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BY HAND DELIVERY

Mr. David M. Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Ave. and 14th St., NW
Washington, DC 20230

Re: Proposed Change in Policy Regarding Market-Oriented Enterprise Methodology

Dear Mr. Spooner,

This letter is being filed in response to the May 25, 2007, request for comments on the Commerce Department's potential changes in policy regarding market-oriented enterprises in the People's Republic of China.¹ This letter is filed on behalf of Standard Furniture Manufacturing Company, a domestic producer of wooden bedroom furniture, and Collezione Europa, Fine Furniture Design & Marketing, Hillsdale Furniture, Klaussner International, RiversEdge Furniture Company, Trademasters LLC and L. Powell Company, domestic importers of wooden bedroom furniture from China. These U.S. companies share an interest in the most accurate calculation of nonmarket economy ("NME") antidumping duty rates possible. These companies support a change to the current market-oriented industry ("MOI") test and corresponding methodology because the Department's current practice creates an unfairly-high threshold for MOI treatment. While these comments are informed, in part, by the realities of the furniture

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

industry in China, they are intended to provide general guidance for the revised policy, regardless of industry.

The above-mentioned parties appreciate the Department's initiative and have a keen interest in any changes the Department makes regarding its MOI treatment because such changes might alleviate the unfair distortion in antidumping margins currently resulting in NME cases. The Department has the responsibility to administer the antidumping laws in accordance with World Trade Organization ("WTO") agreements and the Tariff Act of 1930, as amended. Recognizing that the Department administers the antidumping laws with particular attention to U.S. interests, the companies on whose behalf these comments are filed would like to respectfully remind the Department that there are many interested parties in the United States. U.S. interested parties include not just petitioners, but also other U.S. manufacturers and importers—entities that significantly contribute to the U.S. economy. These are companies whose business interests rely on the fair application and predictability of U.S. antidumping policy.

I. Introduction

The Department's current NME methodology unfairly and artificially inflates antidumping margins. The Department's significant step towards granting market-economy treatment to individual respondents based on an examination of the company itself rather an assumption based on its host country via its MOI methodology is welcomed. As the Department considers such an important change, it should also consider whether it should dispense with its

NME methodology altogether, especially in light of its recent change in policy regarding the application of the countervailing duty law to NME countries.²

If the Department determines that it should continue this distortive NME methodology, it should nevertheless revise its MOI test to afford companies that independently operate pursuant to market principles a reasonable opportunity to be examined as market-economy driven entities. The way to achieve this goal is to develop a test that examines the respondent itself and not solely the industry as a whole.

Set forth below are comments showing why the Department should change its current methodology, including responses to the questions posed by the Department. The abovementioned parties recognize that while the following comments are brief, nevertheless they provide important input regarding the change in policy.

II. A Change to the MOI Test is Long Overdue Based on Developments in the Chinese Economy

As the Department acknowledges, its “current MOI test was formulated 15 years ago.”³ The current test is outdated and must be drastically revamped to comport with the reality of China’s marketplace. Over the past 25 years, China’s economy has undergone a remarkable transformation, opening up to the outside world, allowing the explosive growth of a market-oriented commercial sector, and making impressive strides toward a more market-oriented economy.⁴ China is putting forth significant effort in the recognition and protection of property

² See *Coated Free Sheet Paper from the People’s Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 17,484 (Apr. 9, 2007).

³ *Market-Oriented Enterprise*, 72 Fed. Reg. at 29,303.

⁴ Mark A. Groombridge, *China’s Long March to a Market Economy: The Case for Permanent Normal Trade Relations with the People’s Republic of China* 2-3, Cato Institute, 2000, <http://www.freetrade.org/pubs/pas/tpa-010.pdf>. The European Commission concurs, stating that in the last three years, “China has made significant progress towards market economy status...[and has] shown evidence that it is committed to significantly reducing state interference in the management of companies.” Helena Spongenberg, *Brussels Impressed by China “Market Economy” Progress*, EU Observer, June 4, 2007, http://euobserver.com/9/24185?rss_rk=1.

rights at a time of declining government control over production and prices for isolated industries, restructuring and reorganizing its state-owned enterprises (“SOEs”), enhancing market liberalization measures taken in compliance with China’s accession to the WTO, and making alterations to its financial sector. These exceptional changes necessitate that the Department modernize its own methodology to acknowledge current reality. A more detailed discussion of the foregoing changes is set forth below.

A. Recognition and Protection of Personal Property Rights

In recent years, the Chinese government has taken significant steps to recognize and protect personal property rights. The Chinese Constitution states in Article 13 that “[t]he state protects the rights of citizens to own lawfully earned income, savings, houses and other lawful property. The state protects by law the right of citizens to inherit private property.”⁵ The Constitution was amended in March 2004 to provide additional support for and protection of private property rights.⁶ On March 16, 2007, the National People’s Congress passed by a resounding majority the *Property Rights Law of the People’s Republic of China*, a landmark property rights bill offering increased protection for private property.

B. Declining Government Control Over Production and Prices

Contrary to the misguided belief that perpetuates the NME policy of the Department, government control of prices is not rampant in China. China’s 2001 accession to the WTO includes a listing of products and services that are subject to price controls.⁷ The products listed

⁵ Xianfa [Constitution] art 13, (1982)(P.R.C.).

⁶ Xianfa [Constitution] art. 13, amended by amend. XXII (2004)(P.R.C.). The amendment states, “[c]itizens’ lawful private property is inviolable. The State, in accordance with law, protects the rights of citizens to private property and to its inheritance. The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and shall make compensation for the private property expropriated or requisitioned.”

⁷ Annex 4 (“Products and Services Subject to Price Controls”) to the Protocol on the Accession of the People’s Republic of China to the World Trade Organization.

are either of strategic importance and limited or critical to the general public welfare.⁸ The list is primarily made up of foodstuffs, which the WTO members accepted as reasonable and prudent given China's large population and inherent vulnerability to shifts in global pricing. It is important to note that governmental involvement in such regulation is not inconsistent with a market economy, as similar controls exist or have existed in the United States energy, agricultural and forestry sectors.⁹ The U.S. energy sector is highly regulated and was subject to price controls during the 1970s.¹⁰ Moreover, many domestically-produced agricultural commodities are subject to U.S. government intervention as to prices and production quantities.¹¹ The U.S. Forest Service also imposes quotas for logging in national forests.¹²

C. Restructuring and Reorganization of State-Owned Enterprises

The economic significance of SOEs in China has declined with the rapid growth of the private sector. In early 2007, the private sector accounted for more than 65 percent of China's gross national product.¹³ Beginning in 2003, central and local government institutions transferred operation of SOEs to the State-owned Assets Supervision and Administration Commission of the State Council ("SASAC").¹⁴ One of the main functions of SASAC is to guide and promote the reform and restructuring of SOEs.¹⁵ SOEs are being restructured using

⁸ *Id.* Under Annex 4, products subject to state pricing include tobacco, salt, natural gas and certain pharmaceuticals; products subject to government guidance are grain, vegetable oil, processed oil, fertilizer, silkworm cocoons and cotton.

⁹ *Id.*

¹⁰ Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 (1973)(authorizing the Department of Energy and its predecessor, the Federal Energy Administration, to issue price control orders governing the sale and resale of crude and refined oil)(repealed 1981).

¹¹ See Farm Security and Rural Investment Act of 2002, Pub. L. 107-171 (May 13, 2002).

¹² See 36 C.F.R. Part 223 (2003)(governing the sale and disposal of national forest system timber by the U.S. Forest Service).

¹³ *New Law Strengthens China's Private Property Rights*, THE GUARDIAN, Mar. 16, 2007.

¹⁴ *The Extent of the Government's Control of China's Economy and its Impact on the United States: Hearing before the U.S.-China Economic & Security Review Commission* (2007)(statement of Thomas R. Howell).

¹⁵ *Main Functions and Responsibilities*, State-owned Assets Supervision and Administration Commission of the State Council, 2007, <http://www.sasac.gov.cn/eng/zyzz.htm>.

market principles and SASAC has and continues to allow SOEs to file for bankruptcy and eventually close. For example, SASAC expects more than 2,000 SOEs to declare bankruptcy by the end of 2008.¹⁶

D. Market Liberalization Measures Taken in Compliance with WTO Accession

In order to comply with its WTO accession commitments, China has taken measures to open its domestic market, remove barriers to foreign trade and attract foreign direct investment (“FDI”). FDI continues steady growth, with an 11.6% increase in the first quarter of 2007 alone.¹⁷ Foreign-invested enterprises play a large role in China’s economy, accounting for fifty-eight percent of China’s foreign trade. In 2006 alone, China approved more than 40,000 foreign-invested enterprises.¹⁸

E. Recent Changes to the Chinese Financial Sector

The Chinese financial sector has recently undergone several important changes. In November 2006, the State Council promulgated the *Regulations on the Administration on Foreign Banks*, removing restrictions on foreign-invested banks.¹⁹ After enactment in December 2006, foreign banks no longer had to obtain regulatory approval to operate their businesses in renminbi (“RMB”), effectively opening up China’s banking industry to foreign competition. A similar liberalization is occurring in the insurance industry, with 49 foreign firms now operating

¹⁶ *China to Approve Bankruptcy of over 500 SOEs by the end of 2006*, Embassy of the People’s Republic of China in the United States of America, Dec. 5, 2006, <http://www.china-embassy.org/eng/gyzg/t282582.htm>.

¹⁷ *China’s Foreign Direct Investment Up 11.6% in First Quarter*, Market Watch, Apr. 12, 2007, <http://www.marketwatch.com/news/story/chinas-foreign-direct-investment-up/story.aspx?guid=%7B4CA7E991-44D3-4886-BA4D-60C1182CA5E5%7D>.

¹⁸ *Foreign Investment in China*, The U.S.-China Business Council, Feb. 2007, <http://www.uschina.org/info/forecast/2007/foreign-investment.html>.

¹⁹ *Regulations on the Administration of Foreign Banks (2006)*(P.R.C.).

in China.²⁰ Additionally, China has taken steps to widen the daily band within which its currency is permitted to move against the dollar.²¹ In its June 2007, *Report to Congress on International Economic and Exchange Rate Policies*, the Bush Administration even refused to cite China as a country that manipulates its currency to gain unfair trade advantages.²²

III. The New MOI Test Should Examine Individual Respondents

In its request for comments, the Department has asked:

What are the conditions under which the Department might grant market-economy treatment to individual Chinese respondents, and, if so, how might this affect the Department's antidumping duty calculations for such qualifying enterprises (individual respondents as opposed to industries)? Whether and how a market-oriented enterprise or limited market-oriented enterprise should be identified?

The Department's current MOI test has required respondents seeking MOI treatment to present evidence regarding "virtually all" of the industry in question.²³ The Department should develop a company-based, as opposed to industry-based, test to determine whether to grant market-economy treatment to a company located in an NME. The Department already conducts an individual assessment to determine whether a Chinese company is entitled to a separate rate. The Department currently presumes that all companies within an NME country are subject to governmental control and should be assigned a single antidumping duty rate unless an exporter demonstrates the absence of both *de jure* and *de facto* governmental control over its export

²⁰ *Foreign Insurers Stride on Chinese Market*, China Economic Net, May 4, 2007, http://en.ce.cn/Industries/Insurance/200705/04/t20070504_11253719.shtml. This effectively doubles the pre-WTO accession number of foreign insurance firms operating in China.

²¹ The Economist Intelligence Unit, *China Country Forecast*, THE ECONOMIST, June 5, 2007, <http://www.economist.com/countries/China/profile.cfm?folder=Profile-Forecast>.

²² U.S. Treas., *Report to Congress on International Economic and Exchange Rate Policies*, June 13, 2007, available at http://www.ustreas.gov/offices/international-affairs/economic-exchange-rates/pdf/2007_FXReport.pdf.

²³ *Notice of Preliminary Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from China*, 69 Fed. Reg. 35312, 35320-1 (June 24, 2004).

activities through a “separate rates” test.²⁴ The test focuses on controls over the decision-making process on export-related investment, pricing and output decisions at the individual firm level rather than macroeconomic border-type controls.²⁵ It is, therefore, also possible for it to conduct an individual assessment to determine whether a company is a market oriented enterprise (“MOE”).

Assessing market-orientation on company-specific level is common among international antidumping methodologies. For example, the European Commission looks to a variety of factors including degree of government influence, absence of state-induced distortions in the operation of the enterprise and existence and implementation of a transparent and nondiscriminatory company law. This policy emphasizes that nonmarket economy analysis is not a judgment on a country’s overall economic development.²⁶ Rather, such analysis focuses on whether costs and prices can be considered reliable for the purposes of an antidumping duty investigation or review.²⁷

The Chinese firms whose merchandise is subject to antidumping duty orders are as diverse as the products they produce. They vary from very large, urban manufacturing companies to small, rural agricultural operations. Given this diversity, there must be flexibility in any new MOI methodology adopted by the Department. The Department’s new MOI test should be flexible enough to ensure that market economy treatment is not denied to a company

²⁴ See *Final Determination of Sales at Less Than Fair Value: Bicycles from the People’s Republic of China*, 61 Fed. Reg. 19026, 19027 (Apr. 30, 1996).

²⁵ See *Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 Fed. Reg. 61754, 61757 (Nov. 19, 1997); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 61,276, 61,279 (Nov. 17, 1997). See also, *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13,246 (Mar. 21, 2007).

²⁶ Commission of the European Communities, *Commission Staff Working Document Accompanying the 24th Annual Report from the Commission to the European Parliament*, 2005, available at

http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134455.pdf (citing Council Regulation Art. 2(7)(EC)).

²⁷ *Id.*

on the basis of one factor alone in situations where the overwhelming majority of evidence shows that the company behaves in a manner consistent with market considerations. What constitutes an “overwhelming majority” will differ from case-to-case and, therefore, the Department should not attempt to create any bright-line distinctions in its updated MOI methodology.

The many general factors that define a market economy should be considered by the Department as background to any alteration to the MOI Test. First, the freedom of commercial entities to produce the products they want by the methods and materials of their choosing and the subsequent ability to set prices that meet the competition they face from others in the industry is integral to a functioning market economy.²⁸ Second, workers should have the ability to choose their employment based on their education and skills and wages should be determined by worker availability and productivity.²⁹ Third, the financial sector should be decentralized so that individuals and corporate entities are free to make independent investment decisions.³⁰ Fourth, the role of the government should be such that the government does not take the place of the marketplace, but rather improves its functioning.³¹ Fifth, consumers must be granted sovereignty to determine through their choices in consumption what goods and services will be provided in the economy.³² When such factors are considered on a company-specific level, the Department may obtain a more realistic assessment of individual market orientation. The Department should take the following factors into account when developing the revised MOE test.

- (i) is the enterprise free to produce what it chooses,

²⁸ Michael Watts, *What is a Market Economy?*, U.S. Dept. of State, 1998, available at <http://usinfo.state.gov/products/pubs/market/homepage.htm>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

- (ii) is the enterprise free to employ workers based on skill and availability,
- (iii) is the enterprise able to make its own investment decisions,
- (iv) is government involvement facilitative rather than directional, and
- (v) is the enterprise able to purchase goods and services of its choosing.

These factors, taken together, will allow the Department to conclude whether or not a company's business is market-economy driven in terms of purchases and management.

In its request for comments, the Department has also asked:

[W]hat extent the Department should rely on a market-oriented enterprise's prices and costs, particularly for those inputs that are inextricably linked to the broader operating economic environment, i.e., labor, land and capital.

In cases where the Department finds independence from the Chinese government and that a respondent behaves in a manner consistent with market considerations, the Department should calculate the respondent's dumping margin using its normal market economy methodology. The market economy antidumping calculation presents a much more accurate picture than the fictional NME methodology.

The Tariff Act of 1930, as amended, requires that the valuation of factors of production be based "on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority."³³ The absolute best information available is, of course, an actual price paid by a producer in an NME country, as opposed to one that is derived from surrogate country data. Indeed, the courts have concluded that "using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law."³⁴

³³ 19 U.S.C. § 1677b(c)(1)(2000).

³⁴ *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (quoting *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55,271, 55,275 (Oct. 25, 1991)(final determination)).

The Department's further mandate is to calculate a respondent's antidumping duty margin as accurately as possible³⁵ and construct the product's normal value as it would have been if the NME country were a market economy country.³⁶ Actual prices paid for an input, whether produced in a foreign market economy or in a market-driven domestic economy, are the best indicators of normal value because that reflects the NME producer's actual cost. The courts have consistently maintained that it is axiomatic that a fair and accurate determination is fundamental to the proper administration of the antidumping laws.³⁷ The Department itself has acknowledged on many occasions that market economy prices ensure greater accuracy than reliance on surrogate values.³⁸ This is because actual market prices are "determined by market economy forces" whereas surrogate values "at best" represent "only an estimate" of what the NME producer might pay for the input.³⁹ The Department is now poised to extend its market economy purchases policy to domestic purchases in a market-driven economy such as China. The Department should adopt a change in its MOI test to fix these long-overdue distortions in the application of U.S. antidumping law and provide market economy enterprises within China with the opportunity to prove their status on an individual basis.

The Department has expressly concluded that "while an enterprise may be market-oriented, the cost of certain inputs obtained in the broader economy may necessarily be

³⁵ See *Rubber flex SDN. BHD v United States*, 59 F. Supp. 2d 1338 (Ct. Int'l Trade 1999).

³⁶ *Rhodia, Inc. v. United States*, 185 F. Supp. 2d 1343, 1351 (Ct. Int'l Trade 2001).

³⁷ See, e.g., *Koyo Seiko Co., Ltd. v. United States*, 746 F. Supp. 1108 (Ct. Int'l Trade 1990); see also *Ipsco Inc. v. United States*, 14 C.I.T. 265 (Ct. Int'l Trade 1990).

³⁸ E.g., *Issues and Decision Memorandum for Hand Trucks and Certain Parts Thereof from the People's Republic of China*, Comment 4, at p. 19 (Oct. 6, 2004) (stating that "[n]ormally, market economy inputs provide more accurate values."); *Certain Helical Spring Lock Washers from the People's Republic of China*, 64 Fed. Reg. 13,401, 13,403 (Mar. 18, 1999) (final results) (acknowledging that the Department "believe[s] that reliable import prices for the same input are a better means of valuing an input than surrogate values").

³⁹ *Certain Helical Spring Lock Washers supra* note 31.

determined on a non-market basis.”⁴⁰ If the Department concludes that the broader economic environment in which MOEs in China operate may preclude a use of all the enterprise’s costs, it should place the burden of proof that there are nonmarket forces at work for items such as land, labor and capital on the petitioners and develop a hybrid methodology in which it uses actual costs and data for material inputs and financial ratios but a surrogate for other factors.

IV. Conclusion

Standard Furniture Manufacturing Company, Collezione Europa, Fine Furniture Design & Marketing, Hillsdale Furniture, Klaussner International, RiversEdge Furniture Company, Trademasters LLC and L. Powell Company believe that an enterprise-level MOI test is the most appropriate treatment the Department can afford this issue and respectfully request that the above comments be taken into account in forming the new policy.

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In accordance with the Department’s Market-Oriented Enterprise Methodology request for comments, a signed original and ten copies of this document. An electronic copy of this submission is also being provided to the Department via electronic mail. Should the Department have any questions regarding these comments, please feel free to contact the undersigned.

Respectfully submitted,



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⁴⁰ *Market-Oriented Enterprise*, 72 Fed. Reg. at 29,303.