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PUBLIC INFORMATION

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VIA HAND DELIVERY

Joseph A. 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 on Regulations Pertaining to Market Economy Inputs in Non-Market Economy Dumping Cases

Dear Mr. Spetrini:

The purpose of this letter is to provide on behalf of Furniture Brands International, Inc. our comments on the Commerce Department's practice regarding market economy inputs in non-market economy cases. The Department requested such comments in a May 26, 2005 Federal Register notice at 30,418. As requested, we are submitting six copies of this letter, along with an electronic version in PDF format.

As amplified below, we see no reason for Commerce to change its long-standing practice of using market economy prices of imported inputs to value a non-market economy producer's use of the input even if some of the inputs are purchased in a non-market economy country. Indeed, to change its regulations or practice along the lines suggested would be contrary to *Lasko Metal Products, Inc. v. United States*, 43 F. 3d 1442 (Fed. Cir. 1994), which held that "using surrogate

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values when market-based values are available would, in fact, be contrary to the intent of the [Tariff Act of 1930]."[1/]

If Commerce is concerned, as it should be, about accuracy in measuring the cost of a factor of production, it should continue its existing practice because there is no better measure of the true cost of an input than what the producer has actually paid for it in the marketplace. No non-market economy producer would pay market economy prices for an input if it were available at a lower cost from a non-market economy supplier. He would turn to the non-market economy supplier instead. His market economy purchases of the input are, therefore, the best indicator of his actual cost for the input. Put another way, they provide the best available information about the cost of that input. For Commerce to ignore information of that kind in favor of hypothetical transactions involving surrogate countries where the imports in question are not even produced would be contrary to its statutory mandate in non-market economy cases to value the factors of production "based on the best information available information regarding the values of such factors in a market economy." 19 U.S.C.A. § 1677b(c)(1) (2005).

There may, of course, be an issue in a given case about whether a market economy purchase truly reflects a producer's costs of production. That is presumably why Commerce reserves the right to determine whether given market economy purchases are "meaningful." It is not possible, however, to establish in advance what is or is not "meaningful" in a given case.

1/ *Lasko*, 43 F.3d at 1446.

Whatever criteria are chosen would simply become a target to aim at, but the results would not necessarily be any more meaningful.

Percentage targets provide the best example. Set the target at 5%, for example, and producers will meet that target. There is no reason, however, to believe that 5% is inherently any more meaningful than 4.9%.

It would, thus, be far better for Commerce to assume that all market purchases are meaningful indicators of an input's cost subject to rebuttal if it can be shown that they are not. This would avoid the fruitless task of attempting to establish *a priori* rules for an concept that requires subjective judgment about an endless variety of circumstances that cannot possibly be anticipated. It would subject the task of valuation to the cauldron of actual experience rather than leave it beholden to arbitrary rules that have no basis in theory or reality.

I. Background

One of the purposes of the Tariff Act is "to facilitate the determination of dumping margins as accurately as possible. . . ."[2/] In making determinations about the foreign market value of merchandise exported from non-market economies, Commerce is required by the Act to value factors of production "based on the best available information regarding the values of such factors in a market economy country. . . ." 19 U.S.C.A. § 1677b(c)(1) (2005). Commerce regulations provide:

2/ *Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442 (Fed. Cir. 1994), quoting *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993).

> [W]here a factor is purchased from a market economy supplier and paid for in a market economy currency, [Commerce] 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, [Commerce] normally will value the factor using the price paid to the market economy supplier.[3/]

In *Lasko Metal Products, Inc. v. United States*, the Federal Circuit Court of Appeals specifically addressed the issue whether the Tariff Act permitted Commerce "to determine the factors of production using both surrogate country values and actual cost values."[4/] Although the Court noted that the Act did not require "that the factors of production must be ascertained in a single fashion," it quoted with approval the following from Commerce's final determination in the underlying matter:

> 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.[5/]

The Court thus upheld the Commerce Department's conclusion that the best available information on the cost of supplies used by the Chinese manufacturers of ceiling fans in that case was the price actually charged for those supplies on the international market even though only a portion of those

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3/ 19 C.F.R. § 351.408(c)(1) (2004).

4/ *Lasko*, 43 F.3d 1442 at 1445.

5/ *Lasko*, 43 F.3d 1442 at 1446, quoting *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55,271, 55,275 (Dep't Comm. 1991).

supplies had actually been purchased in a market economy. [6/] The reasoning presumably was that a non-market economy producer could not obtain its non-market supplies at a cost any lower than the price it paid in a market economy. In reaching its conclusion, the Court of Appeals in effect endorsed existing Commerce Department practice because it produced "accuracy, fairness, and predictability."[7/]

Almost nine years ago during the process of formulating the rule now codified at 19 C.F.R. § 351.408(c)(1) (2004), Commerce addressed concerns similar to those raised in the recent request for comments to which this letter responds. One commenter then objected that prices paid by non-market economy producers for factors imported from a market economy (i) are not publicly available, (ii) are not internally coherent with other values included in the calculation, (iii) might contain distortions attributable to barter transactions or centralized purchasing and (iv) should be used, if at all, only in valuing the specific transactions to which they pertain.[8/] With respect to the last point, the commenter reasoned as follows: "[R]elying solely on the price paid to the market economy supplier to value the input is inappropriate because it assumes that the NME producer could purchase all of its needs at this price. . . ."[9/]

6/ *Lasko,* 43 F.3d 1442 (Fed. Cir. 1994), citing *Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993).

7/ *Lasko*, 43 F.3d at 1446. *See also* 61 Fed. Reg. 7307, 7344 (Feb. 27, 1996).

8/ *See* 62 Fed. Reg. 27,295, 27,366 (May 19, 1997).

9/ *Id.*

Commerce rejected these suggestions citing *Lasko* and noting further that it "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. Because the amounts purchased from the market economy supplier must be meaningful, this requirement goes some way in addressing the commenter's concern that the NME producer may not be able to fulfill all its needs at that price."[10/] Commerce continued to take the position, as it had done in *Lasko*, that "accuracy is enhanced when the NME producer's actual costs can be used."[11/] Nothing has changed in the interim to question this conclusion.

II. Questions Raised by Commerce

A. 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?

A central purpose of the dumping laws is to determine dumping duties as accurately as possible. Commerce's practice, developed and applied over many years in order to promote accuracy, fairness, and predictability, is consistent with that purpose and has been upheld by the Federal Circuit Court of Appeals. In quoting Commerce's own conclusion in the final determination in the underlying matter, the *Lasko* Court found that "using surrogate values when

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10/ *Id.*

11/ 61 Fed. Reg. at 7344 (Feb. 27, 1996).

market-based values are available would, in fact, be contrary to the intent of the law."[12/] Accordingly, a departure from the Commerce Department's long-standing practice of using market economy import prices paid in bona fide transactions for meaningful quantities of imported merchandise to value an entire input would be contrary to law.

Commerce's regulations and practice, moreover, are consistent with the general proposition that actual, arms length, bona fide commercial transactions are inherently more reliable as an indicator of actual value than a statistical sample from a theoretical basket of products from a surrogate.[13/] Indeed, it is and should be Commerce's preference to use as many actual transactions as possible in making determinations across the full range of issues involved in antidumping matters. This preference is and should be rebuttable, of course, but as a general matter the burden should be placed on the party that opposes using evidence of actual free market transactions to explain why in a given case such transactions are not reliable.

In its request for comments, Commerce has offered no compelling reason why it should end its long-standing practice in this area or amend its regulations contrary to *Lasko*. Instead, it notes two hypothetical "concerns" without offering a factual predicate for either. Both of these concerns can be addressed easily under the current regulatory framework and existing practice.

12/ *Lasko*, 43 F.3d 1442 at 1446, quoting *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55,271, 55,275 (Dep't Comm. 1991). *See also Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

13/ *See, e.g.*, 19 C.F.R. § 351.407(b)(3) (2004); 19 U.S.C.A. § 1677b(a)(1)(B) (2005) (arms length affiliated party transactions used as basis for determining normal value).

The first concern is that "basing an 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."[14/] This is essentially identical to one of the concerns raised by a commenter to the proposed regulations in 1996. The reason Commerce rejected the comment then, namely that Commerce could exercise its discretion not to rely on the price paid by a non-market economy producer to a market economy supplier if the quantity of the input purchased were insignificant,[15/] applies with equal force now. This concern is further mitigated by Commerce's policy and practice of requiring that average input prices paid by respondents to market economy suppliers be calculated on the basis of bona fide sales of inputs actually used in the production of subject merchandise and by disregarding all inputs Commerce has reason to believe or suspect might be dumped, subsidized or produced in a non-market economy and sold through a market economy.[16/]

The second concern is that Commerce's "current practice may allow parties to manipulate the Department's margin calculation by sourcing just enough of an input from market economy suppliers so that the market economy price is used to value the entire input."[17/] This concern also is mitigated by Department's current practice of examining market economy purchases to ensure

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14/ 70 Fed. Reg. 30,418 (May 26, 2005).

15/ 62 Fed. Reg. at 27,366 (May 19, 1997).

16/ *See* 70 Fed. Reg. 30,418 (May 26, 2005). *See also, e.g., Certain Helical Spring Lock Washers from the People's Republic of China*, 70 Fed. Reg. 28274 (May 12, 2005) (declining to use market economy prices where they may have been subsidized); *Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 Fed. Reg. 34,125 (June 18, 2004) (declining to use prices of inputs produced in a non-market economy but sourced from a market economy supplier); *Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 Fed. Reg. 60,980 (October 14, 2004) (declining to use market prices for input not actually used in production of subject merchandise).

17/ 70 Fed. Reg. 30,418 (May 26, 2005).

that they are bona fide and actually used in the production of subject merchandise and by disregarding inputs that either are produced in a non-market economy and sold through a market economy or reflect dumped or subsidized prices.[18/]

Commerce must exercise its judgment based on the facts of a given case. To abandon the current practice in favor of hard and fast rules would be to abandon the exercise of judgment that is essential to accurate measurement.

B. 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 input price to be used to value all of the input?

Commerce currently enjoys considerable discretion in this area. An intellectually sound threshold rule for determining "meaningful" shares or volume of market economy inputs, moreover, would be impossible to devise. At any particular level, a threshold would likely prove too high in some cases, too low in others and contentious in many. It would, moreover, easily be subject to manipulation as producers would face irresistible incentives to make just enough market economy purchases to meet the threshold.

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

Neither of the concerns raised in the request for comments is of any less significance in antidumping proceedings involving market economies than it is in non-market economy cases.

18/ *See cases cited in note 17, supra.*

Yet in market economy cases, the Tariff Act provides for costs of production to be based on actual data for costs of (i) materials, fabrication and processing, (ii) selling, general and administrative expenses and (iii) containers and coverings.[19/] Such costs are normally based on records of the exporter or producer of the merchandise provided such records are kept in accordance with the generally accepted accounting principles of the producing or exporting country and they reasonably reflect the costs associated with the production and sale of the merchandise.[20/] Nothing in the Tariff Act or Commerce regulations or practice would prevent reliance on a single invoice documenting the purchase of an actual factor of production. Any concerns the Department has about the reliability of market economy purchases of inputs in non-market economy cases should be dealt with in the same way they are dealt with in market economy cases.

III. Retroactivity

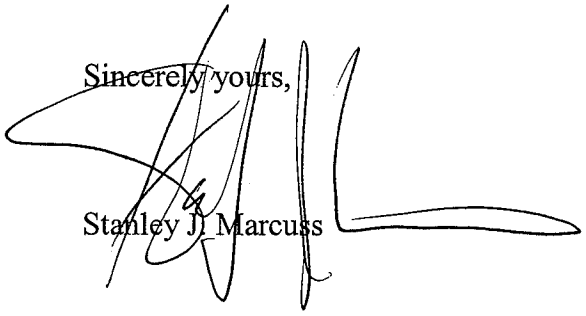
To further its stated policy of predictability, Commerce should not institute any change in regulation or practice retroactively or with respect to any existing investigation or period of review. Our client and others involved in the Chinese wooden bedroom furniture matter have relied and continue to rely on the existing regulations and the long-standing Commerce practice of applying them. As we are now preparing for the first administrative review in that case, our client would be adversely affected by any significant change in regulation, policy or practice if it were applied to the current period of review. No doubt, other parties with matters before Commerce have similar concerns.

19/ *See* 19 U.S.C.A. § 1677b(b)(3) (2005).

20/ See 19 U.S.C.A. § 1677b(f)(1) (2005).

Thank you for the opportunity to comment.

Sincerely yours,



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