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October 15, 2004

DELIVERY BY HAND

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

Attn: Mr. James J. Jochum

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

Dear Mr. Secretary:

On behalf of Collier Shannon Scott, PLLC, we submit these comments in response to the September 20, 2004 notice seeking comments on the Department's proposed revisions to its separate-rates practice in antidumping proceedings involving non-market economy countries. See Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 56,188 (Sept. 20, 2004).

I. INTRODUCTION

The Department has described three proposed changes to its current separate-rates practice. First, the Department proposes to streamline the process of requesting a separate rate. Second, the Department proposes "extending this practice of assigning 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 calculated rate for establishing the cash deposit rate for estimated antidumping duties." Third, the Department proposes "instituting a rebuttable presumption that NME producers shipping subject merchandise through third countries are aware that their goods are bound for the United States." As discussed below, we generally support these proposals, but are concerned that the effectiveness of antidumping orders and the integrity of the administrative process not be undercut by the steps taken to address administrative burdens caused by a dramatic increase in the number of respondents seeking separate rates in antidumping duty investigations involving non-market economy countries.

II. DISCUSSION

A. The Department Should Not Grant Separate Rates Without Verification of Individual Responses

As discussed in our June 2, 2004 response to the Department's May 3, 2004 request for comments on its present separate-rates practice,[1] compelling reasons support a determination by the Department to restrict its use of the separate rates practice in investigations and reviews to only those respondents that are individually investigated or reviewed and subject to verification in that segment of a proceeding. See Letter from Collier Shannon Scott, PLLC to Secretary of Commerce, Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries: Request for Comments at 2 (June 2, 2004). Where, pursuant to Section 777A(c)(2) of the Tariff Act of 1930, as amended (the "Act"), 19 U.S.C. § 1677f-1(c)(2), and

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

Section 782(a) of the Act, 19 U.S.C. § 1677m(a), the Department limits the number of respondents that are individually investigated or reviewed, the Department should only engage in separate-rates analysis for those companies that are individually examined and are subject to verification. This approach, which is in accordance with law, will conserve the Department's resources and will ensure that the results of the Department's investigations and reviews are as accurate as possible.

Without unduly jeopardizing the statute's purpose of guarding against injuriously dumped imports, this approach would directly address the administrative burdens imposed on the Department by the large numbers of respondents seeking separate rates in recent proceedings. In its September 20th notice, however, the Department did not address this option. We urge that the Department adopt this approach for the reasons just noted.

B. Steps to Streamline the Process of Applying for a Separate Rate Should Be Taken Only After Ensuring That Revisions Will Not Effectively Reduce the Showing Required For a Separate Rate

The Department first proposes steps to "streamline the separate rates process for NME exporters and the Department and to focus the analysis on those issues most relevant to separate rate eligibility." See 69 Fed. Reg. at 56,189. To accomplish these goals the Department proposes to require specific certifications and the submission of specific types of documentation by the party applying for a separate rate. See 69 Fed. Reg. at 56,189-90. The Department also proposes to reduce the requirements for a separate-rate application to a form that is published on the ITA's Internet website. Id. The Department asserts that these measures will reduce its administrative burden while promoting administrative efficiency. Id.

While we support measures to reduce the administrative burden that presently accompanies the Department's separate-rates practice, we believe that the Department must avoid reducing the showing that must be made under law by a respondent in an NME proceeding to overcome the legal presumption of state control. See 19 U.S.C. § 1677(18).

Reducing the showing required of a respondent to a "punch list" risks encouraging boilerplate applications that provide little substantive information while appearing to satisfy the Department's requirements for a complete separate-rate application. Even under the Department's current practice, the submissions received from many "section A" respondents in a non-market-economy proceeding are remarkably similar and not substantively very meaningful or informative.

Reducing the requirements for a separate-rate application to a list divorced from the specific factual situation of the given respondent will, we believe, eventually increase the Department's administrative burden as well as facilitate circumvention of antidumping duty orders. Receiving numerous boilerplate responses to a published "punch list" of separate-rate requirements will require as much staff as is presently the case, because each response, while perhaps superficially satisfying the separate-rate requirements, will entail analysis and, potentially, issuance of supplemental questionnaires. Moreover, while the list of requirements will be published on the Department's Internet site, the Department will still need to serve individual respondents with copies of its information requests.

Lastly, along these lines, the Department should clearly and unequivocally stress that revisions to streamline the application process do not reduce the obligation of a respondent party to respond properly and fully to requests for necessary information. In accordance with current

law, the Department is required to resort to facts available when necessary information is missing from the record, for whatever reason. See, e.g., 19 U.S.C. § 1673e(a); 19 C.F.R. § 351.308; Nippon Steel Corp. v. United States, 337 F. 3d 1373 (Fed. Cir. 2003). This obligation is not reduced by efforts to streamline administrative processes, particularly when the legal presumption of state control remains unaltered in the law. 19 U.S.C. § 1677(18)(C). In the event that the Department takes steps to reduce its separate-rate requirement to a formalized listing, it should also clearly reiterate the consequences of a party's failure to provide all required and requested information.

C. The Department Should Limit Entitlement to Separate Rates To Entities That Have Demonstrated the Required Absence of De Jure and De Facto Control

The Department's second proposed revision to its separate-rates practice contemplates "extending {its} practice of assigning 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 calculated rate for establishing the cash deposit rate for estimated antidumping duties." 69 Fed. Reg. at 56,190.

We support this proposed revision. As discussed in our June 2, 2004 comments, the separate-rates practice provides a company-specific exception to the legal presumption that all companies within an NME country are controlled by the central government. By its nature, this benefit is limited and should be strictly applied only to the specific NME entities that have made the significant legal and factual showings required to demonstrate the absence of de jure and de facto central government control. Allowing, for example, exporters to ship merchandise from producers other than the producer that supplied the exporter when an existing separate-rate

determination was made, while still enjoying the benefit of the separate rate, would wholly undermine the legal effect of Section 777(18)'s presumption that all NME companies are part of the NME entity until proven otherwise. Similarly, focusing only on the presence or absence of government control of a producer, irrespective of any control exercised over its exporter, also would undermine Section 777(18) of the Act, 19 U.S.C. § 1677(18).

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

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

NME-wide rate should apply until all participating entities have been determined to be free from de jure or de facto central government control.

In conjunction with this proposal, the Department also solicited "comments as to what rate it should assign to exporters' merchandise from suppliers for which the Department has not established a combination rate." Id. Consistent with the Department's established practice, where subject merchandise enters the customs territory of the United States from a foreign producer or producer-exporter combination, based in a non-market-economy country, for which a specific cash deposit rate has not been calculated, as a matter of law and sound policy the Department should instruct U.S. Customs and Border Protection ("Customs") to collect cash deposits calculated using the NME-wide rate. This conclusion follows from and properly reflects the legal presumption that producers and exporters in the NME country are subject to government control until they demonstrate otherwise. Indeed, statutory and regulatory provisions implementing the "new-shipper" law provide a readily-available mechanism by which NME producers and producer-exporter combinations can apply for and, if appropriate, obtain a calculated rate specific to their export scheme.

D. The Department Should Institute a Rebuttable Presumption That NME Producers Shipping Subject Merchandise Through Third Countries Are Aware That Their Goods Are Bound For the United States

The Department lastly proposes to institute a rebuttable presumption that NME producers shipping subject merchandise through third countries are aware that their goods are bound for the United States. This proposal

> 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. In accordance with standard practice, the NME

> producer/exporter would be required to demonstrate lack of de facto and de jure government control in order to receive a separate rate.

69 Fed. Reg. at 56,190.

This proposal properly would place the burden of production and persuasion related to this issue on the parties in possession of the necessary information. In so doing, it would provide an appropriate and reasonable level of incentive for the respondents to provide necessary information in a timely fashion. As such, it would address the difficulties inherent in assessing the complex and frequently opaque business relationships in non-market economy countries such as China. At the same time, and importantly, the Department should expressly note that this presumption does not preclude the Department from also calculating dumping margins for a third-country exporter if the circumstances so warrant.

In conjunction with this proposal, the Department specifically requested comments "as to whether there are grounds for such a rebuttable presumption." Id. We believe that where, as here, the Department acts to address difficulties experienced in its administration of the law, its actions will be upheld if reasonable and in accordance with law. In this instance, given the difficulties experienced with obtaining necessary information required to assess the nature of the business relationships at issue, the Department's actions would be practical and consistent with its legal obligations as the administering authority. If experience were to suggest revision to this presumption, the Department would have the authority reasonably to effect such changes under the statue as well.

III. COORDINATION WITH CUSTOMS

As discussed in Section I above, any changes by the Department to ease the administrative burden should not be made at the expense of the ability to achieve the statute's

goal of imposing antidumping duties as warranted to offset injurious dumping. Along these lines, we request that the Department not only require verification of each respondent applying for a separate rate, but also coordinate with Customs so that relevant entry documents filed with Customs can be made available to the Department and included in the Department's administrative record with access by petitioners' counsel under Administrative Protective Order. Such documentation will be germane to what combination rate, if any, should apply in each instance and also will shed light on whether the antidumping rate should be calculated for the NME producer/exporter or a third-country re-exporter or both.

* * *

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

Respectfully submitted,

Jeffrey S. Beckington

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