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January 24, 2005

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; 69 Fed. Reg. 77,722 (12/28/04); Public Comments

Dear Secretary Jochum:

We are filing these comments on behalf of our firm in response to the captioned Federal Register notice. It solicited comments on the Department of Commerce's proposals (1) to employ an application process for evaluating separate rate requests by non-investigated firms in a non-market economy country ("NME") antidumping proceeding and (2) to introduce the use of combination rates in all of its NME antidumping cases. Our firm practices before the Commerce Department and frequently represents American firms in antidumping cases, including cases that involve countries with non-market economies.

I. Comments on Proposed Application Form and Process

We have a major concern about a loophole that the Department's proposals will create as well as various comments on other aspects of the Department's proposal.



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A. Failure to Require Applications from Both Exporters and Their Suppliers Will Create a Significant Loophole.

In its original request for comments on the separate-rate application process, the Department asked:

(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?¹

In its June comments, our firm asserted that “every entity and/or combination seeking an exception to the general rule should establish full and true independence” and “[i]f an exporter free of government control is nevertheless able to obtain merchandise for export resale at unfair prices from state-controlled suppliers, it is possible to re-sell to the United States at distorted and unfair prices.”² In our October comments, we iterated our advice that the Department grant a separate rate to an exporter only in combination with a supplier that has also qualified for a separate rate.³

The Department’s most recent notice indicates that it may have already made a tentative decision on this issue. Explaining its proposal for combination rates, the Department says:

This would not mean that the separate rates analysis would be extended back to producers, or that producers would in any way be required to demonstrate their independence of government control. The separate rates test focuses

¹ *Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries*, 69 Fed. Reg. 24,119, 24,121 (Dept. Commerce May 3, 2004).

² Stewart and Stewart comments at 11 (6/2/2004).

³ At 4.

exclusively on the independence of respondent's export activities from *de jure* and *de facto* government control.⁴

Apparently, the Department proposes to limit the application of separate rates for an exporter to the products of the manufacturers it is importing during the investigation or administrative review in which it applies for the separate rate. *See* questions 6, 7, and 8 regarding such products in the Department's draft application form, also the Department's example in its most recent notice.⁵ The Department has not explained why it will not inquire beyond the exporter when making a separate rates determination.

Unless the Department requires applications from both the exporter seeking a separate rate and the producer of the products for which it seeks a separate rate, it will create a loophole allowing companies that would not themselves qualify as independent of the state to export at lower rates. If a state-run company is not reviewed during an original investigation, it may qualify to export at the separate rate through any exporter that has exported its products. If it has not exported through any trading companies or other independent exporters at the time of an original investigation, it may qualify to do so thereafter by exporting through such a company. The exporting company may then apply in an administrative review for a separate rate for its exports of the state-owned company's products.

The Department's draft application requires that if the applying firm is affiliated with any other exporters of subject merchandise, all such affiliates must file separate single-rate treatment applications.⁶ The Department requires this in order to preclude a state-run

⁴*Practice in Antidumping Proceedings Involving Non-Market Economy Countries*, 69 Fed. Reg. 77,722, 77,725 (Dept. Commerce December 28, 2004).

⁵ *Id.*

⁶ *See* Draft Application Form at 4.

company from exporting through an affiliate that may qualify for a separate rate. It should similarly preclude a state-owned company from exporting through a trading company or other independent exporter that may qualify for a separate rate.

The Department has applied its country-wide rate to imports made by a U.S. importers when the exporters it purchased from did not supply Commerce with information. The Department's right to impose an obligation on a company unrelated to the importer was upheld by the Federal Circuit.⁷ The lower court had noted that the U.S. importer "must bear the responsibility for the failure of its sources to provide the necessary information."⁸ In the same way, an exporter should bear the risk that its supplier(s) may not supply the information needed by the department to qualify the exporter for a separate rate. This, not a loophole allowing state-run suppliers to qualify for a separate rate, would implement the remedial purpose of the antidumping law.

In its September notice soliciting comments on its proposals for combination rates for exporters actually reviewed, the Department identified the problem it was addressing:

Another issue that has been raised by parties concerns potential evasion of duties. Under current practice, separate rates are assigned only to exporters, and the assigned rate applies regardless of which entity produces the subject merchandise. In cases where the rates vary widely from exporter to exporter, there is a strong incentive for exporters assigned either the country-wide rate or a high calculated rate to ship their merchandise through an exporter assigned a lower rate. Such diversion arguably undermines the effect of other antidumping or countervailing duty margins the Department calculates.⁹

⁷ *Transcom, Inc. v. United States*, 294 F.3d. 1371, 1379 (Fed. Cir. 2002).

⁸ *Transcom, Inc. v. United States*, 121 F.Supp.2d 690, 705 (Court Int'l Trade 2000); *aff'd Transcom, Inc. v. United States*, 294 F.3d. 1371 (Fed. Cir. 2002).

⁹ *Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries*, 69 Fed. Reg. 56,188, 56,189 (Dept. Commerce September 20, 2004) ("*Separate Rates 9/20*").

For the same reasons, a company that would otherwise be assigned the country-wide rate for its exports will have a strong incentive to export through an exporter that can qualify for a separate rate. Such diversion will similarly undermine the effect of the antidumping margins the Department calculates.

B. Comments on Other Aspects of the Department's Proposal

On page 2 of the proposed draft application, Commerce identifies the factors it considers to determine absence of *de facto* government control. As we noted in our June 2 comments and iterated in our October 15 comments,¹⁰ the Department's inquiry should not be limited to the four factors it has traditionally relied on,¹¹ particularly since it is changing its approach to require an application instead of a questionnaire. As we noted, the Department's inquiry should extend to including questions and requiring documentation regarding the firm's ability to discharge employees, to purchase equipment, and to obtain capital.

The draft application does not include any requests for information on U.S. sales or factors of production. We have recommended that the Department require that respondents seeking a separate rate supply this information. While Commerce may not have the resources to analyze this information in detail, counsel for domestic industry may need it in order to perform its own analysis and so ensure the full protection of the law for the domestic industry.

¹⁰ See Stewart and Stewart Comments at 3-4 (6/1/04) and at 2 (10/15/04).

¹¹ These are the firm's ability to (1) set prices for exported goods free of governmental control, (2) negotiate and enter into export contracts, (c) select its own management

The Department has included a statement to respondents that are applying for a separate rate that their information may be verified.¹² We urge the Department to strengthen this statement by altering it to indicate that the Department is likely to select at least one applicant for verification. This will highlight the seriousness of the process and inhibit enterprises that do not actually qualify for a separate rate from applying.

The application includes a series of questions (6, 7, and 8) regarding suppliers of merchandise that were exported by an exporter-applicant.¹³ The Department notes that these will be asked only if it adopts its proposed policy of issuing only combination rates for exporters, noting that in such a case, it will assign separate rates only for combinations.¹⁴ As we have reviewed above, the Department should avoid creating a loophole by requiring that both the exporter and the producer of any of the goods it exports be required to file separate rate application. In any event, in addition to supplying information on the identity of its suppliers, the exporter should also be required to supply documentation of its purchase of subject merchandise from the supplier during the period of review or investigation. This parallels its requirement that applicants supply documentation of their sales to the U.S. during the period examined.

II. Comments on Combination Rates

As we indicated in our October 15, 2004, comments, we support the use of combination rates for independent exporters that export goods supplied by other companies. The Department itself has identified the incentives for producers to shop for better rates by

¹² See Draft Application Form at 4.

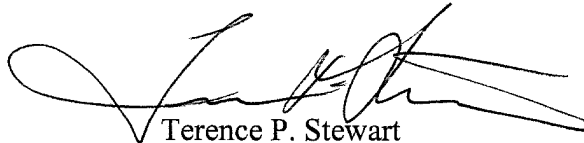
¹³ *Id.* at 6.

¹⁴ *Id.*

exporting through exporters that have better rates.¹⁵ As the Department also stated, allowing such diversion will undermine the antidumping duty order.¹⁶ The domestic industry will be denied the protection of the order and the remedial purpose of the law will be thwarted.

Thank you for your consideration of our comments.

Stewart and Stewart

A handwritten signature in black ink, appearing to read 'Terence P. Stewart', written over a horizontal line.

Terence P. Stewart
Wesley K. Caine
William A. Fennell

¹⁵ *Separate Rates* 9/20, 69 Fed. Reg. at 56,189.

¹⁶ *Id.*