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BY HAND DELIVERY

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

PUBLIC DOCUMENT

Re: Comments Regarding Separate Rates Practice In Antidumping Proceedings Involving Non-Market Economy Countries – 69 Fed. Reg. 56188 (Sept. 20, 2004)

Dear Mr. Jochum:

The American Furniture Manufacturers Committee for Legal Trade and the Polyethylene Retail Carrier Bag Committee ("the Committees") submit these comments regarding the Department's separate rates practice in antidumping investigations involving non-market economy ("NME") countries.[1] The Department first requested comments on its separate rates

[1] Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 56188 (Sept. 20, 2004) ("Second Notice").

practice and options for changes in May 2004.[2] After considering submissions from 23 interested parties, the Department presented three proposals with respect to its separate rates practice and requested additional public comment on these proposals. Second Notice, 69 Fed. Reg. at 56188. The Department's proposals focus on (1) the administrative burden placed on the Department because of the submission by separate rates respondents of deficient questionnaire responses and the efficiency of the current construction of the separate rates test with respect to determining a company's independence from the government, (2) the potential evasion of duties and the application of combination rates, and (3) administration of the knowledge test with respect to producers' shipments of subject merchandise to the United States through third countries. Id.

I. INTRODUCTION

As an initial matter, the Committees believe that the Department should abandon its practice of assigning a "voluntary all-others" rate. As explained in our June 2, 2004 comments, the statutory provisions that require determination of an all-others rate for non-investigated exporters or producers in a market economy investigation do not explicitly apply to NME cases. See 19 U.S.C. § 1673d(c)(1)(B)(i)(II), (5) (2004). Moreover, the legislative history does not reflect congressional intent that the Department apply a separate rate to non-mandatory respondents under any circumstances. Therefore, the Department's practice of assigning separate rates to non-mandatory respondents under certain circumstances is discretionary, and is

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[2] Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 24119 (May 3, 2004) ("First Notice").

not required by the statute. If the Department continues to assign a separate rate to NME producers and exporters not selected for individual investigation, it should at least change the rate applied to those companies. There is no reason that the Separate Rate Respondents should receive a rate that is a weighted average of fully analyzed and verified companies. i.e., the all others rate. Instead, the Department should apply the highest calculated rate that is not based on total adverse facts available.

If the Department continues to apply a "voluntary all others" rate, the Committees urge the Department to clarify its practice and establish clear guidelines for the administration of its separate rate policy in order to return the policy to its original purpose and to achieve consistency and predictability of outcomes. This will contribute to the streamlining of the process and ease the administrative burden on the Department, because Separate Rate Respondents will know exactly what requirements and standards must be met to receive a separate rate. Many of the suggestions articulated below are already reflected in the Department's current practice, as demonstrated in recent investigations and reviews. At a minimum, the Department should articulate a comprehensive policy statement that clearly reflects what is already occurring in practice.

In addition, the Department should take this opportunity to improve its administration of the statute. The Department's determination of separate rates status has become perfunctory and virtually automatic, as both mandatory and non-mandatory respondents routinely obtain a separate rate by submitting rote, standardized responses. The Department's analysis of this extremely important, threshold issue has become a "rubber stamp" of information submitted by a

respondent. The Committees urge the Department to make the separate rate test meaningful so that it will effectuate the purpose for which it was established and only grant separate rates to those companies that affirmatively demonstrate the absence of government control. Below, the Committees address several of the issues raised in the Second Notice and present their proposed changes to the Department's policy.

II. CHANGE TO SEPARATE RATES APPLICATION PROCESS

A. In Any Application Process, The Department Must Establish An Evidentiary Standard And Require Enough Detail To Legitimately Establish A Company's Independence From The Government

In its Second Notice, the Department stated that it is considering a change in its current separate rates process from a Section A questionnaire response process to an application process. 69 Fed. Reg. at 56189. Although the Committees do not object to an application process, per se, the process must not be a mere formality. Change is needed in the administration of the test, not merely in the form. The Department must establish clear guidelines and require Separate Rate Respondents to provide complete and accurate information in their initial response. Moreover, the application or questionnaire must ask for information from the Separate Rate Respondent that is sufficiently detailed to permit the Department to conduct a meaningful analysis and to determine accurately whether a company is independent from government control.

In its Second Notice, the Department stated that it "could ask questions not addressed currently by its standard NME Section A questionnaire that are pertinent to separate rates eligibility . . . ." 69 Fed. Reg. at 56190. Accordingly, the Committees propose several additional questions that are described below.

1. Is the company controlled by any provincial or local government body?

As the U.S. Court of International Trade ("CIT") recently held, the Department's separate rate test "should not be limited to proving absence of national-government ownership but should be applied to whatever level of government control is implicated." Coalition for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v United States, No. 01-00825, Slip Op. 04-31 (Ct. Int'l Trade 2004). The Department must evaluate the relevant laws pertaining to national, provincial, and local governments that delineate forms of ownership by the people to establish whether a non-mandatory respondent is free from government control. To that end, the Department must also require non-mandatory respondents to submit copies of all relevant laws, not just the standard laws usually produced by non-mandatory respondents, so that it can conduct the separate rate analysis that is required by the statute.

2. Are there meetings where a government official is present and production and pricing are discussed?

The Department should specifically ask Separate Rate Respondents to disclose if government officials are present at any meetings at which production and pricing decisions are discussed. Although a government official may not exert influence in an official capacity, e.g., as a member of the company's board of directors or as a shareholder with an ownership stake, government control may be exerted on a more informal level. Therefore, the Department should request this information so that it can analyze whether such circumstances amount to government control of the Separate Rate Respondent.

3. Is the company a member of any trade association controlled by the government?

The Department's Section A questionnaire (Question 2.h) specifically asks about coordination with other exporters in setting prices or determining the markets to which companies will sell. Such coordination may occur through trade associations, particularly when the trade association is subject to government control or influence. In those circumstances, producers and exporters that are members of the trade association may be subject to government control. The Department, therefore, should ask questions to determine whether a Separate Rate Respondent or any of its affiliates or suppliers is a member of a trade association, whether any government officials are officers or members of the trade association, and whether the trade association exerts any influence over their sales or pricing decisions.

4. To what extent is the respondent dependent on government subsidies?

The Department's current separate rate analysis ignores the full effect of the influence exerted by an NME government on the marketplace as a whole and on a particular industry. The Department's de facto control analysis effectively looks at the individual company in a vacuum. For example, significant export subsidies exist in the PRC. As described in our June 2, 2004 Comments, information available on the Internet suggests that various forms of export subsidies are provided by regional governments in the PRC to develop export-oriented industries. Accordingly, when extensive reliance on government export subsidies pervades the industry in question, the Department should analyze the impact of these forces on the export-related investments, pricing, and output decisions at the individual firm level.

This argument was also made in the investigation involving hand trucks from the PRC. See Hand Trucks and Certain Parts Thereof from the People's Republic of China: Request For Supplemental Questionnaire Focused on Chinese Government Control Over Qingdao Hand Truck Companies, March 19, 2004 ("Request for Supp. Questionnaire"). In that case, Petitioners requested that the Department issue a supplemental questionnaire to the mandatory respondents as well as to the national, provincial, and municipal governments. The proposed supplemental questionnaire pertained to preferential programs and other incentives provided for industry members by the different levels of government. The Department rejected the petitioners' request, stating that "the Department's current separate rates test . . . does not examine the types of government control alleged by petitioners." Hand Trucks, 69 Fed. Reg. at 29512 (the Department's determination was unchanged in the final -- 69 Fed. Reg. 60980 (Oct. 6, 2004)).

In a recent investigation involving magnesium metal from the People's Republic of China, however, the Department asked the respondent to indicate its level of dependence, if any, on government subsidies. See Magnesium Metal from the People's Republic of China, Supplemental Questionnaire for Tianjin Magnesium International Co. Ltd., July 23, 2004, at 4 and Supplemental Questionnaire for RSM Companies, July 23, 2004, at 8.[3] Notwithstanding the

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[3] In the Supplemental Questionnaire the Department asked that the respondent:

> Please provide a detailed description of all subsidies or preferential policies provided to your company by the PRC government or any local or provincial government entity, including how long your company has participated in the subsidy program. Please quantify the value of such subsidies and indicate the percentage of your company's total sales that government subsidies represent.

Department's determination in Hand Trucks, such inquiries should be a standard part of the Department's separate rate questionnaire/application.

It is inconsistent to presume that an NME company is under the control of the NME government and, at the same time, presume that a company operates in a "free market export bubble" so that it is isolated from the actions undertaken by the NME government. Moreover, it is unrealistic. Reliance on government subsidies constitutes a form of control over NME companies. In its separate rates analysis, therefore, the Department should consider the level of dependence on government export subsidies as evidence for its de facto analysis.

B. The Department Should Continue To Reserve The Right To Issue Supplemental Questionnaires To Separate Rate Respondents

The Department should reserve the right to issue supplemental questionnaires to Separate Rate Respondents, as stated in its Second Notice. 69 Fed. Reg. at 56189. Although the Department should expect Separate Rate Respondents to provide complete and accurate responses to its initial request for information, there will likely be circumstances where the Department will require additional information or corroboration from a Separate Rate Respondent in order to determine if there is de jure or de facto government control. Therefore, the Department should reserve the right to issue supplemental questions. Moreover, a failure to file a timely response to the Department's supplemental questionnaires should result in the denial of a separate rate.

C. The Department Must Institute A Verification Policy For Separate Rate Respondents To Provide An Incentive For Applicants To Provide Accurate And Complete Responses To The Department's Questions

The Department stated in its Second Notice that it would "continue to reserve the right to . . . verify applicants if necessary." 69 Fed. Reg. at 56189. Verification, however, is a necessary aspect of an effective process to establish eligibility for a separate rate. Requiring the NME producers and exporters to certify their responses, while important, is not a sufficient safeguard to establish the veracity of their questionnaire responses. In fact, in the pending investigations involving wooden bedroom furniture and certain frozen and canned warmwater shrimp, the Department conducted verifications of the responses of a small number of Separate Rate Respondents. At the verification of one of the Separate Rate Respondents in the wooden bedroom furniture investigation, the company attempted to submit substantial revisions to critical data that it had reported in its initial Section A questionnaire response regarding the company's ownership/legal structure and reported quantity and value ("Q&V").[4] This underscores the necessity of conducting verifications of Separate Rate Respondents.

The Department, therefore, should clearly state a policy that the responses or applications of all Separate Rate Respondents are subject to verification. Without the possibility of verification of the information provided, there is no incentive for a Separate Rate Respondent to provide complete and accurate responses to the Department's inquiries. The Department should verify a representative sample of Separate Rate Respondents and, in addition, conduct a surprise verification of at least one Separate Rate Respondent in every investigation.

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[4] See Verification Report of Locke Furniture Factory, September 15, 2004.

Furthermore, as part of its verification policy, the Department should clarify that if there is any material failure at verification the applicant will fail the verification and will receive the country-wide rate. In particular, if the Department cannot verify the Q&V information provided by a Separate Rate Respondent, the company should fail verification and receive the country-wide rate. As explained in part I.D, accurate Q&V information is critical because the Department relies upon this data when selecting the mandatory respondents in an investigation.

D. The Department Should Announce A Clear Policy That Separate Rate Respondents Must File A Timely Response To The Department's Mini-Section A Questionnaire In Order To Receive A Separate Rate

The Department requires Q&V information from all known producers in the subject country so that the Department has accurate and complete information with which to select mandatory respondent during its investigation. The Department should not grant a separate rate to companies that ignore its initial request for Q&V information. If there is no incentive for foreign producers and exporters to submit accurate and complete Q&V information in response to the Department's mini Section A questionnaire, the process by which the Department selects mandatory respondents in an investigation will be compromised.

The Department should state a policy that it will apply adverse facts available to all Separate Rate Respondents who failed to file or who failed to file timely mini Section A questionnaire responses. This is consistent with the Department's current practice. See, e.g., Polyethylene Retail Carrier Bags from Malaysia, 69 Fed. Reg. 3557, 3559 (Jan. 26, 2004) (preliminary determination) ("we have used total facts available for Branpak Industries Sdn. Bhd. and Gants Pac Industries because the firms did not provide the data we needed to decide

whether they should be selected as mandatory respondents"); Polyethylene Retail Carrier Bags from Thailand, 69 Fed. Reg. 3522, 3554 (Jan. 26, 2004) (preliminary determination) ("we have used total facts available for all three of these companies because these firms did not provide the data we need to decide whether they should be selected as a mandatory respondent"); Certain Folding Gift Boxes from the People's Republic of China, 66 Fed. Reg. 40973, 40975 (Aug. 6, 2001) (preliminary determination) (applying the PRC-wide rate to exporters who failed to respond to partial Section A questionnaires).[5]

The Department should also apply adverse facts available when a Separate Rate Respondent does not submit a timely mini Section A questionnaire response. See Certain Stainless Steel Wire Rods From India, 58 Fed. Reg. 41729, 41731 (Aug. 5, 1993) (Preliminary Determination) (rejecting mini Section A questionnaire responses submitted six calendar days after the filing deadline). In Steel Concrete Reinforcing Bars From Poland, Indonesia, and Ukraine, the Department stated:

> In accordance with section 776(a) of the Act, we have determined that the use of adverse FA is warranted for Sakti, Bhirma, Krakatau, Perdana, Hanil, Pulogadung, Tunggal, and Master Steel. Sakti, Bhirma, Krakatau, and Perdana failed to respond to the Department's partial section A questionnaire. Hanil, Pulogadung and Tunggal failed to respond the Department's partial section A questionnaire by the applicable deadline. Because these respondents failed to provide the requested quantity and value information by the applicable deadline, the Department must use

[5] In the pending investigation involving wooden bedroom furniture, however, the Department granted a separate rate in the preliminary determination to certain NME producers and exporters that failed to file mini Section A questionnaire responses despite Petitioners' objections on the grounds explained here. This issue was again raised by Petitioners in their October 6, 2004 case brief and is still pending.

> FA, in accordance with section 776(a) of the Act. The Department has also determined that because these companies either failed to respond to the partial section A questionnaire, or failed to respond in a timely manner to the partial section A questionnaire, they did not act to the best of their ability to comply with the Department's request for information. Without completed questionnaire responses, the Department lacks critical information that is necessary to the dumping calculation and cannot determine an accurate dumping margin. Therefore, in accordance with section 776(b) of the Act, the Department has used an adverse inference in determining a margin for these companies.

66 Fed. Reg. 8343, 8346 (Jan. 30, 2001) (prelim.) (emphasis added).

Furthermore, the Department should not accept lack of notice as an excuse for a Separate Rate Respondent's failure to file any mini Section A questionnaire response or an untimely mini Section A questionnaire response. The Department serves its mini Section A questionnaire on representatives of the People's Republic of China with instructions that it be forwarded to producers and/or exporters of subject merchandise. See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Letter from Mr. Edward Yang to Mr. Liu Danyang, Ministry of Commerce, People's Republic of China, dated December 30, 2003. Notice to the government of a non-market economy country constitutes notice to all producers and exporters. See Folding Gift Boxes from the People's Republic of China, 66 Fed. Reg. 40973 (Aug. 6, 2001).[6] Thus, the Department should clarify in a Policy Bulletin that it will not accept an alleged lack of notice of the mini Section A questionnaire as an excuse for an untimely response.

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[6] In Folding Gift Boxes from the PRC, the Department recognized that until a PRC entity demonstrates its entitlement to a separate rate, it is presumed to "constitute a single enterprise under common control by the Chinese government." 66 Fed. Reg. at 40975. Accordingly, the ultimate responsibility for "identifying and transmitting" questionnaires to potential respondents rested with the PRC government, which clearly received the respondent selection questionnaire.

E. Companies That Are 100 Percent Foreign Owned Or That Have An Affiliate In A Market Economy Country Should Be Required To Certify Their Eligibility For A Separate Rate

The Committees agree with the Department's proposal that under the suggested application process, "all exporters, including those that are 100% foreign-owned, would be required to certify their eligibility for separate rates (*i.e.*, to certify that they exported subject merchandise to the United States and that they operate *de jure* and *de facto* independently of the government)." Second Notice, 69 Fed. Reg. at 56189. NME producers and exporters that are 100 percent foreign owned or that have administrative or sales offices in market economy countries should not automatically receive a separate rate.

1. The Department should require companies that are 100 percent foreign-owned to demonstrate that they are de facto and de jure free of government control

Under any new practice, the Department should state a clear policy that it will not automatically assign a separate rate to NME producers and exporters that are 100 percent foreign-owned. The Department explained its current practice in the pending investigation involving wooden bedroom furniture from the People's Republic of China:

> The Department's consistent practice has been to require companies, regardless of whether wholly owned by a market-economy entity, to respond to the Department's Section A questionnaire. Information requested in the Section A questionnaire is required in order for the Department to assess whether a particular respondent is entitled to a separate rate. While the Department's practice has been to treat Hong Kong-based companies as market-economy companies for which, in those cases, a full-blown separate-rate analysis is not required, the Department still needs to analyze the company's Section A questionnaire response to examine information such as whether the company is registered for business in Hong Kong or the PRC, the

> ownership interests of each branch of the company, the type of working relationship between the exporter, producer and other affiliates, and the volume and value of sales that were made to the United States during the POI.

Untimely Request for Separate-Rate Status of Certain PRC Exporters, Memorandum from Jeffrey May to James Jochum, dated September 20, 2004, at 4 (citations omitted). Consistent with its practice in the furniture investigation, the Department should announce a clear policy that regardless of its ownership status, every Separate Rate Respondent must file a timely Section A questionnaire response or separate rate application.

2. The Department should not automatically grant a separate rate to companies with an administrative or sales office in a market economy country

In the pending investigation of polyethylene retail carrier bags ("PRCBs") from China, the Department found that six companies with offices in Hong Kong were based in Hong Kong and determined that no separate rate analysis was required for those companies because "it is the Department's policy to treat Hong Kong companies as market-economy companies." PRCBs from the People's Republic of China, 69 Fed. Reg. 3544, 3547 (Jan. 26, 2004) (prelim.) ("PRCBs from the PRC"). This policy simply does not make sense.

First, antidumping investigations are concerned with subject merchandise produced in the country that is the target of the investigation. Thus, the Department's separate rate analysis should focus on the subject merchandise that is produced in the NME, regardless of the location of an affiliated company. Second, there is no basis to assume that the PRC government does not or cannot exert control over a company's production facility in the PRC merely because it has an affiliate located in Hong Kong. Third, according to the Department's current approach, one

could argue that it should automatically assign a separate rate to a company with an affiliate in any market economy, including, for example, a company with a sales office in the United States. This makes no sense. Finally, the current policy provides substantial opportunities for circumvention by Chinese manufacturers. In order to receive a separate rate in an antidumping duty investigation, the Chinese manufacturer merely would have to obtain a Hong Kong address in order to escape the Department's separate rates analysis.

For these reasons, the Department should require a PRC producer with an affiliated sales or administrative entity in Hong Kong or any other market economy to certify its eligibility for a separate rate and should not automatically award a separate rate to a PRC producer with an affiliated sales or administrative entity in Hong Kong or any other market economy.

III. THE DEPARTMENT SHOULD ASSIGN COMBINATION RATES TO NON-MANDATORY RESPONDENTS TO AVOID CIRCUMVENTION OF ANTIDUMPING DUTY ORDERS

The Committees agree with the Department's proposal to assign exporter-producer combination rates to NME exporters receiving a separate rate so that only the specific exporter-producer combination that existed during the period of investigation or review receives the rate calculated in the investigation or review. Under its current NME practice, "the Department assigns exporter-specific separate rates, and not exporter-producer combination rates," with only three limited exceptions: (1) where an exporter is excluded from the order, (2) where the Department determines there is middleman dumping, and (3) in a new shipper review, where the rate is assigned to a specific exporter-producer combination. Second Notice, 69 Fed. Reg. at 56190. Restricting assignment of combination rates to these situations, however, fails to

recognize the massive potential for circumvention of orders that can occur by producers subject to a relatively high cash deposit rate simply shipping subject merchandise through a company subject to a lower margin. The Department's current policy recognizes the opportunity for circumvention when the Department finds no dumping or excludes an exporter from an antidumping duty order, but differentiates the situation where an NME exporter receives a low dumping margin. The Department's policy does not make sense because the incentive and opportunity to evade the antidumping duty in this latter situation remain.

Under the current practice, evasion of antidumping duties can be addressed only in an administrative review. Administrative reviews do not provide an effective remedy to the problem of producers selling through exporters with a low cash deposit rate, however, because the first administrative review is not concluded until at least two years after the final determination in an investigation and not all investigated respondents necessarily will be reviewed.

The Department clearly has the authority under the statute and section 351.107 of the regulations to assign combination rates in NME investigations and reviews. Moreover, the Department has a duty to apply its law in a manner to prevent the evasion of antidumping duties. Tung Mung Dev. Co. Ltd. v. United States, 219 F. Supp. 2d. 1333, 1343 (Ct. Int'l Trade 2002), aff'd 354 F.3d 1371 (Fed. Cir. 2004) (citing Mitsubishi Elec. Corp. v.United States, 700 F. Supp. 538, 555 (Ct. Int'l Trade 1988), aff'd 898 F.2d 1577 (Fed. Cir. 1990)). Therefore, the Department should do everything reasonably possible to prevent exploitation of the system by shipping merchandise through a non-producing exporter that received a lower, separate rate in

the investigation. See, e.g., Jian Farn Mfg. Co. v. United States, 817 F. Supp. 969, 975 (Ct. Int'l Trade 1993). Assigning combination rates to all NME exporters receiving a separate rate will prevent circumvention, yet it will not inhibit or deter legitimate trade. In addition, assignment of combination rates will not result in a heavier administrative burden for the Department. The Department must simply issue specific, detailed liquidation instructions to Customs, which must then enforce the order in accordance with those instructions.

Finally, if a supplier was not investigated in the original investigation and does not have a combination rate, that supplier's merchandise should be subject to the country-wide rate until a specific combination rate is established in a new shipper review. Merchandise from a supplier that was not previously investigated should not receive an exporter's separate rate that was calculated based on sales of another supplier's merchandise. This approach is consistent with the Department's current practice of presuming that merchandise is subject to the country-wide rate until it is established that the merchandise should be subject to a separate rate.

IV. THIRD-COUNTRY RESELLER REBUTTABLE PRESUMPTION

The Department proposes a change to its current policy regarding third country resellers whereby it "would assume that NME producers shipping through third countries set the export price to the United States and assign to them, and not the reseller, antidumping duty rates, unless evidence were presented to the contrary." Second Notice, 69 Fed. Reg. at 56190. Thus, in accordance with the standard practice, the NME producer/exporter would be required to demonstrate lack of de facto and de jure governmental control in order to receive a separate rate. Id. The Committees are unclear, however, exactly what this proposal would entail and the

rationale behind it. Because so many questions remain, we are unable to support the proposed change and urge the Department to continue with its current practice.

For example, it is unclear to what sales the rebuttable presumption would apply. Would the Department presume that all third-country sales are destined for the United States unless the producer can show otherwise? Or would the Department apply the rebuttable presumption only to those sales of the producer's merchandise which did, in fact, enter the United States from a third-country exporter? In either case there are issues that require thoughtful consideration.

Putting aside the legal difficulties associated with introducing a presumption into agency practice, there are important practical considerations. Were the Department to presume all third-country sales are U.S. sales, absent evidence to the contrary, the NME producer could very easily "game" the system. For example, if some of the NME producer's third-country sales prices are higher than its U.S. sales prices, the company could simply elect not to rebut the presumption for those sales. Alternatively, if some of the producer's third-country sales prices are lower, the company could elect to present evidence showing that the merchandise was consumed in the third country or transshipped to a non-U.S. destination.

Were the Department to presume knowledge by the NME producer only for those third-country sales which actually did enter the United States, however, the practical problems are even more complex. First and foremost, given that the NME producer would not report these transactions in its U.S. sales file, how would such sales be identified during the course of the investigation or review? This might require, in every NME case, a detailed analysis of transaction-specific Customs data (which are not available to the private litigants). Next,

assuming the Customs data show entries of the NME producer's merchandise from a third-country exporter, how would Commerce obtain the NME producer's pricing data for those sales? The Department would have to request that the NME producer report its third-country sales to the relevant exporter. But that might include a far larger set of sales than those which actually entered the United States. In order to identify which of those sales entered the United States, Commerce would somehow have to link the transaction-specific Customs data to individual third-country sales reported by the NME-respondent. If the goal of this presumption is to decrease the administrative burden on the Department, this proposed change appears to work against that goal.

These practical considerations apply only if the Department envisions including these third-country sales prices in the NME producer's U.S. sales file. Alternatively, Commerce could ignore these sales entirely when determining the NME producer's dumping margin, but simply apply the manufacturer's rate to entries by the third-country exporter. The problem with this approach, however, is that it would permit the NME-producer to hide its low priced U.S. sales in such a way that they would never be subject to review, thereby understating the manufacturer's rate. It would also free the third-country exporter to sell at massively dumped prices with the knowledge that its sales can never be assessed at a rate higher than the manufacturer's rate.

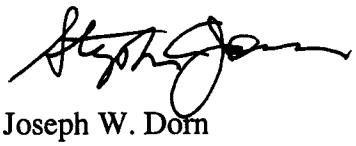
Because the proposed change in policy raises so many important and troubling questions, and the application of the policy is unclear, the Committee recommends that the Department maintain the current approach, which is both fair and workable, until the issues raised above have been considered and addressed. Under the current practice, if the NME producer knew or

should have known that the sales were destined for the United States, it must report such sales or face an adverse inference. Those entries would then be subject to the manufacturer's rate. Alternatively, if the producer had no such knowledge, the third-country exporter may request its own rate, or those entries would be subject to the country-wide rate.

V. CONCLUSION

The Department should revise and clarify its separate rates policy is accordance with these comments. Please contact us if you have any questions about these recommendations.

Respectfully submitted,



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