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PUBLIC DOCUMENT

VIA HAND DELIVERY

Hon. Joseph A. Spetrini
Acting Assistant Secretary for Import Administration
International Trade Administration, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street NW
Washington, D.C. 20230

Re: Request for Comments on Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries

Dear Mr. Spetrini:

On behalf of Lacquer Craft Manufacturing Company, Ltd. ("Lacquer Craft") and the Coalition of Chinese Furniture Producers, we submit the following response to the Departments' request for comments on a proposed change to the Department's market economy inputs practice in antidumping proceedings involving non-market economy countries.[1/]

I. Introduction and Summary

The proposed change to the Market Economy Inputs Practice is both unnecessary and contrary to the Department's fundamental obligation to calculate dumping margins as accurately

[1/] *Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries*, 70 Fed. Reg. 46,816, (Aug. 11, 2005) ("Request for Comments").

as possible.[2/] We are sympathetic to the Department's need to ensure that its Market Economy Inputs Practice addresses the possibility of price manipulation or purchase prices that do not reflect market realities. The proposed policy, however, does nothing to improve on the tools already available in the existing policy for addressing possible manipulation or price inaccuracies. In fact, neither the Department nor the parties advocating the change in policy, provide any evidence that the manipulation and distortion discussed in the Request for Comments have ever occurred or, if they did occur, were not addressed by the existing policy. Indeed, by relying on a bright-line rule rather than actual review and verification of prices, the proposed policy invites distortion and inaccuracies in the calculation of dumping margins. Accordingly, the Department should continue its policy of determining on a case-by-case basis whether market economy purchases provide reliable and accurate values with which to value factors of production.

If, despite evidence that no policy changes are necessary to address potential issues of manipulation and accuracy, the Department persists in making changes to its market economy purchase policy, it must 1) consider alternatives that are less distorting; 2) provide for a full notice and comment proceeding as required for changes in the regulation; and, 3) implement any change in policy in such a way that it does not negatively impact respondents that have relied on the longstanding existing policy to prepare for upcoming administrative reviews.

[2/] *See Rhone Poulenc, Inc. v United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990)

II. The Department's Proposed Changes are Unnecessary.

The change in policy proposed by the Department's August 11, 2005 notice is a significant departure from its existing policy that has the potential to substantially alter the outcome of antidumping investigations and administrative reviews involving China and other non-market economies. Such significant changes in policy should not be undertaken lightly. Indeed, absent evidence that change is necessary, a change in policy of this magnitude should not be undertaken at all. Neither the Department's August 11, 2005 notice, nor the comments submitted in response to the Department's May 27, 2004 Request for Comments, provide any evidence that the proposed change to Department policy is necessary.

A. The Rationales Provided for the Proposed Change are Not Grounded in Reality.

In support of its proposed policy change, the Department cites comments asserting that the "current case-by-case assessment does not ensure that prices paid by respondents for the portion of the input sourced from market economy countries are an accurate valuation of the entire input."[3/] The Department describes two scenarios in which a market economy purchase might not reflect an accurate valuation of the entire input. First, that "it may be possible, under the Department's current practice, for respondents to source a small amount of an input on favorable terms with the goal of manipulating the Department's margin calculations."[4/] And second, that "market economy suppliers may sometimes offer limited quantities of an input at

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[3/] *Request for Comments*, 70 Fed. Reg. at 46,817

[4/] *Id.*

prices that are much lower than the price at which respondents could acquire the total amount of the input in question."[5/]

Neither of the rationales offered by the Department for its proposed change in policy have any grounding in reality. In fact, the analysis of the Department and the courts has consistently been that the existing policy resulted in the use of better, more accurate prices for factors of production. In assessing its existing policy, the Department has stated:

- "Normally, market economy inputs provide more accurate values" [6/]
- "The import price is a more reliable and more accurate basis for establishing the normal value. . ." [7/]
- [T]he actual price paid for any inputs imported from a market economy in meaningful quantities . . . is the best available information for valuing production factors." [8/]
- "We also believe that reliable import prices for the same input are a better means of valuing an input than surrogate values." [9/]

Similarly, the courts have repeatedly endorsed the Department's case-by-case policy and have found that actual prices are more accurate than surrogate values.[10/] Nothing in recent Department investigations or court decisions indicates any reason for a shift in this approach.

[5/] *Id.*

[6/] *Notice of Final Determination of Sales at Less than Fair Value; Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 Fed. Reg. 60,980 (Oct. 14, 2004).

[7/] *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from the People's Republic of China*, 67 Fed. Reg. 35,479 (May 20, 2002).

[8/] *Heavy Forged Hand Tools from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 57,789 (Sept. 12 2002).

[9/] *Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 13,401 (March 18, 1999);

Neither the Department nor the parties advocating a shift in policy point to any instance in which a respondent manipulated the outcome of a case by securing inputs at favorable terms.[11/] Similarly, there is no evidence that respondents obtained a small portion of their inputs at prices that are lower than those charged for larger quantities of the same input. In fact, when businesses offer a discount it is generally for large quantities not small --- the assumption that a respondent would have to pay more to fulfill all of its needs has little or no basis in the reality of commercial practice. The alleged manipulation and the below market sales scenarios both are nothing more than hypothetical situations that, to the best of our knowledge, have never occurred in a real-life antidumping case.

"Before a change is made in established policy there should be evidence to show that the change is warranted."[12/] In the past, when faced with a "commenter's hypothetical scenarios", the Department has refused to change its policy, stating that "rules having general applicability are most firmly grounded in, and should reflect an awareness of, the usual and unexceptional, not

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[10/] *See, e.g., Lasko Metal Products v. United States, 43 F.3d 1442 (Fed. Cir. 1994); Shakeproof Assembly Components, 26 F.3d at 1382.*

[11/] The purchase of inputs at favorable terms must be distinguished from the purchase of inputs for the express purpose of satisfying the Department's regulatory requirement that a meaningful quantity of an input be purchased from a market economy supplier. Purchases at arm's-length prices that are generally available to other customers of the supplier cannot be considered distortions or manipulation regardless of the size of the purchase. Quite the contrary, a purchase, at a verifiable market economy price removes distortion from the dumping calculation by providing the Department with an actual market economy price to use in place of a surrogate value that is, at best, a rough approximation of the actual price.

[12/] *Viraj Forgings Ltd. v. United States*, 350 F. Supp. 2d. 1316, 1325 (Ct. Int'l Trade, 2004) quoting *British Steel PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997).

the exception."[13/] In developing regulations and policies to implement the antidumping law, the Department has consistently focused on "issues concerning the application of the law to real life factual scenarios" not "abstract concepts"[14/] and has refused to address "hypothetical situations".[15/] Similarly, the Department has declined to change a "well established methodology" that had been repeatedly sustained by the courts on the basis of "theoretical examples" of possible distortions when it has "no basis on which to conclude" that an existing policy was unreasonable.[16/]

The Department should apply the same test to its existing policy regarding market economy purchases. The current policy is well-established and has been repeatedly sustained by the courts. The reasons provided for changing the policy are based on hypothetical scenarios, not real problems that have occurred in actual investigations or administrative reviews. As such, the examples cited in the Department's request for comments provide insufficient basis for a change to its long-standing policy.

[13/] *Changes in the Insular Possessions Watch, Watch Movement and Jewelry Program*, 67 Fed. Reg. 77,407 (Dec. 18, 2002) (Dep't of Commerce).

[14/] *Antidumping Duties; Countervailing Duties; Final Rule* 62 Fed. Reg. 27,296, 27,346 (May 19, 1997) (Dept. of Commerce).

[15/] *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186, 69,196 (Nov. 15, 2005) (Dept. of Commerce).

[16/] *Tapered Roller Bearings and Parts Thereof From Japan*, 63 Fed. Reg. 20585, 20592 (April 27, 1998) (Comment 8) (citations omitted).

B. The Existing Department Policies Are Adequate to Address Possible Manipulation and are More Appropriate and Less Distorting than the Proposed Policy.

Even if the hypothetical scenarios cited in the August 11, 2005 Request for Comments were grounded in reality, they provide no support for the policy change proposed by the Department. As the Department articulates quite clearly in the Request for Comments, its existing policy provides significant safeguards to ensure that a market economy purchase was made at a legitimate and accurate price. In addition to other tests to ensure accuracy, the price "must reflect arms-length, bona fide sales."[17/] Thus, the Department's existing practice already requires the examination of market economy purchases to determine if they are bona fide sales. This provides a much more accurate and less distorting methodology than an inflexible quantity test for addressing concerns about sourcing of inputs at "favorable terms" or purchases of small quantities made at below market prices. Unlike the proposed test based on quantity, actual review and verification of sales to determine legitimacy ensures the use of accurate market prices.

The bright-line majority requirement in the proposed policy does little to address the concerns raised in the Department's Request for Comments. Whether the majority of a particular input is purchased from a market economy supplier has little bearing on the accuracy of the price paid for the input. In fact, such a rule suffers from the dual flaws of being both over- and under-inclusive. On the one hand, the bright-line rule proposed by the Department would almost certainly prevent the use of accurate and legitimate market economy prices by precluding reliance on prices when the quantity purchased fell below the threshold of more than 50 percent.

[17/] *Request for Comments* at 46,816.

On the other hand, if the allegations of manipulation and below price sales are taken at face value, there is no reason to believe a cut-off at 50 percent will capture all manipulation and below price sales. The proposed policy adds nothing to the tools already at the Department's disposal for addressing manipulation and below market prices and will likely lead to greater inaccuracy in calculation of antidumping duties.

III. The Proposal Is Inconsistent with the Department's Obligation to Use the Best Information Available.

When an antidumping investigation involves a product from a non-market economy, 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 countries."[18/] By dictating the use of surrogate values for all inputs where market economy purchases are less than a majority, the Department's proposed rule ignores the statutory mandate to use the best available information.

Both the Department and the courts have consistently found that the purchase price of market economy imports is a better source of factor values than surrogate values generally found in a third country. The Department has long recognized that "accuracy, fairness, and predictability are enhanced" by using market determined input prices.[19/] The Court of

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[18/] 19 U.S.C. § 1677b(c)(1)(B)(2) (emphasis supplied).

[19/] See, e.g., *Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55,271, 55275 (1991); *Notice of Final Determination of Sales at Less than Fair Value; Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 Fed. Reg. 60,980 (Oct. 14, 2004); *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from the People's Republic of China*, 67 Fed. Reg. 35,479 (May 20, 2002); *Heavy Forged Hand Tools from the People's Republic of China: Final Results and*

International Trade and the United States Court of Appeals for the Federal Circuit concur with the Department's view that surrogate values are less accurate and have therefore held that use of surrogate values instead of actual market prices "would conflict with the overall statutory purpose" of calculating dumping margins as accurately as possible.[20/] The proposed rule turns years of jurisprudence and Department practice on its head. The Department's proposal will almost certainly result in greater use of surrogate values, which both the Department and the courts recognize to be less accurate and often distorting.

The proposal is further inconsistent with the statute because is assumes there can be two "best" or equally accurate values for a single factor. Under the Department's proposed rule, if 50 percent or less of input was purchased from a market economy supplier the purchase price would be used to value only that portion of the input while a surrogate value would be used to value the remainder of the input. Thus, the proposed methodology assumes that both the market economy purchase price and surrogate value are the "best available" values for a given factor. There cannot be two "best" values for a single factor of production; one or the other value must be less accurate. If the Department determines that the market economy import prices reported by the respondent are adequate to value the inputs actually purchased, there is no rational reason why those same prices should not be used to value the entirety of the input. If the Department

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Partial Rescission of Antidumping Duty Administrative Review, 67 Fed. Reg. 57,789 (Sept. 12 2002); *Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 13,401 (March 18, 1999).

[20/] *Lasko Metal Products v. United States*, 810 F. Supp. 314, 317-18 (Ct. Int'l Trade 1992); affirmed by *Lasko Metal Products v. United States*, 43 F. 3d 1442 (Fed. Cir. 1994); *see also The Timken Company v. United States*, 201 F. Supp. 2d 1316, 1328 (Ct. Int'l Trade 2002).

determines that market economy purchases prices are manipulated or somehow inaccurate, then use of those prices to value any portion of the input is prohibited by the statute.

IV. The Department Must Consider Alternatives to the Proposed Policy

A. If the Department Wants a Bright-Line Test it Should Minimize Distortions by Using a Lower Threshold.

As noted above, the Department and the courts have long held that actual market economy purchase prices are more accurate than surrogate values. The Department's proposal unnecessarily increases the use of surrogate values by setting an unreasonably high threshold of greater than 50 percent. The Department's practice in previous cases provides ample evidence that accurate market economy purchase prices can be determined using quantities far lower than 50 percent. Although we believe that any bright-line rule will create distortions and limit the Department's discretion to determine the best available factor value, a threshold level consistent with recent Department practice, such as 10 or 15 percent, would create far less distortion than the more than 50 percent rule proposed by the Department.

B. Any Policy Must Allow Respondents to Demonstrate that a Market Economy Purchase Price is an Accurate Reflection of Market Prices.

The Department should abandon the notion that there is a minimum volume level below which the Department will not accept the price an NME producer pays for an input from a market economy supplier. Absolute rules do not promote accuracy. While administratively convenient, a *per se* rule on this issue is, necessarily, arbitrary. The only way the Department can meet its statutory responsibility for accuracy in dumping margin calculations is to retain the ability to apply the market economy input rule to the facts of each case.

If the Department is concerned about manipulation or below market sales, the appropriate response is not a strict quantitative test. Even if the Department believes that administrative convenience requires the establishment of a bright-line rule, that rule must not be so rigid that it forces the Department to use less accurate surrogate values when legitimate market economy purchase prices are on the record. Accordingly, we urge the Department to create an exception to any bright-line rule for situations in which a respondent can demonstrate that the purchase price is legitimate and accurate. In such cases, the Department should use the market economy purchase price to value the entire quantity of the input if evidence shows that the actual price paid by the respondent for inputs purchased from a market economy supplier is consistent with: 1) the price paid for the same input by U.S. manufacturers; 2) the world price for the same input; or, 3) the price the market economy supplier charges its other customers for the same input.

This proposal is consistent with the current, court endorsed, policy of case-by-case assessment. In addition, the use of such benchmarking has been relied on by the Department and upheld by the court for testing the reliability of Indian surrogate value data.[21/] The same benchmarking based on U.S. manufacturers' purchases, suppliers' prices lists or other data indicating actual market prices, could reliably be used to verify the accuracy of market economy purchases. Comparing actual purchase prices to reliable benchmarks creates means of determining the legitimacy of market economy purchase prices that is far more accurate than the mere quantitative requirement in the Department's proposal.

[21/] *See The Timken Company v. United States*, 201 F. Supp. 2d at 1328.

V. Any Policy Change Should Not be Retroactive.

Should the Department decide to alter its policy with respect to the use of market economy inputs to value NME factors of production, it may not apply such changes retroactively. The Department must continue to apply the current methodology to proceedings that cover periods of investigation or review that begin prior to the adoption of the new regulation or practice.[22] It is a well-settled principle of administrative law that retroactive implementation of statutes and regulations is disfavored, as it undermines predictability, interferes with the legitimate expectations of parties subject to a rule, and otherwise unfairly prejudices those who are subject the agency's authority. [23/]

Elsewhere, the Department has recognized the importance of ensuring predictability in the administration of the dumping laws, and has declined to retroactively apply changes in rules and procedures.[24/] NME companies currently subject to antidumping orders, including Lacquer Craft, and the Coalition of Chinese Furniture Producers, have relied upon the existing

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[22] *Brother Indus. v. United States*, 15 CIT 332, ----, 771 F.Supp. 374, 382 (1991) ("The fundamental reason for prospective application is to avoid 'the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed.'") quoting *Union Pacific R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913); *Shandong Huarong Machinery Company, v. United States*, Slip Op. 05-54. (Ct. Int'l Trade May 2, 2005). (Commerce may not make changes in methodology where a respondent has relied on the old methodology in preceding stages of the case).

[23/] See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); Micron Tech., Inc. v. United States, 243 F.3d 1301 (Fed. Cir 2001) (noting non-retroactivity of change in Department methodology).

[24/] See e.g., Certain Cut-to-Length Carbon Steel Plate from Mexico: Final Results of Countervailing Duty Administrative Review, 69 Fed. Reg. 1972 (January 13, 2004) (declining to apply new privatization methodology retroactively to proceedings initiated in the month prior to publication of notice of the new methodology).

methodology in structuring their input purchases so as to comply with U.S. law. In fact, Chinese furniture producers and importers have been trying to comply with U.S. dumping law, i.e., to reduce or eliminate dumping by raising prices and lowering costs. If the Department were to retroactively change the methodology it uses to calculate dumping margins, Lacquer Craft and the other respondents would have no way to know what they need to do to comply with U.S. law and avoid dumping.

In the interest of ensuring that respondents have fair notice of modifications to Department regulations and practice, and are given an opportunity to comply with any new rules, the Department should specify that changes to the existing rules are prospective only and would not apply to proceedings in which the period of investigation or review predates the rule change in whole or in part.

VI. Full APA Notice and Comment is Required for Changes of This Magnitude.

Before implementing the change articulated in its Request for Comments the Department must comply with the Administrative Procedures Act ("APA"). The APA requires that when an agency issues a rule 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."[25]

The establishment of a bright-line quantitative rule dictating when the Department may rely on actual market economy purchases prices is a rule as defined in the APA. Under the APA, "rule" is defined as "the whole or a part of an agency statement of general or particular

[25] 5 U.S.C. § 553(b), (c).

applicability and future effect designed to implement, interpret, or prescribe law or policy."[26] The proposed bright-line rule for use of market economy purchases is an agency statement that implements, interprets and prescribes law and policy.

The Department's proposal does not fall into either the interpretive rule or general statement of policy exceptions to the APA definition.[27] The proposed rule is not an "interpretive rule" because it creates new law, rights and duties with regard to the calculation of dumping margins and dumping duties.[28] Nor is a bright-line more than 50 percent rule a "general statement of policy" under the APA. Courts have employed two criteria for distinguishing "rules" from "general statements of policy." A statement of policy is not a rule if 1) it acts only prospectively, and 2) it "genuinely leaves the agency and its decision-makers free to exercise discretion." [29] The rule proposed by the Department leaves the agency no discretion in determining whether to value inputs using market economy purchases. Whether its acts prospectively or not remains to be seen.

Because the Department's proposed change in policy is an agency rulemaking under the APA we request that the Department follow the procedures proscribed in the APA. In addition, consistent with the APA, we request that the Department hold a public hearing at which arguments regarding this proposed policy can be further developed. We also request that the

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[26] 5 U.S.C. § 551(4).

[27] 5 U.S.C. § 553(b)(3)(A).

[28] *See General Motors Corp. v. Ruckelhaus, 742 F. 2d 1561 (D.C. Cir. 1984); American Postal Workers Union v. United Stats Postal Service*, 707 F.2d 548, 558-59 (D.C. Cir. 1983).

[29] *American Business Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).

Department respond in a detailed and meaningful manner to these and all other comments submitted.

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We appreciate your consideration of these comments. In accordance with the Department's instructions, six copies of this letter have been submitted to the Department, as well as a CD ROM with an electronic version in PDF format. Please contact the undersigned if you have any questions regarding this submission.

Respectfully submitted,

/s/ Lynn M. Fischer Fox
John D. Greenwald
Lynn M. Fischer Fox
Deirdre Maloney