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Via HAND DELIVERY

Joseph A. Spetrini
Acting Assistant Secretary for Import Administration
International Trade Administration, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street NW
Washington, D.C. 20230

Re: Request for Comments on Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries

Dear Assistant Secretary Spetrini:

On behalf of Shing Mark Enterprise Co., Ltd. ("Shing Mark"), pursuant to the Department's request (70 Fed. Reg. 30,418, May 26, 2005), we submit the following comments on the Department's market economy inputs practice in antidumping proceedings involving Non-Market Economy ("NME") countries. As requested by the Department, six copies of this submission have been submitted to the Department, as well as an electronic version in PDF format.

I. Introduction

In any given antidumping proceeding involving a NME respondent, the proper valuation of NME inputs raises several complex legal, methodological, and factual questions. The Department's current methodology for analyzing whether input purchases from market economy countries may be used to value an NME respondent's production costs was designed to accommodate the unique circumstances of each NME investigation, and to satisfy several core principles of antidumping law. Should the Department modify its methodology, it must continue to adhere to these principles.

A. Enhancing Accuracy, Fairness and Predictability

First, the Department must ensure that any NME input valuation methodology ensures accuracy, fairness and predictability in the administration of the antidumping laws. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1991). Of paramount importance in this regard is that the Department maintain the general presumption within the antidumping statute and regulations in favor of using *actual market transactions* wherever possible in calculating antidumping liability. This preference, evident in the current input valuation regulation, *see* 19 C.F.R. § 351.408(c)(1) (2004), and the Department's determinations, appears throughout the antidumping law and regulations, and reflects Congress' and the Department's desire that antidumping duties be calculated as accurately as possible.

The Department has routinely noted that market economy prices ensure greater accuracy than reliance on surrogate values. *E.g., Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 13401 (Dep't Commerce Mar. 18, 1999) ("We also believe that reliable import prices for the same input are a better means of valuing an input than surrogate values."); *Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof from*

the People's Republic of China, 69 Fed. Reg. 60,980 (Dep't Commerce Oct. 14, 2004) ("Normally, market economy inputs provide more accurate values."). Whereas an actual market price is "determined by market economy forces" and "has been paid to the market economy supplier by the respondent in convertible currency," the surrogate value "at best" represents "only an estimate" of what the NME producer might pay for the input. Redetermination on Remand, *Certain Helical Spring Lock Washers from the People's Republic of China* (Dep't Commerce Sept. 27, 1999). Thus, the Department should continue to maintain a strong preference for actual market transactions.

In other settings, the statute and Department practice likewise indicates a preference for using actual transactions in the antidumping margin calculation. For example, under the major input rule, the Department may use the actual costs of inputs a respondent has obtained from an affiliated major producer or supplier, provided the transactions are at arm's length. 19 C.F.R. § 351.407(b)(3); *see also* 19 U.S.C. § 1677b(f)(3). The regulations also more generally provide that the Department may use transactions involving affiliated parties for cost purposes provided that the price "fairly reflects" all elements of value in the transaction, consistent with the amount usually reflected in sales of that merchandise in the relevant market. *Id.* at § 1677b(f)(2). *See also id.* at § 1677b(a)(1)(b) (using affiliated party transactions as basis for normal value where such transactions are demonstrated to be at arm's length). Whether a respondent is located in an NME or in a market economy, actual transactions are simply far more reliable indicators of its costs than data from other sources. Actual prices are verifiable, are documented in the respondent's books and records, and are traceable to invoices and other sales documentation. Thus, while in limited circumstances such prices may not be available or appropriate, the Department should maintain a strong presumption in favor of their validity when they do exist, and the party seeking to rely on alternate data sources must bear the burden of demonstrating that such action is necessary.

B. Discouraging Manipulation and Encouraging Compliance with U.S. Law

Second, as the Department's notice properly recognizes, the Department must ensure that its market input methodology does not invite manipulation, so that prices used by the Department reflect "actual prices" for the input in question. 70 Fed. Reg. 30,418, 30,418-19 (Dep't Commerce May 26, 2005). The current regulations contain a number of mechanisms for ensuring that market economy prices are "actual" prices. As the Department notes, it may decline to consider such prices where the transaction is not at arm's length, where the goods may have been dumped or subsidized, or where an insignificant quantity of goods were involved. *Id.* In applying the current regulation, the Department has routinely used the discretion afforded it under the statute to conclude that market economy prices cannot be relied upon where they do not reflect actual prices or are otherwise suspect, including (1) where inputs may have been subsidized or sold at less than fair value,[1] (2) where the inputs were produced in a NME and resold through a market economy;[2] and (3) where the purchased inputs were not actually used in the production of subject merchandise.[3]

While any market input regulation should continue to ensure that prices relied upon by the Department are not subject to manipulation, it should not foreclose opportunities for compliance with

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[1] *E.g., Certain Helical Spring Lock Washers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 Fed. Reg. 28,274 (Dep't Commerce May 17, 2005) (Issues and Decision Memorandum at 3) (declining to use market economy prices where they may have been subsidized).

[2] *Polyethylene Retail Carrier Bags From the People's Republic of China*, 69 Fed. Reg. 34,125 (Dep't Commerce June 18, 2004) (Issues and Decision Memorandum at 21) (declining to use prices of inputs produced in a NME country but sourced from a market-economy supplier to avoid manipulation); *Wooden Bedroom Furniture From the People's Republic of China*, 69 Fed. Reg. 67313 (Dep't Commerce Nov. 17, 2004) (Issues and Decision Memorandum at 57) (same).

[3] *Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 Fed. Reg. 60,980 (Dep't Commerce Oct. 14, 2004) (declining to use prices for market economy steel plate purchased by respondent and resold, since it was not used in production of subject merchandise).

U.S. law. The Department's approach to valuing NME inputs should be sufficiently clear, predictable, and accurate, so that companies found to be dumping or potentially subject to an order can, through cost reduction measures and other means, come into compliance with U.S. law. As the Senate Finance Committee explained, the NME methodology was changed precisely to enhance predictability in existing U.S. law and allow opportunities for compliance:

> The dumping margins for a non-market economy country will vary widely depending on which methodology or surrogate country is used. As a result, a nonmarket economy country typically is unable to predict whether or not a particular U.S. price will be considered a dumped price, and is unable to structure its activities accordingly. The Committee is changing the law to overcome this reliance on information that is extremely difficult to obtain, and to provide greater certainty and predictability in the administration of the antidumping duty law as it applies to nonmarket economy countries.

OMNIBUS TRADE ACT OF 1987, REPORT OF THE COMM. ON FINANCE ON S. 490, S. REP. NO. 100-71, at 108 (1st Sess. 1987). A respondent that decides to source a sufficient percentage of its inputs from a market economy supplier in order to ensure that the Department has actual price data upon which to rely in calculating its antidumping margin is not "manipulating" the antidumping law; rather, it is attempting to ensure that the Department has the information necessary for an accurate margin calculation. Elsewhere, the Department has encouraged respondents to modify their ordinary commercial practices so that it may have sufficient transaction-specific cost data. *E.g.*, *Certain Frozen and Canned Warmwater Shrimp From Brazil*, 69 Fed. Reg. 76,910 (Dep't Commerce Dec. 23, 2004) (Issues and Decision Memorandum at 15) (requesting that respondent alter its cost reporting practices in future administrative reviews to allow the Department to rely on company data for cost allocation). Any methodology adopted by the Department cannot penalize companies for complying with U.S. law, and should provide sufficient clarity and predictability so that compliance is possible.

II. Views on Specific Questions Posed by the Department

With regard to the specific issues raised by the Department, Shing Mark would like to offer the following comments:

(1) Is it appropriate for the Department to change its regulations and end its long-standing practice of using market economy import 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 surrogate country prices to value the remainder of the input?

The short answer to the first question posed by the Department is *no, it is not at all appropriate for the Department to change its regulations to end its long-standing practice of using market economy prices to value an entire input.* Shing Mark submits that the suggested change would be contrary to the statute, illogical, and at odds with the Department's overriding obligation to accurately calculate antidumping margins.

First, such a methodology would be inconsistent with the statute, which requires that the valuation of factors of production be based "on *the best available information* regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1) (emphasis added); *see also Shangdong Huraong General Corp. v. United States*, 159 F. Supp.2d 714, 719 (Ct. Int'l Trade 2001). There cannot be two "best" sources of information on prices for a single input. If "actual prices" from a market economy are available, they represent the best available information regarding input valuation and must alone be used to calculate the cost of that input. As the Federal Circuit noted in *Lasko Metal Products*, "[u]sing surrogate values when market-based values are available would, in fact, be contrary to the intent of the law." 43 F.3d 1442, 1446 (Fed. Cir. 1994) (quoting *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55,271, 55,275 (Dep't Commerce 1991)). The change to the regulations suggested by the Department

would not conform to the purpose of the antidumping statute, which is designed to determine margins "as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1991); *see also Shakeproof Assembly Components Division of Illinois Tool Works v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). As the *Lasko* court recognized, where actual market values are available, they reflect the most accurate information available regarding the value of the input, and failing to use those values for the entirety of a given input would be inconsistent with the Department's statutory obligation to calculate accurate margins.

Furthermore, the suggested approach is simply illogical. Should the Department use market economy import prices to value some portion of the input, and at the same time use a surrogate value for the rest of that same input, it would effectively be finding that there are two, equally accurate prices for a single input. Such a determination cannot be sustained — if the market economy prices the Department has identified are "actual prices," there is no rational reason why they should not be used to value the entirety of the input. If they are not "actual prices," then there would be no basis to use them to value any fraction of the input. Thus, the proposed methodology does not even address the Department's stated concern with potential manipulation of input prices. The mere fact that a company does not source all of its inputs from a market economy cannot support the conclusion that the prices have been "manipulated" or are otherwise not "actual prices" that should not be used as the basis for the Department's input cost calculation.

Indeed, when it was developing the current rule, the Department declined to adopt a proposal nearly identical to that which it now suggests. A commenter at the time argued that prices paid by NME producers for inputs obtained from market economy producers should not be used, and if used, should only be applied to the share of inputs imported from the market economy. 62 Fed. Reg. 27,295, 27,366 (May 19, 1997). The Department indicated that such a

policy would be inconsistent with *Lasko*, and that its authority to reject transactions that are not "meaningful" would be sufficient to avoid potential manipulation by respondents. This logic applies equally today.

Lastly, we note that if the Department chooses to change its regulations regarding the use of market economy prices to value NME inputs, it must provide for notice and comment pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 553 (1982). When the Department revises a rule such as that at issue here, it must publish a notice of rulemaking in the Federal Register, "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(b), (c); *see also Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States*, 10 C.I.T. 301 (1986). Shing Mark notes that the Notice issued in this regard does not satisfy the requirements prescribed by the APA.

(2) 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 sourced from market economy suppliers to qualify as "meaningful" in order for the import price to be used to value all of the input?

The Department's apparent desire to enhance predictability in use of market economy prices is to be applauded. However, any specific threshold adopted by the Department must be sufficiently flexible to account for the particular circumstances of a given NME respondent. Due to substantial differences in the types of products investigated, the market practices of the companies involved, and the particular inputs at issue, no single threshold for the share of volume of a given input can be reliably applied in all cases to determine whether market economy import prices should be used to value the input as a whole.

Furthermore, any threshold adopted by the Department cannot impose a higher standard for demonstrating the existence of valid market economy prices than that which the Department currently applies for identifying a surrogate country price. In past investigations, the Department has relied upon surrogate prices reflecting relatively small transaction volumes, because it has found that the data is not distortive and is not inconsistent with other price information for a given input. *E.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 Fed. Reg. 20,594 (Dep't Commerce April 16, 2004) (using as surrogate value import data covering less than 100 kilograms of chokes and coils). *See also Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States*, 59 F. Supp. 2d 1354, 1358-59 (Ct. Int'l Trade 1999). There is no justifiable basis for the Department to adopt a higher standard with respect to market economy prices than that which currently exists for surrogate data, given that the courts and the Department have long recognized that the former is more accurate and reliable than the latter. Therefore, the Department should not refuse to consider available market economy prices merely because the volumes associated with them are relatively small.

Certainly, if market economy prices represent transaction volumes are 5 percent or more of the importer's total purchases of a given input, there should be a strong presumption that these purchases are "meaningful." Such a presumption would reflect commercial reality in many industries subject to antidumping investigations and would be consistent with threshold requirements used elsewhere in the antidumping statute, such as that for using third country transactions to calculate normal value. 19 U.S.C. 1677b(a)(1)(B)(ii)(II) (2000). If *bona fide* market economy imports constitute less than 5 percent of the producer's total input purchases, it

is understandable that the Department may want to examine such purchases more closely, but the Department should not adopt a *per se* rule rejecting such prices in all circumstances, as such a rule would undermine the statute's overriding goal of ensuring accuracy in antidumping calculations.[4]

(3) Please provide any additional views on any other matter pertaining to the Department's practice concerning the use of market economy import prices.

Should the Department alter its regulations or its practice with respect to the use of market economy inputs to value NME factors of production, it must continue to apply the current methodology to proceedings initiated or review periods already begun, or to input purchases made prior to the adoption of the new regulation or practice. It is a well-settled principle of administrative law that retroactive implementation of statutes and regulations is disfavored, as it undermines predictability, interferes with the legitimate expectations of parties subject to a rule, and otherwise unfairly prejudices those who are subject the agency's authority. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); *Micron Tech., Inc. v. United States*, 243 F.3d 1301 (Fed. Cir 2001) (noting non-retroactivity of change in Department methodology).

Elsewhere, the Department has recognized the importance of ensuring predictability in the administration of the dumping laws, and has declined to retroactively apply changes in rules and procedures. *See e.g., Certain Cut-to-Length Carbon Steel Plate from Mexico: Final Results of Countervailing Duty Administrative Review*, 69 Fed. Reg. 1972 (Dep't Commerce Jan. 13, 2004) (declining to apply new privatization methodology retroactively to proceedings initiated in

[4] In this regard, it is quite possible that a single, arm's-length transaction may be sufficient to constitute a "meaningful" amount of input purchases.

the month prior to publication of notice of the new methodology). NME companies currently subject to antidumping orders, including Shing Mark, have relied upon the existing methodology in structuring their input purchases so as to comply with U.S. law. In the interest of ensuring that respondents such as Shing Mark have fair notice of modifications to Department regulations and practice, and are given an opportunity to comply with any new rules, the Department should specify that changes to the existing rules are prospective only and would not apply to proceedings initiated or review periods underway prior to the promulgation of any new rules and regulations, and would not be applied to evaluate input purchases made prior to their adoption.

* * *

This submission has been served as indicated on the attached certificate of service. Please do not hesitate to contact the undersigned if you should have any questions.

Sincerely,

Thomas J. Trendl
Eric C. Emerson
Elissa M. Alben

Counsel for Shing Mark Enterprise Co., Ltd.