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June 2, 2004

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Secretary of Commerce
U.S. Department of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Attn: Mr. James J. Jochum

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

Dear Mr. Secretary:

On behalf of Collier Shannon Scott, PLLC, we submit these comments in response to the May 3, 2004 notice seeking comments on the Department's separate rates practice in antidumping proceedings involving non-market economy countries: See Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 24,119 (May 3, 2004). According to the notice, the Department is considering options to change certain aspects of its separate rates policy and practice. Id. Comments were requested on several various options for such changes and the manner in which that would or would not address problems with the Department's present practice.

I. INTRODUCTION

The Department described two motivations for its decision to reconsider its separate rates practice. Both arise from a significant increase in requests for separate rates from respondents who appear in proceedings but who are not selected as mandatory respondents subject to verification:

> The first is that the Department lacks the resources to evaluate the typically large number of section A respondents which request a separate rate. The second concern parties now have raised is that, independent of the number of separate rate requests the Department receives in any given case, current implementation of the separate rates test may not offer the most effective means of determining whether exporters act, de facto, independently of the government in their export activities.

69 Fed. Reg. at 24,120. These interrelated concerns cut to the core of the Department's ability to properly administer the law given its finite resources, and support fundamental changes in the Department's approach to the treatment of respondents in NME proceedings.

As discussed below, the Department should revise or clarify its current practice in two ways. First, the Department should restrict its use of the separate rates practice in investigations and reviews to only those respondents who are individually investigated and subject to verification in a segment of a proceeding. Where, pursuant to Section 777A(c)(2) of the Tariff Act of 1930, as amended (the "Act"), 19 U.S.C. § 1677f-1(c)(2), and Section 782(a) of the Act, 19 U.S.C. § 1677m(a), the Department limits the number of individually-investigated respondents in an investigation, the Department should only engage in separate rates analysis for those companies who are individually examined and subject to verification. This approach, which is in accordance with law, will conserve the Department's resources and will ensure that the results of the Department's investigations and reviews are as accurate as possible.

Second, the Department should award separate rates only to the specific NME producer, exporter, or producer-export combination who makes a sufficient showing that it or they are free from de jure and de facto central government control. Where a producer of exporter who has demonstrated entitlement to a separate rate begins to ship merchandise in combination with any other producer or exporter who has not been determined to be entitled to a separate rate, the NME-wide rate should apply until all participating entities have been determined to be free from de jure or de facto central government control.

II. THE DEPARTMENT SHOULD DISCONTINUE ITS DISCRETIONARY PRACTICE OF GRANTING SEPARATE RATES TO NME RESPONDENTS WHO ARE NOT INDIVIDUALLY EXAMINED AND SUBJECT TO VERIFICATION

> *The separate rates practice articulated in Sparklers from the PRC and its progeny is not required by law. Application of this practice to companies that are not individually examined and subject to verification should be discontinued in light of the attendant administrative burdens and constraints upon the Department's available resources.*

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter and producer of subject merchandise in a proceeding. 19 U.S.C. §1677f-1(c)(1). When it is not practicable to calculate individual weighted average dumping margins for each known producer or exporter because of the large number of exporters or producers involved in an investigation or review, however, pursuant to Section 777A(c)(2) of the Act the Department may limit the number of individually-examined producers or exporters by examining either a statistically-valid sample, or by examining "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." 19 U.S.C. §§ 1677f-1(c)(2)(A)-(B). The statute is silent concerning

the treatment of exporters or producers who are known but not included in the group of entities individually examined.

Proceedings involving market economy countries necessarily begin with the assumption that producers and exporters exist in and are part of an economy that operates on market principles of cost of pricing. Thus, where the Department is unable to individually investigate all known produces or exporters in a proceeding the Department assigns to non-selected cooperative respondents the weighted-average, "all others" rate resulting from the rates of the individually-investigated companies.

Conversely, as a matter of law, in antidumping proceeding involving non-market economy ("NME") countries, the Department presumes that all companies within the country are subject to governmental control and should be assigned a single, NME-wide antidumping duty rate. This presumption flows from the Department's designation of the country as a non-market entity pursuant to Section 777(18) of the Act, 19 U.S.C. § 1677(18).

This legal presumption results in a fundamentally different approach to the assignment of exporter-specific or producer-specific dumping margins. Exporters and producers from an NME country are presumed to be part of the NME entity, subject to their successfully demonstrating that they are not subject to government control. Beginning in 1991, with the antidumping duty investigation of Sparklers from the People's Republic of China, Case No. A-570-804, the Department articulated its present policy of granting a separate rate to companies within an NME who demonstrate that they are not subject to either de jure or de facto governmental control. This practice has been refined in subsequent cases to permit award of separate rates to other NME entities that are not privately held, but which are owned "by all of the people". See Final

Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 Fed. Reg. 22,585, 22,587 (May 2, 1994). The separate rates inquiry is factually intensive, requiring the gathering and analysis of significant amounts of data concerning each company seeking a separate rate, as well as substantial information concerning applicable laws.

When, pursuant to Section 777A of the Act, fewer than all NME respondents are individually investigated, the Department has developed a practice of assigning the weighted-average of the individually calculated rates to those producers or exporters who sought to participate but were not selected. This rate, the NME equivalent of the "all others rate" in a market economy proceeding, is assigned to cooperative, non-selected respondents instead of the NME-wide rate. While the rationale underlying this practice has not been clearly articulated, it presumably derives from equitable considerations.

The Department's separate rates practice, whether applied to individually-investigated "mandatory" respondents or to non-selected "Section A only" respondents, however, is neither required nor suggested by law. With respect to mandatory respondents, whose information is subject to verification, the Department is able to fully examine and investigate the existence of de jure or de facto governmental control. Given the level of scrutiny and verification of submitted information pertaining to these companies, for individually-investigated respondents we believe that the Department's discretionary separate rates practice is not inappropriate and should not be discontinued at this time.

For exporters or producers who are not individually investigated, however, the Department should discontinue its practice of granting a separate rate based on limited and unverified submissions. To be assured that the information being relied upon when making a

separate rates determination is accurate, the Department would be required to scrutinize and verify the legal and factual representations specific to each NME exporter, producer, or producer-exporter combination. Doing so required significant resources that are not available. Indeed, the determination not to calculate individual margins for all known producers or exporters in the first instance is driven by limitations and constraints on the Department's resources. Were additional resources available to the Department, it presumably would choose to individually investigate and verify additional respondents.

Especially when multiple respondents appear who are not individually investigated, significant resources are required to properly review (and verify or potentially verify) even the most minimal submissions related to de jure and de facto control. With increasing numbers of companies seeking separate rates, the Department's resources are further and unnecessarily strained, and its ability to undertake complete and accurate separate rates analyses for Section A respondents is undermined.

As discussed above, the statute is silent on the issue of what rate should be assigned to exporters or producers who are known but not included in the group of entities individually examined when the Department examines a limited number of respondents under Section 777A(c)(2) of the Act. Given the statutory silence on this issue and the Department's inherent authority to fill such gaps in the statute as well as to revise it practices when required, the Department can and should consider discontinuing its practice of awarding separate rates to respondents who are not individually investigated and subject to verification.

III. THE DEPARTMENT SHOULD LIMIT ENTITLEMENT TO SEPARATE RATES TO ENTITIES WHO HAVE DEMONSTRATED THE REQUIRED ABSENCE OF DE JURE AND DE FACTO CONTROL

Only producer and exporters who have made the requisite showing of freedom from de jure and de facto government control should be allowed a rate apart from the NMW-wide rate.

The Department's May 3, 2004 notice listed nine specific topics for consideration and comment by interested parties. 69 Fed. Reg. at 24,121. The eighth and ninth topics related to whether the Department should apply a separate rate only to merchandise from producers that supplied the exporter when the rate was granted, and whether the Department should extend its separate rates analysis to exporter-producer combinations. Id. As discussed below, the Department should amend or revise its current practice to implement both measures.

The separate rates practice provides a company-specific exception to the legal presumption that all companies within an NME country as controlled by the central government. By its nature, this benefit is limited, and should be applied only to the specific NME entities who have made the significant legal and factual showings required to demonstrate the absence of de jure and de facto central government control. Allowing, for example, exporters to ship merchandise from producers other than the producer that supplied the exporter when an existing separate rates determination was made, while still enjoying the benefit of the separate rate, would wholly undermine the legal effect of Section 777(18)'s presumption that all NME companies are part of the NME entity until proven otherwise. Similarly, focusing only on the presence or absence of government control of a producer, irrespective of any control exercised over its exporter, also would undermine Section 777(18) of the Act.

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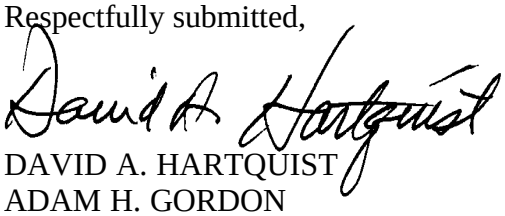
To avoid this legally improper circumstance, the Department should apply a separate rate only to merchandise from producers that supplied an exporter when the rate was granted, and, where appropriate, should tie its award of separate rates to the specific producer-exporter combination that makes the required legal and factual showing. This approach would avoid inadvertently undermining the legal framework related to NME proceedings, and would be comparable to the Department's determination to limit the availability of other extraordinary benefits, such as the use of a bond in lieu of cash deposits by new shippers, to the specific entities that have satisfied the relevant legal requirements. See Dept. of Commerce Import Administration Policy Bulletin 03-2, Combination Rates in New Shipper Reviews (Mar 4, 2003). As such, it would properly reflect the burden of proof applying in the separate rates analysis and would operate to avoid improper manipulation of the separate rates practice and procedures.

* * *

We appreciate your attention to these comments. Please contact the undersigned with any questions that may arise concerning the above.

Respectfully submitted,



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