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Mr. David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Attn: Carrie Blozy, Lawrence Norton

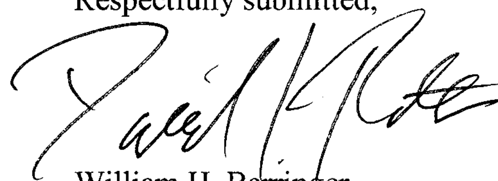
Re: Response to the Department of Commerce's Request for Comments on Market Economy Treatment for Individual Respondents in Antidumping Proceedings Involving China

Dear Mr. Spooner:

In response to the Department's request for public comment, listed in the May 25, 2007 issue of the *Federal Register,* enclosed please find comments on market economy treatment for individual respondents in antidumping proceedings involving China submitted on behalf of the China Chamber of Commerce of Metals, Minerals, and Chemicals Importers and Exporters (CCCMC). CCCMC appreciates the opportunity to submit these comments.

Please contact the undersigned should you have questions about this submission.

Respectfully submitted,



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# CHINA CHAMBER OF COMMERCE OF MINERALS, METALS AND CHEMICALS IMPORTS AND EXPORTS ("CCCMC")

## Response to Commerce Department's Request for Comments

## On

## Market Economy Treatment for Individual Respondents in Antidumping Proceedings Involving China

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**Dated: June 25, 2007**

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## INTRODUCTION

This submission is respectfully made on behalf of the China Chamber of Commerce of Minerals, Metals and Chemicals (CCCMC) in response to the Department's May 25, 2007 request for comments on:

> "whether it should consider granting market-economy treatment to individual respondents in antidumping proceedings involving China, the conditions under which individual firms should be granted market-economy treatment, and how such treatment might affect our antidumping calculation for such qualifying respondents."[1]

More specifically, the Department has also asked:

> "whether and how a market-oriented enterprise or limited market–oriented enterprise should be identified and to what 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, factors of production that were discussed at length in the Department's recent assessment of China's status as an NME in the antidumping duty investigation of certain lined paper from China."[2]

Finally, the Department asks:

> "to what extent, if any, a finding of a market-oriented enterprise might be limited and how a respondent's prices and costs within China could be utilized together with certain surrogate prices and costs in our antidumping duty calculations."[3]

CCCMC is a membership organization whose members include producers of two products recently targeted by the U.S. for countervailing duty investigations: standard pipe and off-road tires. As discussed in greater detail below, CCCMC's position is that the questions being asked here, while on the right track, do not go far enough. As the Department's own recent analysis in the countervailing duty

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1 72 Fed. Reg. 29302 (May 25, 2007).
2 *Id.* at 29303.
3 *Id.*

("CVD") case against coated free sheet ("CFS") paper demonstrates, China is as much a market economy as multiple countries that the United States currently treats as market economies. The Department now clearly accepts the notion that China is no longer a centrally planned economy. Rather, China is like so many other nations around the world whose economies are dominated by the market but remain influenced, in some measure, by the state. This finding should not merely permit the United States to pile on other forms of trade remedy measures, like the CVD laws. Rather, it should carry with it the obvious conclusion that China's economy is market oriented, and therefore deserves to be treated equally with other U.S. trading partners in the application of U.S. antidumping ("AD") laws.

In the event the Department continues to deny the repeated requests by the Government of China to be treated as a market economy, CCCMC insists that mandatory respondents subject to U.S. AD proceedings should at least be granted the presumption that they are market oriented, pending submission of an allegation by the petitioners, supported by sufficient evidence, demonstrating that this is not the case. Such evidence would not, by definition, include claims of subsidization, as such evidence would be addressed by the CVD laws to which the Department has now decided to subject China. Rather, the petitioners would be required to identify evidence that the exporter being examined is influenced by the state such that certain elements of the AD calculation – that is, prices or costs – are distorted in ways that the CVD laws are unable to address and in ways that differ from how such distortions would be treated if the targeted country was deemed a market

economy by the Department. Absent such evidence, the exporters would be treated in exactly the same way a respondent would be treated in a market economy case.

In the event a petitioner submits evidence that overcomes the presumption, it would not result in non-market economy ("NME") treatment with regard to the entire normal value calculation for an exporter, but only to those aspects of the calculation for which petitioners have met their burden. In other words, overcoming the presumption would more likely than not result in limited market oriented enterprise treatment; rarely would full NME treatment be appropriate. Indeed, it would be difficult to imagine petitioners being able to identify evidence to suggest that any company in China should continue to be treated as Chinese exporters have been treated under NME rules – that is, with the construction of normal value using surrogates to value factors of production for all cost elements.

Once the specific elements of the normal value calculation that are distorted have been identified, the Department must then consider what correction is needed to fix the distortion. It must not automatically resort to the traditional surrogate valuation methodology used in NME cases. After all, such distortions are addressed in market economy AD cases all the time, through application of the arm's length test, the major input rule, particular market situation, and other methodologies. There is no reason why China should be treated differently, particularly now when it is also subject to CVD laws, the application of which risks double counting of remedies if the surrogate values used in the AD calculation are borrowed from other countries on the grounds that the values in those countries are not subsidized

values (as required by the statute). Chinese exporters must be given the same chance that market economy exporters are given to replace their distorted values with other market-based values. Only if these alternative values were unavailable would the Department resort to the use of market economy surrogate values as have been traditionally used – and even then only on a factor-by-factor basis.

CCCMC sees no reason why this approach would not generally apply to all factors of production, including labor, land, and capital. Again, only if the petitioners identify evidence to suggest that these or other factors are distorted by measures unreachable by the CVD laws should they even be scrutinized differently than they would be if China were granted full market economy treatment.

We address below each element of our position outlined above, and urge the Department to adopt procedures making this approach a reality.

## I. THE FACTUAL FINDINGS MADE IN THE CFS PAPER CVD CASE REQUIRE THE COMMERCE DEPARTMENT TO RE-EVALUATE WHETHER TO TREAT CHINA AS A NON-MARKET ECONOMY

We detail below several of the *recent factual findings* that the *Commerce Department itself* has made concerning the Chinese economy of today. These findings can be summarized by three factual statements that the Commerce Department cited in support of its decision to apply the CVD law to China:

> "China economy {of today} presents a significantly different picture than the traditional communist economic system of the early 1980's, i.e. the so-called "Soviet style economies"[4]
>
> "{P}rivate industry now dominates many sectors of the Chinese economy, and entrepreneurship is flourishing. . . .The role of central planners is vastly smaller."[5]

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4 *Georgetown Steel* Memorandum at p. 4.

> "The PRC Government has eliminated price controls on most products; market forces now determine prices of more than 90 percent of products traded in China." [6]

CCCMC submits that such factual findings raise serious questions about the legality and propriety of the Commerce Department's continued designation of China as an NME. Very simply, given that the Commerce Department itself has admitted that (1) the Chinese economy of today is vastly different from the "Soviet-style" non-market economy that existed when the NME AD methodology was designed, and (2) there is a sufficient market economy "to determine whether the PRC Government has bestowed a {countervailable} benefit upon a Chinese producer," it makes no logical or economic sense for the Commerce Department to continue to designate China as an NME. ***CCCMC therefore believes that the Department has sufficient evidence to terminate its designation of China as a non-market economy.***[7]

## II. IF CHINA REMAINS AN NME, THE DEPARTMENT'S RECENT FACTUAL FINDINGS AND APPLICATION OF CVD LAW TO CHINA AT LEAST REQUIRE A REVERSAL OF THE PRESUMPTION THAT EXPORTERS IN CHINA ARE CONTROLLED BY THE STATE, AND IMPOSITION ON PETITIONERS THE BURDEN OF ALLEGING AND PROVING OTHERWISE.

Even if the Department continues to treat China as an NME, CCCMC submits that the Department's factual findings underlying the Department's decision to apply the CVD law to China require Commerce, at least, to reverse the current presumption that Chinese exporters are controlled by the state. The

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5 *Id.* at p. 10.

6 *Id.* at p. 5.

7 China's most recent complete submission requesting reconsideration of its status was submitted on December 30, 2005 in the AD investigation of *Certain Lined Paper Products.*

presumption should be that Chinese exporters are controlled by the market, unless proven otherwise. We explain our position below.

### A. The Recent Factual Findings Regarding the Chinese Economy Require Reversal of the Presumption

CCCMC submits that the Department's current presumption is completely at odds with *more recent* factual findings that the Commerce Department itself has made about China's "present-day" (2006-2007) economy. These more recent factual findings include the following:

> "The PRC Government has undertaken significant reforms to promote the introduction of market forces into the economy."[8]
>
> "The Department notes that China permits all forms for foreign investment, e.g. joint ventures and wholly-owned enterprises, in most sectors of the economy. Foreign investors are free to repatriate profit and investments are protected from nationalization and expropriation."[9]
>
> "{P}rivate industry now dominates many sectors of the Chinese economy, and entrepreneurship is flourishing. . . .The role of central planners is vastly smaller."[10]
>
> "The PRC Government has eliminated price controls on most products; **market forces now determine prices of more than 90 percent of products traded in China.**"[11]
>
> "Many business entities in present-day China are generally free to direct most aspects of their operations, and to respond to (albeit limited) market forces."[12]
>
> "China's currency . . . is freely convertible on the current account today. . . Domestic and foreign companies and individuals are free to acquire,

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8 *See* Commerce Department Decision Memorandum, dated August 30, 2006, re: China's Status as a Non-market Economy prepared for its antidumping investigation of *Certain Lined Paper Products from the People's Republic of China* at p. 3 ("NME Status Memo").

9 *Id.*

10 *Georgetown Steel* Memorandum at p. 10.

11 *Id.* at p. 5.

12 *Id.* at p. 10.

> hold and sell foreign exchange and foreign companies are free to repatriate capital and remit profits."[13]
>
> "Starting in the 1990's the PRC Government began to allow the development of a private industrial sector, which today dominates most of the industries in the PRC Government has not explicitly preserved a leading role for SOE's."[14]
>
> "The **PRC Government has dismantled its monopoly over foreign trade** and finally extended trading rights to all FIE's in accordance with its WTO accession obligations."[15]
>
> "**Private enterprises in China today have significant discretion over these business decisions** {e.g. wages and input prices, investment, production, quotas, sales prices}."[16]

These recent Commerce Department factual findings demonstrate unequivocally that the *factual assumption* underlying the Department's presumption that markets do not exist in China because of Chinese government control is simply no longer true. China is no longer a nation in which "bubbles of capitalism" exist;[17] rather, only bubbles of state control now exist in the Chinese economy. And, more importantly, any distortions within the Chinese economy created by these "bubbles of state control" are now deemed identifiable and measurable.

### B. The Application of CVD Law To China Requires Reversal of the Presumption

The application of CVD law to China completely undermines the basis for the presumption to apply the NME methodology to all Chinese respondents. Any meaningful consideration of NME versus market-economy treatment must be

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13 *Id.* at p. 6.
14 *Id.* at p. 6-7.
15 *Id.* at p. 7.
16 *Id.* at p. 7.
17 *Final Determination of Sales at Less Than Fair Value: Chrome-Plated Lug Nuts From the People's Republic of China*, 56 Fed. Reg. 46153 (September 10, 1991)

informed by the fact that U.S. domestic industries now possess the ability to seek relief through CVD cases for state-created distortions.

The original rationale underlying the Department's decision in the 1980s that CVD law was inapplicable to NMEs centered around two tenets fundamental to the definition of what a subsidy is under the WTO Agreement on Subsidies and Countervailing Measures: subsidies must be specific and provide a financial benefit.[18] The Department believed that it was impossible in NMEs to determine that a subsidy was specific: the "Soviet-style economies {prevalent in NMEs} at that time made it impossible to apply these criteria because they were so integrated as to constitute, in essence, one large entity."[19] The Department also observed in the 1980s an even more fundamental characteristic of subsidization as it applied to the market:

> "We believe a subsidy (or bounty or grant) is definitely any action that distorts or subverts the market process and results in a misallocation of resources. . . . In NMEs resources are not allocated by a market. With varying degrees of control, allocation is achieved by central planning. Without a market, it is obviously meaningless to look for misallocation of resources caused by subsidies. There is no market process to distort or subvert.... It is this fundamental distinction—that in an NME system the government does not interfere in the market process but supplants it—that has led us to conclude that subsidies have no meaning outside the context of a market economy."[20]

The existence of a subsidy is unquestionably linked to the existence of the market it distorts – subsidies cannot affect distorting behavior from firms if there is no market to distort. The determination that allows the CVD law's application to

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18 WTO Agreement on Subsidies and Countervailing Measures, Articles 1 and 2.

19 *Georgetown Steel* Memorandum at page 10.

20 *Carbon Steel Wire Rod From Czechoslovakia: Final Negative Countervailing Duty Determination*, 49 Fed. Reg. 19370 (May 7, 1984) ("*Carbon Steel Wire Rod From Czechoslovakia CVD*") and *Carbon Steel Wire Rod From Poland: Final Negative Countervailing Duty Determination*, 49 Fed. Reg. 19374 (May 7, 1984).

China necessarily means, by extension, that government interference does not supplant the market, a fact the Department implicitly accepts in its NME Status Memo in *Lined Paper*.[21] To put it in the context of a specific case, in the CFS paper CVD case, the Department concluded that the *sales values* of the Chinese CFS exporters are perfectly acceptable for use in the calculation of CVD rates.[22] Given that the sales values the Department utilized in the CVD case are simply the sum of the *net prices of individual (home market and export) sales* by the Chinese CFS exporter, there is no reason why these same sales prices could not be used in the AD proceeding.

Quite simply, markets exist in China. Thus, if "'market forces now determine the prices of more than 90 percent of products traded in China,'" as the Department recently declared, then the prices of less than 10 percent of products in China are not set by market forces.[23] Yet, even with this small percentage of non-market oriented products, their prices apparently still provide meaningful measures of value; if the prices did not do so, then the Department would not be able to apply CVD law to China since subsidies, as defined by the WTO Agreement on Subsidies and Countervailing Measures, must create a specific benefit that is *measurable.*[24] Therefore, if Chinese prices meaningfully measure value such that they permit the

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[21] NME Status Memo at page 5.

[22] *See Coated Free Sheet Paper from People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 17,484 (April 9, 2007). See also Memorandum to File, dated March 29, 2007 Re: Calculations for the Preliminary Determination for Gold East Paper, prepared for Inv. C-570-907, Coated Free Sheet Paper from China.

[23] The Department went to great lengths to use the noun "market forces" as opposed to the noun "market" in both the NME Status and *Georgetown Steel* Memoranda. However, this is a silly distinction: if market forces exist, so does the market.

[24] SCM Agreement, Articles 14 and 19 (it must be possible to calculate the benefit).

Department to measure benefits within the context of a CVD case,[25] then it follows that these very same prices must also be reliable enough to use in the calculation of normal value in an AD case.

Whether the economic logic is accepted or not, consistency in treatment of the evidence requires the approach we propose. The Commerce Department must apply consistent standards in CVD and AD proceedings when analyzing the exact same evidence. Application of consistent evidentiary standards requires use of home market and third country sales prices, rather than surrogate values, to determine normal value for the AD calculation.

It cannot be otherwise. We are not aware of any legal or logical basis under which the Department could declare that values are reliable in the CVD framework but unreliable in the AD framework. As such, the Department must reverse the current presumption of government control in AD cases involving China, and, in turn, halt the automatic calculation of normal value using the NME methodology.

### C. Reversal of the Presumption Must Be Implemented For All Aspects of the AD Examination

The current presumption is that all aspects of an NME respondent's business are controlled by the state. In order to overcome that presumption with regard to U.S. sales, all companies must meet the separate rate test. We propose to reverse

25 See *Coated Free Sheet Paper From the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination*, 72 FR 17484 (April 9, 2007) ("*Coated Free Sheet Paper*") at the "Grant Programs," "Income Tax Program," "VAT and Duty Exemptions," and "Domestic VAT Refunds for Companies Located in the Hainan Economic Development Zone" sections of the FR where the Department measured benefit using internal values derived in China.

the presumption entirely, with respect to all issues that arise in the AD proceeding, such that the Department presumes that all aspects of a company's business are dominated by the market, unless the petitioners are able to show otherwise.

We have addressed the need to reverse this presumption in prior comments, as it relates to the separate rate test and the countrywide rate.[26] Specifically, we have argued that because the logical conclusion to the Department's findings in the CFS paper case is that companies cannot be assumed to be controlled by the state, then the Department must dismantle both the countrywide rate and the separate rate status rate for companies not individually examined. Such companies would instead receive an all others rate, calculated just like the all others rate non-mandatory respondents are subject to in market economy cases.[27]

However, the reversal of the presumption should not stop with the separate rate analysis, which largely focuses on the participating respondents' U.S. sales business. After all, the Department's findings in the *Georgetown Steel* Memorandum were not limited to U.S. sale considerations. Rather, the Department's findings go to all aspects of an exporter's business, including all of the elements needed to calculate normal value – i.e., home market prices, third country export prices, and production costs. If all entities within China were considered parts of a single entity, as is assumed in an NME context, then the analysis needed for specificity in the CVD context would be subverted. However, since the

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[26] BOFT Comments on Separate Rates and Surrogate Countries (April 20, 2007); BOFT Pre-AD Preliminary Determination Comments (May 11, 2007).

[27] This is calculated the same way the separate rate status rate is calculated – i.e., the weighted average of the mandatory respondents' rates, not including *de minimis* rates and rates based on facts available, pursuant to 19 U.S.C. §1673d(c)(5).

Department concluded that the CVD law now applies to China, by extension, the Department obviously determined that companies in China are sufficiently separate and independent such that a specificity analysis can be conducted.

As such, the presumption should be reversed across the board. Non-investigated companies should be treated as non-investigated market economy companies are treated -- i.e., they should be subjected to the all others rate, with no requirement to prove separate rate status, and with no application of an adverse countrywide rate. They would, as a result, no longer need to submit the separate rate application (or certification in reviews).[28]

Meanwhile, individually examined companies should be assumed to be market oriented, unless petitioners are able to supply evidence to the contrary. There is nothing that prevents the Department from presuming MOE treatment for Chinese companies (whether private or state owned), and then collecting the same information as is collected from market economy respondents and calculating normal value using market-economy rules. As the Department knows, the statute does *not require* that Commerce apply a special AD calculation methodology to NME countries. Rather, the applicable statutory provision states:

**(c) Nonmarket economy countries**

(1) In general

If—

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28 At most, a separate rate application might still be required, but curtailed even further than the current one, and tailored in a similar manner to the Section A questionnaire for mandatory respondents that we discuss below – that is, requiring less for private companies than for state owned companies.

> (A) the subject merchandise is exported from a nonmarket economy country, and
>
> (B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a) {home market or third country sales},
>
> the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise ....[29]

The above statutory language makes clear that the key factor in deciding whether to apply the special NME AD methodology in a particular case is not simply that the case targets imports from a country that the Commerce Department has determined is an NME country, but rather whether "available information" permits normal value to be determined from home market or third country sales prices.

Similarly, the Department's regulations state that in AD cases against NME countries the Department "normally" will calculate AD margins according to the special factors of production methodology.[30] By utilizing the word "normally" instead of simply "shall," the Department's regulations explicitly recognize that there may well be exceptions to the rule; that is, there may well be cases against an NME country in which it is not necessary to utilize the factor of production methodology to calculate normal value.

The distinction between a statutory mandate and a regulatory preference is critically important, one which the Department acknowledged when it established the market-oriented industry ("MOI") test under which respondents could

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[29] 19 U.S.C. 1677b(c).
[30] *See* 19 C.F.R. 351.408.

presumably receive market-economy treatment and thus also face potential CVD cases:

> "{That Congress amended the U.S. antidumping laws in 1988 to allow the Department to calculate AD margins using the market economy methodology reflects} recognition of attempts by the traditional NME countries to evolve toward market-oriented economies... Congress clearly contemplated a situation in which a sector of an NME may be sufficiently free of NME distortion so that the actual prices and/or costs incurred in the NME could be used in the dumping calculations and render meaningful results."[31]

While this interpretation only discussed the possibility of one sector, the Department clearly established that the market economy methodology could be applicable to NME respondents.

The Department's pronouncement on MOIs contemplated a factual finding where a market exists for one industry, after which the market economy treatment and CVD law would come into effect. However, in this case, the *Georgetown Steel* Memorandum is a factual finding regarding the whole of China – the *Georgetown Steel* Memorandum explicitly, and the NME Status Memo on which it factually relies, discusses at great length changes in the economy as a whole. More importantly, the *Georgetown Steel* Memorandum does not overtly limit the scope of its finding, which we assume was intentional. The Department did not and does not intend to limit the application of CVD law to any particular industry. As such, the complementary finding that markets exist is also a country-wide determination.

Taken within the context of the Department's standard MOI test, China satisfies these requirements – 1) there is virtually no government involvement in setting prices or amounts to be produced, something which the Department can

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[31] *Final Negative Countervailing Duty Determination: Oscillating Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24018 (June 5, 1992).

confirm through a test like the separate rate test; and 2) companies pay market-determined prices for all significant inputs. Until now, the Department has interpreted China's NME status to mean that all prices within China are distorted by government interference, such that they cannot provide any meaningful measures of value in calculating normal value. In turn, the Department has essentially adopted the rebuttable presumption that normal value cannot be determined in the same manner as is done for market economies. This presumption can no longer withstand scrutiny given the Department's findings concerning the evolution of the Chinese economy and the application of CVD laws to China.

### D. In Practice, The Department Would Issue Market Economy Questionnaires To Mandatory Respondents, *Whether or Not State Owned*, With Only Minor Adjustments To The Section A Questionnaire

In practice, reversal of the current NME presumption, as it concerns calculation of normal value, means that mandatory respondents would receive a set of questionnaires that is largely the same as the market economy questionnaire. This is consistent with the language of the statute, which says that the NME methodology should be applied only if "the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a) {home market or third country sales}".[32] ***This cannot be determined unless the DOC actually collects the "available information" on which normal value would normally be based. Now that***

[32] 19 U.S.C. 1677b(c).

***the basis for the NME presumption has been extinguished by the Department's recent findings, this information should at least be collected before making a decision that alternative information is needed.***

As with the separate rate test, the Department would apply the same approach irrespective of a respondent's ownership. That is, all companies – whether private or state owned – would be presumed market oriented. State ownership would not result in the automatic denial of market oriented treatment to state owned companies. After all, if state owned companies are not automatically denied separate rate status because the state owns them, it cannot be assumed that state ownership also distorts their home market prices, third country prices, and production costs.

Indeed, this is a position the Department has effectively already adopted. In the CFS Paper case, the Department ruled that firms with state ownership can operate separately and independently in the Chinese market, such that government subsidies exert influence leading the firm to behave in a market-distorting manner. Specifically, Department decided to apply the CVD law to the state-owned Shandong Chenming Paper Holdings Ltd. ("Chenming").[33] If this state-owned company was not sufficiently separate and independent from the Government of China, the Department could not have applied the CVD law to it, since, as the Department recognized in the original *Georgetown Steel* case, doing so would lead to the illogical and ultimately meaningless conclusion that the state specifically

[33] See *Coated Free Sheet Paper* at 17489 ("The Shouguang State-Owned Asset Administration owned 31.24 percent of Chenming during the POI. Therefore, for purposes of the creditworthiness determination, we are preliminarily treating Chenming as government-owned...")

granted a financial benefit to itself.[34] If Chenming was not an independently run company capable of reacting to market forces, then Chenming would be a part of the NME entity and assigning the company an individually calculated margin, whether in the CVD or AD context, would be a futile exercise.

There are also multiple examples of the Department examining state owned companies in AD and CVD cases against market economy countries, in which state ownership itself did not deny the respondent equal treatment with its privately owned competitors.[35] There is no reason to treat state-owned companies in countries denominated as NMEs any differently.

That being said, a hierarchy could be constructed under which state owned companies are required to answer certain questions in the Section A questionnaire not required of privately owned companies (similar to the treatment of foreign

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[34] This is further supported by China's WTO Accession agreement which specifically provides that state-owned enterprises can receive "specific" subsidies simply by being the "predominant" recipient of a subsidy. Clearly, in negotiating China's accession agreement, other WTO members contemplated the notion of whether state-owned enterprises could be separate from the Government of China such that CVD law could apply. *See* WTO Protocol on the Accession of the People's Republic of China, Article 10.

[35] For example, consider the Department's treatment of Brazilian state-owned steel producer CSN relative to its privatized competitor Usiminas in the context of simultaneous AD and CVD investigations on hot-rolled steel. *See Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Brazil*, Part IV, 58 Fed. Reg. 37295 (July 9, 1993) and *Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From Brazil*, Part IV, 58 Fed. Reg. 37091 (July 9, 1993). As a general matter, in a market economy context the Department has uniformly applied its AD and CVD rules whether the respondent is state-owned or privately-held. *See generally Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria*, Part IV, 58 Fed. Reg. 37217 (July 9, 1993) (addressing various general issues from numerous market economy CVD investigations involving both state-owned and privately-held respondents) and *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From France*, Part IV, 58 Fed. Reg. 37125 (July 9, 1993) (applying standard AD methodology to French state-owned producer Usinor Sacilor and its affiliates).

owned enterprises in the Department's separate rate application used now). Under this approach, the Department would request from all companies – including wholly private companies, whether domestic or foreign owned -- information regarding their ownership, corporate structure, and the applicable laws/regulations that demonstrate their ability to negotiate sales and purchase prices independently. For firms with full or partial state ownership, the Department would request additional information, like that currently requested through the separate rate test, regarding the firms' de facto ability to operate separately of the Chinese government. The special Section A questionnaire would therefore contain the following subcomponents and variants based on state ownership:

| **Market Economy Section A Questionnaire Addendum for Companies in Countries Deemed Non-Market Economies** | |
|---|---|
| For All Companies: | For Fully or Partially State-Owned Companies: |
| 1. Submit complete ownership information (shareholders and percentages)<br>2. Submit complete corporate structure information (parent and subsidiaries)<br>3. Submit documentation related to the above (financial statements, company charter, articles of incorporation/articles of association), share transfer agreement<br>4. Submit laws showing that the company has the legal right to act on its own account (submit applicable business license and export license)<br>5. Submit laws/regulations showing products regulated by the government (either distribution or price setting) | 1. Submit information regarding Selection of Management (meeting minutes and appointment letters; employment contracts; curriculum vitae of managers)<br>2. Evidence of price negotiation for sales of finished product and purchase of inputs (emails, contracts, purchase orders; sales package (U.S., China, and possible third country market); input purchase package<br>3. Distribution of profit/financing of losses (meeting minutes of shareholders/owners discussing profit/loss) |

Like the separate rate test, the questions asked in the Section A questionnaire for purposes of determining MOE status should focus on whether the company legally possesses the ability to operate independently of the government (i.e., the de jure

requirement) and thus respond to market forces and whether the company actually does (i.e., the de facto requirement). This test is perhaps the most important question in defining MOEs: since we know the market exists, the question becomes whether a potential respondent is free from government interference such that it can operate in the market.

Private enterprises, whether owned by domestic or foreign parties, can indubitably respond in the affirmative; they are by definition free from government control. The Government of China, both in law and practice, guarantees the ability of private and foreign-owned enterprises to operate freely, notwithstanding regulations typical of market economy countries. Therefore, MOE status for such companies would simply rest on the firm's ability to demonstrate that the company is privately owned and operates without government interference in much the same manner as the Department's current separate rate test. The questions we propose for Section A above are constructed accordingly.

The question then becomes whether enterprises that are partially or completely owned by the state are sufficiently separate and independent from the state such MOE status could apply. While private ownership alone should be sufficient to establish a company's separation and independence, the existence of state ownership does not deny it. While the notion of state-owned enterprises as being controlled by the state is conceivable, state ownership is not a determinative factor. The Department is well aware of this, as its precedent is littered with numerous CVD cases in which state-owned companies in market economies were

subjected to CVD investigations.[36] Moreover, the presence of state-owned enterprises in numerous market economies, such as in Europe, provides substantial proof that ownership alone is not dispositive proof of state control.[37]

Rather the relevant analysis should focus on whether state-owned companies are actually state-run companies. Again, the Department's experience in applying separate rates provides instructive guidance on this matter as the Department has continually judged state-owned companies to possess sufficient separation. The questions posed above for state owned companies, borrowed from the separate rate test, properly recognize that it is the firm's behavior that is determinative since trade remedy laws, by their very nature, are aimed at affecting how firms participate in markets.

Beyond these special Section A questions, all fully examined Chinese respondents would be asked to complete the market economy Section B (comparison market sales), Section C (U.S. sales), and Section D (actual costs, not factors of production) questionnaires. Only if petitioners are able to identify information submitted in response to these questionnaires, or from elsewhere, establishing the

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36 *See, e.g., Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria*, Part IV, 58 Fed. Reg. 37217 (July 9, 1993) (addressing Austrian-specific issues for state-owned respondents as well as various general issues from numerous market economy countervailing duty investigations involving both state-owned and privately-held respondents); *Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Brazil*, Part IV, 58 Fed. Reg. 37295 (July 9, 1993) (involving Brazilian state-owned producers); and *Final Affirmative Countervailing Duty Determinations: Certain Steel Products From France*, Part IV, 58 Fed. Reg. 37304 (July 9, 1993) (involving French state-owned producers).

37 *See, e.g., Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria*, Part IV, 58 Fed. Reg. 37217 (July 9, 1993); *Final Affirmative Countervailing Duty Determinations: Certain Steel Products From France*, Part IV, 58 Fed. Reg. 37304 (July 9, 1993); *Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany*, Part IV, 58 Fed. Reg. 37315 (July 9, 1993); *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From Italy*, Part II, 64 Fed. Reg. 73244 (Dec. 29, 1999).

existence of distortions in a respondent's prices or costs that could not be addressed through the CVD law would the Department seek additional information, possibly including factors of production. And, importantly, absent any governing laws or regulations that restrict or control a firm's ability to sell and react to market forces (which the separate rate test already examines for export markets), the Department would never determine that state ownership in itself precludes a firm from receiving market oriented economy treatment. Rather, MOE treatment should be presumed for all mandatory respondents, until petitioners allege and prove otherwise.

## III. IF A PETITIONER IS ABLE TO OVERCOME THE PRESUMPTION, THIS SHOULD NOT MEAN NON-MARKET ECONOMY TREATMENT WILL BE AUTOMATIC OR COMPLETE

If the approach we propose is accepted, it is safe to assume, at least in the early days of implementation, that petitioners will make a claim in every case that the facts overcome the presumption. It is important, therefore, to establish standards for overcoming the presumption, as well as for resorting to the NME normal value calculation methodology. After all, a mere allegation cannot result in rejecting a respondent's own home market prices and costs, nor should it result in automatic replacement with the traditional surrogate valuation. We therefore propose below an approach the Department can implement to discern when and if the NME methodology would be used.

### A. Market Economy AD and CVD Procedures Provide A Multitude of Remedies Against Market Distortions, Which Must Be Considered Before Resorting to the NME Normal Value Calculation

To properly evaluate any claim that distortions prevent the use of prices derived in the Chinese market, it is first important to revisit the manner in which prices affect normal value. Normal value accounts for prices through two primary methods: the prices in the home market (or comparison market) and production cost including the prices of all inputs, labor costs, overheads, and various general expenses (G&A, interest). Home market prices are then compared against the cost of production using the cost test; sales that fail the cost test are eliminated from the matching pool and are thus never used in the normal value calculation.

In each case, market economy AD rules provide a multitude of remedies to correct market distortions without resort to the NME methodology. For example, where prices are between affiliates, the arm's length test (e.g., transactions disregarded) or the major input rule is used.[38] In instances where the domestic market for a certain product is so distorted or controlled by certain factors, interested parties have the opportunity to file a "particular market situation" allegation that the said market is not suitable for normal value purposes.[39] In such a case, the Department would resort to a third-country market (if such a market were viable) or constructed value, as opposed to using the NME methodology.

The statute provides similar recourse with regard to cost:

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38 19 U.S.C. §1677(f)(2) and (3).

39 Section 351.404(c)(2).

> Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.[40]

The Department has employed this provision in numerous cases, including in *Carbon and Certain Alloy Steel Wire Rod* and *Certain Softwood Lumber*.[41] Moreover, the Department determined in applying this provision that "under certain circumstances the Department possesses the legal authority to use some reasonable alternative to the costs recorded by the respondents in their books and records in order to calculate the respondents' cost of production."[42] Such a provision allows interested parties to submit relevant information concerning market distortions and permits the Department wide discretion to disregard cost in favor of a substitute, or "surrogate" value, to replace the distorted value or apply an adjustment to "correct" the distorted value. Additionally, the Department's decision

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40 19 U.S.C §1677(f)(1)(A).

41 See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico, 67 FR 55800 (August 30, 2002); Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002) ("Lumber AD").

42 Issues and Decision Memorandum: Magnesium Metal from the Russian Federation: Final Determination of Sales at Less-than-Fair Value at Comment 2 where the Department contemplated using outside information to calculate an adjustment factor for electricity. Moreover, the Department explicitly staked a claim to this ability in the memorandum graduating the Russian Federation to market-economy status:

> "Accordingly, the Department will examine prices and costs within Russia, utilizing them for the determination of normal value when appropriate or disregarding them when they are not. In this regard, the Department retains its authority to disregard particular prices when the prices are not in the ordinary course of trade, the costs are not in accordance with generally accepted accounting principles, the costs do not reasonably reflect the costs associated with the production or sale of the merchandise, or in other situations provided for in the Act or in the Department's regulations."

See Memorandum to Faryar Shirzad from Albert Hsu et al, Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law (June 6, 2002).

to impose the CVD law to China provides U.S. domestic industries with additional recourse to remedy "market distortions," application of which must be careful not to double count the remedy, since the primary market distortion eliminated by the NME methodology is subsidization, elimination of which occurs through use of surrogate values from non-subsidized countries.

As such, the Department has multiple options from which it should choose to correct market distortions before resorting to the NME methodology to calculate normal value. And, importantly, petitioner allegations of subsidization could never be a justification to overcome the MOE presumption, given that U.S. domestic industries now have at their disposal use of the CVD laws to address such distortions.

The approach we propose is no different from how market economy countries are treated when facing similar facts. As the Department has noted, "few modern economies are purely market driven...{governments} frequently intervene in the market place to promote social (as opposed to economic goals)... The state {also} sometimes owns selected firms or industries."[43] The fact is, as economists have repeatedly recognized, that perfect markets (as characterized by perfect competition) do not exist.[44] An economy may approach a perfect market but may

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[43] Carbon Steel Wire Rod From Czechoslovakia CVD at 19371.

[44] See "The Theory of the Firm - Perfect Competition: About the perfect competition in economics," Economics and Politics:

> "In **perfect competition**, all firms are **separate** and **independent** from each other - Each firm operates as an individual enterprise looking only to its own best interests. Each is in contention with all the others for a share of the market. Perfect competition is an extreme situation in which competition is as strong as it could ever possibly be. There are 4 conditions for perfect competition:
>
> **1)** A large number of buyers and sellers. There must be so many participants involved that

never reach it. Therefore, it is arbitrary, ridiculous, and inequitable to hold China to a standard and scrutiny which many market economies themselves cannot meet.

Consider the CVD investigation on *Certain Softwood Lumber* from Canada.[45] In the final determination on *Lumber* CVD, the Department found the entirety of the domestic Canadian stumpage market to be distorted to the extent that *no market prices even existed*:

> ...{a} government-dominated market will distort the market as a whole if the government itself does not sell at market-determined prices. In such a situation, true market prices may not exist in the country, or it may be difficult to a find a market price that is independent of the distortions caused by the government's action... We find that such circumstances are present in this investigation.[46]

The entire *non-existence* of a stumpage "market" in Canada led the Department to employ a "surrogate value" to estimate the proper market-driven stumpage price, in

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no one of them acting alone is able to have any noticeable effect on the overall demand or supply position.
**2)** A homogenous product - The goods from each of the sellers must be absolutely identical in every respect to those of all the others. This means there is no advantage for the consumer to buy from any particular supplier rather than any other.
**3)** Perfect knowledge - No one has any privileged information. All participants are fully informed, all the time, about everything that is going on in the market.
**4)** Freedom of entry and exit to the market. Everyone involved is a willing participant. No one who wants to buy or sell is prevented from doing so in any way. One consequence of this condition is that there must be plenty of productive resources easily available to those who want them.

These conditions are very extreme. There is probably no real market anywhere in the world that completely compiles with them. The point of this hypothetical market is to show, as clearly as possible, the effects of competition upon a supplier."

Available online at: http://economics.informbank.com/articles/economic-theory/theory-firm-perfect-competition.htm See also, "Research Tools: Economics A-Z: Perfect Competition," The Economist: "PERFECT COMPETITION: The most competitive market imaginable. Perfect COMPETITION is rare and may not even exist." Available online at: http://www.economist.com/research/Economics/alphabetic.cfm?TERM=PERFECT+COMPETITION.

[45] See Lumber AD and Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada, 67 FR 15545 (April 2, 2002) ("Lumber CVD").

[46] Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada at the "Benefit" section, citing Dr. Robert Stoner and Dr. Matthew Mercurio, "Economic Analysis of Price Distortions in a Dominant-Firm/Fringe Market" (January 4, 2002), submitted as Exhibit 4 of Letter from Dewey Ballantine to Department of Commerce (February 14, 2002).

a manner that the Department could similarly employ to value the price of inputs which it deems are not paid by MOE companies in China.

Yet, what is the most interesting and important aspect is how the Department adjusted for what can only be characterized as a complete and absolute abrogation of the market in the calculation of normal value on the AD side – the Department *did nothing.*[47] The Department did not declare the sales in the downstream market to be non-market prices; it did not adjust or disregard input prices to offset distortions on the normal value. Instead, the Department calculated normal value as it normally does.

One interpretation of the case is that the Department simply did not care about how government action "supplanted" the market in this case when it calculated AD margins. A better, and more correct interpretation, is that the Department, as well as the domestic industry in that case, realized that the current U.S. CVD law is capable of handling and remedying a wide variety of trade distorting subsidies, such as tax preferences, upstream subsidies on inputs, pass-throughs, government bailouts, preferential loans (whether to cover losses, finance operations, etc.), export subsidies, and the purchase of goods and services by the government (i.e., HM price).[48]

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[47] No party appeared to have argued that the Department should adjust the costs to correct for distorted prices in the AD case since the preliminary determination, the final determination, and the Issues and Decision Memorandum do not address this issue. We interpret this silence to mean that the Department did not adjust respondents' costs and that all parties agreed that this was accurate and fair.

[48] Upstream subsidies cover distortions related to raw material inputs most often through less than adequate remuneration analysis. Pass-through subsidies, among other things, also include distortions related to raw material and energy inputs. Preferential loans, government bailouts, and pass-through account for distortions related to general and administrative expenses. The purchase

Moreover, the use of the market-economy methodology allows the Department to avoid the double-counting issue. As argued in separate comments filed with the Department in the context of the CFS paper case,[49] CCCMC submits that double counting would occur if the Department simultaneously countervailed domestic subsidies and applied an AD duty rate based on the NME methodology. Presumably, this is the very reason that the Department did not adjust respondents' cost to correct for the fact that "true market prices" did not exist in the *Lumber* AD case discussed above; the Department determined that the input (stumpage fees) in question was subsidized and therefore countervailed the program. For the Department to then adjust these costs in the AD context because they did not reflect true market prices would have penalized the Canadian respondents twice for the same subsidy.

To deny that double counting would not occur is to be plainly disingenuous. Subsidies by their very nature affect a firm's behavior in the market through financial incentive – in the absence of a subsidy, the manner by which the firm engages in the market (i.e., the way in which it sets prices and decides on optimal production levels) would be different. Therefore, in the *Lumber* AD case, the prices at which the respondents sold would have been completely different if market forces determined the price of the input. The CVD law remedies this distortion. If the

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of goods/services by the government can account for issues related to home market price distortions. Export subsides address the issue of U.S. price. Clearly, the CVD law covers all aspects of potential distortions that matter in the AD calculation. Therefore, the application of CVD law effectively extinguishes the need for the NME methodology.

49 BOFT Comments on Issues to be Addressed in Preliminary Antidumping Determination, CFS Paper from China (May 11, 2007), at 11-24.

Department had adjusted the price of the input, it would have done so to correct the distortion created by the very same program it countervailed in the companion case, and thus double counted the affect.

Now, consider if the *Lumber* AD and CVD case had occurred in China with essentially the same fact pattern. If the Department applied the NME methodology in the AD context, the actual price paid by the respondents would have replaced the input cost with a non-subsidized market-determined price before calculating normal value, claiming implicitly that the actual price is so distorted as to be unusable. Simultaneously, the Department would have countervailed the program which caused the domestic price for this input to be so distorted in the first place. This clearly results in double counting and can be avoided by adopting the approach we suggest here.

As numerous Federal courts have noted, the Department is required to calculate dumping margins as accurately as possible using the best available information.[50] The Department's broad discretion in determining what constitutes the "best available information" to be used as surrogate values "is constrained by the underlying objective of the statute: to obtain the most accurate dumping margins possible."[51] The Department cannot be said to have applied the "best available information" if the surrogate values it selects produce less accurate results than other alternatives.[52]

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50 For example, see *Shakeproof Assembly Components*, 268 F.3d at 1382.

51 *CITIC Trading Co., Ltd. v. United States*, 27 CIT, Slip Op. 03-23 at n. 12 (2003) (citations omitted).

52 Id.

Although the court's rulings concern the use of discretion in selecting surrogate values, the legal guidelines espoused provide valuable instruction on this issue. If its directive is to calculate antidumping margins "as accurately as possible," then the Department cannot analyze the distortions prevalent in the Chinese economy in a vacuum by comparing the economy against an abstract, and fictional, perfect market economy. Instead, the Department should view the distortions inherent in China against the distortions inherent in the surrogate countries that the Department would use if it decided to deny market economy treatment to Chinese respondents.

In other words, if China and India both have markets which generate market prices, a decision to calculate an MOE respondent's normal value, either in whole or in part, by the current surrogate value methodology *would have* to be accompanied by an explicit ruling that first, all prices in China are distorted; and second, the prices in India are not as distorted as those in China.[53] Such a finding would have to be supported by fair and equitable analytical framework and a detailed factual record. Given the judicial mandates noted above, CCCMC submits that the Department cannot find that all prices in China are distorted and thus unusable, and then use surrogate values from India without first comparing whether the Chinese prices are more distortive relative to those in India, and that such distortions are significant.

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53 We use India for exemplary purposes only since India is the surrogate country designated by the Department in a predominant number of AD cases involving China. Such a precedent indicates that the Department believes India is the most comparable economy to the Chinese economy.

As such, the Department should grant MOE respondents full market economy treatment. Where evidence indicates that the market prices of certain inputs are significantly distorted by government action, and that such government action is not countervailable, then the Department should first attempt to employ "surrogate" information to either create an adjustment factor or, as a last resort, use a surrogate value as governed by its current surrogate value methodology. If the Department completely disregards any input price, the Department must issue a finding which discusses the existence of the distortion and its significance in relation to the overall value of the product in question. Next, in choosing the appropriate "surrogate" adjustment or surrogate value, the Department must compare the surrogate information against the disregarded Chinese price in terms of what produces the most "accurate margin possible."

Therefore, CCCMC submits that:

1. Markets exist in Chinese economy and indeed are the norm.
2. These markets provide adequate measures of value such that CVD law can be applied.
3. The CVD law can adequately address subsidies (i.e. market distortions by government intervention), where such exist.
4. The AD law also contains other provisions which allow the Department to correct for certain market distortions.
5. Where Petitioner demonstrates and the Department agrees that the market price for an input is so distorted such that the Department determines that it cannot use this price, the Department can:
    a. Adjust this price in a manner using the best available information and alternatives available to it under market economy provisions of the law.
    b. If the price cannot be adjusted, the Department can use a surrogate value provided that after performing a comparative analysis, it determines that the surrogate value is not more distortive than the actual price that the Department determined is unusable.

c. If there is a companion CVD case that accounts for the subsidy on this input, then the Department must accept the actual value.
d. If the Department nonetheless decides to use a surrogate value, then an adjustment must be made to correct for double counting.

As such, MOE treatment should generally still be applied even when distortions are identified.

## B. No Special Treatment Is Warranted For Land, Labor, or Capital

In its request for comment, the Department mentions specific inputs – land, labor, and capital – which it apparently views as especially problematic. Although the above comments effectively address these issues in general, we provide additional views on these factors below.

### 1. *Land*

Although the Department cited numerous distortions with regard to land in the NME Status Memo, CCCMC believes that distortions caused by land are largely immaterial or insignificant relative to COP.

First, land is a fixed asset. Under U.S. GAAP principles, for almost all industries,[54] land is not depreciated since it is not consumed (i.e., land is indefinite).[55] If land is not depreciated, then land does not affect costs, and therefore land has no affect on the cost of production. In the ongoing Coated Free

54 An example of an industry where land would be depreciated or coasted is mining.

55 American Institute of Professional Bookkeepers, *Depreciation Under GAAP (For Book Purposes)*, Mastering Depreciation (Professional Bookkeeping Certification), June 30, 2005, at page 13 and 21. ("Similarly, although land is not depreciated (because it does not wear out), improvements to land, such as paving or fences, are depreciated because these improvements wear out or become obsolete over time...{In discussing how depreciation is reflected on the financial statement} Land is not depreciated, so {the book value} amount does not change from year to year.).

Sheet Paper AD investigations, all of the surrogate companies used to calculate the surrogate financial ratios own their own land and do not depreciate it.[56]

In China, land-use rights are carried as an intangible asset.[57] Under Chinese GAAP, land-use rights are amortized (the equivalent of depreciation for an intangible asset), since the land-use rights are not indefinite and therefore can be "consumed" in a sense (inasmuch as time consumes the land-use right. Thus, if anything, Chinese land costs are likely to increase not decrease the cost of production when compared with other economies.

Therefore, while the Department may believe that the land-use right market is distorted, the effects of such a distortion have no material impact on the calculation of cost. As such, land distortions have no material impact on normal value either. Chinese companies incur additional expense which market-economy companies do not incur

In that regard, the distortions in the land-use right market cited by the Department cannot necessarily be presumed to benefit potential Chinese respondents.

Second, as discussed in the NME Status Memo, only allocated land-use rights are granted, and only state-owned enterprises receive allocated land-use rights.[58]

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56 Memo to the File from Drew Jackson Re: Coated Free Sheet Paper from China: Surrogate Values Selected for Shandong Chenming Paper Holdings Ltd. in the Preliminary Determination (May 29, 2007).

57 China's New Accounting Standards: A Comparison with Current PRC GAAP and {International Financial Reporting Standards, Deloitte (August 2006) at page 4. ("Under the ASBEs, land use rights are normally classified as intangible assets and not as operating leases. Where the land use rights meet the criteria to be accounted for as an investment property, the accounting is not restricted to the fair value model as in IAS 40. The cost model may be used.")

58 NME Status Memo at page 43.

Non state-owned enterprises must procure land-use rights by purchasing them from local governments or the real-estate market (i.e., the secondary market).[59] Moreover, while the Department may judge the land to be a distorted factor in the NME Status Memo, the distortions that the Department discusses center primarily on allocated land-use rights given to state-owned enterprises and not the primary and secondary markets for the granted land-use rights available to non-state owned enterprises.[60]

Third, that state-owned enterprises in China have access to "subsidized" land is not a situation unique to China, as the Department has investigated similar situations in CVD investigations in market-economy countries

Fourth, in limited instances, a respondent may rent the land and therefore incur rental expense, in which case, distortions may arise from the land market. However, if the Department were to review all the market economy AD cases it has done, we are reasonably sure that the Department will come to the conclusion that rental expenses account for an insignificant portion of the cost of production.

Therefore, based on the Department's findings in the NME Status Memo, the Department should accept the treatment of land as contained in the books of Chinese companies. If, however, the Department believes that the land value is so distorted, we believe that the Department can use the depreciation of land as

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59 *Id.*

60 *Id.* at page 46.

carried in the books of surrogate companies which would be used to replace the current amortized land-use right expense of the Chinese respondent.[61]

### 2. *Labor*

The concerns cited by the Department in the *Georgetown Steel* and NME Status Memo are completely incidental to the Department's main finding:

> Wages between employer and employee appear to be negotiated, as opposed to government-set, as evidenced by the variability in wages across regions, sectors, and enterprise demands. Certain rights, such as the right to compensation and choice of employment, are afforded to workers; employers, while hampered in the ability to reduce staff, are generally free to make independent decisions regarding labor.

Although the Department goes on to cite some reservations, they are not uncommon to any labor market that has not fully developed. Moreover, one of the two primary reservations raised involves the *"hukou"* system, which theoretically raises labor costs in industrial areas as opposed to lowering them since labor supply is restricted (to the detriment of many Chinese manufacturers). The Department also does not appear to take into account the ongoing reforms to the "hokou" system. For instance, the Department states that migrant workers face the loss of their land-use rights in their original place of residence.[62] Yet, this stipulation was removed in October 2001.[63]

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61 The depreciation of land should be limited to only land that is held as a fixed asset as opposed to an investment asset (e.g., some companies may purchase land in hopes of selling the land later – typically such land is classified and treated differently than the primary land held by the company).

62 NME Status Memo at page 21-22. The Department did not provide a factual cite for this statement so the time period to which this statement refers is unclear.

63 Brooks, Ray and Tao, Ran. "China's Labor Market Performance and Challenges" (IMF Working Paper), November 2003 at page 16.

While the labor market continues to develop in China, the Department should not penalize China for what it is – a developing labor market. The reservations that the Department cite, while problematic, do not undermine the notion that a market establishes the wage rate, something which is reflected in the observations noted in the NME Status Memo. High turnover in industries, rising wage rates, and rapid urbanization are phenomenon of a market at work.

### 3. *Capital*

As with land, although the Department has found the financial markets in China to be influenced by the state, the real question is (a) how the normal value calculation is affected by that influence and (b) whether the CVD laws are better equipped to address such influence.

Capital affects the normal value calculation primarily in the calculation of interest expenses; yet, this is also one of the best examples of how the CVD law and the NME AD methodology will indubitably collide; as we have stated in our previous comments on this issue, low interest rates resulting from a distorted, state-influenced financial sector, can be fixed either by countervailing the subsidy or borrowing a surrogate to value such expenses in the NME normal value calculation. But, in no event should both be done.

It further stands to reason that capital should not be a factor that completely denies a respondent market-economy treatment. As long as such measures are remediable through the CVD laws, normal value should be calculated the same way it is calculated for countries deemed by the Department to be market economies. Moreover, since capital expenses typically represent a small portion of COP, it

cannot reasonably be argued that distortions, however severe in magnitude, adversely affect COP such that a respondent is denied market oriented enterprise status. This is especially true of private companies, whether domestic or foreign owned, since these companies are not the primary lending targets of China's banking sector, a fact which the Department itself has observed.[64]

### C. Only Once Other Market Economy Alternatives Have Been Exhausted Should The Department Require Reporting of Factors of Production, and Even Then Only On A Discrete Factor-Specific Basis

Under the approach discussed above, Chinese respondents would be issued market economy questionnaires, with only slight modification to Section A to ensure collection of information on the influence of the state. As such, the NME Section D questionnaire would not be issued unless the Department deemed such information necessary following consideration of the various other market economy approaches to correcting market distortions. Furthermore, the Department would not require completion of the NME Section D questionnaire in its entirety, but rather only for those factors of production for which distortions have been identified that are impossible to address through means of market economy AD adjustments or the CVD law.

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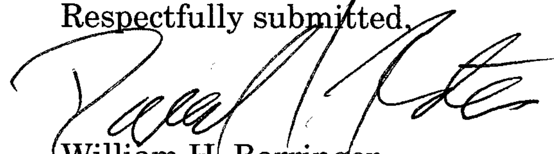
[64] NME Status Memo at page 72 where the Department notes that "private enterprises, both foreign and domestic," account for a disproportionately small amount of loans from China's banking sector.

* * * *

We urge the Department to adopt the methodological approach outlined above in implementing a new MOE policy for AD cases against China. Should you have any questions, please contact the undersigned.

Respectfully submitted,



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