

COMMITTEE TO SUPPORT U.S. TRADE LAWS

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June 24, 2005

Mr. Joseph A. Spetrini
Acting Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

Re: Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries

Dear Mr. Spetrini:

On behalf of the Committee to Support U.S. Trade Laws ("CSUSTL"), these comments are presented in response to the Department's May 26, 2005 notice concerning proposed changes to its practices for valuation of raw material inputs obtained from market-economy sources in non-market economy proceedings. See Market Economy Input Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 70 Fed. Reg. 30,418 (May 26, 2005) (the "Notice").

The Notice sought comment on two issues:

- (1) 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?
- (2) 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?

Notice, 70 Fed. Reg. at 30,418. The Department also sought comments on any other relevant matters pertaining to its market economy input practice. Id. The following sections address both the proposed changes and propose a third alternative that relies on elements of both options.

Commerce’s current practice with respect to valuation of inputs obtained in part or in whole from market economy sources is summarized in the Notice:

Normally, if a respondent sources an input from a market–economy supplier, the Department will use the average input price paid by the respondent to market economy suppliers (in market economy currency) to value all of the given input (both imported and domestically–sourced) used by respondents, provided three conditions are met. First, the volume of the imported input as a share of total purchases from all sources must be “meaningful,” a term used in the Preamble to the Regulations but which is interpreted by the Department on a case–by–case basis. See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27366 (May 19, 1997) (Preamble). See, also, Shakeproof v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001). Second, this average import price must reflect bona fide sales. Third, the Department disregards all inputs it has reason to believe or suspect might be dumped or subsidized.

Id.; 19 C.F.R. § 351.408(c)(1). In its current iteration, this approach has several weaknesses that can and should be remedied.

First, the current approach operates on the implicit assumption that a non-market economy (“NME”) respondent’s purchase of any market economy input establishes that the respondent could obtain 100 percent of its input needs from market economy sources. We believe that such an assumption is not warranted and contrary to commercial reality. An NME producer’s ability to obtain some quantity of an input at a particular price is evidence only of its ability to obtain that specific quantity of the good at that specific price; it does not show that the producer could obtain all of its needs from the market economy supplier or suppliers at that

price. A particular spot market may make a “meaningful” quantity of an input available at a very low price, but the availability will nonetheless be limited. The Department’s inherent presumption that the producer could have obtained all of its needs at that rate is not warranted and detracts from the Department’s ultimate goal of calculating the most accurate dumping margins.

Second, the Department’s current approach, while providing a benefit to a respondent who purchases inputs from market economy sources, does not promote or facilitate calculation of the most accurate dumping margin. When, based on the facts of each proceeding, the Department determines that a “meaningful amount” of any input has been sourced from a market economy supplier, a respondent is able to obtain valuation of all of an input using market economy pricing, even when significantly less than 100 percent of the input is obtained from market economy sources. This aspect of the current methodology is contrary to the Department’s legal obligation to calculate accurate dumping margins in antidumping duty proceedings.

Third, the Department’s current approach encourages non-market economy respondents to “game” the Department’s methodology by sourcing just enough of an input from market economy sources to be deemed “meaningful,” and thus to have the Department value all of that input using such prices, notwithstanding only part of the input is being acquired from market economy sources. In such situations, the current methodology can bestow a benefit upon the respondent that is not supported by the record evidence.

Fourth, by not using all the actual inputs to calculate normal value in NME proceedings, the Department departs from its practices in market economy cases, where the cost of production

and constructed value must include all the materials and other inputs used, and from all factories producing similar merchandise.¹ The purpose of the NME methodology is to accurately determine what the constructed value for sales would be if the NME were a market economy. With this goal in mind, the Department should adhere as closely as possible to market economy practice for determining dumping, absent compelling reasons to do otherwise. In this case there is no apparent reason why the Department should decline to use the values for materials that were actually used to make the exported product – market value for materials procured from a market economy and surrogate values for materials obtained from a non-market economy.

CSUSTL believes that the changes proposed in the Notice potentially would address these weaknesses and materially strengthen the Department's methodology. As discussed below, we also believe that the Department effectively could combine elements of both options described in the Notice.

I. PROPORTIONAL VALUATION BASED ON MARKET ECONOMY INPUT SHARE

CSUSTL supports the Department's proposal to value the proportional amount of an input obtained from market economy sources in all cases. This practice change would address many of the issues discussed above. First, it would directly foster accuracy in the Department's

¹The Department's standard market economy questionnaire, at section D, III A 3, provides:

If you produced the merchandise under investigation at more than one facility during the POI, provide a detailed description of the method you used to weight average the production costs from all facilities in order to compute a single, weighted-average cost of manufacturing (COM) for each model (i.e., unique product) of the merchandise under investigation. For one CONNUM, provide worksheets showing the calculation of the weighted average figures reported for COP and CV.

antidumping duty calculations by accurately and actually valuing inputs sourced from market economy suppliers in the amounts purchased but not more. Conversely, this practice change also would remove or reduce the incentive to manipulate the Department's valuation methodology either (1) by defining factor inputs more narrowly or more broadly to dictate whether the market economy input will be "meaningful" or (2) by sourcing only a limited amount of an input or inputs from market economy sources. This practice change also would implicitly acknowledge that while an NME producer may be able to obtain some portion of its needs from one or more market economy sources, it may not be able to obtain 100 percent of its supply needs from market economy sources.

II. DEFINING "MEANINGFUL" SHARE OR VOLUME

Under current practice, what constitutes a "meaningful" share or volume of a raw material input sourced from a market economy source or sources is decided on a case-by-case basis. The Department's second option proposes to define the amount deemed "meaningful" by establishing a threshold level that must be reached before the Department will use the market economy input price to value the input. Under this approach, however, the Department would continue to value 100 percent of the respondent's input usage using the market economy price, once the threshold amount is reached.

CSUSTL believes that the Department should not implement this approach in its proposed state. While we recognize the benefit of establishing a bright line threshold to define the term "meaningful amount," we believe that this approach, implemented in its proposed form, would not address the concerns discussed above. Specifically, by continuing to employ an "all or nothing" approach once the threshold level has been reached, the Department will continue to

operate with the implicit assumption that a respondent could obtain all of its supply from market economy sources, when in fact this may not be the case. This approach also would continue to provide an incentive for respondents to source exactly enough from market economy sources to reach the established threshold, but no more. Moreover, this proposal also would not increase the accuracy of the Department's calculations, but rather would institutionalize a threshold beyond which the accuracy of the Department's calculations would deteriorate.²

III. USE OF PROPORTIONAL VALUATION ONCE AN ESTABLISHED THRESHOLD IS REACHED

On balance, CSUSTL believes that both options have important conceptual merits that should be included in any revision of the Department's current practice. Using the concepts inherent in the Department's proposals, the Department can revise its current methodology in a "margin-neutral" manner that increases accuracy in the margin calculations while avoiding prejudice to either respondent parties or to petitioning domestic industries. Specifically, the Department should revise its current practice to value only that portion of a respondent's inputs obtained from market economy sources at the acquisition value, but only after a respondent has made an initial showing that such inputs obtained from market economy sources were above a minimum quantity threshold and were obtained through bona fide sales made in the ordinary course of trade. By coupling the idea of proportional market economy valuation with a clear threshold showing that the input in question was obtained in the ordinary course of trade, the

² If the Department nonetheless elects to continue the "all or nothing" approach that it currently uses, it should choose a threshold that requires at least a majority (over 50 percent) of market economy inputs before valuing all inputs at that market economy value. Where a minority of the inputs are from a market economy, the likelihood that the producer could not have sourced all of its inputs at similar market economy prices is much greater.

Department will increase the accuracy of its calculations and conserve administrative resources by avoiding the need to employ both the market economy value and the surrogate value where the inputs in question are either (1) insignificant in volume, (2) or are of questionable utility (*i.e.*, where they have not been shown to be obtained through a bone fide sales made in the ordinary course of trade).

In terms of the threshold that should be set before the Department gives proportional credit, we suggest that a respondent seeking market economy valuation be required to make a prima facie case that five percent or more of the input in question was obtained in the ordinary course of trade.³ This threshold is consistent with the threshold showing employed by the Department in such fundamental aspects of its dumping methodology as market viability, and would provide a reasonable threshold to be satisfied.

Once a respondent has successfully made the required initial showing that the input in question has been sourced from a market economy supplier in quantities above the threshold level, a rebuttable presumption would be established with respect to this respondent in the segment of the proceeding concerning the input question. That rebuttable presumption should be subject to challenge by any other interested party, who would be allowed to present evidence on the record that the input was not obtained through a bone fide sale in the ordinary course of trade.

Such an approach is administratively feasible and represents an improvement to the Department's current practice that is fair to both domestic interested parties and to respondents.

³ This threshold should be applied to both market economy and non-market economy inputs. For example, if less than 5 percent of the inputs were sourced in the non-market economy, then only market economy purchases should be used to value the input.

By requiring a threshold showing that the input in question has been obtained in the ordinary course of trade, the Department will (1) promote the development of a complete and accurate record concerning the origin of the input, and (2) avoid potentially including highly unrepresentative market economy prices that result from very small transactions that do not reflect bona fide market prices (i.e., small spot markets or sample/test sales with highly aberrant pricing). Such sales frequently involve merchandise that is sold outside the ordinary course of trade, such as sales of questionably quality, test or sample sales, and the like. The inclusion of prices from even relatively small amounts of merchandise sold under such questionable circumstances potentially and improperly may skew the blended factor value for the input at issue, even where the actual amount of the “market economy” input is proportionally attributed.

If the respondent fails to make the required showing, the Department should decline to value any portion of the input using the allegedly market economy values. This would foster an appropriate conservation of the Department’s resources by avoiding the need to value the same input twice when the record does not support this approach. If the initial showing is made, other interested parties may present contrary evidence for the Department’s analysis.

If the Department determines that the input at issue has been obtained from market economy sources in the ordinary course of trade, it would value the amount of that input obtained from market economy sources using the market economy value. The amount of the input that is not obtained from market economy sources would continue to be valued using the existing surrogate valuation methodology.

IV. THE DEPARTMENT SHOULD REQUIRE RESPONDENTS TO ESTABLISH THE COUNTRY OF ORIGIN OF MATERIAL INPUTS

In addition to the methodology outlined above the Department should require respondents to affirmatively establish the country of origin of material inputs. This will further address the potential for manipulation by preventing the valuation of inputs using a market economy price when the input was, in fact, produced in an NME country. For example, if the input is produced in China but is actually sold to the NME producer by a Hong Kong trading company, this input should be assigned a surrogate value as an NME input. This result should not change even if the input actually leaves China and is re-imported by the respondent. Consistent with this approach, we note that the Department recently clarified that it will value raw material inputs that are manufactured in a NME by using a surrogate value, regardless of whether the NME input manufacturer is owned by a market economy entity, the input is purchased with market economy currency, or the input physically leaves the NME and is re-imported prior to incorporation in the subject merchandise. See *Wooden Bedroom Furniture From China*, 69 Fed. Reg. 67,313 (Nov. 17, 2004) (I&D Memo Comment 46); *Polyethylene Retail Carrier Bags from China*, 69 Fed. Reg. 34,125 (June 18, 2004) (I&D Memo Comment 4).

The potential for manipulation also exists where the surrogate value is lower than the potential value of the market economy input. Under these circumstances, the Department should be concerned that respondents may be able to manipulate the calculation by claiming an inability to demonstrate the country of origin of a market economy input in order to have the input valued using a surrogate value. Thus, the Department should require respondents to demonstrate with positive evidence the country of origin of the input, whether the origin is ME or NME. If a respondent refuses or fails to demonstrate the country of origin, the Department should use the

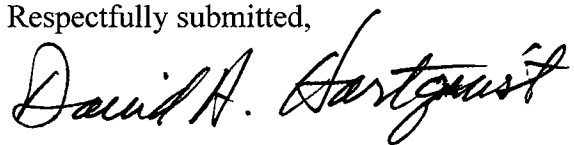
higher of the available surrogate value or market economy price to value the raw material input. This would discourage attempts by respondents to manipulate the Department's margin calculation by claiming an inability to provide information in order to steer the Department toward the most favorable value.

V. **CONCLUSION**

CSUSTL values the opportunity to provide these comments to the Department. For the reasons discussed above, we submit that the Department should revise its current market economy input practice using elements of both options described in the Notice.

Please contact the undersigned with any questions that may arise concerning this submission.

Respectfully submitted,



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