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VIA HAND DELIVERY

The Honorable James J. Jochum
Assistant Secretary for Import Administration
Attention: Import Administration
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And Bryan Cave,
A Multinational Partnership,
London

Re: Comments on Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries

Dear Mr. Jochum:

This is in response to the Department's May 3, 2004 request for comments on the questions pertaining to its separate rates practice in antidumping proceedings involving non-market economy (NME) countries set forth in the Appendix to its May 3rd Federal Register notice.

The Department's questions and our responses are as follows:

(1) Should the Department institute an earlier deadline for parties filing section A submissions who are requesting only a separate rate (as opposed to a full review), in relation to the deadline for mandatory respondents?

The Department should not institute an earlier section A response deadline for parties requesting only a separate rate because doing so would be unduly burdensome. The Department's current practice of requiring section A responses within a few weeks of the issuance of the questionnaire already imposes a tremendous burden on NME companies. In order to file a timely response under current Departmental practice, a company must learn of the questionnaire, translate it if necessary, respond to the 50 or so questions and subparts therein and file multiple copies in the format required by the Department. As the current wooden bedroom furniture from China case illustrates, many respondents already find it impossible to meet the Department's section A response deadline. Requiring companies to meet an earlier deadline would simply exacerbate the problem and deprive the Department of the information it needs to make informed separate rates determinations.

Rather than shortening the time, the Department should extend the time for filing section A responses where companies do not receive notice of the questionnaire prior to the filing deadline. The rigid application of deadlines in such cases is fundamentally unfair.

In the ongoing investigation of wooden bedroom furniture, for example, a number of producers did not learn of the section A questionnaire until after the submission deadline because the Chinese government failed to notify them. After learning of the questionnaire, many scrambled to submit their responses only to miss the deadline by a matter of days. The Department rejected those late responses as untimely even though they were filed months before

the deadline for the preliminary determination. Those companies are now subject to the possibility of being assigned the China-wide rate even though they were deprived of the opportunity to demonstrate their eligibility for the all-others rate through no fault of their own. This is fundamentally unfair because the Department is punishing these companies for the failure of others. The Department should reverse course on this issue and permit companies to file their section A responses after the deadline has passed so long as they do so in ample time for the Department to analyze the response prior to the preliminary determination.

(2) In light of the Department's limited resources, should the number of section A respondents be limited and, if so, upon what basis should the Department limit its examination? For example, should the Department limit the examination to a specific number of parties, base this decision upon a percentage of the number of overall respondents requesting separate rates treatment, or develop an entirely different test to limit its examination?

The Department should not limit the number of section A respondents eligible to obtain a separate rate. Doing so would be contrary to the statute.

The statute provides that "{the Department} shall ... determine ... the estimated all-others rate for all exporters and producers not individually investigated." 19 U.S.C.A. § 1673d(c)(1)(B)(i)(II) (1999) (emphasis supplied). It does not provide any basis for limiting the number of companies eligible for the all-others rate. If the Department were to limit the number of companies eligible for a separate rate, it would be effectively limiting the number of companies eligible for the all-others rate because only those companies that apply for a separate rate may receive the all-others rate. The Department does not have authority under the statute to do so.

It would also be fundamentally unfair for the Department to limit the number of companies eligible for the all-others rate because there is no logical basis for excluding one company from

eligibility for a separate rate while including another. If a company is willing to go through the burden of completing a section A response and shows its entitlement to a separate rate, it should not be excluded from the separate rate simply because other NME companies also chose to prove their eligibility.

(3) Under current practice, the Department maintains three rate categories: country-wide, individually calculated, and the average of the non-zero, non-*de minimis*, non-adverse rates. Does the Department have the authority to eliminate entirely the rate category that is based on the average of the calculated non-zero, non-adverse, and non-*de minimis* margins? If the Department has authority, should it eliminate this category and upon what basis?

The Department does not have the legal authority to eliminate the rate category that is based on the average of the non-zero, non-*de minimis*, non-adverse rates, or so called "all-others rate."

As noted, the statute provides that "{the Department} shall ... determine ... the estimated all-others rate for all exporters and producers not individually investigated." 19 U.S.C.A. § 1673d(c)(1)(B)(i)(II) (emphasis supplied). The Department is, therefore, required to calculate an all-others rate in a dumping case for "all" companies not individually investigated. Although the courts have approved the Department's separate rates analysis in NME cases, the statute provides no basis for limiting the number of all-others rate recipients. E.g., Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Mfrs. v. United States, 44 F. Supp. 2d 229 (Ct. Int'l Trade 1999) (approving the Department's separate rates analysis).

The Statement of Administrative Action (SAA) approved by Congress to implement this provision, moreover, requires the Department to calculate an all-others rate. In pertinent part, the

SAA provides that "Commerce will calculate individual dumping margins for those firms selected for examination and an 'all others' rate to be applied to those firms not selected for examination." Uruguay Round Agreements Act Statement of Administrative Action, at 872 (1994), reprinted in 1994 U.S.C.C.A.N 3773, 4200 (emphasis supplied).

The Court of International Trade has, in addition, held that the statute does not permit different approaches to the all-others rate for NME countries. Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Mfrs., 44 F. Supp. 2d 229 (rejecting plaintiff's argument that the Department should not have assigned an all-others rate to non-investigated companies because the statute and fairness concerns required the calculation of an all-others rate in an NME dumping case); see also UCF America Inc. v. United States, 919 F. Supp. 435, 440-41 (Ct. Int'l Trade 1996) (observing that the statute "indicate{s} Congressional support for the 'all others' rate without distinction for NME or non-NME contexts").

Thus, neither the statute, the SAA or case law permit the Department to eliminate the rate category based on the average of the non-zero, non-*de minimis*, non-adverse rates.

(4) Should the Department develop an additional rate category beyond country-wide, individually calculated, and the average of the non-zero, non-*de minimis*, non-adverse rates? This additional rate could be assigned to cooperative firms denied a separate rate, as an alternative to assigning them the country-wide rate. How should the duty rate for this fourth category be calculated?

The Department should adopt a fourth rate category to apply to cooperative producers denied a separate rate because the current practice of assigning the NME-wide rate to all producers not assigned an individual rate or the all-others rate is unjust. The NME-wide rate, which is calculated using "facts otherwise available," is often based on the rate in the petition. E.g., Certain

Color Television Receivers from the People's Republic of China, 69 Fed. Reg. 20,594, 20,597 (Apr. 16, 2004) (final determination). Such rates are typically grossly inflated because they are based on sources selected for no purpose other than to produce the highest dumping rate possible. In Color Televisions, for instance, the China-wide rate was 78.45 percent, or more than three times higher than the highest margin calculated for companies individually investigated. Id. Cooperative companies should not be burdened with a dumping rate that has no basis in reality. They should instead be assigned a fourth type of rate based on an average of the rates applicable to mandatory respondents. A fourth rate category such as this would more accurately reflect actual dumping rates for non-investigated companies than the rates that typically appear in petitions.

Sincerely yours,

Stanley J. Marcuss