 59 FR at 22586-87.

A MOE test based on the separate rate test would simply expand the focus of the analysis from just the export operations to the respondent's entire operations -- both manufacturing and export activities. Thus, under the MOE test, the Department should assign MOE status if the respondent can demonstrate an absence of both *de jure* and *de facto* governmental control over its export and manufacturing activities in accordance with the MOE test criteria.

Consistent with the separate rate analysis, we propose that the evidence supporting a finding of *de jure* absence of government control over export and manufacturing activities would include: 1) an absence of restrictive stipulations associated with an individual respondent's business and export licenses; 2) any legislative enactments decentralizing control of companies; and 3) any other formal measures by the central and/or local government decentralizing control of companies.

Furthermore, we propose that the absence of *de facto* government control over manufacturing and exports would be based on the factors similar to those used in the separate rate analysis:

1. whether each respondent sets its own sale prices (both export and home market) independent of the government and without the approval of a government authority;
2. whether each respondent retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses;
3. whether each respondent has the authority to negotiate and sign contracts and other agreements;

4. whether each respondent has autonomy from the government regarding the selection of management;

5. whether each respondent negotiates its input prices and costs independent of the government and without the approval of a government authority;

6. whether each exporter has autonomy from the government regarding the allocation of resources.

Of the above factors, the first four factors are essentially identical to the four factors of the separate rate analysis; the only difference is that the first factor would review the pricing decisions of both the home market and export sales. Thus, the type of evidence examined under these factors would be identical to those currently reviewed by the Department under the separate rate test.

The last two factors supplement the traditional four-factor separate rate criteria and would serve to analyze the absence of government control over the manufacturing operations of the respondent. These factors would examine whether the input prices paid by the enterprise and over how its resources are allocated are market-driven and not government-set. For instance, the Department may consider whether the price paid for a raw material was freely negotiated and are free from significant government restrictions. In this regard, the focus should be on whether there was any government interference over the purchasing decisions of the individual respondent.

The Department should also note that the Chinese government, at the time of China's WTO accession, made explicit commitments that the government would exert control over prices of certain limited products, which are listed in Annex 4 of the Accession Agreement.

See Attachment. Thus, this list serves as prima facie evidence that the prices of all products, other than those listed, are free from government control.

**III. Once a Respondent is Found to Be a MOE, the Department Should Rely on All of the MOE's Prices and Costs Unless They Are Proven to be Distortive.**

Once the Department applies the above MOE test and then determines that a respondent is a MOE, the Department should rely on all of the MOE's prices and costs for purposes of calculating dumping margins, *i.e.*, apply a standard ME methodology of a price-to-price comparison or a CV comparison, unless there is a particular price or cost that is shown to be government-controlled. In other words, the use of MOE's prices and costs should be a rebuttable presumption that can be overcome by a showing of explicit and credible evidence demonstrating that a particular price or cost is distorted through significant government control.

The rebuttable presumption approach should be adopted because the alternative is simply unworkable. For instance, it would be administrably impossible for the Department to analyze each and every input price to determine whether the input is a market-driven cost.

**IV If Any Price Is Found To Be Not Market-Driven, the Department May Rely on the Surrogate Methodology.**

If the rebuttable presumption of market-oriented price is overcome for any price or cost, the Department may allow the use of a surrogate methodology for that particular price or cost. For example, if positive evidence shows that a price paid for a particular raw material was distorted through significant government interference, the Department may value that input using its standard NME surrogate valuation methodology. This way, the Department

retains the flexibility to combine the surrogate methodology with the MOE methodology where necessary.

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On behalf of Baosteel, we appreciate the opportunity to provide comments concerning the above issues implicated by the antidumping methodologies applied to imports from China. Please feel free to contact us if you have any questions.

An electronic version is being submitted via email.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Philippe M. Bruno" and "Rosa S. Jeong", written in a cursive style.

Philippe M. Bruno  
Rosa S. Jeong



**ATTACHMENT**

**ANNEX 4**

**PRODUCTS AND SERVICES SUBJECT TO PRICE CONTROLS**

*Products Subject to State Pricing*

<b>NO</b>	<b>PRODUCTS</b>	<b>HS NO</b>	<b>DESCRIPTION OF PRODUCTS</b>
1	TOBACCO	24011010	Flue-cured tobacco, not stemmed/stripped
		24011090	Tobacco other than flue-cured, not stemmed/stripped
		24012010	Flue-cured tobacco, partly or wholly stemmed/stripped
		24012090	Tobacco other than flue-cured, partly or wholly stemmed/stripped
2	EDIBLE SALT	25010010	Salt, whether or not in aqueous solution or containing added anticaking or free-flowing agents
3	NATURAL GAS	27112100	Natural gas in gaseous state
4	PHARMA-CEUTICALS	30011000	Glands & other organs, dried, whether or not powdered
		30012000	Extracts of glands or other organs or of their secretions
		30019010	Heparin & its salts
		30019090	Substances of human or animal origin, for therapeutic or prophylactic uses, nes
		30021000	Antisera & other blood fractions & modified immunological products, whether or not obtained by means of biotechnological processes
		30022000	Vaccines for human medicine
		30023000	Vaccines for veterinary medicine
		30029010	Saxitoxin
		30029020	Ricitoxin
		30029090	Human blood; animal blood prepared for therapeutic, prophylactic or diagnostic uses; other toxins, cultures of micro-organisms (excl. yeasts) and similar products, nes
		30041011	Medicaments containing ampicillin, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30041012	Medicaments containing amoxicillin, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30041013	Medicaments containing penicillins V, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
30041019	Medicaments containing penicillins , nes, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale		

NO	PRODUCTS	HS NO	DESCRIPTION OF PRODUCTS
		30041090	Medicaments containing penicillins or derivatives thereof nes, or streptomycins or their derivatives, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30042011	Medicaments containing cefotaxime, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30042012	Medicaments containing ceftazidime, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30042013	Medicaments containing cefoxitin, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30042014	Medicaments containing ceftazole, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30042015	Medicaments containing cefaclor, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30042016	Medicaments containing cefuroxime, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30042017	Medicaments containing ceftriaxone, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30042018	Medicaments containing cefoperazone, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30042019	Medicaments containing other cephamycines, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale, nes
		30042090	Medicaments containing other antibiotics, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale, nes
		30043100	Medicaments containing insulin, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30043200	Medicaments containing of adrenal cortical hormones, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale
		30043900	Medicaments containing other hormones, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms of packing for retail sale, nes

NO	PRODUCTS	HS NO	DESCRIPTION OF PRODUCTS
		30044010	Medicaments containing quinine or its salts, but not containing antibiotics or products of heading 29.37, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured does or in forms of packing for retail sale
		30044090	Medicaments containing alkaloids or their derivatives, but not containing hormones or other products of heading 29.37 or antibiotics, consisting of mixed or unmixed products put up in measured does or in forms of packing for retail sale, nes
		30045000	Other medicaments containing vitamins or other products of 29.36, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured does or in forms of packing for retail sale
		30049010	Medicaments containing sulfa drugs, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured does or in forms of packing for retail sale, nes
		30049020	Medicaments containing biphenyl dicarboxybenzoate, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured does or in forms of packing for retail sale, nes
		30049053	Bai Yao, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured does or in forms of packing for retail sale
		30049059	Medicaments of Chinese type, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured does or in forms of packing for retail sale, nes
		30049090	Medicaments of products for therapeutic, prophylactic or diagnostic uses, consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured does or in forms of packing for retail sale, nes
		30051010	Adhesive plasters, impregnated or coated with pharmaceutical substances or put up in forms of packing for retail sale for medical, surgical, dental or veterinary purposes
		30063000	Opacifying preparations for X-ray examinations; diagnostic reagents designed to be administered to the patient
		30066000	Chemical contraceptive preparations based on hormones or spermicides
		40141000	Sheath contraceptives

***Products Subject to Government Guidance Pricing***

NO	PRODUCTS	HS NO	DESCRIPTION OF PRODUCTS
1	GRAIN	10011000	Durum wheat
		10019010	Seed of wheat & maslin, excl. durum wheat
		10019090	Wheat & maslin, excl. for seeding and durum wheat
		10051000	Maize (corn) seed
		10059000	Maize (corn), excl. for seeding

NO	PRODUCTS	HS NO	DESCRIPTION OF PRODUCTS
		10061010	Rice in husk (paddy or rough) seed
		10061090	Rice in husk (paddy or rough), excl. for seeding
		10062000	Husked (brown) rice
		10063000	Semi-milled or wholly milled rice, whether or not polished or glazed
		12010010	Seed of soybeans
		12010091	Yellow soybeans, not for seeding, whether or not broken
		12010092	Black soybeans, not for seeding, whether or not broken
		12010093	Green soybeans, not for seeding, whether or not broken
		12010099	Soybeans, nes, not for seeding, whether or not broken
2	VEGETABLE OIL	15071000	Crude soybean oil, whether or not degummed, but not chemically modified
		15079000	Soya-bean oil and its fractions, refined, but not chemically modified
		15141010	Crude rape, colza oil, but not chemically modified
		15141090	Crude mustard oil, but not chemically modified
3	PROCESSED OIL	27100011	Motor gasoline & aviation gasoline
		27100013	Naphtha
		27100023	Aviation kerosene
		27100024	Lamp-kerosene
		27100031	Light diesel oil
		27100033	Fuel oil No.5 to No.7 (National Code)
		27100039	Diesel oils & preparations thereof and other fuel oils, nes
4	FERTILIZER	31021000	Urea, whether or not in aqueous solution
5	SILKWORM COCOONS	50010010	Mulberry feeding silk-worm cocoons
		50010090	Other silk-worm cocoons suitable for reeling
6	COTTON	52010000	Cotton, not carded or combed

**Public Utilities Subject to Government Pricing**

NO	CPC	PUBLIC UTILITIES
1	1720	Price of gas for civil use.
2	1800	Price of tap water.
3	1710	Price of electricity.
4	1730	Price of heating power.
5	1800	Price of water supplied by irrigation works.

**Service Sectors Subject to Government Pricing**

NO	CPC	SERVICE	NOTES
1	7511 7512 7521 7522	Postal and telecommunication services charges	Including postal services charges, national and trans-provincial telecommunication services charges.
2	964	Entrance fee for tour sites	Referring to significant historical relics and natural landscape under protection.
3	921 922 923	Education services charges	

**Service Sectors Subject to Government Guidance Pricing**

NO	CPC	SERVICE	NOTES
1	7214 745** 731 7111 7112 743 7131 7139	Transport services charges	Including rail transport of both passenger and freight, air transport of freight, port services, and pipeline transport.
2	861 862 8671 8672	Professional services charges	Including architectural and engineering services, legal services, assets assessment services, authentication, arbitration, notarization and inspection.
3	621	Charges for commission agents' services	Including commission for trademark, advertisement taxation and bidding agents.
4	81339**	Charges for settlement, clearing and transmission services of banks	Including settlement, clearing and transmission services of the RMB, transaction fees and seat charges of national securities exchanges, as well as seat charges for China Foreign Exchange Center
5	82101	Selling price and renting fee of residential apartments	
6	931	Health related services	

Notes:

1. CPC classification is added to the service sectors subject to state pricing in this Annex in accordance with the GATT document MTN.GNS/W/120, 10 July 1991, which provided services sectoral classification for the purpose of services negotiations during the Uruguay Round.
2. The government pricing in the service sectors which are listed in China's Schedule of Specific Commitments shall be applied in a manner consistent with Article 6 of GATS and the Reference Paper on Basic Telecommunication.