



MINISTRY OF TRADE
THE SOCIALIST REPUBLIC OF VIETNAM

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 in Response to the May 26, 2005 Federal Register Notice that the Department Is Considering Changes to Its Practice of Using Actual Market-Economy Prices in Determining Normal Values in Non-Market Economy Antidumping Proceedings

Dear Secretary Gutierrez,

The Government of Vietnam's Ministry of Trade submits these comments on the U.S. Department of Commerce's (the "Department's") practice of valuing production factors in non market-economy ("NME") antidumping proceedings with actual market-economy prices. These comments are timely filed in response

to the Department's May 26, 2005, *Federal Register* notice that the Department is considering changes to this long-standing practice.¹ The Government of Vietnam respectfully requests the Department's consideration of these comments.

Changes Under Consideration by the Department on its Use of Market-Economy Prices in NME Antidumping Proceedings

The Department's *Federal Register* notice states that the Department is considering changes to its methodology of calculating normal values in NME antidumping proceedings. Specifically, the Department may amend its long-standing practice of using the actual market-economy prices paid for certain production inputs when calculating NME respondents' normal values.

The Department is primarily concerned with whether it should implement a policy that NME producers source a certain amount of an input from market-economy suppliers before using the market-economy prices to value all of a producer's use of the input.

Traditionally, the Department has used actual market-economy prices paid by NME producers for a particular input if such purchases represented a *meaningful* share of the producer's total purchases of the input. What constituted a *meaningful* amount of purchases was decided on a case-by-case basis. The Department's *Federal Register* notice states that it is considering changes to this

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

policy of determining what constitutes a *meaningful* amount of market-economy purchases.

Government of Vietnam's Position²

The Government of Vietnam believes that the Department should continue its long-standing practice of valuing a NME producer's consumption of a particular input with the actual market-economy prices paid for the input. This practice furthers the U.S. Antidumping Statute's mandate of using the best available information to value NME producers' factors of production. The Department's practice of using the actual market-economy prices for such inputs has been incorporated into its regulations, has been used by the Department in numerous antidumping proceedings, and has been upheld by the U.S. Courts.

The Department's practice of using actual market-economy prices in NME proceedings increases the accuracy of antidumping determinations and the calculated antidumping margins. This practice of using actual prices set by the international market should not be curtailed in any way; instead, it should be expanded. In this respect, the Government of Vietnam encourages the Department to adopt a standard that a single market-economy purchase represents a *meaningful* quantity so that such a market-economy price could be used in NME antidumping determinations. Such a position is supported by the Department's precedent in market-economy antidumping proceedings. In

² Please see attached documents

addition, the Government of Vietnam encourages the Department to expand its use of actual market-economy prices so that such prices can be used in all proceedings and for all NME producers - including those that did not have market-economy purchases.

We are looking forward to receiving your positive response.

Respectfully,

(Signed)

**Truong Dinh Tuyen
Minister
Ministry of Trade
Socialist Republic of Vietnam**



BỘ THƯƠNG MẠI
CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM

Ngày 24 tháng 6 năm 2005

Kính gửi:
Ngài Carlos M. Gutierrez
Bộ trưởng
Bộ Thương mại Hoa Kỳ
Washington D.C. 20230

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V/v: Ý kiến bình luận phúc đáp Công báo liên bang ngày 26 tháng 5 năm 2005, theo đó Bộ Thương mại Hoa Kỳ đang xem xét thay đổi phương pháp sử dụng giá thực tế tại nền kinh tế thị trường để xác định giá trị thông thường trong các vụ kiện chống bán phá giá có liên quan các nước có nền kinh tế NME.

Kính thưa Ngài Bộ trưởng,

Bộ Thương mại Việt Nam xin gửi tới Bộ Thương mại Hoa Kỳ (DOC) những ý kiến bình luận về phương pháp định giá các yếu tố sản xuất trong các vụ kiện chống bán phá giá liên quan đến nước có nền kinh tế phi thị trường (NME) thông qua giá thực tế tại nước có nền kinh tế thị trường. Những ý kiến

bình luận này được nộp đúng hạn theo như thông báo của DOC đăng trên *Công báo Liên bang* ngày 26 tháng 5 năm 2005, theo đó DOC đang cân nhắc những thay đổi đối với phương pháp tính giá đã được áp dụng từ lâu.¹ Chính phủ Việt Nam trân trọng đề nghị DOC xem xét những ý kiến bình luận này.

Những thay đổi mà DOC đang cân nhắc về việc sử dụng giá theo nền kinh tế thị trường trong các vụ kiện chống bán phá giá liên quan đến nền kinh tế NME.

Theo thông báo của DOC đăng trên *Công báo Liên bang*, DOC đang xem xét những thay đổi về phương pháp tính giá trị thông thường trong các vụ kiện chống bán phá giá liên quan đến những nước có nền kinh tế NME. Cụ thể, DOC có thể sửa đổi phương pháp đã được sử dụng từ trước đến nay là áp dụng giá thực tế phải trả cho nguyên liệu sản xuất đầu vào tại nước có nền kinh tế thị trường để tính toán giá trị thông thường cho bị đơn thuộc nước có nền kinh tế NME.

DOC chủ yếu quan tâm đến việc liệu họ có nên áp dụng một chính sách đòi hỏi các nhà sản xuất thuộc nền kinh tế NME mua một lượng nguyên liệu đầu vào nhất định từ các nhà cung cấp thuộc nền kinh tế thị trường thì mới được sử dụng giá của nền kinh tế thị trường để định giá cho toàn bộ lượng tiêu thụ nguyên liệu đầu vào của nhà sản xuất.

Theo thông lệ trước đây, DOC đã sử dụng giá thực tế tại nước có nền kinh tế thị trường mà các nhà sản xuất NME phải trả đối với một nguyên liệu đầu vào nhất định nếu việc mua nguyên liệu sản xuất đầu vào chiếm một phần đáng kể trong tổng lượng mua nguyên liệu đầu vào của nhà sản xuất. Tỷ lệ lượng mua đầu vào đáng kể sẽ được quyết định theo từng vụ việc. Thông báo đăng trên

¹ Phương pháp tính giá nguyên liệu đầu vào theo nền kinh tế thị trường trong các vụ kiện chống bán phá giá liên quan đến các nước có nền kinh tế thị trường, công báo 70. reg 30,418 (Bộ Thương mại Hoa Kỳ ngày 26 tháng 5 năm 2005) (Yêu cầu bình luận)

Công báo Liên bang của DOC cũng cho biết họ đang cân nhắc những thay đổi đối với chính sách này trong việc xác định tỷ lệ lượng mua đầu vào như thế nào thì được coi là đáng kể.

Quan điểm của Chính phủ Việt Nam²

Chính phủ Việt Nam tin rằng DOC nên tiếp tục sử dụng phương pháp đã được áp dụng từ lâu đối với việc tính lượng tiêu thụ của một nguyên liệu đầu vào cụ thể của các nhà sản xuất từ nước có nền kinh tế NME thông qua giá thực tế phải trả tại nước có nền kinh tế thị trường. Phương pháp này giúp cho việc sử dụng thông tin sẵn có tốt nhất để định giá các yếu tố sản xuất của các nhà sản xuất từ nước có nền kinh tế NME theo quy định của Luật chống bán phá giá của Hoa Kỳ. Phương pháp nói trên cũng đã được thể chế hóa thành các quy định của DOC, đã được DOC áp dụng trong một số vụ kiện chống bán phá giá và cũng nhận được sự ủng hộ của Toà án Hoa Kỳ.

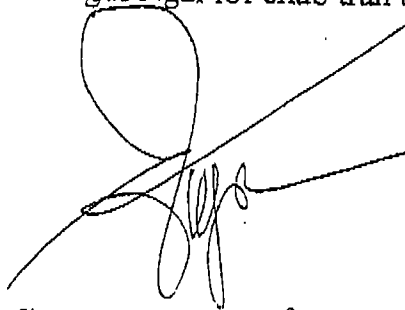
Phương pháp sử dụng giá thực tế tại nền kinh tế thị trường của DOC trong các vụ kiện đối với nước có nền kinh tế NME sẽ làm tăng độ chính xác của các quyết định chống bán phá giá và việc tính biên độ phá giá. Phương pháp sử dụng giá thực tế theo thị trường quốc tế bằng bất cứ cách nào cũng không nên bị thu hẹp mà ngược lại cần được mở rộng. Về khía cạnh này, Chính phủ Việt Nam khuyến nghị DOC nên đưa ra một chuẩn mực nhằm xác định một giao dịch mua nguyên liệu đầu vào tại một nền kinh tế thị trường duy nhất sẽ đại diện cho một khối lượng *đáng kể*, từ đó giá nguyên liệu tại nền kinh tế thị trường có thể được sử dụng trong các quyết định chống bán phá giá đối với nước có nền kinh tế NME. Quan điểm này còn có cơ sở từ tiền lệ của DOC trong các vụ kiện liên quan đến nền kinh tế thị trường. Ngoài ra, Chính phủ Việt Nam cũng khuyến

² Ý kiến bình luận chi tiết xin được gửi kèm theo.

việc sử dụng giá thực tế tại nền kinh tế thị trường để phương pháp này có thể được áp dụng trong tất cả các vụ kiện và đối với tất cả các nhà sản xuất thuộc NME - kể cả những nhà sản xuất không thực hiện việc mua nguyên liệu đầu vào tại nền kinh tế thị trường.

Chúng tôi mong sớm nhận được phúc đáp tích cực của Quý Ngài.

Xin gửi Ngài lời chào trân trọng,



Trương Đình Tuyển
Bộ Trưởng
Bộ Thương mại
Cộng hoà xã hội chủ nghĩa Việt nam.

**United States Department of Commerce
International Trade Administration — Import Administration**

**Comments on the Department of Commerce's Consideration of Changes to Its
Long-Standing Practice in Non-Market Economy Proceedings of Using Actual
Market-Economy Prices to Calculate Normal Values**

**Government of Vietnam
Ministry of Trade**

June 24, 2005

Introduction

Under the U.S. Antidumping Statute, the Department determines a NME respondent's normal value by valuing the NME producer's factors of production – that is, all direct inputs, labor, and financial overhead, selling expenses, and profit. The general purpose of using such a “factor of production” methodology is to determine the value of the subject merchandise in the NME as if it had been produced in a market-economy country. The U.S. Antidumping Statute clearly mandates that the factors of production in NME cases

shall be based on the *best available information* regarding the values of such factors in a market economy country....¹

Basically, we consider the Department's May 26 request for comments as an invitation to provide views on what constitutes the *best available information* to value a NME producer's factors of production — actual prices or surrogate values.

The Government of Vietnam supports the Department's long-standing practice – explicitly included in its regulations and upheld by both the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade – of using the actual prices that NME producers pay to market-economy suppliers when these prices are available. As a general rule, the Department uses pricing and cost data from a “surrogate country” to value the factors of production. However, the Department has recognized that such values are not as precise as actual prices paid for inputs that have been set according to international market principles. The Court of Appeals has taken this argument even

¹ 19 U.S.C. § 1677b(c) (emphasis added).

further and stated that “using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law.”²

When data about the market-economy prices that a NME producer has paid are available, the Department has recognized that such data satisfy the Antidumping Statute's mandate of using the *best available information* to value the factors of production. The Department has correctly adhered to the Antidumping Statute's mandate by using such actual market-economy prices to value all of a NME producer's consumption of a particular input sourced from both market-economy and NME suppliers. Again, recognizing that such prices result in the most accurate antidumping margins, the Department included this practice in its regulations.

The Department's concerns underlying its current analysis of whether to use actual market-economy prices to value all of a respondent's usage of a particular input are ill-founded. In its May 26 *Federal Register* notice, the Department stated its concern that certain NME producers may purchase only minimally sufficient amounts of an input from market-economy suppliers so that all of their usage is valued with market-economy prices that may not reflect what these producers actually pay for the input. In addition, the Department voiced its concern that market-economy prices for only a small amount of an input may be used to value all of a NME respondent's use of the input even if such a respondent does not typically buy from market-economy suppliers. Such arguments that focus on the quantity of the inputs purchased from a market-economy supplier do not properly reflect the principal concern of the U.S. Antidumping Statute that such values

² *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1446 (Dec. 29, 1994) (quoting *Fans from China*, 56 Fed. Reg. 55,275).

represent the "best available information" for normal value calculations. As the Department has held in prior decisions, the nature of market-economy prices does not change simply because the purchaser is in a market-economy country or a NME country. Specifically, the Department has stated that

{t}he 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."³

The Government of Vietnam addresses the following three issues below in support of its position that the Department should continue to value NME producers' factors of production with actual prices paid to market-economy suppliers:

1. The Department's long-standing practice of using the actual prices paid by a NME producer to value all of its consumption of a particular input satisfies the U.S. Antidumping Statute's mandate to use the best available information in antidumping calculations. However, failure to use such market-economy prices, when available, to value all of the NME producer's consumption of an input would violate the U.S. Antidumping Statute's mandate.
2. In deciding whether the quantity of market-economy purchases should dictate whether actual market-economy prices are used to value all of a NME producer's consumption of a particular input, the Department should adhere to its practices in market-economy cases.
3. In previous cases in which certain NME respondents had market-economy purchases and others did not, the Department has used an average of the available market-economy prices to value all respondents' consumption of a particular input. The Department should apply this practice to all NME antidumping proceedings.

³ *Fans from China*, 56 Fed. Reg. at 55,271 (accompanying decision and issues memorandum at Cmt. 1).

These three general issues are discussed in greater detail and are supported with additional arguments below.

1. *The Department's long-standing practice of using the actual prices paid by a NME producer to value all of its consumption of a particular input satisfies the U.S. Antidumping Statute's mandate to use the best available information in antidumping calculations. However, failure to use such market-economy prices, when available, to value all of the NME producer's consumption of an input would violate the U.S. Antidumping Statute's mandate.*

The Department's principal obligation in administering the antidumping laws is to ensure that its dumping determinations, as well as the calculated margins of dumping, are made accurately and with the best available information.⁴ Calculating normal values for respondents in NME antidumping proceedings necessarily challenges the Department because the Department does not normally use the actual expenses incurred by NME producers in producing the subject merchandise. Because the U.S. antidumping laws assume that NME respondents' prices are subject to their NME governments' control, the U.S. antidumping laws mandate that the Department rely on a "factors of production" methodology to construct the NME respondents' normal values. The specific provisions of the "factors of production" methodology are provided at Section 773(c) of the Tariff Act of 1930 and Section 351.408 of the Department's regulations.⁵

In calculating NME respondents' normal values, the Department approximates the costs that NME producers would have incurred to produce the subject merchandise if

⁴ *Lasko*, 43 F.3d at 1443 (Dec. 29, 1994).

⁵ *See* 19 U.S.C. § 1677b(c); 19 C.F.R. § 351.408.

they were operating in a market economy. After determining the amounts of all inputs used to produce the subject merchandise, the Department values these inputs with either values from surrogate countries or the actual prices paid to market-economy suppliers. The sum of these inputs' values, in addition to amounts for factory overhead, general expenses, and profit, is a NME respondent's normal value. Although the Department relies on the actual quantity of inputs that NME producers consumed to calculate their normal values, it often relies on surrogate prices from market-economy countries to value these inputs. Such surrogate values do not satisfy the Statute's requirement for the best available information when actual prices paid to market-economy suppliers are available.

The Antidumping Statute requires the valuation of a NME producer's production factors with the best available information from a market-economy country or countries that the Department considers appropriate.⁶ The Statute's requirement for the best available information is reinforced by the Court of International Trade's emphasis on the Department's statutory obligation for accuracy. Specifically, the Court has said that

{w}hile 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.⁷

Normally, the Department is forced to rely on the least accurate and least predictable means of valuing the factors of production — that is, subjectively deciding

⁶ 19 U.S.C. § 1677b(c)(1).

⁷ *Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States*, 59 F.Supp. 2d 1354 (July 29, 1999).

what prices or costs from the surrogate country most closely approximate the value for a particular input. However, in those cases in which a NME producer purchases an input from a supplier in a market economy in the market-economy currency, the Department can be confident that it is accurately valuing this input with the best available information. The Department cannot obtain a more accurate value for what a NME producer would have paid if it were operating in a market economy than the price it actually paid to a market-economy supplier. Surrogate values for another country cannot approximate the accuracy of actual market-economy prices paid by companies in the NME country.

As the Court of International Trade has stated, the surrogate values that the Department uses to value the factors of production in NME cases are fictional.⁸ The actual price paid by a NME producer represents the best available information for valuation purposes because the Department does not 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. Because the input was purchased from a market-economy supplier, its price was necessarily based on commercial negotiations and was set according to international market principles.

The Department should continue to adhere to its practice of using actual prices paid to market-economy suppliers because it results in the most accurate, fair, and

⁸ *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)).

predictable way of calculating NME respondent's normal values and dumping margins.

The Department recognized the inherent fairness of using actual prices paid to market-economy suppliers, as well as the fact that these prices are the best available information to value these inputs, when it drafted its regulations. Specifically, on the issue of valuing the factors of production, the Department's regulations provide that

{t}he Secretary normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary *normally* will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary *normally* will value the factor using the price paid to the market economy supplier.⁹

This regulation's emphasis on *normally* using the actual market-economy price paid for an input in calculating a NME respondent's normal value clearly reflects the Department's long-standing practice of using such values in its NME margin calculations. It also demonstrates the Department's recognition that such prices are the best information to value a NME producer's inputs.

The United States Court of Appeals for the Federal Circuit has considered the issue of whether a surrogate value or the market-economy price that a NME respondent actually paid for an input is the most accurate value. The Court of Appeals stated that in such a case, the best option for approximating what a NME producer's costs for inputs would be in a market economy country would be the price charged for such inputs on the

⁹ 19 C.F.R. § 351.408(c)(1) (emphasis added).

international market.¹⁰ Specifically, the Court stated that when “input prices are market determined, accuracy, fairness and predictability are enhanced by using those prices.”¹¹ The Court of Appeals further stated that if market-based values are available, the Department’s use of surrogate values would be contrary to the law.¹²

The Department has followed the Court of Appeals’ decision in its longstanding practice of using actual market-economy prices paid by NME producers. The Department has concluded that when an NME producer imports an input from a market economy, the price paid for such imports is also the best available information to value the domestically sourced identical input.¹³ The Department has stated that in such a case, it is more appropriate to use the actual prices to value the factors of production than to rely on surrogate values.¹⁴ Moreover, the Department specifically stated that the actual market-economy prices paid for the imported input are more accurate values for an identical domestically sourced input than potential surrogate values from other market economies.¹⁵

In its recent request for comments, the Department stated that one of the concerns with its valuation of the factors of production is that “the market economy prices the

¹⁰ *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1443 (Dec. 29, 1994).

¹¹ *Id.* at 1446 (quoting *Fans from China*, 56 Fed. Reg. 55,275).

¹² *Id.* The Court specifically stated that “{u}sing surrogate values when market-based values are available would, in fact, be contrary to the intent of the law.”

¹³ *Final Results of Redetermination on Remand pursuant to Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States* available at <http://ia.ita.doc.gov/remands/99-70.htm>.

¹⁴ *Oscillating Fans and Ceiling Fans from China*, 56 FR 55,271 (Dep’t Commerce Oct. 22, 1991) (Final Det.).

¹⁵ *Id.*

Department would use to value an entire input may not be reflective of actual prices.”¹⁶

Such concern is ill-phrased and illogical in that market-economy prices are actual prices.

As the court and the Department have confirmed, the Department cannot obtain *more accurate* prices that reflect a market-economy value than an *actual* price to a market-economy supplier. Conversely, a surrogate value representing what a company in another country paid for a particular input can, at best, only approximate the actual value in the particular NME.

2. *In deciding whether the quantity of market-economy purchases should dictate whether actual market-economy prices are used to value all of a NME producer's consumption of a particular input, the Department should adhere to its practices in market-economy cases.*

In considering whether to amend its long-standing practice of using market-economy prices in NME cases, the Department is primarily concerned with whether such prices represent a “meaningful” quantity of a NME producer’s use of the particular input. Currently, the Department determines whether the actual prices paid for a particular input constitute a “meaningful” quantity of all of the consumed input on a case-by-case basis. The Government of Vietnam believes that the Department should continue to base its determination of a “meaningful” quantity on such a case-by-case basis. Nonetheless, even when an analysis of the appropriate quantity is conducted on such a case-by-case basis, the Department should conclude that a quantity is meaningful even in those cases in which just one purchase was made on a bona-fide commercial basis.

¹⁶ *Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries*, 70 Fed. Reg. 30,418, 30,418-30,419 (Dep’t Commerce May 26, 2005)(Request for Comments).

Citing its position in the Preamble to the Final Rule on the Antidumping and Countervailing Duties, the Department states in its May 26 request for comments that the focus on a "meaningful" standard is to ensure that a NME producer could purchase all of its requirements of a particular input at the actual price paid for the input.¹⁷ The Government of Vietnam asserts that the central question is not whether the NME producer can purchase all of its input at that particular price, but instead whether such a price is the *best available information* to value the particular input. In all cases in which the NME producer pays a *bona fide* price for an input, such a price will necessarily reflect a more accurate value than a price from a surrogate country. This is true regardless of the quantity represented by such market-economy purchases.

The Government of Vietnam asserts that the Department's practice in market-economy cases supports a conclusion that the Department should use *bona fide* market-economy prices of any quantity in valuing all of NME respondent's use of a particular input. Specifically, the Department should follow its practice of using market-economy prices of any quantity in determining whether sales were made below the cost of production in the home market and also in its applying of the "major input rule."

¹⁷ *Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries*, 70 Fed. Reg. 30,418 (Dep't Commerce May 26, 2005) (Request for Comments) (*citing* Antidumping Duties; Countervailing Duties, 62 Fed. Reg. at 27,366).

The Department should follow its practice in market-economy cases of using home market prices of any quantity in determining whether home market sales were made below the cost of production.

In determining whether to disregard home market sales that were made below the cost of production in market-economy cases, the Department is obligated to adhere to the following statutory provision:

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.¹⁸

In adhering to the statutory provision on disregarding below-cost sales, the Department has implemented a “20%-80%” test to determine whether below-cost sales should be disregarded.

Specifically, once the Department finds that a market-economy producer has made home market sales below their costs of production, the Department will decide whether to use such below-cost sales under one of the following three scenarios:

- (1) First, if the Department finds that less than 20 percent of the producer's home market sales were made below their costs of production, then the Department uses all home market sales to determine normal value, including below-cost sales.
- (2) Second, if the Department finds that more than 20 percent of a producer's home market sales were concluded below their costs of production, the Department calculates normal value by using only the above-cost home market sales.

¹⁸ 19 U.S.C. 1677b(b) (emphasis added).

- (3) Third and finally, if the Department concludes that there were no home market sales that were made above cost, the Department resorts to constructed value in the antidumping margin calculation.

The three options above clearly demonstrate that the Department does *not* require a market-economy producer to demonstrate that it had a *specific amount* of above-cost sales before such sales can be used in the normal value calculation. Instead, the Department will use any quantity of arm's-length home market sales — even one sale — that is above the cost of production to calculate the market-economy producer's normal value. In support of using a single above-cost sale in calculating a market-economy respondent's antidumping margin, the Department clearly stated that

{t}he 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.*¹⁹

The Department must treat *bona fide*, arm's-length purchases from market-economy suppliers similarly in both market-economy and NME antidumping proceedings. As explained above, the Department in market-economy cases deems a single *bona-fide, arms-length* home market sale as adequately representing all prices that a market-economy respondent charges in its home market. Similarly, in NME cases, the Department must also deem that a single *bona-fide, arms-length purchase transaction*

¹⁹ *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). *See also 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) (stating that "{t}he 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").

from a market-economy supplier as adequately representing all prices that a NME producer pays for a particular input.

The Department should also follow its practice in market-economy cases of not requiring a minimum number of transactions in determining appropriate prices under the "major input rule."

The Department's use of market-economy prices in NME cases is similar to its practice of using such prices in the "major input" test in market-economy cases to determine whether home market sales were made below their costs of production. In both practices, the Department's use of the market-economy prices does not depend on whether a certain number of such prices exist. Rather than focusing on the number of transactions, both tests are concerned with whether the home-market sales or purchases at issue were concluded at *arms-length*.

In calculating a respondent's cost of production in market-economy cases, Section 773(f) of the U.S. Antidumping Statute provides that the Department may use other values for inputs purchased from affiliated parties if the Department believes that the reported values are less than the input's cost of production.²⁰ The Department's basic goal in applying the "major input rule" is to determine whether prices charged to a market-economy producer by its affiliated suppliers are reasonable. Under its regulations, the Department will base the value of a major input purchased from an affiliated entity on the higher of the following:

- (1) the actual price that the market-economy producer paid to its affiliated supplier for the input;

²⁰ See 19 U.S.C. § 1677b(f)(3).

- (2) the input's value when sourced from unaffiliated suppliers in the producer's home market; and
- (3) the cost incurred by the affiliated supplier in producing the input.²¹

Importantly, in applying the major input rule to value a market-economy respondent's purchases from affiliated suppliers, the Department does not require a minimum number of purchases when considering values under (1) or (2) above. If the Department has a viable value under (1) or (2) above, and such value is the highest available, then the Department will rely on such a value for the purchases of the input from an affiliated supplier in determining the respondent's cost of production. We are aware of no case in which the Department has ever rejected an arms-length price under categories (1) or (2) on the sole basis that the quantity of such purchases or sales was not sufficiently large. Conversely, the Department on several occasions has utilized arm's-length prices under categories (1) or (2) when these represented only a small percentage of the respondent's total purchases of the material input.

The rationale for using actual values to determine whether home market sales were made below their costs of production, as well as to determine how to value a major input from an affiliated supplier, should also apply to decisions of whether to use market-economy prices in NME antidumping cases. In using market-economy prices, the Department's focus should be whether the prices were paid on a *bona-fide*, arms-length basis to a market-economy supplier. The Department does not ignore such prices in market-economy antidumping cases simply because they represent values for a small

²¹ 19 C.F.R. 351.407(b).

number of purchases or sales. If the Department does not apply a quantitative test in market-economy cases, it has no logical justification for applying one in NME cases.

3. *In previous cases in which certain NME respondents had market-economy purchases and others did not, the Department has used an average of the available market-economy prices to value all respondents' consumption of a particular input. The Department should apply this practice to all NME antidumping proceedings.*

The Department should follow its case precedent and adopt a policy of always using the market-economy prices paid by certain NME producers to value other producers' use of a particular input if certain producers had no market-economy purchases. Such a policy would adhere to the Courts' and the Department's recognition that the actual prices paid by NME producers to market-economy suppliers are the best information available to value the factors of production. As the Department has stated, "{r} equiring the use of surrogate values in a situation where actual market-based prices incurred by a particular firm are available would be contrary to the statutory purpose."²²

In past antidumping proceedings, the Department has used the average of the market-economy prices that certain producers paid for a particular input to value the consumption of the input by other producers that had no market-economy purchases.²³

²² *Oscillating Fans and Ceiling Fans from China*, 56 FR 55,271 at Cmt. 1 (Dep't Commerce Oct. 22, 1991) (Final Det.).

²³ *Bicycles from China*, 61 Fed. Reg. 19,026, 19,029-19,030, 19,032 (Dep't Commerce Apr. 30, 1996) (Final Det.); *Non-Frozen Apple Juice Concentrate from China*, 65 Fed. Reg. 19,873 (Dep't Commerce Apr. 13, 2000) (Final Det. at Cmt. 6).

This approach has also been endorsed by U.S. domestic producers.²⁴ In these cases, however, the Department has stated that it considered such data to be a “second alternative” to design-specific data available in the surrogate country.²⁵ Such a policy decision that favors surrogate values over actual market economy purchase prices contradicts decisions by both the Courts and the Department that actual market-economy prices are the best available information to value the factors of production.

A policy decision to use surrogate values over actual market economy purchase prices or averages of such actual prices is counterintuitive and clearly violates the Department's statutory obligation to administer the antidumping laws in the most accurate, fair, and predictable manner. Use of the actual price paid for an input, averages of such prices, or publicly-ranged values for other producers' business proprietary prices for respondents that had no market-economy purchases satisfies the Department's mandate to use the best available information.

Conclusion

In conclusion, the Government of Vietnam asserts that the Department should continue its long-standing practice of valuing all of a NME producer's use of a particular input with the actual prices paid to market-economy suppliers. As both the Courts and the Department have concluded, the actual market-economy prices represent the best available information to value inputs in NME proceedings. Because the U.S. Antidumping Statute requires the Department to value production factors in NME cases

²⁴ *Non-Frozen Apple Juice Concentrate from China*, 65 Fed. Reg. 19,873 at Cmt. 6.

²⁵ *Id.*

with the best available information, failure to use actual market-economy prices would — as stated by the Court of Appeals — clearly be contrary to the intent of the law.²⁶

The Department's decision of whether to use actual market-economy prices paid for inputs in calculating normal values for NME respondents should focus solely on whether such prices represent *bona fide* sales. The Department should not focus on whether a NME producer has purchased a significant quantity of a particular input to determine whether such prices represent what the producer would ordinarily have paid if it operated in a market economy. Such questions can only be addressed by reviewing the nature of the purchase to determine whether it was a *bona-fide*, arm's-length purchase. The Department's precedent of using market-economy prices in calculating the costs of production in market-economy cases, regardless of the quantity of such transactions represented by these prices, requires that the Department follow this practice in NME proceedings.

Furthermore, because the actual market-economy prices that NME respondents pay for inputs represent the best available information to value such inputs, the Department should use such prices in all cases. The Department should continue to use a NME producer's actual market-economy prices to value all of its consumption of a particular input. In addition, the Department should also use the averages of the market-economy prices paid by certain NME producers for certain inputs to value the consumption of these inputs by other producers who did not have market-economy purchases. The Department has applied this methodology in former NME proceedings.

²⁶ *Lasko*, 43 F.3d at 1446 (quoting *Fans from China*, 56 Fed. Reg. 55,275).

It should adopt such a practice in all NME cases to satisfy the U.S. Antidumping Statute's mandate for valuing the factors of production with the best available information.

The Department should not restrict its long-standing policy of using NME producers' market-economy purchases to value all of their use of an input sourced from both market-economy and NME suppliers. However, in the event that it decides to do so, such a change should only apply to NME antidumping investigations initiated after the date on which the Department officially acknowledges the change in its practice. Applying such a methodological change to only prospective NME investigations would follow the Department's practice in implementing new policies as demonstrated in its recently implemented NME separate-rate application process. Limiting such a change to prospective cases also reflects the Department's recognition that parties in ongoing antidumping proceedings may make commercial decisions that could be adversely affected by a sudden change in antidumping methodologies.