# COMMITTEE TO SUPPORT U.S. TRADE LAWS

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Request for Comments
Office of Policy
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**DELIVERY BY HAND**

Secretary of Commerce
U.S. Department of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Attn: Mr. Lawrence Norton; Mr. Anthony Hill

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

Dear Mr. Secretary:

On behalf of the Committee to Support U.S. Trade Laws, this letter responds to the Department's August 11, 2005 notice requesting comments on proposed changes to the methodology used to value inputs obtained from market economy sources in a proceeding involving a non-market economy country. See Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries, 70 Fed. Reg. 46,816 (Aug. 11, 2005) (the "Notice").

As noted by the Department in the Notice, under its current practice, where an NME producer purchases inputs from market economy suppliers and pays in a market economy currency, the Department normally uses the actual price paid for these inputs to value the input in question, where possible. See 19 C.F.R. § 351.408(c)(1); see also Final Determination of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans from the People's Republic of China, 56 Fed. Reg. 55,271 (Oct. 25, 1991).

Where a portion of the input is purchased from a market economy supplier and the remainder from a non-market economy supplier, the Department will normally use the average price paid for the inputs sourced from market economy suppliers to value all of the input, provided four 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 Fed. Reg. 27,296, 27,366 (May 19, 1997) (the "Preamble"). See also Shakeproof v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("Shakeproof"). Second, this average import price must reflect arms-length, bona fide sales. See Shakeproof, 268 F.3d at 1382-1383. Third, the Department has disregarded all input values it has reason to believe or suspect might be dumped or subsidized. See China National Machinery Import & Export Corporation v. United States, 293 F. Supp 2d 1334 (Ct. Int'l Trade 2003), aff'd, 104 Fed. App. 183 (Fed. Cir. 2004). Fourth, the Department has disregarded the prices of inputs that could not possibly have been used in the production of subject merchandise during the period of investigation or review. See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam, 69 Fed. Reg. 71,005 (Dec. 8, 2004).

On May 26, 2005, the Department solicited comments from interested parties concerning the market economy input valuation methodology employed in proceedings involving producers in non-market economy countries. Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries, 70 Fed. Reg. 30,418 (May 26, 2005).

On June 24, 2005, CSUSTL and other interested parties presented comments and recommendations in response to the Department's May 26, 2005 request. CSUSTL proposed that the Department consider changing its present "all or nothing" approach and the case-by-case determination of what constitutes a "meaningful" quantity of any given input. See Letter from CUSUTL to Secretary of Commerce (June 24, 2005) (available at http://www.ia.ita.doc.gov/download/market-economy-inputs/meip-cmts.html). CSUSTL suggested that the Department instead revise its methodology to determine an input's value using a proportionate combination of surrogate valuation and the cost and amount of the input obtained from market economy sources, once a reasonably threshold was met. Specifically, CSUSTL proposed that where a respondent affirmatively demonstrated that it obtained five percent or more of an input from market economy sources, the Department should value the relevant factor of production using weighted average of the input's market economy price and surrogate valuation. Where a respondent failed to establish that the input was produced in a market economy country, or where less than five percent of the input was obtained from market economy sources, the Department should value the relevant factor of production using surrogate valuation. Id.

Rather than adopt this reasonable proposal, the Department's Notice states that the Department

> is now proposing to use respondents' market economy purchase prices to value all of the input . . . when the majority of each input by volume is

> sourced from market economy countries. Where respondents source less than a majority of the total volume of an input from market economy countries in transactions meeting the Department's other requirements, the Department will weight-average the portion that was purchased from market economy countries, using the actual price paid, with the portion sourced domestically, using a surrogate value.

Notice, 70 Fed. Reg. at 46,817. The Department states that this proposal "is intended to reduce potential distortions in the Department's current market economy inputs practice while continuing to use the average price paid for the inputs sourced from market economy suppliers to value an entire input." Id.

While we believe that this proposal is an improvement on existing practice, we believe that the Department's proposal does not serve the ends described. The Department's proposed valuation methodology would encourage respondents to game the "majority" test by redefining (i.e., sub-dividing) various categories of factor inputs in such a way as to ensure that a majority of certain (redefined) input categories were obtained from market economy suppliers. Only by adopting a reasonable proportional valuation methodology which assigns surrogate values and employs actual market economy import prices in proportion to the actual utilization of factor inputs could the Department avoid such manipulation of the normal value.

As discussed in our June 24, 2005 submission, CSUSTL recognizes the desirability of applying proportionate valuation and supports a revised methodology that employs this approach. Such an approach accurately reflects the actual market economy experience of the producer and fosters the most accurate calculation of antidumping duty margins. To that end, a methodology that relies upon proportional valuation reduces potential distortions in the current practice and should be adopted. CSUSTL believes that the Department should revisit the suggestion that it employ proportionate valuation without limitation once a reasonable threshold has been satisfied and with appropriate factual shows concerning country of origin.

The Department's proposed methodology, however, unnecessarily and without any rational basis limits this approach to situations in which less than a majority of an input is obtained from market economy sources, and does not require any affirmative showing that the input was in fact produced in a market economy country. Limiting that approach by introducing an artificial threshold above which the market economy price will be used to value 100 percent of an input, despite the acknowledged fact that less than 100 percent of the input is obtained from market economy sources, automatically introduces distortion into the calculation methodology that can and should be avoided. It is not clear why the Department would choose to foster accuracy in its dumping margin where a respondent sources less than a majority of an input from market economy sources, but would choose to employ a less accurate methodology where a majority or more of an input is obtained from market economy sources. In all other respects and in all other circumstances the Department requires that actual costs be reported. It stands to reason that surrogate values should be used only to the extent necessary, to wit, in the proportion that they are actually required to value inputs that are not deemed to have been obtained from market economy sources and paid for in a market economy currency.

Next, assuming the propriety of establishing an arbitrary threshold above which all of an input will be valued using the market economy price, the Department's selection of a 50+ percent threshold ("a majority") to trigger valuation of 100% of the input using the market economy price is too low. By definition, the Department's proposed methodology will value all of an input using market economy pricing where virtually equal amounts are obtained from market economy and non-market economy sources. In light of this, the Department should only value 100 percent of an input using market economy pricing related to less than 100 percent of the input's purchases when a very high level of the input – say, 90 or 95 percent – is produced by and obtained from sources that are shown to be in market economy countries. Here again, however, any threshold established by the Department is inherently arbitrary, and arguably indefensible when a more accurate methodology (proportionate valuation at all levels of sourcing) is immediately available and readily may be employed.

The Department's proposed use of proportionate valuation appears to contemplate using proportional valuation where even the smallest amount of an input is obtained from market economy sources. Consistent with our June 24, 2005 comments, CSUSTL respectfully suggests that the Department should include a minimum threshold – 5 percent – below which, for reasons of administrative efficiency and conservation of resources, proportionate valuation will not be used. The Department should not require calculation of a weight-averaged value where de minimis amounts of an input are at issue.

Given the reasonable concerns with avoiding distortion of the record, the Department also should require respondents to affirmatively demonstrate that demonstrate that, broadly speaking, the factor input at issue actually is produced in and obtained from market-economy sources, and is actually used in the production of the subject merchandise. Furthermore, the agency should require that the specific inputs at issue were produced/acquired in legal and legitimate fashion in the market economy, and were exported to the NME at issue legally and legitimately. Where an interested party makes a sufficient evidentiary showing, the Department should adopt a policy of excluding prices associated with stolen, ill-gotten and/or black market goods from consideration in determining factor values. As discussed in CSUSTL's June 24, 2005 comments, this will properly place the burden of properly developing the record on the party in control of necessary information, and will minimize situations in which an input is produced in a non-market economy country but simply channeled through a market-economy trading company.

Similarly, the Department should expressly acknowledge the ability of interested parties to challenge market economy pricing information presented by a respondent. In the event that a party demonstrates that one or more of the four criteria employed by the Department are not satisfied, the Department should decline to rely upon purportedly market-economy prices when valuing an input. Expressly acknowledging the ability of a party to challenge pricing data will foster the development of a compete and accurate record, and thus the accuracy of the ultimate dumping calculation.

The Department should also give serious consideration to liberalizing its current practice with respect to not using actual market prices when it has reason to believe or suspect that the prices were dumped or subsidized. The Departments current practice required a very high evidentiary showing before discarding prices as being dumped. Commerce requires the petitioner to identify and cite an actual official finding of dumping for the particular class or kind against the market country in question. Thus, under Commerce's present practice, international trade statistics showing that average prices from the country of origin of a "market economy input" are conspicuously and demonstrably low relative to prices from other countries does not create a reasonable suspicion so far as Commerce is concerned. Commerce should liberalize its standard to permit a party to demonstrate a reasonable suspicion that prices are dumped on any fair and reasonable grounds.

While CSUSTL recognized the substantial discretion afforded to the Department's methodological choices, we respectfully submit a methodology that maximizes accuracy in the dumping calculation would be the most reasonable and appropriate. To that end, a methodology that employs proportionate valuation where more than five percent of an input is obtained from market economy sources, and that is not limited by the introduction of a arbitrary ceiling above which the input will be valued using only the market economy prices, should be preferred to the methodology that has been proposed in the Notice.

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

Respectfully submitted,

David A. Hartquist

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Executive Director
Committee to Support U.S. Trade Laws