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June 22, 2005

Joseph A. Spetrini

Acting Assistant Secretary for Import Administration

Central Records Unit, Room 1870

U.S. Department of Commerce

Pennsylvania Avenue and 14th Street NW

Washington DC, 20230

Re: Market Economy Inputs Practice in Antidumping Proceeding involving Non-Market Economy Countries

Dear Acting Assistant Secretary:

As a law firm specializing in the representation of clients in antidumping proceedings, Shanghai Capitallaw & Partners law firm, together with Xiamen Antidumping Affairs Reference Center, an organization providing antidumping consultation services for Chinese exporters, hereby submit joint comments in response to the notice published by the Department of Commerce ("Department") in the Federal Register on May 26, 2005 entitled "Market Economy Inputs Practice in Antidumping Proceeding involving Non-Market Economy Countries", 70 Fed. Reg. 30418. In that notice, the Department states that it is considering changes to its current policy and practice regarding market economy input prices and poses three questions in the Appendix to the notice. These questions are: 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? 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? 3) Please provide any additional views on any other matter pertaining to the Department's practice concerning the use of market economy import prices. The following are our answers to these questions.

1. It is inappropriate for the Department to change its regulations and end its long-standing practice of using market economy import prices to value an entire input, because this practice advantageously serves the antidumping statutes purpose of "determining margins as accurately as possible", works well in practice and has been upheld by the Court of International Trade ("CIT") and the Court of Appeals for the Federal Circuit ("CAFC") repeatedly.

First, the Department's current market economy inputs practice is based on its

interpretation of 19 U.S.C. § 1677b(c), which requires the Department to determine the normal value of merchandise exported from a non-market economy country ("NME") on the basis of the best available information regarding the values of the factors of production. As the CAFC and CIT clearly point out, "the purpose of the statutory provisions [that is, §§1677b(c)(1) and (4)] is to determine margins 'as accurately as possible'"[1], "while 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"[2]. Keeping this mandate in mind, and recognizing that "the best available information on what the supplies used by the Chinese manufacturers would cost in a market economy country was the price charged for those supplies on the international market"[3] because "the cost of raw materials from a market economy supplier, paid in a convertible currency, provides Commerce with the closest approximation of the cost of producing the goods in a market economy country"[4], the Department, after using the actual prices paid by NME producers in market economy currencies to value the inputs obtained from market economy suppliers, began to utilize these market-based prices to value the domestically sourced inputs. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Melamine Institutional Dinnerware Products From the People's Republic of China ("PRC"), 62 Fed. Reg. 1708 (January 13, 1997) (where the Department stated that "[w]hen melamine powder was purchased from a market economy, we used the prices paid to market economy suppliers to value this input, even though the producer did not purchase 100 percent of the melamine powder from a market economy. We believe that the market economy price is the most appropriate basis for determining the value of melamine powder purchased from PRC suppliers"), and Certain Helical Spring Lock Washers From the

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[1] Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States ("Shakeproof III"), 268 F.3d 1376, 1382 (Fed. Cir. 2001).
[2] Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States ("Shakeproof I"), 23 CIT 479, 481, 59 F. Supp.2d 1354, 1358 (1999).
[3] Lasko Metal Prods., Inc. v. United States ("Lasko"), 43 F.3d 1442,1446 (Fed. Cir. 1994).
[4] Lasko Metal Prods., Inc. v. United States, 16 CIT 1078,1081,810 F. Supp. 314, 317 (1992).

PRC; Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 61794 (November 19, 1997) (where the Department stated that "[t]herefore, in accordance with the Department's established practice, we continue to use the actual imported steel prices to value steel inputs because these prices represent the actual market-based prices incurred by the respondent in producing the subject merchandise and, as such, are the most accurate and appropriate values for this particular factor for the purpose of calculating NV").This practice later has been codified in Section 351.408(c)(1) of the Antidumping Duties; Countervailing Duties; Final Rule ("Final Rule"), 62 Fed. Reg. 27296 (May 19,1997), which provides that:

…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 Department] normally will value the factor using the price paid to the market economy supplier.

Final Rule, 62 Fed. Reg. at 27366.

To ensure that "the price paid to the market economy supplier" is an actual market-driven price so that accuracy, fairness and predictability are really enhanced by using this price, the Department has developed three conditions to set limits on the use of this practice: (1) the amounts purchased from the market economy supplier must be meaningful; (2) the purchase price must be arm's length price;(3) the Department mush have no reason to believe or suspect that the purchase price may be dumped or subsidized. The Department in recent years has applied these conditions consistently. In many cases, prices charged by market economy suppliers were ignored on the basis that they didn't meet these conditions and therefore were distorted or unreliable. See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields from the PRC, 67 Fed. Reg. 6482 (February 12,2002)(where the Department stated that "Xinyi's market economy purchases of molding are not significant, and therefore, for the final determination, we continue to determine that Xinyi's molding input should be valued using a surrogate value and not using its actual purchase price from a market economy supplier"). Since this practice harmonizes with the 19 U.S.C. § 1677b(c)'s origin and purpose, it surely is a reasonable interpretation of that statute and should not be arbitrarily ended merely

because of some concerns as mentioned in the Department's notice.

Next, according to our statistics, from 1996 up to date, of nearly sixty NME determinations in which the Department has used its current market economy input practice, only three were in dispute and were challenged before the court.[5] This low percentage clearly shows that this long-standing practice works well in practice and has been widely accepted by petitioners and respondents. As such, it is unnecessary and inappropriate for the Department to change this practice because the advantages provided by it for interested parties—accuracy, fairness and predictability—would be deprived of and this would unfairly punish interested parties, especially NME respondents.

Finally, the Department's current market economy input practice is strongly supported by the CIT and CAFC. In Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States ("Shakeproof II"), 102 F. Supp.2d 486 (Ct. Int'l Trade 2000), the landmark case addressing this practice for the first time, the CIT, after reviewing the Department's remand determination, held that the Department's use of actual import prices to value a factor of production in an NME was reasonable. The CIT reasoned:

Actual import data may be the best available information to accurately value a factor of production in a [sic] NME, and therefore this method of valuation arguably may provide more accurate information than the use of fictional surrogate data. Indeed, as

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[5] These three determinations are: Certain Helical Spring Lock Washers From the PRC; Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 61794 (November 19,1997); Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the PRC, 62 Fed. Reg. 6189 (February 11,1997); and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the PRC: Final Results of 1997-1998 Antidumping Duty Administrative Review and Final Results of New Shipper Review, 64 Fed. Reg. at 61845 (November 15, 1999) ("TRBs XI"). They were reviewed by the CIT and CAFC in Shakeproof I, 23 CIT 479, 481, 59 F. Supp.2d 1354, aff'd, Shakeproof III, 268 F.3d 1376; Peering Bearing Co. v. United States ("Peering"), 25 CIT __, __, 182 F. Supp. 2d 1285 (2001); and Luoyang Bearing Factory v. United States ("Luoyang"), 2002 Ct. Intl. Trade LEXIS 117, Slip Op. 02-118 (Oct. 1,2002).

this court has previously stated,

Commerce's task in a nonmarket economy investigation is to calculate what a producer's costs or prices would be if such prices or costs were determined by market forces. As Commerce incisively stated in Oscillating Fans and Ceiling Fans from the PRC, 56 Fed. Reg. 55271, 55275 (final determination): "requiring 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."

Standing alone, the use of the market price actually paid for valuing a factor of production is reasonable because it brings market price into the comparison. Therefore, using surrogate value is not the only way to value a factor of production.

Shakeproof II, 102 F. Supp.2d 486, 491 (Ct. Int'l Trade 2000) (citations omitted).

In its judgment affirming the CIT's decision, Shakeproof III, 268 F.3d 1376, the CAFC further pointed out:

As we observed in Lasko, the statute does not require the factors of production to be ascertained in a single fashion. Moreover, the statute does not require that Commerce always use surrogate country values. Indeed, the statute requires the valuation of the factors of production to be based "on the best available information." Surrogate country values represent only an estimate of what a non-market economy manufacturer might pay in a market economy setting. Thus, the statute recognizes that surrogate values are used only "to the extent possible".

In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible. …Thus, we agree that the best available and most accurate information regarding the normal value of the domestically obtained steel is the purchase price of the steel imported from the United Kingdom. Commerce's Remand Determination demonstrates that the methodology used in this case is a permissible interpretation of 19 U.S.C. 1677b(c) (1994).

Shakeproof III, 268 F.3d 1376, 1382 (citations omitted).

These decisions, which articulated the rationale behind the Department's practice in detail, have been followed by the CIT in two subsequent cases involving the same issue[6]. Since these decisions are still controlling, the Department's proposal, i.e., to change its regulations and end this practice is contrary to judicial precedents and therefore lacks judicial support.

2.The Department should continue its present case-by-case approach to the determination of whether the amounts purchased from a market economy supplier are meaningful, because this approach accords with commercial reality and furthers the overriding goal of the Department's market economy inputs practice—achieving the greatest degree of accuracy possible. Establishing a specific threshold regarding share or volume for determining whether inputs sourced from market economy suppliers are meaningful is difficult and meaningless. However, if the Department insists that such a threshold should be developed, it should comply with the following principles: (1) the Department must take into account the complexity of commercial transactions and the threshold established by it must be dynamic enough to meet changing circumstances within markets; (2) the Department must keep the CAFC's decision in Shakeproof III, 268 F.3d 1376, which held that the steel imported from the United Kingdom accounting for approximately one-third of all steel used to produce the subject merchandise constituted a "meaningful" amount, in mind.

In our view, for the reasons discussed below, it is inappropriate for the Department to change its current case-by-case approach to meaningfulness determinations.

First, the Department's approach is consistent with the dictionary definition of the term "meaningful". "Meaningful" is defined as "a: having a meaning or purpose; b: full of meaning." Merriam-Webster, available at http://www.m-w.com. Although this

[6] Peering, 25 CIT __, __, 182 F. Supp. 2d 1285 (2001); Luoyang, 2002 Ct. Intl. Trade LEXIS 117, Slip Op. 02-118 (Oct. 1,2002).

term, as an adjective, denotes a quality of the thing named, such as "amount", it does not indicate that thing's quantity or extent. Facing this vagueness, the Department has employed the most practicable approach to interpreting this term as accurately as possible, i.e., determining what is a meaningful amount on a case-by-case basis. This approach is in conformance with the definition of "meaningful", because it places emphasis on the quality requirements inherent in this term and ensure that every amount satisfying these requirements, i.e., having a meaning or purpose or full of meaning, albeit in different quantities, qualifies as "meaningful". In other words, this approach allows the Department to fulfill the quality requirements by utilizing flexible standards, including quantity standards. Replacing this approach by the Department's proposed new methodology based on specific threshold would shift the emphasis from quality requirements to quantity requirements and unnecessarily reduce the Department's flexibility, thereby making the Department's efforts to define "meaningful" more accurately meaningless.

Second, the Department's current approach accords with commercial reality and furthers the overriding goal of its aforesaid practice—achieving the greatest degree of accuracy possible. A commercial transaction involves many factors, including quantity sold, quality required and price paid. Since none of these factors is decisive on their own and the importance of the different factors will alter from time to time, a determination whether any particular commercial transaction is "meaningful" will necessarily depends on assessing each of these factors, as relevant in the particular circumstances. In light of this principle, the Department has developed a case-by-case approach to balancing these factors and determining which commercial transaction qualifies as "meaningful". This approach was articulated in the Department's Final Results of Redetermination on Remand Pursuant to Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States, Court No. 97-12-02066 ("Shakeproof Remand Determination"), namely,

"[t]he Department determines what is a meaningful level of imports on a case-by-case basis, i.e., reviewing the specific facts of each case in light of the purpose of the rule. We will find the imports "meaningful" if we can reasonably conclude from the quantities sold, and ***other aspects*** of the transactions, that the price paid is a reliable

market economy value for the input."

Shakeproof Remand Determination, at 5 (emphasis added).

This approach matches commercial reality exactly, because it is based on the Department's correct understanding that quantity factor is not the only factor affecting commercial transactions and different factors may have different weights in different cases. It also achieves accuracy because under this approach, all relevant factors will be taken into account by the Department. For these reasons, it is inappropriate for the Department to introduce a new methodology, which attributes great weight to quantity factor, in lieu of this approach because such a methodology would be out of touch with commercial reality and produce less accurate results.

However, if the Department insists that a new methodology based on specific threshold should be developed, we recommend complying with the following principles:

First, the Department must take into account the complexity of commercial transactions and the threshold established by it must be dynamic enough to meet changing circumstances within markets. As the Department correctly pointed out in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the PRC: Final Results of 1997-1998 Antidumping Duty Administrative Review and Final Results of New Shipper Review, 64 Fed. Reg. at 61845 (November 15, 1999) ("TRBs XI"), "[t]here are a variety of reasons for setting a particular price higher and lower than a world benchmark in an arm's length transaction". The same holds true with respect to other factors involved in commercial transactions, such as quantity. As such, if the Department decides to develop a threshold to quantify the term "meaningful", it must think over all aspects of commercial transactions and the threshold established by it must adapt to the rapidly changing world of global trade.

Second, the Department must establish the threshold in light of the CAFC's decision in Shakeproof III, 268 F.3d 1376,holding that the steel imported from the United Kingdom accounting for approximately one-third of all steel used to produce the subject merchandise constituted a "meaningful" amount. This does not mean we recommend one-third as a reasonable threshold. Rather, what we mean is that at a

minimum, the threshold established by the Department should not be above this percentage. In fact, in its Final Results of Redetermination Pursuant to Court Remand in Luoyang Bearing Factory v. United States, Slip Op. 02-118 (October 1,2002) ("Luoyang Remand Results"), the Department has used this percentage as a benchmark to test Luoyang's market economy steel imports and concluded that the steel imported by Luoyang constituted a significant, meaningful market-economy input because Luoyang's imports "exceed that percentage".

3. The Department should clarify its current practice regarding the use of market-economy inputs prices obtained by NME trading companies. Moreover, the Department should reconsider its practice of refusing to value an NME producer's factors of production using the other producer's market economy purchases where data in a surrogate country is available.

First, although in Olympia Industry Inc. v. United States ("Olympia 1998"), 22 CIT 387, 7 F. Supp. 2d 997 (1998), the CIT instructed the Department to review NME trading company import prices and to determine whether that data constituted the best available information for purposes of the factors of production calculation, and the Department complied with this instruction by developing a three-pronged test, under which it examined: "(1) the value and volume of steel imports, (2) the type and quality of the imported steel, and (3) consumption of imported steel by the NME producer"[7], to assess the reliability of that data, the Department seems reluctantly to apply this test approved in Olympia Industry Inc. v. United States ("Olympia 1999"), 23 CIT 80, 36 F. Supp. 2d 414 (1999) and its practice regarding the use of market prices paid by NME trading companies is inconsistent. For example, in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the PRC; Final Results of 1996-1997 Antidumping Duty Administrative Review and New Shipper Review and Determination Not to Revoke Order in Part, 63 Fed. Reg. 63842

[7] Final Results of Redetermination Pursuant to Court Remand of Olympia Indus., Inc v. United States, Slip. Op. 98-49 (April 17, 1998), at 7-8.

(November 17, 1998) ("TRBs X"), the Department, after applying the abovementioned test to evaluate the reliability of the steel prices paid by an NME trading company to market-economy suppliers, utilized these prices "as surrogate data for those companies that actually used the imported steel". However, in TRBs XI, the Department refused to follow its determination in TRBs X, reasoning that:

We recognize that in Olympia (Slip Op. 99-18), the Court, in dicta, stated that Commerce must test the reliability of the trading company value in order to determine whether it comprises the best available information for purposes of the FOP calculation. However, Commerce respectfully disagrees with the Court's interpretation of the statute. As we stated in our Final Results of Redetermination Pursuant to Court Remand of Olympia Indus., Inc v. United States, Slip. Op. 98-49 (April 17, 1998), page 6, nothing in the Lasko decision alters the statutory mechanism for selection of surrogate values. In Lasko, the Court merely recognized that, where the actual cost to the producer was a market economy price (and paid in a market economy currency), the actual cost to the producer was better information than a surrogate value. See Lasko, 43 F.3d at 1446. The selection of surrogate values is governed by section 773(c)(4) of the Act, which, as discussed above, establishes a preference for values from a comparable market economy that is a significant producer of comparable merchandise. Had Congress intended a preference for using import prices into the NME as surrogate values, it could easily have stated this preference.

TRBs XI, 64 Fed. Reg. at 61845.

Both determinations were appealed to the CIT[8], the CIT affirmed the former and remanded the latter, on the grounds that the Department's use of its three-pronged test in assessing the reliability of trading company import prices in TRBs X "is reasonable, is in accordance with law and is in accord with the purpose of the statutory provisions to determine antidumping margins as accurately as possible"[9], while its refusal to review and use NME trading company import prices in TRBs XI was unreasonable.

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[8] Timken Co. v. United States ("Timken"), 26 CIT __, __, 201 F. Supp. 2d 1316 (2002); Luoyang, 2002 Ct. Intl. Trade LEXIS 117, Slip Op. 02-118 (Oct. 1,2002).
[9] Timken, 26 CIT __, __, 201 F. Supp. 2d 1316,1335 (2002).

Although the Department followed the remand order of the CIT, in view of its statement in the Luoyang Remand Results, page 5-6, i.e., "the CIT acknowledged that the Department is not required to used the three-pronged test approved in Olympia III (Olympia 1999) to review and assess the reliability of Luoyang's PRC trading company import price", as well as its contentions in Luoyang, 2002 Ct. Intl. Trade LEXIS 117, Slip Op. 02-118 (Oct. 1,2002), namely,

"[h]aving reconsidered the meaning of Lasko,[43 F.3d 1442,] and the statute's NME provisions, Commerce now views Lasko, [43 F.3d 1442,] as limited to the situation involving the actual cost to the producer (not the price paid by the trading company).Commerce further views the statue itself as expressing a preference for the use of values from a comparable market economy that is a significant producer of comparable merchandise. Moreover, in [10th Annual review, 63 Fed. Reg. 63842], Commerce conducted its review applying its prior regulations, *** The current regulations do not permit the result advocated by Luoyang."

It is possible that the Department would refuse to test and use NME trading company import prices again, therefore compelling the NME respondents, in every instance, to appeal to the CIT and thus imposing undue burdens on these respondents, on the CIT as well as on the Department itself. Based on the forgoing, the Department should clarify its current practice regarding the use of NME trading company import prices in light of the CIT's decisions in Olympia 1998, Olympia 1999, Timken and Luoyang, and its clarified practice should not violate its obligation "to review all data and then determine what constitutes the best information available or, alternatively, to explain why a particular data set is not methodologically reliable."[10]

Second, the Department should reconsider its practice of not using market-economy purchases made by one NME producer to value the factors of production for other NME producers where data from a surrogate country is available. Since "Commerce's task in a nonmarket economy investigation is to calculate what a producer's cost or prices would be if such prices or costs were determined by market force"[11], and "[t]he

[10] Olympia 1998, 22 CIT 387, 7 F. Supp. 2d 997, 1001(1998).
[11] Tianjin Machinery Import & Export Corp. v. United States, 16 CIT 931, 940,806 F

cost for raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the cost of producing the goods in a market economy country"[12], it is logical for the Department to use the market-economy price for an input paid by one NME producer, which has been determined to be the "best" available information and provides a more accurate value than other potential surrogates, to value the same input for another NME producer, regardless of whether data from the preferred surrogate country is available. The Department's rationale for its current practice, i.e., "to minimize distortions and ensure the most accurate margin calculation possible, we developed a hierarchy for selection of surrogate values…. Our first choice under that hierarchy is to use data from India …or Indonesia…. Where …data was not available in a surrogate country, we used the average actual market-economy prices from market-economy suppliers to the PRC. However, we used this data strictly as a second alternative to… data from India or Indonesia, where available"[13], is analogous to Timken's contention in Luoyang that the Department was not required to assess the PRC trading company data since the Department applied 19 U.S.C. §1677b(c)(4)'s preference by valuing the subject merchandise using values from its primary surrogate, which has been rejected by the CIT on the basis that "there is no requirement that Commerce value factors of production pursuant to 19 U.S.C. §1677b(c)(4) prior to resorting to a PRC trading company's import prices paid to a market-economy supplier to value costs for certain steel inputs"[14]. Moreover, this rationale is inconsistent with the Department's "obligation to review all data and then determine what constitutes the best information available or, alternatively, to explain why a particular data set is not methodologically reliable." [15] Because the rationale behind the Department's current practice is unreasonable, is contrary to law and is not in accordance with the purpose of the statutory provisions, and this practice actually has maximized distortions and has led

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Supp. 1008, 1018 (1992).

[12] Lasko Metal Prods., Inc. v. United States, 16 CIT 1078,1081,810 F. Supp. 314, 317 (1992).

[13] Notice of Final Determination of Sales at Less Than Fair Value: Bicycles From the People's Republic of China, 61 Fed. Reg.19026,19029-30 (April 30, 1996).

[14] Luoyang, 2002 Ct. Intl. Trade LEXIS117 at 46 n.13, Slip Op. 02-118 (Oct. 1,2002).

[15] Olympia 1998, 22 CIT 387, 7 F. Supp. 2d 997, 1001(1998).

to a less accurate margin calculation, the Department should reconsider its current practice in this area and establish a new practice, which at a minimum must require the Department to test the reliability of one NME producer's market-economy price and determine whether that price is preferable to surrogate data from a market-economy country that is a significant producer and at a level of comparable economic development, therefore constitutes the best available information for valuing the other producers' same inputs.

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Pursuant to the Department's requirements, we submit an original and six copies of this submission, as well as an electronic version on CD-ROM.

Please do not hesitate to contact the undersigned should you have any questions regarding this submission.

Respectfully submitted

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