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VIA HAND AND ELECTRONIC DELIVERY

Mr. Joseph A. Spetrini  
Acting Assistant Secretary  
For Import Administration  
U.S. Department of Commerce  
CRU Room 1870  
Washington, D.C. 20230

**PUBLIC DOCUMENT**

Re: Comments on Market Economy Input Valuation Practice

Dear Mr. Spetrini:

On behalf of Red Chamber Co., a U.S. importer of various sea food and other fancy food items, we hereby submit comments in response to the Department's solicitation of comments on its market economy input practice in antidumping proceedings involving non-market economy ("NME") countries. *See* 70 Fed. Reg. 30418 (May 26, 2005) ("Notice for Comment").

The Department's current practice with respect to calculating normal value for an NME respondent is to value a factor of production ("FOP") according to the price paid when the input is (1) purchased from a market economy whose exports are not subsidized and in a market currency; (2) the purchase is a *bona fide* sale; and (3) the volume of the imported input as a share of total purchases from all sources is "meaningful". *See id.*; *see also*, 19 C.F.R. § 351.408(c)(1). Moreover, once Commerce determines that the market-purchased input is in a meaningful

quantity and meets the other criteria for acceptability outlined above, Commerce attributes the unit value of the import purchase to the entire amount of that input consumed in the period of investigation or review.

The Department determines what amount is meaningful on a case-by-case basis, but typically accepts a percentage of volume for the imported input that is far less than 50 percent. In the recent 2004 cut-to-length tissue paper investigation, Commerce set forth a threshold as low as five percent. The Department indicates, in its Notice for Comment, that it is considering changes to its current practice. Further, the Department expresses concerns that “parties” (*viz* respondents) are manipulating margin calculations by sourcing just enough of a market input so that the market input is used as the entire price, and that this value “may not be reflective of the actual prices.” 70 Fed. Reg. at 30418-19 (May 26, 2005). The Department, in an appendix published in the notice, sets forth two broad proposed approaches to this perceived problem and solicits comments thereupon.

## **I. APPENDIX APPROACH ONE**

***Is it appropriate for the Department to change its regulations and end its long-standing practice of using market economy input prices to value an entire input? For example, should the Department use market economy import prices to value only the portion of the input that was imported, and use the surrogate country prices to value the remainder of the input?***

Response: Given the degree of discretion afforded to the Department in selecting surrogate values, and its existing multiple step test for accepting market values, it would appear unnecessary for it to change its regulations to ensure that it is selecting the “best available information” to value a particular input. *See* 19 U.S.C. §1677b(c)(1)(B) (requiring Commerce to

use the “best available information” to value factors of production). It would be useful to review the theoretical underpinnings to the Department’s current test, which support its reasonableness.

The starting point is that the market input purchase must be a *bona fide* sale. This threshold test carries important implications supporting the reasonableness of the existing rule and practice. First, “Bona fide sale” is defined as “a completed transaction in which seller makes sale in good faith, for a valuable consideration without notice of any reason against the sale.” Black’s Law Dictionary at 161 (5<sup>th</sup> Ed. 1979). Second, the predicate that the seller sells from a “market economy” indicates, *per se*, that the seller sets its prices based upon market forces, i.e., based upon the laws of supply and demand.<sup>1</sup> The laws of supply and demand reflect the economic observation that in an open market,<sup>2</sup> as demand increases and supply remains stable or decreases, prices go up. The inverse is also true: as demand decreases and supply remains stable or increases, prices go down. In other words, free market sellers charge a premium for scarcity and offer a discount for oversupply. In any event, it is a hallmark of a market economy that *sellers in all circumstances seek to maximize their profit*.

The implications of the concerns expressed in the Department’s Notice for Comment, *i.e.*, that respondents are artificially suppressing the value of their factors of production by making market economy purchases, conflicts with the basic theory of market economics. The

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<sup>1</sup> The term “market economy” refers to “the national economy of a country that relies on market forces to determine levels of production, consumption, investment, and savings without government intervention.” The Language of Trade: A Glossary of International Trade Terms. Office of International Information Programs, U.S. Dept. of State (3<sup>rd</sup> Ed., prepared by Merritt R. Blakeslee).

<sup>2</sup> The term “open market” refers to “a market wherein supply and demand are expressed in terms of price.” Black’s Law Dictionary at 875 (5<sup>th</sup> Ed.).

Department's test requires a *bona fide* sale, so why would a market seller in a *bona fide* transaction accept less than the market would bear?

In truth, there are many reasons why an NME manufacturer might purchase a market input: quality, selection, price, local or state regulations, etc. Once the Department makes the finding that the sale is *bona fide*, it would appear unnecessary and unduly burdensome for the Department to concern itself with the reason for the purchase.

As the Department's current regulation implicitly recognizes, an actual market economy transaction for the actual input has many advantages over the often imprecise public surrogate country sources for the input's value. In terms of specificity, a critically important criteria in the Department's surrogate value matching test,<sup>3</sup> the market-purchased input scores 100 percent. Commerce rarely obtains surrogate country data that reflects this level of specificity.

In fact, the Department frequently chooses basket category values from the Indian import statistics for the surrogate values that would score well under 100 percent in terms of specificity and are many times higher than the individual Indian price quotes, world commodity prices, or available market values—the values selected by the Department for ink in the polybag and cut-to-length tissue investigations are prime examples. It is not the market economy arm's-length transaction values that “may not be reflective of actual prices”; rather, it is the Department's

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<sup>3</sup> The Department's practice is to “value factors using prices that reflect the specific grade and physical characteristics of the input used by the NME producer.” Issues & Decision Memorandum for the Antidumping Duty Administrative Review of Sebacic Acid from the People's Republic of China (Dec. 10, 2004) (Comment 2).

selection of aberrantly high values from surrogate country sources that has distorted antidumping margins.

The Department is obligated by statute to use the “best available information” to value a respondent’s factors of production. We submit that a *bona fide* market transaction value for the *exact* input at issue should enjoy a rebuttable presumption—as it does now—that it is the “best available information” to value the *entire* input. The Department should not apply an arbitrary presumption that such values are not probative of the actual value of the remaining portion of the input sourced locally in the NME—if anything, the Department could reasonably infer that the locally sourced input cost less: is that not at the heart of the reason for the disparate NME calculation methodology in the Tariff Act?

Finally, the implications of Commerce’s concern with respect to value manipulation, i.e., that relatively small volume market purchases are more likely to mask higher actual costs, is contradicted by the common business practice of offering discounts for increases in quantity purchase commitments. It is unheard of for a seller to charge a price premium for an *increase* in a volume commitment. If anything, the Department could reasonably infer the opposite—that the seller would have charged an even lower price had the respondent increased the purchase volume. This point speaks directly to the Department’s second proposed approach, discussed below.

Fundamentally, evidence of market purchases is an important tool at the Department’s disposal that serves as a guide to the “best available information” on input values and as a check

on the potential use of arbitrary and less accurate values from surrogate country sources. The Department should make full use of this tool.

## II. APPENDIX APPROACH TWO

*Assuming the Department continues its long-standing practice of using market economy import prices to value an entire input, what should the threshold be for the share or volume of a given input sources from market economy suppliers to qualify as “meaningful” in order for the import price to be used to value all of the input?*

Response: Red Chamber submits that the Department need not set a minimum threshold for the share or volume of a given market-sourced input value to be imputed as a unit value to the entire input. As stated above, if the sale meets the Department’s other requirements, the seller will have charged as much as the free markets would bear for the input. Why sell to a Chinese purchaser for less than a purchaser is willing to pay in New York? Accordingly, that price *is* an actual market value for the specific input at issue. Moreover, as stated above, that price is more likely to decrease—rather than increase—as the purchase share increases.

For the most part, the values that would be affected by Commerce’s proposals are values for raw material and other material inputs as opposed to labor and energy, both of which are locally sourced in the NME. Except in economies already excluded from eligibility by Commerce practice (for subsidizing exports), raw materials and other commodity inputs increasingly bear a global market price due to the increasing globalization of the world economy. Therefore, accurate valuations in Commerce’s preferred surrogate country sources will not differ greatly from market values; accordingly, Commerce does not risk underestimating dumping margins by accepting evidence of input-specific market prices for valuation purchases.

Red Chamber makes this observation as one of the largest U.S. importers, and as a company with global procurement from market and NME sources alike.

The same common sense economic reasoning discussed above applies “on the ground,” so to speak, in the surrogate countries themselves. Why, under market conditions, would an Indian manufacturer pay more for ink in the local market than it would have to pay to a supplier in New York or Paris? It is imminently reasonable for Commerce to conclude that a New York seller of a specific ink for a specific application would sell it at the same price to a Chinese manufacturer as it would to an Indian manufacturer requiring that exact ink. When the import value for a basket category of inks is 10 times this price, it is the public source and not the *bona fide* sale that distorts the actual value.

Red Chamber submits that any sale in a commercial quantity (as opposed to a sample) on market economy terms is going to be highly probative of the actual value of the specific input consumed by a respondent. Therefore, Commerce need not establish a minimum threshold for using that unit value for the entire quantity of the input.

The sole benefit of establishing a minimum quantitative threshold for ascribing the market value to the NME-purchased portion is that it would assist respondents in planning sales at fair value. The courts have confirmed that the antidumping laws are remedial, not punitive. As such, the courts have recognized that planning to avoid dumping complies with, rather than “manipulates,” the U.S. antidumping statute. Although there is no scientific quantitative definition of the term “meaningful”, the Department should consider any amount in a commercial quantity to be meaningful. If the Department insists on setting a percentage

threshold, surely portions reaching 5-10% of the total input quantity are “meaningful.” In any event, “meaningful” is a portion well short of the majority.

### III. ADDITIONAL VIEWS

*Please provide any additional views on any other matter pertaining to the Department’s practice concerning the use of market economy import prices?*

Response: As the Department considers the evidentiary value of market-purchase prices, it should also consider and recognize the difficulties facing NME respondents who must otherwise identify public sources of values for their very specific inputs in another part of the globe. In many cases, the basket category import value from the surrogate country is significantly higher than the known world market value of the input. Commerce frequently rejects price quotes located by NME respondents, indicating that they are self-selected and/or that they do not reflect actual sales. At the same time that Commerce allows and expects companies to demand administrative protective order protections for their actual commercial invoices, Commerce appears to expect of respondents that Indian companies would willingly disgorge such sensitive information (prices and quantities of actual transactions) in public form for factor valuation purposes.

Regardless of the proportional share, Commerce ought to consider as probative *any* evidence of market purchases in commercial quantities when evaluating whether the surrogate values from the surrogate country accurately reflect the actual values for the inputs. The less pure the surrogate data source, the more likely the market purchase information will be more probative than the surrogate data for the value. Thus, for example, if Respondent 1 purchased input A from a market source for \$2.00/kg (in a commercial quantity), based upon their



proprietary submissions, the Department should take that into consideration when choosing between an Indian import value of \$20.00/kg for the basket category including the input as opposed to Indian price quotes in the \$2.00/kg range.

Another troubling aspect of the Department's surrogate value input valuation practice is its application of adverse facts available to the surrogate input *values* themselves rather than to the *quantities* reported by uncooperative respondents. Thus, in the tissue investigation, Commerce "punished" the value of the pulp and the plastic bag by selecting the highest surrogate values on the record for those inputs. Of course, the values of the pulp and the plastic did not, in a sense, "cooperate" or fail to "cooperate" in that case. If a respondent did not act to the best of its ability, that does not absolve the Department from its statutory mandate to select the "best available information" (which was voluminous and based on Department-approved public sources, namely the Indian import statistics) to apply to the adverse factor usage ratios it applied in that investigation. The Department should reconsider this practice and instead use the "best available information" for the surrogate values in future investigations and reviews.

In our experience, there are rarely more than a handful of material input surrogate values that are distorted in surrogate country sources but it only takes one or two such distortions to generate margins tens or hundreds of points higher than they otherwise would be. Full consideration of record evidence of market purchase values for these inputs could be an important curb on these distortions and the arbitrary selection of winners and losers in NME industry that flows as a consequence from them. In sum, rather than further restricting

consideration of market transaction values, the Department should expand its consideration of such probative evidence of actual value.

Respectfully submitted,

/s/ John J. Kenkel

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*On behalf of Red Chamber Co.*