December 10, 2007

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

RE: **Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 FR 60649, October 25, 2007**

Dear Assistant Secretary Spooner:

Thank you for providing the American Apparel & Footwear Association (AAFA) – the national association of the apparel and footwear industries and their suppliers – this second opportunity to submit comments in response to the U.S. Department of Commerce's ("the Department") October 25, 2007 request for comments regarding the efficacy of granting market economy treatment to select respondents in anti-dumping cases targeting U.S. imports from China – particularly the Department's authority to apply a market-oriented enterprise (MOE) test in non-market economies as well as the efficacy of apply such a test in light of the Department's limited resources and time constraints.

AAFA members make, market and sell apparel and footwear in the United States and throughout the world, including China. Therefore, we feel we are in a unique position to comment on the Department's request.

AAFA members understand the need for strong U.S. trade remedy laws to combat unfair trade practices. However, in representing companies that both source from and sell into a variety of countries around the world, including China, we have a strong interest in ensuring that U.S. trade remedy laws are administered in a rational, fair and balanced manner. We, therefore, welcome the opportunity to provide these comments for the Department's consideration.

DEPARTMENT'S STATUTORY AUTHORITY TO APPLY MOE TEST

Under section 773(c)(i) of the Tariff Act of 1930, the Department is to rely on a nonmarket economy ("NME") methodology only if:

- the subject merchandise is exported from a nonmarket economy, *and*

- the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a) of this section [which describes the standard, market economy methodology to calculate normal value based on a respondent's actual cost, price, and sales data].

19 U.S.C. § 1677b(c)(1). Stated simply, the Department may not rely on surrogate values to calculate normal value if the Department finds that it can calculate normal value for a NME exporter using standard, market economy methodologies. Given the Department's recent finding that market forces determine the price of more than 90 percent of products traded in China,[1] it is incumbent upon the Department, consistent with the statute, to develop a MOE test that will enable the Department to determine whether a Chinese company's own data can be relied upon to calculate normal value.

THE EFFICACY OF AN MOE TEST

In developing the MOE test, the Department should take into account not only the requirements of the law, but also the need for a test that is administrable, does not substantially increase the Department's workload, is already subject to tight deadlines and does not substantially increase the cost of participation by both petitioners and respondents (who already must invest significant resources in order to participate in anti-dumping proceedings). Drawing on the Department's past experience in developing the "separate rates" test, AAFA believes it is possible to meet all of these objectives.

The Department has a long-standing policy of presuming that all exporters in a NME country constitute a single entity under common government control, and assigning a single anti-dumping duty rate to that entity. For many years, however, the Department has recognized that exporters can have a great deal of autonomy over their export activities, even in economies in which there is far more government control than in China today. The Department, therefore, established a policy that allows a NME company to demonstrate that its export activities are not subject, *de jure* or *de facto*, to government control[2]. All NME exporters that can make that showing receive a company-specific anti-dumping duty rate. Over the years, the Department has found that the vast majority of respondents in anti-dumping cases qualify for a separate rate.

Although the separate rates test focuses only on the respondent's export practices, the purpose of the test is to determine whether there is government control over those activities. Similarly, the purpose of a MOE test should be to determine whether the company's domestic activities (*e.g.*, input sourcing, production, sales) are free from government control. Absent *de jure* and *de facto* government control, the company is free to operate on market principles and, therefore, its prices and costs would "permit the normal value of the subject merchandise to be determined under subsection (a) of this section." 19 U.S.C. § 1677b(c)(1).

[1] Memorandum from Shauna Lee-Alaia to David M. Spooner re Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy, Case No. C-570-907 (March 29, 2007) ("Georgetown Steel Memo") at 5.
[2] Import Administration Policy Bulletin 5.1 (April 5, 2005).

Thus, the separate rates test provides a good (and familiar) template for developing a MOE test. Using that template as a guide, a MOE test should consider the following factors:

1) whether the respondent's production levels and domestic prices are set by, or subject to the approval of, a governmental authority;
2) whether the respondent has independent authority to negotiate and sign contracts and other agreements (*e.g.*, with input suppliers and domestic customers);
3) whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management;
4) whether the respondent retains the proceeds of its domestic sales and makes independent decisions regarding disposition of profits or financing of losses; and
5) whether the respondent's accounting records are independently audited and in accordance with international accounting standards.[3]

These factors will enable the Department to determine whether a Chinese company operates in the market independently and ensure that the Department will have reliable, verifiable financial data with which to calculate normal value.

Finally, with respect to input costs and the possibility raised in the May 25, 2007 *Federal Register* notice that certain inputs "may necessarily be determined on a non-market basis", we note that U.S. petitioners now have the ability to bring countervailing duty cases against imports from China. Thus, any upstream subsidies that might exist as a result of government involvement in an upstream sector from which the respondent sources inputs can be addressed through the countervailing duty law. Such situations, therefore, should not preclude treating a respondent as a MOE and using its prices and costs within China to determine normal value. The possibility raised in the May 25, 2007 *Federal Register* notice of creating a hybrid methodology whereby normal value is calculated using a combination of a respondent's actual costs for certain inputs and surrogate values for others would inject an unacceptable amount of uncertainty and subjectivity into anti-dumping calculations and would require an unreasonable amount of additional time and resources from the respondents, petitioner and the Department. In accordance with the statute, if a company is found to be an MOE, then it should be accorded the standard, market economy methodology.

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

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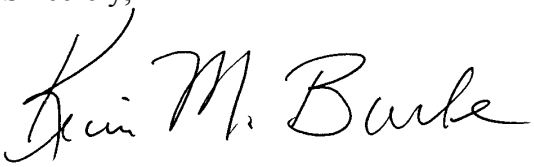
[3] This requirement is similar to one found in the European Commission's MOE test COUNCIL REGULATION (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ L 56, 6.3.1996, p. 1), Amended by Council Regulation (EC) No 2331/96 of 2 December 1996, OJ L 317/1 06.12.1996; Council Regulation (EC) No 905/98 of 27 April 1998, OJ L 128/18 30.4.1998; Council Regulation (EC) No 2238/2000 of 9 October 2000, OJ L 257/2 11.10.2000; Council Regulation (EC) No 1972/2002 of 5 November 2002, OJ L 305/1 07.11.2002; Council Regulation (EC) No 461/2004 of 8 March 2004, OJ L 077/12 13.03.2004;Council Regulation (EC) No 2117/2005 of 21 December 2005, OJ L 340, 23.12.2005.

CONCLUSION

If a Chinese respondent can satisfy the five requirements outlined above, it should be granted MOE status. MOE status means that the respondent's information provides an appropriate basis to determine normal value. In accordance with the statute, therefore, MOE status should afford that respondent the same rights and obligations afforded to respondents in market economy cases.

Please accept my best regards,

Sincerely,



Kevin M. Burke
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