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Market Orientalism: Reassessing an Outdated Anti-Dumping Policy Towards the People's Republic of China

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MARKET ORIENTALISM: REASSESSING AN OUTDATED ANTI-DUMPING POLICY TOWARDS THE PEOPLE'S REPUBLIC OF CHINA

INTRODUCTION

From the perspective of many enterprises operating in the People's Republic of China ("PRC"), U.S. unfair trade law has failed to keep pace with the market reforms of the Chinese economy.[1] This failure has led the United States Department of Commerce ("Commerce") to assume the role of a veritable Janus, simultaneously recognizing and denying the market-oriented features of the PRC's economy, depending on what trade law is being applied.[2] In this Note I will evaluate Commerce's current anti-dumping law valuation approach to the PRC and propose an alternative PRC anti-dumping policy that balances a pro-market position with the goal of promoting equity and bilateral reciprocity.

Section I of this Note begins with an overview of anti-dumping law as applied to market economy ("ME") countries and non-market economy ("NME") countries, emphasizing the crucial role of valuation methodology in calculating dumping margins.[3] After detailing the disadvantages of being classified as an NME for purposes of anti-dumping law, I will explore the current approach of classifying the PRC as an NME for purposes of anti-dumping law, while treating the country as an ME for countervailing duty ("CVD") law purposes.[4]

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1. Liu Danyang, Comment on Behalf of Ministry of Commerce of the People's Republic of China, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 7 (December 10, 2007), http://ia.ita.doc.gov/download/nme-moe/comments-20071210/boft-nme-moe-cmt-20071210.pdf (stating disapproval with Commerce's "delay in crafting rules" to address the "inconsistency" between anti-dumping laws for non-market economies and countervailing duty laws as applied to the People's Republic of China).

2. For a discussion of how Commerce assumes in anti-dumping investigations that non-market-economy countries have distorted their internal markets so that is impossible to measure real prices, but assumes in countervailing duty investigations against the PRC, a non-market economy that the real price of government subsidies is measurable, see discussion *infra*, Section I.D.1.

3. *See* Sanghan Wang, *Article: U.S. Trade Law Concerning Nonmarket Economies Revisited for Fairness and Consistency*, 1 EMORY INT'L L. Rev. 593, 615–16 (2005) (discussing how the method by which normal value is calculated can lead to "potentially inaccurate determination[s]").

4. *See* Memorandum from Shauna Lee-Alaia and Lawrence Norton, Office of Policy, Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Regarding Countervailing Duty Investigation of Coated Free Sheet Paper from

Section II will first discuss Commerce's recent interest in reevaluating the PRC's status as an NME. In pursuit of a possible new approach to an anti-dumping framework for the PRC, Commerce has been soliciting interested parties for comments on a proposed test to identify certain market-oriented enterprises ("MOE") in order to grant them an individualized valuation methodology.[5] Section II will explore multiple perspectives on whether such a test would be legally permissible, whether there are actually firms operating in the PRC that could be identified as market-oriented, and finally whether such a test would be administratively feasible.

In section III, I take the position that an MOE test would be the most pragmatic way for U.S. trade law to address the fact that many PRC firms are operating under relatively market-oriented conditions. After arguing against the inequitable practice of double counting, section III discusses how a recent case, *GPX Int'l Tire v. United States*, potentially requires Commerce to adopt an MOE approach.[6] Finally, I attempt to lay the framework for a valuation approach that contains elements of both ME and NME methodology so that U.S. anti-dumping law may work in concert with CVD law to best reflect the current economic reality of the PRC.[7]

People's Republic of China, 10 (Mar. 29, 2007), http://ia.ita.doc.gov/download/nme-seprates/prc-cfsp/china-cfs-georgetown-applicability.pdf [hereinafter Georgetown Steel Memorandum] (concluding that Commerce is capable of identifying and measuring subsidies bestowed by the PRC government upon Chinese producers).

5. *See* Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 Fed. Reg. 29, 302, 29, 302 (proposed May 25, 2007) [hereinafter May 25 Request]; *see also* Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, 72 Fed. Reg. 60, 649, 60, 649 (proposed Oct. 25, 2007) [hereinafter October 25 Request] (refining the request for comments to focus on legality, identification and administrability).

6. *See generally* GPX Int'l Tire Corp. v. United States, No. 09-103, 645 F. Supp. 2d 1231, 1251 (Ct. Int'l Trade 2009).

7. *See* Georgetown Steel Memorandum, *supra* note 4, at 4–5 (stating that the PRC's economy is "more flexible" than the Soviet command-style economies in regard to which the NME valuation approach was formulated).

I. UNITED STATES ANTI-DUMPING LAWS AND THE NON-MARKET ECONOMY

A. Overview of Anti-Dumping Investigations

Anti-dumping laws have operated in the U.S. for almost a century[8] with the purpose of preventing low-priced foreign-manufactured goods from undercutting U.S. competition and damaging domestic manufacturers.[9] Anti-dumping laws operate by imposing a duty on foreign imports equal to the amount by which the import is considered undervalued, in cases where domestic manufacturers of similar goods (the "domestic industry") are hurt by such undervaluation.[10] The result of this simple yet elegant arithmetic is a price that is intended to reflect what the value of the imported merchandise would (or indeed, should) be, were the product priced at the "correct" level.[11]

An anti-dumping investigation is initiated against foreign exporters either by Commerce, or by representatives of the domestic industry.[12] In order to ensure that the majority of the domestic industry supports the investigation, there are certain statutory representation requirements that the petitioners must meet.[13] Commerce must determine that the petitioners represent 25% of the total domestic industry, 50% of those expressing an opinion on the issue, and that they have met certain evidentiary standards in bringing the complaint.[14] Although the United States originally

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8. Daniel M. Lopez, *The Continued Dumping and Subsidy Offset Act of 2000: "Relief" for the U.S. Steel Industry; Trouble for the United States in the WTO,* 23 U. PA. J. INT'L ECON. L. 415, 415 (2002) (stating that anti-dumping laws were first implemented in 1916).

9. *See* NEVILLE PETERSON, CUSTOMS LAW & ADMINISTRATION 1 (2008) (explaining that the anti-dumping statute is intended to provide relief to domestic producers that are injured, or threatened with injury, because of unfairly priced foreign-manufactured goods imported for sale in the US).

10. *See* Patricia H. Piskorski, *A Dangerous Discretionary "Duty": U.S. Antidumping Policy Toward China*, 34 HOFSTRA L. REV. 595, 603 (2005) (describing the anti-dumping duty as the average amount by which the fair market value of the product in question exceeds the price that the product is sold for in the US).

11. Lopez, *supra* note 8, at 417–18.

12. *See* Andrea Miller, *The United States Antidumping Statutes: Can A Trade Agreement With The United States Be Both "Free" And Fair? A Case Study Of Chile,* 54 CATH. U.L. REV. 627, 629 (2005) (discussing how an anti-dumping investigation is initiated).

13. *See* 19 U.S.C. § 1673a(c)(4)(A) (2006).

14. *See id*.

resisted implementing this threshold requirement,[15] it has since defended the requirement on the grounds that "national authorities have a responsibility to examine the petition for accuracy and adequacy of evidence."[16]

Any interested party may respond to the petitioner's allegations subsequent to initiation, but Commerce limits its dumping calculation to a selected group of respondents.[17] These mandatory respondents will have "within 45 days after the date on which the petition is filed" to present a response to the allegations.[18] Although the petitioners have generally spent significantly more time preparing their case, they also bear the burden of proof that they, as the domestic industry, are injured or threatened by foreign dumping.[19] Because responsibility for carrying out an anti-dumping investigation is shared by Commerce and the International Trade Commission ("ITC"), the investigation itself is best thought of as a process of multiple determinations rather than as a single event.[20] For example, Commerce is responsible for determining sales at less than fair value ("LTFV"), while the ITC is responsible for determining injury.[21]

For the purposes of this Note we will primarily consider Commerce's role in the anti-dumping investigation. Commerce initially makes several determinations critical to a finding of dumping.[22] The initial determination is based on whether the petitioners have satisfied Commerce that the petitioners as a whole makes up a minimum percentage of the domestic market for that product in question (the "representation requirement").[23] Sixty days after the ITC has determined that there is a "reasonable indi-

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15. *See* Tara Gingerich, *Why The WTO Should Require The Application Of The Evidentiary Threshold Requirement In Antidumping Investigations*, 48 AM. U.L. REV. 135, 158–59 (1998).

16. *See id*. at 164.

17. *See* Bernd G. Janzen, *International Trade Decisions Of The Federal Circuit: Three Years Of Rigorous Review*, 52 AM. U.L. REV. 1027, 1074 (2003).

18. 19 U.S.C. § 1673b(a)(2)(A)(i) (2006).

19. William D. DeGrandis, *Proving Causation in Dumping Cases*, 20 INT'L L. 563, 563 (1986).

20. *See* Robert H. Lantz, *The Search For Consistency: Treatment Of Nonmarket Economies In Transition Under United States Antidumping And Countervailing Duty Laws*, 10 AM. U.J. INT'L L. & POL'Y 993, 1000–01 (1995).

21. *Id*. at 1001.

22. *See* U.S. INT'L TRADE COMM'N, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK II-3 (2008), *available at* http://www.usitc.gov/trade_remedy/documents/handbook.pdf (detailing the various determinations that Commerce must make during the course of an anti-dumping investigation).

23. *Id*. at I-6.

cation" of material injury,[24] Commerce makes its preliminary determination of dumping, based on whether there is a "reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value."[25] Within 75 days of the preliminary determination, Commerce will issue its final determination.[26] While the preliminary determination included an estimated penalty, at this point Commerce will publish a final amount by which a number called normal value exceeds export price. This number becomes the estimated dumping margin, subject only to the additional requirement that the ITC make an affirmative finding of material injury.[27]

Following the calculation of the dumping margin, the ITC makes its final determination on whether or not the inflated prices are harming or have the potential to harm the domestic industry.[28] The ITC makes this determination by evaluating a large number of economic factors relating to the affect the imports are having (or may have) on the domestic industry.[29] This is a key determination because a finding of no-injury terminates the investigation, regardless of Commerce's earlier determination.[30]

Despite the misleading nomenclature of the "final determination," the actual duties are not calculated until the (very important) annual review.[31] During an annual review, the dumping margin is completely reassessed, potentially resulting in a revised rate that is substantially different than the rate originally assigned.[32]

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24. STEPHEN D. COHEN ET AL., FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY 171 (2003).

25. 19 U.S.C. § 1673b(b)(1)(A) (2006).

26. 19 U.S.C. § 1673d (2006).

27. *See* Lantz, *supra* note 20, at 1001–02

28. *See id*. at 1002.

29. *See id*. at 1002–03.

30. *See* Herbert C. Shelley et al., *A Review Of Recent Decisions Of The United States Court Of Appeals For The Federal Circuit: Area Summaries: The Standard Of Review Applied By The United States Court Of Appeals For The Federal Circuit In International Trade And Customs Cases*, 45 AM. U.L. REV. 1749, 1759 (1996) (stating that Commerce will only publish an anti-dumping order after the ITC has issued an affirmative final determination).

31. *See* Michael A. Lawrence, *Bias in the International Trade Administration: The Need for Impartial Decision-makers in United States Antidumping Proceedings*, 26 CASE W. RES. J. INT'L L. 1, n.33 (1994).

32. *See id*.

B. Calculating Normal Value

1. The Importance of Normal Value

Normal value is the number calculated by Commerce to represent a fair price for the imported good in question.[33] This number is then held up as a benchmark of sorts against the export price (or the constructed export price, if the first domestic sale is to an affiliated purchaser). It is important to respondents that the normal value be as low as possible, because the dumping margin itself is calculated as the difference between normal value and the export price above.[34] This makes an understanding of the valuation process absolutely crucial in order to reduce margins by as much as possible. The task is complicated by the fact that there are at least three methods of calculating normal value in cases involving market economy respondents, and an additional method applicable to respondents from non-market economies.[35]

While the available methods are analyzed below, it is important to consider that the tension exists between normal value and export price because the duty is payable not as a flat tax or a levy but as an *ad valorem* duty proportional to the value of the merchandise.[36] It follows that when the product is being exported in large quantities, a relatively small adjustment to normal value can result in significantly higher or lower costs for the exporting company.

2. Normal Value Calculations for Market Economy Exporters

When the respondent is based in a country that Commerce considers a market economy, Commerce will determine normal value using one of the three methods.[37] Commerce's first preference is to use the home-

33. Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N.C.L. REV. 357, 381(2009) (defining normal value as "a normative, fair price, which should have been set in the home (exporting) market without any alleged unfair governmental intervention").

34. *See* Jarrod M. Goldfeder, *A Review Of Recent Decisions Of The United States Court Of Appeals For The Federal Circuit: Area Summary: 2008 International Trade Decisions Of The Federal Circuit*, 58 AM. U.L. REV. 975, 1020–21 (2009).

35. *Id.* at 1020–22; *See also* 19 U.S.C. 1677(35)(A) (2006) (defining the dumping margin as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise").

36. *See* Bryan A. Edens, *Substantial Evidence In The Law Of International Trade: Meaningful Judicial Review Of Antidumping Actions Or Perpetuation Of The Yo-Yo Effect?*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 431, n.62 (2008).

37. *See* Lantz, *supra* note 20, at 1001.

market method.[38] Subject to a series of price adjustments, normal value is calculated at the price that the product is sold in the market of the exporting country for domestic consumption.[39]

This constructed value method involves cumulating certain inputs, including allowances for profit and other indirect costs.[40] Under this method, normal value is constructed as a sum of a product's component costs.[41] Commerce will use results of this exceedingly complex calculation[42] as the as the price against which the export price (or constructed export price) is compared, in order to determine the dumping margin.[43]

3. Control of the Valuation Process for Market Economy Exporters

The calculation of normal value remains critically important to the respondents long after the ITC's final determination. Rather than existing as a static number, normal value is generally recalculated annually as part of regular review, which is important.[44] Furthermore, a change in normal value can affect duties already paid as far back as 18 months, which gives the respondent great incentive to lower the normal value during these annual reviews.[45] As a result, exercising control over the valuation process is highly valuable to respondents.[46]

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38. *See* Brink Lindsey & Dan Ikenson, *Antidumping 101: The Devilish Details of "Unfair Trade" Law*, CATO INST. TRADE POL'Y ANALYSIS 5 (21 Nov. 2002), http://www.cato.org/pubs/tpa/tpa-020.pdf.

39. *Id.* at 6–8 (explaining the price adjustments).

40. 19 U.S.C. § 1677b(e) (2006) (explaining that the "constructed value" is equal to the sum of "the cost of materials and fabrications," plus "the actual amounts incurred . . . by the specific exporter," plus "all other expenses incidental to placing the subject merchandise in condition packed ready for shipment").

41. *Id.*

42. *See* Lester Engineering Co. v. United States, 3 C.I.T. 236, 240 (1982) (asserting that calculating constructed value "involves a complex compilation and analysis of many facts").

43. *See* Goldfeder, *supra* note 34, at 1020–21.

44. ROBERT FEINSCHREIBER & CHARLES L. CROWLEY, IMPORT HANDBOOK: A COMPLIANCE AND PLANNING GUIDE 277–79 (stating that "a new [dumping] rate for each exporter . . . is determined as the weighted average of dumping rates found on all sales reviewed in each [one year] period").

45. *Id*. at 279 (explaining that the Uruguay Round Agreements Act imposed a statutory deadline of 1 year for annual reviews, extendable by 6 months).

46. *See* Brenda A. Jacobs, Comment on Behalf of Chutex Group, Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 4–5 (June 25, 2007), http://ia.ita.doc.gov/download/nme-moe/chutex-nme-moe-cmt-20070625.pdf [hereinafter Chutex June 25 Comment] (arguing that because of the unpredictable nature of the valuation process, NME producers are unable to identify the necessary pricing adjustments in

When the home or third country market valuation method is used, a respondent can exercise control over the normal value by adjusting its prices in those markets, potentially affecting a lower dumping margin.[47] Even more significantly, respondents that are able to predict their calculated normal value with a high level of accuracy are able to adjust their selling price in the U.S. to bring their export price up to the proper value level and reduce or eliminate the dumping margin.[48]

C. Anti-Dumping Investigations Against Nonmarket Economy Exporters

1. Overview

Exports from countries on Commerce's list of NMEs are subject to a different valuation process than exports from market-economy countries.[49] If Commerce determines that a country "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise" then it has the discretion to designate that country as an NME.[50] While the anti-dumping timeline and means of initiating the investigation are the same, the process of calculating normal value is markedly different.[51]

Commerce is vested with substantial power to determine which countries are market-oriented for the sake of unfair trade laws.[52] In determining whether to consider a country market-oriented, Commerce will look at several statutory factors, including but not limited to the extent of government ownership or control of the means of production and also the extent of government control over the allocation of resources and over the price and output decisions of enterprises.[53]

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order to fairly trade their goods with the United States, and asking Commerce to use actual prices and costs when appropriate).

47. David A. Gantz, *A Post-Uruguay Round Introduction To International Trade Law In The United States*, 12 ARIZ. J. INT'L & COMP. LAW 7, 74 (1995).

48. *See* Chutex May 25 Comment, *supra* note 46, at 5.

49. *See* Joseph A. Laroski, Jr., *NMES: A Love Story Nonmarket and Market Economy Status Under U.S. Antidumping Law*, 30 LAW & POL'Y INT'L BUS. 369, 375 (1999).

50. *Id*. at 381–82 (quoting 19 U.S.C. § 1677(18)(A) (1994)).

51. *Id.* at 375–76.

52. *Id*. at 381–82; *see also* 19 U.S.C. § 1677(18)(A) (2006) (defining a "nonmarket economy country" as "any foreign country that [Commerce] determines does not operate on market principles").

53. *See* 19 U.S.C. § 1677(18)(B) (2006). The list also includes the extent to which the currency of the foreign country is convertible into the currency of other countries; the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; the extent to which joint ventures or other investments by

While normal value in NME cases is calculated differently from any of the three methods used in ME cases, the methodology is conceptually most similar to the constructed value method, in that Commerce seeks to cumulate the exporters costs to determine normal value.[54] The essential difference between the two methodologies is that under the constructed-value method, the costs will be calculated based on the price actually paid, but under the NME method the amount paid by the exporter generally[55] has no bearing on the final dumping calculation.[56] Instead, Commerce determines the component cost of inputs in a third country, and applies the resulting numbers as if they were the actual costs ("factors of production") of the respective NME enterprise.[57]

The NME valuation process is generally unfavorable to the exporter, compared to the valuation processes used for market-economy exporters, for two major reasons.[58] First, the NME valuation method normally results in a higher dumping margin than its ME counterparts.[59] Second, the

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firms of other foreign countries are permitted in the foreign country; and such other factors as the administering authority considers appropriate. *Id*.

54. *See* U.S. Dep't of Commerce, Int'l Trade Administration, Import Administration, Antidumping (anti-dumping) / Countervailing Duty (CVD) Petition Counseling and Analysis Unit, Glossary, http://ia.ita.doc.gov/pcp/pcp-index.html (defining constructed value as the sum of the "cost of materials and fabrication of the subject merchandise . . . selling, general, and administrative expenses and profit," and similarly defining the factors of production approach as the sum of the hours of labor; the quantities of raw material; the amounts of energy; and the representative capital costs, although the costs are determined based on their "value . . . in a market economy country").

55. This rule is subject to an exception. *See* text accompanying notes *infra*, p 14.

56. *See* 19 U.S.C. §1677b(c) (2006). Commerce is required to calculate the normal value of a product from an NME exporter by using surrogate values, called "factors of production," derived from the cost of producing a similar product in an economically comparable ME country, *id.* at §1677b(c)(4). These surrogate values, rather than actual costs, are used as the NME exporter's factors of production, which are then summed to ascertain normal value, *id.* at §1677b(c)(1).

57. 19 U.S.C. §1677b(c)(2) (2006). If Commerce finds that the available information is inadequate to determine normal value, it may use the market price of comparable merchandise produced by an ME country.

58. Lantz, *supra* note 20, at 1004–05 (asserting that the use of NME valuation methodology generally results in dumping margins that are higher than if the methods used for ME exporters had been applied, and explaining that the surrogate country approach has been criticized for being "unpredictable and arbitrary").

59. For a thorough analysis of the higher rates typical of NME anti-dumping methodology, see Bruce M. Mitchell & Ned H. Marshak, Comment on Behalf of the Government of the People's Republic of China, Ministry of Commerce, Response to Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates; Request for Comment, at 6 (April 20, 2007), http://ia.ita.doc.gov/download/ nme -surrogate-20070321/prc-mofcom-cmts-042007.pdf [hereinafter PRCMOC Comment] (demonstrating that over a period of 3 years the China-

nature of the NME method makes it difficult for exporters to predict how the normal value will change during the annual reviews; as a result such exporters are unable to set their prices to the correct levels.[60]

While it is widely accepted that the NME valuation method results in higher dumping margins than its market-economy equivalent,[61] the unique methodology is premised on the idea that NME countries have distorted their internal markets to such an extent that it is impossible to determine the "real" price paid for goods and services.[62] As a result, the ME valuation methods which rely on said "real prices" are necessarily inapplicable.

2. NME Valuation and the Factors of Production

The surrogate country valuation process acts by imposing certain costs, known as the factors of production.[63] The process can be illustrated by conceptualizing a good produced in a non-market economy as a sum of its parts, each with a blank price tag. The price tag is then filled in using published prices from the surrogate country or countries, at which point the prices are cumulated to find normal value, similar to the constructed value method.[64]

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wide rate was, on average, "*13 times greater* than the average market economy 'all other' rate") (emphasis added); *see also* Bruce M. Mitchell & Ned H. Marshak, Comment on Behalf of the Government of the People's Republic of China, Bureau of Fair Trade for Imports & Exports, Response to Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries; Request for Comment, at 5–8 (June 1, 2004), http://ia.ita.doc.gov/download/nme-sep-rates/comments/boft-nme-sep-rates-cmt.pdf (presenting multiple examples of how the average PRC rate is significantly higher than the average "all other" rate in ME countries for similar merchandise).

60. *See* Chutex June 25 Comment, *supra* note 46, at 5.

61. The view that surrogate-country methodology leads to higher dumping margins appears to be widely adopted by foreign exporters and even acknowledged by the U.S. government. *See*, *e.g.*, U.S. Gov't Accountability Office, Report No. GAO-06-231, *U.S. Chinese Relations: Eliminating Nonmarket Methodology Would Lower Anti-Dumping Duties for Some Chinese Companies* (2006), *available at* http://www.gao.gov/htext /d06231.html; EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE UNITED STATES OF AMERICA, REPORT: US TRADE RULES UNFAIR (2005), *available at* http://www.china-embassy.org/eng/zmgx/1/ t191208.htm.

62. PETERSON, *supra* note 9, at 99.

63. *Id*. at 65.

64. *Id*. The factors that Commerce considers when calculating normal value for an NME country include hours of labor required; quantities of raw minerals consumers; amount of energy and other utilities consumed; and representative capital costs. These factors are similar to the factors used in the constructed value approach, discussed *supra* note 40.

For better or for worse, this disconnect between actual cost and surrogate cost is absolute.[65] Regardless of what kind of market the component materials were purchased from, whether or not the wages paid to the workers were competitive or not, and no matter the price paid for utilities to run the factories, Commerce attaches no significance to the expenditures required to produce the exported goods.[66] Instead, Commerce assigns values to these factors of production equal to their "cost" in the surrogate country.[67]

One significant exception to this rule is if the NME respondent purchased one of its factors of production directly from an ME producer, and paid in the currency of that ME country.[68] In this case, Commerce will use the actual price paid instead of the surrogate value for this factor of production, even in cases where only a portion of the factor is purchased according to the requirements.[69]

3. Surrogate Country and Data Selection

Selection of a surrogate country (like many processes within the NME anti-dumping framework) is controversial, heavily criticized and often difficult to justify.[70] Commerce is guided by the conditions that the surrogate country be "at a level of economic development comparable to that of the [NME] economy country" and also a "significant producer of the subject merchandise."[71] These provisions notwithstanding, Commerce's efforts to find a suitable surrogate country are often frustrated by the lack of publicly available data or the unwillingness of the selected

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65. Subject to the exception explained *infra* Part 4.

66. 19 U.S.C. §1677b(c)(1) (2006). When merchandise is exported from a nonmarket economy country and the available information does not permit the value of the merchandise to be determined pursuant to market economy valuation schemes, normal value is to be determined instead using the surrogate country factors of production approach, rather than using actual costs pursuant to the market economy approach.

67. *Id*.

68. *See* 19 C.F.R. § 351.408(c)(1) (2005).

69. *Id*. ("In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary normally will value the factor using the price paid to the market economy supplier").

70. *See* Peter D. Ehrenhaft & Charlotte G. Meriwether, *The Trade Agreements Act of 1979: Small Aid for Trade?*, 58 TUL. L. REV. 1107, 1128 (1984).

71. 19 U.S.C. § 1677b(c)(4)(A)-(B) (2006). Advocates for exporters would not have us forget that the statute predicates selecting an appropriate surrogate country on the condition that Commerce finds that the available information does not permit Commerce to determine normal value pursuant to the market economy valuation methods. 19 U.S.C. § 1677b(c)(1)(B).

country to cooperate with the investigation, leading to the selection of seemingly bizarre match-ups.[72]

Although Commerce recently expressed its interest in reevaluating its methodology for selecting a surrogate country,[73] the current practice is to prepare a list of several countries that Commerce finds to be potentially suitable as surrogates, and then solicit recommendations from interested parties on which country is most suitable.[74] Nonetheless, Commerce ultimately has wide discretion in choosing the surrogate country.[75]

With regard to the actual data that Commerce elects to use in determining the factors or production, the statute provides that that such data chosen from the surrogate country be "the best available information."[76] If the adjective "best" begs the question "best for what purpose?" it is clear that Commerce would surely prefer to leave the answer to this question in the realm of bureaucratic discretion. However, it is becoming increasingly clear that Commerce is to gather this information for the purpose of calculating the dumping margin "as accurately as possible."[77] While this anchor creates a certain tension in the selection of acceptable surrogate country data, Commerce still retains a substantial amount of proverbial slack in settling on a data set.[78]

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72. *See* Ehrenhaft & Meriwether, *supra* note 70, at note 66 (discussing an investigation wherein India, Commerce's first choice, refused to cooperate with the investigation, leading Commerce to choose Thailand as a surrogate for the PRC).

73. *See generally* May 25 Request, 72 Fed. Reg. 29, 302 (requesting comment on reevaluating its anti-dumping NME methodology for the PRC); October 25 Request, 72 Fed. Reg. 60, 649 (requesting further comment).

74. *See* Antidumping Methodologies in Proceedings Involving Non–Market Economy Countries: Surrogate Country Selection and Separate Rates, 72 FR 13, 246, 13, 246–47 (Proposed March 21, 2007) [hereinafter Surrogate Proposal] (explaining Commerce's process of "inviting comments" regarding surrogate countries from interest parties). For a criticism of this process, see PRCMOC Comment, *supra* note 59, at 3.

75. *See* Surrogate Proposal, *supra* note 74, at 13, 246 ("The Tariff Act…provides broad discretion in the selection of surrogate market economy countries.").

76. 19 U.S.C. § 1677b(c)(1) (2006).

77. Allied Pac. Food (Dalian) Co. v. United States, 587 F. Supp. 2d 1330, 1342 (Ct. Intl. Trade 2008) (citing Parkdale Int'l v. United States, 475 F.3d 1375, 1380 (Fed. Cir. 2007)) (finding that Commerce failed to prove that its chosen data set was more reliable than other data offered by the respondent); *see also* Shakeproof Assembly Components v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (reflecting that the purpose of the statutory provisions outlined in 19 U.S.C. §1677(b)(c)(1) determine margins accurately).

78. *See Allied Pac. Food*, *supra* note 77, at 1342 (asserting that while Commerce's choice is to be guided by the purpose of calculating duties as broadly as possible, Commerce has been granted wide discretion in what it considers the best available information).

4. Consequences of Surrogate Country Valuation

Respondents from NME countries argue vociferously against the use of surrogate country factors of production in determining normal value.[79] NME exporters subject to this methodology argue that both surrogate country and data sets are selected in an arbitrary and even capricious manner.[80] Unsurprisingly, criticism of the methodology reflects the widely held belief that using surrogate country values of production leads to higher normal value calculations, and thus higher penalties, than comparable anti-dumping actions against ME exporters.[81]

Commerce assumes that "all companies within the NME country are essentially operating units of a single, government-wide entity and should receive a single antidumping rate."[82] As a result, a firm with high input costs (and perhaps an equivalently-priced product) is going to receive a much higher dollar-penalty than a firm operating in a low-cost environment.[83]

Although Commerce "presumes that all companies within the NME country are subject to government control," it does allow certain firms the opportunity to receive individually calculated normal values ("sepa-

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79. *See* Meikun Liu, Comment on Behalf of China Chamber of Commerce for Import & Export of Machinery and Electronic Products, Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 6 (June 17, 2007), http://ia.ita.doc.gov/ download/nme-moe/cccme-nme-moe-cmt-20070625.pdf [hereinafter CCCIEM June 17 Comment] (arguing that Chinese respondents should receive market-economy valuation in dumping investigations).

80. *See, e.g.*, Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 NW. J. INT'L L. & BUS 315 , 328–32 (2005); Karen Halverson, *China's WTO Accession: Economic, Legal and Political Implications,* 27 B.C. INT'L & COMP. L. REV. 319, 329–30 (2004).

81. *See* PRCMOC Comment, *supra* note 59, at 6.

82. IMPORT ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, IMPORT ADMINISTRATION ANTIDUMPING MANUAL, Chapter 10, at 7 (Jan. 22, 1998), *available at* http://ia.ita.doc.gov/admanual/index.html (last updated Oct. 13, 2009) [hereinafter COMMERCE ANTIDUMPING MANUAL]. In accordance with Commerce's disclaimer, this citation to the Manual is intended to illustrate the reasoning behind the practice of assigning a single rate, and is not intended to establish that this is the practice currently adopted by Commerce. For a citation to satisfy the latter purpose, see Certain Tissue Paper Products and Certain Crepe Paper Products From the People's Republic of China: Notice of Preliminary Determinations of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination for Certain Tissue Paper Products, 69 Fed. Reg. 56, 407, 56, 412 (2004) [hereinafter Tissue Determination].

83. *See* Tissue Determination, Fed. Reg. 56, 407 at 56, 412. ("it is the Department's policy to assign all exporters of merchandise subject to investigation in an NME country this single [percentage] rate").

rate rate status") by proving an absence of governmental control.[84] Because of the high administrative burden of conducting a separate rate status analysis, Commerce tends to limit the number of entities that qualify, although its discretion is not unlimited.[85]

The NME exporter is further disadvantaged by the relatively arbitrary and unpredictable nature of using factors of production to determine normal value. The implications of this unpredictability are best illustrated through comparison to the ME exporters. In ME cases, Commerce uses relatively predictable, consistent methods to calculate normal value, methods that closely track either the producer's sale price or its input cost.[86] This is important because it allows an ME respondent to either lower the price of its inputs, or "correctly price its goods in the U.S. market, thereby avoiding an anti-dumping duty."[87]

Because the NME respondent is unable to predict which data set Commerce is going to use to calculate the factors of production for any given review, it is effectively constrained against calculating a "correct" price for its merchandise.[88] Furthermore, because Commerce is using surrogate country inputs, it is "impossible for an NME producer to price its goods in the US market to avoid the imposition of antidumping duties."[89] This lack of control over the valuation process is a source of frustration to many NME respondents subject to anti-dumping duties, espe-

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84. U.S. Dep't of Commerce, Import Administration Policy Bulletin 05.1, *Separate Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries* 1 (Apr. 5, 2005), *available at* http://ia.ita.doc.gov/policy/bull05-1.pdf (laying out the dual requirements of absence of *de Jure* (in law) control and *de facto* (in fact) control [hereinafter Separate Rates Policy Bulletin].

85. *Compare* Longkou Haimeng Mach. Co. v. United States, 581 F. Supp. 2d 1344, 1351–52 (Ct. Int'l Trade 2008) (holding that Commerce's decision not to calculate company-specific dumping margin for plaintiff, a voluntary respondent, was in accordance with law. In this case Commerce's decision not to grant mandatory respondent status to the plaintiff was based on part on the high administrative burden the analysis would require), *with* Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States, 637 F. Supp. 2d 1260, 1264 (Ct. Int'l Trade 2009) (holding that Commerce's decision not to select voluntary respondent Zheijian for review was not in accordance with law. Distinguished *Longkou* by stating that the plaintiffs in that case had "conceded that Commerce had the authority to limit the number of mandatory respondents," while in this case the plaintiffs alleged that Commerce had no such authority, given the small number of total respondents).

86. Laroski, *supra* note 49, at 395 (arguing that "market economy status adds accuracy to antidumping investigations and adds predictability").

87. *Id.*

88. *Id.*

89. Charlene Barshefsky, *Non-Market Economies in Transition and the US Antidumping Law: Remarks on the Need for Reevaluation*, 8 B.U. INT'L L.J. 373, 375 (1990).

cially when Commerce argues that the respondent should have known it was dumping.[90]

D. The PRC's Status under US Unfair-Trade Laws

1. NME Status and the Market-Oriented Industry Test

The PRC's accession to the World Trade Organization ("WTO") was completed on December 11, 2001.[91] Following extensive negotiations, the PRC gained full membership, but the permanent WTO members forced the PRC to make several concessions in order to achieve this end.[92] Concerned that the PRC's abundance of cheap labor would make it impossible for certain low-skill domestic industries to compete with Chinese imports, the US and other developed countries insisted on certain protectionist measures.[93] One such concession was that the US and other WTO member countries would be able to treat the PRC as an NME until 2016.[94]

The immediate consequence of permitting member states to classify the PRC as an NME was that imposing surrogate-country valuation methods on Chinese exporters became officially permitted in certain situations.[95] A brief summary of NME valuation under the GATT rules is valuable at this point to illustrate how the PRC Accession Protocol interacted with the rules that existed prior to the PRC Accession Protocol.

An explanatory note to the 1947 GATT Agreement, which preceded the WTO, provided that valuation methods that did not utilize domestic prices may be necessary when the exporting country has "a complete or substantially complete monopoly of its trade and where all domestic

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90. *See* Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States, 432 F.3d 1363, 1368 (Fed. Cir. 2005) (reh'g denied 2006 U.S. App. LEXIS 4544) (agreeing with defendant respondent's argument that it did not or should not have known it was dumping, despite Commerce's assertion to the contrary).

91. Tracy Elizabeth Dardick, *The US-China Safeguard Provision, the GATT, and Thinking Long Term*, 6 CHI. J. INT'L L. 467, 474 (2005) (discussing the importance of the valuation process in anti-dumping investigations).

92. *Id.* at 472.

93. *Id.* at 473–74.

94. *Id*. at 472.

95. *See* World Trade Org., *Protocol on the Accession of the People's Republic of China*, pt. I, § 15(a)(ii), WT/L/432 (Nov. 23, 2001) (on file with author) ("The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail"), *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002123.pdf [hereinafter Accession Agreement].

prices are fixed by the state." [96] Although this seemingly strict "monopoly" requirement would appear to refer exclusively to Soviet-style command economies, in practice it has not been applied quite so strictly.[97] This note was retained in the 1994 GATT Agreement (which led to the creation of the WTO),[98] which explicitly provided that surrogate country valuation would be appropriate when actual costs are unemployable "because of the particular market situation [in the exporting country]."[99]

Because the PRC's economy is somewhere between a classic command-economy and a purely market-based economy,[100] it is unclear whether WTO members would have legally been able to subject the PRC to the surrogate-country valuation method under the 1947 and 1994 GATT rules. However, it is clear that the PRC Accession Protocol sets out guidelines for an NME status determination that differs from the traditional GATT protocol. The reference to a state "monopoly" did not survive.[101] Instead, a member country is permitted to impose surrogate country valuation on Chinese respondents, unless such respondent can prove that the entire industry for that product operates under market-economy conditions ("MOI Test").[102]

Although the revised GATT rules were finalized in 1994, Commerce had already employed a Market Oriented Industry ("MOI") Test as far back as 1992.[103] In order to escape surrogate-country valuation using the MOI test, the respondent in an anti-dumping investigation must prove

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96. General Agreement on Tariffs and Trade, Annex I: Notes & Supplementary Provisions, Art. VI, ¶ 1(2) (1947), *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_03_e.htm#annexi [hereinafter GATT Annex 1]

97. *See* Gary N. Horlick & Shannon S. Shuman, *Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws*, 18 INT'L LAW. 807, 807 n.57, 858 (1984).

98. *See* Marcia Don Harpaz, *China and the WTO: New Kid on the Developing Bloc?*, 36 n.139 (Hebrew Univ. of Jerusalem Faculty of Law, Research Paper No. 2-07, 2007), *available at* www.ssrn.com/abstractid=961768.

99. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, pt. 1, art. 2, Determination of Dumping (1994), *available at* http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm.

100. *See* Daniel H. Johnson, Comment, *East Seats West: China's Accession to the World Trade Organization and the Rise of a Potent Threat to the North Carolina Furniture Industry*, 29 N.C.J. INT'L L. & COM. REG. 83, 92–93 (2003).

101. *See generally* Accession Agreement, *supra* note 95 (omitting reference to the GATT protocol or the "monopoly" requirement laid out in GATT Annex 1, *supra* note 96).

102. *Id.* at pt. I, § 15(a).

103. *See* David Codevilla, Comment, *Discouraging the Practice of What We Preach: Saarstahl I, Inland Steel and the Implementation of the Uruguay Round of GATT 1994*, 3 GEO. MASON INDEP. L. REV. 435, 466 n.190 (1995).

virtually no government involvement in industry prices or production; that the industry is marked by private or collective ownership that behaves as one in an ME country; and that producers pay market-determined prices for all major inputs and almost all minor inputs.[104]

According to Laroski, "the strict market-oriented industry test used by [Commerce] virtually guarantees that a market oriented industry will not be found."[105] As of this date, no respondent has been successful in its attempts to convince Commerce that its industry is market-oriented under the terms of the test, and it appears unlikely that any industry will be able to qualify in the near future.[106]

2. The "Double Standard" of Anti-Dumping & CVD Penalties

While this Note focuses primarily on anti-dumping valuation issues, it is important to briefly discuss CVD law, another unfair trade mechanism. In *Georgetown Steel Corp. v. United States*, the court explained that the purpose of CVD law is "to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments."[107] CVDs are relevant to the discussion of anti-dumping NME valuation as applied to the PRC for two interrelated reason. First, Commerce's recent decision to employ CVD law against the PRC, an NME, apparently spurred the decision to reevaluate the valuation method used against Chinese respondents in anti-dumping cases. More recently, the Court of International Trade expressed its own dissatisfaction with the status quo approach, and ordered Commerce to either drop CVD penalties against the PRC or rethink its anti-dumping approach to take CVDs into account.[108]

In 2007 Commerce reversed its policy of not applying CVDs against NMEs, in a case involving imports of paper from the PRC.[109] In that case, the respondents argued that Commerce was precluded from applying CVDs to NME countries by virtue of *Georgetown Steel*, in which the Court of Appeals upheld the administrative decision to refrain from ap-

104. *See* May 25 Request, 72 Fed. Reg. 29, 302 at 29, 302–03.

105. Laroski, *supra* note 49, at 396.

106. *See* May 25 Request, 72 Fed. Reg. 29, 302 at 29, 303.

107. Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1315 (Fed. Cir. 1986) (citing Zenith Radio Corp. v. United States, 437 U.S. 443, 455–56 (1978)).

108. *See* GPX *supra* note 6. This case is discussed in detail in Section III.A.2, *infra*.

109. *See* Press Release, Dep't of Commerce Office of Pub. Affairs, Commerce Applies Anti-Subsidy Law to China (March 30, 2007) (on file with author) *available at* http://www.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_002950 [hereinafter Commerce Press Release].

plying CVDs to the PRC.[110] However, Commerce maintained that it had imputed authority to apply CVD law to the PRC.[111]

Prior to 2007, commentators, courts and assumedly the PRC had long believed that NME status guaranteed that CVD duties would not be imposed, which was consistent with Commerce statements made in the Federal Register.[112] During this period Commerce maintained that the centrally controlled aspect of NME economies made government subsidies immeasurable for purposes of calculating CVDs.[113] In explaining the change in policy, Commerce stated that it had become possible to identify and measure government subsidies due to increasingly market-oriented nature of the PRC's economy.[114]

This was the first time that the US had imposed CVDs on an NME,[115] but recent development notwithstanding, it appears to have become the rule rather than the exception.[116] Imposing CVDs on NME countries is not explicitly precluded by WTO regulations.[117] However, since the poli-

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110. *See* Memorandum from Stephen J. Claeys, Deputy Director, Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, regarding Issues and Decision for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China, at 16–17 (Oct. 17, 2007), http://ia.ita.doc.gov/frn/summary/PRC/E7-21046-1.pdf [hereinafter Coated Free Sheet Final Determination] ("The [respondent] argues that [Commerce] does not have the authority to apply the CVD law to China as long as the Department continues to designate China as a nonmarket economy, , , In support, [petitioner] points to . . . [*Georgtown Steel*]").

111. *Id*. at 19–20.

112. *See* Countervailing Duties, 63 Fed. Reg. 65, 348, 65, 360 (Dep't Commerce Nov. 25, 1998).

113. *See* Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19, 370, 19, 371-19, 372 (Dep't Commerce May 7, 1984).

114. *See* Georgetown Steel Memorandum, *supra* note 4, at 10.

115. *See* Commerce Press Release, *supra* note 109 ("This is the first time countervailing duties will be imposed on imports from a non-market economy."). However, for a discussion on the first CVD *investigation* against an NME, see Harris, *infra* note 257.

116. *See, e.g.*, Kathleen Canon, *U.S. PC Strand Industry Files Antidumping and Countervailing Duty Cases Against China*, REUTERS, May 27, 2009, at http://www.reuters.com/article/pressRelease/idUS195758+27-May-2009+PRN20090527 (announcing the domestic producers of steel wire filed anti-dumping and CVD petitions against the same PRC respondent); Department of Commerce, Int'l Trade Comm., Fact Sheet, *available at* http://ia.ita.doc.gov/download/factsheets/factsheet-prc-drill-pipe-init-012110.pdf; *but cf. GPX*, *supra* note 6, at 3 (holding that the application of both CVDs and NME anti-dumping penalties in their current form to PRC producers was impermissible).

117. *See* Loren Yager, Director, International Affairs and Trade, U.S. Government Accountability Office GAO-06-608T, Testimony Before the U.S.-China Economic and Security Review Commission, at 2 (April 4, 2006).

cy-shift, the Chinese government has been lobbying heavily for so-called equal treatment: either its exporters receive the benefit of ME valuation methods under anti-dumping laws, or CVD laws not apply.[118]

Currently, Chinese exporters may be subject to unfavorable status under both CVD and anti-dumping laws.[119] On one hand, the Chinese economy has liberalized to the point where Commerce believes government subsidies have become measurable and thus subject to CVD analyses.[120] At the same time, Commerce does not believe the Chinese economy has developed to the point where ME valuation is appropriate.[121] Further, no individual industry can establish that it is operating entirely under free-market principles in order to pass the MOI test and receive the benefit of the ME valuation method.[122] At this point in time the PRC is the only country to receive NME status per anti-dumping laws and ME status per CVD policy.[123]

In September 2009, the Court of International Trade effectively mandated that Commerce do something about its failure to address its application of anti-dumping procedures against the PRC in light of the market liberalization impliedly recognized by the decision to apply CVDs to Chinese exporters.[124] The reasoning behind this holding—that NME anti-dumping valuation plus CVD duties effectively amount to "double counting"[125]—speaks to both the need for, and the legality of, a new val-

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118. *See* William H. Barringer, Comment on Behalf of China Chamber of Commerce of Minerals, Metals and Chemical Imports and Exporters, Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 7–8 (June 25, 2009), http://ia.ita.doc.gov/download/nme-moe/cccmc-nme-moe-cmt-20070625.pdf [hereinafter CCCMMC June 25 Comment]. Although demonstrating frustration for being penalized under both anti-dumping and CVD law, Chinese respondents are generally more inclined to advocate for abolition of NME status than to argue for elimination of CVD duties, *id*.

119. Subject to the discussion of *GPX*, *infra* Section III.A.2.

120. *See* Coated Free Sheet Paper From the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 Fed. Reg. 17, 484, 17, 486 (Dep't Commerce Apr. 9, 2007).

121. *See* Georgetown Steel Memorandum, supra note 4, at 7.

122. *See* May 25 Request, 72 Fed. Reg. 29, 302 at 29, 303.

123. *See* Polyethylene Retail Carrier Bags From the Socialist Republic of Vietnam: Initiation of Countervailing Duty Investigation and Request for Public Comment on the Application of the Countervailing Duty Law to Imports From the Socialist Republic of Vietnam, 74 FR 19064, 19067 (Dep't of Commerce April 27, 2009).

124. *See GPX*, 645 F. Supp. 2d at 1288–89; *see also* Yager, *supra* note 117, at 2 ("[a]bsent a clear congressional grant of authority, [applying CVDs to an NME] could be challenged in court, with uncertain results").

125. *GPX*, 745 F. Supp. 2d at 1235.

uation approach for anti-dumping investigations against Chinese countries, and will be discussed more fully in section III of this Note.

II. AN ECONOMY IN TRANSITION: THE STATE OF THE PRC'S MARKETS AND A SEARCH FOR A NEW VALUATION APPROACH

A. The Transitional State of the PRC's Economy

Cognizant of the competitive disadvantage its exporters suffer due to NME classification, the Government of the PRC supported a request made by Chinese respondents in an anti-dumping case that Commerce review the PRC's status as an NME country.[126] In response, Commerce drafted two memoranda in which it discussed in detail whether the PRC could be considered an ME country.[127]

In the Georgetown Steel Memorandum, which effectively summarized the two memoranda,[128] Commerce found that the PRC had implemented significant economic reforms since the early 1990's, and that its economy was far more "flexible" than the soviet-style economies for which the NME valuation methods were formulated.[129] In contrast to those economies, the PRC has eliminated price controls on most products; allows employers to set wages; permits a certain degree of individual entrepreneurship; and extends foreign trading rights to Foreign-Invested Enterprises.[130] Commerce summarized the PRC's economy as "one in which constrained market mechanisms operate alongside (and sometimes, in spite of) government plans."[131]

Unfortunately for the respondent in that case, and for Chinese exporters in general, Commerce found that those alluded-to government plans

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126. *See* Georgetown Steel Memorandum, *supra* note 4, at 2.

127. *See generally* Memorandum from Shauna Lee-Alaia et al., Office of Policy, Import Adminstration, to David M. Spooner, Assistant Sec'y, Import Administration, The People's Republic of China (PRC) Status as a Non-Market Economy (NME) (May 15, 2006), http://ia.ita.doc.gov/download/prc-nme-status/prc-nme-status-memo.pdf [hereinafter May 15 Memorandum] (evaluating whether the PRC's economy had graduated to ME status); Memorandum from Shauna Lee-Alaia ET AL., Office of Policy, Import Administration, to David M. Spooner, Assistant Sec'y, Import Administration Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ("China")- China's status as a non-market economy ("NME") (Aug. 30, 2006), http://www.docinweb.com/Lined_Paper_Products_from_the_People%27s_Republic_of_China_61356#download_link [hereinafter August 30 Memorandum] (evaluating in great detail whether China's economy had graduated to ME status).

128. Georgetown Steel Memorandum, *supra* note 4, at 3 n.1.

129. *Id*. at 4.

130. *Id*. at 5–7.

131. *Id.* at 9.

in fact constrained the Chinese market to a legally determinative extent.[132] In particular, the May 15 Memorandum stated that the Chinese government continued to exert a great deal of control over the banking sector, which was particularly significant given that one of the factors for an NME determination is the extent of government control over the allocation of resources.[133] The August 30 Memorandum additionally highlighted the extent of government control over currency value,[134] labor mobility,[135] and the undeveloped state of property rights[136] as evidence that the PRC was not yet a ME under its interpretation of the Tariff Act requirements.

Based on these findings, Commerce reached the conclusion that due to the "limited extent to which market forces and institutional reform have taken root in critical sectors of the [PRC's] economy . . . the [PRC] should therefore continue to be considered an NME country for purposes of U.S. antidumping law."[137] In answer to the PRC's request that it be allowed to use ME country valuation methods in anti-dumping investigations, Commerce stated, "market forces in the [PRC] are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis."[138]

B. A Reconsideration of NME Valuation Methods for Chinese Respondents

1. Commerce's Requests for Comment

The astute reader will have noticed the adverbial form of the word "yet," used above, referring to the (in)appropriateness of ME valuation

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132. Coated Free Sheet Final Determination, *supra* note 110, at 19–20.

133. May 15 Memorandum, *supra* note 127, at 3. Given the investment-driven nature of the PRC's economy, the May 15 Memorandum attached extra significance to government control of the financial sector.

134. *See* August 30 Memorandum, *supra* note 127, at 13 (concluding that although the renminbi was not yet market-based, it was not "completely insulated from market forces"). Although the PRC is currently pegging the value of the renminbi to that of the dollar, *see* Michael Pettis, *What the [PRC] Cannot Do With Its Reserves* (Feb. 22, 2010), http:// http://mpettis.com/2010/02/what-the-pboc-cannot-do-with-its-reserves, I posit that this imbalance is best addressed by the executive branch of government, and that the legislative and judicial branches should respectfully defer.

135. *Id*. at 22 ("[R]estrictions on labor mobility serve to inhibit and guide workforce flows and seriously distort the supply side of the labor market").

136. *Id*. at 46 (concluding that property rights in the PRC "remain poorly defined and weakly enforced").

137. May 15 Memorandum, *supra* note 127, at 8–9.

138. August 30 Memorandum, *supra* note 127, at 82.

methods for Chinese exports in anti-dumping investigations. In the negative, the adverbial "yet" signifies that the speaker is expecting something to happen.[139] The literalist may protest that there is no error, as the valuation method is expected to change in 2016.[140] However, Commerce has recently demonstrated a more immediate willingness to re-evaluate the valuation procedures for Chinese companies in anti-dumping investigations, although it has not yet implemented any changes.

In May of 2007 Commerce began to publicly solicit for suggestions on modifying its approach to calculating normal value for individual Chinese respondents.[141] Acknowledging the Georgetown Steel Memorandum, the May 25th request stated:

> The evolution of the PRC's economy together with the features and characteristics of the PRC's present-day economy…suggest that modification of some aspects of the Department's current NME antidumping policy and practice with regard to the PRC may be warranted, such as the conditions under which the Department might grant an individual respondent in the PRC *market-economy treatment* in some or all respects.[142]

Although commentators such as Lantz had been advocating an approach that focused on individual enterprises since the 1990's,[143] this was the first time Commerce had raised the possibility of an MOE analysis.[144] The incentive for proposing the MOE test now apparently stemmed in part from Commerce's admission that no Chinese industry had met the high standard required to pass the MOI test[145] and also in part from the

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139. RAYMOND MURPHY, ENGLISH GRAMMAR IN USE: A SELF-STUDY REFERENCE AND PRACTICE BOOK FOR INTERMEDIATE STUDENTS OF ENGLISH 222 (2004). True purveyors of grammatical nuance may have also noticed the continual use of the word "continue," this time in reference to the PRC's nominal status as an NME. One may assume an equivalent connotation.

140. 2016 is the date at which the PRC will become an ME under the terms of the Accession Agreement. *See* Accession Agreement, *supra* note 95, at pt. I, § 15(d).

141. *See* May 25 Request, 72 Fed. Reg. 29, 302 at 29, 302.

142. *Id*. at 29, 303 (emphasis added).

143. Lantz, *supra* note 20, at 1049 (arguing that such an individualized approach would be "superior," and also stating rather prophetically that such a test would forestall the undesirable possibility that an NME respondent would be subject to both NME valuation for Ad purposes and ME liability for CVD purposes).

144. The short-lived "bubbles-of-capitalism" approach attempted briefly to address this type of enterprise, but was ultimately never utilized. This approach will be discussed in Section III.B.1, *infra*.

145. May 25 Request, 72 Fed. Reg. 29, 302 at 29, 302.

fact that it the PRC's economy had evolved to the point where government subsidies could be "identified and measured."[146]

In its May 25th Request, Commerce asked interested parties to respond to two questions. Initially, how should Commerce identify individual Chinese respondents that are operating under market conditions, if at all? In posing this question, the May 25th Request emphasized an identification of the particular "conditions" under which the ME treatment might be warranted.[147] Then, once identified, to what extent should Commerce rely on the MOE's own costs to determine normal value?[148] Regarding this second question, Commerce was particularly concerned with costs that were "inextricably linked" to the factors that the Georgetown Steel Memorandum identified as still being subject to Chinese government control.[149]

After receiving initial responses, Commerce published a second request for comment.[150] The October 25th request posed new question in response to certain arguments made in the initial responses, arguments addressed in detail in part C of this section. First, does Commerce have the legal authority to administer an MOE test?[151] Second, would an MOE test be administratively feasible, particularly considering the interconnectedness of prices within an economy?[152] And finally, Commerce asked again for comment addressing the extent to which an MOE's own prices and costs could be utilized, specifically those costs most exposed to "macroeconomic NME distortions."[153]

For the purposes of this Note, I will attempt to summarize the positions argued in the responses in regard to three questions. First, is an MOE test legal? That is, does Commerce have the statutory authority to adopt an MOE test, and would such a test be compatible with our WTO obliga-

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146. *Id*. While CVDs were not explicitly mentioned in the May 25th Request, Commerce referred repeatedly to the Georgetown Steel Memorandum, which had posited the applicability of CVDs as a direct consequences of that fact that government benefits could be identified and measured.

147. *Id*. at 29, 303.

148. A valuation method that took an MOE's own costs into consideration would likely resemble the ME Constructed Value method, although this term is not used explicitly in the May 25th Request. *See generally* May 25 Request, 72 Fed. Reg. 29, 302.

149. *See* May 25 Request, 72 Fed. Reg. 29, 302 at 29, 303 (the "inextricably linked" inputs identified were labor, land and capital).

150. *See generally* October 25 Request, 72 Fed. Reg. 60, 649 (asking for further comment on the proposed MOE test).

151. *Id.* at 60, 650.

152. *Id*.

153. *Id.* The inputs that were given as "inextricable linked" were the same as the ones mentioned in the May 25 Request, 72 Fed. Reg. 29, 302, namely, labor, land and capital.

tions. As you will see, many of the respondents argue that not only is an MOE test legal, but in fact it is necessary. Second, assuming that an MOE test is legal, which companies qualify for it, and how would those companies be identified? Finally, after identifying an MOE, the question becomes how to calculate normal value, that is, for what inputs may Commerce depart from traditional NME valuation methods, and on what alternate methods should it rely?

2. Responses to Commerce's Request for Comment: A Summary

a. Legality of a Market-Oriented Enterprise Test

Commerce received almost 40 responses the May 25th request[154] and almost 30 for the October 25th request,[155] although there was a fair amount of overlap in terms of participants.[156] Arguments around legality generally centered around 19 U.S.C. 1677 and 1677b (the "Tariff Act"), as well as the accession act granting the PRC admission to the WTO (the "Accession Act").

The responses in favor of an MOE test ("Responses in Favor") were adamant in their assertion that the Tariff Act language did not create a barrier to the MOE test. One noteworthy response made the point that the "two-step statutory analysis [of 19 U.S.C. 1677b(c)(1)] anticipates that the Department may find it appropriate to use its standard methodology for calculating normal value even in proceedings involving an NME country."[157] For readers possessing neither a photographic memory nor encyclopedic knowledge of trade law, 19 U.S.C. 1677b(c)(1) outlines two requirements that must be in order to impose NME valuation methods in anti-dumping investigations: first, that the merchandise subject to the anti-dumping investigation be exported from an NME, and second,

154. A complete list of the May 25th responses is available at http://ia.ita.doc.gov/download/nme-moe/nme-moe-cmt-20070625-index.html.

155. A complete list of the October 25th responses is available at http://ia.ita.doc.gov/download/nme-moe/comments-20071210/nme-moe-cmt-20071210-index.html.

156. Of the 29 Second-Round Responses received, 13 had also been First-Round Responses. *See* http://ia.ita.doc.gov/download/nme-moe/nme-moe-cmt-20070625-index.html.

157. Brenda A. Jacobs, Comment on Behalf of Chutex Group, Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 2 (December 10, 2007), http://ia.ita.doc.gov/download/nme-moe/comments-20071210/chutex-nme-moe-cmt-20071210.pdf [hereinafter Chutex December 10 Comment].

that the available information does not permit standard ME methods of valuation must be met.[158]

The first prong of the above test is rather straightforward. However, it is the second prong that the Responses in Favor are fixated upon, however painfully. As the Chutex December 10 Comment clearly enunciates, "the mere fact that an antidumping proceeding involves an NME is insufficient reason for the Department to deviate from the standard [ME] methodology for calculating normal value."[159] This implicitly implies that the state of the PRC's economy does indeed allow the application of ME methods to determine the normal value of merchandise. In fact, this interpretation extends an MOE test, which would hypothetically account for this situation, beyond permissible and into the rigid realm of necessary, considering that Commerce would actually be precluded from using NME methodology if the available information made certain ME methods applicable.

In case its statutory interpretation is in doubt, the Chutex December 10 Comment pointed to the legislative history of the 1988 trade act that amended the antidumping statute.[160] Read in part, the history stipulates that "[i]f information submitted by a non-market economy country to the Department permits foreign market value to be determined accurately using the normal [ME] methodology, then the committee expects such methodology to be used by the department."[161]

Statutory provisions aside, various responses pointed out that Commerce enjoys an interpretive flexibility that allows it to deviate from the industry-wide surrogate value method.[162] Put less formally, Commerce already tweaks the NME valuation approach to account for certain market-oriented forces by allowing certain respondents the opportunity to gain separate rate status by showing a lack of government control, and also by valuing certain inputs purchased directly from market-economy

158. *See* 19 U.S.C. 1677b(c)(1) (2006).

159. Chutex December 10 Comment, *supra* note 157, at 2.

160. *Id.* at 3.

161. *Id.* at 3–4 (citing S. Rep. No. 100-71, 100th Cong., 1st Sess., 108 (1987)).

162. *Id.* at 4–5; *see also* Douglas J. Heffner & Rick Johnson , Comment on Behalf of J.C. Penney, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 4 (December 10, 2007), http://ia.ita.doc.gov/download/nme-moe/comments-20071210/jcpenney-nme-moe-cmt-20071210.pdf [hereinafter J.C. Penney December 10 Comment] (pointing out that the MOI test itself would not be legal under an interpretation of [19 U.S.C. 1677b] that precluded ME methodology from being applied in an NME setting).

countries at market price.[163] Because these practices are currently accepted as legal interpretations of statutory authority, it seems unlikely that an MOE test would be impermissible.

The responses that advocated against an MOE test (the "Responses Against") tended to emphasize both the PRC WTO Accession Agreement and also 19 U.S.C. §1677b(c)(1). Citing the Tariff Act, the American Furniture June 25th Comment argues that 19 U.S.C. §1677b(c)(1) precludes an MOE test by defining NMEs as countries where ME methodologies are inapplicable, therefore "when the exporting country is designated a [NME], the Department must use the [NME] methodology."[164] However, while such circular logic is questionable, a closer reading of the statute reveals that this argument effectively jumps from the term "Nonmarket economy countries" to the factors of production approach at the end of the sentence, effectively skipping the two-prong test discussed above.[165]

A stronger argument is that neither the Accession Agreement nor the Tariff Act contemplates individual entities receiving special status. A comment arguing that the language in Accession Agreement precludes an MOE test points out that "while the [Accession Agreement] provides for determinations as to whether Chinese *industries* warrant market economy treatment, there is no such provision [that this would be done for individual companies]."[166] Similarly, the ICL June 25th Comment ar-

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163. *See* Harry Lee, Comment on Behalf of Textile Counsel of Hong Kong, Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 3–4 (December 10, 2007), http://ia.ita.doc.gov/download/nme-moe/comments-20071210/tchk-nme-moe-cmt-20071210.pdf [hereinafter Textile Counsel December 10 Comment] ("Other practices adopted by [Commerce] reinforce the principle that [Commerce] may deviate from its alternative NME methodology where warranted").

164. *See* Joseph W. Dorn, et al., Comment on Behalf of American Furniture Manufacturers Committee for Legal Trade et al., Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 2–3 (June 25, 2007), http://ia.ita.doc.gov/download/nme-moe/king-spalding-nme-moe-cmt-20070625.pdf [hereinafter American Furniture June 25 Comment] The exact statutory language is, "the valuation of the factors of production shall 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," 19 U.S.C. 1677b(c)(1) (2006).

165. *See* 19 U.S.C. 1677b(c) (2006).

166. Robert E. Lighthizer et al., Comment on Behalf of United States Steel Corporation, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 2 (June 25, 2007), http://ia.ita.doc.gov/download/nme-moe/us-steel-nme-moe-cmt-20070625.pdf [hereinafter U.S. Steel June 25 Comment].

gued that the NME methodology outlined by the Tariff Act at 19 U.S.C. 1677b, "applies to exports from 'a nonmarket economy,' not to exports of a particular enterprise."[167]

While there is nothing factually wrong with these arguments, they do not address the fact that Commerce already applies special rules to individual respondents, as several of the Responses in Favor were quick to point out.[168]

b. Identifying a Market-Oriented Enterprise

Most of the Responses in Favor shared one prominent stipulation regarding identification: the identification portion of the test should not be impossible to pass.[169] These concerns arose from the fact that "no industry has met the MOI standard in the fifteen years since this test was introduced by the Department."[170]

Although virtually all of the Responses in Favor cited specific criteria that Commerce could use to help it identify whether an individual enterprise was sufficiently market-oriented, the responses trifurcated on whether the identification criteria should be modeled more on the MOI test, on the Separate-Rates Test, or on the NME test.[171]

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167. James R. Cannon, Jr., Comment on Behalf of ICL Performance Products, LP and Innophos, Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 4 (June 25, 2007), http://ia.ita.doc.gov/download/nme-moe/icl-innophos-nme-moe-cmt-20070625.pdf [hereinafter ICL June 25 Comment] (citing 19 U.S.C. 1677b(c)).

168. *See* Textile Counsel December 10 Comment, *supra* note 163, at 3–4.

169. *See* Brenda Jacobs, Comment on Behalf of Textile Counsel of Hong Kong, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 6–7 (June 25, 2007), http://ia.ita.doc.gov/download/nme-moe/tchk-nme-moe-cmt-20070625.pdf [hereinafter Textile Counsel June 25 Comment] (suggesting that the MOE test employ criteria "that may be realistically met by companies that have embraced market principles," and "avoid the problems that have plagued application of the MOI test").

170. *Id*. at 6.

171. *Compare* Chutex December 10th Comment, *supra* note 157, at 7–8 (arguing that unlike the NME test, the Separate-Rate Test was created with individual enterprises in mind, and thus would reduce the administrative costs of implementing an MOE test based on its design), *with* Wang Xuehua & Bao Xiaobo , Comment on Behalf of Huanzhong & Partners, Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 3 (December 10, 2007), http://ia.ita.doc.gov/ download/nme-moe/comments-20071210/bhp-nme-moe-cmt-20071210.pdf [hereinafter Huanzhong December 10 Comment] (arguing that some of the factors listed in U.S.C. 1677(18)(B) that constitute the NME test "appear to be more suitable for individual companies rather than for a country").

Despite the failure of the MOI test, several of the Responses in Favor urged Commerce to borrow certain aspects of the MOI test to identify individual companies that may be considered market oriented.[172] In addition to the general requirements of the MOI test, these responses suggested that Commerce consider whether the firm utilizes generally accepted accounting principles, adheres to regularized depreciation and payment systems, and are not protected from bankruptcy or afforded debt relief from the government.[173]

In fact, such a test would be similar to one already utilized by the European Union.[174] According to the Jurisno June 20 Comment, the European Community Regulations identify 5 criteria for granting ME treatment to individual respondents.[175] These criteria include whether pricing and related decisions are made without State interference; whether accounting records are in line with international accounting standards; whether the production costs and financial situations are not subject to significant distortions, whether the firms are subject to reliable bankruptcy and property laws; and exchange rate conversions being carried out at the market rate.[176]

Another group of Responses in Favor urged Commerce to identify MOEs using criteria already employed in the separate-rate test.[177] One response explained, "the separate rate test serves as the appropriate boilerplate for developing an MOE test because the purpose of the separate rate test is the same as the test for determining an MOE – i.e., determin-

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172. *See*, *e.g.,* Eric J. Jiang & Aimin Sun, Comment on Behalf of Jurisno Law group, Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 6 (June 20, 2007), http://ia.ita.doc.gov/download/nme-moe/jurisino-nme-moe-cmt-20070625.pdf [hereinafter Jurisno June 20 Comment] (suggesting that Commerce initially base its MOE test on the conditions developed for the MOI test, and also consider the European Union approach); Textile Counsel June 25 Comment, *supra* note 169, at 7 (suggesting that the MOI criteria be applied to an MOE test "in a more practical manner").

173. Jurisno June 20 Comment, *supra* note 172, at 3.

174. *Id.*

175. *Id.* at 3.

176. *Id*. at 3 (citing Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on Protection Against Dumped Imports From Countries Not Members of the European Community).

177. Douglas J. Heffner & Rick Johnson, Comment on Behalf of J.C. Penney, Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 3–4 (June 25, 2007), http://ia.ita.doc.gov/download/nme-moe/jcpenney-nme-moe-cmt-20070625.pdf [hereinafter J.C. Penney June 25 Comment]. For a comprehensive list of separate-rate test factors, see Separate Rates Policy Bulletin, *supra* note 84, at 2.

ing absence of government control."[178] In principal such a test would "expand the focus of the analysis from just the export operations to the respondent's entire operations—both manufacturing and export activities."[179]

Conceptually similar to the separate-rate test approach was the mutually compatible suggestion that Commerce establish a shifting burden of proof depending on the classification of the respondent. As one response put it, "a hierarchy could be constructed under which state owned companies are required to answer certain questions . . . not required of privately owned companies."[180] Analogously, SOEs could be presumed ineligible for MOE treatment, while wholly-foreign-investment enterprises ("WFIE") would be granted MOE status prima-facie, with private Chinese-owned companies falling somewhere in the middle.[181]

Finally, the Huanzhong December 10 Comment argued that the factors used for the determination of the market-economy status of a country "could be adapted for individual companies."[182] In particular, they argue that it would be feasible to determine on an individual basis whether the company set wage rates or not and whether the government or the company controlled the production means or made decisions regarding output.[183]

Less subtle than the above suggestions were the responses made on behalf of various Chinese Chambers of Commerce. In forceful, immoderate terms, these responses argued, "that an absolute majority of Chinese enterprises are operate under market-economy environment [sic],"[184] and

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178. Philippe M. Bruno, Comment on Behalf of Baosteel Group Corp., et al., Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 3–4 (June 25, 2007), http://ia.ita.doc.gov/download/nme-moe/baosteel-nme-moe-cmt-20070625.pdf [hereinafter Baosteel June 25 Comment].

179. *Id.* at 5.

180. CCCMMC June 25 Comment, *supra* note 118, at 17–18.

181. *See* Richard Malish et al., Comment on Behalf of Cheng Meng Furniture, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 7–9 (June 21, 2007), http://ia.ita.doc.gov/download/nme-moe/cmf-nme-moe-cmt-20070625.pdf [hereinafter Cheng Meng June 25 Comment] (arguing that Commerce should "distinguish between" state-owned enterprises and privately owned companies for purposes of an MOE test).

182. Huanzhong December 10 Comment, *supra* note 171, at 3.

183. *Id.*

184. Wang Hangjiang, Comment on Behalf of China Chamber of Commerce for Import & Export of Machinery & Electric Products, Response to Antidumping Methodologies in Proceedings Involving Certain Non- Market Economies: Market-Oriented Enterprise; Request for Comment, at 2 (December 10, 2007), http://ia.ita.doc.gov/ down-

"currently, the vast majority of Chinese industries have met the . . . MOE criteria."[185] Responding specifically to administrative feasibility, the Chamber of Commerce responses argue across the board that most private-owned firms operating completely under "a fair and liberal market economy,"[186] with the implication that identification of those firms should be fairly straightforward.

Many of the Responses Against made the equally hard-line assertion that "*economy-wide* distortions in the PRC . . . affect all Chinese respondents," and that "accordingly, it would be inappropriate for the Department to find that any Chinese respondent is entitled to [MOE] treatment."[187] Thus according to this argument, the problem with identifying NMEs is the fact that none exist.

A better argument was that determining whether Chinese enterprises are market-oriented would be administratively unfeasible.[188] Based on the premise that non-market distortions permeate the Chinese economy, "any attempt to demonstrate how an individual Chinese company could be shown to be so insulated [against non-market distortions] would be extremely complicated and excessively time-consuming."[189]

On a similar note, the ICL December 10 Comment raised the question of where Commerce would obtain its data to make an MOE determination. It stated, "the crux of the problem is not whether market-based prices to [sic] exist, but whether it possible [sic] to identify such prices. More specifically, is it possible to analyze whether market-based price [sic]

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185. China Chamber of Commerce of Metals, Minerals, Chemical Importers & Exporters, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 3 (December 10, 2007), http://ia.ita.doc.gov/download/nme-moe/comments-20071210/cccmc-nme-moe-cmt-20071210.pdf [hereinafter CCCMMC December 10 Comment].

186. China Chamber of Commerce for Import & Export of Textiles, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 2 (December 10, 2007), http://ia.ita.doc.gov/download/nme-moe/comments-20071210/ccct-nme-moe-cmt-20071210.pdf [hereinafter CCCIET December 10 Comment].

187. U.S. Steel June 25 Comment, *supra* note 166, at 8.

188. *See* David A. Hartquist, Comment on Behalf of Committee to Support U.S. Trade Laws, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 7 (December 10, 2007), http://ia.ita.doc.gov/download/nme-moe/comments-20071210/csustl-nme-moe-cmt-20071210.pdf [hereinafter Committee December 10 Comment].

189. *Id.* at 8.

exist from the books and records of individual enterprises in the market?"[190]

The issue of whether the petitioner or respondent should bear the burden of proof was particularly contentious, with several Responses in Favor arguing for a presumption of MOE status unless the petitioner can show evidence to the contrary.[191] On the other hand, Reponses Against argued that if MOE status were presumed, the burden and expense of disproving MOE status would be excessive both to petitioners and also Commerce.[192]

c. Administering MOE Valuation

Assuming than an MOE test is legal and that individual MOEs can be identified, the more difficult question then becomes how to calculate normal value for the newly-dubbed MOE's exports. The strongest proposals put forward by the Responses in Favor advocated for a hybrid approach that combined aspects of NME methodology, and ME, as well as several innovative concepts not currently in use.

For example, the Cheng Meng June 25 Comment advocated using ME valuation methods in situations involving foreign investment enterprises ("FIE") and private Chinese companies, but using surrogate prices when the input in question is subject to price controls, guidance prices, etc.[193] Such a method would use home-market sales when possible, but likely disallow sales made to State Owned Enterprises ("SOE"), which them-

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190. *Id.*

191. *See*, *e.g.*, Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the People's Republic of China, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 7 (June 15, 2007), http://ia.ita.doc.gov/download/nme-moe/boft-nme-moe-cmt-20070625.pdf [hereinafter BOFTA June 15 Comment] (arguing for a presumption of MOE status for Chinese enterprises, and urging that the burden of proving otherwise be put on the petitioner); Ou Meng, Comment on Behalf of China Chamber of Commerce of Import and Export of Foodstuffs Native Produce & Animal By-Products, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 2 (June 21, 2007), http://ia.ita.doc.gov/download/nme-moe/cfna-nme-moe-cmt-20070625.pdf [hereinafter CCCIEF June 25 Comment] (urging Commerce to apply MOE treatment to all Chinese respondents).

192. *See* Committee December 10 Comment, *supra* note 188, at 6–7 (arguing that the multi-layered analysis necessary to disprove a respondent's assertion of NME status would be "well-nigh impossible").

193. Cheng Meng June 25 Comment, *supra* note 181, at 12 (recommending a surrogate valuation method or "de minimis" rule when an input is subject to Chinese government interference).

selves would be prima facie barred from MOE status.[194] Although the Responses in Favor generally preferred a home-market method (unsurprisingly), if the constructed value method were used, they preferred that the test dictate the use of actual price paid for imported inputs[195] and also allow use of the actual price paid if the input was purchased from an FIE or privately owned company.[196]

The strongest argument seemed to be for an MOE method modeled after the ME Constructed Value methodology. This is in large part due to the fact that some inputs, such as those purchased from SOEs, would have to be valued separately, and the Constructed Value method is best suited to take multiple inputs into account. An approach modeled on the Constructed Value method would also address one of the primary concerns of MOE valuation: that of a home-market method that would use the price of the product sold in the PRC as the normal value benchmark.[197]

This concern is predicated on the possibility that government distortions in the home market could distort demand, with the result that the home-market test would generate a deceptively low normal value.[198] The implication for purposes of administrability was that in order to account for these potential distortions, Commerce would be forced to undertake the exhaustive task of examining the upstream and downstream markets for subject merchandise, rather than limiting its analysis to the individual seller.[199] However, an MOE test employing constructed value analyses

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194. *Id.* at 9 n.12.

195. This would be consistent with Commerce's current practice of using price paid for ME inputs. *See*, 19 C.F.R. § 351.408(c)(1) (2005).

196. *See* Cheng Meng June 25 Comment, *supra* note 181, at 11 (hypothesizing that a potential MOE test would use the actual price paid for inputs purchased from foreign-investment enterprises).

197. *See* James R. Cannon, Jr., Comment on Behalf of ICL Performance Products, LP and Innophos, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 3–4 (December 10, 2007), http://ia.ita.doc.gov/download/nme-moe/comments-20071210/icl-innophos-nme-moe-cmt-20071210.pdf [hereinafter ICL December 10 Comment] (addressing the possibility of home-market price manipulation by stating "the questionnaire would have to be expanded to address whether home market prices are set in a free market for the subject merchandise").

198. *Id.*

199. *See* J. Christopher Wood, Comment on Behalf of Occidental Chemical Corp., Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 6–7 (November 26, 2007), http://ia.ita.doc.gov/download/nme-moe/comments-20071210/oxychem-clearon-nme-moe-cmt-20071210.pdf [hereinafter OxyChem November 26 Comment] ("[T]he Department would be required to expand the scope of its analysis to determine whether

would be not only more feasible from a legal and administrative perspective, but could also help to alleviate these concerns.[200]

The Responses in Favor were mixed on the important issue of how to address individual inputs that were clearly not market-oriented. Some responses, such as the Baosteel June 25 Comment, were apparently so confident that the majority of (its own) inputs would be market oriented, that they suggested, "if any price is found not to be market-driven, the department may rely on the surrogate methodology."[201] On the other hand, some responses rejected any use of surrogate-country methodology, instead urging that Commerce only apply ME methodology to potential MOEs.[202]

The Chutex December 10 Comment cautioned against simply reverting to traditional NME anti-dumping methods for MOE inputs that were determined to be non-market-driven. It stated, "in the . . . case where it may be appropriate to limit an MOE finding, the Department has the tools to make such limitation feasible by not accepting a particular input cost as market-based."[203]

One of these suggested tools was an "inflator" for costs that could not be divorced from government control, such as labor, land and capital costs identified by the Georgetown Steel Memo.[204] The "inflator" would increase these distorted costs by an ad valorem percentage equal to the distortion effect.[205] According to the Chutex December 10 Comment, this

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suppliers of inputs to the producer were similarly market-oriented and whether purchasers in the non-market economy of the producer's output operated according to market principles").

200. While Responses Against argued that government intervention could affect the prices of inputs, necessitating a more complex analysis even for an MOE methodology more akin to constructed value, *id*. at 6, generally the arguments focused on likelihood of intervention in home-market demand. *See* U.S. Steel June 25 Comment, *supra* note 166, at 6–7 (questioning whether it is possible that all of a Chinese firm's customers would be operating under market conditions). Whether or not the firm's home-market customers were market oriented would only necessarily be factored in under a home-market approach, *see* Lindsey & Ikenson, *supra* note 38, at 6–8 (discussing the factors that are considered under the home-market approach).

201. Baosteel June 25 Comment, *supra* note 178, at 7.

202. *See* CCCMMC June 25 Comment, *supra* note 118, at 22 (arguing that, "in such a case [that inputs were purchased from a SOE] 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"). It is unclear where this approach expects Commerce to find values for those inputs purchased from an SOE under a constructed value analysis.

203. Chutex December 10 Comment, *supra* note 157, at 12.

204. *Id*. at 13.

205. *Id*. (stating that this "inflator" approach would be similar to adjustments proposed with respect to energy costs for companies from the Russian Federation in 2005).

approach would "lend[] stability and predictability to the Department's calculations" and also be easier to administer than a mix-and-match surrogate value approach.[206]

This inflator approach would make sense, especially considering the understandable concerns that "a Market-Oriented Enterprise Test would require consideration of direct and indirect state influence in the competitive environment in which an individual firm operates."[207] Echoing the Georgetown Steel Memorandum, the OxyChem November 26 Comment cited land, labor, and in particular, capital allocation, as the three most problematic areas in this regard.[208] The inflator approach discussed above would be an elegant and equitable solution to these pervasively distorted factors.

One proffered guideline for utilizing individual inputs was the oft-repeated prohibition against allowing inputs paid to SOEs into the proverbial cauldron.[209] The OxyChem November 26 Comment argued, "any assessment of market-oriented enterprises should exclude state-owned enterprises in a non-market economy."[210] The underlying resistance to SOEs stems from the perception that "when [SOEs] receive economics benefits from the government, their price and output decisions are influenced by those benefits and are thereby distorted. These distortions create false price signals that impact the competitive decisions of all firms within the industry."[211]

Merely excluding inputs purchased from SOEs while allowing ME valuation methods for the rest of the inputs would be unsatisfactory to the many Responses Against that point to the difficulty of uncoupling inputs that are operating under market principals from inputs that are affected by the greater NME economy. Indeed, the primary factor identified by the Responses Against as an impediment to an administratively

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206. *Id*.

207. OxyChem November 26 Comment, *supra* note 199, at 5.

208. *Id.* at 4–6; *see also* ICL December 10 Comment, *supra* note 197, at 9 (arguing that "the banking system does not operate in a genuinely open market," and that "the government continues to preserve its ability to direct the economy").

209. *See generally* Cheng Meng June 25 Comment, *supra* note 181, at 11 (arguing for the exclusion of inputs subject to government price controls). This principal as applied would most likely exclude many SOEs, in particular those "pillar" SOEs discussed in Section III.C.2, *infra*.

210. Oxychem November 26 Comment, *supra* note 199, at 7.

211. Terence P. Stewart & Gert De Prest, Comment on Behalf of Stewart and Stewart, Response to Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise; Request for Comment, at 21 (Dec. 10, 2007), http://ia.ita.doc.gov/download/nme-moe/comments-20071210/stewart-stewart-nme-moe-cmt-20071210.pdf [hereinafter Stewart December 10 Response].

feasible MOE test was the difficulty of determining whether a given Chinese price was market-based or not.[212] U.S. Steel June 25 Comment pointed out that, "even if a Chinese producer were to try to operate its own business on market principles, it is extremely unlikely that all of its myriad *suppliers* and *customers* would also be doing so."[213] The American Furniture June 25 Comment made a similar point: "[I]n order for an entity to operate as a market-oriented enterprise within an industry marked by non-market conditions, it would have to source its inputs . . . outside of the industry's supply chain."[214]

Responding to the idea that Commerce could impose a system that would use actual Chinese costs for certain inputs, but use surrogate values for the three problematic inputs identified above, ICL December 10 Comment stated that this would create a "hodge-podge of unrelated factor values."[215] Elaborating on this argument, the ICL December 10 Comment asserted that all of the actual Chinese costs would inevitably be affected by the allocation of land, labor, and capital.[216] Furthermore, it stated, "the surrogate overhead rate is divorced from its context in a particular market," creating an "arbitrary[,] not accurate" result.[217]

III. AN EQUITABLE APPROACH: LOGISTICS AND LEGALITY OF A WORKABLE MARKET-ORIENTED ENTERPRISE TEST

In this final section I first argue that the current NME anti-dumping approach for the PRC is inadequate for its purpose, of dubious legality, and therefore needs to be supplemented by an MOE test that would address these deficiencies. I follow up this assertion by laying out the framework for a workable MOE test conceptually grounded in a previous test called the "Bubbles of Capitalism," while employing several distinct features. Next, I answer the question posed by Commerce regarding legality, arguing that an MOE test is not only legal, but also required if

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212. *See* ICL December 10 Comment, *supra* note 197, at 5 (highlighting the scope of the analysis necessary to determine whether a given price was distorted).

213. U.S. Steel June 25 Comment, *supra* note 166, at 6.

214. American Furniture June 25 Comment, *supra* note 164, at 4. Although certainly valid, following this line of argument ultimately leads to the current MOI test, which has proven impossible to pass up to this point. From a policy perspective it is unfortunate that domestic producers and others who weighed in against the administrability of MOE valuation were so united in their opposition to constructive feedback.

215. ICL December 10 Comment, *supra* note 197, at 9.

216. *See id.* at 9–10. For example, when a Chinese manufacturer purchases a raw material from another Chinese manufacturer, the cost of that raw material would be affected by the same problematic distortions (e.g. capital, land, and labor) as the final product, and so on down the line, creating a cycle of distortion.

217. *Id*. at 10.

Commerce continues to apply CVD law to Chinese companies. Finally, I address the remaining issues of identification and administrability, in the context of the proposed test.

A. A Market Oriented Enterprise Test Should be Adopted

1. The Failure of the Status Quo

While the current antiquated NME valuation method is itself probably inappropriate for use against the majority of Chinese respondents, the more fundamental problem with the current approach is the double imposition of both CVD and anti-dumping remedies. To rectify this problem, an MOE test would provide an equitable opportunity not afforded by the MOI test for certain Chinese respondents in anti-dumping investigations to have the normal value of their products calculated fairly and consistently without the problem of double remedies.

It is significant that less than two months after Commerce changed its policy of not applying CVD law to NME countries, the agency published its first request for comment on a possible MOE approach.[218] In the May 25 Request, Commerce stated that it was considering an MOE approach in light of its determination that CVD laws were applicable to Chinese imports.[219] The timing of the request, along with the references to measurable state subsidies (required for a CVD investigation),[220] argues that the impetus for an MOE test was directly related to the decision to impose CVD laws to imports from the PRC.

Commerce has long recognized that double remedies are generally not permitted by its regulations and has thus attempted to avoid imposing

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218. The preliminary decision to apply CVD law to imports from the PRC was announced on March 30, 2007, *see* Commerce Press Release, *supra* note 109. The first request for comment was published in the federal registrar on May 25, 2007, s*ee* May 25 Request, 72 Fed. Reg. 29, 302.

219. *See* May 25 Request, 72 Fed. Reg. 29, 302 at 29, 302 (stating that it was requesting comment on the conditions for an MOE test "given the Department's analysis in the March 29, 2007 Georgetown Steel Memorandum," which served as a basis for its decision to apply CVD law).

220. *Id*. ("[I]t is possible to determine whether the state has bestowed a benefit upon a Chinese producer (i.e., a subsidy can be *identified* and *measured*)") (emphasis added). It is important to note that this is a reference to the CVD analysis, rather than an admission that state subsidizations can be measured in the context of an MOE test, which is a comparison some Responses in Favor have drawn, *see* Huanzhong December 10 Comment, *supra* note 171, at 5 ("[I]f the subsidy can be 'identified' and 'measured' for the purpose of applying the anti-subsidy duty, the subsidy can also be identified and measured to make adjustments to the normal value in the anti-dumping proceeding.").

them.[221] In Certain Cut-To-Length Carbon Steel Plate From Germany: Final Results of Antidumping Duty Administrative Review, Commerce refused to allow CVD to affect its calculation of normal value in an anti-dumping case in order to avoid counting the same benefit twice.[222] Similarly, in *Wheatland Tube Co. v. United States,* the Court held that Commerce's decision to deviate from its usual practices in order to avoid imposing a "double remedy" in a 201 Investigation was reasonable.[223] Significantly, GATT Article VI(5) also states, "No product of the territory of any Member imported into the territory of any other Member shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization."[224]

The AAFA addressed this situation of double remedies in its December 10 Comment. It stated:

> [I]f a countervailing duty is applied to offset an upstream subsidy on a particular input in a countervailing duty proceeding involving the same product from [the PRC], an anti-dumping calculation based on anything higher than the respondent's actual costs for that input would inevitably result in [double] remedies that are disproportionate with the subsidies granted.[225]

This argument makes sense: if a surrogate value approach results in a factor of production that is higher than a producer's cost, the difference represents a benefit to the company.

The surrogate-country valuation method produces higher dumping margins than the home market or constructed value methods, effectively acting as a penalty for enjoying the benefits of a quasi-state controlled economy like the PRC's. These benefits, while certainly worthy of a penalty to offset the inequitable advantage over competing American companies, are best addressed by CVD law.

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221. *See* Certain Cut-To-Length Carbon Steel Plate From Germany: Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 18390, 18, 395 (Dep't of Commerce, April 15, 1997) (stating that double counting was "unjustifiable").

222. *Id.*

223. Wheatland Tube Co. v. United States, 495 F.3d 1355, 1363 (Fed. Cir. 2007). A 201 Investigation is an unfair trade action similar in effect to an anti-dumping investigation, *see id.*

224. General Agreement on Tariffs and Trade, Article VI: Anti-dumping and Countervailing Duties, ¶ 5, 1947, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleVI.

225. Letter from Kevin M. Burke, Chief Executive Officer and President. American Apparel and Footwear Association, to David M. Spooner, Assistant Secretary for Import Administration of U.S. Dept of Commerce, at 3 (December 10, 2007), *available at* http://ia.ita.doc.gov/download/nme-moe/comments-20071210/aafa-nme-moe-cmt-20071210.pdf [hereinafter AAFA December 10 Comment].

It is the position of this Note that applying both CVD law and NME anti-dumping law to Chinese imports is essentially granting double-remedies, and Commerce is acting consistently with its past approach of avoiding this situation by attempting to formulate an MOE test. Commerce has made it clear that this is against its policy, and as the case below explains, the courts have held that Commerce must modify its approach in the future to avoid the double remedy phenomenon.

2. The GPX Int'l Tire Corp. Mandate

On September 18 the Court of International Trade addressed the problem of double remedies in its *GPX Int'l Tire Corp.* decision.[226] This case arose from a challenge to Commerce's decision to apply both CVD law and NME anti-dumping methodology to imports of pneumatic off-road tires from the PRC. Agreeing with the respondent that "the application of both the CVD and anti-dumping law using the NME methodology results in a double counting of duties,"[227] the court ordered Commerce to decide between foregoing the imposition of CVDs on Chinese imports and adapting its NME methodology, presumably by creating a workable MOE test.[228]

The Court's rational for requiring Commerce to choose between CVD and a new NME anti-dumping method was similar to the reasoning above. The Court agreed that CVD law and NME valuation in anti-dumping cases addressed many of the same practices. Specifically, it stated that, "the NME anti-dumping statute was designed to account for government intervention in an NME country's economy, including resulting price distortion."[229] Referring to the similarity between the former statute and the CVD statute, the Court stated, "the anti-dumping and CVD law when applied to NME countries both work to correct government distortion of market prices."[230]

Significantly, the Court seized upon Commerce's failure to implement a workable test for MOE treatment, finding the decision to address the plaintiff's request for MOE status to be "arbitrary and capricious."[231] Even more significantly (especially for the purposes of this Note), the Court essentially mandated that Commerce consider a Chinese respon-

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226. *See* 645 F. Supp. 2d 1231, 1241 (Ct. Int'l Trade 2009) (holding that the current NME anti-dumping framework combined with the application of CVDs constituted a double remedy).

227. *Id.* at 20.

228. *Id*. at 28–29.

229. *Id*. at 17–18.

230. *Id*. at 19.

231. *Id*. at 30.

dent's request for MOE status in order to comply with the statutory requirement to "establish[] antidumping margins as accurately as possible."[232] Because this part of the decision was contextually separated from discussion of the CVD investigation, it leaves open the possibility that Commerce must at least consider granting MOE status to Chinese respondents even in situations where CVD law was not being applied.[233]

The *GPX* court concluded that Commerce would have to choose between not applying CVDs to NMEs and constructing a new NME antidumping methodology.[234] Leaving the choice in the agency's hands, the court stated, "Commerce must determine how best to harmonize these two statutes and account for the fact that the statute provides no direction as to how to calculate both NME ADs and CVDs at the same time."[235] At the least, the decision was an endorsement of the MOE test. Moreover, assuming that Commerce decides not to rescind application of CVD law to the PRC, the decision is clearly a mandate to implement an MOE or similar test.

On April 26, 2010, Commerce released a redetermination in response to a remand order issued by the *GPX* court ("Redetermination").[236] In the Redetermination, Commerce defended its decision to apply CVD law to the PRC.[237] It also stated that it has "no procedure or policy governing any category of NME companies as MOEs, [nor] criteria that could be used to qualify any respondent company as an MOE."[238]

The lack of framework notwithstanding, Commerce did agree to consider the request for MOE status from Starbright, one of the tire-importer respondents. Without "official" factors to work from, Commerce analyzed the three factors identified as indicatory of MOE status by Star-

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232. *Id*. at 32–33 (citing Shakeproof Assembly Components v. United States, 268 F.3d 1376, 1382).

233. *Id.* at 35 ("It is impossible to tell if Commerce was not required to apply MOE status to [respondent] because Commerce simply refused to address the issue. As stated previously, however, if the CVD statute is being imposed in an NME country situation, Commerce *must modify its application of the NME anti-dumping statute*, which it did not do") (emphasis added).

234. *Id*. at 35–36.

235. *Id*. at 35.

236. Results of Redetermination Pursuant to Remand, GPX Int'l Tire Corp. v. United States, Consol. Court No. 08-00285 (Ct. Int'l Trade 2009) (stating that Commerce does not have any MOE procedures in place to address the problem of double counting, and stating Commerce's intent to address this issue temporarily by offsetting the CVD penalties against the anti-dumping penalties).

237. *Id*. at 7–8. Based on the *GPX* holding, discussed *supra* p. 48–49, a decision to continue to apply CVD law to the PRC would require Commerce to address the problem of double-counting, most likely via an MOE test.

238. *Id*. at 12.

bright itself: its complete ownership by a U.S. company; its focus upon external markets; and its belief that any distortions to manufacturing costs would be addressed by CVD law.[239]

Regarding the "foreign ownership" argument, Commerce stated that while foreign ownership can be relevant to the separate rate analysis,[240] it wanted Starbright to explain how American-style "market principles and managerial systems" affected production costs, which Commerce argued was relevant to an analysis of whether "available information permits the calculation of normal value."[241] This implicit reference to the second requirement laid out in 19 U.S.C. § 1677b(c)(1) marks an acknowledgment by Commerce that it is considering an MOE test justified, at least in part, on that section of the Tariff Act.[242]

In responding to Starbright's "external market focus" requirement, Commerce again referenced the "available information" section of the Tariff Act.[243] It argued that an emphasis on sales to external market "does not speak to domestic production" and does not defeat the conclusion that government distortions "render[] price comparisons and the calculation of production costs invalid under [ME] methodologies."[244] Finally, Commerce dismissed the argument that the presence of a "companion CVD case" should serve as grounds to grant MOE status as "unsupported by record evidence."[245]

Although the arguments advanced by Strarbright were perhaps lacking the persuasive power of several of the more well-considered Arguments in Favor [of an MOE test], Commerce rejected any real analysis of whether Starbright could be considered to operate under market-oriented conditions, and instead opted for a less thoughtful approach.[246] To address the problem of double remedies, Commerce decided to offset the *GPX* respondents' CVD duty against their calculated dumping margin.[247] This exceptionally straightforward methodology is neither accurate nor satisfactory, nor is it logical. It is not accurate because it does not distin-

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239. *Id*. at 15.

240. For a discussion of the separate rate analysis, see *supra* Section 1.C.4.

241. *Id*. at 16.

242. For a discussion of the two prong test laid out in 18 U.S.C. § 1677b(c)(1), see *supra* note 66.

243. Results, *supra* note 236, at 17.

244. *Id*.

245. *Id.*

246. While Commerce's rather dismissive analysis of Starbright's MOE status certainly was consistent with Commerce's admitted failure to generate any of its own MOE criteria, at least Starbright gets points for trying. Commerce's response was a template, so to speak, for paying mere lip-service to a court's mandate.

247. Results, *supra* note 236, at 3.

guish between duty attributable to government subsidies and duty attributable to under-priced goods. It is surely unsatisfactory to the domestic industry because it neuters CVD law to the point where the only case where it is beneficial to bring a CVD case against a PRC respondent would be when the CVD actually exceeds the dumping margin, drastically disincentivizing the domestic industry from bringing CVD investigations. Finally, per Commerce's own admission, it is not logical that anti-dumping law and CVD law were not meant to be mutually exclusive.[248]

Ultimately, the Redetermination is illustrative of the fact that Commerce has yet to develop a clear MOE policy. Furthermore, the inadequacy of the offsetting solution suggests that Commerce will continue to resist setting out a framework until it has exhausted its judicial remedies in regards to the *GPX* decision.[249]

3. A Market Oriented Enterprise Test is Good Foreign Policy

I argue that creating a reliable, efficient, and predictable MOE test would be beneficial even if avoiding double counting and the *GPX* decision are not yet driving Commerce's policy. First, a test that is reliable and predictable would undercut many of the problems with the current surrogate-value approach. Second, it would help modernize our trade laws to reflect the economic realities of the Chinese economy. Finally, it would create an effective policy lever with which to engage the PRC and encourage the development of independent institutions in that country.

As discussed above in Section I, the current surrogate country method lacks the predictability and consistency of the ME valuation methods.[250] The main reason the method is so unpredictable is the wide range of acceptable surrogate-country data sets, combined with the fact that the data set so employed may be changed from year to year. Eliminating reliance on surrogate-country data for most inputs and employing a simple and consistent inflator for those inputs that are subject to unspecific distortions not addressed by CVD law would increase overall efficiency by decreasing burdensome and unpredictable litigation for both Chinese respondents as well as the domestic industry.

Additionally, the current policy of applying NME valuation across-the-board in anti-dumping cases means that imports from a U.S.-owned and

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248. *See id.* at 7–8 (noting that it "does not agree that the [Tariff Act] necessitates the 'coordination' of concurrent [anti-dumping] and [CVDs]").

249. *See* Order, GPX Int'l Tire Corp. v. United States, Consol. Court No. 08-00285 (Ct. Int'l Trade 2009) (on file with author) (stating that "it is important to get this case in a position for appeal" and also questioning whether Commerce's redetermination has adequately complied with the remand order).

250. Laroski, *supra* note 49, at 395.

managed company operating in the PRC faces the same constraints as products created by a Chinese SOE. NME valuation methods were first propagated against Soviet command-style economies that did not allow or severely restricted foreign capital investment and ownership.[251] In contrast, today the PRC ranks among the top destinations for foreign direct investment in the world.[252] Although the Chinese government continues to exert significant control over SOEs,[253] private enterprises in the PRC have "significant discretion" over major business decisions, according to Commerce.[254] Consequently, it does not make sense to subject foreign-owned enterprises to the same valuation methods as SOEs, especially considering the context in which such methods were created.

Finally, implementing an MOE test would create particularized incentives for market-based reform in the Chinese economy. In compliance with its WTO Accession requirements, the PRC has begun to privatize some of its SOEs, largely through the securities markets.[255] An MOE test that penalized firms for purchasing too many inputs from SOEs would further incentivize the privatization of these enterprises, as well as discourage the banking practices that artificially help to stabilize them.[256]

B. Logistics of a Proposed MOE Test

1. An Old Approach New Again: "Bubbles of Capitalism"

Before Commerce formulated the current MOI test, it briefly employed an unusually named "Bubbles of Capitalism" ("Bubbles") test that calculated normal value for an individual respondent by using actual input price for inputs that were determined to be market driven, while using

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251. *See generally* W. Gary Vause, *Perestroika and Market Socialism: The Effects of Communism's Slow Thaw on East-West Economic Relations*, 9 NW. J. INT'L L. & BUS. 213 (1988).

252. *See Stock of Direct Foreign Investment – At Home*, CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2198rank.html (last visited Dec. 20, 2009) (showing the PRC ranked among the top ten countries receiving direct foreign investment).

253. *See* Georgetown Steel Memorandum, *supra* note 4, at 8 (describing various control levers at the disposal of the Chinese government over SOEs).

254. *Id*. at 7.

255. Jiangyu Wang, *Dancing with Wolves: Regulation and Deregulation of Foreign Investment in China's Stock Market*, 5 ASIAN-PACIFIC L. & POL'Y J. 1, 47–48 (2004) (discussing the role of securities markets in advancing economic reform in the PRC).

256. Georgetown Steel Memorandum, *supra* note 4, at 9 (discussing how the PRC's misuse of its banking sector control has perpetuated unsustainable corporate practices among certain SOEs and irresponsible lending within the banking sector).

surrogate figures for those that were not.[257] This input-by-input approach, along with several modifications discussed in the next section, would serve as a solid foundation for a workable MOE test.

When it implemented the Bubbles approach, Commerce stated, "there is nothing to be gained in terms of accuracy, fairness, or predictability in using surrogate values when market-determined values exists in the NME country."[258] Commerce applied the Bubbles test by analyzing the extent to which each input was controlled by the state.[259] Even though Commerce would only grant complete ME valuation if every input was market-based, it decided that the anti-dumping statute directed it to use actual price for each individual input that passed the test.[260]

While rather unfortunately named, the Bubbles test produced more positive findings of market orientation in its two applications than the MOI test has in fifteen years.[261] When Commerce applied this test to its initial anti-dumping action against *Chrome-plated Lug Nuts from the PRC*, it found that two of the major inputs purchased domestically overcame the presumption of state control, and thus, those prices could be used in the factor of production formula instead of a surrogate-country value.[262] In support of its new approach, Commerce went so far as to state in *Oscillating Fans* that, "[re]quiring the use of surrogate values in a situation where actual market-based prices incurred by a particular firm are available would be contrary to the statutory purpose."[263]

Commentators remarked that this Bubbles approach (sometimes more benignly referred to as "mix and match") "mitigated the worst faults of

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257. Luke P. Bellocchi, *The Effects of and Trends In Executive Policy and Court Of International Trade (CIT) Decisions Concerning Antidumping and the Non-Market Economy (NME) of the People's Republic of China,* 10 N.Y. INT'L L. REV. 177, 208 (Winter, 1997) ("[Commerce] would use those inputs from the home country that were determined to be market driven, while using surrogate figures for the rest").

258. Final Determination of Sales at Less Than Fair Value: Chrome-Plated Lug Nuts From the People's Republic of China, 56 Fed. Reg. 46, 153, 46, 154 (Dep't of Commerce 1991) [hereinafter Lug Nuts].

259. *See id*. at 46, 155 ("We have determined whether particular inputs are market-driven by analyzing the extent to which each factor input is state-controlled").

260. *See id.* (stating that the price for certain inputs may be appropriate when "market forces" are at work).

261. This, of course, is due to the fact that while the Bubbles approach identified market-oriented inputs, *see id.* at 46, 155, the MOI test has yet to identify a single market-oriented industry, *see* May 25 Request, 72 Fed. Reg. 29, 302 at 29, 303.

262. *See* Lug Nuts, 56 Fed. Reg. 46, 153, at 46, 155 (finding that "the presumption of state control" had been "overcome" for the inputs of steel and chemicals").

263. Final Determinations of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans From the People's Republic of China, 56 Fed. Reg. 55, 271, 55, 275 (Dep't Comm.1991).

the factors-of-production methodology" and "enhanced the accuracy, fairness, and predictability of the dumping determination."[264] In retrospect, the major criticism of this approach was that it potentially exposed market-oriented sectors of an NME country to CVD actions while leaving the non-market driven sectors insulated.[265] Significantly, under Commerce's current approach of applying CVDs to the PRC this would no longer be a concern.

Unfortunately, Commerce's enthusiasm for bubbles popped rather unexpectedly when it decided to end the test less than six months after a CVD case was initiated against a Chinese respondent.[266] In addition to the problem with the CVDs, Commerce also decided that the Bubbles of Capitalism approach failed to account for "indirect effects of nonmarket economy distortions"[267] and that ultimately, "the scope of inquiry was too narrow."[268] I address the concerns of indirect distortions and scope in the following section.

2. Modifications to the Bubbles Approach

This Note proposes an MOE test that combines the Bubbles approach of an input-by-input analysis, with a basket system to address CVD overlap, while using the "inflator" approach posited in the December 10 Chutex Response to address indirect NME distortions. This approach would best address the problems identified with the Bubbles test, while preserving a role for CVD law to function alongside a modified anti-dumping NME approach for the PRC.[269]

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264. Robert L. Harris, Note, *Goin' Down the Road Feeling Bad: U.S. Trade Laws' Discriminatory Treatment of the East European Economies in Transition to Capitalism*, 31 COLUM. J. TRANSNAT'L L. 403, 429 (1993); *see also* Jeffrey P. Bialos et al., *Trading with Central and Eastern Europe: The Application of the U.S. Unfair Trade Laws to Economies in Transition*, 7 INT'L L. PRACTICUM 69, 73 (1994) ("By allowing the use of actual prices for particular market-driven inputs, Commerce was trying to improve the accuracy and fairness of the less-than-fair value calculation.").

265. *See* Harris, *supra* note 264, at 435 ("[a] nation in transition from communism to capitalism [becomes] highly vulnerable to CVD liability.").

266. *See id*. at 436. Harris, I must confess, was not responsible for the pun.

267. David W. Richardson & Robert E. Neilsen, *Recent Development in the Treatment of Nonmarket Economies Under the anti-dumping/CVD Laws*, 789 PLI/CORP 149, 159 (Oct. 1–2, 1992).

268. Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts From the People's Republic of China, 57 Fed. Reg. 15, 052, 15, 053 (Dep't of Commerce, 1992) [hereinafter Lug Nuts Amendment].

269. While the Dec. 10 Chutex Response, *supra* note 157, did not discuss the inflator concept in great detail, it referred to Magnesium Metal from the Russian Federation: Notice of Final Determination of Sales at Less Than Fair Value, 70 Fed. Reg. 9041, 9043

My proposed MOE test would work by examining the component inputs of a given product and breaking them down into individual price tags, similar to the constructed value approach. For inputs that Commerce determined to be produced and exchanged under market conditions, the respondent would be allowed to use the cost paid in the local currency, identical to the approach used by the Bubbles test.

To address the problem of double remedies and NME distortion, non market-based inputs (i.e. those affected by NME distortions) would be divided into two baskets. One basket would contain all distortions currently accounted for by CVD law. For example, because CVD duties account for direct government spending on energy subsidies, all energy inputs that were so subsidized would go into the CVD basket. In contrast to the Bubbles approach, respondents would be able to use their actual costs for the distorted inputs that land in the CVD basket, which would satisfy the need to avoid double-remedies.[270] Because CVD duties were not applied to NME countries when the Bubbles approach was formulated, this would be a needed modification of the original Bubbles framework.

The inputs in the second basket, those that suffer from NME distortions not addressed under CVD law, would be subject to the application of an inflator. This inflator would impose a tariff proportional to the average benefit conferred. For example, if the benefit from a particular distorted input was not taken into account under CVD law, an inflator, or markup may be applied to the corresponding input.[271] The basket approach is further discussed in the section on administrability below.

Such a test would eliminate the administrative and legal burden, not to mention the uncertainty and inaccuracy, of surrogate values. It would also comply with the policy and *GPX* mandate to avoid double-counting CVD and anti-dumping duties. Finally, with the addition of certain requirements discussed below, it would be more reflective of the modern state of the Chinese economy.

(Dep't Commerce Feb. 24, 2005), in which Commerce responded to petitioners argument that an inflator should be applied to a Russian mining company's energy costs to reflect non-market economy style distortions. In that case, Commerce abstained from applying an inflator, but it did reserve for itself the legal authority to do so, stating, "the Department has the discretion to calculate the costs of production by some other reasonable means," *id.*

270. The benefit received from the subsidy could be recovered under a parallel or subsequent CVD investigation.

271. For example, if Commerce were to find that wages were artificially suppressed in the particular region of the PRC where a certain good was produced, it could apply an inflator to the labor input equal to the percent those wages were suppressed in comparison to unsuppressed Chinese wages.

C. Response to Commerce's Request for Comment

1. Legality

When Commerce published its October 25 Request, there were two implicit threshold questions regarding the legality of an MOE test: first, whether Commerce has the power to calculate normal value using actual costs in an NME context, and second, whether it has the power to apply this analysis to individual firms.[272] I argue that both of these questions should be answered in the affirmative.

Commerce answered the first question in the affirmative itself when it published notice that it was rescinding its Bubbles test in favor of the MOI test. At that time it defended the legality of an input-based approach by stating, "section 773(c)(1)(B) allows the Department to calculate foreign market value using normal foreign market value methodologies despite the fact that the economy of the subject country, on a macro basis, is nonmarket in nature."[273]

In defending its decision under the Bubbles approach, Commerce noted it was not legally authorized to employ the factors of production methodology unless it found that the available information "did not permit" it to determine normal value using ME country methodologies.[274] When Commerce refined its Bubbles test to evaluate each individual input under the above analysis, it stated that such an approach was in line with Congressional intent by, "not using NME prices to determine FMV, while at the same time recognizing that an NME country that is undergoing a transition to a market-oriented economy may contain sectors within its overall economic structure where market forces have already come into play."[275]

The courts have generally deferred to Commerce's interpretations of unfair trade law statutes.[276] In *Sigma Corp. v. United States*, the court noted that Commerce has "broad authority to interpret the antidumping statute and devise procedures to carry out the statutory mandate."[277] In fact, Commerce has already exhibited this authority to interpret the antidumping statute by formulating the MOI test. One can also interpret the

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272. *See* October 25 Request, 72 Fed. Reg. 60, 649 at 60, 650 (discussing the legal arguments regarding the MOE test).

273. *See* Lug Nuts Amendment, 57 Fed. Reg. 15, 052, at 15, 054-55.

274. *Id*. at 15, 054. This interpretation is consistent with the argument raised in the Chutex December 10 Comment, *supra* note 157, at 2.

275. Lug Nuts, 56 Fed. Reg. 46, 153, at 46, 155.

276. Although *GPX*, 645 F. Supp. 2d, is a rather notable exception, for the more common approbation see *Sigma*, *infra* note 277, at 1405.

277. Sigma Corp. v. United States, 117 F.3d 1401, 1405 (Fed. Cir. 1997).

current exception that enables an NME enterprise to use actual costs for purchases from an ME country as another example of how Commerce has modified its valuation approach in the past without interference from the courts.

In fact, the court tacitly affirmed the legality of using market prices for individual inputs in *Consolidated Int'l Automotive v. United States*.[278] In that case, the Court of International Trade upheld Commerce's authority to implement the Bubbles approach.[279] Addressing Commerce's decision to re-formulate its valuation approach for NME respondents, the court stated, "Commerce has presented an acceptable basis both in law and fact for its actions."[280]

To address the second question of whether it is legal for Commerce to single out individual respondents for special treatment, I would concur with the argument presented by the Textile Counsel December 10 Comment, that other practices such as the ME currency exceptions (as well as the separate rates test) "reinforce the principle that the Department may deviate from its . . . NME methodology."[281]

The approach recommended by this Note does not expand Commerce's authority to single out individual respondents beyond the liberal powers they currently posses. Also, because the approach borrows heavily from the Bubbles approach approved in *Consolidated*, while also responding to concerns about double remedies raised by the Court of International Trade, the proposed approach satisfies the threshold questions of legality. Most importantly, this approach attempts to satisfy the requirement to calculate anti-dumping margins "as accurately as possible," which is ultimately the goal of any valuation approach, and certainly the goal of calculating normal value.[282]

2. Identifying MOEs

As discussed above, many of the Responses Against argued that it would be impossible to identify an MOE due to the profusion of NME distortions throughout the PRC's economy.[283] The MOE approach recommended by this Note addresses this concern by adopting a presump-

278. Consolidated Int'l Automotive v. United States 16 C.I.T. 692, 696–97 (Ct. Int'l Trade 1992) (holding that Commerce's Bubbles approach was not unjustified).

279. *See id*. at 696–97 (stating that a change of methodology "does not make Commerce's original [Bubbles] approach unjustified").

280. *Id*. at 696.

281. Textile Counsel December 10 Comment, *supra* note 163, at 3–4.

282. *Allied Pac. Food*, *supra* note 77, at 1342.

283. *See* U.S. Steel June 25 Comment, *supra* note 166, at 7 (arguing that the market distortions are of such severity that the existence of an MOE is inconceivable).

tion of MOE status for all non-SOEs. For SOEs that are partially privatized and not operating in one of the "pillar" industries toward which the PRC is consolidating its state control, a test similar to the separate-rate test would be a fair way to identify the SOEs that are only nominally state owned, as opposed to the SOEs that are permeated by NME distortions to the extent that MOE status would not apply, as discussed below.

Using a separate-rate test analysis to identify SOEs that may be market oriented would facilitate MOE identification by employing a method that Commerce is familiar with and currently uses effectively.[284] The identification issue is further simplified by the assumption that all non-SOEs are market-oriented to the extent that their inputs are determined under market conditions. Shifting the benefit of MOE status away from automatic market economy valuation and towards an input-by-input approach makes identification as an MOE less contentious. Rather, the emphasis shifts to the individual inputs employed by the MOE, making it more important for an enterprise to employ market-oriented inputs than to achieve nominal MOE status.

3. Administering an MOE Test

a. Application of the Test to State-Owned Enterprises

While the Chinese government has been making efforts to implement market-style reforms to SOEs for years, SOEs are still largely directed by the hand of the state.[285] As a result, the SOEs, especially the banks, continue to serve as significant barriers to comprehensive market reform.[286] Because of the pervasiveness of NME distortions regarding SOEs, the MOE test should contain a disqualification threshold for manufacturers that receive a threshold level of their inputs from SOEs.

The government of the PRC began the process of de-centralizing its SOEs in 1978, one year before signing the historic Sino-U.S. Trade Agreement.[287] Yuma Wei writes that in 1993, "the introduction of modern corporate governance mechanisms was emphasized, and trials of corporatization and privatization were carried out in selected sectors and enterprises."[288] More recently, the PRC has focused on consolidating the

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284. *See* Separate Rates Policy Bulletin, *supra* note 84, at 1 (discussing the separate rates test).

285. *See* August 30 Memorandum, *supra* note 127, at 73 (discussing the role of the banks as regional barriers).

286. *Id*.

287. *See* Vause, *supra* note 251, at 223–24.

288. Yuwa Wei, *An Overview of Corporate Governance In China*, 30 Syracuse J. INT'L L. & COM. 23, 37 (2003).

largest SOEs that operate in "pillar industries," while continuing to privatize SOEs operating in other areas of the economy.[289]

Despite the fact that many SOEs now operate as quasi-private entities, those SOEs operating in the "pillar industries" remain "excessively burdened by a range of social obligations," which results in significant government intervention, especially in the banking sector.[290] While identifying SOEs is a straightforward task,[291] it is more difficult to measure the extent of government interference.[292] Commerce found that "the government no longer sustains such SOEs through the traditional means of direct resource allocations or the setting of prices (which are now largely freely set), but instead through a complex web of regulatory restrictions, control over the allocation of land-use rights, and the continued dominance accorded to the state-owned banking sector."[293]

Whether or not subsidization of SOEs can be measured by CVD law is subject to a specificity requirement, yet in a 2008 determination, Commerce found certain subsidies to SOEs to be so measurable.[294] Rather than apply a CVD-style specificity test to each situation where a Chinese respondent does business with a non-FIE SOE, creating an administrative workload that would be both duplicative and inefficient, it would be more efficient to disallow MOE status to respondents that purchase a significant amount of their inputs from SOEs.

Commerce already employs "threshold" rules in several anti-dumping situations, such as representation requirements.[295] Furthermore, "bright line" tests such as threshold requirements promote predictability, effi-

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289. *Id.* at 38. Under this policy, SOEs remain dominant in certain high-tech sectors: non-renewable natural resource sectors; public utility and infrastructure sectors; and national security sectors.

290. *Id.* at 39–40 (arguing that the antiquated system in which SOEs played a quasi-government role by providing a variety of social services now makes it difficult for many of these enterprises to fully privatize).

291. In fact, the Chinese government maintains a (somewhat outdated) list of Chinese SOEs online. *See* GOV.cn, A-Z Index of China's State Enterprises, http://www.gov.cn/misc/2005-10/21/content_80894.htm (last visited Apr. 04, 2009).

292. Georgetown Memorandum, *supra* note 4, at 3 (discussing the "complex web" of regulatory restrictions, etc., that the government uses to manipulate the Chinese economy).

293. *Id*.

294. Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 Fed. Reg. 40480, 40485 (Dep't of Commerce, 2008) (deciding that an income tax exemption to an SOE was countervailable).

295. *See* 19 U.S.C. § 1673a(c)(4)(A) (2006).

ciency, and uniformity.[296] Finally, because the so-called "pillar industries" in the PRC often correspond to powerful U.S. industries most wary of an MOE test, the SOE threshold requirement would serve as an effective bar to MOE status for enterprises in these "pillar industries" that sufficiently enjoy the benefits of operating in these industries, which could potentially lowering resistance to a new approach from domestic U.S. producers who operate in the same industries.[297]

b. Administering the Test for Privately Held Companies

A presumption of MOE status is simple to implement from an administrative perspective. After making the initial determination, Commerce would need to develop a method to identify individual inputs that are market oriented. While Commerce briefly employed an input-by-input test under its Bubbles approach, it cited the difficulty of identifying inputs that were free of NME distortions as one of the reasons for abandoning the test.[298] The approach recommended here addresses this administrative problem by only allowing a respondent to use actual price-paid under two circumstances: either the input is clearly market oriented, or the input is accounted for under CVD law. The upstream, non-explicit distortions referenced in the Lug Nuts Amendment,[299] and also in the Georgetown Steel Memorandum,[300] are addressed using the inflator.

In the situations where it is extremely clear that the input is market oriented (e.g., a manufactured input purchased from a wholly-foreign owned enterprise operating outside of the SOE "pillars," or an input purchased from an ME supplier), the actual price paid would be utilized. In the case of inputs, such as labor, that are found to be distorted, applying a

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296. *See* Cassandra Jones Harvard, *Goin' Round in Circles . . . and Letting the Bad Loans Win: When Subprime Lending Fails Borrowers: The Need for Uniform Broker Regulatio*n, 86 NEB. L. REV. 737, 792 (2008) (discussing the importance of predictability, efficiency and uniformity from a regulatory perspective).

297. At least six of the June 25 Responses Against were filed on behalf of the Steel Industry. In the PRC, the Steel industry is considered the archetypical SOE. *See* Import Administration, Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies Market-Oriented Enterprise, http://ia.ita.doc.gov/download/nme-moe/nme-moe-cmt-20070625-index.html (last visited December 21, 2009); Thomas Brizendine & Charles Oliver, *China's Steel Sector in Transition*, THE CHINA BUS. REV. (Jan.–Feb. 2001), *available at* http://chinabusinessreview.net/public/0101/oliver.html.

298. *See* Lug Nuts Amendment, 57 Fed. Reg. 15, 052, at 15, 053 (discussing how the absence of "*explicit* government involvement" is not enough to warrant a finding of market orientation) (emphasis added).

299. *Id.*

300. Georgetown Steel Memorandum, *supra* note 4, at 5 (discussing the "broader, distorted economic environment").

pre-determined inflator (perhaps one that considered factors such as geography, industry, etc.) would require some up-front determinations, but ultimately would also be a straightforward and predictable process.

Finally, identifying inputs covered by CVD law in order to exempt those inputs from the inflator adjustment is administratively possible due to Commerce's extensive experience determining what is and what is not measureable as a CVD, as well as its recent determination that subsidies in the PRC have become measurable in general.[301] The fact that Commerce has decided to apply CVD law to respondents in the PRC is in itself evidence that identifying CVD benefits is administratively feasible, and therefore removing those inputs affected by such benefits should be feasible as well.

D. CONCLUSION

In conclusion, the proposed MOE approach would provides for predictable, consistent, and accurate valuation. Commerce has the authority to implement it based on court approval of the Bubbles approach as well as tacit approval for its separate rate-status test. An MOE test is not only legal, but also necessary to correct double remedy problems if Commerce continues to apply CVD law to Chinese respondents.[302] Applying a presumption of MOE status on most Chinese enterprises and a separate-rate style test on the rest would simplify the identification process, and as shown, the combination approach proposed is administratively feasible.

Valuation methodology lies at the heart of our unfair trade laws, because it determines whether and to what extent certain goods will be penalized upon entering this country. Whatever valuation method we adopt should be tailored to the economic reality of the country wherein and individual enterprise by which the good was produced. A method that balances a pro-market position with our international commitments will succeed in encouraging reciprocity that will ultimately lead to growth in the long-term.

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301. *Id*. at 10 (concluding that it is possible to decide if a benefit bestowed upon a Chinese producer is identifiable and measurable).

302. *GPX*, 645 F. Supp. 2d 1231, 1234–35 ("If Commerce is to apply CVD remedies where it also utilizes NME anti-dumping methodology, Commerce must adopt additional policies and procedures for its NME anti-dumping and CVD methodologies.").

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