



June 25, 2007

STAMP AND RETURN

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

Subject: Response of the Textile Council of Hong Kong to Request for Comments Concerning Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise (72 Fed. Reg. 29302 (May 25, 2007))

Dear Mr. Spooner:

The Textile Council of Hong Kong (the Textile Council), hereby responds to the Department of Commerce's request for public comments on the proposed application of market-economy treatment to individual respondents in antidumping proceedings involving the People's Republic of China (China).¹ This response is filed within the thirty-day period established in the request for comments.

The Textile Council has a strong interest in the treatment of producers in countries considered by the United States to be non-market economies. Comprised of eleven major textiles and garment manufacturing associations, the Textile Council represents the entire Hong Kong textile and garment manufacturing industry.² In addition to production within Hong Kong, companies represented by the Textile Council have invested in production of textile and apparel products around the world, including in China and the Socialist Republic of Viet Nam (Vietnam).

¹ See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29302 (Dep't Commerce May 25, 2007) (request for comments).

² Member Associations:

The Federation of Hong Kong Garment Manufacturers
Hong Kong Garment Manufacturers Association
Hong Kong Knitwear Exporters & Manufacturers Association
Hong Kong Woollen & Synthetic Knitting Manufacturers' Association
The Hong Kong Association of Textile Bleachers, Dyers, Printers and Finishers
The Hong Kong Cotton Spinners Association
The Federation of Hong Kong Cotton Weavers
The Hong Kong Cotton Made-up Goods Manufacturers Association
The Hong Kong Weaving Mills Association
Hong Kong Chinese Textile Mills Association
Hong Kong Intimate Apparel Industries' Association

The companies represented by the Textile Council and its member associations operate their businesses on market-based principles. In dealing with U.S. buyers, prices are negotiated between the vendor – the exporter and/or manufacturer – and the U.S. buyer. For those companies with manufacturing facilities in more than one location, including locations outside of China or Vietnam, the price offered to the U.S. buyer may vary, based upon the different costs involved, including different labor costs and different transportation costs. These companies also set the labor rates for their workforces based upon the dynamics of the labor market in which they are located. For example, in Southern China and in Vietnam, demand for qualified labor often exceeds availability, and the vendors compete for labor by offering better wages and benefits.

As a consequence, the Textile Council is particularly qualified to address the issues raised by the Department in its request for comments. The Textile Council strongly supports the Department's efforts to adjust its antidumping methodologies to better reflect the economic realities of modern non-market economies.

Issue One: Whether Commerce Should Grant Market-Economy Treatment to Individual Respondents in Antidumping Proceedings Involving Non-Market Economies

“The China of today is not the China of years ago.”³ As the Department recently noted in its countervailing duty investigation of *Coated Free Sheet Paper from the People's Republic of China*, “private industry now dominates many sectors of the Chinese economy, and . . . [m]any business entities in present-day China are generally free to direct most aspects of their operations”⁴ The evolution of China's economy toward market-based principles has been driven, in large part, by China's export-oriented industries. “[T]he PRC Government has dismantled its monopoly over foreign trade” and, in its place, entrepreneurship has flourished.⁵ More than 200,000 firms now have the right to import and export from China.⁶ These firms (and their major suppliers) are internationally competitive, as demonstrated by the influx of foreign direct investment (FDI) that has accompanied the liberalization of China's markets.⁷ Moreover,

³ *Commerce Applies Anti-Subsidy Law to China* (Dep't Commerce Mar. 30, 2007), available at http://www.commerce.gov/opa/press/Secretary_Gutierrez/2007_Releases/March/30_Gutierrez_China_Antisubsidy_law_application_rls.html.

⁴ *Countervailing Duty Investigation of Coated Free Sheet (“CFS”) Paper from the People's Republic of China – Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy*, C-570-907 (Dep't Commerce Mar. 29, 2007), at 10.

⁵ *Id.* at 7; see also *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”)*, A-570-901 (Dep't Commerce Aug. 30, 2006) (hereinafter “Lined Paper”) at 46 (“The government has made a decision, however, to recede from direct state control over certain parts of the economy (particularly across much of export-oriented manufacturing) . . .”).

⁶ *Id.*

⁷ See, e.g., *Foreign Investment in China*, *U.S.-China Business Council*, Feb. 2007 (“In

while such foreign invested enterprises (FIEs) are important to China's burgeoning industries, they face very real competition from Chinese firms which have embraced market-oriented business practices.⁸

Although the Department has limited the scope of its request for comments to China, the Textile Council notes that like China, significant market-oriented change has occurred in Vietnam. Hong Kong companies are among those foreign entities that have recently invested in Vietnam, responding to the changes in that economy and contributing to the dramatic expansion of foreign investment in Vietnam.⁹ Indeed, as early as 2002, the Department itself made the following observations concerning the Vietnamese economy:

The Department is cognizant of the positive changes, both in law and on the ground, that Vietnam has experienced over the past 15 years. The Government of Vietnam has undertaken significant market reforms in its *doi moi* initiative and passed legislation to promote the market-based development of its economy. Wage rates are largely market-based. The government has also encouraged the development of small- and medium-sized enterprises through legal reforms that have led recently to the impressive growth of the private commercial (non-farm) business sector.¹⁰

This finding, made in the context of the Department's evaluation of Vietnam's eligibility for graduation from non-market economy status, belies the Department's assertion in the request for comments that it "has only examined China's economy on a country-wide basis."¹¹ Since 2002, the Department has reviewed the Vietnamese economy on an annual basis, through the lens of

2006, China maintained its position as one of the world's top destinations for [FDI]. [FIEs] play a large role in China's economy, accounting for 27 percent of value-added production, 4.1 percent of national tax revenue, and more than 58 percent of foreign trade."), available at <http://www.uschina.org/info/forecast/2007/foreign-investment.html>.

⁸ See *Lined Paper* at 33 ("Even in the export market, where most FDI is still concentrated, FIEs compete with domestic private firms in various sectors . . . These sectors in China are able to reap the efficiency gains of greater competition, international practices, and foreign technical expertise.") (footnote omitted).

⁹ See, e.g., Vietnam's Leader Wants U.S. Visit to Be All Business, *The New York Times*, June 14, 2007 ("The United States is Vietnam's largest trading partner, with an increasing two-way trade that rose to \$7.8 billion in 2005, from \$1.5 billion in 2001, according to Vietnamese government figures."); Vietnam's foreign investment surges in first quarter, *People's Daily Online*, Mar. 23, 2007 ("Vietnam is estimated to entice over 2.5 billion U.S. dollars in foreign direct investment (FDI) in the first three months of this year, a year-on-year rise of 22 percent . . .").

¹⁰ *Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam – Determination of Market Economy Status*, A-552-801 (Dep't Commerce 2002) at 42, available at <http://www.ia.ita.doc.gov/download/vietnam-nme-status/vietnam-market-status-determination.pdf>.

¹¹ *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. at 29303.

individual Vietnamese respondents in the context of two ongoing antidumping proceedings.¹² As a result of these proceedings, the Textile Council submits that the Department has collected the information necessary to determine that market-economy treatment for individual Vietnamese respondents is also warranted. Therefore, the Textile Council respectfully submits that the Department should adjust its antidumping methodologies to reflect the profound changes in *both* China and Vietnam's economies.

Although the Department has already attempted to account for aspects of China and Vietnam's newfound market-orientation in certain of its methodologies, such as the "33 percent rule" for market economy inputs,¹³ these methodological changes have not gone far enough in recognizing the true nature of modern Chinese and Vietnamese companies as market actors. Indeed, the "33 percent rule" is applied as an exception to the Department's baseline treatment of such companies as *non*-market actors, as signified by the use of surrogate values in place of these companies' actual costs when calculating dumping margins.¹⁴ As discussed above, such a premise is directly contrary to the reality of most export-oriented firms in China and Vietnam. Even though, in the Department's view, China and Vietnam may not operate a perfectly *laissez-faire* economy such that graduation from non-market economy status is currently warranted,¹⁵ "private enterprise can flourish" nonetheless.¹⁶ The Department should recognize – and thereby encourage – these market-oriented entrepreneurs – which include Textile Council member companies -- by affording them market economy treatment in the first instance. Just as these companies now face market economy forces in their day-to-day business, they should be subject to corresponding market economy treatment in the Department's proceedings.

When applied to appropriate companies (as identified by application of the criteria discussed below), such treatment would result in more accurate dumping margin calculations and thus assist the Department in achieving important enforcement goals. The Department has a well-recognized duty to ensure that dumping margins are calculated as accurately as possible,¹⁷

¹² See *Certain Frozen Fish Fillets*, 68 Fed. Reg. 37116 (Dep't Commerce June 23, 2003) (final determination of sales at less than fair value); *Certain Frozen and Canned Warmwater Shrimp*, 69 Fed. Reg. 71005 (Dep't Commerce Dec. 8, 2004) (final determination of sales at less than fair value).

¹³ See *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61716 (Dep't Commerce Oct. 19, 2006) (instituting rebuttable presumption that market economy input prices are best available information for valuing an entire input when the total volume of the input purchased from all market economy sources during the period of investigation/review exceeds 33 percent of the total volume of the input purchased from all sources during the period).

¹⁴ See 19 U.S.C. § 1677b(c) (requiring the Department to calculate the normal value of merchandise from a non-market economy by valuing its factors of production using surrogate values obtained from a market economy).

¹⁵ See *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")* at 82.

¹⁶ *Id.* at 81.

¹⁷ See, e.g., *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1190 (Fed. Cir. 1993); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

and this duty is intended to apply “with equal force to imports from a [non-market economy].”¹⁸ By applying market economy treatment to appropriate companies in China and Vietnam, the Department would be able to use these companies’ actual prices and costs in calculating dumping margins. As such, the Department would avoid the “process of constructing foreign market value for a producer in a non-market economy country” which is widely recognized as “difficult and necessarily imprecise.”¹⁹ This would result in more accurate determinations of dumping margins by the Department.

Further, if the Department were to use the actual prices and costs of appropriate companies operating in China or Vietnam, these companies would be in a better position to adjust their prices to avoid dumping in the U.S. market – another important goal of the antidumping law. That is, it is currently very difficult to predict how the Department will value the factors of production in an investigation or review, given vagaries in the availability of surrogate value data available across multiple time periods. This uncertainty makes it virtually impossible for companies manufacturing in and/or exporting from non-market economy countries like China and Vietnam to establish pricing policies compliant with U.S. antidumping law. Market-oriented companies which would otherwise seek to fairly trade their goods with the United States are unable to identify the necessary pricing adjustments to do so. By injecting greater predictability in its calculations of these companies’ dumping margins, the Department may in fact be able to reduce the overall incidence of dumped Chinese and Vietnamese imports in the U.S. market, to the benefit of domestic industries.

Application of market-economy treatment to appropriate companies would also enable the Department to better address the problem of double counting which may result from simultaneous antidumping and countervailing duty investigations of Chinese or Vietnamese imports. The Department has recognized that this is a problem which may arise now that U.S. countervailing duty law is being applied to imports from non-market economies, such as China and Vietnam.²⁰ Whether the use of surrogate values in non-market economy investigations necessarily captures and compensates for government subsidies remains an open question in the view of the Department and many commentators.²¹ What is certain is that the Department is

¹⁸ *Dorbest Ltd. v. United States*, Slip Op. 6-160 at 11 (Ct. Int’l Trade Oct. 31, 2006).

¹⁹ *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001).

²⁰ See *Commerce Applies Anti-Subsidy Law to China* (Dep’t Commerce Mar. 30, 2007), available at http://www.commerce.gov/opa/press/Secretary_Gutierrez/2007_Releases/March/30_Gutierrez_China_Anti-subsidy_law_application_rls.html (“Since the possibility of double counting resulting from simultaneous anti-dumping and countervailing duty investigations is dependent on the specific facts arising in such investigations, to the extent that the parties to these proceedings provide evidence on the record of these investigations, Commerce will have to respond to these concerns in the course of our investigations.”)

²¹ See, e.g., *Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 30758, 30760 (Dep’t Commerce June 4, 2007) (preliminary determination of sales at less than fair value) (“We further note that the question of whether a double remedy has been or could be applied, or whether the Department has the authority to adjust for such a situation, involves

generally able to avoid double counting when dumping margins are calculated using the actual prices and costs of respondents from market economies. To the extent that the Department is also able to use the actual prices and costs of appropriate respondents from non-market economies, like China and Vietnam, the Department will be able to avoid double counting and the litigation (both domestic and international) that will almost certainly be engendered by this factually and legally complex issue.

Issue Two: How a Market-Oriented Enterprise or Limited Market-Oriented Enterprise Should Be Identified

The Textile Council respectfully submits that the Department should identify companies appropriate for market economy treatment, or market-oriented enterprises (MOEs), by reference to clearly defined, objective criteria that may be realistically met by companies that have embraced market principles.

As noted in the request for comments, the Department currently employs an industry-wide, rather than enterprise-specific, test to determine whether market economy treatment may be afforded to companies under investigation. This market-oriented industry (MOI) test focuses on three criteria, related to: (1) government involvement in production or prices, (2) private or collective ownership of companies and (3) frequency of payment of market-determined prices for inputs used in the production of the subject merchandise (significant and insignificant).²² Although the MOI test features clearly defined, objective criteria, its extremely “high standard” has rendered the test ineffectual, as the Department itself has recognized.²³ As a practical matter, industries in non-market economies have faced the greatest difficulties in satisfying the test’s third-prong, *i.e.*, proving that virtually all prices for local inputs were unaffected by government intervention. Despite the profound economic changes in China and Vietnam, no industry has met the MOI standard in the fifteen years since this test was introduced by the Department.²⁴

complex factual, methodological and legal issues that will require additional time to analyze.”); *U.S. China Trade: Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies*, GAO-06-231 (GAO Jan. 2006) at 18 (“When an antidumping duty is calculated using the third-country-based methodology that Commerce applies to NME countries, the normal value of the product (the basis for calculating an antidumping duty) is based not on Chinese prices (which might be artificially low as a result of domestic subsidies) but on information from a country where prices are determined by free markets. Thus, when the normal value is compared with the export price, the difference will, at least in theory, reflect the price advantages that the exporting company has obtained from both export and domestic subsidies.”).

²² See *Certain Color Television Receivers from the People’s Republic of China*, 69 Fed. Reg. 20594, 20595 (Dep’t Commerce Apr. 16, 2004) (final determination of sales at less than fair value).

²³ *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. at 29303.

²⁴ See *id.*

Any new MOE test developed by the Department must be constructed in such a way as to avoid the problems which have plagued application of the MOI test. To that end, and as requested by the Department, suggested criteria for identifying MOEs are provided below. However, the Textile Council respectfully submits that these same criteria may instead be worked into a revised form of the MOI test. If applied in a more practical manner, we believe that the MOI test may still enable the Department to appropriately reflect the economic realities of modern China and Vietnam but with greater efficiency than an individually-applied MOE test.

One criterion which the Department should consider in identifying an MOE is the extent to which a company makes decisions regarding prices, output, sales and investment in response to market signals and without significant government interference. The Department is already well-versed in evaluating this criterion, as it parallels much of the inquiry made by the Department in its current test for separate rates eligibility.²⁵ The relevance of this criterion to both the separate rates and MOE tests is manifest: independent decision-making is a hallmark of the private sector. The Department could request companies to provide documentation establishing their independence, including their articles of incorporation limiting the possibility of government influence over business decisions. Other documentation could include evidence of a company's ties to foreign business partners, such as distribution agreements with major multi-national companies. A Chinese or Vietnamese company that regularly does business with such entities, which typically have their own rigorous evaluation system for suppliers, is likely to be operating under market conditions. Moreover, the Department could employ a presumption that FIEs satisfy this criterion of the MOE test, under the rationale that international investors would not invest in a company lacking sufficient safeguards from government intervention in decisions affecting profitability.

A second criterion which the Department could consider in an MOE test is whether a company has a clear set of basic accounting records that are independently audited in accordance with international accounting standards (IAS) and that are used by the company for relevant business purposes. Adherence to IAS, such as the proper recording of assets and liabilities, reflects a company's awareness of the need to manage to the bottom line. Orderly and consistent accounts are indicative of a company that is responsive to its shareholders' profit-maximizing concerns. They also demonstrate a company's integration in the market-driven international business community, particularly if internationally-recognized accounting firms are used as auditors. In addition, a company's responsiveness to auditor's comments and reservations further reflects a commitment to conducting business in a reliable and consistent manner.

²⁵ See *Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries* (Dep't Commerce Apr. 5, 2005) at 2 (noting that, with respect to a company's *de facto* independence from government control, the Department considers (1) whether the export prices are set by, or subject to the approval of, a governmental authority; (2) whether the company has authority to negotiate and sign contracts and other agreements; (3) whether the company has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and (4) whether the company retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses).

The Department may also consider a third criterion for identifying an MOE: adherence to regularized depreciation and payment systems. Companies which employ inadequate depreciation of assets or which tolerate barter or significant arrearages in their business transactions typically do not operate in accordance with market principles. Indeed, this is a factor regularly considered by the Department on a macroeconomic level when considering whether to graduate a country from non-market economy status.²⁶ To the extent that a company has shed these indicia of non-market operations, it should be considered an MOE by the Department.

In addition, the Department may consider as a fourth criterion a company's ability to set the wage rates for its employees and freely hire or discharge employees. Labor is a major aspect of production for many industries, and freely determined wages validate that a company is subject to prices and costs generated by market forces. Here again, the Department already considers this factor on a macroeconomic level when assessing a country's overall progress toward market economy status.²⁷ This analysis is equally applicable on a company-specific basis and may be considered indicative of whether a company is operating as an MOE.

Issue Three: How Antidumping Calculations Should Be Revised to Accommodate Recognition of Market-Oriented Enterprises or Limited Market-Oriented Enterprises

The Textile Council respectfully submits that the Department should adjust its antidumping calculations with respect to MOEs by using these companies' actual prices and costs instead of surrogate values.

The Department is permitted to resort to surrogate values in antidumping calculations only when "available information does not permit the normal value of the subject merchandise to be determined" by reference to a company's actual prices and costs.²⁸ As discussed above, the normal value of merchandise produced or exported by MOEs would be susceptible to Commerce's standard calculation methodology because these companies operate in accordance with market principles, notwithstanding their non-market economy origins.

Nonetheless, we recognize that the Department has observed the residual influence of non-market economy policies on non-material inputs which are linked to the "broader operating economic environment" in China and Vietnam, such as capital, energy and depreciation of real

²⁶ See, e.g., *Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law*, A-821-816 (Dep't Commerce June 6, 2002), available at <http://ia.ita.doc.gov/download/russia-nme-status/russia-nme-decision-final.htm>; *Decision Memorandum Regarding Ukraine's Status as a Non-Market Economy Country for Purposes of the Antidumping Duty Law Under a Changed Circumstances Review of the Antidumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from Ukraine*, A-823-812 (Dep't Commerce Feb. 16, 2006), available at <http://ia.ita.doc.gov/download/ukraine-nme-status/ukraine-nme-final-02-17-2006.pdf>.

²⁷ See 19 U.S.C. § 1677(18)(B)(ii).

²⁸ 19 U.S.C. § 1677b(c)(1)(B).

property.²⁹ To the extent that the Department is able to obtain substantial evidence in a given investigation or review demonstrating that a particular respondent's access to these non-material inputs has been gained under non-market conditions, then the Department may consider modifying its approach to antidumping calculations by adjusting the actual prices and costs reported for these particular inputs.

For example, with respect to capital, the Department may consider applying an expanded version of its "33 percent rule." That is, if a company obtains a significant portion of its loans and credit from market economy or otherwise market-determined sources (*i.e.*, other MOEs), then the Department could accept that company's reported capital charges. The Department has already employed the "33 percent rule" as an antidumping methodology in investigations and reviews involving non-market economies and, thus, this rule seems particularly adaptable to the MOE context.

With respect to energy or depreciation of real property, the Department may consider applying an inflator to reported costs or depreciation values which are found to be distorted by government intervention. In the past, the Department has recognized that even market economies may feature unusual distortions provoked by government intervention,³⁰ such that adjustments are required to the Department's standard methodologies on an exceedingly exceptional basis. The Department has specifically noted that adjustments (typically inflators) may be needed with respect to the energy costs reported by companies from countries just emerging from state planning and control – a close analogy to the economic conditions experienced by MOEs.³¹ For example, with respect to the energy costs reported by companies from the Russian Federation, the Department expressly found that "adjustments [were] permissible" when called for by the unusual facts of an investigation or review.³² The

²⁹ See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Market-Oriented Enterprise* 72 Fed. Reg. at 29303.

³⁰ See, e.g., *Hynix Semiconductor Inc. v. United States*, 425 F. Supp. 2d 1287, 1308 (2006) (holding that Commerce reasonably rejected as benchmarks private loans with terms affected by government involvement with borrower); *Allegheny Ludlum Corp. v. United States*, 358 F. Supp. 2d 1334, 1338 (2005) (noting that presumption of subsidy extinguishment which accompanies sale of government-owned company for fair market value may be rebutted upon showing of distortive government intervention in broader market); *Al Tech Specialty Steel Corp. v. United States*, Slip Op. 04-114 at 26-27 (Sept. 8, 2004) (noting that, if proven, government manipulation would render a real estate appraisal an unreliable measure of market conditions).

³¹ See, e.g., *Inquiry into the Status of the Russian Federation as a Non-Market Economy Country under the U.S. Antidumping Law* (noting that "energy is of such significance to the Russian economy that continuation of the Russian government's current energy price regulatory policies may warrant careful consideration of energy price data in future trade remedy cases"); *Certain Cut-to-Length Carbon Steel Plate from the Russian Federation*, 68 Fed. Reg. 3859, 3861 (Dep't Commerce Jan. 27, 2003) (notice of suspension of antidumping duty investigation) ("Examples of possible areas in which adjustments may be necessary include, but are not limited to, costs related to energy, depreciation, transactions among affiliates, barter as well as items that are not recognized by the Russian Accounting System.")

³² *Magnesium Metal from the Russian Federation*, 70 Fed. Reg. 9041, 9043 (Dep't

