212-973-7712

June 24, 2005

BY HAND
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, D.C. 20230

Attention: Joseph A. Spetrini
Acting Assistant Secretary for
Import Administration

Re: Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 70 Fed. Reg. 30,418 (May 26, 2005)
Our Reference: 4896

Dear Sir,

These comments are submitted on behalf of our client, American Signature, Inc., ("ASI") in response to a Federal Register Notice of May 26, 2005, soliciting comments from interested parties regarding the manner in which the Department of Commerce ("Department") values a foreign producer's factors of production in non-market economy ("NME") antidumping duty ("AD") proceedings.

Founded in 1948, and based in Columbus, Ohio, ASI is one of this country's largest independently owned furniture designers, manufacturers and retailers. To meet its customers' needs, ASI sources furniture from a mix of vendors located around the world, including manufacturers located in the United States and China. Certain furniture imported by ASI is subject to the AD Order on wooden bedroom furniture from China. Importers of Chinese furniture subject to this Order currently are required to pay estimated AD duty at time of entry at rates ranging from 2.32 percent to 15.78 percent, depending on the vendor.

As the Department is aware, these deposit rates are estimates only. In the likely event that either Petitioners or Respondents request an Annual Administrative Review of the AD Order, AD duty ultimately due on current shipments from China, for merchandise which already has been sold by ASI to its customers at fixed prices, will differ from the estimated duty

deposited upon entry, resulting in duty refunds or additional duty payments sometime in the indefinite future.

If China were a market economy (or if the AD Order were in effect with respect to goods exported from a market economy country), ASI would not be unduly concerned with the "retrospective" manner in which the United States determines AD liability and the fact that ultimate duty due often is not determined until many years after goods are entered, upon completion of an Annual Review (and potential litigation over the results). This is because market economy AD liability reflects the actual experience of a foreign manufacturer, and its own prices and costs in sales in its home market and to the United States. The antidumping duty law is not intended to be a trap for the unwary. It is not intended to result in the assessment of substantial AD duty. Nor is it necessarily intended to ensure that prices to the United States rise to levels higher than the sales price of comparable goods produced domestically. Rather, this law is intended to eliminate unfair price discrimination. With respect to goods purchased by companies such as ASI from market economy suppliers, the AD law encourages an exporter to change its pre-Order pricing policies, by reducing home market prices or increasing U.S. prices, or both, so that importers will not be required to pay additional duty to the U.S. government. By allowing an exporter to adjust its prices in this manner, importers such as ASI can continue to purchase merchandise subject to a market economy AD Order, since they will have some assurance from their suppliers as to the AD duty which ultimately will be assessed. Not only does an importer's ability to continue business while an Order is in place conform to the intent of the AD law and U.S. international obligations, it also obviously benefits importing/ retailing companies (such as ASI) and their employees and communities, American consumers and the American economy.

In contrast, importers of merchandise subject to an NME AD Order find themselves in a significantly more precarious position. This state of uncertainty results from the fact that NME exporters (unlike their market economy counterparts) can only control one side of the dumping equation – their sales prices to the United States. In NME investigations, the DOC does not compare U.S. sales prices with the prices and/or costs of subject merchandise sold in the home market; rather, the Department normally compares U.S. prices to the "value of the factors of production," as defined in Section 773(c)(4), Tariff Act of 1930, as amended, plus "an amount for general expenses and profit plus the cost of containers, coverings and other expenses," as required by Section 773(c)(1)(B). The factors of production to be valued, specified in Section 773(c)(3), include labor, raw materials, energy and other utilities and capital costs. Their value is determined, pursuant to Section 773(c)(4)(A)-(B), based on the prices or costs of these factors "in one or more market economy countries that are (A) at a level of economic development comparable to that of the non market economy and (B) significant producers of comparable merchandise."

Thus, to calculate normal value, the Department must make the following decisions: (1) select the appropriate market economy country or countries for determining the values of the factors of production; (2) select the cost or value of factors of production in these surrogate countries; (3) apply these surrogate costs or values to the labor, raw materials, energy and other utilities used in the NME; and (4) calculate the general expenses, profit and cost of containers, coverings and other expenses to add to the value of the factors of production. All of these

decisions are made by the DOC during the course of its investigation, which takes place after the period in which the sales subject to review have been consummated. With certain critical exceptions – i.e., the practice currently under review by the Department - none of the cost or value information upon which the DOC relies relates to actual costs or values incurred by producers in the NME.

The manner in which the Department calculates surrogate value has been repeatedly described by the courts as being "difficult and necessarily imprecise." Sigma Corp. v. United States, 117 F.3d 1401, 1408 (Fed. Cir. 1997). Scholars and practitioners also uniformly agree that calculation of NME surrogate values is a complex exercise, leading to unpredictable results.

> Importers cannot predict which country will be chosen as a surrogate for the non market economy, and thus cannot possibly set their prices to assure compliance with the dumping laws.[1]
>
> The results in a nonmarket economy investigation are highly unpredictable. . . .As such, petitioners cannot know whether it will be worthwhile to bring a case, and respondents can never know how to price in order to avoid dumping.[2]
>
> An exporter from a nation deemed to have a non market economy in effect cedes control over the prices that it can charge in the United States market (at present and in the future) to foreign firms that, by definition, are almost certain to be its competitors.[3]
>
> {I}n NME cases, . . .the cost data used are not those of the firm under investigation; instead, surrogate values from another country are applied

[1] G. Horlick and S. Shuman, Nonmarket Economy Trade And U.S. Antidumping/ Countervailing Duty Laws, 18 Int'l Law 807, 817 (Fall, 1984). See also Charlene Barshefsky, Nancy B. Zucker, Amendments To The Antidumping And Countervailing Duty Laws Under The Omnibus Trade And Competitiveness Act Of 1985, 13 N.C. J. Int'l L. & Com. Reg. 251, 260 (Spring, 1988) ("The surrogate country methodology creates unpredictability for both nonmarket suppliers (and their U.S. importers, and for the competing domestic industry. . . .An exporter cannot typically gauge in advance whether a particular export price will trigger an antidumping action.").

[2] Gilbert B. Kaplan, Bonnie B. Varga, Recent Developments In The Antidumping And Countervailing Duty Area, Practicing Law Institute, Commercial Law and Practice Course Handbook Series, 372 PLI/Comm 77, 109 (December 2, 1985)

[3] William P. Alford, When Is China Paraguay? An Examination of the Application Of The Antidumping And Countervailing Duty Laws Of The United States To China And Other 'Nonmarket Economy' Nations, 61 S. Cal. L. Rev. 79, 92 (November, 1987)

> to that firm's factors of production. This methodology is fraught with potential for gross inaccuracy.[4]
>
> {T}he factors methodology unfairly ignores the NME's comparative advantage and essentially renders it nothing more than an inefficient user of higher cost labor from the surrogate country.[5]
>
> It is, therefore, impossible for an NME producer to price its goods in the U.S. market to avoid the imposition of antidumping duties.[6]

The modification to U.S. law in the 1988 Trade Act – designating the factors of production methodology as the primary method for estimating normal value – did nothing to solve this problem:

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[4] Brink Lindsey and Daniel J. Ikenson, Antidumping Exposed: The Devilish Details of Unfair Trade Law 24 (Cato Institute 2003 See also James K. Kearney, Jing Wang, The Commerce Department Speaks 1992: Developments in Import Administration; Export and Investment Abroad, The Department Of Commerce's Market-Oriented Industry Methodology For Non market Economies In Antidumping Investigations: The Responding Party's Perspective, Practicing Law Institute Corporate Law and Practice Course Handbook Series 789 PLI/Corp 255, 281 (October 1-2, 1992 ("The Department's 'blanket' prohibition of using any domestic factor costs when any "significant" cost -- however that may be determined -- is state-determined dooms these producers to unpredictable and arbitrary treatment under surrogate methodology.")

[5] Jeffrey P. Bialos, Randolph W. Tritell, Martin S. Applebaum, Trading With Central And Eastern Europe: The Application Of The U.S. Unfair Trade Laws To Economies In Transition, AUT Int'l L. Practicum 69, n.25 (Autumn, 1994)

[6] Charlene Barshefsky, Symposium: International Trade Issues for the 1990s--Unilateral Trade Issues Non-Market Economies In Transition And The Us Antidumping Law: Remarks On The Need For Reevaluation, 8 B.U. Int'l L.J. 373, 375 (Fall, 1990); See also Tycho H.E. Stahl, Problems With The United States Anti-Dumping Law: The Case For Reform Of The Constructed Value Methodology, 11 Int'l Tax & Bus. Law. 1, 9 (1993 ("CMEC could not have foreseen at the time of the transaction that its liability would one day turn in part upon prices charged by a firm in Bombay, India which the ITA would happen to choose as being comparable. With no way to predict elements essential to the procedure used by the ITA to find a violation, it is unclear how CMEC could have avoided committing a "violation."); see also Sanghan Wang, U.S. Trade Laws Concerning Non market Economies Revisited For Fairness And Consistency, 10 Emory Int'l L. Rev. 593, 620 (Winter 1996) ("The fact remains, however, that the producer in China had no means of finding out at the time of its exports that it should, in effect, be pricing as a Philippine producer. . . .Therefore, the outcome of the antidumping investigation is inherently unpredictable because a non market economy country has no advance knowledge of which surrogate will be used to determine its prices and costs.").

> The lack of predictability of result remains the greatest problem of the new law, from the perspective either of a petitioner or of a respondent. The new methodology is simply the same bad wine in a new, and unattractive, vessel. The key to the new law remains the choice of the surrogate country.
>
> Yet even if the comparability problem could be overcome, the fundamental flaw in the surrogate country methodology remains--it is utterly unpredictable and its unpredictability results in a law which has very little deterrent effect on NME pricing and presents serious problems of fundamental fairness for the NME. When faced with the stark reality that there is no reliable price at which an NME can structure its prices to ensure that it is not selling at LTFV, few NMEs are likely to see much incentive to carefully monitor their prices to the United States.[7]

As experienced counsel for Petitioners in NME proceedings have candidly admitted, the final results of NME proceedings often reflect the respective abilities of counsel for Petitioners and Respondents to submit useable third country surrogate values to the Department, rather than an accurate determination of whether NME exporters are engaging in an unfair trade practice. Counsel has stated:

> Because surrogate data may vary widely, petitioners can have a substantial effect on the calculation of FMV and dumping margins by providing Commerce with usable surrogate data. This places a premium on petitioner's research into published, publicly available statistics as well as petitioner's advocacy as to the appropriate primary and secondary surrogates.[8]

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[7] Jeffrey S. Neeley, The Omnibus Trade and Competitiveness Act of 1988: Where It Came From and What It Means For U.S. Business, Nonmarket Economy Import Regulation From Bad To Worse, 20 Law & Pol'y Int'l Bus. 529, 541-543 (1989); see also Lantz, Robert H., The Search For Consistency: Treatment Of Non market Economies In Ransition Under United States Antidumping And Countervailing Duty Laws, 10 Am. U. J. Int'l L. & Pol'y 993, 1006 (Spring 1995) ("Regardless of the view one takes of the value of the changes made in the 1988 Trade Act, virtually everyone would agree that Commerce has had a difficult time administering the current AD law in cases involving NMEs in transition.. . . The NME methodology under the 1988 Trade Act produces unpredictable results which usually result in a higher dumping margin for NME products than would exist if any of the standard methodologies were applied.").

[8] Lawrence J. Bogard, Linda C. Menghetti, The Treatment of Non-Market Economies Under U.S. Antidumping and Countervailing Duty Law: A Petitioner's Perspective, Practising Law Institute Corporate Law and Practice Course Handbook Series, 789 PLI/Corp 217, 252-253 (October 1-2, 1992).

It is for these critical reasons that ASI believes that the Department should refrain from taking any action which would result in the calculation of NME AD rates from becoming even less predictable than is currently the case.

Unfortunately, the Department's May 26, 2005 Notice suggests that the Department is considering this possibility.

As the Notice states, current Department policy results in some predictability with respect to the "home market" side of the dumping equation for NMEs "where an NME producer purchases inputs from market economy suppliers and pays in a market-economy currency." In these instances, "the Department uses the actual price paid for these inputs." Where a portion of the factor input is purchased from a market economy supplier and the remainder from a non market economy supplier, the Department normally values the factor using the price paid to the market-economy supplier, unless: (1) the quantity purchased from the market economy supplier is not "meaningful;" (2) the Department believes the transaction was not conducted at arm's length; or (3) the Department has reason to believe or suspect that the goods may be dumped or subsidized.

Where the exporter's purchase price of a market economy input is used to value a factor of production, the exporter has the ability to predict how the Department will calculate "normal value," and, accordingly has the ability to determine the price at which it can sell merchandise to the United States so that its U.S. customers will not be required to pay additional AD duties. Thus, from the importer's perspective, it is important that the Department administer U.S. law in a manner which maximizes reliance on actual purchase prices as the basis for determining normal value, thereby leading to greater predictability as to the importer's ultimate liability. As discussed below in response to the Department's specific questions, adoption of the Department's proposals may result in even greater unpredictability than currently exists.

> *QUESTION ONE: Is it appropriate for the Department to change its regulations and end its long-standing practice of using market economy import prices to value an entire input? For example, should the Department use market economy import prices to value only the portion of the input that was imported, and use surrogate country prices to value the remainder of the input?*

RESPONSE: As discussed in detail above, a decision by the Department to end its long-standing practice would result in greater uncertainty for importers of NME subject merchandise than currently exists. For this reason alone, current policy should not be changed.

Moreover, the current practice has withstood the test of time and has repeatedly been described by the Department and the courts as leading to more accurate dumping margins than the alternative suggested in the May 26, 2005 Notice.

The rationale for the Department's current policy was initially summarized in detail in the Department' October 25, 1991, decision, in Oscillating Fans and Ceiling Fans From the

People's Republic of China, Final Determinations of Sales at Less Than Fair Value, 56 Fed. Reg. 55271-01, 1991 WL 215198 (F.R.) (October 25, 1991). In an oft-quoted statement, the Department reasoned:

> More specifically, in the case of a firm operating in an NME, the purpose of section 773(c) is to determine what the firm's prices or costs would be if such prices or costs were determined by market forces. Requiring the use of surrogate values in a situation where actual market-based prices incurred by a particular firm are available would be contrary to the statutory purpose. Where we can determine that an NME producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law. In addition, the goals of accuracy, fairness, and predictability should apply whether a country's economy is market or nonmarket oriented. In antidumping proceedings concerning imports from market economy countries, the Department uses the price of imported inputs when calculating FMV using constructed value methodology. The fact that it is more accurate to use an actual input value for merchandise sourced from a third country should not change simply because the country under investigation is an NME. Different treatment of an imported input based solely on whether the input is imported into a market or nonmarket economy country is illogical. The simplest example of a value based on market principles in a proceeding involving an NME is a price paid in convertible or market economy currency for an input sourced from a market economy country. A number of the factors involved in these investigations have such values and the Department has used them to calculate FMV. The petitioner has argued that the use of the input prices for materials sourced from Japan, the United States, Hong Kong, and Taiwan is, in effect, an unlawful selection of those countries as surrogates. However, these input values are not surrogate values. They are the actual market based prices incurred by the respondents in producing the subject merchandise and, as such, are the most accurate and appropriate values for these particular factors for the purposes of calculating FMV.

Petitioners appealed the Department's determination in Oscillating Fans to the Court of International Trade, which affirmed, reasoning that reliance on surrogate country values when market prices are available "would conflict with the overall statutory purpose." Lasko Metal Products, Inc. v. United States, 810 F.Supp. 314 (CIT 1992). The Federal Circuit also affirmed. Lasko Metal Products, Inc. v. United States, 43 F. 3d 1442 (Fed. Cir.1994). The Appellate Court reasoned:

> The Act requires the ITA determination to be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering

> authority. In this case, the best available information on what the supplies used by the Chinese manufacturers would cost in a market economy country was the price charged for those supplies on the international market. As the Court of International Trade correctly observed, although Lasko's alternative interpretation of the statute requiring that ITA abandon all actual prices once it is forced to resort to surrogate country values might have been possible, ... such an interpretation would conflict with the overall statutory purpose. The purpose of the Act is to prevent dumping, an activity defined in terms of the marketplace. The Act sets forth procedures in an effort to determine margins "as accurately as possible. Where we can determine that a NME producer's input prices are market determined, accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law. (citations deleted) [9]

Thus, not only did the Federal Circuit in Lasko uphold the Department's analysis, it did so in a manner which implied that if the Department had failed to base costs on "the amount the Chinese manufacturers actually paid on the international market for the supplies they used," the Department's determination would not have conformed to the overriding purpose of the law "to determine margins as accurately as possible."

In Certain Helical Spring Lock Washers From the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 61794-01, 1997 WL 715519 (F.R.) (November 19, 1997), Petitioners again challenged the Department's policy to calculate surrogate values based on actual purchase prices, by arguing that "the Department should limit the use of imported steel prices to valuing the imported steel actually used." The Department rejected this argument, reasoning that

> in accordance with the Department's established practice, we continue to use the actual imported steel prices to value steel inputs because these prices represent the actual market-based prices incurred by the respondent in producing the subject merchandise and, as such, are the most accurate and appropriate values for this particular factor for the purpose of calculating NV.

Both the CIT and Federal Circuit affirmed. Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 102 F.Supp.2d 486 (CIT 2000), aff'd 268 F. 3d 1376 (Fed. Cir. 1518). The Federal Circuit stated:

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[9] See also Tianjin Machinery Import & Export Corp. v. United States, 806 F. Supp. 1008 (CIT 1992) ("Specifically, Commerce's task in a nonmarket economy investigation is to calculate what a producer's costs or prices would be if such prices or costs were determined by market forces.. . . In addition, the goals of accuracy, fairness, and predictability should apply whether a country's economy is market or nonmarket oriented.")

> In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible. . . . Although we recognize that the level of a "meaningful" amount of imported merchandise must be determined on a case-by-case basis, we are persuaded that the steel imported from the United Kingdom in this case constitutes a "meaningful" amount. . . . Thus, we agree that the best available and most accurate information regarding the normal value of the domestically obtained steel is the purchase price of the steel imported from the United Kingdom. Commerce's Remand Determination demonstrates that the methodology used in this case is a permissible interpretation.

Prior to the Shakeproof judicial decisions, the Department codified its market economy input policy in Section 351.408(c)(1) of its Regulations. In comments accompanying its Notice of Proposed Rulemaking, 61 Fed. Reg. 7308-01, 1996 WL 79522 (FR) (February 27, 1996), the Department explained that

> in situations where a portion of the NME producer's input is sourced from a market economy source (and paid for in a market economy currency) and the remainder is sourced from producers within the NME, paragraph (c)(1) makes clear that the price paid to the market economy supplier should normally be used to value the input, not the price derived from a surrogate

because, according to the Department, "accuracy is enhanced when the NME producer's actual costs can be used."

After receipt of comments on its proposed regulations from interested parties, the Department again reaffirmed its belief that codification of its practice would result in "increased accuracy" in calculating margins. Final Rule, Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27295, 27366 (May 19, 1997). The Department stated:

> We believe that the [Lasko] Court's emphasis on "accuracy, fairness and predictability" does provide us with the ability to rely on prices paid by the NME producer to market economy suppliers, in lieu of surrogate values, for the portion of the input that is sourced domestically in the NME. Moreover, as noted in the AD Proposed Regulations, 61 FR at 7345, we would not rely on the price paid by an NME producer to a market economy supplier if the quantity of the input purchased was insignificant. Because the amounts purchased from the market economy supplier must be meaningful, this requirement goes some way in addressing the commenter's concern that the NME producer may not be able to fulfill all its needs at that price.

The rationale underlying this practice has been repeatedly reaffirmed by both the Department and the courts. The Courts have recognized that "where actual prices reflect true market values, not to employ such prices would indeed be contrary to Commerce's mandate of estimating antidumping duty margins as accurately as possible,"[10] and the Department has discussed the rationale for its policy in its Annual Review determinations.

> {A}ssuming for the sake of argument that the price paid by Hangzhou is low, we do not agree that this is a basis for rejecting the price. It is the price paid by Hangzhou to an unrelated market economy supplier through an unrelated market economy trading company, i.e., an arm's length price, and the petitioner has provided no information except the allegedly low price that would lead us to question the reliability of the data."[11]

> We disagree more generally with the petitioner's contentions that this practice violates important aspects of AD and NME policy. In a NME case, we need to value the inputs used by respondents to produce the subject merchandise. When meaningful amounts of a particular input are imported from a market economy country and paid for in a market economy currency, those import transactions provide a reliable market indicator of the very value we need. Whether the imported input is also used for production of other (including home market) merchandise, is not relevant."[12]

> We have no reason to assume that, when dealing with Chinese importers, market-economy suppliers ignore rules of supply, demand, and profit-seeking behavior within a competitive world market.. . . There are a variety of reasons for setting a particular price higher or lower than a world benchmark in an arm's length transaction. In examining actual sales between private parties, the Department would have to be convinced by

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[10] China Nat. Machinery Import & Export Corp. v. United States, 264 F.Supp.2d 1229 (CIT 2003); see also Timken Co. v. United States, 201 F.Supp.2d 1316 (CIT 2002) ("Accordingly, the Court affirms Commerce's decision to value material costs for steel inputs by using the prices paid by a PRC producer and a PRC trading company to market-economy suppliers")

[11] Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Certain Helical Spring Lock Washers from the People's Republic of China, 67 ITADOC 8520, 2002 WL 332051 (ITA) (February 25, 2002).

[12] Issues and Decision Memo for the 1998-99 Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results, 66 ITADOC 1953, 2001 WL 118968 (ITA) (January 10, 2001).

> evidence on the record that the particular sale in question was in some way unrepresentative of market-economy forces.[13]

The Department's rationale in these decisions is as valid today as it has been in the past 14 years, and there simply is no compelling reason why the Department should reverse this long-standing practice at this time.

Notwithstanding the foregoing, the Department, in its Request for Comments, expresses its "concern" that "basing the entire input value on a small amount of purchases might not be the most accurate reflection of what a company pays to source the entire input," and that its "current practice may allow parties to manipulate the Department's margin calculations by sourcing just enough of an input from market economy suppliers so that the market economy price is used to value the entire input, even though that party does not source the entire input from foreign (market economy) suppliers in the normal course of business." The Department then notes that "in such situations, concern has been expressed that the market economy prices the Department would use to value an entire input may not be reflective of actual prices."

None of these concerns constitute sufficient reason for the Department to reject a policy which repeatedly has been re-affirmed by the Department and approved by the courts. In this regard,

- The current policy undeniably leads to more "predictable" normal values than those based on surrogate country prices, which remain totally unknown until after all sales to the United States have been consummated and an Annual Review is initiated.

- A price negotiated by a market economy vendor for its goods clearly constitutes better information as to the price at which the buyer could purchase additional quantities of the input material than a price posted in a newspaper in a third country or a price derived from a third country financial statement for non-identical merchandise. The Department's current practice may not lead to 100 percent accuracy; however, it cannot be seriously disputed that reliance on actual prices is more accurate than the surrogate values upon which the Department has relied in numerous NME proceedings.

- Petitioners obviously have the resources to present evidence to the Department that the prices paid to market economy vendors are "in some way unrepresentative of market-economy forces," in which case, the Department has the authority, in appropriate circumstances, based on substantial evidence in the record, to deviate from its normal practice; thus, the Department's current policy already contains sufficient safeguards against potential abuse.

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[13] Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China; Final Results of 1997-98 Administrative Review, 64 Fed. Reg. 61,837, 1999 WL 1028339 (November 15, 1999).

- The fact that an NME producer may not source all of a particular input material from a market economy vendor does not mean that the producer could not purchase additional input material from this source at the same price or that the vendor does not have the capability to supply additional inputs to the vendor at the same price. In the absence of credible evidence that a market price is unrepresentative, this price constitutes the best information available as to the surrogate value for the input.

Finally, the Department's concern that continuation of its current policy may allow a party to "manipulate the Department's margin calculation" ignores the basic purpose of U.S. antidumping laws. As discussed in detail above, the antidumping duty law is intended to eliminate price discrimination; it is not intended to maximize the collection of AD duty. In the same manner as a market economy producer can accurately project and reduce its customers' AD duty liability by modifying its home market and/or U.S. prices and reducing its production costs, an NME producer can attempt to project and reduce its customers' liability by sourcing input materials from a market economy vendor at market economy prices. Petitioners may characterize this reasonable response to an Order as "manipulation," since their "Byrd" money payments potentially can be reduced without a corresponding increase in sales prices to the United States. The Department, however, should not lose sight of its responsibility to determine margins as accurately as possible, and to administer the AD law to attain the goals of accuracy, fairness and predictability, whether goods are exported from a market economy country or an NME. Thus, a decision by an NME producer to purchase material inputs from a market economy vendor does not constitute manipulation of an AD Order and a decision by the Department to continue its longstanding practice to value the material input based on this purchase price constitutes the best available information as to the cost of the input to the Chinese producer for 100 percent of the quantity actually used.

> *QUESTION TWO: Assuming the Department continues its long-standing practice of using market economy import prices to value an entire input, what should the threshold be for the share or volume of a given input sourced from market economy suppliers to qualify as "meaningful" in order for the import price to be used to value all of the input?*

RESPONSE: Assuming that the Department decides to continue its long-standing practice of using market economy input prices to value an entire input, it should continue to rely on market economy prices unless the "quantity of the input purchased was insignificant." See 62 Fed. Reg. at 27,366 (May 19, 1997). The term "insignificant" should not be reduced to a precise mathematical formula, but instead should be examined in the context of normal commercial transactions for the input. Thus, in the absence of substantial evidence that the quantity sold by the market economy vendor does not represent the quantity at which the vendor normally sells similar goods in its commercial transactions, the input price should be accepted as a "meaningful" quantity.

This threshold should be accepted by the Department in the same manner as the Department has correctly recognized that a company which consummates a single sale to the United States can qualify for a New Shipper Review.

Finally, requiring a higher threshold based on a strict numerical standard could result in resort to a surrogate value which has absolutely no relationship to actual costs that would be incurred by an NME producer if it were operating in a market economy setting.

> *QUESTION THREE: Please provide any additional views on any other matter pertaining to the Department's practice concerning the use of market economy import prices.*

RESPONSE: In light of its overriding obligation to select surrogate values which are accurate, fair and predictable, the Department should rely on market economy input prices in NME AD proceedings more often than it has in the past.

Two areas which can be readily reformed to attain these goals are the Department's refusal to value a factor of production for one NME respondent based on the market economy price paid for an input by a second respondent and its overly rigid construction of the "reason to believe or suspect that prices are dumped or subsidized" test for rejecting purchase prices as surrogate values.

In this regard, the goals of accuracy, fairness and predictability would be enhanced by calculating surrogate values for all respondents based on the input market prices paid by one respondent to its vendors. The market price paid for a particular input clearly constitutes better evidence as to the price which a producer of similar merchandise would be required to pay for the input if it were operating in a market economy setting than does a price found in a third country newspaper or a value derived from a third country financial statement.[14]

With respect to the subsidy standard, the Department should adopt the test set forth in Fuyao Glass Industries, Inc. v United States, Slip Op. 05-06 (January 25, 2005), which requires that

> to justify a finding with respect to subsidization, Commerce must demonstrate by specific and objective evidence that (1) subsidies of the industry in question existed in the supplier countries during the period of

[14] The Department clearly has the authority to expand its reliance on actual market prices in appropriate circumstances. See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China, 65 Fed. Reg. 19873 (April 13, 2000) and accompanying Issues and Decision Memorandum at Comment 6 ("{A}bsent reliable surrogate values and consistent with our practice, for those producers which did not purchase aseptic bags from a market economy supplier, we have applied an average of the prices other respondents paid to purchase aseptic bags from a market economy supplier."); Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China, 61 Fed. Reg. 19026, 19030 (April 30, 1996) ("Where design or material composition appeared to have a significant impact on price but design or material-specific data was not available in a surrogate country, we used the average actual market-economy prices from market-economy suppliers to the PRC.")

investigation ("POI"); (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier to not have taken advantage of such subsidies.

Failure to adopt this more reasonable standard would be directly contrary to directly controlling judicial precedent, Congressional intent, and the Department's mandate to calculate margins as accurately as possible, based on the best information available.

We thank the Department for affording us the opportunity to submit comments on this important issue and are available to answer questions with respect to any of the matters discussed above.

Sincerely,

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