UNITED STATES ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL

HEADQUARTERS:
13 EAST 16TH STREET, 6TH FL.
NEW YORK, NY 10003
212-463-0089
FAX: 212-463-0583

2100 L STREET, NW
SUITE 210
WASHINGTON, D.C. 20037
202-638-7640
FAX: 202-419-0487

December 10, 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

Subject: Response to Request for Comments Concerning Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprises (72 Fed. Reg. 60649 Oct. 25, 2007)

Dear Mr. Spooner:

The U.S. Association of Importers of Textiles and Apparel, USA-ITA,[1] is pleased to respond to the Department of Commerce's request for additional public comments on the proposed application of market-economy treatment to individual respondents in antidumping proceedings involving the People's Republic of China (China).

Summary of Comments

In its current request, the Department has identified two topics of specific interest concerning the proposed market-oriented enterprise (MOE) test in investigations involving a nonmarket economy (NME), China. These topics are:

(1) the legal basis for instituting the MOE test, and

(2) the administrative feasibility of applying the MOE test.

As explained in greater detail below, the U.S. antidumping law, its legislative history, and the Department's regulations and practice provide the legal basis for the MOE test. Further, it is clearly administratively feasible for the Department to apply the MOE test, as the Department has already demonstrated with the Separate Rates test and the practice it has adopted when inputs are produced in market economies. Those who suggest that use of the MOE test will undermine the benefits "won" by

---

[1] 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 nonmarket economies (NMEs), such as China and Vietnam.

petitioners as a result of the Department's decision to the apply the countervailing duty law to China only reveal the extent to which they are seeking to unfairly disadvantage NME respondents in antidumping investigations. The Department is taking the right approach in moving to adjust its methodology to bring its antidumping calculations into conformity with its countervailing duty practice.

A. There is a Strong Legal Basis for Adopting the MOE Test

A review of the U.S. antidumping statute and its legislative history makes clear that the Department has the legal authority to adopt the MOE test for antidumping proceedings involving an NME country, such as China. There is also no impediment under World Trade Organization (WTO) rules; to the contrary, adoption of the MOE test in antidumping investigations now that products of China are subject to U.S. countervailing duty laws may avoid a WTO challenge to U.S. practice.

1. The Statute Provides Authority For Commerce to Adopt the MOE Test

The U.S. antidumping statute requires the Department to calculate the "normal value" of subject merchandise using the price at which that merchandise is sold in its home market or a third country.[2] This statute permits the Department to deviate from this approach in an investigation involving an NME like China, and to calculate normal value on the basis of factors of production calculated using surrogate values.[3] However, that deviation is permissible only under very limited circumstances. To justify use of an alternative (*i.e.*, NME) methodology, the Department first must make *two* distinct findings. It must find that

> (A) the subject merchandise is exported from a nonmarket economy country, *and*
>
> (B) that available information does not permit the normal value of the subject merchandise to be determined under [the standard, market economy methodology for calculating normal value based on actual price, cost and sales data].[4]

From this statutory language, it is clear that the mere fact that an antidumping proceeding involves an NME is not, by itself, sufficient reason for the Department to deviate from the standard methodology for calculating normal value. The Department also must consider whether "available information" permits use of the standard methodology, even though the respondents are producers in an NME. This two-step statutory analysis clearly anticipates the possibility that the Department may find it appropriate to use its standard methodology for calculating normal value even in proceedings involving an NME country. In fact, where the Department finds that "available information" permits use of the standard methodology, the Department is *statutorily obligated* to do so.

---

2 *See* 19 U.S.C. § 1677b(a)(1)(B).

3 *See id.* § 1677b(c)(1)-(2).

4 *Id.* § 1677b(c)(1) (emphasis added).

We understand that the proposed MOE test will involve an analysis by the Department of an individual respondent's business to determine whether it is sufficiently driven by market forces such that the respondent's price, cost and sales data may be used in calculating normal value. This analysis of "available information" clearly conforms with the Department's statutory mandate to apply an alternative NME methodology for calculating normal value only when strictly necessary.

So while the antidumping statute does not specifically dictate use of the MOE test, it does provide the Department with ample basis and discretion to adopt this new methodology, because use of surrogate data should occur only when available information does not permit the standard market economy analysis.

2. The Legislative History of the Statute Supports Adoption of an MOE Test

Even if it could be argued that the statute is ambiguous, the legislative history of the antidumping statute also supports the Department's adoption of the MOE test. Specifically, the legislative history of the Omnibus Trade and Competitiveness Act of 1988, which amended the antidumping statute, states:

> [T]he bill does not prohibit [the Department] from using its normal methodology for determining foreign market value in cases regarding non-market economy countries. If information submitted by a non-market economy country to the Department permits foreign market value to be determined accurately using the normal methodology, then the committee expects such methodology to be used by the [Department].[5]

This legislative history contradicts the suggestion of several of the comments submitted previously that Congress did not intend to allow exceptions from NME treatment. In fact, Congress did envision that individual respondents[6] from NME countries could be amenable to the Department's standard normal value methodology under certain circumstances. Therefore, the proposed MOE test is neither a radical departure from congressional intent nor a form of special treatment for Chinese companies. Rather, adoption of the MOE test would assist the Department in fulfilling its statutory mandate.

3. The Department's Regulations and Practice Support Adoption of an MOE Test

The Department's regulations and practices related to antidumping proceedings involving NME countries also support adoption of the proposed MOE test. Like the antidumping statute, the Department's regulations do not expressly require adoption of this test or use of the standard methodology for calculating the normal value of subject merchandise from an NME country. However,

---

[5] S. Rep. No. 100-71, 100th Cong., 1st Sess., 108 (1987); *see also* Conf. Report No. 100-576, 100th Cong., 2d Sess. 591 (1988).

[6] The reference in the legislative history to "countries" rather than individual respondents, when only producers and exporters are parties to an antidumping investigation, must be interpreted as including individual respondents.

significantly, the Department's regulations also do not mandate use of the alternative methodology for calculating normal value in all proceedings involving NME countries. The regulations simply provide that the Department will "normally" use the alternative NME methodology.[7] This permissive terminology allows for use of the standard methodology for calculating normal value of subject merchandise from an NME country, where appropriate.

Other practices adopted by the Department reinforce the principle that the Department may deviate from its alternative NME methodology where warranted. Thus, the Department will "normally" use publicly available information to value factors of production in calculating the normal value of merchandise from an NME country,[8] but where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Department will instead "normally" use the price paid by the NME respondent to the market economy supplier.[9]

Similarly, the Department has a market-oriented industry (MOI) test, which permits use of the standard normal value methodology for qualifying industries within an NME country. That too demonstrates recognition that the alternative NME methodology for calculating normal value may not be suitable in every instance involving NMEs. As the Department observed in adopting the MOI test:

> Congress clearly contemplated a situation in which a sector of an NME may be sufficiently free of NME distortion so that the actual prices and/or costs incurred in the NME could be used in the dumping calculations and render meaningful results.[10]

Therefore, where the facts warrant it – because it is apparent that market-based costs are being incurred -- the Department may deviate from strict application of the alternative NME methodology for calculating normal value in an antidumping proceeding, even if the Department has never identified an industry satisfying the requirements of the MOI test.

4. The Department Has Legal Authority To Change Past Interpretations In Light of Changed Circumstances

The fact that the Department has not applied an MOE test previously does not preclude it from changing its practice or interpretation now, based upon the changed circumstances. "[A]n agency is free to change its policy based on either a change of circumstances or a changed view of the public interest" so long as the agency "suppl[ies] a reasoned analysis for the change."[11] With respect to trade remedy proceedings involving China, the Department has provided a detailed analysis of the changes in China's

---

7 *See* 19 C.F.R. § 351.408.

8 *Id.* § 351.408(c)(1).

9 *Id.*

10 *Oscillating Ceiling Fans from the People's Republic of China*, 57 Fed. Reg. 24018 (Dep't Commerce June 5, 1992) (final negative countervailing duty determination).

11 *Tung Mung Dev. Co. v. United States*, 354 F.3d 1371, 1379 (Fed. Cir. 2004) (quotation mark omitted).

economy warranting revision of the methodologies used in such proceedings.[12] Although the Department determined that China's economy is still government-controlled and thus still designated as an NME country, the Department also recognized that China has undergone a series of profound economic reforms, such that "business entities in present-day China are generally free to direct most aspects of their operations . . . ."[13] In light of this express finding with respect to individual Chinese companies, it is perfectly consistent, and even necessary, for the Department to now update its policies and practices on a more company-specific basis.

Strong policy considerations also support the Department's reconsideration of its approach to calculating normal value for respondents from NME countries. Providing more predictable and regularized treatment of MOEs may encourage and speed the further expansion of capitalism within China. Further, contrary to charges that the MOE test provides a "back door" method of graduating China from NME status, the reality is that it is necessary to prevent disadvantaging Chinese companies now that China is subject to U.S. countervailing duty investigations.

5. The WTO Also Provides A Basis for The MOE Test

Nothing under the WTO precludes the MOE test either. The WTO Anti-Dumping Agreement states that "the Authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation."[14] In other words, there is a preference under the WTO for national antidumping proceedings that afford individualized treatment to respondents whenever feasible. The Department's MOE test, therefore, would allow the United States to better fulfill its obligations under the WTO Anti-Dumping Agreement.

To the extent that China's WTO Accession Protocol does not specifically envision application of market economy treatment to individual antidumping respondents, it also does not preclude the United States from granting such treatment where warranted.[15] To the contrary, the failure of the Department to

---

[12] *See, e.g., 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); *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); *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.*

[13] *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*, at 10.

[14] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (WTO Anti-Dumping Agreement), Art. 6.10, *available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf.*

[15] *See Accession of the People's Republic of China* (China's Accession Protocol), Decision of 10

recognize MOEs in the context of antidumping investigations, now that it has determined that China's economy justifies application of the U.S. countervailing duty law to Chinese products, is what could create the possibility of a WTO challenge.

For all these reasons, it is clear that the Department has the legal authority to establish and implement the MOE test for antidumping proceedings involving China.

B. It Is Administrative Feasible To Apply the MOE Test

The Department asks about the feasibility of identifying an MOE, the feasibility of relying upon MOE prices and costs, and the feasibility of limiting the MOE test so that it does not apply to all factories. We discuss each of these points in turn. As this discussion reveals, the MOE test presents no greater administrative difficulties or costs than do existing Department practices.

1. It is Administratively Feasible To Identify an MOE

It is feasible for the Department to identify MOEs operating within a broader NME environment by reference to clearly defined, objective criteria that may be realistically met by companies that have embraced market principles. Through the comment process, the Department has been presented with several criteria which it may readily use to identify an MOE. These include:

a. Ability to make decisions regarding prices (including export prices), output and sales in response to market signals and without significant government interference;

b. Retention of proceeds from export sales and control over disposition of profits and financing of losses;

c. Authority to negotiate and sign contracts and other agreements;

d. Use of one clear set of basic accounting records that are independently audited in accordance with international accounting standards and that are used by the company for all relevant purposes;

e. Adherence to regularized depreciation and payment systems;

f. Autonomy from the government in the selection of management; and

g. Ability to set wage rates for employees and freely hire or discharge employees.

November 2001, WT/L/432, Nov. 23, 2001, ¶ 15, *available at www.wto.org.*

None of these are new concepts. The Department is already well-practiced in applying such factors in the context of its separate rates test. In fact, the successful application of the separate rates test contradicts many of the criticisms voiced in response to the Department's first request for comments.

In fact, the respondents that are currently in a position to seek Separate Rate status would likely be the very same respondents who would pursue the more stringent MOE status; the universe of potential candidates is unlikely to expand under the MOE test except to the extent that capitalism expands in China. That means that the administrative burdens and costs of the MOE test are not likely to be any greater for the Department than those associated with the Separate Rates test.

USA-ITA does recognize that the Separate Rates test has presented some resource challenges for the Department, especially in investigations involving consumer goods, such as furniture, because of the large number of respondents involved. That is because those Chinese industries are characterized by large levels of foreign investment and by U.S. importers who play a significant role in development of the products. But at the very least, the Department's experience with the Separate Rates test provides it with valuable expertise that is transferable to administering the MOE test, and can only ensure its smooth adoption and use.

2. It is Feasible For the Department to Rely on MOE Prices and Costs

It also is feasible for the Department to rely on the prices and costs of individual MOE respondents for purposes of antidumping calculations. As the Department has observed, "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 . . . ."[16] In light of the broad reforms in China, the Department should consider the price, cost and sales data of Chinese entrepreneurs, many of which are foreign investors in China, to be generally reliable.

USA-ITA disagrees strongly with comments filed with the Department in June that suggested that it would not be possible to rely on an MOE respondent's prices and costs because upstream and downstream Chinese industries linked to an MOE do not necessarily operate on commercial terms. As a result, it was asserted, an MOE that receives significant inputs from or sells to the broader Chinese market will be influenced by the distortions caused by government intervention. Such broad generalizations disregard the extent to which many inputs are produced outside of China, with Chinese factories only responsible for assembly operations, a function of the increasing presence of foreign invested enterprises and of the design and development role of U.S. importers, who control even the selection of inputs. In any event, even if there are some instances in which the state affects input costs, they are likely to be limited to costs like water and electricity, and the Department has the means to identify and value them.

---

[16] *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*, at 10.

USA-ITA also notes that the proposal of an MOE test is not unique to the United States. The European Union has experience in applying a similar concept, Market Economy Treatment (MET), to respondents from NME countries.[17] The European Union has employed the MET concept – which closely resembles the proposed MOE test – for nearly ten years, including with respect to respondents from China.[18] The experience of the European Union demonstrates the feasibility of relying on the price, cost and sales data of MOE respondents.

3. *It is Feasible To Limit an MOE Finding Where Necessary*

In the rare instance 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. But it is important to emphasize that the circumstances in which the Department may be forced to deviate from its standard normal value methodology with respect to MOE respondents are likely to be exceedingly limited. As the Department has observed:

> [A]lthough price controls and guidance remain on certain "essential" goods and services in China, the PRC Government has eliminated price controls on most products; market forces now determine the prices of *more than 90 percent of products* traded in China.[19]

Indeed, the burden of limiting an MOE finding with respect to a few inputs is far less than the burden currently incurred by the Department in identifying surrogate values. There can a huge number of minor inputs comprising subject merchandise and identifying surrogate values for them can be a tedious and time-consuming process, with limited impact on margin calculations.

Nonetheless, if the Department is able to demonstrate by substantial evidence in a given investigation or review that a particular input used by an MOE respondent was obtained under non-market conditions, then the Department still may modify its approach to that antidumping calculation by adjusting the actual prices and costs reported for that input. For example, the Department may apply an

---

17 *See 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, as last amended by Council Regulation (EC) No 2117/2005 of 21 December 2005, OJ L 340, 23.12.2005, p. 17.

18 *See, e.g., Council Regulation (EC) No 2570/2000 of 20 November 2000 amending Regulation (EC) No 393/98 imposing a definitive anti-dumping duty on imports of stainless steel fasteners and parts thereof originating, inter alia, in the People's Republic of China*, OJ L 297, 24.11.2000; *Commission Regulation (EC) No 255/2001 of 7 February 2001 imposing a provisional anti-dumping duty on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China*, OJ L 38, 8.02.2001; *Council Regulation (EC) No 950/2001 of 14 May 2001 imposing a definitive anti-dumping duty on imports of certain aluminum foil originating in the People's Republic of China and Russia*, OJ L 134, 17.5.2001.

19 *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*, at 5 (quotation marks omitted and emphasis added).

adjustment (or inflator) to labor, land or capital costs similar to the adjustments proposed with respect to energy costs reported by companies from the Russian Federation.[20] As USA-ITA noted in its comments on June 25, such adjustments, if applied in a regularized manner, could permit the Department to account for any residual distortions in the Chinese economy while lending stability and predictability to the Department's calculations.

Conclusion

USA-ITA appreciates this opportunity to provide its further comments in strong support of the adoption of an MOE test for individual respondents, pending a determination that China is a market economy. We look 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 ultimately, Vietnam.

Respectfully submitted,

Laura E. Jones
Executive Director

Of Counsel:
Brenda A. Jacobs, Washington trade counsel to USA-ITA
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005
202-736-8149 direct dial
202-736-8711 fax
bjacobs@sidley.com

[20] *See 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).