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**PUBLIC DOCUMENT**

Via HAND DELIVERY

Joseph A. Spetrini
Acting Assistant Secretary for Import Administration
International Trade Administration, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street NW
Washington, D.C. 20230

**Re: Request for Comments on Proposed Change to Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries**

Dear Assistant Secretary Spetrini:

On behalf of Shing Mark Enterprise Co., Ltd. ("Shing Mark"), pursuant to the Department's request (70 Fed. Reg. 46,816, August 11, 2005), we submit the following comments on the proposed change to the Department's market economy inputs practice in antidumping proceedings involving Non-Market Economy ("NME") countries. As requested by

the Department, six copies of this submission have been submitted to the Department, as well as an electronic version in PDF format.

**Introduction**

Despite its longstanding recognition that market economy purchase ("MEP") prices typically provide the most accurate information for valuing a respondent's inputs, and despite a range of serious concerns raised by several commenters in June regarding possible changes to its existing practice, the Department now proposes to use MEP prices to value inputs only where more than 50% of the input volume is sourced from a market economy, and to use a combination of MEP and surrogate values in all other cases. This proposal is contrary to law, unreasonable, and fails even to address the Department's stated concern with potential manipulation of input prices.

## I. Use of Surrogate Values Where Undistorted MEP Prices Are Available Is Illogical and Contrary to Law

As Shing Mark and other commenters have previously noted, using inherently less accurate surrogate values when undistorted MEP prices are available is fundamentally at odds with the statute, which requires that the valuation of factors of production 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." 19 U.S.C. § 1677b(c)(1) (emphasis added); *see also* Letter from Steptoe & Johnson LLP to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration (June 24, 2005) ("Comments of Shing Mark"), at 6-7. The Department proposes to continue to use surrogate values for the portion of the input purchased in a NME, despite the fact that undistorted, *bona fide* MEP prices are available, prices that the Department acknowledges are appropriate to value that very input — indeed, prices that

*it intends to use* to value the remainder of the input. This approach does not accord with the requirement under 19 U.S.C. § 1677b(c)(1) to use only "the best information available," or with the Department's general obligation to calculate dumping margins as accurately as possible. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1991).

This point was explicitly recognized by the Federal Circuit in *Lasko Metal Products*, where the court found that "[u]sing surrogate values when market-based values are available would, in fact, be contrary to the intent of the law." 43 F.3d 1442, 1446 (Fed. Cir. 1994) (quoting *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55,271, 55,275 (Dep't Commerce 1991). Market-based MEP prices represent the best information available, and must alone be used to value the input when they exist on the record. As Congress and the Department have recognized, surrogate values are simply less accurate and reliable than market prices, and therefore cannot constitute the "best information available" where MEP prices exist.[1] Whereas an actual market price is "determined by market economy forces" and "has been paid to the market economy supplier by the respondent in convertible currency," the surrogate value "at best" represents "only an estimate" of what the NME producer might pay for the input. Redetermination on Remand, *Certain Helical Spring Lock Washers from the People's Republic of China* (Dep't Commerce Sept. 27, 1999). Thus, the approach now proposed would violate the plain language of the statute and would be directly contrary to prior decisions of the Federal Circuit.

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[1] *E.g., Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 13401 (Dep't Commerce Mar. 18, 1999) ("We also believe that reliable import prices for the same input are a better means of valuing an input than surrogate values."); *Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 Fed. Reg. 60,980 (Dep't Commerce Oct. 14, 2004) ("Normally, market economy inputs provide more accurate values.").

Moreover, the suggested approach is simply illogical, and does not even address the Department's stated concerns regarding distortion. Using MEP prices to value some of an input, while using surrogate values for the remainder, does not ensure that the Department avoids relying on distorted prices, but rather amounts to a finding that there are two, equally accurate prices for a single input. As Shing Mark previously noted, such a determination is without basis in logic — if the market economy prices the Department has identified are "actual prices," there is no rational reason why they should not be used to value the entirety of the input. If they are not "actual prices," then there would be no basis to use them to value any fraction of the input. The Department states that its goal 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." 70 Fed. Reg. at 46,817. Yet, the proposed methodology does nothing to prevent the Department from relying on distorted prices, and in fact, would require the Department to use distorted surrogate values in a greater number of instances. Price distortion is not a function of the share of an input purchased from market economies: the mere fact that a respondent sources less than 50% of a given input from a market economy supplier does not permit the conclusion that its MEP prices are distorted, or otherwise do not represent "actual prices." While other factors may cause distortion, the Department has routinely used the ample discretion available to it under the regulations to decline to use MEP prices on that basis. *See* Comments of Shing Mark (June 24, 2005) at 5.

The various theories offered by certain commenters on how respondents might manipulate their market economy purchases to undermine the antidumping calculation are unsupported by facts or basic economics. 70 Fed. Reg. at 46,817. Neither the Department nor any commenters have pointed to any actual circumstance in which the Department encountered

such manipulative behavior, much less a situation it was unable to address using its existing discretion under the regulations. As the Department has elsewhere recognized, policy changes should not be premised solely on "theoretical examples" or "hypothetical scenarios." *Tapered Roller Bearings and Parts Thereof from Japan*, 63 Fed. Reg. 20,585, 20,592 (Apr. 27, 1998); *Changes in the Insular Possessions Watch, Watch Movement and Jewelry Program*, 67 Fed. Reg. 77,407, 77,407 (Dec. 18, 2002).

Finally, to the extent that the Department's revised methodology is intended to address respondents' attempts to "manipulate" sales so as to reduce their dumping margins, the remedy it proposes is overbroad. Certainly, the proposed 50% rule goes well beyond the "small amount" or "limited quantities" the Department suggests could be used to distort prices. Furthermore, in an investigation, there is no prospect for manipulation — the sales and purchases at issue were made long before a respondent knew it would be subject to antidumping liability — yet the Department does not limit its proposal to administrative reviews. The proposed changes thus are overly broad, and do nothing to remedy the concern (itself conjured from hypotheticals) that the Department claims to be attempting to address.

## II. 50% Threshold Is Unlawful and Unreasonable

In addition to the problems outlined above, the Department's proposal is premised on a 50% threshold that is itself arbitrary and inconsistent with the regulations and prior court decisions. 19 C.F.R. § 351.408(c)(1) provides that:

> 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.

19 C.F.R. § 351.408(c)(1) (emphasis added). If the Department only values an input using MEP prices where a majority of the input is purchased from market economy suppliers, it will have effectively read "normally" out of the regulations, as only in the exceptional case will MEP prices, rather than surrogate values, be used to value the factor. Consistent with the statute, the regulations are designed to ensure that only in exceptional cases are surrogate values applied to an input where MEP prices exist, and the Department's proposed policy change thus contravenes an express directive contained in the regulations.

A 50% threshold also is inconsistent with prior decisions of the Federal Circuit, which has found market economy purchases to constitute a "meaningful" volume when they account for far less than 50% of the overall volume of a given input purchased. See e.g., *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (finding purchases of steel that constituted approximately one-third of all steel used by respondent in manufacturing subject merchandise were "meaningful" volume). Certainly the Department may not adopt a threshold beyond that which has been sanctioned by U.S. courts.

Finally, the 50% threshold results in a substantially higher standard for demonstrating the existence of valid market economy prices than that which the Department currently applies for identifying a surrogate country price. In past investigations, the Department has relied upon surrogate prices reflecting relatively small transaction volumes, because it has found that the data is not distortive and is not inconsistent with other price information for a given input. *E.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 Fed. Reg. 20,594 (Dep't Commerce April 16, 2004) (using as surrogate value import data covering less than 100 kilograms of chokes and coils). *See also Shakeproof*

*Assembly Components Division of Illinois Tool Works, Inc. v. United States*, 59 F. Supp. 2d 1354, 1358-59 (Ct. Int'l Trade 1999). There is no basis to permit the use of surrogate values based on extremely small transaction volumes, but require substantially greater volumes when relying upon actual, verifiable market economy prices.

As Shing Mark has noted in previous comments, any specific threshold such as that proposed by the Department will be insufficiently flexible to account for the particular circumstances of a given NME respondent. If the Department nonetheless imposes some volume-based threshold, Shing Mark submits that market economy prices representing transaction volumes constituting 5 percent or more of the importer's total purchases of a given input, should give rise to a strong presumption that these purchases are "meaningful." Furthermore, *bona fide* market economy imports constituting less than 5 percent of the producer's total input purchases should not be *per se* disqualified from consideration.

## III. The Department's Proposed Change in Policy Leaves Basic Questions Unanswered

If, despite the concerns noted above, the Department proceeds to change its practice regarding the valuation of NME inputs, it must at minimum address basic questions raised by Shing Mark and others, and thus far ignored by the Department, regarding how the change is to be applied. In particular the Department should clarify the following:

- Non-retroactivity. As Shing Mark noted in previous comments, should the Department alter its regulations or its practice with respect to the use of market economy inputs to value NME factors of production, it must make clear that it will continue to apply the current methodology to proceedings initiated or review periods already begun, or to input purchases made prior to the adoption of the new regulation or practice. *See* Comments of Shing Mark (June 24, 2005) at 8.

- Calculation of "Majority" by Volume. The Department should clarify how it intends to determine whether a "majority" of the volume of a given input was

> obtained from market economy suppliers. For example, the Department should indicate whether it intends to rely on purchases made during the period of investigation only, or if it will also consider pre-POI purchases as well, given that such purchases are often used in the production of subject merchandise sold during the POI. Furthermore, the Department should provide some additional guidance as to how it proposes to define the input product for purposes of applying the new rule.

Finally, given the considerable time and resources expended by various parties, including Shing Mark, in an effort to provide the Department with comments to assist it in evaluating its NME policies, Shing Mark respectfully requests that the Department fully address the concerns raised herein and in previous submission should it proceed to change its regulations or policies following consideration of these issues. In addition, if the Department chooses to change its regulations regarding the use of market economy prices to value NME inputs, it must provide for notice and comment pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 553 (1982). Neither the May 2005 notice nor the August 2005 notice satisfies the requirements prescribed by the APA. *See* Comments of Shing Mark (June 24, 2005) at 11.

* * *

This submission has been served as indicated on the attached certificate of service. Please do not hesitate to contact the undersigned if you should have any questions.

Sincerely,

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Elissa M. Alben

*Counsel for Shing Mark Enterprise Co., Ltd.*

## CERTIFICATE OF SERVICE

I, Elena Volochay, hereby certify that copies of the attached document of the Shing Mark Enterprise Co., Ltd., were served this 6th day of September, 2005, via first class mail upon the following parties:

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