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June 25, 2007

David M. Spooner
Assistant Secretary for Import Administration
Department of Commerce
Room 1870
14th Street and Constitution Ave., N. W.
Washington, D.C. 20230

Re: Comments Regarding Proposed Market-Oriented Enterprises

Dear Assistant Secretary Spooner:

These comments are being filed on behalf of FMC Corporation ("FMC"). FMC is an American company, headquartered in Philadelphia, Pennsylvania, and has sales of approximately two billion dollars. In the normal course of business, FMC finds itself in competition with sales of products imported from China.

It is FMC's position that the Department should not apply market-economy treatment to individual Chinese respondents as proposed in the *Federal Register* on May 25, 2007[1]. Unfairly traded imports from China and other non-market economies ("NMEs") make it more difficult for American companies, such as FMC, to compete in domestic markets. As is discussed below, the

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1 *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market Oriented Enterprise*, 72 Fed Reg. 29302 (May 25, 2007).

Department should not enhance the ability of Chinese companies to unfairly trade in the United States by establishing a market-oriented enterprise policy.

Application of market-economy status to individual Chinese respondents would result in inaccurate antidumping calculations as the calculations would fail to account for the distortive impact created by the policies of the Chinese government and their impact on the Chinese economy. At this time, calculation of an antidumping duty margin for Chinese companies based upon market economy principles is not a realistic option and would be contrary to the Department's mandate to calculate the most accurate antidumping margins possible.[2]

I. The Chinese Government Maintains Significant Control Over the Entire Economy Which Causes Irreparable Distortions That Cannot Be Overcome with Market Economy Margin Calculations.

A. General Policies and Features of the Chinese Economy Prevent the Department from Accurately Calculating Dumping Margins on a Market Economy Basis.

While China has enacted numerous economic reforms the Department has consistently maintained that China's economy is "riddled with distortions {due} to the extensive intervention of the PRC government . . ."[3] The Department recently concluded that the "level of government intervention in certain important sectors of the economy remains significant, as do deeply rooted institutional problems, *e.g.*, with respect to the banking sector, land ownership and property rights, and rule of law."[4] As a result of these distortions, the Department reasonably concluded

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2 *See, e.g., NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) ("It is the duty of the ITA to determine dumping margins 'as accurately as possible.'").

3 U.S. Department of Commerce Memorandum to David Spooner, *Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy*, 5 (March 2, 2007) ("DOC *Georgetown Steel* Memorandum").

4 U.S. Department of Commerce Memorandum to David Spooner, *The People's Republic of China Status as a Non-Market Economy*, 2 (May 15, 2006) ("PRC Status 1").

that it must "continue to question seriously the validity of prices and costs in China as meaningful measures of value for the purposes of the U.S. antidumping law."[5]

In addition, China has not, according to the U.S. Trade Representative, "fully embraced the key WTO principles of market access, non-discrimination, and national treatment, *nor has China fully institutionalized market mechanisms and made its trade regime predictable and transparent*."[6]

The Chinese government's interference in the market is widespread and frequently includes the use of "preferential tax policies, government funds for state-owned enterprises, double bookkeeping by such enterprises, subsidized inputs for such enterprises, 'give-away' prices on energy and land, sectoral credit allocation, loan extensions, debt forgiveness, wage ceilings, and the undervalued renminbi."[7]

These governmental practices are so endemic that any attempt to rely on seemingly market oriented enterprises in China for prices and costs would be futile and counter productive. China's significant and demonstrated influence over the economy distorts the country's entire economic system to the point that even what may appear to be market oriented enterprise costs cannot be relied upon to fulfill the Department's mandate to provide accurate dumping margins.

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5 *Id.*

6 U.S. Trade Representative, *2006 National Trade Estimate*, 92 (Washington, D.C. March 2006) (emphasis added).

7 U.S.-China Economic and Security Review Commission, 2006 Report to Congress, at 31 ("China Commission 2006 Report").

B. The Chinese Government's Institutional Restraints With Respect to Wages Would Have a Distorting Influence on Market Economy Dumping Calculations.

Current Chinese labor law allows individual enterprises to set wages above the government minimum, but the freedom to set wages and prices does not inevitably lead to the conclusion that wages and prices are market-based.[8] China still maintains various "institutional restraints on the extent to which market forces can act upon the formation of wages" including residency requirements that restrict labor mobility and the absence of independent trade unions.[9] Thus, wages for labor, while today closer to a market based system, are still distorted and unreliable for the purpose of calculating dumping margins. Furthermore, since wages are not free of governmental restraints, the market price of inputs produced in China will be below market value and prove untrustworthy for determining a dumping margin.

C. China's Undervaluation of the RMB Fundamentally Alters Prices and Costs in the Chinese Economy Making Those Prices and Costs Unsound for Dumping Calculations.

China's central bank controls the exchange rate by allowing only slight fluctuations in the value of currency.[10] Federal Reserve Chairman Bernanke stated that the Chinese government's undervaluing of the RMB creates an "important distortion in the Chinese economy" [11] and effectively provides a subsidy for Chinese firms that focus on exporting.[12] China's

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8 DOC *Georgetown Steel* Memorandum at 5.

9 DOC *Georgetown Steel* Memorandum at 5-6.

10 DOC *Georgetown Steel* Memorandum at 6.

11 Chairman Ben Bernanke, Remarks at the Chinese Academy of Social Sciences, Beijing, China 6 (Dec. 15, 2006) at http://www.federalreserve.gov/boarddocs/speeches/2006/20061215/default.htm.

12 In addition, Chairman Bernanke stated that the undervalued exchange rate contributes to "capital markets that, despite positive steps, remain distorted and underdeveloped." *Id.* at 7.

undervaluation of currency distorts the economy to such an extent that bipartisan legislation was recently introduced in the U.S. Senate which would require the Department's dumping calculations to include the undervaluation of the currency.[13]

D. China's Restrictions on Personal Property Rights and Private Enterprise Generally Inhibit Market Forces Causing Distortions that Cannot be Overcome in Market Economy Margin Calculations.

As the Department has recently stated, "{p}rivate enterprises and citizens in China, though generally free to pursue entrepreneurial activities, still conduct all business within the broader, distorted economic environment over which the PRC Government has not ceded fundamental control."[14] A company's mere existence in this 'broader distorted economic environment' makes its prices and costs wholly unreliable.

While private ownership of companies is allowed, "Beijing still wields a heavy hand in planning the overall economy, particularly when it comes to promoting an export-based growth strategy."[15] For example, the Chinese government's current five year plan for economic development seeks to promote specific industries through 2010.[16] Industries that have been targeted for promotion include: integrated circuits and software, next generation network

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[13] The bipartisan bill introduced by Senators Baucus, Grassley, Schumer, and Graham requires the Department of Commerce calculation of dumping margins to reflect the currency undervaluation for any country designated as a priority country, whose currency is "fundamentally misaligned" and which fails to adopt new currency valuation policies within 180 days. Currency Exchange Rate Oversight Reform Act of 2007, S.110th Cong. § 115(a)(1)(A) June 13, 2007).

[14] DOC *Georgetown Steel* Memorandum at 5.

[15] *China Commission 2006 Report* at 29.

[16] *China Commission 2006 Report* at 29.

technology, civilian aircraft, satellite applications, equipment manufacturing, clean power generation equipment, rail transportation equipment and machine tools.[17]

In addition, China's restraints on private ownership ensure government dominance over the economic market. China maintains its "stated goal to preserve a leading role for S{tate} O{wned} E{nterprises} in the 'core industries' of energy, defense, metals, motor vehicles, transport, and telecom."[18] China also restrains the growth of private industry by limiting access to bank credit and private property rights.[19] These stated goals of market dominance for its SOEs and restraints on private industry further exacerbate the distorting effects on China's economy and forestall the possibility of extracting reliable prices and costs even from enterprises that may appear to be market oriented.

E. China's Government Controlled Banking System Prevents Market-Based Allocation of Financial Resources Causing Unreliable Prices and Costs.

The Chinese government still, despite several reform efforts, maintains almost complete ownership of the commercial banking sector which "enables {the Chinese government} to use non-direct measures to guide the allocation of credit."[20] Banks in China are "predominately state-owned or state controlled and often are expected to grant loans with below-market interest rates, carry large amounts of defaulted loans on their books, or forgive such debts of government owned companies."[21]

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17 *China Commission 2006 Report* at 29

18 DOC *Georgetown Steel* Memorandum at 7.

19 DOC *Georgetown Steel* Memorandum at 7.

20 DOC *Georgetown Steel* Memorandum at 9.

21 *China Commission 2006 Report.*

In this economic environment, prices and costs of Chinese companies cannot be relied upon because the banking system operates not on market conditions, but as a conduit for government expenditures.

II. The Department's Proposed Change in Policy is Contrary to the WTO Accession Agreement with the People's Republic of China.

The WTO Accession Agreement of China permits only <u>industry-wide deviation</u> from China's NME status.[22] That agreement does not allow deviation on an enterprise or company specific basis.[23] In order for China to join the WTO, both China and WTO members negotiated concessions and agreements to facilitate China's transition into the WTO. The Accession Agreement sets forth additional rights and obligations for both member countries and China. Section 15 addresses price comparability in determining subsidies and dumping. The agreement provides that "{i}f the {Chinese} producers under investigation can clearly show that market economy conditions prevail ***in the industry*** . . . the importing WTO member shall use Chinese prices or costs ***for the industry*** under investigation in determining price compatibility."[24] If the Chinese exporters cannot clearly demonstrate that market economy conditions prevail throughout an entire industry, the importing member is not free to use prices or costs in China.[25]

The U.S. Trade Representative recently stated that the administration is "committed to maintaining the effectiveness of {the special non-market economy methodology contained in China's Accession Agreement} for the benefit of affected U.S. businesses, workers and

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[22] *See Protocol on the Accession of The People's Republic of China*, ¶ 15, WT/L/432 (Nov. 23, 2001).

[23] *Id.*

[24] *Id.* at ¶ 15(a)(i) (emphasis added).

[25] *Id.* at ¶ 15(a)(ii).

farmers."[26] If the Department adopts a MOE analysis, the Department would be acting contrary to provisions of the Accession Agreement that were specifically negotiated to protect U.S. producers from the distorted Chinese economic market.

In conclusion, for the reasons set forth above, the Department should not adopt a policy allowing individual Chinese companies to be treated as market-oriented enterprises in dumping investigations.

Very truly yours,

Thomas V. Vakerics
Kristen Smith

Counsel to FMC Corporation

[26] U.S. Trade Representative, *2006 Report to Congress on China's WTO Compliance*, at 12.