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MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA
2, DONG CHANG'AN STREET, BEIJING, CHINA 100731

June 24, 2005

PUBLIC DOCUMENT

The Honorable Joseph A. Spetrini
Acting Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit; Room 1870
U.S. Department of Commerce
Pennsylvania Avenue at 14th Street, N.W.
Washington, D.C. 20230

Re: *MOFCOM Comments on Possible Change in Practice Concerning Use of Imported Inputs in NME AD Cases*

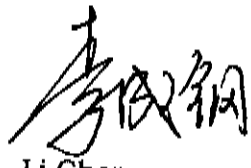
Dear Mr. Assistant Secretary:

The Ministry of Commerce of the People's Republic of China hereby submits comments on possible changes to the Department's practice of using actual transaction prices paid by respondents for imported inputs from market economy suppliers when calculating antidumping margins for producers in non-market economies.

The enclosed comments are submitted pursuant to the Department's Request for Comments that was published in the *Federal Register* on May 26, 2005.

The comments are provided in the attached paper. In accordance with the Department's request we provide six copies of the comments and a CD containing MOFCOM's comments in electronic form.

Respectfully submitted,



Li Chenggang

Deputy Director General

Bureau of Fair Trade for Imp & Exp

Ministry of Commerce

Before the United States Commerce Department
International Trade Administration

Comments of the Ministry of Commerce, People's Republic of China

on

Possible Changes to the Department's Practice of Using Actual Transaction Prices of Imported Inputs in the Antidumping Margin Calculations for Non-Market Economies

June 24, 2005

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Introduction and Summary

This submission provides the comments of the Ministry of Commerce of the People Republic of China ("MOFCOM") concerning possible changes to the Department of Commerce's (the "Department") practice of using actual transaction prices paid by respondents for imported inputs from market economy suppliers when calculating antidumping margins for producers in non-market economies ("NME"). These comments are submitted in response to the Department's request for such comments, as set forth in the Department's Federal Register notice of May 26, 2005.[1] MOFCOM appreciates the opportunity so submit these comments and participate in the discussion of this issue.

In brief, MOFCOM urges the Department to take into account the following when evaluating this issue:

- The Department's *current practice* of using actual transaction prices paid by respondents for an imported input from a market economy supplier to value the *total quantity* consumed of that input, even though the respondent purchased the input from both market economy and NME suppliers, *is fully consistent with the mandate of the statute* to utilize "best available information" and the Department's stated goal of promoting accuracy, fairness and predictability.

  In fact, the Court of Appeals for the Federal Circuit (the "Federal Circuit") has not only endorsed and affirmed the Department's practice but also has ruled that "**using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law**."[2]

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1 *See* Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries, 70 Fed. Reg. 30,418 (Dep't Commerce May 26, 2005).

2 *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) [hereinafter

- Given that, at its core, this issue concerns how to use *market economy prices* in the antidumping margin calculation, the Department's examination of this issue should be guided by its long-standing experience and practice of using arms-length sales and purchase prices in market economy antidumping cases. The Department's practice demonstrates that a specific quantity of arms-length sales or purchases is NOT required to utilize the prices of such sales and purchases in the antidumping margin calculation for market economy cases. Indeed, under the Department's practice since 1995, it is possible for *a single* above-cost home market sales transaction to constitute normal value in the antidumping margin calculation.

  MOFCOM submits that there is no reason not to apply the same practice to arms-length purchases of imported inputs from a market economy supplier. If a *single arms-length* home market sales transaction in a market economy can constitute an adequate representation of all prices that a foreign market economy producer charges in its home market, there is no reason why a *single arms-length purchase transaction* from a market economy supplier could not likewise constitute an adequate representation of the market economy price for that input.

- The Protocol on the Accession of the People's Republic of China to the World Trade Organization (the "WTO") provides only a limited exception to the rules otherwise governing the determination of the margins of dumping; namely, limiting the rejection of information submitted by respondents to "Chinese costs and prices" when such costs and prices are not subject to market economy conditions. Costs and prices of market economy inputs in investigations of NME dumping are not subject to different treatment than the treatment of costs and prices in a market economy investigation.

- The concerns with the Department's practice that were identified in the Federal Register notice are not valid and therefore do no justify a restriction of the Department's practice.

Fans from the PRC]). *See also Luoyang Bearing Corp. v. United States*, 347 F. Supp. 2d 1326, 1340 n.8 (Ct. Int'l Trade 2004) ("The Court notes 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.'" (quoting *Lasko*, 43 F.3d at 1446)).

The first identified concern was that "basing the entire input value on a small amount of purchases might not be the most accurate reflection of what a company pays to source the entire input." MOFCOM submits that such concern applies the wrong standard.

Under the law, the issue is not whether actual purchase prices of imported inputs is the "most accurate" reflection of what the respondent would pay for the input in market economy; rather, the issue is simply whether such prices are better, *i.e.*, more representative, than the alternative, *i.e.*, using surrogate values from a comparable market economy country.

MOFCOM submits that the Department cannot obtain *more accurate* prices that reflect what the respondent company would pay to source a particular input in a market economy than the *actual* price that a NME respondent *actually* paid for the input from a market economy supplier.

The second concern that was identified in the Federal Register notice was that the Department's 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, even though that party does not source the entire input from foreign (market economy) suppliers in the normal course of business."

MOFCOM submits that such concern does not make any sense. Given that the primary objective of the antidumping exercise for NME respondents is, in essence, to "guesstimate" the prices that the respondent would pay for inputs if the respondents conducted business in a market economy, MOFCOM fails to see how it could be considered unfair manipulation when the respondent actually conducts business with a market economy supplier. The respondent is doing the very thing that the antidumping law wants it to do.

- The better approach to any change in practice is for the Department to allow broader utilization of actual import prices paid by respondents to market economy suppliers.

  MOFCOM submits that if record evidence contains actual arms-length import purchase prices paid to a market economy supplier for a particular input by one respondent, there is no reason why some public version of those prices should not also be used for other respondents that did not have imports purchases in place of a less reliable surrogate value.

In the sections below, we explain these points in more detail.

I. Any Reconsideration of the Department's Practice Concerning Valuation of Factors of Production in NME Cases Should Reflect Both the Mandate of the Statute to Utilize the "Best Available Information" and the Department's Stated Goal of Promoting "Accuracy, Fairness and Predictability" in Calculating Antidumping Margins.

Under U.S. law, the calculation of antidumping margins for producers in NME countries is governed by Section 773(c) of the Tariff Act of 1930. For cases involving NME countries, Section 773(c)(1) directs the Commerce Department to utilize a "factors of production" methodology for determining the appropriate "normal value" to compare to U.S. price.[3]

Under the factors of production methodology, the Commerce Department essentially calculates the market economy equivalent of the NME producer's cost of production -- what the producer's actual cost of production would be if prices and costs were determined by market forces. Pursuant to Section 773(c)(1), the Department accomplishes this task by constructing a value based on the quantity of each factor of production (*e.g.*, material components, labor, overhead) used by the NME producer to manufacture the subject merchandise. While the quantity of each input consumed in production is taken from the NME producer's actual production experience, Section 773(c)(1) makes clear that the values or prices of such inputs "*shall* be based on the *best available information* regarding the values of such factors in a market economy country . . ."[4]

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[3] 19 U.S.C. 1677b(c) (2004).

[4] *Id.* (emphasis added).

Accordingly, although the Department retains a certain amount of discretion in determining appropriate values for a respondent's factors of production, the plain language of the statute limits that discretion by the overarching requirement to use the "best available information" that effectuates the statutory purpose -- calculating accurate dumping margins. As explicitly held by the Court of International Trade ("CIT"):

> While 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.[5]

Consistent with the statutory mandate to use the best available information and the statutory goal of calculating accurate dumping margins, the Department has a long-standing practice[6] that utilizes the actual prices that NME respondents

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[5] *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)).

[6] We note that the Department's practice extends as far back as 1991. In that year, the Department ruled:

> There is nothing to be gained in terms of accuracy, fairness, or predictability in using surrogate values when market-determined values exists [sic] in the NME country. *Indeed, where we can determine that a NME producer's input price are market determined, accuracy, fairness, and predictability are enhanced by using those prices.*

Chrome-Plated Lug Nuts from the People's Republic of China, 56 Fed. Reg. 46,153 (Dep't Commerce Sept. 10, 1991) (final determination of sales at less than fair value) (emphasis added).

have paid for imported inputs purchased from market economy suppliers as the best available information to value that input.[7] Over the years, the Department has employed this practice on countless occasions.[8] In one case, in particular, it went as far as stating the following:

> In 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 value 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 market-based values are available would, in fact, be contrary to the intent of the law.*

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7 *See* 19 C.F.R. § 351.408(c)(1) (2004). *See also Certain Helical Spring Lock Washers from the People's Republic of China*, 70 Fed. Reg. 28,274 (Dep't Commerce May 17, 2005) (final results of antidumping duty administrative review) (accompanying decision and issues memorandum at Comment 7) (using respondent's market economy input price in the factor valuation process) [hereinafter *Washers from the PRC*].

8 *See, e.g.*, *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 64 Fed. Reg. 61,837 (Dep't Commerce Nov. 15, 1999) (final results of 1997-1998 antidumping duty administrative review and final results of new shipper review); *Certain Cut-to-Length Carbon Steel Plate from the People's Republic China*, 62 Fed. Reg. 61,964, 61,966 (Dep't Commerce Nov. 20, 1997); *Collated Roofing Nails from the People's Republic of China*, 62 Fed. Reg. 51,410, 51,416 (Dep't Commerce Oct. 1, 1997); *Washers from the People's Republic of China*, 70 Fed. Reg. at 28,274 (accompanying decision and issues memorandum at Comment 7); *Heavy Forged Hand Tools from China*, 69 Fed. Reg. 55,581 (Dep't Commerce Sept. 15, 2004) (final results of antidumping duty administrative reviews, final partial rescission of antidumping duty administrative reviews, and determination not to revoked in part) (accompanying decision and issues memorandum at Comment 14).

> 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.*[9]

The courts have resoundingly approved the Department's valuation of an input based on the respondent's actual import purchases from a market economy supplier.[10] Significantly, the courts themselves have recognized that the actual prices that a respondent pays to a market economy supplier indeed serve as the best available information. As the CIT has stated, the surrogate values that the Department often uses to value the factors of production in NME cases are, in fact, "fictional."[11] Therefore, the actual price paid by an NME producer represents the best available information for valuation purposes because the Department does not

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9 *See Fans from the PRC*, 56 Fed. Reg. at 55,271 (accompanying decision and issues memorandum at Comment 1) (emphasis added).

10 *See, e.g., Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382-83 (Fed. Cir. 2001), *aff'g* 102 F. Supp. 2d 486 (2000); *Lasko*, 43 F.3d at 1446, *aff'g* 810 F. Supp. 314 (1992); *Luoyang Bearing Corp.*, 347 F. Supp. 2d at 1340 n.8; *Peer Bearing Co.-Changshan v. United States*, 298 F. Supp. 2d 1328, 1335 n.2 (Ct. Int'l Trade 2003); *The Timken Co. v. United States*, 201 F. Supp. 2d 1316, 1337 (Ct. Int'l Trade 2002); *Peer Bearing Co. v. United States*, 182 F. Supp. 2d 1285, 1312 (Ct. Int'l Trade 2001).

11 *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 102 F. Supp. 2d 486, 491 (June 9, 2000) (citing *Olympia Industrial, Inc. v. United States*, 7 F. Supp. 2d 997, 1001 (1998)).

have to conjecture about what the producer would have paid for a particular input if the NME country operated under market economy principles. Instead, the Department can rely on an actual market economy price that in fact reflects a value for a particular input.

It is for this reason that the courts have ruled that "the cost for raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the cost of producing the goods in a market economy."[12] Indeed, the Federal Circuit has explicitly endorsed the rule 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***."[13]

MOFCOM submits that, against this background, any retrenchment from the current policy, which has been in effect for decades, would sidestep the Department's oft-repeated commitment to accuracy, fairness and predictability in the factor valuation methodology and would violate the statute by failing to use the best available information. To reiterate, the Department has stated and the courts have repeatedly held that *import purchase prices actually paid by the respondent to*

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12 *Lasko,* 810 F. Supp. at 317.

13 *Lasko*, 43 F.3d at 1446 (quoting *Fans from the PRC*, 56 Fed. Reg. 55,275). *See also Luoyang Bearing Corp.*, 347 F. Supp. 2d at 1340 n.8 ("The Court notes 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.'" (quoting *Lasko*, 43 F.3d at 1446)).

a market economy supplier constitute best available information that, under the unambiguous terms of the statute, must be used by the Department.

Simply put, where an NME respondent has paid actual market prices for a given input, best available information regarding that input exists. And under the statute, the Department's is obliged to use that information in its factor valuation methodology. New criteria that unduly hinders the Department's ability to do so flies in the face of the agency's own policy, disregards the courts' unqualified endorsement of such policy, and contravenes the statute. A defined numerical standard for the application of the market input rule would do just that by precluding the use of actual market-based prices in the dumping analysis when such prices are indeed reliable and reflect the best available information.

II. The Department's Analysis Should Be Guided By The Department's Experience and Practice of Using Arms-Length Sale (and Purchase) Prices in Market Economy Cases.

Given that, at its core, this issue concerns how to use *market economy prices* in the antidumping margin calculation, MOFCOM believes that the Department should be guided by its long-standing experience and practice of using arms-length sales and purchase prices in market economy antidumping cases. MOFCOM submits that the Department's practice demonstrates that a specific quantity of arms-length sales or purchases is NOT required to utilize the prices of such sales and purchases in the antidumping margin calculation used in NME cases.

Home Market Sales

Interestingly, over the years, the Department's practice has been to allow fewer and fewer home market sales to serve as the basis for normal value in antidumping calculations used in market economy cases. This is demonstrated most vividly by the change in the Department's practice (as required by the change to the statute) concerning the calculation of normal value after excluding below-cost sales.

The U.S. antidumping law generally requires that home market sale prices that are below the producer's cost of production be excluded from the calculation of normal value used for determining antidumping margins. Prior to 1995, when enforcing this requirement the Commerce Department typically applied a practice called "10-90-10." Under the Department's 10-90-10 practice, if the Department determined that more than 90 percent of the respondent's home market sales had been made at prices below the respondent's cost of production, the Department would calculate normal value (referred to as "fair market value" at the time) by resorting to its constructed value methodology; that is, the Commerce Department ignored those sales made at prices above-cost.

The passage of the Uruguay Round Agreements Act of 1994 led to a change in the Department's practice. The applicable statutory provision that addresses the exclusion of below-cost home market sales in the calculation of normal value was changed to state:

> Whenever such [below-cost] sales are disregarded, normal value shall be based on the remaining sales of the foreign

> like product in the ordinary course of trade. If no sales made in the ordinary course of trade remain, the normal value shall be based on the constructed value of the merchandise.[14]

In light of this new statutory language, the Commerce Department changed its practice of excluding below-cost sales from "10-90-10" to "80-20". Under the Department's new, current "80-20" practice (in effect since 1995), if the Department determines that the respondent producer has made home market sales below its cost of production, the Department will exclude the below-cost sales from the calculation of normal value, regardless of the quantity and will utilize any remaining home market sales that are above-cost, regardless of the quantity.

As evident from this practice, the Department does not require above-cost sales to exceed a minimum quantity in order for those sales to be used as the basis for normal value in the antidumping margin calculation. Rather, as long as *any* arms-length home market sales are above-cost, the Department will use such sales prices to calculate normal value.

Indeed, under the Department's practice since 1995, it is possible for *a single* home market sales transaction to constitute normal value in the antidumping margin calculation. The Department itself has made clear that it is entirely appropriate to utilize a *single home market sales transaction* in the antidumping margin calculation:

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[14] 19 U.S.C. § 1677b(b).

> The 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.*[15]
>
> The statute also infers that a positive profit amount must be included in the calculation of constructed value by mandating the use of profit from *any sales* above the costs of production (*even one sale*) . . .[16]

MOFCOM submits that there is no reason not to apply the same practice to arms-length purchases of imported inputs from a market economy supplier. If a *single arms-length* home market sales transaction in a market economy can constitute an adequate representation of all prices that a foreign market economy producer charges in its home market, there is no reason why a *single arms-length purchase transaction* from a market economy supplier could not likewise constitute an adequate representation of all prices for the import from a market economy supplier. Given that *both situations involve arms-length single sales transactions by a market economy supplier*, there is no valid reason allow use of only one transaction in one scenario, but not in the other.

Purchases of Major Inputs

The Department also ignores quantities and number of purchase transactions (in market economy antidumping cases) when applying the "major

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15 *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).

16 *Extruded Rubber Thread from Indonesia*, 64 Fed. Reg. 14,690, 14,693 (Dep't Commerce March 26, 1999) (notice of final determination of sales at less than fair value) (emphasis added).

input rule" in calculating a respondent's cost of production. As explained below, what is most important to the Department's application of the major input rule is whether the purchase transaction was made at *arms-length*, and not how many transactions or the quantity of the input that was purchased.

In calculating a respondent's cost of production in market economy cases the statute requires that the Department employ a special rule, called the "major input rule," when the respondent purchases material components from an affiliated supplier. The Department employs the major input rule to test the reasonableness and reliability of the prices charged by the affiliated supplier. The Department typically uses three benchmarks to test the validity of the prices charged by the affiliated supplier:

(a) the affiliated supplier's actual cost of producing the material input

(b) prices that the respondent pays for the same material input to other unaffiliated suppliers; and

(c) prices that the affiliated supplier charges to unaffiliated customer for the same material input.[17]

The Department's practice, in accordance with the statute, is to utilize the highest of these three values in calculating the respondent's cost of production.

What is important about the Department's application of the major input rule is that *the Department does not require any minimum number of transactions or any minimum quantity of purchases* before using (a) or (b) (if they are the highest value) in calculating the respondent's cost of production. MOFCOM knows of no

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[17] 19 C.F.R. § 351.407(b).

case in which the Department has ever rejected the arms-length prices established by (a) or (b) merely because the quantity of purchases (sales) at issue was too small. In contrast, MOFCOM's counsel is aware of several cases in which the Department utilized the prices in (a) or (b) to calculate the respondent's cost of production, notwithstanding that the actual quantities purchased (sold) in (a) or (b) were but a tiny fraction of the respondent's total purchases of the material input.

MOFCOM submits that there is no reason for the Department not to employ the same concept in an NME antidumping calculation when faced with arms-length import purchases from a market economy supplier. Again, there is no difference between the two underlying factual scenarios. In each instance, the Department is faced with the same type of prices: arms-length prices of a material input from a market economy supplier. There is simply no justification to restrict the use of such prices in an NME case, while allowing it in a market economy case.

III. Failure In NME Investigations to Use Transaction Prices for Inputs Purchased from Market Economies Based on the Volume of Such Inputs Is Inconsistent with the Protocol on the Accession of the People's Republic of China to the WTO, the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, and the 1994 General Agreement on Tariffs and Trade.

A. The Protocol on the Accession of the People's Republic of China to the WTO Provides Only a Limited Exception to the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 in Application of Antidumping Measures on Exports from the People's Republic of China.

The Protocol on the Accession of the People's Republic of China[18] (the "Protocol") to the WTO sets forth the terms of the People's Republic of China's ("China") accession to that organization, and the rights and obligations of both the U.S. and China under the various WTO Agreements, including the Agreement on the Application of Article VI of the General Agreement on Tariffs and Trade 1994 (the "WTO Anti-dumping Agreement"). Article 15 of the Protocol specifically addresses the extent to which Article VI of the 1994 General Agreements on Tariffs and Trade and the WTO Anti-dumping Agreement apply to proceedings involving Chinese imports.

The sole issue addressed by Article 15 of the Protocol with respect to antidumping is whether market economy conditions prevail in the industry under investigation so that actual Chinese prices or costs should be used in determining price comparability or, in the absence of market economy conditions in the industry

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[18] WT/L/432 (Nov. 23, 2001)

under investigation, a methodology that is not based "on a strict comparison with domestic prices or costs." Accordingly, the Protocol demonstrates that the entire WTO Anti-dumping Agreement equally applies to a Member's antidumping determinations regarding Chinese imports, with the sole exception of a Member's ability to rely on an alternative methodology (as opposed to actual Chinese costs and price) in determining normal value in Chinese industries where market economy conditions do not prevail.

As stated above, assuming that market economy conditions do not prevail, authorities may rely on alternative methodologies which are not based on a strict comparison (*i.e.*, between home market prices or home market prices based on constructed value) using domestic Chinese prices and costs. However, this exception does not permit authorities, including the Department, to ignore other requirements of the WTO Anti-dumping Agreement unrelated to the question of the reliability of home market prices and costs. While the Protocol provides some discretion to authorities in situations regarding an industry deemed as not operating under market economy conditions, it does not exempt authorities from other obligations of the WTO Anti-dumping Agreement, such as the obligation to make a "fair comparison" under Article 2.4 and to apply appropriate evidentiary standards under Article 6 and Annex II.

B. The WTO Anti-dumping Agreement Permits Authorities to Reject Information from Interested Parties Only In Limited Circumstances.

Both Article 6 and Annex II of the WTO Anti-Dumping Agreement impose limits on a domestic authority's ability to reject the use of information submitted by interested parties in determining the margin of dumping. Article 6.8 limits recourse to facts available to circumstances where an "interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes an investigation." Paragraph 3 of Annex II elaborates by stating:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties which is supplied in a timely fashion…should be taken into account when determinations are made.

The Appellate Body has found that the combination of Article 6.8 and Annex II prohibits authorities from using facts available in lieu of information submitted, except under specified circumstances.[19] Although Article 6 and Annex II were not drafted specifically to address the situation of NME investigations or Article 15 of the Protocol, together they constitute the context under which Article 15 must be applied. Article 6.8 and Annex II identify the only circumstances (other than those specified in Article 15) in which authorities may reject actual information from interested responding parties and resort to "facts available." Thus, in order to reject

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19 *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/AB/R, at ¶¶ 73-81 (July 24, 2001).

use of respondents' cost or price information in an NME investigation, authorities must rely either on Article 15 of the protocol, which is limited to Chinese prices and costs, or Article 6.8 and Annex II.[20]

Article 6.8 and Annex II demonstrate a strong preference in the WTO Anti-dumping Agreement for use of primary information received from the affected interested parties, an objective which the U.S. cannot ignore. There is no basis for the Department to apply different standards in applying this preference to NME investigations than it applies in market economy investigations except with respect to information which falls within the Article 15 exception, namely "Chinese prices and costs". Since inputs purchased and imported from market economies at market-determined prices do not fall within this exception, use of the costs and prices of such inputs in NME investigations should be governed by the same standards as are applied in market economy investigations.

While Article 15 of the Protocol permits authorities to substitute "a methodology that is not based on a strict comparison of domestic prices or costs in China" where the industry under investigation is not operating under market economy conditions, it does not permit authorities to reject prices or costs as part of this methodology when such prices or costs are clearly based on market economy

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[20] There are, of course, substantive provisions in the WTO Anti-dumping Agreement which may permit authorities to reject, for example, certain sales not in the ordinary course of trade or sales between affiliated parties. However, these do not create a situation where authorities substitute "facts available" from secondary sources for information submitted; rather, they create a situation where other submitted information is substituted for the information which cannot be used, such as the remaining above-cost sales for sales not in the ordinary course of trade or sales to unaffiliated parties for affiliated party sales.

conditions, such as arms-length purchases by a respondent under investigation from a market economy supplier. Input purchases from market economy suppliers in market economy currencies are not "domestic prices or costs in China." As such, authorities, including the Department, do not have the discretion to reject such prices under Article 15 of the Protocol.

Rather, any rejection of such costs and prices is governed by the terms of Article 6 and Annex II and the treatment of market economy prices and costs. Specifically, such costs must be used unless they fail to meet the evidentiary requirements of the WTO Anti-dumping Agreement in terms of timely submission, accuracy, the ability to be verified, and the ability of the information to be used by the authorities. Indeed, paragraph 5 of Annex II imposes an obligation on authorities to use such information even though it "may not be ideal in all respects."

C. Inputs Imported from Market Economies Should Be Considered the "Best" Facts Available For Respondents That Have Not Imported Such Inputs.

Paragraph 7 of Annex II imposes disciplines on the use of secondary information applicable in those cases where authorities cannot, for whatever reason, base their findings on primary information from respondents. The provisions of Annex II should be applied in determining what secondary sources should be used in those cases where "Chinese costs and prices" have been rejected because the industry under investigation does not operate according to market economy principles. Annex II is the only portion of the WTO Anti-Dumping

Agreement which addresses the issue of the use of information not submitted by interested parties.

While paragraph 7 of Annex II provides domestic authorities with the discretion to select the secondary information that will be used in those circumstances where use of such information is permitted, it urges authorities to apply facts available "with special circumspection" and emphasizes the need to "check the information from other independent sources", including information obtained from other interested parties during the course of the investigation. As the title to Annex II indicates, the objective is to use the "best information available" when relying on a secondary source. This objective applies with the exception of circumstances where a party does not cooperate.

The objective of Article 15 of the Protocol is not to create a "result which is less favorable" than the result that would occur if "Chinese prices and costs" were used. Rather, because authorities may deem Chinese prices and costs to be unreliable when the industry under investigation does not operate according to market forces, the objective is to determine what prices and costs would apply if the industry under investigation was operating in a market economy. Obviously, the "best" information in terms of accuracy would be information relating to the actual input used by the exporting industry acquired from an actual supplier of that input.

The underlying presumption of Paragraph 7 of Annex II is that most secondary sources of information are flawed. And this is certainly true with respect to the Department's use of surrogate values in antidumping investigations of

NMEs. For example, import statistics generally include much broader categories of merchandise than just the input used to produce the product under investigation, list prices may or may not be representative of transaction prices, and average input prices of publicly held entities may not reflect the same product mix as that of individual exporters or the exporting industry. The "best" information is that which most accurately reflects the experience of the exporter or exporters under investigation. A transaction price for an input imported from a market economy provides an actual price for a specific product actually procured by the exporting industry for use in the production of the merchandise under investigation. Application of any other prices should be done with great circumspection and only after checking those prices with the actual transaction price or prices. Indeed, failure to use such prices may result in authorities failing to use the "best" facts available.

IV. The Concerns with the Department's Practice That Were Identified in the Federal Register Notice Are Not Valid and, Therefore, Do No Justify a Restriction of the Department's Practice .

The Federal Register notice that set forth the Department's request for comments identified two concerns with the Department's current practice of utilizing a respondent's actual import purchase prices to value a particular input. MOFCOM submits that neither of the stated concerns justifies abandoning the Department's current practice.

The first identified concern was that "basing the entire input value on a small amount of purchases might not be the most accurate reflection of what a company

pays to source the entire input." MOFCOM submits that such concern applies the wrong standard. Under the law, the relevant issue is NOT whether the amount of purchases is small; but rather whether the prices of such purchases represent the "best available information" for the value of the input. Stated differently, the issue is whether actual purchase prices of imported inputs are a more accurate reflection of what the respondent would pay for the input in a market economy than using surrogate values from a comparable market economy country. Stated differently, the real question is whether actual arm's length transactions with a market economy supplier are a *more* accurate representation of what an NME company would pay for an input than a surrogate value based on a secondary source.

MOFCOM submits that the Department cannot obtain *more accurate* prices that reflect what the respondent company would pay to source a particular input in a market economy than the *actual* price that an NME respondent *actually* paid for the input from a market economy supplier. Such prices are certainly more representative than publicly available information from a country that is considered to be at an approximately equivalent level of economic development as the NME at issue. Indeed, it is for this very reason that the Federal Circuit held that "using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law."[21]

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[21] *Lasko*, 43 F.3d at 1446

The second concern that was identified in the Federal Register notice was that the Department's 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, even though that party does not source the entire input from foreign (market economy) suppliers in the normal course of business."

MOFCOM first submits that such concern does not make any sense. Given that the primary objective of the antidumping exercise for NME respondents is, in essence, to "guesstimate" the prices that the respondent would pay for inputs if the respondent conducted business in a market economy, MOFCOM fails to see how it could be considered unfair manipulation when the respondent actually conducts business with a market economy supplier. The respondent is doing the very thing that the antidumping law seeks to do; namely, providing a reliable market economy value for its input.

More importantly, there is no basis at all to assume that the potential for such manipulation exists for NME respondents, but does not exist for market economy respondents. As detailed above, in market economy cases the Department has no qualms about using purchase or sales prices in the dumping margin calculation even when such purchase or sales prices are derived *from a single transaction*. Indeed, under the Department's practice in market economy cases, even the market economy respondent purchases virtually its entire needs from an affiliated supplier, the Department could well utilize a single purchase transaction

from an unaffiliated supplier to value the *entire quantity* of that input when calculating the respondent's cost of production.

The Department has not explained why the exact same factual circumstance generates the potential for unfair manipulation in NME cases but does not generate such potential in market economy cases. Absent such just explanation, MOFCOM submits that the Department should not adopt different standards in NME cases. As the Department itself has ruled that "*[d]ifferent treatment* of an imported input based solely on whether the input is imported into a market or nonmarket economy country *is illogical.*"[22]

Finally, the stated concerns ignore the fact that the underlying purpose of the meaningful imports test is to determine *price reliability*, which is inherently a fact-specific question. Accordingly, it cannot -- and should not -- rest primarily on the import level of a given input. Rather, the question of price reliability should be guided by other factors probative of price, including the product at issue, market conditions, corporate affiliations and the ordinary course of trade. The confluence of different factors in each case dictates that a given level of imports in one case may be meaningful, while the same level of imports in another case may not.

The Department itself understands and has endorsed this very point. Indeed, in one of the court appeals the Department explained its overall approach to the Court of Appeal for the Federal Circuit by using an example that explicitly

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[22] *See Fans from the PRC*, 56 Fed. Reg. at 55,271 (accompanying decision and issues memorandum at Comment 1) (emphasis added).

recognized that the meaningful imports test cannot be limited to quantity but is also affected by the normal course of business:

> [A]ssume that a particular product is typically sold in lots of 1000 units, but the NME producer had only a single import transaction for 20 units. In such a case, Commerce would not likely find the 20 units "meaningful". However, if an NME producer normally purchases 10-unit lots from domestic suppliers, then Commerce would be more likely to find ***an*** *import transaction* for 10 units to be meaningful.[23]

It is all about context. The current meaningful imports test recognizes that "other aspects of the transactions" are equally relevant as quantity in determining price reliability.[24] The Department also emphasized that "meaningful" would be determined on a case-by-case basis.[25] The current meaningful imports test thereby affords the Department with the necessary flexibility to ensure that the actual market-based price paid for market economy input is reliable. A minimum import quantity is not needed.

In contrast, by setting a defined minimum threshold, the meaningful imports test would be dictated by quantity, foreclosing the Department's ability to consider other factors equally relevant to the question of price reliability. Ultimately depriving the Department of the flexibility required of a fact-intensive inquiry, the meaningful imports test would simply involve a mechanical application of a

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[23] Brief for Appellee at 11, Shakeproof v. United States, 268 F.3d 1376 (Fed. Cir. 2001) (No. 00-1521).

[24] *See id.*

[25] *See id.*

numerical threshold that is likely to conceal the true reliability of actual market-based prices. Accuracy in the dumping analysis calls for consideration and balancing of all factors bearing on price, which does not and cannot occur where an inflexible numerical criteria is assigned to the determination of "meaningful." Therefore, the better approach is to refrain from any restriction of the current meaningful imports test.

V. The Department Should Change Its Practice To Allow Broader Use of Purchase Prices from Market Economy Suppliers

The change to its current practice that the Department should adopt is to allow broader utilization of actual import prices paid by respondents to market economy suppliers. MOFCOM submits that if record evidence contains actual arms-length import purchase prices paid to a market economy supplier for a particular input by one respondent, there is no reason why some public version of those prices should not also be used for other respondents that did not have imports purchases in place of a less reliable surrogate value.

MOFCOM notes that the Department has adopted such approach in two past cases.[26] In these cases, however, the Department has stated that it considered such

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[26] *Bicycles from the People's Republic of China*, 61 Fed. Reg. 19,026, 19,029-30, 19,032 (Dep't Commerce Apr. 30, 1996) (notice of final determination of sales at less than fair value); *Non-Frozen Apple Juice Concentrate from the People's Republic of China*, 65 Fed. Reg. 19,873 (Dep't Commerce Apr. 13, 2000) (notice of final determination of sales at less than fair value) (accompanying decision and issue memorandum at Comment 5).

actual price data to be a "second alternative" to publicly available data in the surrogate country.[27]

MOFCOM submits that such a policy decision that favors surrogate values over actual prices contradicts the decisions by both the courts and the Department that actual market economy prices are the best available information to value the factors of production. As noted above, the Federal Circuit has ruled that "using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law."[28] Given that in most cases it is relatively easy to ensure that a suitable public version of the respondent's actual import prices are made part of the record, MOFCOM urges the Department to adopt a practice of using such prices for all respondents that utilize the input in their production process. By adopting such a practice, the Department will ensure that its antidumping margin calculations are truly based on the best available information.

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[27] *Id.*

[28] *Lasko*, 43 F.3d at 1446

Conclusion

None of the usual circumstances that might lead the Department to change a long-standing practice are evident here. There has been no change in U.S. law which would support, much less require, such a change. Moreover, there has been no change in the consistent position of the courts supporting existing practice. No less significant, there has been no change in U.S. international obligations which would support or require such a change.

Against this background, the Department's Federal Register notice for comments provides only the flimsiest of rationales for a change in the treatment of market economy transactions in NME investigations: (1) concerns about whether a small volume of such transactions is the most accurate value; and (2) concerns about manipulation of such transactions to somehow improperly influence the results of an investigation. Remarkably, *there is no evidence whatsoever* that these concerns are valid, despite scores of investigations and reviews over many years involving NMEs and applying existing practice with respect to market economy inputs. The possible changes in the Department's practice appear to be solutions in search of a problem which has yet to be identified.

Therefore, we respectfully request that the Department not change its current practice to prevent or restrict the use of *bona fide* import purchase transactions to value an input in NME antidumping calculations.