MOWRY INTERNATIONAL GROUP, LLC

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PUBLIC DOCUMENT

BY HAND DELIVERY

Mr. Joseph A. Spetrini
Acting Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and Fourteenth Street, NW
Washington, DC 20230

Re: Proposed Change in Policy Regarding Market Economy Input Prices

Dear Mr. Spetrini,

This letter is being filed in response to the August 11, 2005 request for additional comments on the Commerce Department's proposed change in policy regarding market economy input purchase prices. Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 70 Fed. Reg. 46,816 (Aug. 11, 2005) ("Market Economy Inputs Practice"). This letter is filed on behalf of Coaster Company of America; Collezione Europa, USA, Inc.; Fine Furniture Design & Marketing, LLC; Guildcraft of California; Hillsdale Furniture, LLC; Largo International; Klaussner International; Magnussen Home Furnishings Inc.; L. Powell Company; RiversEdge Furniture Company; Woodstuff Manufacturing Inc., d/b/a Samuel Lawrence Furniture; Schnadig Corporation; Standard Furniture Manufacturing Company; and Trade Masters LLC. These U.S. importers and producers of wooden bedroom furniture oppose the proposed change because there is no evidence of the current policy producing distortion or manipulation and the newly proposed majority rule is unwarranted and contrary to established case law.

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The foregoing companies filed comments on June 24, 2005.[1] In the initial request for comments on the market economy purchase issue, the Department asked three questions:

> (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?
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> (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?
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> (3) Please provide any additional views on any other matter pertaining to the Department's practice concerning the use of market economy import prices.

Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 70 Fed. Reg. 30,418, 30,419 (May 26, 2005).

On June 24, 2005, the Department received numerous responses to its questions. The vast majority of comments filed indicated that the Department should not abandon its long-standing practice of using market economy input prices to value an entire input. A few comments stated that the Department should abandon the long-standing practice and instead use market economy purchases to value only that portion of the input that was actually imported. The Department has chosen to completely disregard the responses to these questions and other comments filed on June 24, 2005 by the above-mentioned companies and sixteen other parties that opposed any change to its current policy. The Department has instead arbitrarily chosen a new methodology without

[1] The June 24 filing was filed on behalf of the foregoing companies, with the exception of Klaussner International. Although not specifically named, Klaussner International supports the June 24 filing.

providing any analysis whatsoever of the comments filed on June 24th. (The generalized summary of comments provided in the August 11 Federal Register notice is cursory at best.) Interested parties are at a distinct disadvantage when asked to comment on a policy change where the Department previously disregarded all reasons for not changing the policy in the first place.

I. No Evidence of Distortion or Manipulation

The Department states that it proposes to change its current practice to "use respondents' market economy purchase prices to value all of the input ... when the majority of each input by volume is sourced from market economy countries" to "better ensure that the market economy input purchase prices it accepts are as free as possible from distortions and constitute the best available information." Market Economy Inputs Practice, 70 Fed. Reg. at 46,817.

The Department has cited no evidence of actual instances of distortions created through the purchase of inputs from market economy sources. Nor have those who urge the Department to change its practice presented evidence of the "manipulation" of which they complain. Purchasing market economy inputs to obtain the best possible price or even avoid the imposition of distortive surrogate values is not "manipulation" of the antidumping law. **Indeed, legitimate measures taken to bring purchasing decisions into conformity with Departmental policies is not manipulation; it is compliance.** In other cases, the Department has actually encouraged respondents to change their ordinary commercial practices to accommodate Commerce Department methodology. E.g., Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 Fed. Reg. 76,910 (Dec.

23, 2004) (final determination) (Issues and Decision Memorandum at Comment 6, p. 20) (requesting that the respondent change its cost reporting practices in future reviews). The Department has provided no justification for how, on the one hand, it is permitted to ask respondents to change their commercial practices to comport with the Department's methodologies but, on the other, when a respondent does so voluntarily, the respondent is branded as manipulating or distorting its antidumping margin.

Given that there has been no evidence of manipulation or distortion, either real or perceived, the Department is seeking to remedy a situation it does not know to exist. It is the Department's practice not to change its policy or methodology based on mere hypothetical situations. For example, in its explanation of changes to its policy on affiliated party sales in the comparison market, the Department decided not to adopt a proposal to exempt respondents from downstream sales reporting where they could show such sales were made at prices below the relevant upstream sale and agreed to use the upstream sale in its place because the Department did "not believe it would be appropriate to address such hypothetical situations" and would instead "do so if and when such issues are raised in a case." Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 69,186, 69,196 (Nov. 15, 2002).

Moreover, in Tapered Roller Bearings and Parts Thereof from Japan, the Department declined to change its normal practice where a respondent failed to show that the agency's existing arms-length test was distortive. There, the Department stated that "[w]hile Fuji argues that our 99.5 percent arm's-length test produces arbitrary results, it failed to provide a single example from its own data supporting its assertions. Fuji presents only theoretical examples of why the arm's-length test is distortive and we have

no basis upon which to conclude that our test is unreasonable. Furthermore, not only is our 99.5 percent arm's-length test methodology well established ... but the CIT has repeatedly sustained this methodology." Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof from Japan, 63 Fed. Reg. 20,585, 20,592 (April 27, 1998) (final results) (Comment 8) (citations omitted).

There is no reason to depart from established practice here. If the Department's concern is, as stated, that it fears that its existing policy could lead to manipulation and distortion, the appropriate measure would be to examine the *bona fides* of the market economy purchases. The Department already does so by, among other things, examining purchases to exclude those inputs that have been subsidized or sold at less than fair value and rejecting inputs produced in an NME that are resold through a market economy and through its extensive verification procedures. See, e.g., Certain Helical Spring Lock Washers from the People's Republic of China, 70 Fed. Reg. 28,274 (May 17, 2005) (final results) (Issues and Decision Memorandum at Comment 1, p. 10) (rejecting 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) (final determination) (Issues and Decision Memorandum at Comment 4, p. 26) (declining to use prices for inputs produced in an NME but sourced from a market-economy supplier).

Absent actual evidence of distortion or manipulation, there is no reason for the Department to address a mere hypothetical situation and change is current policy on what constitutes a "meaningful" percentage for purposes of valuing inputs purchased in part from a market economy country. The effort afoot to change the current policy on market

economy inputs seems to be aimed not at true distortion or manipulation, but at artificially raising antidumping margins in cases where petitioners find the margins to be lower than desired.

II. "Majority" Rule is not Warranted

In any event, the "majority" rule selected by the Department is contrary to Congressional intent, as codified in the Tariff Act of 1930, as amended, as well as case law and past Departmental practice, including the agency's own regulations.

The statute requires use of the "best available information" in calculating antidumping margins. 19 U.S.C. § 1677b(c)(1). As discussed in our June 24, 2005 submission as well as the submission of several other parties, market economy purchase prices paid by the respondent are the best information available to value the entire input because they reflect actual prices, not some hypothetical price derived from distorted surrogate values. See, e.g., Comments filed on behalf of Shing Mark at 6-8 (June 24, 2005); Comments filed on behalf of Furniture Retailers of America at 7-8 (June 24, 2005).

The courts have held as such. The Federal Circuit has previously recognized in upholding a Commerce Department determination, that "where we can determine that a [non-market economy] 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." Lasko Metal Prods., Inc. v. United States, 43 F.3d 1442, 1446 (Fed. Cir. 1994). The Federal Circuit has also recognized that "[i]n 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." Shakeproof Assembly Components v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("Shakeproof").

The proposal to equate meaningful with majority would also be contrary to court precedent. In Shakeproof, the Federal Circuit upheld the Department's own determination that one-third constitutes a "meaningful" amount for purposes of valuing an entire input using market economy purchase prices. See id. at 1382. It did not, however, rule out the possibility that even lesser amounts could be considered "meaningful." If one-third is considered "meaningful," the Department may not ignore that court-upheld threshold in deciding that purchases are meaningful only if they are more than half of all purchases. Use of the market economy purchase price to value an entire input only where the majority of the input is purchased from a market economy country would, therefore, ignore court precedent directing the Department to use actual prices as the "best information available."

Changing its methodology to require that a majority of purchases be from a market economy source before it will use that source to value the entire input would, moreover, change the Department's existing regulations. The regulations provide 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) (2005) (emphasis supplied). The meaning of the term "a portion" is different from the meaning of the term "majority." "Portion" is commonly defined to

mean a "part or share of something." Webster's Ninth New Collegiate Dictionary at 917 (1988). The term "majority," on the other hand, is commonly defined to mean "a number greater than half the total" or "the preponderant quantity or share." Id. at 718. The Department may not resort to a rule equating "meaningful" with "majority" when its regulations require that only a portion of the input be purchased from a market economy source because doing so would mean changing the regulations outright. A part or share of something in no way connotes more than 50 percent of the total. Indeed, the Department has already recognized in prior cases that a "portion" as little as five percent is "meaningful" under the law.

III. The Department Must Comply with Administrative Protective Act Requirements

The Department may not change its regulations without fulfilling Administrative Procedures Act ("APA") requirements. The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). When an agency issues a rule, the APA requires that the agency publish a notice of rulemaking in the Federal Register, give interested persons a meaningful opportunity to participate in the rulemaking through written submissions and "incorporate in the rules adopted a concise general statement of their basis and purpose." Id. § 553(b), (c). The Court of International Trade has held, in addition, that a promulgation of a rule must comply with the APA's notice and comment provisions. See Carlisle Tire & Rubber Co. v. United States, 634 F. Supp. 419 (Ct. Int'l Trade 1986). Furthermore, pursuant to Executive Order, agencies are responsible for "afford[ing] the public a meaningful opportunity to

comment on ... proposed regulation[s], which in most cases should include a comment period of not less than 60 days." Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). The Department itself has complied with this requirement in numerous past instances of rule promulgation or modification of its methodology. E.g., Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 69,186 (Nov. 15, 2002); Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,295 (May 19, 1997) (final rule). In each of these instances, the Department directly responded to comments from the parties.

The Department's proposed revision to the market economy purchase rule amounts to an agency statement on how to interpret the statute's best information available requirement. This new methodology is precisely the kind of "rule" subject to APA requirements. In this case, the Federal Register notice requesting comments on its proposal regarding market economy purchases was issued on August 11, 2005. Comments are due on September 6, 2005. Interested parties thus have less than half of the time period provided by the Executive Order to comment. The fact that the Department seeks to promulgate a new rule requiring a "majority" of the input be sourced from a market economy country without any analysis puts this rulemaking back at square one. The Department, in short, has provided inadequate notice and comment procedures.

Providing a simple scorecard of how many parties previously submitted comments for or against the proposal to change the market economy purchase rule as it did in its August 11, 2005 request for comments is no substitute for thoughtful, deliberate, cogent decision making. If the Department wants to change its regulations as proposed, it must comply with its normal notice and comment procedure under the

Administrative Procedures Act, extend the period for comments, and, when it issues new regulations, address all comments submitted. At a minimum, the Department must respond to the comments filed regarding this matter and, in particular, explain how the current rule leads to distortions and manipulation.

Sincerely,

Kristin H. Mowry
Mowry International Group, LLC