



Consuming Industries
Trade Action Coalition

June 25, 2007

VIA HAND DELIVERY AND E-MAIL PDF

The Honorable David Spooner
Assistant Secretary for Important Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
1401 Constitution Avenue, N.W.
Washington, DC 20230

ATTN: Carrie Blozy, Program Manager, AD/CVD Operations

RE: Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise

Dear Secretary Spooner:

On behalf of the Consuming Industries Trade Action Coalition ("CITAC"), we write in response to the Department of Commerce's request for comments on whether it should consider granting market-economy treatment to individual respondents in antidumping (or "AD") proceedings involving China and other non-market economies, the conditions under which individual firms should be granted market-economy treatment, and how such treatment might affect our antidumping calculation for such qualifying respondents. 72 Fed. Reg. 29,302 (May 25, 2007). CITAC members largely represent U.S. manufacturers, distributors and retailers who rely on imports to produce their goods for manufacture in the United States and for sale in the United States and abroad.

We urge the Department to take the following actions in respect of non-market economy cases under the antidumping and countervailing duty laws. First, the Department should terminate the use of the non-market economy (NME) methodology in antidumping cases involving imports from China (and other NME countries) where there is concurrent consideration of applying countervailing duties to the same imports. CITAC submits that this change is necessitated by fundamental fairness to importers and purchasers in the United States and also to ensure that the United States complies with its World Trade Organization (WTO) obligations.

CITAC further urges that the Department consider other changes to its market-oriented industry (MOI) methodology, discussed below, and to rely on information submitted by mandatory respondents, as well as other companies seeking separate rates, in making its MOI

determination in each particular AD proceeding. Such changes will ensure that exporters and importers in AD investigations involving China (and other NME countries) are provided with a viable means to avoid the Department's punitive NME methodology in antidumping cases involving NME countries.

I. THE DEPARTMENT SHOULD NOT APPLY ITS NME ANTIDUMPING METHODOLOGY TO IMPORTS THAT ALSO ARE SUBJECTED TO COUNTERVAILING DUTIES

The NME methodology applies only to a few countries. Department traditionally has applied a special methodology in antidumping cases involving imports from NMEs including China. 1/ As part of that methodology, the Department constructed the normal value ("NV") for Chinese respondents based on the factors of production actually used by those respondents to manufacture CFS paper during the period of investigation (or review). The Department typically values the factors of production for Chinese imports using prices and financial statements from a "surrogate country" or, where appropriate, from the market economy prices paid by the respondent for the particular factor of production. 2/ This methodology results in higher antidumping duties that in turn result in higher prices for goods required by CITAC's members to maintain their production and assembly activities here in the United States.

On June 4, 2007, the Department published its affirmative preliminary determination in the *Coated Free Sheet Paper from China* antidumping ("*CFS Paper AD Prelim*") investigation. In the *CFS Paper AD Prelim*, the Department decided that China should continue to be treated as a non-market economy ("NME") country, and therefore that antidumping duties should be applied to Chinese imports of CFS paper in accordance with the Department's traditional NME antidumping methodology. The Department had previously issued its preliminary determination in the *CFS Paper from China* countervailing duty ("CVD") investigation on March 30. That landmark decision marked the first time in which the Department determined that it could assess

1/ In the *Certain Lined Paper Products from China* antidumping investigation, the Department reaffirmed China's status as a NME country for purposes of U.S. antidumping law. In that decision, the Department examined China's economy pursuant to the terms of section 771(18)(B) of the Tariff Act of 1930 and found that "the limits the PRC Government has placed on the role of the market forces are sufficient to preclude China's designation as a market economy under the U.S. antidumping law." *Countervailing Duty Investigation of Coated Free Sheet 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 2* (Mar. 29, 2007) ("*Georgetown Steel Memo*") (discussing China's NME status). The Department's NME analysis examines an economy as a whole and takes into account the following six factors: (1) the extent to which the currency of the foreign country is convertible into the currency of other countries; (2) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; (3) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; (4) the extent of government ownership or control of the means of production; (5) the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and (6) such other factors as the administering authority considers appropriate. *Id.* at 2-3.

2/ *Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 30,758, 30,763 (June 4, 2007) (prelim. antidumping determ.) ("*CFS Paper AD Prelim.*").

CVDs against imports from a NME country and reversed more than 20 years of Department policy.

The Department's decision to impose CVDs against CFS paper imports from China while at the same time imposing AD duties in accordance with the Department's NME methodology raises several potential methodological and WTO issues that are of concern to CITAC and its members. One key issue is whether the Department's decision to impose both AD and CVDs against CFS paper imports leads to a double remedy for the same practice. U.S. antidumping law requires that the price used to establish the export price or constructed export price be offset by the amount of any countervailing duty imposed on the subject merchandise in order to counteract the provision of *export* subsidies. ^{3/} This provision of U.S. law is derived from Article VI.5 of the GATT 1994, which prohibits WTO Members from assessing both AD and CVDs against the "same situation of dumping or *export* subsidization." ^{4/} Based on a report from the Government Accountability Office ("GAO"), the Department appears to accept that these legal provisions would require some form of offset to the dumping margins for any export subsidies that are countervailed. ^{5/}

CITAC has an analogous concern about *domestic* subsidies (*i.e.*, subsidies not tied specifically to export performance). While no provision of U.S. or WTO law expressly addresses the potential double-counting of CVD remedies targeting "domestic subsidies," this omission is due to the fact that such offsets are not needed in market-economy cases. The reason for this is that domestic subsidies, by their nature, benefit sales in both the domestic and export markets. Accordingly, in market economy cases – where normal value is usually determined on the basis of home market prices or home market costs – any impact that the subsidies have on the export price are already offset by the impact the same subsidies have on domestic prices (or costs), such that the comparisons of export price and normal value are "subsidy-neutral." However, this natural offset does not apply in cases involving NME countries: normal value in an NME case is determined using surrogate values from an unsubsidized market economy. ^{6/} Accordingly, in NME cases, a subsidy-neutral normal value (based on costs in a surrogate country) is compared to an export price that is affected by domestic subsidies. By imposing a CVD against the domestic subsidy without offsetting the dumping margin for the same subsidy, the Department effectively counts the domestic subsidy twice. This is an unfair comparison which overtaxes foreign producers, and, more to the point for present purposes, U.S. purchasers of the imported product.

While the Department has previously indicated that it lacks the authority under U.S. law to address the "double counting" problem identified above, the U.S. courts have suggested in

^{3/} See 19 U.S.C. § 1677a(c)(1)(C).

^{4/} See WTO General Agreement of Tariffs and Trade, art. VI.5 (emphasis added).

^{5/} GAO, *U.S.-China Trade: Eliminating Non-Market Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies* (January 2006).

^{6/} As certain respondents have noted, the surrogate values are "unsubsidized" because the Department has a firm policy against utilizing any surrogate values that are even suspected of being subsidized.

earlier cases that double-counting trade remedies is not lawful and that there is a general obligation in Section 773(a) of the Tariff Act of 1930, equally applicable to NME cases, requiring the Department to ensure a “fair comparison” between export price and normal value. This obligation is generally paralleled in Article 2.4 of the WTO Antidumping Agreement.

We recognize that the Department explicitly avoided deciding the issue of double-counting in the *CFS Paper AD Prelim* and has asked the parties in that proceeding for their comments on the issue (in addition to the request to public comments to which CITAC is responding here). ^{7/} Accordingly, in response to this request, CITAC submits that the Department should recognize requirements under the U.S. statute and WTO law for adjusting calculations to eliminate double counting in NME cases. Such an adjustment would benefit U.S. manufacturers, distributors and retailers, including CITAC’s members, which rely on imports to employ American workers and to grow the American economy. The Department should reverse course in the final AD determination in the *CFS Paper* case and should not apply its NME methodology to imports from China so long as the Department also elects to apply countervailing duties to those same imports.

II. THE DEPARTMENT SHOULD REVISE ITS MOI METHODOLOGY TO REDUCE AD DUTIES IMPOSED ON IMPORTERS PURCHASING GOODS SUPPLIED IN NMES UNDER “MARKET-ORIENTED” CONDITIONS

CITAC is well aware of the very real impact of the Department’s NME methodology. The Department’s NME methodology results in the imposition of higher antidumping duties on imports from NME countries than use of the Department’s market-economy AD methodology and therefore contributes to higher prices for inputs needed by U.S. manufacturers. CITAC urges the Department to revise its MOI methodology so that producers and exporters in China and other NME countries that are selling their goods under “market-oriented” conditions can receive fair treatment under the U.S. antidumping law. This is not a suggestion to ignore genuine instances of dumping or subsidization, but simply to recognize that these practices should be offset only once.

The dramatic effect of Department’s use of NME methodology in antidumping cases can scarcely be denied. In recent comments filed with the Department, the Chinese Government observed that the antidumping duty margins for Chinese respondents qualifying for separate treatment in eight multiple country antidumping duty investigations completed between 2004 and 2007 has been 55.63 percent (the “China Separate Rate”), or four-and-one-half times greater than the average “all other” rate (12.38 percent) assessed on imports of the same subject merchandise from market economy countries. ^{8/} The same comments observed that the “China-wide rate,” the rate assessed against imports from companies that are found not to be entitled to

^{7/} *CFS Paper AD Prelim.*, 72 Fed. Reg. at 30,760 (citing *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29,302 (May 25, 2007)).

^{8/} See Comments of the Government of the People’s Republic of China, Ministry of Commerce, *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates* 3 (Apr. 20, 2007).

separate rates, has averaged 167.03 percent, or three times greater than the China Separate Rate and thirteen times greater than the average market economy “all other” rate. ^{9/} These high antidumping duty margins on imports from China (and other NME countries) have a significant impact on the manufacturing operations and assembly processes of CITAC’s members.

CITAC requests that the Department alter its MOI methodology in antidumping proceedings involving NME countries in order to provide relief to industries and companies that are operating under “market-oriented” conditions. The Department currently employs an industry-wide test to determine whether, under section 773(c)(1)(B), available information in a NME permits the use of the market economy antidumping methodology for the NME industry producing the subject merchandise. In order for an industry in China (or another NME) to be assessed antidumping duties pursuant to the Department’s market-economy AD methodology, the industry must currently meet the following test: (1) there be virtually no government involvement in production or prices for the industry; (2) the industry be marked by private or collective ownership that behaves in a manner consistent with market considerations; and (3) producers must be found to pay market-determined prices for all major inputs, and for all but an insignificant proportion of minor inputs. ^{10/}

The current MOI test was designed to give the Department maximum flexibility in assessing antidumping duties pursuant to the Department’s NME antidumping methodology. Such an approach may have had some merit in an era in which the Department offset the imposition of punitive AD margins by refusing to assess countervailing duties against imports from China and other NMEs. Now that the Department has determined in the *CFS Paper* case that it may impose CVDs against from China and other NMEs, however, the Department should revise its MOI methodology to permit industries and companies to be exempted from the Department’s NME AD methodology where the facts on the record demonstrate that they operate under “market-oriented” conditions. Indeed, the Department’s request for comments recognizes that its current approach is flawed, as the Department concedes that “no industry in China has yet been granted MOI status.” ^{11/} Maintaining such a test does not meet the basic principle of administrative fairness to which the Department strives to adhere.

CITAC submits that the Department should revise its MOI test to better take into account the interests of exporters and importers with the most significant stake in antidumping cases involving imports from China and other NME countries. These companies typically are the mandatory respondents selected by the Department in a given antidumping investigation, as well as other producers and exporters seeking separate rates under the Department’s current NME practice.

^{9/} See *id.*

^{10/} See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 Fed. Reg. 20,594, 20,595 (Apr. 16, 2004) (hereinafter “*Certain Color TVs from China*”).

^{11/} See *Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. 29, 302, 29,303 (May 25, 2007).

CITAC therefore recommends that the Department provide questionnaires to the mandatory respondents in a given investigation, as well as to other companies seeking separate rates, and rely on their questionnaire responses to determine whether an industry operates under "market-oriented" conditions. If the Department were to find that such conditions exist for a given industry, the Department then would apply its "market-economy" AD methodology to the sales of that respondent. This approach would eliminate a serious fairness problem in the Department's current MOI approach: the Department has repeatedly rejected MOI requests because it has not had adequate information on "all (or virtually all) of the producers in the industry in question." ^{12/} In other words, the Department has routinely rejected MOI requests because firms with little or no stake in an AD case have refused or simply failed to provide the Department with information.

Several practical considerations favor the adoption of such an approach. First, mandatory respondents in a given investigation typically account for a significant portion of the exporting countries' domestic production and can provide the Department with a representative view of the industry as a whole. Second, since mandatory respondents must respond to the Department's questionnaires or be subject to "adverse facts available," the Department will be able to secure the information it believes necessary to make its MOI determination and can make follow-up inquiries as necessary. Third, limiting the MOI inquiry to mandatory respondents, and companies seeking separate rates, will minimize the burden on the Department. Mandatory respondents and companies seeking separate rates are obligated to provide information in a timely manner, and their submissions are subject to verification by the Department. Finally, this approach will permit the Department to obtain the necessary MOI information early in an AD investigation, thereby making it available to petitioners for scrutiny and criticism as the investigation develops.

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CITAC appreciates the opportunity to provide its views on this important matter. We would welcome the opportunity to discuss this matter further with the Department.

Sincerely,



Stephen Alexander
Executive Director



Lewis E. Leibowitz
Counsel to CITAC

^{12/} See, e.g., *Certain Color TVs from China*, 69 Fed. Reg. at 20,595.