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UNITED STATES ANTI-DUMPING REGULATIONS

Addendum

Final Rule Concerning Merchandise from State-Controlled Economies

The following communication has been received from the Permanent Mission of the United States.

I am attaching revised United States anti-dumping regulations for valuing merchandise from State-controlled economies. I would appreciate it if you would circulate this notification under Article 15 of the GATT Anti-dumping Code to the interested parties. For your information I am also attaching a press release from the United States Department of Treasury which summarizes the new regulations.

(T.D. 78-)

Antidumping--Customs Regulations amended

**Part 153, Customs Regulations, relating to procedures under the
Antidumping Act, 1921, amended**

**DEPARTMENT OF THE TREASURY
OFFICE OF THE COMMISSIONER OF CUSTOMS
Washington, D. C.**

TITLE 19--CUSTOMS DUTIES

CHAPTER I -- UNITED STATES CUSTOMS SERVICE

PART 153--ANTIDUMPING

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final Rule.

SUMMARY: This document amends the Customs Regulations relating to antidumping investigations which involve merchandise from countries whose economies are determined to be "state-controlled" for the purposes of the Antidumping Act, 1921, as amended. The amended regulations provide that in determining the fair value of merchandise from a state-controlled-economy country through comparisons with prices or the constructed value of merchandise in a country or countries not regarded as having a state-controlled-economy, the Secretary of the Treasury may give recognition to the level of economic development and to relative efficiencies or natural advantages in the state-controlled-economy country. In addition, the amended regulations provide that antidumping petitions which involve merchandise from a state-controlled-economy country should contain information pertinent to the new procedures.

EFFECTIVE DATE: The amendments will become effective as noted below under that part of the document entitled "Effective Date".

FOR FURTHER INFORMATION CONTACT:

Theodore Hume, Office of the Chief Counsel, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D. C. 20229, 202-566-5476.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 9, 1978, notice was published in the FEDERAL REGISTER (43 FR 1356) of a proposal to amend sections 153.7 and 153.27 Customs

Regulations (19 CFR 153.7 and 153.27), concerning investigations under the Antidumping Act, 1921, as amended (19 U.S.C. 160 et seq.) ("the Act"), which involve merchandise imported from a "state-controlled-economy country." Section 205(c) of the Act (19 U.S.C. 164(c)), as added by the Trade Act of 1974, provides that the Secretary of the Treasury ("the Secretary") may determine the foreign market value of merchandise exported from a state-controlled-economy country on the basis of the normal costs, expenses, and profits for the merchandise, as reflected by the prices or the constructed value of such or similar merchandise from a non-state-controlled-economy country or countries. Based on its experience in administering this provision and in an effort to make comparisons on a more equivalent and realistic basis, it was concluded that when the foreign market value, and thereby the fair value, of merchandise from a state-controlled-economy country is being determined based upon the prices or the constructed value of such or similar merchandise in a non-state-controlled-economy country or countries, the latter country or countries should be comparable in terms of economic development to the state-controlled-economy country in which the merchandise under investigation is produced.

Accordingly, it was proposed to amend section 153.7 to provide that prices shall be used as a basis of comparison if they are available from a non-state-controlled-economy country of comparable economic development. Where such or similar merchandise is not produced and sold in sufficient quantities in a non-state-controlled-economy country comparable in terms of economic development to the state-controlled-economy country from which the merchandise is exported, a constructed value could be used. When constructed value is used as the basis for fair value, it would be determined based upon the actual factors of production in the state-controlled-economy country as valued in a non-state-controlled-economy country of comparable economic development. If such factors and values cannot be adequately verified, then prices of such or similar merchandise sold or produced by any other non-state-controlled-economy country including, if necessary, the United States would be used.

It also was proposed to amend sections 153.27(a)(3)(i), (ii), and (iii) to distinguish clearly certain types of information required in any petition involving merchandise from a state-controlled-economy country, as well as to require that such petitions include information pertinent to the comparability of the state-controlled-economy country with a non-state-controlled-economy country from which prices or constructed value are to be determined.

Interested persons were invited to submit comments on the proposed amendments on or before February 8, 1978. By notice published in the FEDERAL REGISTER on February 6, 1978 (43 FR 4871), the comment period was extended to February 22, 1978.

DISCUSSION OF COMMENTS
USE OF PRICES OR CONSTRUCTED VALUE
IN DETERMINING FAIR VALUE

A number of commenters argued that the proposed amendments would depart from the statutory requirements for determining the fair value of merchandise from a state-controlled-economy country. Some commenters interpreted the proposed amendments as giving preference to prices over constructed value in determining fair value. Others believed the amendments would make the constructed value of such or similar merchandise in a non-state-controlled-economy country the primary determinant of fair value.

Section 205(c) provides that the Secretary shall determine the foreign market value in antidumping investigations of merchandise from a state-controlled-economy country on the basis of the normal costs, expenses, and profits as reflected by either--

- (1) the prices at which such or similar merchandise of a non-state-controlled-economy country or countries is sold either (A) for consumption in the home market, of that country or countries, or (B) to other countries, including the United States; or
- (2) the constructed value of such or similar merchandise in a non-state-controlled-economy country or countries.

It is the position of the Treasury Department that section 205(c) provides that either prices or constructed value may be used by the Secretary in determining the foreign market value and thereby the fair value, depending upon the information available in the particular case under consideration. To indicate more clearly that the regulations are intended to follow the statutory standards, section 153.7(a) retains the statutory structure.

AUTHORITY FOR APPLYING A STANDARD
OF COMPARABILITY OF ECONOMIES

Some commenters questioned the authority of the Treasury Department to make adjustments in determining fair value based on differences in the level of economic development between the non-state-controlled-economy country or countries and the state-controlled economy country, or to determine fair value on the basis of prices for such or similar merchandise in a non-state-controlled-economy country of comparable economic development.

One commenter objected that the proposed regulations would provide for examination of economic criteria and factors of production in the state-controlled-economy country whose merchandise is under investigation even though, in his view, the intent of the law is that information concerning markets and products in state-controlled-economy countries must be disregarded altogether.

Section 205(c) of the Act provides that the Secretary shall determine the foreign market value, and thereby the fair value, of merchandise from a state-controlled-economy country on the basis of the normal costs, expenses, and profits as reflected by the prices or constructed value of such or similar merchandise in a non-state-controlled-economy country or countries, as set forth in sections 205(c)(1) and (c)(2) of the Act. This provision reflects Congressional concern that state control of an economy renders inherently suspect the prices and costs of producers in such countries. Therefore, the prices (or costs, if appropriate) are to be determined from a non-state-controlled economy country. In selecting a non-state-controlled-economy country as a surrogate for the country from which the products, in fact are being exported to the United States, the Treasury in the past has attempted to select a country that is most like the exporting country. The standard for selection, however, has not been articulated clearly. The present regulation seeks to provide such a standard, consistent with the principles of the Antidumping Act which attempt generally to establish the "fair value" of merchandise from the practices of the foreign producer or, in the instant case, of the surrogate producer.

One commenter argued that the most suitable non-state-controlled-economy country to be selected is the one with a market for sales most like the United States. This, however, is, not the usual priority established by the Act. Under section 205(a) of the Act and section 153.2(a) Customs Regulations (19 CFR 153.2(a)), it is the home market that is the preferred reference for establishing the foreign market value, and thereby the fair value. The proposed regulation attempts to follow that concept by using data from another country, but not a state-controlled-economy country, most like the unavailable home market. The prices in such a country will be the preferred reference, but costs may be used if sales in a non-state-controlled economy country are insufficient or data is unavailable.

Even though the prices and costs in the state-controlled-economy country are not regarded as sufficiently reliable to establish the foreign market value, and thereby the fair value, of merchandise, the actual physical inputs in such a country can be recorded and verified. If adequately recorded and verified, they should provide a reliable measure of the capabilities of the producer to make and sell the merchandise in question. These inputs then can be valued in a non-state-controlled economy country, and the appropriate value established, which recognizes both the natural advantages and possible disadvantages of production for the producer. This method should accord most closely with the statutory requirement

of section 205(c) of the Act that the "normal costs" be found. Based on past experience and practice -- which the Congress sought to incorporate into the Act -- the regulatory provisions hereby adopted seem best suited to achieving the purposes of the Act as a whole in the unique circumstances to which they are addressed.

The Treasury Department believes that the new procedures are necessary for fulfilling properly its responsibilities under the Act and are consistent with both its past practices and the law that adopted those practices. For example, the Treasury Department has based, in part, its selection of a non-state-controlled-economy country or countries for price comparison purposes on the comparabilities of that country's or countries' level of economic development with that of the state-controlled-economy country from which the merchandise under investigation was exported.

COMMENTS ON PROPOSED COMPARISON PROCEDURES

Some commenters argued that the fact that the proposed regulations require examination and comparison of production costs in various countries introduces elements of unreliability and speculation in determinations of fair value. Similarly, it was contended that there is no reliable basis for applying a standard of comparability between state-controlled-economy countries and non-state-controlled-economy countries. Further, it was suggested that without detailed guidelines and definitions in the regulations, persons affected will not be able to make informed judgments as to whether they are in compliance with the statute.

The regulations as adopted should make clear that costs of production in a non-state-controlled-economy country of comparable economic development will be used only if (1) price information is unavailable, and (2) verified information is made available by the state-controlled economy country producer concerning the specific factors actually used in producing the merchandise exported to the United States. As stated in the amended regulations, these specific factors include, but are not limited to, hours of labor required, quantity of materials employed, and amounts of energy consumed. The valuation of these components and factors in a comparable non-state-controlled economy country also would be required to be subject to verification.

The basis for the use of constructed value in fair value determinations under the Act generally is that the components and factors of production can usually be ascertained, for any given type of merchandise and, if verified, provide a reliable basis for determining fair value. Similarly, comparability

in economic development will be determined from per capita gross national product, the level of infrastructure (particularly in the sectors of the economy at issue), and other widely used criteria for which generally reliable information is publicly available.

Proposed section 153.7(b)(i) is not being adopted. This section provided for adjustments for differences in economic factors between (1) a non-state-controlled-economy country or countries actually producing such or similar merchandise, and (2) a non-state-controlled-economy country or countries determined to be comparable in terms of economic development to the state-controlled-economy country whose merchandise was under investigation. Upon further consideration, it has been concluded that adoption of this provision would, as the commenters argued, be relatively speculative and unreliable, and would create an unnecessary burden upon persons involved in an investigation, without significantly improving the Treasury Department's ability to ascertain the normal costs, expenses, and profits.

USE OF UNITED STATES

PRICES OR CONSTRUCTED VALUE

Some commenters contended that section 205(c) of the Act does not authorize the use of prices or constructed value of such or similar merchandise in the United States.

The Treasury Department does not agree with this interpretation of the statutory language. Proposed section 153.7(b)(3) is not new, but merely restates the provision for the use of prices or constructed value of United States produced merchandise in the existing section 153.7 and, indeed, in section 153.5 of the Customs Regulations in effect prior to the Trade Act of 1974. Specifically, former section 153.5 provided for the use of "prices at which such or similar merchandise is sold by a non-state-controlled-economy country." The Treasury Department considers that this language clearly authorized, and continues to authorize, the use of U.S. prices in appropriate situations.

EDITORIAL CHANGES

In addition to the change in format and deletion of proposed section 153.7(b)(i), the last sentence of proposed section 153.7(b)(ii), which is being adopted as the last sentence of section 153.7(c), is revised to read as follows:

To the constructed value thus obtained, there shall be added an amount for general expenses and profit, as required by section 206(a)(2) of the Act (19 U.S.C. 165(a)(2)), and the cost of all containers and coverings and other expenses, as required by section 206(a)(3) of the Act.

After consideration of all comments received and further review of the matter, it has been determined that the amendments should be adopted as proposed, except for the noted changes.

EFFECTIVE DATE

These amendments will take effect 30 days after publication with respect to investigations initiated on or after that date, and to the extent practicable, will be applied to any investigations pending on the effective date. Similarly, the Department intends to adopt the procedures set forth in these amendments for the purposes of determining whether special dumping duties should be assessed on any merchandise entered for consumption or withdrawn from warehouse for consumption on or after the effective date. Recognizing the need to assess the effects of these amendments, the Department will evaluate the impact of these amendments as soon as sufficient experience has been acquired, with a view to making further revisions if deemed appropriate.

DRAFTING INFORMATION

The principal author of this document was Edward T. Rosse, Regulations and Legal Publications Division, U.S. Customs Service. However, other personnel in the Customs Service and the Treasury Department assisted in its development.

AMENDMENTS TO THE REGULATIONS

Part 153 of the Customs Regulations (19 CFR Part 153) is amended as set forth below.

(signed) Leonard Lehman
Acting Commissioner of Customs

Approved: 3 August 1978

(signed) Robert H. Mundheim
General Counsel of the Treasury

PART 153 - ANTIDUMPING

1. Section 153.7 is amended to read as follows:

153.7 Merchandise from state-controlled-economy country.

(a) **General.** If the information available indicates to the Secretary that the economy of the country from which the merchandise is exported is state-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of fair value under section 153.2, 153.3, or 153.4, the Secretary shall determine fair value on the basis of the normal costs, expenses, and profits as reflected by either:

(1) The prices, determined in accordance with subsection 205(a) and section 202 of the Act (19 U.S.C. 164(a), 161) at which such or similar merchandise of a non-state-controlled economy country or countries is sold either: (A) for consumption in the home market of that country or countries, or (B) to other countries, including the United States; or

(2) The constructed value of such or similar merchandise in a non-state-controlled-economy country of countries.

(b) Comparability of economies. (1) The prices as determined under section 153.7(a)(1), or the constructed value as determined under section 153.7(a)(2), shall be determined, to the extent possible, from the prices or costs in a non-state-controlled-economy country or countries at a stage of economic development comparable to the state-controlled-economy country from which the merchandise is exported. Comparability of economic development shall be determined from generally recognized criteria, including per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise).

(2) If no non-state-controlled-economy country of comparable economic development can be identified, then the prices or constructed value as determined from another non-state-controlled-economy country or countries other than the United States shall be used.

(3) If neither section 153.7(b)(1) nor (b)(2) provides an adequate basis for determining the price or constructed value of such or similar merchandise, then the prices or constructed value, as determined from the sales or production of such or similar merchandise in the United States, shall be used.

(c) Use of constructed value. If such or similar merchandise is not produced in a non-state-controlled-economy country which is concluded to be comparable in terms of economic development to the state-controlled-economy country from which the merchandise is exported, the constructed value of such or similar merchandise may be determined from the costs of specific objective components or factors of production incurred in producing the merchandise in question, including, but not limited to, hours of labor required, quantities of raw materials employed, and amounts of energy consumed, if such information is obtained from the producer of the merchandise in the state-controlled-economy country under investigation, and verification of such information in the state-controlled-economy country is concluded to the satisfaction of the Secretary. Such components or factors shall be valued and such values verified in a non-state-controlled-economy country determined to be reasonably comparable in economic development to the state-controlled-economy country under investigation. To the values thus obtained, there shall be added an amount for general expenses and profits, as required by section 206(a)(2) of the Act (19 U.S.C. 165(a)(2)), and the cost of all containers and coverings and other expenses, as required by section 206(a)(3) of the Act (19 U.S.C. 165(a)(2)).

* * * * *

2. Paragraph (a)(3)(i-iii) of section 153.27 is amended by deleting subparagraph (iii) and revising subparagraph (i) and (ii) to read as follows:

153.27 Suspected dumping; nature of information to be made available.

(a) General.

* * * * *

(3) Price information; fair value.

(i) If the merchandise is being exported from a country other than one considered to be a "state-controlled-economy country" within the meaning of section 205(c) of the Act (19 U.S.C. 164(c)):

(A) The home market price of such or similar merchandise in the country of exportation;

(B) If such information is unavailable, the price at which such or similar merchandise is sold to a third country from the country of exportation; or

(C) If the information required under section (a)(3)(i)(A) or (a)(3)(i)(B) is unavailable, the constructed value (as defined in section 206 of the Act (19 U.S.C. 165)) of such merchandise produced in the country of exportation.

(ii) If the merchandise is being exported from a country considered to be a "state-controlled-economy country":

(A) The price or prices at which such or similar merchandise of a non-state-controlled-economy country or countries, considered to be comparable in terms of economic development to the state-controlled-economy country, is sold for consumption in the home market of that country or countries or to other countries (including the United States);

(B) The constructed value of such or similar merchandise in a non-state-controlled-economy country, determined in accordance with sections 153.7(b) and (c).

(iii) Deleted.

* * * * *

(Sec. 201-212, 407, 42 Stat. 11 et seq., as amended, sec. 5, 72 Stat. 585, secs. 406, 407, 42 Stat. 18 (5 U.S.C. 301, 19 U.S.C. 160-173))

TREASURY ANNOUNCES REVISED ANTIDUMPING
REGULATIONS FOR VALUING MERCHANDISE FROM
STATE-CONTROLLED ECONOMIES

The Treasury Department announced today a revised regulation for the valuation of merchandise from state-controlled economies under the Antidumping Act.

Under the new regulation, products imported from countries considered "state-controlled" will be valued for the purposes of the Antidumping Act by comparing them to similar products made and sold in a non-state-controlled economy that is at a comparable stage of economic development.

If similar products are not actually made and sold in such a free market economy, a "constructed value" for the merchandise will be calculated based on the physical inputs (labor, material, energy, etc.) in the state-controlled economy, valued in a non-state-controlled economy at a comparable stage of economic development.

If neither of these procedures provides data that can be verified to the satisfaction of the Secretary of the Treasury, domestic prices and costs may be used to establish the "fair value" of the merchandise.

Under the Antidumping Act, a special dumping duty is applied to products imported at "less than fair value" if the International Trade Commission determines that such sales cause or threaten injury to a U.S. industry. "Fair value" is generally based on the prices or costs of the foreign producer in its home market or sales to third countries.

However, because the prices and costs in state-controlled economies are generally not reflective of market supply and demand, but are arbitrarily determined, they cannot be used to establish "fair value" under the Antidumping Act.

The new regulation provides a basis for establishing "fair value" for a producer in a state-controlled economy that takes into account any advantages (and disadvantages) in its production abilities, and allows the resources used to be valued in a market economy that is approximately comparable to the economy in which the goods are produced.

The new method for calculating "fair value" might be applied, for example, to the case of golf carts from Poland. Golf carts are not sold in Poland and appear not to be produced in commercial quantities in any other country outside the United States. The cost of producing golf carts (plus statutory minimums for general expenses and profit) may now be calculated by obtaining the verified physical inputs from the Polish producer and valuing them in a non-state-controlled economy such as Spain or Portugal.

The regulation was first proposed in January 1978 and has been intensively studied since then. It is being adopted on a trial basis and will be reconsidered in the light of experience.