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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 its market economy inputs practice in antidumping proceedings involving non-market economy countries.[1]

A. Introduction and Summary

The changes that the Department is considering regarding the use of the actual prices paid by producers in non-market economy ("NME") countries for their hard currency purchases of inputs from market economy suppliers must be assessed in light of the Department's core

[1] Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 70 Fed. Reg. 30,418, (May 26, 2005) ("Request for Comments").

obligation to calculate dumping margins as accurately as possible.[2/] With that as the guiding principle, Lacquer Craft believes that:

1. The presumption must be that the actual hard currency prices paid by NME producers and exporters to their Market Economy ("ME") suppliers are the best measure of the true, i.e., the most accurate, market price for the inputs in question; *no other price or value is (or can be) as specific to the actual inputs used in production of the merchandise under investigation.*

2. The presumption favoring the use of the actual prices paid to ME suppliers can be rebutted if, for example, the prices are not at arms-length or otherwise are unreliable (i.e., they are distorted because of concessions between the parties in other areas) -- *but the burden must be on the party opposing their use to show that the actual market economy purchase prices are inappropriate*.

3. The Department should judge the suitability of actual transaction prices paid to ME suppliers on a case-by-case basis. *Rigid rules of general application (e.g., the hard currency purchase price paid to a market economy supplier is* per se *invalid if the purchases account for less than 5 percent of the total supply of the input at issue; the price paid to the market economy supplier is valid only for that portion of supply of the input that is purchased from ME sources) are at odds with the obligation to search for the best available input values.* Rules of this sort are easy to apply (they require little in the way of thought), but they do not promote accuracy in case-specific dumping margin calculations.

The existing regulation governing the use of market economy inputs in NME antidumping investigations[3/] gives the Department all the flexibility it needs to implement a policy that is fully consistent with these basic principles. There is, therefore, no need (or good reason) to change it. At the same time, there is room for better application of the regulation by the Department. In particular, two changes in the Department's practice would bring it into closer conformity with the three core principles that we believe should guide the Department's application of the regulation:

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

[3/] 19 C.F.R. § 351.408(c)(1).

First, the Department should abandon the notion that there must be any minimum volume level before the Department will accept the price an NME purchaser pays for an input from an ME supplier. If the volume of the input purchased from an ME supplier is de minimis (e.g., less than 2 percent of that total supply of the input), there may be grounds to question whether the input price is fairly representative of market prices typically paid by purchasers. At the same time, if nothing else provides a more accurate value (e.g., if, for example, there are no other product-specific data on the record because the applicable import value data are derived from imports under a basket category), even a small volume of arms-length purchases from an ME supplier may still be the "best available" evidence of the market value of the input and should, therefore, be used.

Second, the Department should recognize that where a market economy supplier *produces* in an NME country (e.g., China) as well as other countries (e.g., Malaysia) and *chooses* to supply its NME customers from its NME plant at hard currency prices (e.g., U.S. dollars), the presumption must be that the ME supplier of the input (e.g., Akzo Nobel for paints sold to unrelated Chinese furniture producers) is charging a market price that represents the "best available" value for the input (e.g., various types of paint) in question. As a market economy company, the seller/producer operates on market economy principles; it seeks the best market price it can for its NME production in exactly the same way as it maximizes its profits on its ME production -- and would not sell to its NME customers at a price below the price it could command for the input in the world market.

B. Comments on the Department's Specific Questions

1. Answer to Question One: It is Not Appropriate for the Department to Change its Regulations to End Its Long-Standing Practice of Using Market Economy Import Prices to Value All Usage of a Particular Input.

When an antidumping investigation involves a product from an NME, such as China, 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."[4/] 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.

In fact, well before it adopted the regulation at issue, the Department recognized that "accuracy, fairness, and predictability are enhanced" by using market determined input prices.[5/] The Court of International Trade and the United States Court of Appeals for the Federal Circuit have agreed with the Department's view that alternative surrogate values were 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.[6/]

[4/] 19 U.S.C. § 1677b(c)(1)(B)(2). (Emphasis supplied.)

[5/] See, e.g., Oscillating Fans and Ceiling Fans from the People's Republic of China, 56 Fed. Reg. 55,271, 55275 (1991).

[6/] 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).

The Department's regulation governing the valuation of an NME respondent's factors of production states that:

> Where a factor is purchased from a market economy supplier and paid for in market economy currency, the Secretary 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, the Secretary normally will value the factor using the price paid to the market economy supplier.[7/]

The Federal Circuit has approved the Department's regulation, holding that the statute "requires the [Department's] determination to be based on the best information available…. In this case, 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."[8/] The Department's proposed modification of the regulation would not only change a long-standing Department practice, it would be inconsistent with the statute and controlling decisions of the court.

There is no reasoned basis to dispute that actual, arm's-length purchases of an input from a market economy supplier are the best source of information about prevailing market prices for the input. The Department itself has routinely expressed this view:

- "We also believe that reliable import prices for the same input are a better means of valuing an input than surrogate values." 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);

[7/] 19 C.F.R. § 351.408(c)(1). (Emphasis supplied.)

[8/] Shakeproof Assembly Components v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

- "Normally, market economy inputs provide more accurate values" 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).

- [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." 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).

- "The import price is a more reliable and more accurate basis for establishing the normal value. . ." 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).

Similarly, the courts have repeatedly endorsed the idea that actual prices are more accurate than surrogate values.[9/] Nothing in recent Department investigations or court decisions indicates any reason for a shift in this approach.

The proposal is further inconsistent with the statute because is assumes there can be two "best" or equally accurate values for a single factor. If the Department determines that the market economy import prices reported by the respondent are adequate to value the inputs purchased, there is no rational reason why those same prices should not be used to value the entirety of the input.

Finally, the proposed change would not address the concerns raised in the Department's Request for Comments. First, the Department expressed concern that the price paid for market economy imports "might not be the most accurate reflection of what a company pays to source the entire input."[10/] This concern is misplaced. The purpose of the NME valuation methodology is not to determine the actual price that a respondent pays for an input sourced from an NME

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

[10/] Request for Comments, 70 Fed. Reg. at 30,418.

supplier. To the contrary, the NME methodology assumes that the actual price paid for an input purchased from an NME supplier is distorted and would not provide an accurate estimate of the real, market-economy cost of producing the merchandise under investigation. The objective of the NME methodology is to identify the most accurate *market economy value* for the factor in question and this is, as the Department and the Courts have recognized repeatedly, the price actually paid for the same inputs when sourced from market economy suppliers.

The second concern expressed in the Request for Comments is that a respondent might not have sourced the entire input from market economy suppliers in the normal course of business. Again, the concern appears to be inconsistent with the purpose of the NME methodology. In valuing factors of production sourced from NME suppliers, the question that the Department is required to answer is not whether the respondent purchased, or could have purchased, all of its inputs from a market economy source. Rather, the Department is required to determine the most accurate market economy price that it can use to value an input that was purchased from an NME supplier.

The final concern expressed by the Department is that the current regulations might allow a respondent to manipulate the process. On this point, the presumption favoring the use of purchases from market economy suppliers can be rebutted if there is substantial evidence that the purchase price is manipulated. But in reviewing its long-standing factor valuation methodology, the Department must take care to correctly identify what might be considered manipulation. In particular, it may not define as "manipulation" efforts by respondents to comply with the antidumping law by purchasing inputs at arms-length prices from legitimate market economy suppliers.

In this regard, an NME producer's decision to source a portion of its input from a market economy source cannot, by itself, be considered manipulation, even if that decision is made for the express purpose of establishing market economy import prices that may be used to value its factors of production. In other circumstances, the Department has encouraged respondents to modify their ordinary commercial practices so that it will have sufficient transaction-specific cost data.[11/] Respondents in NME cases similarly must be allowed to structure their operations in a way that eliminates dumping. Respondents (and, we believe, the Department) are well aware that it is often difficult, if not impossible, to obtain surrogate value information that is product specific. An effort to ensure that accurate market economy pricing data are available to value its factors of production cannot properly be deemed manipulation.

Manipulation (e.g., rigged transactions at artificially low prices) can and should be addressed under the Department's existing regulation. Under the current regulations the Department has the authority to determine if transactions are legitimate, arms-length transactions that produce accurate market economy prices. For example, when the Department finds that a respondent has not actually used a reported market economy input in the production of subject merchandise, it will not use that purchase to value the remainder of a respondents factors.[12/] Similarly, if a reported market economy purchase does not reflect actual market economy prices

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[11/] See, e.g., Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 Fed. Reg. 79,910 (Dec. 23, 2004) (directing respondent to alter its cost reporting practices in future administrative reviews to allow the Department to rely on Company data for cost allocation).

[12/] See 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).

due to subsidies or other distortions, the Department can, and does, reject those purchases for purpose of factor valuation.[13/]

2. Answer to Question Two: The Department Should Not Set an Arbitrary Threshold that Qualifies Purchases as "Meaningful."

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. 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.

Rather than approach this issue in absolutes, we believe that the right approach is one of presumptions. When market economy purchases of an input are above a *de minimis* level, the presumption must be that the price of those purchases is the best available surrogate price for the same input sourced from NME suppliers. When, by contrast, the volume of the market economy sourced input is *de minimis*, the Department might reasonably put the burden on the respondent to show that despite the low volume, the transaction is arms-length and that, given the available alternatives, the price is the best available surrogate value.

At bottom, the Department's task is always to select the best available, most accurate information to value factors of production. In past investigations, this has led to a reliance on surrogate prices from relatively small transaction volumes where the data are not distortive and

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[13/] See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Ball Bearings and Parts Thereof from the People's Republic of China, 68 Fed. Reg. 10,685 (Mar. 6, 2003).

are not inconsistent with other price information for a given input.[14] The same standard should be applied to market economy purchases.

3. Question Three: Additional Comments.

a. The Department Should Modify its Practice to Treat Purchases from Market Economy Producers as Market Economy Transactions.

The Department should recognize that where a market economy producer (as opposed to a trader or a middleman), i.e., a producer that is headquartered in a market economy country, is a multinational corporation that (1) manufactures products in an NME country (e.g., China) as well as other countries, and (2) chooses to supply its NME customers from its NME plant at hard currency prices, the rebutable presumption must be that the ME producer (e.g., Akzo Nobel for paints sold to unrelated Chinese furniture producers) is charging a market price that represents the "best available" value for the product in question. Because a market economy company operates on market economy principles in all markets, it, and not the buyer, would capture any benefits associated with production in the NME.

This minor change in the Department's practice would reflect the economic reality that hard-currency purchases from market economy producers are market economy transactions regardless of the location in which the factor is produced. Furthermore, this change would bring Department practice into conformity with the statute, the decisions of the courts and the Department's own regulations.

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[14] See, e.g., Notice of Final Determination of Sales at Less than Fair Value, Certain Color Television Receivers from the People's Republic of China, 69 Fed. Reg. 20,594 (April 16, 2004) (using as a surrogate value import data covering less than 100 kilograms of chokes and coils). See also, Shakeproof Assembly Components Division of Illinois Tool Works Inc. v. United States, 59 F. Supp. 2d 1354, 1358-59 (Ct. Int'l Trade 1999).

As noted (repeatedly) above, the Department's obligation is to calculate dumping margins "as accurately as possible".[15/] In interpreting that statutory requirement the Federal Circuit has held that

> where {the Department} can determine that a . . . 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.[16]

The Department's assumption that a factor price is not market determined because the place of manufacture is China or another NME is inconsistent with its obligations to calculate dumping margins accurately. Inputs sold in hard currency by multinational producers will be sold at international market prices regardless of the place of manufacture. To assume otherwise is to suggest that multinational companies are not responsive to market forces.

As justification for its support its practice of treating transactions as market economy purchases only if the product is actually manufactured in a market economy, the Department relied on the preamble of the regulations. In the preamble, the regulation is described as allowing reliance on purchase prices "where the NME producer purchases inputs from a market economy producer . . .".[17/] However, a multinational company headquartered in Europe that produces in, for example, China, Europe, Japan, Malaysia and the United States is, by any

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[15/] Rhone Poulenc v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990) ("the basic purpose of the statute {is} determining current margins as accurately as possible")

[16] Shakeproof Assembly Components v. United States, 26 F.3d 1376, 1382 (Fed. Cir. 2001) (quoting Lasko Metal Prods. Inc. v. United States, 43 F.3d 1442, 1445 (Fed. Cir. 1994) (emphasis in the original).

[17/] See Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27,296, 27,366 (May 19, 1997).

measure, "a market economy producer." Moreover, the actual language of the regulation states that a purchase will be considered a market economy purchase if "a portion of the factor is purchased from a market economy supplier."[18/] While it is considering steps to improve its practices with regard to factor valuation, the Department should bring its practice with regard to purchases from market economy suppliers of NME produced goods into conformity with the statute and the regulations.

b. The Department May Not Retroactively Change its Methodology.

Should the Department decide to alter its regulations or its practice 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. 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. [19]

[18/] 19 C.F.R. § 351.408(c)(1).

[19] 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).

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.[20] NME companies currently subject to antidumping orders, including Lacquer Craft, and the Coalition of Chinese Furniture Producers, have relied upon the existing 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.

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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

[20] 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).

well as an electronic version in PDF format. Please contact the undersigned if you have any questions regarding this submission.

Respectfully submitted,

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