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June 24, 2005

By Courier and E-mail

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

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

Dear Mr. Spetrini:

We are writing in response to the notice published by the Department of Commerce (the "Department") in the Federal Register requesting comments regarding the Department's practice as to the valuation of factors of production for respondents in non-market economy ("NME") antidumping proceedings in which the respondents also source inputs from market economies. *See Request for Comments, Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries*, 70 Fed. Reg. 30418 (May 26, 2005) ("Request for Comments"). The Appendix to the Request for Comments asks for consideration of whether it is appropriate for the Department to change its "long-standing practice" of using market economy input prices to value an entire input, including quantities that were obtained from NME suppliers, and what threshold the Department should apply "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." *Id.* at 30419. According to the Department's notice, comments are due by today's date. We respond to these questions below.

On behalf of our clients, who include both manufacturers with production facilities in NME countries and U.S. importers of goods produced in NME countries, we strongly urge the Department to maintain its concededly "long-standing" practice in NME antidumping proceedings of valuing the entire quantity of inputs based upon the actual prices that a respondent paid to market economy suppliers, without limiting the market economy valuation to only those quantities that were actually purchased from the market economy suppliers. Further,

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we believe that it would be inappropriate for the Department to limit its discretion to identify the "best available information," as required by the NME provision of the statute, 19 U.S.C. § 1677b(c)(1), by establishing an arbitrary minimum threshold that constitutes a "meaningful" quantity to support the use of market economy prices to value the entire quantity of an input.

Flexible criteria are essential to identify whether market economy prices are accurately, fairly and predictably identified as commercially reasonable in a given industry. The Department's existing practice of scrutinizing purchases from market economy vendors, to determine whether they are distorted or aberrational, already effectively addresses concerns about potential manipulation of factor valuation while meeting the statutory mandate that valuation be based upon the "best available information."

I. Accuracy, Fairness and Predictability Are Served By The Current Rule

The antidumping statute specifically requires that in cases involving exports from NMEs, where normal value is determined "on the basis of the value of the factors of production utilized in producing the merchandise," the valuation of those factors "shall be based upon the best available information regarding the value of such factors in a market economy country or countries deemed to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). In accordance with this mandate, the Department has consistently used prices that NME manufacturers have actually paid in market economy currencies to market economy-based suppliers – and this practice has consistently been upheld by the courts. Thus, in an early challenge to that practice, Lasko Metal Products, Inc. v. United States, 43 F.3d 1442 (Fed.Cir. 1994), the Federal Circuit rejected an argument that surrogate costs should be developed despite the fact that actual market-based values exist:

As the Court of International Trade correctly observed, although Lasko's "alternative interpretation of the statute requiring that ITA abandon all actual prices once it is forced to resort to surrogate country values might have been possible . . . such an interpretation would conflict with the overall statutory purpose." *Lasko Metal Products*, 810 F. Supp. at 317-18. The purpose of the Act is to prevent dumping, an activity defined in terms of the marketplace. The Act sets forth procedures in an effort to determine margins as "accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191 (Fed. Cir. 1990). "Where we can determine that a 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." *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55271, 55275 (Dep't Comm. 1991)(final determination).

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Id. at 1446.¹

After careful and deliberate consideration, the Department prudently incorporated this practice into its regulations in 1997, where it is now found in 19 C.F.R. § 351.408(c)(1). The Department, in its review of the comments that were submitted in response to its draft regulations, explained the reasoning that underlies its practice:

While we certainly do not view this [*Lasko*] decision as permitting us to use distorted (i.e., non-arm's length) prices, we believe that the Court's emphasis on "accuracy, fairness and predictability" does provide us with the ability to rely on prices paid by the NME producer to market economy suppliers, in lieu of surrogate values, for the portion of the input that is sourced domestically in the NME. Moreover . . . we would not rely on the price paid by an NME producer to a market economy supplier if the quantity of the input purchased was insignificant.

62 Fed. Reg. 27296, 27366 (May 19, 1997).

Nevertheless, the Department now questions whether "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." 70 Fed. Reg. at 30418. The Request for Comments suggests a concern that "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." *Id.* Yet, the Department cites no situation in which its existing criteria for assessing the reliability of such data failed to reveal the occurrence of such manipulative conduct.

The Department's proposed revisions to its practice would in effect create a preference for surrogate values, which are necessarily estimates, often based upon "basket category" import statistics covering a period of time different from the period of investigation, over actual market prices actually paid by the respondent. This revision in practice would clearly derogate from the objective recognized by both the Department and the Court of Appeals of achieving accuracy, fairness and predictability in the NME valuation methodology. Thus, despite the fact that the Department is required by law to calculate a dumping margin as accurately as possible, the change of practice being considered would inevitably and arbitrarily increase the use of surrogate data, which is inherently less accurate than actual market prices.

¹ See also *Shakeproof Assembly Components v. United States*, 268 F.3d 1376 (Fed. Cir. 2001), in which the court noted, "In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based upon the best available information and establishes antidumping margins as accurately as possible."

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The Department itself has noted that it “uses actual market economy inputs wherever possible in NME cases because we believe this enhances the accuracy of our calculations.” *Final Determination, Bicycles from the People’s Republic of China*, 61 Fed. Reg. 19026, 19033 (April 30, 1996). This is an important element in the calculation of normal values in NME proceedings, which as the Department and the courts have recognized is a “difficult” process. *See, e.g., Shakeproof Assembly*, 268 F.3d at 1381 (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)). It cannot be suggested that a greater degree of accuracy can be achieved in this “difficult” process by requiring the use of a greater proportion of surrogate data for those inputs that are obtained from market economy suppliers, as opposed to the longstanding practice of extrapolating actual prices paid in the marketplace when those market economy vendors supply a “meaningful” quantity of the inputs in question. *Shakeproof Assembly*, 268 F.3d at 1383.

II. Existing Criteria Effectively Identify When Actual Market Prices Should Be Disregarded or Limited

The Department already has developed effective criteria for determining those instances in which it either should not use actual market economy prices paid for inputs or should use those prices only for the quantities actually purchased from a market economy supplier. These criteria have been more than sufficient to ensure that market economy purchases are not manipulative, and there is no reason to believe that they will not continue to serve that objective. The criteria are: 1) whether the purchased quantity of market economy inputs was “meaningful,” 2) whether the purchases were aberrational or not otherwise arms-length, and 3) whether the purchases were from suppliers found to have dumped or subsidized goods. *See, e.g., Olympia Industrial, Inc. v. United States*, 36 F. Supp.2d 414 (CIT 1999); *Circular Welded Carbon-Quality Steel Pipe from the People’s Republic of China*, 67 Fed. Reg. 36570 (May 24, 2002) (Issues Memorandum, Comment 1).

In *Shakeproof Assembly*, the court was presented with the issue of whether the Department properly extrapolated the actual market economy price that was paid for purchases of a portion of a given input to the total quantity of that input. The Court of Appeals upheld the Department’s discretion on this point, noting that it was based upon a “meaningful” amount of merchandise, and that “the level of a ‘meaningful’ amount of imported merchandise must be determined on a case-by-case basis.” 268 F.3d at 1382. The court properly recognized that the decision as to what is a “meaningful” quantity will vary from one case to another, thus implying that a brightline threshold may not be appropriate.

As noted by the Department at the time it promulgated its regulations, a quantity is “meaningful” if it is not insignificant. 62 Fed. Reg. at 27366. Both terms are necessarily relative. Seeking to establish a brightline test for identifying when a quantity is insignificant and therefore the actual market prices should not be extrapolated would actually have the effect of undermining the goal of accuracy in the calculation of dumping margins. What is significant for one industry or product may be insignificant for another. Given the wide diversity of products

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subject to NME antidumping investigations, from steel to wooden furniture to plastic bags to garlic, and the number of inputs involved in the production of this highly diverse universe of goods, a "one size fits all" presumption regarding the valuation of those inputs cannot be justified.

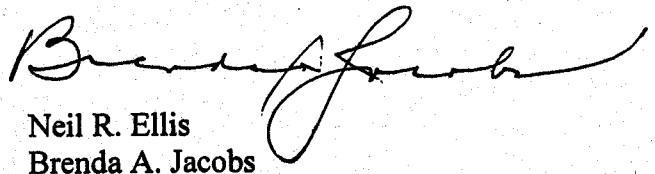
Moreover, inquiry into whether a transaction price is aberrational serves as a further check on the reliability of the actual price information, and may also indicate whether the quantity purchased is meaningful. In this regard, in addition to the usual comparison with other price data as benchmarks, some guidance may be drawn from considering whether the price is one that a "rational producer in a market economy would" pay. *Sigma Corporation v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997). There is no reason why a "normal course of business" inquiry, to identify whether a market economy purchase price reflects a rational business decision, would not identify a practice that is manipulative.

III. Conclusion

The Department's longstanding practice has functioned well for the purpose of determining factor values in this complex area. Replacing that practice with a rigid threshold for the quantity of a given input from a market economy supplier to qualify as "meaningful" in order to value all of the input at the market economy price, would seriously undermine the accuracy and fairness of the Department's dumping determinations in NME proceedings. We therefore submit that the Department should not pursue the proposed revisions to its practice identified in the Request for Comments.

We appreciate the opportunity to submit these comments to the Department. If you have any questions regarding the contents of this letter, please feel free to contact the undersigned.

Respectfully submitted,



Neil R. Ellis
Brenda A. Jacobs