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The Honorable Joseph A. Spetrini
Acting Assistant Secretary for Import Administration
Attn: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Re: Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries: Comments in Response to Announcement of Change in Practice and Request for Comments

Dear Acting Assistant Secretary Spetrini:

On behalf of the Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation and Indian Ridge Shrimp Company, petitioners in the antidumping cases involving warmwater shrimp ("Shrimp Petitioners"), we hereby submit the following comments to the U.S. Department of Commerce (the "Department") in response to the Department's further request for comments regarding the agency's proposed changes in practice for determining separate rates and applying combination rates in antidumping proceedings involving non-market economy ("NME") countries.[1]

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[1] Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 77,722 (Dec. 28, 2004) ("Additional Request for Comment").

ORIGINAL

Shrimp Petitioners are providing specific suggested changes in language to the separate-rate application itself, with particular attention to verification of separate-rate applicants and evidence demonstrating *de facto* control. Shrimp Petitioners strongly support the application of combination rates in NME proceedings but offer suggested clarifications of critical issues in the application of such rates.

It is important for the Department to consider the general context in which it is seeking to alter the non-market economy methodology, which predominately applies to the People's Republic of China ("PRC"). The PRC is the most frequent violator of U.S. and international antidumping laws. Currently, the United States is enforcing 60 antidumping orders against the PRC,[2] more than twice the number of the next most frequent target of antidumping proceedings. Moreover, Chinese exports increasingly are found to be dumped in the United States and materially injuring U.S. producers. Sixteen of the last 24 products subject to the imposition of a U.S. antidumping order were from the PRC.[3] Between fiscal years 2001 and 2004, imports from the PRC accounted for 11 percent of total U.S. imports, but 48 percent of the products for which U.S. industries requested antidumping relief.[4]

Worldwide, the PRC is the most frequent target of antidumping proceedings. The PRC leads all other nations in antidumping orders imposed against its exports and since 2001 nearly one in five new antidumping cases (18 percent) in the world have been brought against Chinese

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2 "Antidumping and Countervailing Duty Orders in Place As of January 5, 2005," U.S. International Trade Commission.

3 "Antidumping and Countervailing Duty Investigations: Jan 01, 2000 to Current," Import Administration, U.S. Department of Commerce at http://www.ia.ita.doc.gov/stats/iastats1.html (last accessed Jan. 21, 2005).

4 USITC Dataweb, U.S. International Trade Commission; Import Injury Investigations: Case Statistics (FY 1980-2003), U.S. International Trade Commission (Nov. 2004).

exports.[5] Yet, during the same period, the PRC accounted for only 6.7 percent of world merchandise exports.[6]

From an a U.S. enforcement standpoint, the overwhelming majority of duties assessed against Chinese products go uncollected. For every one dollar in U.S. antidumping duties collected against imports from the PRC and properly distributed to U.S. industries, $2.80 went uncollected in FY2004.[7] By comparison, for every one dollar collected and properly distributed to U.S. industries in non-China cases, only 17 cents went uncollected in FY2004.[8] In the last two fiscal years, $329 million in U.S. duties assessed against Chinese imports have gone

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5 "Anti-Dumping Initiations: By Exporting Country," World Trade Organization at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (last accessed Jan. 21, 2005) (179 initiations against the PRC, versus 1008 total reported by WTO members from 2001 through June 2004).

6 "World merchandise exports by region and selected economy, 1993-03," WTO International Trade Statistics, 2004, World Trade Organization," at http://www.wto.org/english/res_e/statis_e/statis_e.htm (last accessed Jan. 21, 2005).

7 Continued Dumping and Subsidy Offset Act (CDSOA) of 2000: FY 2004 Annual Disbursement Report, U.S. Customs and Border Protection at http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/ (For imports from the PRC: $79.7 million in duties were collected distributed to U.S. industries, but $224.4 million in duties were reported as uncollected).

8 Continued Dumping and Subsidy Offset Act (CDSOA) of 2000: FY 2004 Annual Disbursement Report, U.S. Customs and Border Protection at http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/ (For imports other than from the PRC: $204.3 million in duties were collected distributed to U.S. industries, and only $35.7 million in duties were reported as uncollected).

uncollected.[9] Overall, 86 percent of all uncollected U.S. duties in FY2004 were from orders against imports from the PRC.[10]

Despite the increasing incidence of dumping by Chinese exports, U.S. antidumping petitions and orders against the PRC are not a significant barrier to Chinese exports. Antidumping duties collected on imports from the PRC in fiscal year 2004 amount to just 0.04 percent of U.S. imports from the PRC during the same period.[11]

Issue 1: Separate-Rate Application

As an initial matter, the Department should make clear that the NME separate-rates application process applies in every segment of the proceeding (e.g., investigation, administrative review), and the term "the relevant period" should be used in the application to refer to the segment of the proceeding at issue. Any NME respondent seeking a separate rate must demonstrate it is entitled to separate-rate status in each segment of the proceeding, regardless of whether it was granted a separate rate in a previous segment of the proceeding.[12] Changes in relevant facts should be accounted for in each segment. Affected entities should be

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9 Id. and Continued Dumping and Subsidy Offset Act (CDSOA) of 2000: FY 2003 Annual Disbursement Report, U.S. Customs and Border Protection at http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/.

10 Continued Dumping and Subsidy Offset Act (CDSOA) of 2000: FY 2004 Annual Disbursement Report, U.S. Customs and Border Protection at http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/.

11 USITC Dataweb, U.S. International Trade Commission ($183 billion in U.S. imports from the PRC in FY2004); Continued Dumping and Subsidy Offset Act (CDSOA) of 2000: FY 2004 Annual Disbursement Report, U.S. Customs and Border Protection at http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/ ($79.7 million in duties collected and disbursed in FY2004).

12 Of course, this includes mandatory respondents, which also must be required to demonstrate in each segment of a proceeding entitlement to a separate rate.

obligated to demonstrate entitlement to the favorable treatment afforded by the separate-rates policy. Otherwise, affected entities would have incentives to provide information only when beneficial and to remain silent when changes would alter previous findings of entitlement to a separate rate.

Verification

With regard to non-mandatory respondents, the agency's standard practice should be to verify all NME entities that are preliminarily granted separate rates. Unless a credible verification process exists for non-mandatory respondents, the process becomes a practical guarantee of a dramatically lower margin by the mere completion of an application. If NME entities can be confident that their application will be accepted on its face without further on-site verification by the Department, there is no incentive to provide complete and accurate information to the agency and every incentive to gamble on gaining a lower margin than the otherwise applicable NME country-wide margin by providing less than complete and accurate information. Certainly, the potential to "game" the process grows as the number of applicants increases. Where it is not possible to verify every non-mandatory applicant because of the large number of entities granted separate rates preliminarily, the agency should verify a substantial portion of the applicants, which should be representative of all those preliminarily granted separate rates (e.g., largest volume).[13] Applicants owned by all the people or by a government collective (e.g., village) or, in the case of the PRC, wholly or partially owned by the People's

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[13] This accords with 19 U.S.C. § 1677f-1(c)(2), which permits the agency to limit its investigation or review to those exporters and producers accounting for the largest volume of subject merchandise exported to the United States that can reasonably be examined.

Liberation Army (PLA") deserve heightened scrutiny and should be verified, as well as others where good cause exists.

The Department should make clear in the NME separate-rate application that all entities applying for separate rate status will be subject to verification. In addition, the application should include a certification by the applicant (with a separate required and dated signature line) acknowledging that it: (1) understands the verification process; (2) agrees to cooperate fully with any verification; (3) and understands that the consequence for non-compliance will be the forfeiture of separate-rates status and the application of the NME country-wide rate (see below).

Further, where the Department is able to verify only a representative portion of the non-mandatory applicants granted separate rates preliminarily (due to their large number), the Department should rely on the results of all of the separate rate verifications to set the cash deposit rate for those NME entities granted separate rates but not verified. If an applicant fails verification, it must receive the NME country-wide rate, as it has failed to demonstrate that it operates free from government control in its exporting activities. In that circumstance, it is reasonable to conclude that a failed applicant is controlled by the government and thus subject to the NME country-wide rate. On the other hand, any applicant passing verification (demonstrating the absence of *de jure* and *de facto* government control) should receive a rate based on the weighted-average margin calculated for the mandatory respondents because it is reasonable to conclude that, had said applicant been examined, its margin would approximate the

weighted-average of the margins calculated for mandatory respondents that were examined and not controlled by the government.[14]

However, non-mandatory applicants preliminarily granted separate rates but unverified should not receive the same rate applied to non-mandatory applicants that passed separate-rates verification (unless all those verified passed separate-rates verification). Rather, it would not be reasonable to conclude that margins of these unverified applicants would approximate the combination of margins calculated for the mandatory respondents and those non-mandatory applicants passing verification. If anything, the failure at verification of certain non-mandatory applicants preliminarily granted separate rates would evidence that some portion of unverified applicants also would have failed verification, i.e., would have failed to demonstrate they are not controlled by the NME government. Consequently, the results of all the separate rate verifications should be taken into account in calculating the margin for unverified applicants preliminarily receiving separate rates.

Specifically, where a significant number of applicants fail verification, the unverified applicants should receive a margin calculated based either on: (1) the weighted-average of the non-mandatory applicants that failed and passed verification; or (2) the highest calculated rate of any mandatory respondent in the proceeding. If the Department did not take account of those failed separate rate verifications, then applicants would be encouraged to game the system and there would be no downside to an inaccurate (but facially complete) application where the applicant was not verified.

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[14] Essentially, the mandatory respondents are considered representative of all respondents. 19 U.S.C. § 1677f-1(c)(2).

Section I

The Department should require that the applying entity certify (with a separate required signature line) that it acknowledges that it: (1) understands the verification process; (2) agrees to cooperate fully with any verification; and (3) understands that the consequence for non-compliance is the forfeiture of separate rates status and the application of the NME country-wide rate. The signature should also be dated.

- Question 2 should be revised to require that the company official also must sign even where represented by counsel. The company official is in a position to know for a fact whether the information provided is accurate, whereas an attorney typically will not have independent knowledge of company information and can only attest to the facts as best as he understands them and as said facts have been presented by company officials.

Section II

- Question 2 should be revised by deleting any reference to third country or home market and by requiring the company to provide other names under which the company does business only in the United States. Only sales to or in the United States during the relevant period should be of concern to the Department. Company names, trade names, or "doing business as" arrangements for business conducted in the home or third country markets is irrelevant to the issue of the appropriate entity entitled to separate-rates status.[15]

- Question 3b should be revised as follows: "to an unaffiliated **U.S.** customer during the period of this segment."

- Question 4 should be revised by deleting: "Applicants must submit their U.S. Customs 7501 Entry Summary or the U.S. FDA Release Form." This sentence is either repetitious or unduly limiting, in which case it is inappropriate and should be deleted.

- Question 5 should be revised by adding: **"If Yes, provide a detailed explanation as to why that is the case."**

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[15] Indeed, the company can only obtain an export certificate of approval for its exports under its name, as the Department well-recognizes with regard to the PRC. See Draft Separate-Rate Application at 9, n. 9.

- Question 7 should be revised by deleting any reference to third country or home market and by requiring the company to provide other names under which the company's suppliers do business only in the United States. Only sales by the company to the United States during the relevant period should be of concern to the Department. Company names, trade names, or "doing business as" arrangements for business in home or third country markets is irrelevant to the issue of the appropriate entity entitled to separate-rates status.

- Question 8 should be revised by deleting: "Indicate whether~~, to the best of your knowledge, whether~~ the suppliers identified under question 6 above directly exported subject merchandise to the United States during the period of investigation." The stricken language should be deleted to prevent the ability to prevaricate. Certainly, in the overwhelming majority of cases the applicant will either know the answer to this question or can easily determine the answer by contacting its customers. Also, **"relevant period"** should be substituted for "period of investigation."

Section III

- Question 2d, footnote eight (8) should be revised as follows: "An applicant submitting a business license without an expiration date must provide **an affidavit from the licensing authority that issued the business license clearly indicating that said license remained valid during the relevant period** in order for the Department to consider its application."

- Question 4, footnote ten (10) should be revised as follows: "If you are unsure of the possible relevance of a given law, **submit the original and a translated copy of the law and indicate clearly that you are not sure whether said law is applicable to your export activities**."

Section IV

- Question A.1 should be revised as follows: "Indicate the names and contact information (full business address, telephone, fax, e-mail address) of the entities **and/or individuals** which are the ultimate owners of your company," and further revised by adding: "**For joint-stock limited companies, provide a listing of the top ten shareholders of your company, together with each of those shareholders' full name, address, phone number, fax number and e-mail address. Provide all names by which such shareholders may be known -- in line with the instructions provided for Question II.2 above.**"

- Question A.1, footnote eleven (11) should be revised as follows: "Note to firms applying as wholly foreign-owned entities: document **whether** the ultimate owners of your company are located in market-economy countries **and, if so, indicate which market economy countries."**

- Question B.3 should be revised: "The applicant certifies that its export prices are not set by, ~~or~~ subject to the approval of, **or in any way controlled by,** a governmental authority **or government-owned entity (national, provincial, local), or, in the case of the PRC, the People's Liberation Army ("PLA").**" Insofar as sub-national governments, including government-owned entities, often play a large role in managing many companies within NMEs and, in the case of the PRC, the PLA also plays such a role, it is imperative that the applicant demonstrate the absence of control by any governmental body or government-owned entity and additionally, with regard to the PRC, demonstrate an absence of control by the PLA. Further, government-imposed price controls may exist, but explicit price setting by the government may not be readily or publicly apparent.[16] Such situations must be carefully examined by the Department, as any government control of export pricing, through whatever means, should disqualify the applicant from separate rate status.

- Question B.4, footnote twelve (12) should be revised as follows: "The authority to conduct independent price negotiation refers to the ability of an **NME** exporter to set its own export prices independently of the government **at any level (national, provincial, local)** and without the approval **of** a governmental authority **or government-owned entity or, in the case of the PRC, the PLA (e.g., suggested prices by a governmental authority).**"

The Department should preface Question B.5 by advising that the agency will require that an NME applicant provide a signed and dated affidavit from a U.S. customer testifying to the independence of the applicant's price negotiations. The Department also should insert cautionary language advising that the agency will be highly skeptical of an affidavit from a sole U.S. customer where that U.S. customer is largely, if not entirely, dependent on the applicant for supply of the subject merchandise. As it is imperative that an affiant be as unbiased as possible (while recognizing a business relationship exists between them), the Department should require (where possible) that the applicant provide a signed and dated affidavit from an unaffiliated U.S. customer attesting to the fact that this customer purchased subject merchandise from a minimum

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16 For example, a governmental authority or government-owned entity may set pricing guidelines that are commonly understood to be minimum or maximum prices and which may be disseminated through non-governmental trade associations.

of two other suppliers during the relevant period. Alternatively, if the applicant's customers only purchase from the applicant, then additional signed and dated affidavits from a minimum of three unaffiliated U.S. customers should be required. If the applicant has only a single customer, the Department should verify said applicant to ensure that its price negotiations are free from government interference.

- Question B.5 should be revised as follows: "affidavit testifying to independent price negotiation signed **and dated** by an *unaffiliated* U.S. customer **attesting that it purchased subject merchandise from a minimum of two other suppliers during the relevant period. Alternatively, if all of your unaffiliated U.S. customers purchase subject merchandise solely from you, provide signed and dated affidavits from three additional unaffiliated U.S. customers attesting to independent price negotiation with you."**

- Question B.5, footnote thirteen (13) should be revised as follows: "If your firm conducts its price negotiations by phone and therefore has no record of price negotiation, **you are required to attach** an affidavit signed **and dated** by the **unaffiliated** U.S. customer, **or customers, as described fully in Question B.5,** attesting that it conducts independent price negotiation with the applying firm."

- Question C.6 should be revised as follows: "The applicant certifies that it has autonomy from all levels of the government **(national, provincial, local) or, in the case of the PRC, the PLA and from government-owned entities** in making decisions regarding the selection of management."

- Question C.9 should be revised as follows: "Have any of the applying firm's managers worked for the government, **at any level (national, provincial, local), or any government-owned entities, or in the case of the PRC, the PLA,** in the past three years?"

- Question C.10 should be revised by adding: "Does the **applying** firm have to submit **any of its** candidates for managerial positions **within the applying firm** for approval to any level of government **(national, provincial, local) or any government-owned entity, or in the case of the PRC, the PLA"**?

- The following new question should be added after Question D.11 and before Question D.12: "**Are you able to gain immediate access to all U.S. dollars earned on export sales to the United States? ___ Yes ___ No. If no, then are you required to route all export revenues through the government (at any level) or through a government-controlled entity and accept such revenues in**

local currency using a pre-determined exchange rate? _____ Yes _____ No. If no, then explain in detail how you receive your export revenues." This question is important to determine how the applicant receives its export revenues and how much control the applicant has over those revenues.

- Question D.13 should be revised by adding: **"Provide a list of all goods and services received by you from any governmental authority or government-owned entity (national, provincial or local level), or in the case of the PRC, the PLA, during the relevant period."**

A new Section E should be added to determine whether ownership exists based on *de facto* control through government financing. As the Department has acknowledged in the Uruguay Round Agreements Act Statement of Administrative Action ("SAA"), control over an entity may exist through (debt) financing.[17] Therefore, the Department should include an additional Section E to determine whether applicants for separate rates have received any grants, as well as loans or other financing from any governmental authority or government-owned entity (at any level) during the relevant period, the terms of repayment and whether the debt was forgiven.

- Section E: **"Indicate whether you received from any governmental authority or government-owned entity (national, provincial or local level) or, in the case of the PRC, the PLA, either: (1) grants,[18] (2) interest-free loans,[19] (3) other interest-free financing, or (4) the majority of your total financing. Yes____ No ___. Specify the type you received and provide the total amount**

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17 See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 at 838 (1994) ("A company may be in a position to exercise restraint or direction through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other"). Id.

18 **A "grant" is funding provided with no requirement of repayment (either principal or interest).**

19 **"Interest-free loans" and "other interest-free financing" includes the provision of loans or financing where no interest is required to be repaid for a period of time and/or is dependent upon the existence of some condition (e.g., repayment of interest if the applicant is profitable in a given time period).**

received for each type. _____. Provide the name, contact information, address, telephone number and e-mail address for each of the governmental authorities or government-owned entities, including, in the case of the PRC, the PLA, from which you received these grants, loans or other financing. _____. In addition, for each of these loans or other financing arrangements provide in detail the terms of repayment and balances outstanding in the relevant period. _____. Further, submit fully translated copies of all loan or other financing documents evidencing the terms or repayment and other conditions. Indicate whether any portion of these loans or other financing you received was forgiven (i.e., you did not have to repay principal)."

Issue 2: Combination (Channel) Rates

As the Department had recognized, combination rates are needed for more effective enforcement of the statute and proper application of the dumping margins calculated by the Department. Petitioners agree with the manner in which the agency is contemplating the use of combination rates in NME proceedings, but wish to clarify certain points critical to the use of combination rates.

Only producers of subject merchandise providing verifiable factors of production information to the Department should be included in any combination rate. This is a reasonable approach because, as the agency recognizes, such data is used to calculate the NME exporter's margin. If an exporter is supplied only minimally (less than 5 percent of subject merchandise imported by the exporter in the relevant period) by an unaffiliated producer during the relevant period, the Department should retain the discretion to forgo requiring verifiable factors of production information from that particular supplying producer. However, in that instance, as that unaffiliated supplier's data will not be used to calculate the exporter's margin, subject merchandise exported by that exporter provided by that supplier should not receive the combination rate associated with the exporter. To do otherwise would inappropriately assign a

supplying producer a combination rate even though that producer provided no information for use in calculating the combination rate of the particular exporter and would continue to provide a loophole in enforcing the statute (indeed, doing so would substantially undercut the entire purpose of applying combination rates).

The Department should clarify that where an exporter receiving a calculated margin in an investigation (or administrative review) sources from a new supplier, the NME- wide rate, or separate rate, whichever is applicable, will apply to that new supplier until the final results of review, at which time a new margin will be calculated, provided that factor of production information from the new supplying producer is submitted and verified.

Additionally, the Department also should clarify that all suppliers receiving a combination rate must be actual producers of the subject merchandise. It should not be possible for two non-producers to receive the same combination rate (by exporting through one another).

Parties opposing the use of combination rates argue that such rates "would place a difficult burden on the Department, on U.S. Customs and Border Protection ("CBP"), and on respondents."[20] This simply is not true. The fact is that there would be no additional or greater burden on the Department, the CBP, or NME respondents. No additional calculations need be performed and no additional data need be supplied. All that would happen is that a loophole -- a potentially huge loophole, as the Department well-recognizes, -- would be closed to ensure that the margins calculated in NME proceedings will be enforced.

Equally unavailing is the claim that the implementing combination rates will be "counterproductive" to the agency's desire to expedite and simplify the handling of separate rate

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20 Additional Request for Comment, 69 Fed. Reg. at 77,725.

requests.[21] These two goals are neither mutually exclusive nor in conflict. The calculation of combination rates, as noted above, would not increase the complexity of the Department's task, or the amount of work required to complete that task, and would not be more burdensome for NME respondents. Claims to the contrary either misconstrue the nature of NME proceedings or are simply disingenuous. Rather, the Department has an obligation properly to (a) determine the margin of dumping, and (b) assign that margin to entities that are specifically defined and properly connected to the sales during the relevant period. Failing to do so would be poor and imprecise administration of the law, potentially undermining the efforts of the Department, the CBP, and the petitioning industry.

Moreover, it would not be a "step backwards," as opposing parties argue, for the Department to limit the application of a given combination rate to only those entities involved in deriving the combination rate.[22] As the Department acknowledged, were the agency to continue to permit the existing loophole, the enforcement of the statute and the margins calculated for specific exporters will not be effective, as "there is a strong incentive for {NME} exporters assigned either the country-wide rate or a high calculated rate to ship their merchandise through an exporter assigned a lower rate."[23] Indeed, effective agency enforcement must be of paramount concern to the agency charged with enforcing the implementation of the antidumping statute. Thus, applying combination rates is a critical step forward in the Department's enforcement of the margins calculated for NME exporters.

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21 Id.

22 Id.

23 Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 56,188, 56,189 (Sept. 20, 2004) ("Separate-Rates Practice").

Finally, it is specious to claim that the use of combination rates, as contemplated by the Department, would preclude NME exporters from using the lowest-cost suppliers, while simultaneously claiming that "whatever change in the margin that may result from a shift in supplier would be accounted for in the next administrative review."[24] As the Department indicates, NME exporters can switch to low cost suppliers at any time,[25] but whether these suppliers are actually low-cost producers only can be determined with accuracy in an administrative review.[26] Ensuring that cash deposit rates are as accurate and specific as possible based on actual producer-specific data during the relevant period comports with the intent of the statute and is permitted under 19 C.F.R. § 351.107. By implementing this proposed change, the Department will be aligning its NME practice with its cash deposit practice for non-producing exporters. 19 C.F.R. § 351.107(b)(1).

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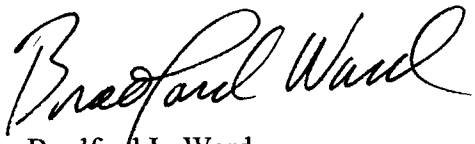
24 Additional Request for Comment, 69 Fed. Reg. at 77,725.

25 Id. at 77,724.

26 It is also the case that under the current practice an NME exporter receiving the higher NME country-wide margin (or separate rate) simply can decide to ship its merchandise through an exporter with a lower calculated margin. However, the Department recognizes that here the potential to diminish effective enforcement of the statute and the margins calculated is great, while the statute's effectiveness is in no way diminished by requiring an exporter to seek review to determine its margin based on a shift in supplying producers.

Please contact any of the undersigned should you require clarification of any aspect of this submission.

Respectfully submitted,



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