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APPAREL**

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June 25, 2007

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

Re: Response 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 U.S. Association of Importers of Textiles and Apparel, USA-ITA, is pleased to provide comments to the Department of Commerce in response to its 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).

USA-ITA has more than two hundred member companies, including apparel manufacturers, distributors, retailers, importers and related service providers, such as shipping lines and customs brokers. The member companies source textile and apparel products from around the world, including from facilities located in countries the United States currently considers to be non-market economies, such as China and Vietnam.

Summary of Comments

USA-ITA commends the Department for considering recognition of the concept of an MOE operating within countries considered by the United States to be non-market economies.

- USA-ITA strongly endorses recognition of MOEs.
- USA-ITA urges the Department to recognize MOEs in both China and Vietnam.
- To identify which companies are MOEs, USA-ITA recommends that the Department look at four factors: 1) The extent to which a company makes decisions regarding prices, output, sales and investment in response to market signals and without significant government interference; 2) Whether a company has one 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 all relevant purposes; 3) Whether a company adheres to regularized depreciation and payment systems; and 4) A company's ability to set the wage rates for its employees and freely hire or discharge employees.

- 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 should maintain its current use of separate rates for non-MOE respondents in non-market economy countries.

Discussion

I. Recognition of Market-Oriented Enterprises Is An Appropriate Step

USA-ITA strongly supports the Department's proposal to adjust its antidumping methodologies to better reflect the economic realities of modern non-market economies. Recognition of MOEs operating in countries considered to be non-market economies represents an appropriate means of crediting those entities that operate based upon free market principles.

USA-ITA member companies do business with suppliers whose businesses are operated on market-based principles, regardless of their location. In many instances, USA-ITA member companies have been working with suppliers for decades and have maintained (and expanded) business with them as those suppliers have evolved from single factories in locations such as Hong Kong, Singapore, Taiwan and South Korea, into multinational companies with factories located in numerous countries, including China and Vietnam. The prices negotiated by USA-ITA member companies (as buyers) are set by the market, no matter the location. Thus, the prices may vary by the manufacturing location, based upon the different costs involved, including different labor costs and different transportation costs. Yet, the mere fact that some manufacturing facilities are located in non-market economies currently means that those costs are disregarded in favor of "surrogate" values in the event of antidumping investigations. That makes it more difficult, if not impossible, for U.S. importers of textile and apparel products to gauge whether products sourced from those factories may be considered dumped. Recognition of market-oriented enterprises (MOEs) is an appropriate step to address that illogical result and assist companies to avoid dumping.

II. The Department Should Recognize MOEs in Both China and Vietnam

USA-ITA appreciates that the Department's notice is limited to the prospect of recognizing MOEs operating in China. However, it is USA-ITA's strong view that adjustment of antidumping methodologies with respect to *both* China and Vietnam is appropriate and warranted.

Like China, significant market-oriented change has taken place within Vietnam. Foreign investment has expanded dramatically in Vietnam, with investment by other Asian apparel manufacturers a major contributor to that phenomenon.¹ The foreign enterprises engaging in this investment activity

¹ 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.");

have expanded operations to Vietnam, injecting both funds and market-oriented principles into the Vietnamese economy. In fact, 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.²

This finding, made in the context of the Department's evaluation of Vietnam's eligibility for graduation from non-market economy status, undercuts the Department's assertion in the request for comments that it "has only examined China's economy on a country-wide basis."³ Since 2002, the Department has reviewed the Vietnamese economy on an annual basis, through the lens of individual Vietnamese respondents in the context of two existing antidumping proceedings, Certain Frozen Fish Fillets and Certain Frozen and Canned Warmwater Shrimp. As a result of these proceedings, clearly the Department has collected the information necessary to determine that market-economy treatment for individual Vietnamese respondents, in addition to Chinese respondents, is warranted.

Given the acknowledged profound changes in both China and Vietnam's economies, it is only appropriate that the Department adjust its antidumping methodologies for companies operating in both of them. Therefore, in the remainder of its comments, USA-ITA addresses how companies operating in either or both countries should be identified as MOEs.

III. The Department Should Recognize MOEs Operating in Non-Market Economy Countries

USA-ITA recognizes that the Department has already attempted to account for aspects of China and Vietnam's market-based orientation in certain of its methodologies, such as the "33 percent rule" for market economy inputs.⁴ But these changes do not go far enough in recognizing the true nature of

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 . . .").

² *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>.

³ *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Market-Oriented Enterprise*, 72 Fed. Reg. at 29303.

⁴ *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

modern Chinese and Vietnamese companies as individual 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. Such a premise is directly contrary to the reality of most export-oriented firms in China and Vietnamese. 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,⁵ “private enterprise can flourish” nonetheless.⁶ The Department should recognize – and thereby encourage – these market-oriented entrepreneurs 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, such treatment would result in more accurate dumping calculations and actually 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,⁷ and this duty is intended to apply “with equal force to imports from a [non-market economy].”⁸ 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. The Department therefore 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.”⁹ This would result in more accurate determinations of dumping margins by the Department.

More importantly, from the perspective of USA-ITA member companies, if the Department were to use the actual prices and costs of appropriate companies operating in China and/or Vietnam, these companies would be in a better position to adjust their prices to avoid dumping in the U.S. market. USA-ITA member companies are currently grappling with the uncertainties of potential antidumping investigations in large part because of the vagaries of the surrogate value process. It is very difficult to predict how the Department will value the factors of production in an investigation or review. This uncertainty makes it virtually impossible for suppliers operating in non-market economy countries to be sure that they have established pricing policies compliant with U.S. antidumping law. Further, by injecting greater predictability in the calculations of companies’ dumping margins, the Department may

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).

⁵ 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.

⁶ *Id.* at 81.

⁷ 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).

⁸ *Dorbest Ltd. v. United States*, Slip Op. 6-160 at 11 (Ct. Int’l Trade Oct. 31, 2006).

⁹ *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001).

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 also would 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.¹⁰ To the extent that the Department is able to use the actual prices and costs of appropriate respondents from non-market economies, like China and Vietnam, the Department may be able to avoid double counting and the litigation (both domestic and international) that would almost certainly follow.

IV. MOEs Can Be Identified Through Objective Criteria

The Department should identify companies appropriately deemed MOEs by reference to clearly defined, objective criteria which may be realistically met by companies that have embraced market principles.

As the Department itself noted in the request for comments, it 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). Although the MOI test features clearly defined, objective criteria, its extremely “high standard,” as expressly acknowledged by the Department, has rendered the test ineffectual. As a practical matter, industries in non-market economies, such as China and Vietnam 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.

The 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. USA-ITA recommends the following criteria:

¹⁰ 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.”)

First, the Department should consider 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, because it parallels much of the inquiry made by the Department in its current test for separate rates eligibility.¹¹ Independent decision-making is clearly a hallmark of the private sector. The Department could request that companies provide documentation establishing their independence, including a company's 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 should employ a presumption that foreign invested enterprises (FIE) 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.

Second, the Department should consider whether a company has one 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 all relevant 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.

Third, the Department should consider whether an enterprise adheres to regularized depreciation and payment systems.

¹¹ 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).

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. This is already a factor regularly considered by the Department when considering whether to graduate a *country* from non-market economy status.¹² To the extent that a company has shed these indicia of non-market operations, it should be considered an MOE by the Department.

Fourth, the Department should consider a company's ability to set the wage rates for its employees and freely hire or fire employees.

Labor is a major aspect of production for many industries, including apparel production, 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 progression toward market economy status.¹³ This analysis is equally applicable on a company-specific basis and may be considered indicative of whether a company is operating as an MOE.

V. *The Department Should Adjust Antidumping Calculations For MOEs By Using Actual Prices and Costs*

Once an entity is recognized as an MOE under the criteria proposed above, the Department should adjust its antidumping calculations 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.¹⁴ To determine the normal value of merchandise produced or exported by MOEs, it would be appropriate to use Commerce's standard calculation methodology because these companies operate in accordance with market principles, notwithstanding their non-market economy origins or non-market economy manufacturing site.

Nonetheless, USA-ITA recognizes that the Department believes that there may be a residual influence of non-market economy policies on non-material inputs linked to the "broader operating economic environment" in non-market economies, such as capital, energy and depreciation of real property.¹⁵ To the extent that the Department is able to obtain substantial evidence in a given

¹² 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>.

¹³ See 19 U.S.C. § 1677(18)(B)(ii).

¹⁴ 19 U.S.C. § 1677b(c)(1)(B).

¹⁵ See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Market-Oriented*

investigation or review demonstrating that a particular respondent's access to these non-material inputs has been gained under non-market conditions, then the answer may be that the Department could 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 might 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 should accept that company's reported capital charges.

With respect to energy or depreciation of real property, the Department might 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 certain unusual distortions provoked by government intervention,¹⁶ such that adjustments are required to the Department's standard methodologies – albeit 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.¹⁷ 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.¹⁸ The Department noted that limited adjustments would be appropriate "when evidence of continuing significant distortions at the macroeconomic level is accompanied by sufficient evidence or analysis with respect to the impact of

Enterprise 72 Fed. Reg. at 29303.

¹⁶ 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).

¹⁷ 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.")

¹⁸ *Magnesium Metal from the Russian Federation*, 70 Fed. Reg. 9041, 9043 (Dep't Commerce Feb. 24, 2005) (final determination of sales at less than fair value).

such distortions on . . . prices paid by respondent firms.”¹⁹ Thus, where the Department has observed specific, aberrational distortions in a market economy respondent’s reported prices or costs for energy, the Department has indicated its willingness to adjust those prices or costs for purposes of its antidumping calculations. Importantly, the Department has not suggested resorting to use of surrogate values in the face of unusual aberrations from market economy conditions. To the extent necessary then, the Department should adopt a similar approach for those prices and costs for non-material inputs reported by MOEs which are demonstrably distorted by non-market economy market conditions.

The Department should otherwise accept the prices and costs reported by MOEs for material inputs (*i.e.*, raw materials), consistent with the Department’s recognition that these companies operate in accordance with market principles. As discussed above, in the experience of USA-ITA member companies, much of China’s and Vietnam’s private industries now have substantial contacts with the international business community. Many of these companies obtain important inputs from third-country sources, such as Japan, Taiwan or South Korea. Indeed, the fact that manufacturers operating in both China and Vietnam import many of the inputs used to produce garments (including fabrics) should be viewed as evidence of market economy behavior. Further, U.S. buyers and the vendors with whom they work demand – and obtain – the same market-determined treatment even from non-market economy suppliers which are likewise independent of government control and operate in accordance with market principles. Specifically, vendors with manufacturing facilities in either China or Vietnam often purchase Chinese-made fabrics to produce garments; and such transactions are market-based. In many instances, the fabric purchase is through a Hong Kong vendor, paid for in Hong Kong or U.S. dollars. The Department’s MOE methodology should recognize this operating reality of modern Chinese and Vietnamese companies.

VI. *The Separate Rates Practice Should Be Maintained For Independent Enterprises*

Regardless of any adjustments made to the antidumping calculations for MOEs, the Department should maintain its current use of separate rates for non-MOE respondents in non-market economy countries.²⁰ Although the vendors with whom USA-ITA member companies do business operate in accordance with market principles, there may be others that have not yet fully made the transition to MOE status. To the extent that these companies may have made initial steps toward market-orientation, namely by establishing their independence from the Chinese or Vietnamese government, they should continue to benefit from rates separate from the country-wide non-market economy rate.

Further, as with the Department’s current separate rates practice, the Department should presume that companies found to be MOEs in past investigations or reviews maintain that status in all subsequent proceedings so long as the companies provide appropriate certification which is not contradicted by substantial evidence placed on the record. This approach would substantially reduce the

¹⁹ *Id.*

²⁰ See generally *Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries*.

administrative burden to the Department with respect to administrative reviews of merchandise from non-market economy countries, like China and Vietnam.

Conclusion

USA-ITA appreciates this opportunity to provide comments concerning the application of market-economy treatment to individual respondents in antidumping proceedings involving non-market economies and looks forward to working with the Department to ensure the development of methodologies that accurately reflect the changing and market-based circumstances of companies operating in China and Vietnam.

Respectfully submitted,



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