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Honorable James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit
Room 1870
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

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

Dear Assistant Secretary Jochum:

These comments are submitted on behalf of The Esquel Group ("Esquel") in response to the notice published by the Department of Commerce in the Federal Register on May 3, 2004 entitled "Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries," 69 Fed. Reg. 24119. In that notice, the Department states that an increasing number of requests for separate rates in non-market economy cases has given rise to the following two concerns:

> 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 24120. The Department states in the notice that it is considering changes to its practice, and it requests comments on the various approaches it is considering, as set forth in the Appendix to the notice. Esquel's comments are set forth below.

I. Background.

Section 777A(c)(1) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677f-1(c)(1)) states as a general rule that the Department shall determine an individual weighted average dumping margin for each known exporter or producer of the merchandise. Section 777A(c)(2) provides that when there are a large number of exporters or producers, the Department may limit its examinations and individual determinations to a sample of exporters and producers or to exporters and producers accounting for the largest volume of exports that can reasonably be examined.

Section 735(c)(1) of the Act (19 U.S.C. § 1673d(c)(1)) requires that in each investigation in which it makes an affirmative final determination, the Department shall establish an estimated weighted average margin for each exporter and producer that was individually investigated and an estimated "all-others" rate that is applicable to all exporters and producers that were not individually investigated.[1] Section 735(c)(5) (19 U.S.C. § 1673d(c)(5)) specifies that the all-others rate shall be equal to the weighted average dumping margins established for individually investigated exporters and producers, excluding any zero, *de minimis*, and total facts available margins.[2]

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[1] Section 733(d) of the Act (19 U.S.C. § 1673b(d)) contains a comparable requirement for affirmative preliminary determinations.

[2] At one time Department calculated a new prospective all-others rate in each review. However, since 1993 the Department has applied the all-others rate established in the original

The Department initially applied the all-others methodology to both market economy and non-market economy ("NME") cases. However, it changed this policy in 1991 and established its present practice of calculating a country-wide rate in lieu of the all-others rate for non-reviewed producers and exporters in NME cases. UCF America, Inc. v. U.S., 919 F. Supp. 435 (CIT 1996). The Department has adopted a "rebuttable presumption" that all exporters or producers in a NME country comprise a single exporter under common government control, the "NME entity," for which it establishes a "country-wide" rate based on the statutory authority to determine margins for individually investigated producers or exporters. Bicycles from The People's Republic of China, 61 Fed. Reg. 19026, 19036-19039, April 30, 1996.

The Department treats the failure of any exporter to file a questionnaire response or separate rate request as a failure by the NME entity to cooperate in the investigation, thereby triggering application of an adverse facts available dumping margin to the country-wide entity.[3] Bicycles from The People's Republic of China, supra; Certain Circular Welded Carbon-Quality Steel Pipe from The People's Republic of China, 66 Fed. Reg. 67500, 67503, December 31, 2001; Certain Color Television Receivers from the People's Republic of China, 68 Fed. Reg. 66800, 66805, November 28, 2004; Transcom, Inc. v. U.S., 294 F.3d 1371, 1381 (Fed. Cir. 2002). Accordingly, the country-wide rate is, almost by definition, an adverse facts available rate.

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investigation throughout the life of the order. *See* Import Administration Policy Bulletin No. 93/1, September 1, 1993.

[3] The logic apparently is as follows: Since the exporter did not provide evidence to rebut the presumption that it is part of the NME entity, it is deemed to be part of the NME entity, thereby rendering the NME entity an individual respondent in the review that is subject to adverse facts available because it did not submit a response.

In keeping with the rebuttable nature of the presumption, the Department has established its separate rates methodology, under which an exporter can avoid application of the adverse country-wide rate if it can demonstrate to the Department that it is not subject to either *de jure* or *de facto* government control. If an exporter is a mandatory respondent in an investigation and is able to demonstrate the absence of government control, it is given an individual dumping margin. If the exporter is not a mandatory respondent, it may seek to demonstrate that it is not subject to government control by filing a Section A response with the Department. If the Department agrees that the exporter is not subject to government control, it will treat the exporter as a separate entity from the presumed country-wide entity and will grant the exporter a "separate rate."

The separate rate is calculated in the same manner as the all-others rate, i.e. as a weighted average of the margins of individually investigated companies, excluding zero, *de minimis*, and total facts available margins. Certain Color Television Receivers from the People's Republic of China, *supra*. However, the Department has indicated that it does not consider the separate rate to be an all-others rate. Rather, it has taken the position that calculation of an all-others rate is not necessary in NME investigations on the theory that all exporters or producers either qualify for a separate company-specific rate or are part of the NME entity and receive the country-wide rate. Bicycles from The People's Republic of China, supra; Transcom, Inc. v. U.S., 5 F.Supp.2d 984, 989 (1998).

II. Comments.

As discussed more fully below in response to the questions set forth in the Appendix, Esquel makes the following suggestions:

-- The Department should continue to apply a rate based on the weighted average of non-zero, non-adverse, non-de minimis margins to non-investigated producers/exporters that establish their separateness from the NME entity.

-- The Department should revisit its presumption that all producers/exporters in all NME countries are part of a single state-controlled entity, either as a general matter or on a country-specific basis. For example, in China cases the presumption has been rebutted with such regularity that it arguably has become presumptively incorrect. Where the facts demonstrate that the presumption is no longer valid, the Department should eliminate the country-wide rate, and apply the all-others rate to all exporters that do not receive individual rates.

-- If the Department continues the practice of presumptively applying the country-wide rate to non-investigated producers/exporters, it must continue to provide to such producers and exporters a meaningful opportunity to rebut the presumption and to obtain a separate rate.

(1) Is Section A of the NME questionnaire sufficiently detailed to allow the Department to make complete, accurate, and informed determinations regarding exporters' eligibility for separate rates? If not, what would you recommend that the Department change with respect to its section A questionnaire? For example, should the Department request further information pertaining to de jure control, or lack of control, by the NME entity?

Section A of the NME questionnaire requests comprehensive information regarding the respondent and its business activities including, *inter alia*, the respondent's corporate structure, ownership, legal and regulatory environment, sales process, and accounting/financial practices. These requests clearly are sufficiently detailed to allow the Department to make complete, acccurate, and informed determinations regarding eligibility for separate rates.

Preparing a response to the Section A questionnaire poses a substantial challenge to a respondent seeking a separate rate, since the questionnaire first must be translated into the

respondent's language, a substantial amount of information and documentation must be compiled for the response, and the information and documentation must be translated into English, all within a relatively short period of time. Notwithstanding the effort required, the Section A questionnaire provides an established procedure that NME exporters can pursue in order to demonstrate that the country-wide rate presumption is not applicable to them.

To the extent changes are made to the existing questionnaire, they should be directed toward making it less, rather than more, burdensome. Changes should not be used to impose protectionist barriers or to raise the bar for rebutting the presumption.

We recommend that the Department permit Section A respondents to cite the relevant decentralization laws without being required to provide copies of the laws except upon subsequent request by the Department. Under the present Section A questionnaire, each respondent must submit copies of the laws, resulting in duplicative paperwork which is an unnecessary burden for respondents and for the Department.

(2) What new procedures or approaches should be followed at verification to ensure a rigorous examination of whether a respondent qualifies for a separate rate?

There is no need for the Department to adopt new procedures or approaches specifically for the purpose of verifying separate rate responses. The Department's existing verification procedures already ensure rigorous examination of questionnaire responses.

(3) Due to the number of possible section A respondents in many cases and the Department's resource constraints, should the Department establish a process whereby exporters seeking a separate rate must prepare a request and satisfy established requirements before the Department seeks additional information through the questionnaire process? What requirements would you recommend the Department establish?

The Department has established specific criteria for granting separate rates, and the Department's Section A questionnaire is designed to elicit the necessary information to determine whether those criteria are met. Whether the necessary information is solicited in two steps--i.e. a request and then a follow-up questionnaire--or one--*i.e.* a Section A questionnaire--the criteria are the same. It is unlikely that the initial request requirement would reduce the number of exporters eligible to receive questionnaires, since any entity that could demonstrate in a questionnaire response that it meets the criteria for a separate rate presumably also would meet the initial threshold criteria.

A two-step procedure would, however, complicate and prolong the separate rate determination process by interposing an additional set of decisions to be made by the Department, namely whether applicants had met the initial requirements for issuance of a questionnaire. Thus, if the Department required a Section A response in addition to the original request as a condition of granting a separate rate, the two-step process would increase the Department's workload.

However, if the Department were to adopt a procedure under which a separate rate could be granted based on the initial request, with a questionnaire issued only when the Department felt it needed additional information, then the suggestion would provide a useful streamlining of the separate rate process that would help conserve the Department's resources.

(4) 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? When should this deadline be?

In establishing deadlines the Department should balance the need of respondents for adequate time to compile responses with the need of the Department to maintain the

investigation schedule. The existing Section A schedule already presents a substantial challenge to many exporters, who are not familiar with U.S. antidumping investigations and who may not immediately understand the need to file for recognition of separate status. Since parties seeking separate rates are not mandatory respondents, they may not be on notice of the investigation or review procedures or recognize their significance as soon as those who receive mandatory questionnaires. Therefore, while they are responding only to Section A, as compared with the full questionnaire for mandatory respondents, they often need essentially the same amount of time to submit their responses.

Shortening the deadline for separate rate responses might result in fewer responses, as respondents struggle to meet the shorter deadline. However, it would be inappropriate to use a shorter deadline as a means of discouraging separate rate applications.

(5) 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 Court of Appeals for the Federal Circuit has held that a party that is subject to the rebuttable presumption of state control has a right to attempt to rebut the presumption and therefore that the Department must provide it a meaningful opportunity to do so. Transcom, Inc. v. U.S., 182 F.3d 876, 883-4 (1999). *Cf.* Ta Chen Stainless Steel Pipe, Ltd. v. U.S., Slip Op. 2004-46, pp. 20-21 (CIT 2004). Accordingly, the Department should not and may not limit the number of Section A respondents if this would deprive any exporter of a meaningful opportunity to rebut the presumption and obtain a separate rate. Denying the opportunity to rebut the presumption would turn it into an unlawful irrebutable presumption.

A more effective means of preserving the Department's resources, while complying with the statute, would be to eliminate the single-entity presumption, at least for countries such as China whose exporters have repeatedly rebutted the presumption indicating that the presumption is no longer valid.

(6) 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? This rate category is currently applicable to section A respondents, as well as to non-investigated respondents providing full questionnaire responses. If the Department has authority, should it eliminate this category and upon what basis?

The antidumping statute requires the Department to make two types of weighted average margin determinations in an investigation, namely individual rates for exporters and producers that are individually investigated and an all-others rate applicable to all exporters and producers that are not individually investigated. *See* Section 735(c) and Section 777A(c) of the Act (19 U.S.C. § 1673d(c) and 19 U.S.C. § 1677f-1(c)). These requirements apply to all investigations. Thus, the Department's NME practice must comply with these statutory provisions.

The Department's country-wide rate is an individual rate applicable to the presumed country-wide government-controlled entity. Bicycles from The People's Republic of China, 61 Fed. Reg. at 19036. The Department has not identified the authority under which it calculates the separate rate in NME cases, but the methodology it applies is the same as the statutory all-others rate calculation.

The Department has taken the position that it need not calculate an all-others rate in a NME investigation on the theory that there are no non-investigated entities. This theory does not actually resolve the issue, for two reasons. First, the Department routinely establishes all-others

rates in market economy cases, whether or not all exporters or producers are individually investigated. Second, the fact that the presumption of government control of an exporter is rebuttable means that uninvestigated exporters do exist in NME cases, namely those that are not in fact subject to government control. However, this seems to be essentially a semantic issue, since the Department applies the all-others rate methodology in calculating the separate rate, and it applies the separate rate to all other producers and exporters, *i.e.* those that have not been individually investigated.

Thus, the Department does not have the authority to eliminate the rate category that is based on the average of the calculated non-zero, non-adverse, and non-de minimis margins, whether it calls that category a separate rate or an all-others rate.

(7) 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 category could be assigned to cooperative firms denied a separate rate under options (5) or (6) above, as an alternative to assigning them the country-wide rate. How should the duty rate for this fourth rate category be calculated?

This question appears to be based on the premise that the Department would somehow restrict the number of exporters that would be permitted to apply for separate rates. As discussed in response to question (5), above, we believe the Department is required to provide all producers and exporters a meaningful opportunity to rebut the rebuttal presumption upon which the country-wide rate is based. Therefore, the Department would not be in a position to deny a separate rate to cooperative firms, *i.e.* firms that demonstrated separateness in separate rate requests.

It is unclear what type of rate the Department has in mind and what the statutory authority would be for such a rate. As discussed in response to question (6), above, the

Department is obligated under the statute to establish individual rates for individually investigated companies and an all-others rate applicable to all other producers and exporters. The Department's listing of companies with separate rates is in essence a listing of companies that qualify for the statutory all-others rate because (1) they are not part of the NME entity and (2) have not been individually investigated.

Not only would adding a "denied cooperative respondent" category be inconsistent with the statute, it also would seem to be contrary to the Department's stated objective of conserving resources, as it would require the Department to make additional determinations, namely what entities would be included in the "denied cooperative respondent" category and what the rate for that category would be, thereby complicating the Department's administration of the statute.

(8) Once a separate rate has been awarded, should the Department apply it only to merchandise from producers that supplied the exporter when the rate was granted? In that case, should merchandise from all other suppliers shipped through an exporter with a separate rate receive the country-wide rate, the average of the non-zero, non-de minimis, non-adverse reviewed respondents' margins, or another duty rate altogether?

The country-wide rate is predicated on the rebuttable presumption that all potential respondents constitute a single government-controlled entity. If a potential respondent exporter overcomes the presumption, there is no longer any basis for including the exporter within the NME entity and therefore no basis for applying the country-wide rate to the exporter. Thus, the separate rate should be applied to all merchandise exported by the exporter that receives a separate rate.

(9) Should the Department extend its separate-rates analysis to exporter-producer combinations, i.e., should the Department consider any government control exercised on an exporter through a producer?

Whether an exporter is subject to government control is a factual question to be determined on a case by case basis. If an exporter establishes that it is free from de facto or de jure government control, it should receive a separate rate. There should not be a presumption of government control via a producer.

(10) Please provide any additional views on any other matter pertaining to the Department's practice pertaining to separate rates.

Where exporters in an NME country have demonstrated independence in the course of various product investigations, the Department should consider whether an adequate factual underpinning for the presumption of government control still exists, and the Department should "graduate" NMEs from application of the presumption where evidence of general absence of central government control so warrants.

Sincerely yours,

/s/

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