



National **Retail** Federation
The Voice of Retail Worldwide

**Comments Filed with the
United States Department of Commerce**

on behalf of

The National Retail Federation

regarding

**Possible Changes in the Department's Non Market -Economy
Methodology
of Valuing Production Inputs with Actual Market-Economy Prices**

June 24, 2005

Liberty Place
325 7th Street NW, Suite 1100
Washington, DC 20004
800.NRF.HOW2 (800.673.4692)
202.783.7971 fax 202.737.2849
www.nrf.com

June 24, 2005

The Honorable Carlos M. Gutierrez
Secretary of Commerce
U.S. Department of Commerce
Washington D.C. 20230

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

Re: Comments on Possible Changes in the U.S. Department of Commerce's
Non Market-Economy Methodology of Valuing Production Inputs with
Actual Market-Economy Prices

Dear Secretary Gutierrez:

The National Retail Federation respectfully submits these comments on behalf of the U.S. retail industry in response to the notice published on May 26, 2005, in the *Federal Register* by the U.S. Department of Commerce (the "Department"), which requests public comments on changes the Department is considering to its non market-economy ("NME") methodology. Specifically, the Department stated that it is considering changes to its practice of using actual market-economy purchase prices to value the inputs used by NME producers to make the subject merchandise.

The **National Retail Federation** (NRF) is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.5 million U.S. retail establishments, more than 23 million employees - about one in five American workers - and 2004 sales of \$4.1 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

The NRF applauds the Department's recent efforts to bring uniformity to its application of the U.S. antidumping laws in NME proceedings. Clarification of the Department's policies by issuing policy bulletins and considering parties' comments will lead to more disciplined enforcement of the U.S. antidumping laws and greater levels of accuracy in determining whether, and to what degree, dumping has occurred.

However, abandoning the Department's current practice of valuing the factors of production with actual purchase prices incurred in market economy currency and using instead less precise surrogate values is a step in the wrong direction. Using market economy prices actually incurred by a NME respondent to value all of that respondents' (as well as other respondents') use of a particular input is the best way to ensure that the Department's methodology is as accurate as possible. The Department should not abandon this practice.

Using actual market-economy prices will result in more accurate determinations to calculate dumping margins.

The methodology employed by the Department to value factors of production in NME proceedings is, objectively speaking, an imprecise undertaking. Because an NME respondent's own costs are not being used, and because the surrogate values normally used to replace the respondent's own costs rarely reflect the same circumstances experienced by the respondent (due to differences in product characteristics, terms of sale, and many other factors), the Department's methodology should be biased toward using actual purchase prices incurred by the respondent whenever possible.

Use of actual purchase prices is also desirable because surrogate values are inherently unpredictable. Respondents in NME proceedings often cannot know whether or not they are dumping because the surrogate values the Department uses may change from one proceeding to the next. A system in which parties may be found to be dumping because of changes in surrogate values – not a respondent's actual prices but values that are beyond the respondent's power to control *or even know* – is inaccurate and inherently unfair.

Using actual, market-economy prices in NME proceedings contributes to more objective, accurate, and fair antidumping determinations. The Department's own precedent, as incorporated into its regulations at 19 C.F.R. § 351.408(c), is to use actual market-economy prices when these are available *instead of and in preference to* surrogate values. Not only does the Department's regulation provide that the actual market-economy price should be used to value the portion of the input that was purchased, it also provides that the Department will use the market-economy prices to value all purchases of the input. The Department's regulation, as applied in NME antidumping proceedings over the years, recognizes that these actual market-economy prices are inherently reliable and accurate. As the Department itself has found:

{i}n deciding to use the import price of the NME input rather than a surrogate value for the input, the Department relies instead upon the language in section 773(c)(1) of the Act regarding the use of "best available information" to value factors of production.

Helical Spring Lock Washers from China, 64 Fed. Reg. 13,401 (Dep't Commerce Mar. 18, 1999) (final results).

The Courts have also recognized that actual market-economy prices are preferable to surrogate values. The U.S. Court of International Trade recognizes surrogate values as “fictional” -- a description that hardly befits a supposedly accurate and mathematical calculation of the extent of “unfair trade” committed by a respondent. See *Shakeproof Assembly Components Division of Illinois 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)). Indeed, the U.S. Court of Appeals for the Federal Circuit has held that using surrogate values in NME antidumping proceedings when actual market-economy prices are available would violate the intent of the U.S. antidumping laws. *Lasko Metal Products, Inc. v. United States*, 43 F. Supp. 3d 1442, 1443 (Dec. 29, 1994).

The Department's regulations specifically incorporate a provision that recognizes the greater accuracy of actual market-economy prices, and this regulation has been applied in numerous NME proceedings. The U.S. Courts have also supported the Department's decision. Accordingly, the Department has no reason to restrict this methodology. Indeed, the Department has every reason to implement a policy of using one respondent's actual market-economy prices to value all NME respondents' production factors whenever feasible. Such a policy will lead to greater accuracy, predictability, and fairness in NME antidumping proceedings.

Using actual market-economy prices furthers the general policy objective of uniformity as between market-economy and non market-economy cases.

The Department's May 26 *Federal Register* notice focuses on the issue of *how much* of an input a NME respondent should have purchased before the Department values this input with the actual prices paid. That is, the Department is concerned with whether the market-economy purchases represent a “meaningful” amount of the NME producer's total purchases. In its request for comments, the Department has focused on the wrong question. Instead of asking what qualifies as a “meaningful” amount, the Department instead should be asking why it should apply a “meaningful” standard at all. Is a “meaningful” standard really meaningful?

In our view, the Department should eliminate the meaningful standard from its analysis as unacceptably arbitrary. It is possible that even one bona-fide market-economy purchase is sufficient to value all of a NME respondent's consumption of a particular input. The Department has the ability to verify whether such purchases are, in fact, bona fide based on an analysis of the terms of the purchase and, if necessary, a comparison with other values in the market-economy. Quantity is irrelevant; what matters is if the value is real, which the Department has the power to verify.

The irrelevancy of the question of quantity in this analysis is born out in the Department's treatment of certain transactions in market economy dumping calculations. The Department will use a single transaction in a market-economy case to represent all other transactions. For instance, in determining whether sales have been made below cost in the home market, the Department has stated that:

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.

Silicomanganese from Brazil, 62 Fed. Reg. 37,869, 37,877 (Dep't Commerce July 15, 1997) (final results). Concerns for parity and a desire to see uniformity between market-economy and NME proceedings necessitate that the Department also begin accepting the validity that one transaction can be representative of market-economy purchases in NME proceedings.

Market-economy prices are the same regardless of whether they reflect purchases by a market-economy or NME company. The Department explicitly recognized this fact in stating that “different treatment of an imported input based solely on whether the input is imported into a market or nonmarket economy country is illogical.” *Fans from China*, 56 Fed. Reg. 55,271 (decision and issues memo Cmt. 1). The Department recognizes that actual prices paid to companies in market-economy countries should be treated the same way regardless of the type of antidumping proceeding. To ensure that the antidumping laws are administered equitably, the Department must adopt the policy of recognizing any amount of a purchase from a market-economy country as “meaningful” for purposes of determining NME respondents' normal values.

Any change in the Department's NME methodology should only apply to antidumping proceedings commenced after such an official change in policy.

One of the goals of the antidumping law is to afford parties predictability in antidumping proceedings. In furtherance of this goal, the Department's precedent is to implement new methodologies or policies on a prospective nature so that these new methodologies are effective only for antidumping proceedings commenced after the methodology's adoption.

The Department's *Policy Bulletins* provided on the Import Administration's website demonstrate the Department's recognition that new methodologies must be adopted prospectively. Specifically, the Department's most recently enacted application process for NME separate-rate respondents, and implementation of new exporter-producer “combination rates,” only apply to NME antidumping investigations initiated on or after the date on which the new policy was published in the *Federal Register*. *Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, Import Administration Policy

Bulletin Number 05.1 (Apr. 5, 2005). Similarly, the Department's policy announcement on applying interest provisions to entries made under a subsequently rescinded new shipper bond only became effective for new shipper reviews initiated after the policy bulletin's signature date. *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).

In adopting any new policy change on the valuation of inputs in NME antidumping proceedings, the Department must adhere to its policy of acknowledging parties' due process rights. Yet, to be absolutely fair, the Department should apply its new policy only to investigations initiated following publication of the new policy. The new policy should not apply to future administrative reviews of existing orders. Reversal of current policy for such reviews would make a mockery of the Department's rules, making the NME dumping calculation even more unpredictable than is already the case. Consequently, any change in its NME methodology should only apply to antidumping investigations initiated after the policy becomes effective.

Conclusion

In conclusion, using actual market-economy prices to value all of an NME respondent's – and other respondents' – use of a particular input furthers the overall goal of the Antidumping Statute, *viz.* to reach fair, accurate, and predictable antidumping determinations. Using surrogate values is inherently imprecise and should be avoided whenever more accurate data is available, as required by law. Use of actual market economy purchase transactions – even if only one or very few – is consistent with the Department's recognition in market economy cases that a single transaction can be reliable.

Finally, in the event that the Department decides to change the way in which it uses actual market-economy prices to value NME producers' factors of production, the Department must comply with due process requirements and apply such a policy only on a prospective basis. The policy should not change for pending investigations or reviews, nor for reviews of existing orders.

NRF respectfully submits these comments for your consideration.



Erik O. Autor
Vice President, Int'l Trade Counsel
National Retail Federation