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**Public Document**

## VIA HAND DELIVERY AND E-MAIL

The Honorable David Spooner  
Assistant Secretary for Import Administration  
U.S. Department of Commerce  
Central Records Unit, Room 1870  
Pennsylvania Avenue and 14th Street, N.W.  
Washington, D.C. 20230

**Re: Request for Comment on Antidumping Methodologies in Proceedings  
Involving Certain Non-Market Economies: Market-Oriented Enterprise**

Dear Assistant Secretary Spooner:

We submit the following comments on behalf of IPSCO Inc. and the Southern Shrimp Alliance in response to the U.S. Department of Commerce's (the "Department") Request for Comments on whether market economy treatment should be granted to individual respondents in antidumping duty proceedings involving the People's Republic of China ("China"), as published in 72 Fed. Reg. 29,302 (May 25, 2007) ("Request for Comments").

The continued presence of myriad non-market factors throughout the Chinese economy precludes the Department's graduation of individual Chinese enterprises to market-oriented status and mandates the continued application of the non-market economy ("NME") factors of production methodology to all respondents in antidumping proceedings involving China. Unless and until the Department determines that a market-oriented industry exists in China using the agency's longstanding and well-reasoned three-part test, it would be completely illogical and entirely inappropriate for the agency to bestow market-oriented status on individual enterprises

operating in the non-market, distorted Chinese economy. To the extent that an individual producer acquires specific inputs from market economy sources, the Department's current practice permitting the use of such actual market-based input costs in its factors of production analysis already takes into account those aspects of an individual Chinese producer's costs that are truly market-based. There is therefore no basis and no need for the Department to formulate a new methodology whereby it might grant market economy treatment to individual Chinese respondents.

**I. Persistent and Significant Government Intervention Continues to Prevent the Operation of Free Markets in China**

Section 773(c)(1) of the Tariff Act of 1930 ("Tariff Act") mandates the use of the factors of production methodology to determine normal value if the merchandise subject to the antidumping proceeding is exported from an NME country, and

{t}he administering authority finds that available information does not permit the normal value of the subject merchandise to be determined as is done for respondents in market economy countries.<sup>1</sup>

Congress intended this provision to be used "where the supply and demand forces {of an NME country} do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison purposes."<sup>2</sup> Consistent with its statutory mandate, the Department has undertaken several analyses of China's economic liberalizations over the years, and has consistently concluded that the Chinese economy remains an NME distorted by

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<sup>1</sup> Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 Fed. Reg. 29,302 (May 25, 2007) ("Request for Comments"); see 19 U.S.C. § 1677b(c)(1)(B) (2000).

<sup>2</sup> Senate Comm. on Finance, Trade Reform Act of 1974, S. Rep. No. 93-1298, at 174 (1974).

government intervention and control.<sup>3</sup> As such, domestic cost and price data pertaining to individual Chinese respondents are inherently distorted and cannot be employed to determine normal value.<sup>4</sup>

Indeed, as the Department's Request for Comments notes, after a lengthy analysis of the applicable statutory factors, the Department recently reaffirmed China's status as an NME country in August 2006.<sup>5</sup> In that determination, the Department recognized that despite economic liberalization over time, "market forces in China are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis."<sup>6</sup> Earlier this year, the Department again noted that private enterprises in China "still conduct all business within the broader, distorted economic environment over which the PRC Government has not ceded fundamental control."<sup>7</sup> China's economy continues to be subject to "significant government intervention."<sup>8</sup> Such pervasive intervention fundamentally distorts China's economic infrastructure such that industries and enterprises in China are unable to operate under *bona fide* market economy principles.

As the Department recently concluded in its assessment of China's NME status:

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<sup>3</sup> See, e.g., Coated Free Sheet Paper from the People's Republic of China, 72 Fed. Reg. 17,484 (April 9, 2007) (Preliminary Determination of Countervailing Duty Investigation) ("Coated Free Sheet Paper"); U.S. Department of Commerce Internal Memorandum from S. Lee-Alaia, L. Norton and A. Hill through J. Spetrini, R. Lorentzen and A. Hsu to D. Spooner, Case No. A-570-901 (Aug. 30, 2006) ("Lined Paper Memorandum").

<sup>4</sup> Id.

<sup>5</sup> Request for Comments, 72 Fed. Reg. at 29,303; see Lined Paper Memorandum.

<sup>6</sup> Lined Paper Memorandum at 4.

<sup>7</sup> U.S. Department of Commerce Internal Memorandum from S. Lee-Alaia and L. Norton through J. Spetrini, S. Claeys, J. McInerney, R. Lorentzen, A. Hsu and S. Kuhbach to D. Spooner, Case No. C-570-907 at 5 (Mar. 29, 2007) ("Georgetown Steel Memorandum").

<sup>8</sup> Id. at 3, 7 ("the limits of the PRC Government has placed on the role of market forces are not consistent with recognition of China as a market economy under the U.S. antidumping law.").

{W}hile China has enacted significant and sustained economic reforms, the PRC Government has preserved a significant role for the state in the economy. Indeed, the limits the PRC Government has placed on the role of market forces are sufficient to preclude China's designation as a market economy under the U.S. antidumping law.<sup>9</sup>

The U.S. Trade Representative reached a similar conclusion in December 2006 in its Report to Congress on China's World Trade Organization compliance, as it continued to find "excessive Chinese government intervention in the market through policy directives and the actions of individual officials."<sup>10</sup>

Numerous U.S. government publications confirm the Department's conclusion that fundamental reforms to China's economy remain incomplete, as essential elements of production continue to be subject to government-directed market distortion.<sup>11</sup> These reports preclude any finding that a Chinese enterprise is operating in a wholly market-oriented manner:

- **Labor:** Government controls on labor under the *hukou* system, an administrative system governing permanent residence, continue to restrict labor mobility. Such restrictions serve to "inhibit and guide workforce flows and seriously distort the supply side of the labor market."<sup>12</sup> Further institutional limitations on employment standards hinder the ability of market forces to determine competitive wage rates.<sup>13</sup> As labor unions are legally connected to the Chinese government, there is a fundamental inability for these unions to exert a

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<sup>9</sup> Id. at 2-4 (emphasis added) discussing Lined Paper Memorandum.

<sup>10</sup> The United States Trade Representative, Executive Office of the President of the United States, 2006 Report to Congress on China's WTO Compliance at 3 (Dec. 11, 2006) ("USTR 2006 Report"); see Request for Comments, 72 Fed. Reg. at 29,303 (acknowledging that China's economy "features both a certain degree of private initiative as well as significant government intervention, combining market processes with continued state guidance.").

<sup>11</sup> See, e.g., Lined Paper Memorandum; see The United States Trade Representative, Executive Office of the President of the United States, 2007 National Trade Estimate Report on Foreign Trade Barriers (April 2, 2007); USTR 2006 Report; The United States Trade Representative, Executive Office of the President of the United States, U.S.-China Trade Relations: Entering a New Phase of Greater Accountability and Enforcement, Top-to-Bottom Review at 26 (Feb. 2006).

<sup>12</sup> Lined Paper Memorandum at 22.

<sup>13</sup> See USTR 2006 Report.

“counterweight to the government’s interests in negotiating and resolving labor issues.”<sup>14</sup>

- **Land:** Property rights in China remain heavily restricted and poorly defined.<sup>15</sup> China continues to prohibit private land ownership. While there is a legal regime for securing individual land-use rights, “in practice, however, laws and regulations are regularly violated by individuals and local governments.”<sup>16</sup>
- **Capital:** In China’s financial sector, the government has diverted and manipulated capital investments to sustain otherwise insolvent enterprises. The Department has found that the “continued presence of these enterprises that might have otherwise exited the market significantly distorts the operating environment for the private sector.”<sup>17</sup> As a result, “resources do not flow to their best use, at the firm, industry or sector level.”<sup>18</sup>

“Given the investment-driven nature of China’s economy and the significant share of investment that is bank-financed, the decentralized government’s continued role in the allocation of financial resources indicates that it exerts significant leverage over the allocation of resources in the economy as a whole.”<sup>19</sup>

- **Resource Allocation:** Fundamentally, “the PRC government, at all levels, remains deeply entrenched in resource allocation.”<sup>20</sup> The government has established industrial policies that provide substantial government resources to support Chinese industries, while limiting market access for non-Chinese origin goods.<sup>21</sup>

As demonstrated by these and other of the Department’s own factual findings, China’s economy continues to be plagued by persistent, widespread and significant government intervention. Under such circumstances, it would be practically impossible for the Department to determine that an individual Chinese enterprise is operating on a truly market-oriented basis.

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<sup>14</sup> Lined Paper Memorandum at 22.

<sup>15</sup> Id. at 46.

<sup>16</sup> Id. (emphasis added).

<sup>17</sup> Id. at 77 (emphasis added).

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Lined Paper Memorandum at 77.

<sup>21</sup> USTR 2006 Report at 7.

As such, there is no justification for the Department to deviate from its current NME factors of production methodology for individual Chinese respondents.

## **II. In Order for an Individual Enterprise to be Market-Oriented, It Must Operate within a Market-Oriented Industry**

The Department has for some time maintained a well-reasoned three-part test to determine whether a specific industry within an NME is operating on a market basis.<sup>22</sup> Yet, as the Department concedes in its Request for Comments, in the fifteen years since the Department first established the “market-oriented industry” (“MOI”) test, no industry in China has been able to satisfy the standards of that test. Until an entire Chinese industry has met the Department’s MOI standard, it would be entirely inappropriate for the Department to determine that certain individual enterprises operating within that industry are market-oriented and therefore exempt from NME treatment.

The adoption by the Department of a industry-wide test, rather than a enterprise-specific test, was no accident. In its original formulation of the MOI test, the Department considered “how any industrial sector or any commercial entity in an NME can be said to be operating on

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<sup>22</sup> Request for Comments, 72 Fed. Reg. at 29,302-29,303. The Department’s MOI test requires satisfaction of three elements by the requesting NME industry in order for the Department to calculate normal value using the market economy methodology:

- There must be virtually no government involvement in setting prices or amounts to be produced for merchandise subject to the proceedings;
- The industry producing the subject merchandise should be characterized by private or collective ownership; and
- Producers must pay market-determined prices for all significant inputs, whether material or non-material (i.e. labor and overhead) and for all but insignificant proportions of all the inputs accounting for the total value of the merchandise under investigation or review.

See, e.g., Chrome-Plated Lug Nuts From the People’s Republic of China, 56 Fed. Reg. 46,153 (Sept. 10, 1991) (Final Determination of Sales at Less Than Fair Value) (“Chrome-Plated Lug Nuts”); Oscillating Fans and Ceiling Fans from the People’s Republic of China, 56 Fed. Reg. 25,664 (June 5, 1991) (Preliminary Determinations of Sales at Less Than Fair Value) (“Oscillating Fans Preliminary Determination”) affirmed by 56 Fed. Reg. 55,271 (Oct. 22, 1991) (Final Determination of Sales at Less Than Fair Value) (“Oscillating Fans Final Determination”).

market principles such that costs and prices are acceptable, reliable measures of {normal value}.”<sup>23</sup> After finding that systemic market distortions affected a number of the respondents in the proceedings, the Department chose not to formulate a respondent-specific test.<sup>24</sup> The Department cited labor as a prime example of a non-market input that affected the normal value calculation of all of the respondents in the proceeding.<sup>25</sup> As such, the Department concluded that “absent a showing that all costs and prices are market-oriented, {normal value} in an NME cannot be based on home market prices, third country prices, or constructed value, but must be based on a factors of production methodology.”<sup>26</sup>

This analysis remains true today. Logically, in the context of administering the U.S. antidumping law (if not more broadly), two necessary, but not sufficient,<sup>27</sup> conditions for an enterprise to be appropriately classified as “market-oriented” should be:

1. The enterprise obtains both its productive inputs (i.e., raw materials, energy and labor) and its non-productive inputs (i.e., capital) on a market economy basis; and
2. The enterprise sells its finished product to willing private buyers within a fully-functioning market characterized by neither monopsony nor monopoly.

If these conditions are not met, then there is no credible basis for the Department to determine that the enterprise is “market-oriented” for purposes of administering the antidumping law, as a significant portion of the enterprise’s production costs would be determined on a non-market

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<sup>23</sup> Oscillating Fans Preliminary Determination, 56 Fed. Reg. at 25,667 (emphasis added).

<sup>24</sup> Id. at 25,664. The Department ultimately concluded that because a significant portion of the inputs for production were not “market based,” the respondents’ submitted costs and prices were not accurate, reliable measures of normal value.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> In addition, an absence of government ownership and control would need to exist.

basis and/or the enterprise's prices could not be considered to be arm's length market-determined prices. Absent properly operating markets within which an enterprise may operate, it is simply impossible for an individual firm to be truly market-oriented. Yet, as the Department itself concedes, every sector in China that has been investigated to date has failed to meet these basic tests for market orientation.

The impact of sectoral distortions on individual enterprises has been presented by the Department itself in its recent countervailing duty preliminary determination on coated free sheet paper with respect to the Chinese banking sector.<sup>28</sup> As the Department notes, in the banking sector, the influence of the Chinese government has extended to foreign firms operating in China.<sup>29</sup> In its countervailing duty investigation of coated free sheet paper from China, the Department chose not to use the lending rates of foreign banks operating in China as the benchmark rate because "foreign banks participating in this system are inevitably influenced by this broader environment." The Department found significant market distortion "where a small private (foreign) sector exists alongside a vastly larger state-owned sector where a considerable portion of lending is not conducted on terms and conditions consistent with commercial considerations."<sup>30</sup> The same rationale is applicable to individual Chinese enterprises operating in a larger non-market industry. The enterprise's freedom to operate on market economy principles is unavoidably hindered by significant non-market forces in the sector within which it operates.

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<sup>28</sup> See Coated Free Sheet Paper, 72 Fed. Reg. at 17,484.

<sup>29</sup> Id.; see USTR 2006 Report at 49 (quoting with approval a U.S. trade association's characterization of China's policy directive for the promotion of domestic technology as a policy "implemented through direct or indirect interference by Chinese authorities in licensing negotiations between Chinese and foreign technology companies.").

<sup>30</sup> Coated Free Sheet Paper, 72 Fed. Reg. at 17,488.



Restricted by distortive government intervention, private enterprises in an NME have no choice but to operate according to the surrounding non-market forces.

Accordingly, there is no basis for bestowing market-oriented status on individual respondents in Chinese antidumping investigations until such time as the entire industry within which those enterprises operate is found to meet the current MOI test.

### **III. The Department's Current Practice Accounts for All Truly Market-Oriented Inputs in the Calculation of Normal Value for Individual Respondents**

While there is no basis to treat individual Chinese enterprises as market-oriented under current conditions, it may be possible for an individual Chinese enterprise to obtain a number of its productive inputs from market economy suppliers, and under such a scenario it would be appropriate for the Department to value those inputs at the actual prices paid for the market economy inputs. However, such is current agency practice and no new policy change is required to deal with such situations.<sup>31</sup> This practice accurately accounts for the simultaneous use of market and non-market factors of production by individual Chinese respondents, thus allowing the Department “to select, from the information before it, the best data for calculating an accurate dumping margin.”<sup>32</sup>

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<sup>31</sup> For individual Chinese respondents who purchase inputs used for production of the subject merchandise from market economy suppliers in market economy currency, the Department has established a practice of using the actual price paid for these inputs.

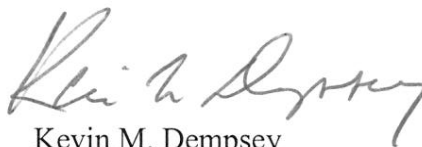
See Lasko Metal Prods. v. United States, 43 F. 3d 1442 (Fed. Cir. 1994); U.S. Department of Commerce, “Import Administration Antidumping Manual” at Chapter 8, Section XVI (1998).

<sup>32</sup> Dorbest Ltd. v. United States, 462 F. Supp. 2d. 1262, 1267 (Ct. Int'l. Trade 2006) (interpreting the requirement of 19 U.S.C. § 1677b(c)(1) to use the “best available information” for valuation of factors of production).

**IV. Conclusion**

For the foregoing reasons, the Department should not adopt a market-oriented enterprise test. Instead, the Department should continue its use of the NME factors of production methodology for respondents in antidumping duty proceedings involving China. To the extent that an individual enterprise in China acquires specific inputs from market economy sources, the Department's current practice permitting the use of such actual market-based input costs in the calculation of normal value already accounts for the enterprise's truly market-based costs.

Respectfully submitted,



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\* Admitted in New York, not admitted in the District of Columbia, practice limited to matters before federal agencies and federal courts.