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The Honorable Carlos M. Gutierrez
U.S. Secretary of Commerce
U.S. Department of Commerce
14th Street & Constitution Avenue, NW
Washington, DC 20230

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

Dear Secretary Gutierrez:

On behalf of ICL Performance Products, LP and Innophos, Inc., and in response to the Department of Commerce's request,¹ 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." Headquartered in Cranbury, New Jersey, Innophos was formed in 2004 when Bain Capital purchased Rhodia's North American specialty phosphates business. Innophos develops, manufactures, and markets phosphates and phosphoric acid. Headquartered in St. Louis and wholly owned by Israel Chemicals Limited, ICL develops, manufactures, and markets phosphates, phosphoric acid, and phosphorus chemicals. ICL and Innophos filed an antidumping petition in February this year concerning Sodium Hexametaphosphate (SHMP) from the People's Republic of China.

¹ Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 Fed. Reg. 29,302 (May 25, 2007).

A Professional Corporation

Both companies have a direct stake and interest in the application of the antidumping law to imports from China.

At the outset, there are numerous, obvious practical difficulties with the task that Commerce has set for itself. The Department for several years has been unable to identify a “market oriented” *industry* in China. If free market conditions cannot be identified for an industry or group of industries, it is implausible that such conditions would exist for any individual entity. In fact, to find an entity operating under free market conditions would require that both the inputs to the production process and the output of the company be free from state control. Such conditions are inconceivable absent “market oriented” industries upstream, to supply the production inputs, and downstream, to purchase the finished products.

More important, however, are the legal barriers to the proposed methodology. The NME methodology is longstanding and well established. It has developed gradually over time with Congress’ approval. Extending market economy treatment to individual Chinese enterprises is inconsistent with the Department’s precedent and practice. It is also inconsistent with the intent of the China Accession Agreement. For these reasons, the proposed change to current methodology is inappropriate.

- (1) **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) of the Tariff Act of 1930 defines a “nonmarket economy” (NME) country to be “any foreign country that the administering authority determined does not

operate on market principles of cost of pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.”² As emphasized, the statute calls for a determination on a country-wide basis. Congress recognized that sales of merchandise subject to an antidumping investigation would not be an appropriate basis for foreign market value if the general economy in the country of exportation was not a free-market economy.³

The statute goes on to identify macroeconomic factors, including the currency, wage rates, investment rules, government ownership, government control “over the allocation of resources and over the prices and output decisions of enterprises,” and so forth.⁴ In the phosphate industry, for example, China has distorted the allocation of resources through its VAT tax policy. China has provided a rebate of VAT taxes on exports of SHMP and other phosphate derivatives. At the same time, it has not provided a VAT tax rebate with respect to exports of the raw material, phosphate rock. In effect, this policy encourages further processing of phosphate rock within China, distorting the allocation of economic resources within the country by encouraging the production of products such as SHMP and discouraging exports of phosphate rock. No individual entity producing sodium phosphates in China could escape the direct and indirect market effects of these government policies.

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

³ See H.R. Conf. Rep. 101-576 at 591 (1988), 1988 USCCAN 1547, 1624.

⁴ 19 U.S.C. § 1677(18)(B).

Section 773(c) of the Act addresses the methodology for the computation of the normal value of imports from a NME.⁵ Again, the statute applies to exports from “a nonmarket economy,” not to exports of a particular enterprise. The statute does not suggest that individual companies in an NME can qualify as market-oriented or escape the country-wide determination that the NME statute applies.

Given the opportunity to address the issue, the plain language of the statute is silent as to the Department’s proposed methodology and provides no reasonable basis for implementing such a change in treatment for individual companies operating in NMEs.⁶ The Department’s administrative authority to reclassify NME countries as market economies does not extend to any conditions that would allow for the reclassification of specific companies within designated NMEs.

The statute specifically conveys that companies in NMEs pose special problems and challenges in the implementation of the antidumping law. The statute mandates special calculation methods to determine the fair value of the products of NME countries because normal market forces are absent. In antidumping investigations involving products from NME countries, U.S. law requires that the Department use a special methodology to calculate duty rates in view of the absence of meaningful home market

⁵ See 19 U.S.C. § 1677b(c) (1994).

⁶ See *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

prices and information on production costs.⁷ By disregarding internal prices and costs in the methodology, the statute recognizes that governmental intrusion makes them meaningless in NME countries. The legislation reflects the decision that internal prices and costs for NMEs do not constitute the “best available information” to calculate data used in the tariff determination because such values are not reliable bases for normal value in the context of an NME.⁸

Finally, the Department’s regulations at 19 C.F.R. § 351.408 outline the NME dumping methodology and likewise do not permit consideration of individual Chinese companies as market-oriented. Thus, the Department’s regulations are inconsistent with the proposed creation of a new methodology for market-oriented enterprises.

(2) The notion of a market-oriented enterprise is inconsistent with longstanding precedent and practice.

Imports from state-controlled economies have been subject to a different methodology for determining normal value since the time Treasury once administered the antidumping law prior to 1980. In the early years, Treasury and Commerce relied upon free-market prices of “such or similar” merchandise in a surrogate country.⁹ Later, Commerce began constructing foreign market value (now normal value) from factors of

⁷ See GAO, *U.S.-China Trade: Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies*, GAO-06-231 (January 2006), available at <<http://frwebgate.access.gpo.gov>>. (Commerce provided written comments on a draft of the GAO’s findings and agreed overall with the results.).

⁸ 19 U.S.C. § 1677b(c)(1)(b) (2005).

production determined in a surrogate country.¹⁰ This later methodology was approved by Congress in 1988 as the primary methodology for determining normal value and is embodied in 19 U.S.C. § 1677b(c) in its present form.¹¹ For decades the law has been consistent in requiring the use of a surrogate value in the case of imports from an NME country.

Throughout the years, the courts have consistently approved the rationale offered by Commerce for its NME methodology: *viz.*, that the existence of state control distorts the entire market within the country and prevents the identification of free-market prices or factors of production.¹² To obtain an individual dumping margin, entities within an NME must establish that they are independent from the central authorities.¹³ The producers seeking their own dumping duty rate must prove that government interference in setting the price and volume of merchandise produced is nearly nonexistent.¹⁴ Yet, even when individual enterprises meet this burden, Commerce still applies the NME methodology to determine normal value because the market (for factors of production

⁹ See, e.g., *Bicycles from Czechoslovakia*, 25 Fed. Reg. 6657 (Treasury Dept. 1960).

¹⁰ See, e.g., *Tapered Roller Bearings from Hungary and Romania*, 52 Fed. Reg. 17,428 (May 8, 1987).

¹¹ Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107 (1988).

¹² See *Union Camp Corp. v. United States*, 22 Ct. Int'l Trade 267, 270 (1998) ("The PRC is a nonmarket economy ('NME') country.").

¹³ See *Transcom, Inc. v. United States*, 24 Ct. Int'l. Trade 1253, 1266 n.11 (2000).

¹⁴ See *Chrome-Plated Lug Nuts From the People's Republic of China*, 57 Fed. Reg. 15,052 (Dep't of Commerce Apr. 24, 1992).

and finished products) remains distorted even if a single company has independent authority to set prices and determine output.¹⁵

In the recent countervailing duty case involving *Coated Paper*, Commerce acknowledged that many companies in China now have gained some measure of independence in terms of the ability to set prices, negotiate for materials and labor, control production levels, and otherwise operate in the same respects as companies in free-market economies.¹⁶ Commerce recognized, nevertheless, that these changes only go so far: “Many business entities in present-day China are generally free to direct most aspects of their operations, and to respond to (albeit limited) market forces.”¹⁷ Market forces are “limited” within an NME country precisely because pervasive government control affects the entire national economy. Even though individual businesses may be “generally free to direct most aspects of their operations,” numerous remaining direct and indirect controls distort the Chinese market.

Commerce precedent thus teaches that market forces are distorted within a non-market economy on a country-wide basis. Likewise, Congress contemplated that the NME methodology would be applied on a country-wide basis: “If information submitted by a non-market economy country to the administering authority permits foreign market

¹⁵ See *Sigma Corp. v. United States*, 117 F.3d 1401, 1406 (Fed. Cir. 1997).

¹⁶ *Coated Free Sheet Paper from the People's Republic of China*, Memorandum re Whether the Analytical Elements of *Georgetown Steel* are Applicable to China's Present-Day Economy, March 29, 2007, available online at <<http://ia.ita.gov/download/prc-cfsp/CFS%20China.Georgetown%20Applicability.pdf>>.

¹⁷ *Id.* (emphasis added).

value to be determined accurately using the normal methodology, then the Committee expects such methodology to be used....”¹⁸

After years’ of experience, Commerce established the notion of a market-oriented industry to allow (in theory) for the application of different methodologies in the event that an entire industry became sufficiently free from government and economic influence.¹⁹ The test requires that all of the members of the industry are free to set prices and “the entire industry is characterized by private or collective ownership.”²⁰ Thus, Commerce recognizes that unless the entire industry is market oriented, no single enterprise within that industry could be entirely independent. After all, its products would have to compete with other products of state-controlled enterprises. Such competition would directly or indirectly affect its prices and output. Similarly, it would have to compete for raw materials and labor with state-controlled enterprises and for capital with other state-controlled producers and industries within China.

In short, case law establishes that entities in NMEs cannot escape the inherent distortion of the market caused by government control of the factors of production. This conclusion follows from the very nature of a non-market economy. Therefore, Commerce should not go beyond the market-oriented industry to recognize an individual enterprise.

¹⁸ S. Rep. No. 100-71 at 108 (1987).

¹⁹ *Sulfanilic Acid from the People's Republic of China*, 57 Fed. Reg. 9,409, 9,411 (Dep't Commerce 1992) (Prelim. LTFV Deter.); *Chrome Plated Lug Nuts from the People's Republic of China*, 57 Fed. Reg. 15,052, 15,053 (Dep't Commerce 1992).

(3) China's protocol of accession to the World Trade Organization does not provide for market-oriented treatment of individual Chinese respondents in antidumping duty proceedings.

Under the 2001 Agreement underlying China's accession to the WTO, Commerce is explicitly authorized to apply the NME methodology to exports from China for fifteen years.²¹ In particular, the Accession Agreement references the "industry" under investigation. Nowhere does the Agreement provide that an individual company would be treated differently than the industry to which it belongs:²²

15. Price Comparability in Determining Subsidies and Dumping

Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

- (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

²⁰ *Id.*

²¹ See 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>, ("Accession Agreement").

²² *See id.*

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability.

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

* * *

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. *In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.*²³

There is no authority to treat individual Chinese companies as market-oriented entities for antidumping purposes. The express focus of the accession protocol speaks only of the "industry or sector" under investigation. In fact, the language regarding

²³ *Id.* (emphasis added).

findings of partial market-orientation of China limits itself explicitly to industries and sectors. The omission of a reference to eligibility for any individual Chinese company is, first, logical—no individual company could operate as a market-oriented enterprise in the context of an industry that is otherwise state-controlled. Second, and more importantly, the lack of any reference in the Accession Agreement to market-oriented “entities” or “enterprises” precludes the contemplated methodology.

It is important also to recall the history of the Accession Agreement. Prior to the Agreement, many in Congress opposed China’s entry into the WTO. Permanent Normal Trade Relations for China was a hard-fought battle. The Accession Agreement memorializes part of the bargain struck by Congress to permit China’s WTO accession: the U.S. could continue using the NME methodology for 15 years or until China, entirely, became a market economy.²⁴ Commerce should not by a change in practice undo the careful bargain established in the Accession Agreement.

(4) Assuming arguendo that Commerce adopts a new methodology, it should not be applied in pending investigations

As noted above, ICL and Innophos filed an antidumping petition in February 2007. The investigation is now ongoing and a preliminary determination is pending. Hence, in the event that Commerce does elect to create a new methodology, the evidence relevant to that methodology would have to be collected after the issuance of a

²⁴ See, e.g., H.R. Rep. 106-632 at 11 (2000) (indicating that permanent normal trade relations were extended to China, in part, due to China’s agreement to “[a]ccept the use by the United States of certain antidumping provisions (over a transitory period).”)

preliminary determination. The purpose for finding a market-oriented enterprise, however, is to permit such an enterprise to use the normal antidumping methodology. This methodology contemplates that the enterprise would submit its actual home market prices, a list of all transactions, its productions costs, and other information. It follows that the determination whether an enterprise is market-oriented must be made at the outset of an antidumping investigation, simply to provide the parties enough time to submit, analyze and comment on the record. Not to mention, the ability for the parties to analyze the strengths and weaknesses of their case in light of such determination prior to spending considerable amounts of time and money in pursuing an antidumping petition.

In the case of a pending investigation, it is now too late to issue new and entirely different questionnaires, calling for the submission of home market prices, costs, and other data. In the SHMP case, with a preliminary determination scheduled to be made in a few weeks, there would be no time to collect such information and to permit full and fair consideration of the data before a determination must be made. Commerce regulations, moreover, indicate that factual allegations and evidence, with one exception, should be submitted for the record prior to verification.²⁵ Again, this deadline practically prevents adoption of such a radical new methodology mid-stream in an investigation.

Given that the relevant factors have not yet even been identified, Commerce will need a full investigation period to consider such a new methodology. It is not fair to any

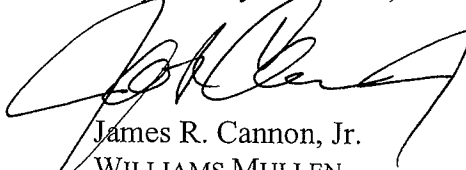
²⁵ 19 C.F.R. § 351.301(b). The regulations do permit the submission of surrogate value information after the preliminary determination.

interested parties to an ongoing investigation to be required to address such a substantial deviation from past practice without the benefit of a full period of investigation.

(5) Conclusion

For the reasons stated above, Innophos and ICL respectfully submit that the antidumping methodologies in proceedings involving certain NME companies in China not be changed to grant them status as a market-oriented enterprises. There is no statutory authority for the contemplated treatment of individual Chinese companies in antidumping cases. Departmental and court precedent establish that China is an NME and markets distorted by governmental interference are distorted on a country-wide basis. China's 2001 accession to the WTO calls for application of the NME methodology for determining normal value until 2016. The Accession Agreement was critical to Congress' grant of Normal Trade Relations to China. Giving China an early exit from the NME methodology without first meeting the enumerated requirements would undermine the basis for the Accession Agreement.

Respectfully submitted,



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