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By Courier and E-mail

Mr. Joseph 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, D.C. 20230

Re: Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries; Comments on Proposed Change, 70 Fed. Reg. 46816 (August 11, 2005)

Dear Mr. Spetrini:

We are writing in response to the notice published by the Department of Commerce (the "Department") in the Federal Register requesting comments regarding the Department's proposed change in certain aspects of its policy and practice regarding market economy input prices in non-market economy ("NME") antidumping proceedings. The proposal, purportedly in response to comments submitted to the agency in June, unfortunately would establish a bright-line of 51 percent as "meaningful," contrary to the more flexible, case-by-case, standard necessary to ensure that the most accurate, fair and predictable data is used. On behalf of our clients, who include both manufacturers with production facilities in NME countries and U.S. importers of goods produced in NME countries, we oppose the proposal.

We strongly urge the Department not to abandon its discretion to identify the "best available information," as required by the NME provision of the statute, 19 U.S.C. § 1677b(c)(1), by imposing an arbitrary minimum threshold to constitute a "meaningful" quantity to support the use of market economy prices to value the entire quantity of an input.

The Court of Appeals for the Federal Circuit has previously held that there is no one quantity that constitutes "meaningful," stating that "the level of a 'meaningful' amount of imported merchandise **must be determined on a case-by-case basis.**" *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (emphasis added). The court

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recognized that the decision as to what is a “meaningful” quantity will vary from one case to another, thus implying that a bright-line threshold – such as 51 percent -- is not be appropriate.

While the new proposal attempts to paint a 51 percent standard as balanced and designed to avoid distortions, it would effectively set aside the decision in *Shakeproof*. As noted by the Department at the time it promulgated its regulations, a quantity is “meaningful” if it is “not insignificant.” 62 Fed. Reg. at 27366. Both terms are necessarily relative. “Significant” does not mean “majority.” What is significant for one industry or product may be insignificant for another. Given the wide diversity of products subject to NME antidumping investigations, from steel to wooden furniture to plastic bags to garlic, and the number of inputs involved in the production of this highly diverse universe of goods, a “one size fits all” presumption regarding the valuation of those inputs will likely work to the disadvantage of traders.

A fixed requirement that at least 51 percent of the input must be sourced from a market economy in order for that market economy input price to be used will very likely reduce the number of instances in which market economy values will be given full consideration, even though such values are generally going to be more commercially realistic than surrogate values, which are often highly distorted and contrived (because they are typically based upon basket categories of merchandise rather than an exact match with the actual input). Even the smallest quantity of market economy purchases is likely to more reflective of actual prices than surrogate data.

The Department’s proposed revision to its practice would in effect create a preference for surrogate values over actual market prices actually paid by the respondent. This revision in practice would clearly derogate from the objective recognized by both the Department and the Court of Appeals of achieving accuracy, fairness and predictability in the NME valuation methodology.¹ Thus, despite the fact that the Department is required by law to calculate a dumping margin as accurately as possible, the proposal to fix a 51 percent threshold for applying the market economy price to all purchases of a particular input would inevitably and arbitrarily increase the use and influence of, which is inherently less accurate surrogate data.

The proposed change also would, whenever the market economy price for an input accounts for less than 51 percent of the purchases, effectively render irrelevant two of the three criteria established to determine whether a market economy input price is appropriate. The current criteria are: 1) whether the purchased quantity of market economy inputs was “meaningful,” 2) whether the purchases were aberrational or not otherwise arms-length, and 3) whether the purchases were from suppliers found to have dumped or subsidized goods. See, e.g., *Olympia Industrial, Inc. v. United States*, 36 F. Supp. 2d 414 (CIT 1999); *Circular Welded Carbon-Quality Steel Pipe from the People’s Republic of China*, 67 Fed. Reg. 36570 (May 24, 2002) (Issues Memorandum, Comment 1). These criteria have been more than sufficient to

¹ See *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Fed.Cir. 1994) and 62 Fed. Reg. 27296, 27366 (May 19, 1997), promulgating 19 C.F.R. Section 351.408(c)(1).

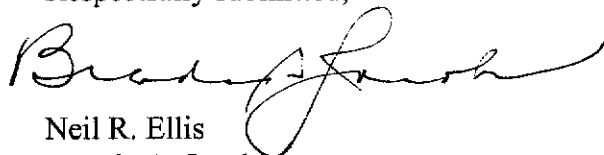
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ensure that market economy purchases are not manipulative, and there is no reason to believe that they will not continue to serve that objective. Inquiry into whether a transaction price is aberrational and fair are important bases for identifying whether a market economy price is reliable and should not be disregarded simply because the quantity purchased from a market economy is less than 51 percent.

The Department's longstanding practice has functioned well for the purpose of determining factor values in this complex area. Replacing that practice with a rigid threshold for the quantity of a given input from a market economy supplier to qualify as "meaningful," in order to value all of the input at the market economy price, would seriously undermine the accuracy and fairness of the Department's dumping determinations in NME proceedings. We therefore submit that the Department should not revise its practice.

We appreciate the opportunity to submit these comments to the Department. If you have any questions regarding the contents of this letter, please feel free to contact the undersigned.

Respectfully submitted,



Neil R. Ellis
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