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January 16, 2007

Susan H. Kuhbach  
Senior Office Director for Import Administration  
U.S. Department of Commerce  
Central Records Unit, Room 1870  
Pennsylvania Avenue and 14th Street, NW  
Washington, DC 20230

Attn: Callie Conroy  
David Layton

**Re: Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment**

Dear Ms. Kuhbach:

Innophos, Inc. herein responds to the Commerce Department's request for comments on whether the countervailing duty ("CVD") law should apply to imports from the People's Republic of China.<sup>1</sup> For the reasons outlined below, Commerce should apply the CVD law to imports from China.

**I. China subsidizes its manufacturers of exported merchandise.**

As Assistant U.S. Trade Representative Timothy Stratford testified on April 4, 2006, China is engaged in "excessive government subsidization benefiting a range of domestic industries in China."<sup>2</sup> A private-sector witness testifying at the same hearing agreed heartily, identifying a wide range of subsidies enjoyed by Chinese steel producers.<sup>3</sup> Building on this testimony, and abundant other information, the 2006 Annual Report of the U.S.-China Economic

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<sup>1</sup> Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment, 71 Fed. Reg. 75,507 (Dec. 15, 2006).

<sup>2</sup> Written Testimony of Timothy Stratford, Asst. U.S. Trade Rep., before the U.S.-China Economic and Security Review Commission (Apr. 4, 2006), available online at [http://www.uscc.gov/hearings/2006hearings/written\\_testimonies/06\\_04\\_04wrts/06\\_04\\_04\\_stratford.php](http://www.uscc.gov/hearings/2006hearings/written_testimonies/06_04_04wrts/06_04_04_stratford.php).

<sup>3</sup> See Written Testimony of Alan Price, Wiley Rein & Fielding, on behalf of the American Iron & Steel Institute and the Steel Manufacturer's Association, before the U.S.-China Economic and Security Review Commission (Apr. 4, 2006), available online at [http://www.uscc.gov/hearings/2006hearings/written\\_testimonies/06\\_04\\_04wrts/06\\_04\\_04\\_price.php](http://www.uscc.gov/hearings/2006hearings/written_testimonies/06_04_04wrts/06_04_04_price.php).

and Security Review Commission expressly urged Congress to enact legislation making CVDs applicable to NMEs like China.<sup>4</sup>

Within the past three years, the United States has often formally questioned the tax benefits, refunds, preferential financing, export incentives and other financial benefits by which the Chinese government has subsidized manufacturers producing exported merchandise or specific industries. As recently as July 2006, for example, the United States submitted to the WTO's Subsidies and Countervailable Measures Committee a list of supplemental questions identifying numerous subsidies to specific Chinese industries, as well as general programs through which Chinese manufacturers received a Value Added Tax ("VAT") rebate or exemption not available on purchases of imported equipment or raw materials.<sup>5</sup> Almost two years earlier, in October 2004, the United States had similarly alleged that various industries in China benefited from myriad subsidy programs, including, *inter alia*, export incentives, preferential tax rates contingent on exportation, income-tax refunds contingent on maintaining an "export-oriented" business, VAT rebates on exports, VAT rebates on imported capital equipment used to produce export goods, low-interest loans for companies that achieved more than \$500,000 in direct exports, refunds or credit for interest payments on loans to state-owned companies, and direct assistance to particular industry sectors.<sup>6</sup> To no avail, the United States has repeatedly asked China either to explain these questionable programs or to stop them.

## **II. China's Accession to the WTO in 2001 calls for a change in U.S. practice**

Notwithstanding that Commerce has exempted NME countries from the countervailing duty law for many years, China's accession to the WTO offers a compelling reason to change that practice. First, it should be noted that "there is no explicit statutory bar against applying the CVD law to NME countries."<sup>7</sup> That is, the exemption for China is an agency practice created by Commerce, not by Congress.<sup>8</sup>

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<sup>4</sup> See U.S.-China Econ. & Sec. Rev. Comm'n, 2006 Annual Report (Nov. 2006) at 55, available on-line at [http://www.uscc.gov/annual\\_report/2006/06\\_annual\\_report.php](http://www.uscc.gov/annual_report/2006/06_annual_report.php); see also 22 U.S.C. § 7002 (creating the U.S.-China Economic and Security Review Commission).

<sup>5</sup> See G/SCM/Q2/CHN/19 (26 July 2006).

<sup>6</sup> See G/SCM/Q2/CHN/9 (Oct. 6, 2004).

<sup>7</sup> U.S. -China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties, GAO-05-474 at 44 (June 2005) (Letter from Timothy J. Hauser to Loren Yager commenting on draft GAO report).

<sup>8</sup> The preamble to Commerce's 1998 CVD regulations refers to the Department's "practice of not applying the CVD law to non-market economies," and notes that the U.S. Court of Appeals for the Federal Circuit "upheld this practice in *Georgetown Steel Corp. v. United States*." Final Rule - Countervailing Duties, 63 Fed. Reg. 65,347, 65,360 (November 25, 1998) (emphasis added).

Moreover, *Georgetown Steel* decided only that Commerce's practice was a permissible interpretation of an ambiguous statute. Thus, the court held that the statute (applicable at the time) did not require Commerce to initiate a CVD investigation. The court did not hold that the statute prohibited Commerce from initiating a CVD investigation. Rather, citing *Chevron*,<sup>9</sup> the court held that the Department had not interpreted the statute in an unreasonable manner or abused its discretion.<sup>10</sup> This result does make the interpretation of the statute in *Georgetown Steel* the only one or imply that, faced with another interpretation, the court might affirm a case in which Commerce initiated an investigation under the CVD statute.<sup>11</sup>

China's 2001 accession to the WTO and the permanent normal trade relations ("PNTR") legislation that accompanied it provide the occasion for Commerce to reconsider its prior practice. Indeed, given that the agency is only now confronted with a formal request to impose countervailing duties on Chinese imports, prior "practice" is in reality mere acquiescence to a 20-year-old decision with respect to East European imports.

Re-evaluation of Commerce's position is overdue, because in 2001 all concerned—the domestic U.S. industry, Congress and China itself—believed and expected that China's WTO accession would subject it to CVD law. To take but one example, when Congress authorized PNTR with China in conjunction with its WTO accession, Congressional provisions for monitoring and enforcing China's WTO commitments appropriated funds necessary for "defending United States antidumping and *countervailing duty* measures with respect to products of *the People's Republic of China*." 22 U.S.C. § 6943(a) (emphasis added). Congress thus understood in 2001 that CVD law would apply to China.

**III. The current statute differs from the CVD statute at issue in *Georgetown Steel*, thereby further distinguishing that case from any future one.**

As detailed above, the result of *Georgetown Steel* would not necessarily control the outcome of Commerce's current review even if the statute at issue in *Georgetown Steel* were in effect today. But, that statute was fundamentally changed in 1994. It follows, therefore, that Commerce must consider whether to apply CVD law to China on the basis of the current law and not on the basis of a 1984 decision interpreting a different statute.

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<sup>9</sup> *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-34 (1984).

<sup>10</sup> 801 F.2d at 1318.

<sup>11</sup> See, e.g., *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Services*, 125 S.Ct. 2688 (2005) (holding that a prior judicial construction of a statutory provision does not foreclose *Chevron* deference with respect to a subsequent construction by the agency different from the prior judicial interpretation).

*Georgetown Steel* construes the terms “bounty or grant” found in Section 303 of the Tariff Act of 1930.<sup>12</sup> The current statute repeals Section 303 of the Tariff Act of 1930 and eliminates the terms “bounty or grant” from the law. Instead, the current law substitutes “countervailable subsidy” as the basis for relief. 19 U.S.C. § 1671. The purpose for this change in the statute was to implement the SCM Agreement signed by the United States in 1994.<sup>13</sup> It follows that Congress in 1994 intended that U.S. law would secure for U.S. industry all of the rights conferred under the SCM Agreement—including the right to bring a countervailing duty action against subsidized imports. As noted above, this is the same interpretation adopted by China and secured in the Accession Agreement.

Turning to the language of the 1994 Act, then, one finds a series of factors defining countervailable subsidies in 19 U.S.C. § 1677(5). There is no reference among the delineated factors to the type of economy, whether market or non-market. The definitions of “financial contribution” and “benefits” do not depend upon the degree of control that is exercised by the government over the economy. Nor does any language found in the current CVD statute prohibit application of the law to an NME. As shown by Section 421 or the textile safeguard, Congress in 1994 clearly understood how to single-out NMEs for different treatment. That Congress did not expressly exempt NMEs from the CVD law implies that Congress did not intent to exempt them.<sup>14</sup>

For all of these reasons, it is only reasonable to conclude that the countervailing duty law should be applied to China in the same terms that the law applies to Canada, to Mexico, or to any other country. Indeed, it is absurd to permit a state-controlled economy to subsidize its local producers when market-economy countries are subject to the countervailing duty law.

Respectfully submitted,

s/William N. Farran

William N. Farran  
General Counsel  
Innophos, Inc.

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<sup>12</sup> *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1309 (Fed. Cir. 1986) (focusing on whether Section 303 of the Tariff Act of 1930 applied to subsidies granted by NME countries) (hereinafter *Georgetown Steel*).

<sup>13</sup> Statement of Administrative Action (“SAA”), 1994 U.S.C.C.A.N. at 4238.

<sup>14</sup> “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.” *Boyer v. West*, 210 F.3d 1351, 1356 (Fed. Cir. 2000) (quoting *Field v. Mans*, 516 U.S. 59, 66 (1995)). See also *Terry v. Principi*, No. 03-7107, slip op. at 7 (Fed. Cir., May 10, 2004).