

# 中华人民共和国商务部

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA  
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September 6, 2005

## PUBLIC DOCUMENT

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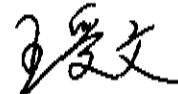
Re: *BOFT Additional Comments on Possible Changes to the Department's Practice of Using Market-Economy Purchase Prices in Non Market-Economy Antidumping Cases*

The Bureau of Fair Trade for Imports and Exports ("BOFT") of Ministry of Commerce of the People's Republic of China provides these additional comments in response to the Department's August 11, 2005 announcement that it is considering specific changes to its policy of valuing the factors of production in NME cases. As provided in its request for additional comments, the Department proposes to continue to use the market-economy prices that an NME respondent paid for a production input to value all of its use of the particular input. However, the Department proposes to restrict this practice to only those cases in which the majority (*i.e.*, over 50 percent) of an NME respondent's consumption of an input by volume was sourced from market-economy suppliers. In all other cases, the Department would determine the value of the production factor by weight-averaging the portion purchased from market-economy suppliers, valued with the actual purchase prices, with the portion of the input sourced from the NME country, valued with surrogates.

BOFT asserts that the Department should reject its proposal for two principal reasons: (1) the Department has not demonstrated that distortions exist in its current practice of valuing the factors of production so as to warrant a new policy on this practice; and (2) the Department's proposed policy would not comply with its regulations.

BOFT appreciates the Department's careful consideration of these comments as well as the comments that we originally submitted on June 24, 2005. As requested by the Department, BOFT provides a signed original and six copies of these comments. We are also providing an electronic version of these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to be '王守文' (Wang Shouwen), written in a cursive style.

Wang Shouwen

Deputy Director General  
Bureau of Fair Trade for Imports and Exports  
Ministry of Commerce

**Before the United States Commerce Department  
International Trade Administration**

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**Additional Comments of the  
Bureau of Fair Trade of Imports and Exports of the Ministry of Commerce,  
People's Republic of China**

*on*

**Possible Changes to the Department's Practice of Using Market-Economy Purchase Prices  
in Non Market-Economy Antidumping Cases**

September 6, 2005

## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| INTRODUCTION .....  | 1           |
| The Department Must First Identify Actual Distortions Before It Can Adopt a New Remedial Policy.....  | 3           |
| The Department's Proposed Policy Is Inconsistent with Its Regulations .....   | 5           |
| 1.    The policy clearly violates the regulations' requirement that the Department normally use the prices paid by NME respondents to market-economy suppliers to value all consumption of a particular input. .... | 5           |
| 2.    A policy that allows surrogate values to be used when actual, market-economy prices are available contravenes the U.S. Antidumping Statute's mandate to use the best available information.....               | 7           |
| 3.    The Department's decision of whether to use an NME respondent's actual purchase prices should not focus on the quantity of these purchases but on their bona fide nature. ....                                | 9           |
| 4.    In the past, the Department has avoided adopting "bright-line" rules. There is no reason why it should do so now.....   | 13          |
| CONCLUSION.....   | 17          |

## INTRODUCTION

On May 26, 2005, the Department published in the *Federal Register* a request for comments on whether it should revise its NME methodology. Specifically, the Department requested comments on whether it should change its practice of valuing all of an NME respondent's consumption of a particular production input with the prices paid to market-economy suppliers. On June 24, 2005, the Ministry of Commerce of the People's Republic of China submitted detailed comments as to why the Department should not restrict in any way its practice of using market-economy prices to value the factors of production in NME antidumping cases.

BOFT asserted in our June 24, 2005 comments that a single actual market-economy purchase price was the best available information to value a factor of production as long as the price was for an arms-length and *bona fide* transaction. BOFT does not reiterate all of the arguments raised in its earlier submission in these comments. Nonetheless, BOFT requests that the Department again carefully consider BOFT's June 24, 2005 submission with regards to its proposed policy.

On August 11, 2005, the Department published in the *Federal Register* a proposal to change the way it values an NME respondent's consumption of an input when some of the input is sourced from market-economy suppliers. Specifically, the Department proposes to use NME respondents' market-economy purchase prices to value all consumption of a particular input if five conditions are satisfied:

1. the volume of the imported input represents a "meaningful" proportion of the total purchases of the input;
2. the average import price reflects arms-length, *bona fide* sales;
3. the Department has no reason to believe that the market-economy import value could be dumped or subsidized;

4. the Department has no concerns of whether the particular input was used during the period of investigation or review to produce the subject merchandise; and
5. *the majority (i.e., 50 percent) of the particular input was purchased from market-economy suppliers.*

The Department's stated purpose for adding the fifth criterion above is to "better ensure that the market economy input purchase prices it accepts are as free as possible from distortions and constitute the best available information."<sup>1</sup> The identified "distortions" with which the Department is concerned are certain parties' allegations that NME respondents may source a small amount of an input at favorable prices with the goal of manipulating the Department's margin calculations.<sup>2</sup> These parties claim that market-economy suppliers may sometimes offer materials used to produce the subject merchandise in limited quantities at drastically lower prices. Under such a scenario, the prices of the purchased input would be lower than the prices at which the NME respondent could otherwise acquire all of the particular input. To our knowledge, such a scenario has never occurred and those suggesting this scenario exists have not identified any examples from the dozens of NME investigation that the Department has undertaken. Thus, the problem the Department is seeking to address is not even known to exist. It is based on speculation.

The Department has requested comments on two specific issues with regards to its proposal. First, it requests comments on whether its proposal will "appropriately address distortions that have been identified in the Department's market economy inputs practice."<sup>3</sup> As

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<sup>1</sup> *Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries*, 70 Fed. Reg. 46,816, 46,817 (Dep't Commerce Aug. 11, 2005).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

explained below, BOFT asserts that the Department cannot adopt a policy to address “distortions” with its practice without first demonstrating that such distortions actually exist. Second, the Department requests comments on whether its proposal would be consistent with its regulations. For the following four reasons, the Department’s recommended policy will not comply with its regulations:

1. The policy clearly violates the regulations’ requirement that the Department *normally* use the prices paid by NME respondents to market-economy suppliers to value all consumption of a particular input.
2. A policy that allows surrogate values to be used when actual, market-economy prices are available contravenes the U.S. Antidumping Statute’s mandate to use the best available information.
3. The Department’s decision of whether to use an NME respondent’s actual purchase prices should not focus on the *quantity* of these purchases but on their *bona fide* nature.
4. In the past, the Department has avoided adopting “bright-line” rules. There is no reason why it should do so now.

Because the Department’s proposed policy will not address either of its stated concerns, this policy cannot be adopted without violating the statute and the Department’s regulations. In addition, it should not be adopted based solely on the speculation of its proponents and in the absence of evidence that the supposed distortions are real.

**The Department Must First Identify Actual Distortions Before It Can Adopt a New Remedial Policy.**

The Department requests comments on whether its proposal would address “distortions that have been identified in the Department’s market economy inputs practice.”<sup>4</sup> In response,

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<sup>4</sup> *Id.*

BOFT asserts that these alleged distortions have not in any way been demonstrated to be actual “distortions”. Rather, the Department is overreacting to mere unsubstantiated allegations by U.S. industries with self-serving interests in antidumping proceedings and illegally gained Byrd Amendment payments.

This argument is not simply a matter of semantics. Instead, one of the principal issues that the Department must address is whether market-economy prices paid by an NME respondent for a portion of its input usage during the review period should be used to value all consumption of this input. BOFT asserts that simply because an NME respondent purchases less than 50 percent of its total usage of an input from market-economy suppliers does not render such prices “distortive.” Where, then, is the alleged distortion?

U.S. domestic industries have painted a picture that the only concern of NME respondents is “gaming” the U.S. antidumping laws in order to obtain more favorable margins. In reality, companies operating in China and other countries deemed NMEs by the Department are operating in the same way as U.S. companies — in ways that will make their companies more profitable. Even if an NME company is able to obtain a production input at a price that is less than a recommended surrogate value in an NME antidumping proceeding, this does not mean that such a price is a “distortion.” The more logical conclusion would be that the surrogate value is distorted because it includes a broader array of products, is not identical to the product in question, is of a different quality, or was subject to any number of other possible distortions.

From BOFT’s perspective, the only parties attempting to game the U.S. antidumping system are domestic U.S. petitioners. These companies want to ensure that the Department values production inputs with the highest possible values — *i.e.*, surrogates — to ensure maximum margins and therefore maximum returns from WTO-illegal Byrd funds. By



encouraging the Department to set abnormally high purchase requirements before valuing all of an input with arms-length, *bona-fide* market-economy prices, these U.S. companies hope to manipulate the dumping rules to ensure high dumping margins.

Before the Department can address a “distortion,” it must first demonstrate that such a distortion actually exists. No documentation or other information has been provided to the public to demonstrate that the market-economy purchases by companies located in NME countries are *per se* distortions when used to value production inputs. The Department cannot adopt a remedial policy to address a distortion that does not exist. This is especially true in this case as the new policy would result in less accurate antidumping determinations and margin calculations.

We note that the proposed policy is contrary to the treatment of inputs in market economy cases where the Department ignores “unreliable” sales and/or purchases but substitutes remaining reliable sales and/or purchases for the unreliable sales or purchases without regard to volume. If the Department is able to identify arms-length, *bona fide* transactions in the context of market economy investigations, including affiliated party transactions, it is difficult to see why it cannot identify such transactions when examining important inputs in an NME context and similarly substitute *bona fide* transactions for less reliable surrogate values.

### **The Department’s Proposed Policy Is Inconsistent with Its Regulations**

1. ***The policy clearly violates the regulations’ requirement that the Department normally use the prices paid by NME respondents to market-economy suppliers to value all consumption of a particular input.***

The Department’s regulations specifically provide that

{t}he Secretary normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a

market economy currency, the Secretary *normally* will use the price paid to the market economy supplier. *In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary normally will value the factor using the price paid to the market economy supplier.*<sup>5</sup>

The Department has proposed the adoption of a policy requiring over 50 percent of an NME respondent's consumption of an input from market-economy suppliers before valuing *all* consumption of the input with such prices. If the Department implements such a policy, it will "normally" value production factors with the average of market-economy prices and surrogate values. This, in turn, will clearly violate the requirements of the Department's regulations to "normally" value all of the consumption of a particular production input with market-economy prices in those situations in which a portion of the input is sourced from market-economy suppliers.

The Department's regulations were drafted with the intention of ensuring the U.S. Antidumping Statute's mandate to value the factors of production in NME antidumping cases with the best available information. As incorporated in the regulations, the actual prices that NME respondents pay to market-economy suppliers for a particular input are the most accurate prices. This is reflected in the regulations' requirement that the Department *normally* use actual market-economy prices to value all consumption of a particular input.

The Department cannot adopt a policy that clearly violates its regulations. The regulations envision that the Department will *normally* use actual prices paid by NME respondents to market-economy suppliers to value all consumption of a particular input. The policy proposed by the Department will result in the Department *rarely* using such prices.

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<sup>5</sup> 19 C.F.R. § 351.408(c)(1) (*emphasis added*).

A review of the Department's decisions in past NME proceedings will demonstrate that the proposed policy would not result in the Department *normally* using actual transaction prices to value all of an NME respondent's consumption of a particular input. BOFT asserts that before adopting the proposed policy, the Department must undertake an analysis of how often it would have used the actual market-economy purchase prices of NME respondents in past decisions to value all consumption of a particular input under such a policy. The Department should undertake such a study and provide all interested parties and the public with the results of this analysis. BOFT is confident that the study's results will indicate that the Department would not have *normally* used the prices paid by NME respondents to value all of their consumption of particular inputs by requiring a 50 percent threshold. If so, the Department should accept this as probative that such a policy will have the same effect in the future. Consequently, the Department will have to conclude that its proposed policy will contravene its regulations and must not be adopted.

**2. *A policy that allows surrogate values to be used when actual, market-economy prices are available contravenes the U.S. Antidumping Statute's mandate to use the best available information.***

BOFT argued in our June 24, 2005, submission that any restrictions on the use of market-economy prices to value the factors of production would contravene the mandate of the U.S. Antidumping Statute. We believe that this is an argument worth reemphasizing. The Department cannot justify a policy that clearly does not comply with the language of its Statute, its regulations, its reviewing courts, and its case precedent.

Section 773(c)(1) of the U.S. Antidumping Statute requires that the Department value NME respondents' production factors with the "best available information regarding the values of such factors in a market economy country or countries considered appropriate by the

administering authority.”<sup>6</sup> The Federal Circuit Court of Appeals has held that where “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.”<sup>7</sup> The Court of International Trade specifically stated that

{w}hile Congress has left it within Commerce’s discretion to develop methodologies to enforce the antidumping statute, any given methodology must always seek to effectuate the statutory purpose -- calculating accurate dumping margins. Whether Commerce’s use of imported prices to value an entire factor of production is reasonable is inextricably linked to whether the methodology promotes accuracy.<sup>8</sup>

The Department has also carefully considered this issue and has clearly stated that using surrogate values over market-economy prices is contrary to the intent of the U.S. Antidumping Statute. Specifically, the Department stated that

{i}n general, the purpose of the antidumping statute is to ‘determine margins as accurately as possible.’ *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1991). 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*

<sup>6</sup> 19 U.S.C. § 1677b(c).

<sup>7</sup> *Lasko Metal Prod., Inc. v. United States*, 43 F.3d 1442, 1446 (quoting *Oscillating Fans and Ceiling Fans from the People’s Republic of China*, 56 Fed. Reg. 55,271, 55,275 (Dep’t Commerce Oct. 25, 1991) (final determinations of sales at less than fair value)). The Court of International Trade has also noted that “the use of surrogate values by Commerce has been determined to be contrary to the intent of the law ‘where we can determine that an NME producer’s input prices are market determined, accuracy, fairness and predictability are enhanced by using those prices.’” *Luoyang Bearing Corp. v. United States*, 347 F. Supp. 2d 1326, 1340 n.8 (Ct. Int’l Trade 2004) (quoting *Lasko*, 43 F.3d at 1446).

<sup>8</sup> *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 59 F.Supp. 2d 1354, 1358 (July 29, 1999) (citing *Lasko Metal Prod., Inc. v. United States*, 810 F. Supp. 314, 317 (Ct. Int’l Trade 1992)).

*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.*<sup>9</sup>

The Department cannot now adopt a policy that would result in ignoring available *bona fide* market-economy prices simply because an NME producer did not purchase over 50 percent of its inventory of a product from market-economy suppliers. To do so and to use surrogate values instead of such actual prices would, in the Department's own words, "be contrary to the intent of the law."<sup>10</sup>

**3. *The Department's decision of whether to use an NME respondent's actual purchase prices should not focus on the quantity of these purchases but on their bona fide nature.***

Inexplicably, the Department is fixated with the issue of the *quantity* of NME respondents' purchases instead of the more germane issue of whether the *prices* represent *bona fide* transactions. The Department states that it will continue to address the issue of whether the purchase prices reflect bona fide sales. The Department must then ask itself — "Do *bona fide* market-economy purchase prices magically become *more bona fide* and therefore better values

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<sup>9</sup> See *Fans from China*, 56 Fed. Reg. at 55,271 at Comment 1 (emphasis added).

<sup>10</sup> *Id.*

simply because they represent over 50 percent of an NME respondent's consumption of a particular product?" The only logical answer is "no."

The Department's proposed policy misguidedly assumes that requiring 50 percent of the total purchases to be from market-economy suppliers will ensure that the *bona fide* prices are more appropriate for the Department's antidumping determinations. We are unsure of whether the Department is simply bowing to current political pressures or whether it has completely abandoned all pretenses of relying on rules of law and logic in developing such a policy. In any event, the Department's proposed policy is untenable on both legal and logical grounds and should not be adopted.

The primary concern of both the U.S. domestic industry and the Department in using NME respondents' market-economy purchase prices is whether such prices are reliable. As cited by the Court of International Trade, the Department's definition of a "meaningful" quantity changes on a case-by-case basis.<sup>11</sup> However, the Department's primary concern is whether the purchase price was *bona fide*. As referenced by the Court of International Trade, the Department "finds a quantity of imports to be meaningful 'if {it} can reasonably conclude from the quantities sold, and other aspects of the transactions, that the price paid is a reliable market economy value for the input'".<sup>12</sup>

Rather than focusing on the quantity of the transactions, which will *not* in any way demonstrate the *bona fide* nature of the market-economy purchase prices, the Department should instead focus its efforts on developing a policy to test the *bona fide* nature of the underlying market-economy prices. An analysis of the *bona fide* nature of the market-economy prices could

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<sup>11</sup> *Shakeproof Assembly Components v. United States*, 102 F. Supp. 2d 486, 492 (June 9, 2000).

<sup>12</sup> *Id.*

focus on the underlying transactions between the NME producer and its market-economy suppliers. Alternatively, the Department could develop tests by which it compares the particular NME respondent's market-economy purchase prices with market-economy prices paid by other NME respondents or with international market prices for the particular input.

In administering the antidumping laws in other contexts, the Department has rejected the principle that a certain quantity of values is necessary before the Department will use such values. For example, in determining whether to use above-cost home market sales for normal value purposes, the Department will use only one sale for margin comparison purposes. On this issue, the Department has stated that

{t}he presumption that normal value includes an element of profit is so strong that the post-URAA statute directs us to use *one above-cost home market sale* as the basis for normal value, *even if hundreds of other sales* have below-cost prices.<sup>13</sup>

Similarly, in applying the "major input rule" to determine the value of a major input that a respondent purchases from an affiliated supplier, the Department uses the highest of the following three options *regardless of the number of transactions concerned*:

1. the price paid by the respondent to the affiliated supplier;
2. the price represented by sales of the major input in the market under consideration;
3. the affiliated supplier's cost in producing the major input.<sup>14</sup>

Given the Department's rejection of quantity-based standards with regards to other aspects of the antidumping laws, we see no justification for implementing such a rule in the case of NME proceedings. Accordingly, the new policy should not be implemented.

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<sup>13</sup> *Silicomanganese from Brazil*, 62 Fed. Reg. 37,869, 37,877 (Dep't Commerce July 15, 1997) (final results of antidumping duty administrative review) (emphasis added).

<sup>14</sup> 19 C.F.R. § 351.407(b).

If the Department decides to revise its policy of using NME respondents' market-economy purchase prices in NME antidumping proceedings, it must not adopt a prohibitively high 50 percent threshold. BOFT continues to assert that a single purchase price, demonstrated as *bona fide*, should be used to value all of an NME respondent's consumption of a particular production input.

However, if the Department is determined to accept an arbitrary percentage threshold on this issue, a 50 percent threshold is unreasonable. Such a large volume of market-economy purchases is unnecessary to address the Department's stated goal of addressing alleged distortions in such prices. Only 9 days before the Department issued its initial request for comments on using market-economy prices in NME cases, it stated in the final results of an administrative review that market-economy purchase prices constituted a "significant amount" if they accounted for only 7 percent of a NME producer's total purchases of the input.<sup>15</sup> U.S. producers have similarly argued that the Department has used purchase prices even when the volume of such purchases represents less than 7 percent of an NME supplier's total purchases of a particular input.<sup>16</sup> Given past positions by the Department and U.S. petitioners on this issue, if a threshold is adopted, the Department must accept a threshold percentage of *less than 7 percent* for valuing all consumption of an input with the *bona fide*, market-economy purchase prices paid for the particular production input.

Moreover, in the event that the Department adopts a "bright line" threshold percentage for determining whether to value all use of a specific production factor with market-economy

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<sup>15</sup> *Helical Spring Lock Washers from the People's Republic of China*, 70 Fed. Reg. 28,274, Cmt. 7 (Dep't Commerce May 17, 2005)(Final Results Issues Memo).

<sup>16</sup> *See Seamless Standard, Line, and Pressure Pipe from Romania*, 68 Fed. Reg. 12,672, Cmt. 1 (Dep't Commerce Mar. 17, 2003) (Issues and Decision Memo).



transaction prices in NME cases, such a policy should be implemented prospectively. Only by applying such a policy on a prospective basis can the Department ensure that it does not violate the due process rights of NME respondents that have structured their U.S. sales on effective Departmental regulations and policies. Moreover, implementing the policy on a prospective basis would conform to the Department's past practice when implementing new policies.<sup>17</sup> Accordingly, in the event that the Department adopts a threshold requirement when deciding whether to use market-economy transaction prices to value all consumption of a specific production factor, such a policy should only apply to NME antidumping investigations initiated after the date on which the policy becomes effective.

Notwithstanding these considerations, the current "meaningful" standard, combined with a requirement that the transactions must be *bona fide*, provides the Department ample authority to address the alleged distortions if and when such distortions actually occur.

**4. *In the past, the Department has avoided adopting "bright-line" rules. There is no reason why it should do so now.***

The Department's objective in adopting a new policy on valuing inputs in NME antidumping cases with market-economy prices is to address alleged "distortions" in such prices.<sup>18</sup> BOFT asserts that the Department cannot demonstrate discernable "distortions" in its current practice of using market-economy prices to value *all* of an NME respondent's consumption of a particular production factor. Even if it could, a "bright-line" requirement that

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<sup>17</sup> *Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, Import Administration Policy Bulletin Number 05.1 (Dep't of Commerce Apr. 5, 2005); *Application of the Interest Provisions in Section 778(a) of the Tariff Act to Entries Made Pursuant to a Subsequently Rescinded New Shipper Bonding Privilege*, Policy Bulletin Number 03.3 (Aug. 26, 2003).

<sup>18</sup> *See Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries*, 70 Fed. Reg. 46,816, 46,817 (Dep't Commerce Aug. 11, 2005).

50 percent of total input purchases must be sourced from market-economy suppliers before these prices could be used to value all consumption of an input will not satisfy the Department's objective.

The Department should not adopt a "bright-line" 50 percent threshold requirement for using the market-economy prices to value all of an NME respondent's consumption of an input because it cannot demonstrate that this policy will result in more accurate antidumping determinations. When faced with the option of using actual transaction prices or surrogate values, only one of these options can satisfy the U.S. Antidumping Statute's requirement of using the *best available information*.

Under the Department's proposal, unless an NME respondent sources over 50 percent of its consumption of a particular input from market-economy sources, the input will be valued by weight-averaging the actual market-economy prices and surrogate values for such an input. Logically, when faced with two options — in this case *bona-fide*, product-specific prices or surrogate values — only one of these options can be the "best" available information. In all cases in which the Department has an arms-length, *bona-fide*, and product-specific price, this is the "best information available."

Simply because the percentage of inputs purchased from market-economy suppliers reaches an arbitrary level of 50 percent does not magically transform these values into the most appropriate values. They are the most appropriate values under the U.S. Antidumping Statute because they provide precise values for the specific input in question. These values, based on the particular NME respondent's actual commercial transactions, will result in the most accurate dumping determinations and margin calculations.

The adoption of a “bright-line” 50 percent threshold requirement for only using market-economy prices to value all of an NME respondent’s consumption of an input eliminates the Department’s ability to analyze and evaluate record evidence about such prices. If the market-economy price is arms-length and *bona fide*, it will necessarily be more accurate than any surrogate information submitted on the case record because it is (1) a demonstrably legitimate price, (2) product-specific, and (3) based on the NME respondent’s actual market-economy pricing conditions. The Department’s duty with regards to these prices is to analyze the information on the case record to determine whether the prices are legitimate and *bona fide*.

As it does in all other cases involving factual information submitted on the case record, the Department must evaluate an NME respondent’s market-economy purchase prices to determine whether these prices are the most appropriate values for particular inputs. Adopting a “bright-line” threshold of 50 percent before using these prices to value all of a specific production factor will preclude such an analysis. Can the Department with a straight face assert that it should value all of one NME respondent’s inputs with market-economy purchase prices, simply because these prices represented over 50 percent of total purchases, while denying to do so for another respondent whose purchases represented 45 percent? How about other NME respondents’ whose purchases represented 40 percent, 35 percent, and so on? Of course not.

The Department has rejected “bright-line” tests in the past, and it should do so on this issue. In rejecting such a “bright-line” test in determining the date of sale for long-term contracts, the Department stated that

even in the case of long-term contracts, the *Preamble rejects a bright-line rule* for date of sale, stating that “[b]ecause of the unusual nature of long-term contracts . . . the Department will

continue to review these situations carefully on a *case-by-case basis*.<sup>19</sup>

Similarly, with regards to agency issues, the Department stated that

{t}he analysis of whether a relationship constitutes one of principal-agent is a fact-driven, case-specific determination; there is no bright line test.<sup>20</sup>

Moreover, on its policy of evaluating change in ownership and privatization for purposes of subsidy determinations, the Department stated that its

criteria were carefully selected to enable the Department to make as meaningful a comparison as possible between the nature of the pre-sale entity, upon which the subsidies were originally bestowed, and the post-sale entity, the current producer or exporter of the subject merchandise. This inquiry does not lend itself to a bright-line test because of the multi-faceted makeup of a legal person (as opposed to a natural person).<sup>21</sup>

The Department's precedent demonstrates that it does not adopt "bright-line" rules for those issues that depend on the specific facts of a particular case. The determination of the most appropriate values to use in a particular NME antidumping case necessarily depends on the specific facts of the case. In a particular proceeding, the Department must first analyze the market-economy purchases to determine whether they were *bona fide*. The Department will then need to examine other factors to ensure the appropriateness of such purchase prices to value particular inputs.

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<sup>19</sup> *Saccharin from China*, 67 Fed. Reg. 79,049, 79,054 (Dep't Commerce Dec. 27, 2002)(prelim det) (emphasis added).

<sup>20</sup> *Hot-Rolled Flat-Rolled Carbon Quality Steel from Brazil and Termination of the Suspension Agreement*, 67 Fed. Reg. 6,226 (Dep't Commerce February 11, 2002)(admin rev susp agmt final results, issues memo to Faryar Shirzad from Joseph Spetrini) (emphasis added).

<sup>21</sup> *Final Results of Redetermination Pursuant to Court Remand - Allegheny Ludlum Corp., et al., v. United States*, Consol. Court No. 99-09-00566 Remand Order (CIT Aug. 15, 2000) (emphasis added).

Once satisfied that an NME respondent's market-economy purchase prices are legitimate, the Department should determine that these prices are the *best available information* to value the NME respondent's consumption of a particular production factor. Because this evaluation necessarily depends on the particular factual circumstances of an NME respondent's purchases, the Department should follow its precedent and reject a "bright-line" rule on this issue.

## CONCLUSION

BOFT has said it before, we say it now, and we will say it again — the Department should not adopt a policy that will restrict *in any way* its use of actual market-economy prices to value NME respondents' production factors.

The Department cited two objectives in soliciting comments on its proposal to revise its methodology of valuing all of an NME respondent's consumption of an input with actual market-economy prices. First, it wanted to know whether its proposed policy would address alleged distortions in its practice. Second, it wanted to know whether its proposed methodology would be consistent with its regulations. As asserted above, neither of the Department's objectives will be satisfied by a revision to its policy. Instead, the principal result of adopting such a proposal would be to ensure that the Department did not satisfy its statutory and regulatory obligations to use the "best available information" when valuing the factors of production in NME antidumping proceedings. In our view, the proposal would also violate U.S. obligations under the WTO Antidumping Agreement as modified by China's accession protocol.

BOFT again respectfully requests that the Department refrain from restricting its current NME practice of using arms-length, *bona fide* market-economy import prices to value all of an NME respondent's consumption of a particular input. This is an important issue that will

directly impact the accuracy of the Department's antidumping determinations in NME proceedings.

Before adopting its proposed policy, the Department must address the arguments submitted by interested parties. The weight of these arguments demonstrate that such a policy would contravene the Department's statute, regulations, precedent, and the precedent of its reviewing courts. Addressing these concerns will clearly demonstrate that the Department's proposed policy is based on the rule of expediency rather than the rule of law.