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**By Hand**

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration
U.S. Department of Commerce
Central Records Unit - Room 1870
14th Street and Constitution Avenue, NW
Washington, D.C. 20230

Re: Market Economy Inputs Practice in Antidumping Proceedings involving Non–Market Economy Countries

Dear Mr. Spetrini:

On behalf of the Furniture Retailers of America ("FRA")[1], we submit the following comments with respect to the Federal Register notice Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries, 70 Fed. Reg. 46816 (Dept. Comm. Aug. 11, 2005). In that notice, the Department of Commerce (the "Department") stated that it "proposes to continue to value respondents' entire input with the prices paid by them to market economy suppliers of the input, as long as the purchases reflect

[1] FRA is a group of many large and small companies throughout the United States, representing over 3500 retail outlets and over 200,000 employees. It includes retailers such as Bombay, City Furniture, Crate & Barrel, Havertys, JCPenney, RoomsToGo and Sumberland.

bona fide sales, were made in market economy currency, constitute a 'meaningful' quantity, and could have been used in the production of the subject merchandise." While the FRA applauds the Department's decision to allow for the possibility of factor valuation based on market economy purchases, the FRA has serious concerns with the Department's intention, as stated later in the notice, to do so only "when the majority of each input by volume is sourced from market economy countries." The FRA raises the following concerns regarding the Department's Proposal.

*1. The Department Should Respond to Significant Points Raised by the Public*

The Department's current regulations, at section 351.408(c)(1), state that "{i}n 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." 19 C.F.R. § 351.408(c)(1) {emphasis added}; see Antidumping Duties; Countervailing Duties; Final Rule ("Final Rule"), 62 Fed Reg. 27296, 27413 (Dept. Comm. May 19, 1997).

The Department's stated intention to define "meaningful" as existing only when the majority of each input by volume is sourced from market economy countries runs absolutely contrary to the Department's regulatory language that it will "normally" value the factor using

the price paid to the market economy supplier.[2] *Indeed, the establishment of such restrictive criteria must be interpreted as a change to the regulation itself.*

As a change to the Department's regulations, the Department must provide for notice and comment pursuant to the Administrative Procedures Act. See 5 U.S.C. § 553 (1982). As Shing Mark noted in its original submission to the Department,

> "{w}hen the Department revises a rule such as that at issue here, it must publish a notice of rulemaking in the Federal Register, 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,' and 'incorporate in the rules adopted a concise general statement of their basis and purpose.' 5 U.S.C. Section 553(b), (c); see also Carlisle Tire & Rubber Co., Div. of Carlisle Corp. v. United States, 10 C.I.T. 301 (1986) Shing Mark notes that the Notice issued in this regard does not satisfy the requirements prescribed by the APA."

Even if, *arguendo*, the Department's request for comments was in keeping with APA procedures, the Department is required under the APA to respond to the significant points raised by the public. See St. James Hosp. v. Heckler, 760 F.2d 1460 (7th Cir. 1985), cert. denied 474 U.S. 902 ("Opportunity under Administrative Procedure Act to comment on proposed rules is meaningless unless agency responds to significant points raised by public."). Action on Smoking and Health v. C.A.B., 699 F 2d 1209 (D.C. Cir. 1983)("In notice and comment rulemaking, an agency need not respond to every comment but it must respond in a reasoned manner to the comments received.")

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[2] As discussed below, "meaningful" is tied inextricably with the concept of *insignificance* in the Department's Final Rule.

Many parties filed comments with the Department in response to the Department's May 26, 2005 notice seeking comments. These comments raised significant questions regarding, *inter alia*, the legality of the proposals currently under consideration in light of explicit Court determinations. Any unwillingness on the part of the Department to address the significant objections raised by many parties in their letters submitted in response to the May 26, 2005 notice and in any letters submitted in response to the August 11, 2005 notice would be inappropriate, contrary to law, and make a mockery of the public comment procedures.

2. ***FRA Reiterates All Comments Made in its June 24, 2005 Letter***

The FRA respectfully refers the Department to its June 24, 2005 letter ("June 24 FRA Comments"), in which the FRA raised serious concerns with the Department's reconsideration of the rules for valuing inputs in NME cases. For the convenience of the Department, FRA's June 24 submission is attached hereto as Exhibit 1. The FRA requests that the Department specifically consider and publicly address these concerns as part of any final announcement regarding the proposed rule changes.

3. ***If the Department Applies its Proposed "Majority" Standard, It Must Do So Only When the Surrogate Data is at Least As Accurate As the Market Economy Purchase Data***

The FRA reiterates its position that there should be no bright-line threshold for determining what constitutes "meaningful" purchases. As long as there were bona fide market economy purchase transactions, all of the input must be valued at the market economy price. However, if the Department goes forward with its proposal to apply surrogate values to the

portion of the input sourced from NME suppliers when the NME-supplied portion is higher than the market-economy-supplied portion, there must be a significant caveat: namely, the Department is proscribed from applying a surrogate value when that surrogate value is inherently less accurate than the market economy purchase data.

As discussed in detail in the June 24 FRA Comments, Indian HTS data (i.e., the most commonly-used source of surrogate value data for direct materials in cases involving the People's Republic of China) is aggregated, basket-category data. The rampant use of the various "other" HTS subcategories in numerous cases represents simply the most obvious examples in which the types of goods entering India that are being used as the basis for the surrogate value may (or may not) include the input in question, but undoubtedly also include imports of other goods. Even where the imported good is arguably generally the "same" good in a particular HTS category, the widely divergent average unit values from source country to source country represent *prima facie* evidence that the types of goods entering under any given HTS number must nonetheless possess significant product differentiations. [3]

The Department itself has explicitly stated that actual market economy purchases provide a more reliable and accurate basis for establishing normal value as compared to Indian import statistics. See Comment 10 of the Issues and Decision Memorandum accompanying the Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from

[3] See June 24 FRA Comments, attached as Exhibit 1.

the People's Republic of China, 67 Fed. Reg. 35479 (Dept. Comm. May 20, 2002) (In rejecting petitioners' request that the Department use Indian import statistics to value a respondent's iron ore purchases, the Department stated that "{o}ur practice is to use market-economy import prices to value both domestic (non-market-economy) and imported (market- economy) inputs when the market-economy imports are of a meaningful quantity and identical to the domestic inputs. The import price is a more reliable and more accurate basis for establishing the normal value of the domestic iron ore.").

As noted by many parties in their initial comments, the statute directs the Department to determine normal value by valuing the respondent's factors of production "based on the best available information regarding the values of such factors in a market economy country or country." 19 U.S.C. § 1677b(c)(1)(B)(2). This is not a matter of Department policy, practice, or preference. This is the governing law. In order to abide by the law, the Department must use the "best available information" to value the factors of production. Where a company's bona-fide market economy purchases are more specific than any surrogate value under consideration, such as any surrogate value derived from inherently less accurate Indian HTS figures, then the Department is bound by the law to use the market economy purchase data.

### *4. The Department's Proposal to Equate "Meaningful" with "Majority" is Arbitrary and Contrary to Federal Circuit Precedent*

The Department's proposal to equate "meaningful" with "majority" (by volume) was not justified in the Federal Register notice. The establishment of a 50 percent bright-line rule

is wholly arbitrary. Indeed, the Department has failed to explain why, for example, 49 percent is not meaningful while 50 percent is meaningful.

In fact, the U.S. Court of Appeals for the Federal Circuit has already ruled that one third (rather than the proposed one-half) constituted "meaningful." In Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001). The Department cannot establish a minimum threshold for "meaningful" that is significantly **above** an amount that the Federal Circuit has already determined to have met the "meaningful" standard. To do so would be to act contrary to the Court's decision.

Notably, the Federal Circuit, in that same case, also recognized that a "meaningful amount" of imported goods must be determined on a case-by-case basis. Once again, the Department cannot now seek to establish a bright-line threshold where the Federal Circuit has already determined that no such bright line can be drawn across all cases. Again, to do so would be to act contrary to the Court's decision.[4]

Moreover, the Department's regulations have already equated "meaningful" with not "insignificant." Specifically, in the Preamble to the Final Rule, the Department stated:

> ...Moreover, as noted in the AD Proposed Regulations, 61 FR at 7345, 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. Because the amounts purchased from the

[4] The Department has explicitly acknowledged and followed this decision in other cases. See, e.g., Comment 1 of the Issues and Decision Memorandum accompanying the Final Results of the Antidumping Duty Administrative Review of Certain Helical Spring Lock Washers from the People's Republic of China, 67 FR 8520 (February 25, 2002).

> 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.

See Final Rule at 27366. It is precisely this definitional link between "meaningful" and whether the amounts are "insignificant" that supports the FRA's proposal to use five percent as a threshold for "meaningful" imports. The Department already uses that threshold as a measure of significance in other areas of the dumping analysis. The Department's proposed "majority" threshold would redefine "meaningful" at a level much higher than that spelled out in the Department's Final Rule.

***5. The Department Should Not Apply Its Proposed New Rule Retroactively***

As the FRA stated in its June 24, 2005 letter, the FRA is concerned with respect to the timing of the implementation of any Department change in practice. Since the preliminary determination in the *Wooden Bedroom Furniture* investigation in June 2004, numerous Chinese companies have been working to comply with the U.S. dumping law. That is the purpose of the law. To comply with U.S. law, i.e., to reduce or eliminate dumping, foreign companies take actions to raise prices, lower costs, buy inputs from market sources, etc. Moreover, U.S. purchasers, as well as the foreign producers and exporters, have explicitly relied on the Department's current practice as they have made sales and purchases of subject goods since the preliminary determination in the LTFV investigation. If the Department changes its calculation rules mid-stream, the Department will in effect prevent Chinese companies from reasonably complying with U.S. law, and will punish importers for their

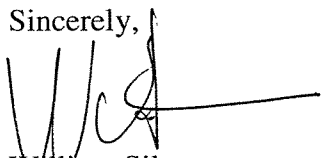
reliance on a well-established agency practice. For these reasons, the Department should not retroactively impose any change in its methodology. Any new methodology should apply to investigation and review periods occurring wholly after the publication of the new rules, in keeping with long-upheld principles regarding retroactivity. For a further discussion on this issue, the FRA respectfully refers the Department to the full text of its June 24 letter.

* * *

Pursuant to the Department's instructions, we hereby submit an original and six copies of this document, as well as an electronic version in PDF format.

Please contact the undersigned if you have questions regarding this matter.

Sincerely,



William Silverman
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cc: Lawrence Norton
Anthony Hill