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September 6, 2005

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

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

Dear Mr. Spetrini:

We provide the following comments in response to the Department's August 11, 2005, proposed change to its market economy inputs approach (70 Fed. Reg. 46816). While the Department has couched its proposal as an amendment to its practice, rather than a modification in the regulation (see 19 C.F.R. § 351.408(c)), and though the proposed change on its face appears quite benign, we hope that the Department has not foreclosed consideration of any issue and that the Department will respond deliberatively to each of our comments.

The Department Has Not Identified Any Distortions in Its Practice

The Department has asked whether its proposal "would appropriately address distortions that have been identified in the Department's market economy inputs practice." 70 Fed. Reg. at 46817. So far, the Department has not specifically identified any actual distortions in its market

economy inputs practice, and its proposed change in practice therefore cannot meet any articulated objectives.

In its first request for comments, the Department noted that "there is further *concern* that our current practice *may* allow parties to manipulate the Department's margin calculations by sourcing just enough of an input from market economy suppliers so that the market economy price is used to value the entire input." 70 Fed. Reg. at 30418 (emphasis added). In its second request for comments, the Department cited the concern of interested parties who have "*alleged* that it *may be possible*" for parties to abuse 19 C.F.R. § 351.408(c) with the purpose of manipulating the Department's margin calculations. 70 Fed. Reg. at 46817 (emphasis added). If...alleged...concern...may be possible... If the Department were to change its antidumping practice in response to every allegation, then it would spend eternity drafting new procedures and implementing new practices to address every possible imaginable scenario. This is neither an effective nor practical way to implement the antidumping law.

In its requests for comments, the Department has not provided an explanation supported by any actual facts for its implied conclusion that the proposed methodological change in practice to 19 C.F.R. § 351.408(c) is either necessary or will result in more accurate margins. We are long past the time when the antidumping law can be implemented based on supposition, conjecture, or theoretical problems. Commerce cannot base its methodologies on mere hypotheticals. See, e.g., Antidumping Duties; Final Rule, 62 Fed. Reg. 27296, 27346 (May 19, 1997) ("In our view, the drafters of the URAA and the SAA were not dealing with abstract concepts, but instead were dealing with issues concerning the application of a law to real life factual scenarios. As the Federal Circuit stated many years ago in connection with this very issue: 'In a purely metaphysical sense, Smith-Corona is correct in that the ad expense cannot be

directly correlated with specific sale. Yet, the statute does not deal in imponderables.' Smith-Corona Group v. United States, 713 F.2d 1568, 1581 (1983).").

The current statutory provision addressing the calculation of normal value in antidumping proceedings involving nonmarket economies ("NME") was enacted as part of the Omnibus Trade and Competitiveness Act of 1988. After eight years of experience, the Department decided to codify its practice of valuing the input with the price paid to the market economy supplier (and not with the price derived from a surrogate) when a portion of the NME producer's input is sourced from a market economy source and the remainder is sourced from suppliers within the NME. 19 C.F.R. § 351.408(c). Since 1997, the Department has had an additional eight years of experience using the actual price paid for market economy inputs to value the input in question of the NME producer, and has refined its practice even further. We presume that if NME respondents had sourced small amounts of ME inputs on favorable terms with the goal *and* result of manipulating the Department's margin calculation, and the Department was not able to address such problems under its "meaningful" and "bona fide" analyses, the Department would be able to cite to such examples. Before changing a practice that has *not* been shown *not* to work, the Department should point parties to real world examples of problems with the existing practice. The Department should not change its practice simply in response to allegations of mere possibilities.[1] Accuracy is not enhanced by changing a functioning practice in response to a hypothetical problem.

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[1] See also Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 69186, 69196 (November 15, 2002) ("Regarding the proposal that we exempt respondents from downstream sales reporting where they can show such sales were made at prices below the relevant upstream sale and agree to use the upstream sale in its place, we do not believe it would be appropriate to address such hypothetical situations."); Tapered Roller Bearings and Parts Thereof From Japan, 63 Fed. Reg. 20585, 20592 (April 27, 1998) (Comment

The Proposed Change in Practice Is Not Sufficiently Explained

To the degree that there have been specific instances where NME respondents have sourced small amounts of ME inputs on favorable terms with the goal and result of manipulating the Department's margin calculation, *and* the Department has not been able to address such problems under its "meaningful" or "bona fide" analyses, then a change in practice might be warranted. But it is not clear that the Department's proposal would appropriately address problems in its market economy inputs practice because the Department's current proposal is not sufficiently explained. The Department states simply that it will maintain its current practice with the exception that it will 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." 70 Fed. Reg. at 46817. This proposal requires clarification.

1. Does the proposal refer to inputs in the singular or the plural? The first part of the proposal refers to a single "input." The second refers to "the majority of each input." Does the Department intend to use a respondent's market economy purchase prices to value all of *an* input only when the majority of *all* inputs are sourced from market economy countries?

2. Is the "majority of each input by volume" to be determined on a purchase basis or on a "consumed in production" basis?

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8) (citations omitted) ("While Fuji argues that our 99.5 percent arm's-length test produces arbitrary results, it failed to provide a single example from its own data supporting its assertions. Fuji presents only theoretical examples of why the arm's-length test is distortive and we have no basis upon which to conclude that our test is unreasonable. Furthermore, not only is our 99.5 percent arm's-length test methodology well established...but the CIT has repeatedly sustained this methodology.").

3. Does the Department intend to calculate the "majority of each input" amount before or after market economy import purchase volumes are disregarded for "meaningful volume," "bona fide sale, or "dumped or subsidized" reasons?

4. In its calculation of the "majority of each input," does the Department intend to disregard domestic purchases as well for "meaningful volume" or "bona fide sale" reasons? Not to do so would seem like the Department is adopting an inconsistent approach.

5. What is the time period to be considered when calculating the sourcing percentages? This question is relevant because the sourcing of inputs occurs before production, and many respondents purchase market economy inputs *prior* to a period of review that are consumed in production subsequently *during* the period of review. See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from Romania, 70 Fed. Reg. 34448 (June 14, 2005) (Comment 3); Ferrovanadium and Nitrided Vanadium From the Russian Federation, 62 Fed. Reg. 65656, 65661 (December 15, 1997). It would be inconsistent for the Department to ignore pre-POR prices paid to market economy suppliers while at the same time disregarding "the prices of inputs that could not possibly have been used in the production of subject merchandise" during the period of review because they were purchased too late during the period of review.

6. Will there be a different practice for original less-than-fair-value investigations where respondents presumably have not been making input sourcing decisions with any consideration of the Department's NME normal value calculation methodology?

7. To the degree that the Department does implement changes in its policy and practice, will it follow its usual practice and implement such changes only in those antidumping proceedings that are initiated after the publication of any notice announcing such changes? See,

e.g., Separate Rates and Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries, 70 Fed. Reg. 17233 (April 5, 2005).

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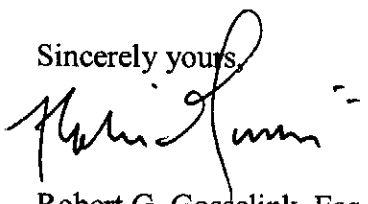
Thank you for the opportunity to provide these comments. In accordance with the Department's request for comments, we are filing the original and six copies of this public document. We also are submitting these comments separately in electronic form to the webmaster indicated in the Department's August 11, 2005, request.

Sincerely yours,



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