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June 21, 2007

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, DC 20230

Re: Comments In Response to *Federal Register* Notice, *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29,302 (May 25, 2007).

Dear Mr. Spooner:

In response to the Department of Commerce's ("Commerce") request published in the *Federal Register* on May 25, 2007, Thompson & Knight LLP hereby submits its comments on behalf of Cheng Meng Furniture, a Singaporean company that processes bedroom furniture in the People's Republic of China ("China") through a wholly-owned Chinese foreign-invested enterprise ("FIE"). In its *Federal Register* notice, Commerce requested that all persons wishing to comment address the following topics: (i) whether Commerce should consider granting market-economy treatment to individual respondents in U.S. antidumping ("AD") proceedings involving China; (ii) the conditions under which individual Chinese firms should be granted such treatment; and (iii) how such treatment might affect Commerce's AD calculations for qualifying respondents. *See* 72 Fed. Reg. at 29,302.

In our comments, we first explain why the market-oriented industry ("MOI") approach is inapplicable to China's economy and why the current economic-market conditions in China support granting market-economy treatment to many Chinese enterprises. Next, we explain how to identify which Chinese enterprises warrant such treatment and how the normal value of Chinese subject merchandise can be calculated in accordance with Commerce's market-economy dumping methodology. Finally, we show

that the major positive effect of our approach is the calculation of accurate dumping margins in U.S. AD proceedings involving China in a manner consistent with statute and U.S. international obligations.

I. INTRODUCTION

Congress codified the first non-market economy (“NME”) provision into the U.S. AD law with the passage of the Trade Act of 1974 to counter the changes in the world market brought about by the then-transitioning economies of the former Soviet-bloc countries. *See* S. Rep. No. 1298, 93d Cong., 2d Sess. 174 (1974). Congress recognized that previous methodologies were “insufficient to counteract dumping from [NME] countries *where the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison purposes.*” *Id.* (emphasis added). Congress specifically found that the absence of supply-and-demand forces in NMEs precludes the agency from correctly ascertaining the normal value of NME subject merchandise.¹

For this reason, Congress ultimately enacted section 773(c) of the Tariff Act of 1930, as amended (the “Tariff Act”), to perfect the methodology employed to calculate NME normal value² and “to provide greater certainty and predictability in the administration of the [AD] law as it applies to [NMEs].” S. Rep. No. 71, 100th Cong., 1st Sess. 108 (1987). Nevertheless, before authorizing Commerce to invoke the NME factors-of-production methodology, the statute first directs the agency to take an additional step and find “that available information does not permit the normal value of the [NME] subject merchandise to be determined” in accordance with the agency’s market-economy dumping methodology. 19 U.S.C. § 1677b(c)(1)(B).

¹ S. Rep. No. 1298, 93d Cong., 2d Sess. 174 (1974); *Antidumping Investigation Procedures Under Antidumping Act, 1921*, 43 Fed. Reg. 35,262, 35,263 (Aug. 9, 1978) (preamble) (publishing regulation implementing first U.S. NME provision codified in the Trade Act of 1974: “This provision reflects congressional concern that state control of an economy renders inherently suspect the prices and costs of producers in such country”).

² *Accord* Memorandum for David M. Spooner, Assistant Secretary for Import Administration, *Antidumping Investigation of Certain Lined Paper Products from the People’s Republic of China (“China”) – China’s status as a non-market economy*, 1, 6 (August 30, 2006) (“NME Memorandum”) (“prices and costs are central to [Commerce’s] dumping analysis and calculation of normal value...NME prices cannot be relied upon as meaningful measures of value because they do not, *as a general rule*, reflect the relative scarcity of resources used in production. The problem with NMEs is not one of distorted prices, *per se*, since few, if any, market economy prices are perfect measures of value, free of all distortions...The problem, instead, is the *price generation process* (*i.e.*, the extent to which **independent demand and supply elements individually and collectively make the market-based price system work**) (bold emphasis supplied)).

By expressly requiring Commerce to make this additional determination, section 773(c) of the Tariff Act explicitly commands Commerce to use, on occasion, home-market prices and costs of an NME enterprise to calculate normal value. Such an occasion typically arises where, as here, an NME like China is in transition – that is, the NME "is in the process of transformation from a centrally-planned economy into a market, free enterprise economy." *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Economies in Transition*, U.S.-Eastern European Seminar on U.S. Antidumping and Countervailing Duty Law, 26 (January 21-30, 1992) ("Eastern European Seminar Document").³ Although the economy as a whole of such a country may be buttressed on NME principles, certain enterprises within that economy may be market-oriented. *Id.* Consequently, the prices and costs of such enterprises are generally established in accordance with free-market principles and, therefore, provide a reliable basis to measure potential price-discrimination practices. *Id.*

II. CHINA'S REFORMS WARRANT GRANTING MARKET-ECONOMY DUMPING TREATMENT TO MARKET-ORIENTED CHINESE RESPONDENTS

Commerce's administrative approach to determine whether its market-economy dumping methodology is applicable in an NME setting has undergone important modifications during the past three decades.⁴ Despite these modifications, the current case-by-case, industry-specific MOI approach

³ The Eastern European Seminar Document is a public document that was distributed by U.S. trade delegates to seminar attendees as part of President George H.W. Bush's Trade Enhancement Initiative for Central and Eastern European countries that provided a background of Commerce's treatment of *transitional* economies under the U.S. AD and countervailing duty laws.

⁴ Compare *Antidumping, Natural Menthol from the People's Republic of China; Final Determination of Sales at Less Than Fair Value*, 46 Fed. Reg. 24,614 (May 1, 1981) (evaluation of macro-criteria to determine whether China as a whole is state-controlled to determine whether a particular industrial sector is market-oriented) and *Petroleum Wax Candles from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 25,085 (July 10, 1986) (following same approach) with *Final Determination of Sales at Less Than Fair Value: Certain Headwear from the People's Republic of China*, 54 Fed. Reg. 11,983, 11,984 (March 23, 1989) (adopting 'bubble of capitalism' approach: Chinese government involvement in production of major input deemed significant and Commerce "not persuaded that...sufficient market-like influences...determine that the prices paid by the headwear producers for cotton cloth are market-driven"); *Final Determination of Sales At Less Than Fair Value: Chrome-Plated Lug Nuts From the People's Republic of China*, 56 Fed. Reg. 46,153 (Sept 10, 1991) (rejecting macro-country criteria and adopting "mini bubbles of capitalism" approach [*i.e.*, 100-percent individual inputs test] to determine whether specific sector is market-oriented); and *Final Determination of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans From the People's Republic of China*, 56 Fed. Reg. 55,271 (Oct. 25, 1991) (embracing 100% "mini-bubbles" approach). But see *Initiation of Countervailing Duty Investigations: Oscillating Fans and Ceiling Fans From the People's Republic of China ("PRC")*, 56 Fed. Reg. 57,616, 57,617 (Nov. 13, 1991) (questioning 100% "mini-bubbles" approach); *Initiation of Countervailing Duty Investigation: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China ("PRC")*, 57 Fed. Reg. 877 (Jan. 9, 1992) (further questioning 100% "mini-bubbles" approach). *Accord Preliminary Determination of Sales at Less Than Fair Value: Sulfanilic Acid From the People's Republic of China*, 57 Fed. Reg. 9409 (March

has become inapplicable to China by virtue of China's comprehensive free-market advances over a contemporaneous period. China's reforms, therefore, when examined in light of the U.S. AD statutory scheme, warrant the adoption of an *enterprise-specific* approach to determine whether an individual Chinese exporter merits market-economy treatment.

Where competitive free markets exist, prices are generally set, and costs are typically incurred, on an *enterprise-by-enterprise*, rather than on an *industry-by-industry*, basis. It necessarily follows that the resulting normal value and export price of the relevant subject merchandise are calculated on an *enterprise-by-enterprise* basis as well in order to identify and offset any international price discrimination practices undertaken in such competitive markets. The U.S. antidumping law is no exception to this general tendency. Hence, the Tariff Act provides a preference for evaluating *market-oriented* respondents, including those from NMEs, on an *enterprise-by-enterprise* basis as well.

As fully recognized by Commerce in its August 30, 2006, NME Memorandum, and as later acknowledged by the agency in its March 29, 2007 memorandum, *Countervailing Duty Investigation of Coated Free Sheet ("CFS") Paper from the People's Republic of China -- Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy* ("Georgetown Steel Memorandum"), China's reforms have had the overall effect of propelling free-market private initiative and private entrepreneurship on an *individual, company-by-company* basis in China. See Georgetown Steel Memorandum at 7 ("entrepreneurship is flourishing in China").

The *sine qua non* factor responsible for the facilitation of private-party negotiations and agreements – which constitutes the essential pillar of free-enterprise markets – is the recognition, creation, enforcement, and protection of private property rights.⁵ China has for several decades provided an ever-

18, 1992) (adopting market-oriented industry test). For an additional discussion concerning the evolution of Commerce's dumping approach in cases involving *transitional* NMEs, see Eastern European Seminar Document at 23-26.

⁵ See Cooter & Ulen, *Law and Economics*, 1, 78-84 (2d Ed. 1995) (analyzing the Coase Theorem published in *The Problem of Social Cost*, 3 J. Law & Econ 1 (1960)); NME Memorandum at 33 ("The right to own private property is fundamental to the operation of a market economy"); *id.* at 62 ("Property ownership is a legal principle fundamental to entrepreneurial activity").

expanding basis for the protection of personal property.⁶ On March 16, 2007, China enacted a new Property Rights Law, effective October 1, 2007, which implements the right of private property expressly recognized in a recent Chinese constitutional amendment, and which has been recognized in other laws such as China's Contract Law. *See* NME Memorandum at 62-64. The purpose of the Property Rights Law is to promote even further China's growing market-economy segments by expressly guaranteeing equal protection to all property owners, including private-property owners. Legal experts and international governmental organizations have heralded the new law as a veritable milestone.⁷ Significantly, the Property Rights Law uses "market prices" as the basis for several of its provisions. *See* Property Rights Law, Art. 195 ("Market price should be taken as reference when converting the mortgaged assets into money or selling the mortgaged assets."), *id.* at Art. 219 ("Market prices shall be used as reference in conversion and/or sale of the pledged property"). The Property Rights Law also helps to facilitate the financing of the private sector, which has been considered a higher credit risk by many banks, by providing a legal basis for various forms of secured lending such as floating charges and pledges over accounts receivables. *See* Property Rights Law at PART IV.

The expansion of private property rights in China, along with the long-term development of its contract law, has propelled private-party negotiations, bargains, and agreements to such an extent that "market forces now determine the prices of more than 90 percent of products traded in China." Georgetown Steel Memorandum at 5; NME Memorandum at 47 ("The 1997 *Pricing Law*...gives most enterprises [in China] the right to set their own prices for goods and services"). Furthermore, the vast majority of private enterprises "in present-day China are generally free to direct most aspects of their operations," *id.* at 10, including the negotiation of wage rates with their employees. Georgetown Steel

⁶ *See, e.g.*, NME Memorandum at 62-64 ("While several rounds of amendments to the Constitution since 1978 have allowed for an increasing scope of rights for individuals and private enterprises, private property rights were not explicitly recognized in the constitution until 2003," which now states that the "lawful property of citizens shall not be violated. The State shall protect private property rights and inheritance rights of citizens in accordance with law.").

⁷ *See* Organization for Economic Cooperation and Development, *The OECD Welcomes Policy Advances at China's 2007 National People's Congress Session*, 3 (March 27, 2007) (stating that "this is a welcome step forward in establishing a firm basis for the protection of investors, both domestic and foreign").

Memorandum at 5 (“enterprises generally are free to set wages”); NME Memorandum at 13 (wages “are an important component of a producer’s costs and prices and, in turn, are an important indicator of a country’s overall approach to setting prices and costs in the economy”); *id.* at 16 (“Article 16 of the *Labor Law* provide [sic] that all employers...are required to *negotiate labor contracts* with their employees) (emphasis added).

As a direct result of China’s sweeping reforms, the overwhelming majority of individual private enterprises in China, guided by the profit motive and the free-market forces of supply and demand, make their own business decisions independent of any Chinese government involvement or control. *See* NME Memorandum at 46-50; *id.* at 66-67 (explaining that “by 2003 private firms were dominant in all 23” of China’s “non-core” manufacturing sectors). These private Chinese enterprises select their desired form of business ownership pursuant to liberalized Chinese investment provisions;⁸ diligently allocate economic resources by autonomously choosing product mix, manufacturing processes, and input suppliers; freely establish wage rates, production levels, and selling prices; and carefully select markets for distribution in an effort to minimize costs and maximize profits. *Id.* at 2-4, 22-26, 28-33, 46-50, 66-70.

Accordingly, the prices charged, and the costs incurred, by these private individual Chinese enterprises for both finished goods and productive inputs sold in China generally reflect economic reality and, therefore, provide a reliable basis to measure alleged dumping practices. *Accord* Eastern European Seminar Document at 24; NME Memorandum at 46 (“Decentralized economic-decision making is a hallmark of market economies, where the independent investment, input-sourcing, output and pricing actions of individuals and firms in pursuit of private gain collectively ensure that economic resources are allocated to their best (most efficient) use. Prices in such economies tend to reflect both demand conditions and the relative scarcity of the resources used in production”). It follows that the price-and-wage generation process in China is increasingly based on the free-market forces of supply and demand. *See, e.g.*, NME

⁸ NME Memorandum at 3, 10-11 (“Domestic and foreign companies and individuals are free to acquire, hold and sell foreign exchange, and foreign companies are free to repatriate capital and remit profits”); *id.* at 22-33 (“China permits all forms of foreign investment...,” and foreign investors are “free to repatriate profits and capital...”).

Memorandum at 18 (“Wage increases and labor shortages in the highly developed southeast region have prompted some FIEs to move inland, where wages can be half of those prevailing on the coast”); *supra* note 2 at 2 (highlighting how the price-generation process functions when market conditions dictate the establishment of prices and costs). Thus, the free-market scenario constitutes the norm for individual private Chinese enterprises today.

III. FACTORS THAT WARRANT APPLYING COMMERCE’S MARKET-ECONOMY DUMPING METHODOLOGY IN AN NME CONTEXT

A. Criteria to Identify Individual Chinese Respondent Enterprises That Merit Market-Economy Dumping Treatment

To identify individual Chinese respondent enterprises eligible for market-economy dumping treatment, Commerce must draw a distinction between wholly and partially stated-owned enterprises (“SOEs”, including “corporatized” SOEs) and purely privately-held enterprises.⁹ Unless SOEs and “corporatized” SOEs can provide compelling evidence to the contrary, such entities generally would be

⁹ To draw this distinction, Commerce can start with a respondent’s legal form, an important factor in determining a company’s independence from state control. *Accord* Import Administration Antidumping Manual (1997), Chapter 13(V)(A). Private enterprises in China are readily distinguishable from their SOE counterparts by virtue of their corporate organization and ownership by private-party members, shareholders, and partners. *See* NME Memorandum at 23 (“The 1994 *Company Law*, as amended in 2006, establishes the basic framework for limited liability companies...and enterprises limited by shares”). China’s registration system also provides for a register of the direct ownership of companies which is more detailed than basic publicly-available official company information in the U.S. NME Memorandum at 26; *see Trade Policy Review, People’s Republic of China*, II(6)(iii)(86), n109 (Geneva: World Trade Organization, February 28, 2006). Other legal forms of organization have been established for private foreign investment. In particular, China has adopted several framework laws providing for the establishment of FIEs, both as cooperative/contractual and equity joint ventures with domestic entities, and for wholly foreign owned enterprises. *See* 20 COLUM. J. ASIAN L. 1, at 12-13; *Accord* NME Memorandum at 23-27.

In addition to the above legal formalities, Commerce has evaluated other substantive factors that establish both *de jure* and *de facto* independence of a Chinese enterprise from the central government. *See, e.g., Fujian Machinery and Equipment Import & Export Corp. v. U.S.*, 25 Ct. Int’l Trade 1150, 178 F. Supp. 2d 1305 (remanding proceeding to Commerce to reconsider application of “adverse facts available” where Commerce failed to show by substantial evidence that Chinese companies were not entitled to separate rates after they had “demonstrated their independence in numerous consecutive preceding reviews”); *Bicycles from the People’s Republic of China*, 61 Fed. Reg. 19026 (1996). Evidence that Commerce typically considers in support of a claim of *de jure* independence includes the following: “(1) An absence of restrictive stipulations associated with an individual exporter’s business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies.” *Fujian Machinery* at 1172 (citing *Coalition for Preservation of American Brake Drum and Rotor Aftermarket Mfrs. v. U.S.*, 318 F. Supp. 2d 1305). Factors that are probative of *de facto* independence include: (1) whether each exporter sets its own export prices independently of the government and other exporters; (2) whether each exporter can keep the proceeds from its sales; (3) whether the Respondent has authority to negotiate and sign contracts and other agreements; and (4) whether the Respondent has autonomy from the government in making decisions regarding the selection of management. *Fujian Machinery* at 1172 (citing *Coalition*); *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the PRC*, 59 Fed. Reg. 22,585, 22,587 (May 2, 1994). Although Commerce has analyzed the foregoing factors in the context of export price for purposes of assigning a separate dumping margin to an individual Chinese exporter, the same kind of market-price analysis is applicable to the determination of normal value.

ineligible for market-economy dumping treatment, because they do not customarily set prices or incur costs in accordance with free-market forces. *See* NME Memorandum at 38-40, 46, 67, 70 (explaining that central government planners still make significant economic decisions for these entities). Furthermore, to date, China has largely failed in its attempt to separate state owners from managers in the “corporatized” SOEs. *Id.* at 36.

By contrast, privately-held Chinese enterprises, including (i) wholly foreign-owned enterprises (“WFOEs”), (ii) majority foreign-owned (*e.g.*, equity or contractual-cooperative joint ventures) FIEs, (iii) minority-owned FIEs with non-state partners, and (iv) private Chinese-owned enterprises, would generally be eligible for market-economy dumping treatment. These business entities typically establish all selling prices, and customarily incur all costs, in strict accordance with market-driven supply-and-demand considerations. *See* NME Memorandum at 2-4, 22-26, 28-33, 46-50, 66-70; *id.* at 49 (“Except for those producers subject to price controls, prices for wholly-owned foreign owned enterprises and equity-joint ventures sales inside China were liberalized in 2001”).

In this context, FIEs in general are more likely than their private domestic counterparts of importing market-economy components as a result of the know-how and relations of their foreign investors.¹⁰ Furthermore, unlike the private sector as a whole, FIEs are generally not hampered by limited access to bank credit in China as they typically look to off-shore bank financing to capitalize their on-shore Chinese operations. *See* Thomas Hall, *Controlling for Risk: An Analysis of China's System of Foreign Exchange and Exchange Rate Management*, 17 COLUM. J. ASIAN L. 433, 468 (Spring 2004)

¹⁰ *See* Development Research Center of the State Council of China, et al., Report and Joint Policy Recommendations on Strengthening Economic Cooperation among China, Japan and Korea in 2002, Section III.2 (October 2002), <http://www.nira.go.jp/newse/paper/joint2/report.html> (last visited June 20, 2007) (“The procurement of both Japanese and Korean funded enterprises highly relies on imports....FIEs depend more on imports from their home countries than other import sources”); Export-Import Bank of India, *India-China Newsletter*, p3, <http://www.eximbankindia.com/icn-jan07.pdf> (last visited June 20, 2007) (FIEs accounted for 59.7% of China’s total imports in 2006); Consumer Electronics Association, *International Insider Series: Opportunities in China* (2006), <http://www.ce.org/PDF/WPChinaLR.pdf> (last visited June 20, 2007) (“China’s manufacturing needs and shifts in consumer preferences have created significant demand for imported electronics components. The U.S. Commercial Service estimates that China accounts for 26 percent of global demand for electronics components....While joint ventures and [WFOEs] often purchase from global suppliers with whom they already have established relationships, many purchase from local suppliers where there is availability of *comparable goods*. Also, state and *privately-owned domestic Chinese companies* usually purchase their parts and/or components from local Chinese suppliers, although they too *will purchase from abroad when necessary*. Given this pattern of sourcing, many foreign component-suppliers are establishing a presence in China through representative offices, distributors and/or agents.”) (emphasis added).

("Foreign currency borrowing transactions...remain heavily restricted. However,...[t]he foreign debt regulations are less restrictive of borrowing by FIEs, which are generally free to borrow and repay foreign loans at will."); *Contra* Georgetown Steel Memorandum at 7 (stating that the private sector's access to bank credit is limited).

Within the overall group of FIEs, WFOEs "are the farthest from the center of state control and closest to the edge of the market." Justin Tan, et al., *When iron fist, visible hand, and invisible hand meet: Firm-level effects of varying institutional environments in China*, JOURNAL OF BUSINESS RESEARCH, vol. 60, issue 7, §3 (July 2007). That a Chinese respondent is a WFOE constitutes *prima facie* evidence for Commerce to establish the lack of *de jure* government control that warrants market-economy dumping treatment.¹¹

B. Calculation of the Normal Value of the Chinese Subject Merchandise Pursuant to the Agency's Market-Economy Dumping Methodology

1. Normal Value Based on Chinese Home-Market or Third-Country Prices

To determine normal value under 19 U.S.C. § 1677b(a), Commerce must first attempt to use the final adjusted selling prices of the Chinese subject merchandise sold in China (by the private Chinese enterprises described above) to other private Chinese enterprises or individuals.¹² 19 U.S.C. § 1677b(a)(1)(B)(i). If, however, a private Chinese enterprise has inadequate sales in the Chinese home market, then Commerce can use the final adjusted selling price of the Chinese subject merchandise as sold by such private enterprise in its leading third-country market to calculate normal value. 19 U.S.C. §

¹¹ In October 2000 and April 2001, additional reforms were made to the WFOE law and implementing regulations that placed WFOEs even further outside the shrinking net of Chinese government control. The reforms relevant for the instant analysis include the elimination or revocation of the following restraints: (1) the prerequisite "that raw materials and fuel for WFOEs be obtained solely within China unless unavailable from the domestic market"; (2) the requirement that "WFOEs submit production and operation plans to local authorities"; and (3) the requirement that "WFOEs sell products in accordance with China's price control regulations or record the prices with price control and tax authorities." George O. White III, *Enter the Dragon: Foreign Direct Investment Laws and Policies in the P.R.C.*, 29 N.C.J. INT'L L. & COM. REG. 35, 42.

¹² Commerce may wish to consider excluding Chinese home-market sales made to SOEs and "corporatized" SOEs for purposes of establishing normal value. The potential exists that any of these government-controlled entities could use its *guanxi* or government connections to compel a privately-owned Chinese enterprise to sell goods in China to the government-controlled entity at prices that are not consistent with free-market considerations. See *generally* NME Memorandum at 80. Commerce would need to adopt some kind of an arm's length test to determine whether such Chinese home-market sales are indeed based on market considerations for normal-value purposes.

1677b(a)(1)(B)(ii),(C). If Chinese home-market and third-country sales are inadequate, then Commerce can use the constructed value of the Chinese subject merchandise to determine normal value. 19 U.S.C. § 1677b(a)(4).

2. Normal Value Based on Chinese Constructed Value Data

To calculate the constructed value of the Chinese subject merchandise pursuant to the Tariff Act, Commerce must take into account, based on cost data existing in China, the following individual cost components: (i) direct material costs (*i.e.*, direct components) and direct and indirect fabrication costs (*i.e.*, direct and indirect labor costs and factory overhead expenses,¹³ including depreciation); (ii) general expenses (*e.g.*, selling, general, administrative, and financing expenses);¹⁴ (iii) packing costs, including the costs of all containers and coverings; and (iv) an amount for a reasonable profit. 19 U.S.C. § 1677b(e).

a. Direct-Material Components

In valuing a Chinese exporter's factors of production pursuant to the agency's NME methodology for transitional economies, Commerce usually seeks to "value factor-of-production inputs at actual acquisition prices if it can be established that those inputs are purchased from a market economy country in freely convertible currency." Eastern European Seminar Document at 29; NME Memorandum at 13 ("The [Chinese] *renminbi* is convertible into foreign currencies for trade purposes"). Private Chinese companies, and in particular many FIEs in China, import many of their essential direct-material components from market-economy countries or purchase these inputs from other market-oriented FIEs in China. *See supra* note 10 and accompanying text. Given that prices for imported components are set in accordance with free-

¹³ Factory-overhead expenses consist of indirect supplies, indirect materials, utilities, maintenance, repairs, light, heat, power, plant and equipment, and the like. Stephen J. Powell et al., *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks*, 11 NW. J. INT'L L. & BUS. 177, 185 n.47 (1990) (citing Brock & Palmer, *Cost Accounting: Principles and Applications* 1, 5-6 (4th ed. 1984)).

¹⁴ In accordance with generally accepted accounting principles ("GAAP"), as interpreted in light of the Tariff Act, the term "general expenses" – that is, selling, general, administrative, and financing expenses – consist of the following items: (i) direct selling expenses (*e.g.*, warranty and advertising expenses); (ii) indirect selling expenses (*e.g.*, telephone, facsimile, stationery, postal charges, and salespersons' salaries); (iii) general and administrative expenses (*e.g.*, salaries of non-sales personnel, rent, heat, and light); (iv) financing expenses (*e.g.*, credit and debt); (v) research and development expenses; (vi) depreciation expenses for non-production assets; and (vii) any other similar general expense. Powell, *Implications for Prospective U.S.-Mexico Free Trade Talks*, 11 NW. J. INT'L L. & BUS. at 185-186.

market principles in a market-economy country, Commerce can comfortably use such direct-material import prices to calculate the constructed value of the Chinese subject merchandise.

In cases in which a private Chinese enterprise sources part or all of its direct-material inputs from China, the rule governing direct-material components imported from market-economy countries will apply with equal force and effect to components sourced from a Chinese FIE. Prices are generally set, and costs are typically incurred, in a Chinese FIE in accordance with market-driven supply-and-demand considerations. See NME Memorandum at 7. In cases in which a private Chinese enterprise sources part or all of its direct-material inputs from a private enterprise other than an FIE in China, Commerce can still rely on the overwhelming majority of Chinese direct-material prices or costs. “[M]arket forces now determine the prices of more than 90% percent of products traded in China,” including productive inputs. Georgetown Steel Memorandum at 5.

In cases in which the Chinese direct-material input in question is subject to some kind of Chinese government fixed price, price control, or “guidance prices” (e.g., metals), Commerce enjoys at its disposal two policy choices. First, the agency can apply a variant of its NME factors-of-production methodology and use surrogate prices or costs to derive the price or cost of the NME Chinese direct-materials component in question. Alternatively, the agency can establish a *de minimis* rule (applied in accordance with a flexible “rule-of-reason” approach that takes into account the totality of the relevant circumstances) that permits a certain specific minimum threshold of direct-material component costs (e.g., 1%, 5%, 10%) to be based on Chinese NME prices or costs.

A 10% *de minimis* rule would not be unreasonable in this context, because modern market economies of the world are not completely devoid of government interference, influence, and regulation in their own economies. *Accord* European Seminar Document at 106, n. 123. Governments in such countries typically promulgate and enforce antitrust laws to control natural monopolies and prices (e.g., the European Union); grant subsidies and tax abatements to promote certain goods and services (e.g., Brazil); award government contracts to domestic producers deemed critical to national security (e.g., the

United States); impose temporary price controls to combat inflationary pressures (*e.g.*, Argentina); intervene in foreign currency markets to stabilize national currencies (*e.g.*, Thailand); enter into domestic credit markets to control interest rates (*e.g.*, Chile); restrict and manage direct foreign investment to control certain strategic market segments (*e.g.*, Bolivia); establish minimum-wage and health and safety requirements to protect production-line workers (*e.g.*, France); and impose pollution controls to preserve the environment (*e.g.*, European Union). *Id.*

b. Direct and Indirect Fabrication and Factory-Overhead Costs

Commerce can also rely on direct-and-indirect fabrication costs incurred by private Chinese respondent enterprises, because such enterprises generally are free to set wages in China. *See* Georgetown Steel Memorandum at 5. Moreover, heightened demand for Chinese labor by FIEs has translated into Chinese wage-rate increases in direct response to market-driven conditions. Not surprisingly, the greatest wage-rate increases in China have “occur[ed] in FIE wages”. NME Memorandum at 18. In short, wages paid by private companies in China are grounded on free-market considerations and, therefore, provide a reasonable basis to establish the constructed value of the Chinese subject merchandise.

In a similar vein, “granted” land-use rights can be privately-owned, purchased on either the primary or secondary markets, and be freely transferred, leased, or mortgaged. *Id.* at 41-44. It follows that land-use rights in China can be valued in accordance with private-market considerations as well.

In cases in which a Chinese direct-indirect fabrication or factory-overhead cost component is subject to some kind of Chinese government fixed price, price control, or “guidance prices” (*e.g.*, electricity, natural gas, or other fuel or energy item), Commerce can employ either the surrogate price-or-cost methodology or the *de minimis* rule discussed in the preceding subsection.

c. General Expenses, Packing Costs, and Profit

All general expenses incurred by private enterprises in China, including selling and administrative expenses, are basically market-driven. *See generally* NME Memorandum at 49. With regard to financing expenses, FIEs often secure their financing from financial institutions located in

market-economy countries outside China. *See supra* note 10 at 8 and accompanying text. General packing costs in China are not subject to any kind of Chinese government fixed price, price control, or “guidance prices.” NME Memorandum at 49-50. Commerce can also ascertain a reasonable amount for profit in China the same way it does in any market-economy country of the world. The agency can start with the individual Chinese respondent in question, obtain comparable profit data from other privately-held Chinese respondents subject to the same AD proceeding, secure public information from publicly-traded Chinese enterprises, or attain other public sources of information in China. Accordingly, Commerce can rely on all of the Chinese data that comprise this last component of the constructed-value matrix.

IV. POSITIVE EFFECTS STEMMING FROM THE APPLICATION OF COMMERCE’S MARKET-ECONOMY METHODOLOGY TO INDIVIDUAL MARKET-ORIENTED CHINESE RESPONDENTS

The case-by-case, enterprise-by-enterprise approach outlined above achieves Commerce’s policy goals and economic rationale set forth in the pertinent *Federal Register* notice, because the proposed approach is generally consistent with the tenets of the agency’s current MOI test. In deciding whether to grant market-economy dumping treatment to an individual Chinese respondent under the proposed approach, Commerce must necessarily ensure (i) that there be virtually no government involvement in the production and price-setting activities for the Chinese enterprise in question, (ii) that such an enterprise be privately owned and behave in a manner consistent with market considerations, and (iii) that it be found to pay market-determined prices for all major inputs. *See* 72 Fed. Reg. at 29,302.

Our approach also fulfills an underlying purpose of the Tariff Act, which is to eliminate international price discrimination practices on a company-by-company basis. Consistent with U.S. international obligations, the proposed approach even eliminates the potential for creating punitive and protectionist dumping penalties that are not grounded on market considerations, but rather on the automatic application of an anachronistic NME methodology that uses as its reference point the now-defunct Soviet bloc.

The rigid application of the NME factors-of-production methodology – which is premised on the outdated legislative assumption that there is a total absence of supply-and-demand forces in all NMEs today (*see supra* note 2 at 2 and accompanying text) – necessarily skews the dumping-margin results whenever a Chinese respondent is market-oriented. By favorable contrast, by facilitating the calculation of dumping margins of a Chinese market-oriented enterprise in the same manner as that employed for any market-economy exporter, the proposed approach guarantees accurate dumping-margin calculations in U.S. AD proceedings involving China. Ensuring that *only* correctly-calculated dumping margins (based on real-life commercial conditions) will be offset is the single most important positive effect of this methodology.

V. CONCLUSION

China's comprehensive reforms warrant that Commerce consider granting market-economy dumping treatment to individual market-oriented Chinese respondents. Wholly foreign-owned enterprises (*i.e.*, WFOEs) would be *prima facie* eligible for such treatment in the absence of evidence to the contrary. Majority foreign-owned enterprises, minority foreign-owned enterprises with non-state partners, and private domestically-owned enterprises would also be eligible for such treatment. The application of the agency's market-economy dumping methodology to individual market-oriented Chinese respondents will achieve an underlying purpose of the Tariff Act; that is, the accurate calculation of any price-discrimination margins for such business entities.

Respectfully submitted,



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