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The Honorable James J. Jochum
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 Request for Public Comments

Dear Assistant Secretary Jochum:

On behalf of the Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation and Indian Ridge Shrimp Company, petitioners in current antidumping investigations 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 request for comments regarding the agency's proposed changes to its practice in determining separate rates in antidumping proceedings involving non-market economy ("NME") countries.[1]

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

At the outset, we commend the Department's recognition of potential problems with certain areas of its NME practice as well as its willingness to reevaluate its practice and to consider changes necessary to proper enforcement of the law. Shrimp Petitioners generally support the Department's reexamination of these issues and favor some of the proposed changes in practice advanced by the agency.

Issue 1: "Streamlining" of Separate Rates Analysis

A. The Department Should Abandon Separate Rates in NME Investigations

Shrimp Petitioners agree that the Department's current separate rates process is problematic. Specifically, requests for separate rate determinations have multiplied dramatically as has the Department's administrative burden. Shrimp Petitioners' experience in dealing with the wave of separate rate requests from non-investigated, non-verified foreign producers and exporters of subject merchandise in the Warmwater Shrimp NME investigations[2] (which the Department in its Request for Comments cited as one of two illustrative examples of this burgeoning administrative problem) mirrors the Department's.

The problems with the Department's current separate rates practice, however, are not the result of flaws in the review process. Rather, the problem is the concept of separate rates in the NME context.

As an initial matter, Shrimp Petitioners question the presumption on which the Department's separate rates process is based. Under the separate rates process as presently constituted, a non-investigated and non-reviewed firm can rebut the basic presumption that all

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[2] Certain Frozen and Canned Warmwater Shrimp from Brazil, Equador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam, 69 Fed. Reg. 3876 (Jan. 27, 2004) (Notice of Initiation of Antidumping Investigations).

firms within an NME are subject to government control (and thus should be assigned a single, country-wide rate), merely by making a pro forma, generally unverified presentation to there is an absence of *de facto* and *de jure* government control over its export activities. Moreover, once a firm clears this extremely low evidentiary hurdle, the firm receives a weighted-average of the rates of the fully verified respondents (excluding any rates that were zero, de minimis, or based entirely on facts available), rather than the highest rate received by any of the verified respondents. Thus, under the Department's current separate rates process, a non-investigated firm can practically guarantee itself a dramatically lower margin by merely filling out a brief Section A Questionnaire, and be confident that its response will be accepted on its face in virtually all instances, without further on-site verification by the Department. This spot-check system turns the NME presumption on its head; reduces what was originally intended to be a demonstration of the absence of government control to a rote, fill-in-the-blanks exercise; and all but guarantees that the separate rate claimant will receive a rate that falls below the highest rate given to a fully verified, mandatory respondent.

This is nonsensical. As the Department's separate rates policy is presently constructed, advice given an NME firm seeking to reduce its exposure in an antidumping investigation might well be: (1) pray you are not selected as a mandatory respondent -- those firms have to answer a number of questionnaires and supplemental questionnaires, and the responses are verified -- you can increase your chances of not being selected by understating your exports with little likelihood you will be caught; (2) timely respond to the "mini Section A" separate rates questionnaire -- that should be the end of it; unless you are extremely unlucky, you will not be subjected to verification or follow-up; and (3) be confident that the worst that can happen for this

minimal investment of time and effort is that the Department will reject your claim for separate rate status, and assign to you the same country-wide rate which you would have received anyway. Not surprisingly, increasing numbers of non-investigated firms in NME investigations have discovered how simple it is to "game" the separate rates system. The increasing number of separate rate applicants will only further increase in the future, unless the Department radically reforms its porous and sanction-free separate rates system.

Thus, rather than "streamline" the separate rates analysis, as the Department suggests in its Request for Comments, the Department should instead abolish the separate rates system altogether, and calculate NME rates so that mandatory respondents receive individual company-specific rates, and the remaining firms receive the "country-wide" rate. Assigning all non-mandatory firms the country-wide margin is appropriate, given the agency's presumption that all NME exporters are part of and under the control of the NME government.

B. At a Minimum, the Department Must Radically Reform the Separate Rates Process

If the Department persists in continuing its separate rates process in NME investigations, however, the Department should institute meaningful checks and balances that would reduce the myriad loopholes in what is presently an ad hoc enforcement sieve. Granting a separate rate is an exception to the Department's presumption that all companies in an NME are part of and controlled by the government and thus subject to the country-wide rate. Exceptions to this presumptive rule, therefore, should be limited. If the Department continues its separate rates practice, the separate rate should be the highest (non-total AFA margin) calculated for a mandatory respondent. This is an appropriate middle ground which mitigates, to some extent, the current practice, which is overly generous to Section A companies, yet does not abolish the

practice outright. Specifically, Shrimp Petitioners believe that any separate rates application process must contain the following elements:

1. The Department must craft an application/questionnaire that requires the applicant to demonstrate conclusively that the applicant (a) operates *de facto* and *de jure* independently of the government and (b) is free of any ready mechanism by which the government could reasonably exercise control (e.g., significant loans by a government entity on non-commercial terms).

2. The Department must require each NME applicant to demonstrate that it is free not only from central government control over its export activities, but also from provincial and local government control over the decision-making process related to export-related investment, pricing and output decisions at the individual firm level. A bare showing by an individual firm that it may no longer be directly controlled by the central government cannot be deemed dispositive of the de facto-de jure government control issue if there is other evidence that indicates local or provincial control. Examples of such evidence include evidence that a provincial or local government holds stock ownership in the firm, provincial-local government officials are involved in the firm's governance, the firm has received significant financing from a government-owned entity (e.g., bank or investment company), and/or the firm participates in organizations that determine or influence output or pricing, and local or provincial government officials participate in those same organizations. Any such situations, rather than being dispositive of the absence of government control issue, would seem otherwise and, at a minimum, should raise red flags.

3. In such situations, the Department must scrutinize with extreme care whether a separate rate applicant has the independent authority to negotiate and sign contracts and other agreements free of government "guidance" or control. In this regard, the evidentiary threshold for establishing independent authority to negotiate and sign contracts must be raised significantly. As presently constituted, the Department's threshold could be summarized as "contract bearing signatures of both parties = bad; contract bearing signature of just one party = good."[3] The Department premises its use of this minimalist threshold on the ground that it is

> sufficient evidence of price negotiations because the contract was only signed by the buyer. The Department views a contract signed by only one party to be evidence of ongoing price negotiations because the other party could potentially reject any contract it has not yet signed.[4]

This bare showing cannot be deemed sufficient to establish that a firm has the authority to negotiate and sign contracts. Absent from this superficial analysis is any in-depth probing of the context in which the buyer and seller are negotiating. For example, if a government ministry has

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[3] See U.S. Department of Commerce Internal Memorandum from N. Bankhead through J. Doyle to E. Yang, Case No. A-570-893 at 2-3 (Aug. 24, 2004) ("Analysis of Allegations of Ministerial Error from Section A Respondents") (emphasis in original):

> The Department disagrees with the Section A Respondents that the Department made a ministerial error in deciding not to allow contracts signed by both parties to be considered evidence of price negotiations. These companies referenced earlier submissions of various types of contracts signed by **both** the buyer and seller as evidence of price negotiations. We found that any contract signed by both the buyer and seller was not direct evidence of price negotiations. The Department determined that if the "contract" is used and signed by both the buyer and the seller, then it is not a sign of price negotiation, but an agreement between the buyer and seller that post-dates the negotiation.

[4] Id. at 2.

instructed firms to establish a contract price between A and B, or if the government has directed A to deal only with B, then A's "offer" to B is hardly independent of government control. Similarly, if the government establishes a contract price of X, any subsequent "negotiation" between the parties, even if reduced to paper, cannot be dispositive. Finally, it is absurd for the Department to accept a single-signature "offer sheet" as sufficient indicia of the authority to sign and negotiate contracts. A signed offer sheet that is not communicated to a potential buyer provides no basis to conclude that negotiation has occurred. Even communication of a signed offer sheet to a potential buyer is insufficient if it is clear to both parties that no legitimate offer to sell is being communicated. Any company can produce such a document but the fact of such a document itself in no way indicates negotiation. This is especially the case where the "potential buyer" is making no representations and undertaking no obligations. Receipt of an irrelevant and inoperative document would prove nothing is such circumstances. For these reasons, the Department must radically revise its criteria with respect to assessing a firm's independence in negotiating and signing contracts. At a minimum, the Department should require complete sales traces -- not merely a one-sided document with a single signature -- as well as notarized affidavits from company officials.

4. Further to the foregoing point, demonstration of the absence of *de jure* and *de facto* government control logically should require affidavits from relevant government officials attesting to these facts, including that negotiations are truly independent.

5. The Department must reject any application that fails to contain <u>all</u> of the requested information sought, or fails to provide <u>complete</u> information. Given the sensitivity of the separate rates process, anything other than full and complete compliance with the separate

rates requirements must be deemed non-compliance with those requirements. In this regard, unsworn statements from company or NME government officials should be deemed as non-complying.

6. The Department must reject any application that is found to contain materially incorrect information. For example, the Department must reject any application that contains export volume and value information which contradicts the volume and value information supplied at the outset of the investigation by the NME company.[5]

7. The Department must maintain the ability (and intent) to require an NME applicant to provide additional corroborating information where information provided to, or obtained by, the Department independent of the applicant's otherwise apparently complete response indicates that the applicant's response may be evasive, incomplete, or inaccurate.

8. The Department must require foreign-owned companies exporting from NMEs to certify and substantiate their ownership structure in order to receive a separate rate. In no event should the agency automatically grant a separate rate to companies with an administrative or sales office in a market economy country.

9. The Department must maintain a posture of "trust, but verify." The Department at the outset should make clear to all potential separate rates applicants that a precondition of any separate rates application is the applicant's willingness to prepare for and participate in an on-site verification of the applicant's submissions. The Department's current practice of picking one or

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[5] Insofar as the volume and value information submitted in the "mini-Section A" responses at the outset of an investigation usually are used to choose the mandatory respondents in an NME investigation, it is imperative that such information be as accurate as possible. The Department must provide NME respondents with every incentive to ensure that such is the case.

two separate rates applicants for on-site verification, and rubber-stamping the information supplied by all remaining applicants, must be substantially revised. That practice is unfair to the domestic industry. If a limited number of sample verifications are conducted, and some or all of those verifications fail, the Department cannot apply those failed results only to those specific companies. Such a practice means absolutely no risk to those companies requesting a separate rate but not verified. There is absolutely no downside and no risk if a company is not selected for verification. In addition to scheduled verifications, the Department also should conduct "surprise" verifications of the information submitted by other randomly-selected applicants in each NME investigation, in order to provide applicants with an incentive to provide accurate information to the Department.[6]

10. The Department must issue an explicit, written warning at the outset of the separate rates application process that any failure by an applicant at any stage of the process to (1) provide complete information to the Department at the outset (i.e., no "do-over's"); (2) cooperate fully and completely at verification; and/or (3) establish to the satisfaction of the Department's verifiers that the applicant's submitted data are accurate and complete, shall result in the application of the country-wide rate to the offending applicant. Consequently, the separate rate application must contain a signed, sworn certification by the senior official of the applicant firm that s/he understands this provision and will abide by it.

11. The Department must inquire of each NME Section A applicant whether, and the extent to which, it is dependent upon government subsidies. The Department's current separate

[6] In the absence of such spot verifications, there is little or no incentive for an NME applicant to provide accurate information to the Department.

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. It is inconsistent to presume that an NME company is under the control of the NME government yet simultaneously presume that an NME company operates its export activities in a "free market setting," entirely isolated from government intervention. Moreover, it is naive. Rather, receiving significant government subsidies surely constitutes government 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.

As noted previously, Shrimp Petitioners strongly believe that the best resolution to the problems identified as to the separate rates process is to discard that process altogether. However, if the Department persists in employing a separate rates process in NME investigations, it should, at a minimum, provide the procedural safeguards warranted above.

Issue 2: The Application of Combination Rates in NME Proceedings

A. The Department Should Apply Combination Rates for NME Exporters and Their Suppliers

Shrimp Petitioners agree with the Department's proposal to apply exporter-producer combination rates for all NME exporters,[7] which should be applied to both affiliated and unaffiliated suppliers. The current practice of applying a single exporter-specific cash deposit rate permits a non-producing exporter to export subject merchandise from any other supplier, even though those other suppliers may have much higher estimated dumping margins. In

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[7] Separate-Rates Practice, 69 Fed. Reg. at 56,190.

application, the current practice permits simple evasion of the Department's antidumping orders. Such a large loophole encourages easy evasion and substantially diminishes the agency's ability to vigorously enforce the statute. In its proposal for change, the Department readily acknowledged the huge gap created likely would, given the monetary incentive, substantially lessen the relief to which all petitioners are afforded under the statute, stating that "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."[8]

In practice, the current system encourages NME producers to rearrange distribution channels to exploit the loophole provided by current Department practice. For example, NME producers that did not receive a separate rate in the investigation can easily evade their higher margin by shipping through a mandatory respondent-reseller or an exporter that received a separate rate, whichever is lower. Even producers which may have been mandatory respondents who received their own relatively high dumping margins and mandatory respondents that failed verification or otherwise received adverse facts available can easily avoid the effect of those margins by the simple expedient of supplying another company which received a lower margin. Applying combination rates will end the ability of suppliers, whose data had not been used to determine the cash deposit rate, i.e., the estimated dumping margin, and who may have much higher estimated dumping margins (either the Section A rate or the NME country-wide rate), to ship through a lesser cash deposit rate and close the large loophole that currently encourages easy evasion of dumping liability.

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[8] Separate-Rates Practice, 69 Fed. Reg. at 56,189.

Also, applying combination rates by limiting the non-producing exporter's rate to producers which supplied the exporter during the investigation will produce fair and predictable results, as the NME exporter's calculated margin will be applied only to the entities which together formed the basis for that precise margin calculation (which becomes the cash deposit rate).[9] Currently, permitting all subject merchandise shipped through that non-producing exporter to receive the same cash deposit rate effectively severs the link between the cash deposit rate and suppliers' information upon which that precise rate was calculated.

Moreover, applying combination rates, as the Department correctly notes, will not prohibit the exporter from sourcing from new suppliers (suppliers which did not supply the exporter during the investigation), but effectively will limit the application of the cash deposit rate to producers which supplied the non-producing exporter during the investigation. Importantly, as many NME proceedings involve large numbers of exporters (e.g., shrimp, wooden bedroom furniture), the agency is forced to limit the number of NME exporters examined in an investigation or review.[10] Consequently, the problem of evasion described herein cannot be redressed in the review process, as not all investigated respondents necessarily will be reviewed. On the other hand, applying combination rates in the investigation will restrict the potential for easy evasion by NME producers that did not receive their own rate or a separate rate in the investigation. Further, as the combination rate could change in a subsequent review if

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9 If the exporter is itself a producer, the exporter's own cost structure will more likely impact its cash deposit rate.

10 U.S. Department of Commerce Internal Memorandum from E. Yang to J. Spetrini, Case No. A-570-893 (Feb. 23, 2004) ("Shrimp Respondent Selection Memorandum"); U.S. Department of Commerce Internal Memorandum from E. Yang to J. Spetrini, Case No. A-570-893 (Jan. 30, 2004) ("Furniture Respondent Selection Memorandum").

the exporter's sourcing of subject merchandise changed, this would encourage reviews to adjust for sourcing changes, and ensure that the margin would be calculated based on the sales and factor of production information of the actual suppliers of the subject merchandise.

The Department has the authority to apply combination rates in NME proceedings under 19 C.F.R. § 351.107 and currently applies combination rates to exclude an NME exporter from an order to the extent that the exporter sources from the same supplier(s) as in the original investigation and to limit the entities receiving a new shipper rate to those which supplied the new shipper.[11] By implementing this proposed change, the Department would be aligning its NME practice with its cash deposit practice for non-producing exporters pursuant to 19 C.F.R. § 351.107(b)(1).

Also, assuming a supplier was not examined in the investigation and did not supply a non-producing exporter for whom a combination rate was calculated, such a supplier should receive a separate rate only if that supplier demonstrated its entitlement to a separate rate in the investigation. Otherwise, that supplier should receive the country-wide cash deposit rate. See 351§ 351.107(b). Such a result reasonably reflects the Department's rebuttable presumption that all exporters are considered part of the government unless able to demonstrate the absence of *de jure* and *de facto* control by the government over their exporting activities and should be adopted by the Department.

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[11] Separate Rates Practice, 69 Fed. Reg. at 56,190.

Issue 3: Application of Rebuttable Presumption of Knowledge For Sales Made Through Third Country Resellers

Where NME producers sell merchandise to the United States through exporters located outside the NME country, i.e., third country resellers, the Department has a practice of determining which entity will be assigned the rate for subject merchandise.[12] The Department applies a knowledge test to determine the appropriate entity to which a rate will apply in this circumstance. If it can be demonstrated that the NME producer had knowledge when selling to the third country reseller that the merchandise was destined for the U.S. market, the NME producer is considered the exporter and the rate calculated will apply to the NME producer. Otherwise, the Department considers the exporter to be the third country reseller, investigates that third country reseller as the respondent and assigns it a rate.

The Department now is considering changing its policy and practice in this situation to eliminate the knowledge test by "instituting a rebuttable presumption that all NME producers shipping subject merchandise through third countries are aware that their goods are bound for the United States."[13] For the reasons discussed below, Shrimp Petitioners oppose the suggested change in practice.

A. The Department Should Not Apply A Rebuttable Presumption That Sales Made Through Third Country Resellers Are Destined For the United States

As an initial matter, rebuttable presumptions are rarely applied in antidumping proceedings (or in general agency practice) and for good reason. A rebuttable presumption forecloses information-gathering and examination of that information by the agency and shifts

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12 Separate-Rates Practice, 69 Fed. Reg. at 56,190.

13 Id.

the burden of producing information. Therefore, before invoking a rebuttable presumption, its application and consequences deserve heightened scrutiny. In NME cases, if the Department preemptively forecloses its ability to investigate a critical aspect of determining dumping -- whether sales reported by an NME producer are, in fact, U.S. sales -- it would be abdicating its investigative authority in a manner contrary to the statute. The suggested presumption substantially disadvantages petitioning industries, as petitioners cannot directly obtain discovery of the foreign entities and must rely on the agency to fulfill the investigative role required by the statute and regulations. Moreover, a rebuttable presumption inappropriately shifts the burden to petitioning industries, which would be required to find evidence to rebut the presumption, when the burden should rest with the NME producer and/or third country reseller to provide an accurate accounting of its sales to the United States. Those parties, not petitioner, possess the information relevant to the Department's analysis.

Unintended consequences likely would result in applying the rebuttable presumption envisioned. Certainly, it can be expected that some NME producers will attempt to "game" the outcome of a proceeding by reporting whichever sales they chose as U.S. sales to manipulate the margin calculation, confidently shielded by a "rebuttable presumption" that the U.S. sales are reported correctly. The nonsensical evolution of the Department's separate rates practice should prove a cautionary warning of the unintended consequences that flow when such a blunt and disadvantageous evidentiary measure is used in the context of an administrative agency proceeding.

Importantly, an NME producer may not always know, at the time of sale, whether its merchandise is destined for the U.S. market. Indeed, in many, if not most, cases an NME

producer may be selling merchandise to more than one export market. Yet, under the agency's proposal, the NME producer would not have any affirmative obligation to determine which of its sales to a third country reseller were, in fact, destined to the U.S. market during the relevant period. In such a situation, the NME producer could report any or all export sales it choses as U.S. export sales. The Department (and of course petitioners who must rely on the agency to investigate foreign companies) would have no way of ensuring that the volume and value of U.S. sales reported by the NME producer are, in fact, solely U.S. sales and not inclusive of sales to other third country markets like Japan or the European Union. Only resort to the books and records of the third country reseller involved would resolve the issue. However, under the proposed change, the third country reseller would no longer be an integral part of the proceeding and thus those critical records could be unavailable to the agency.

In the situation described herein, the rebuttable presumption would, in effect, prevent the agency from examining the U.S. sales dataset reported by the NME producer in any meaningful way to ensure that the correct sales are being reported and the NME producer's margin is being calculated based on U.S. sales only, as required by the statute. 19 U.S.C. § 1677a (a) and (b). It also would effectively and improperly shift the burden of determining the correct U.S. sales dataset to petitioners. While evidence conceivably could be gleaned to rebut the presumption, in practice this is highly unlikely, given the inherent difficulties in unearthing such evidence. As the Department is aware, it is virtually impossible for petitioners to uncover information outside the confines of the proceeding as to whether a particular NME producer had sales to other export markets during the relevant period. This information is always proprietary in nature. Further, as publicly available U.S. import statistics are aggregate in nature, they generally are of no use in

assessing whether a particular NME producer shipped merchandise to third country resellers that was, in turn, shipped to export markets other than the United States.[14] Thus, the burden of producing rebutting evidence cannot fairly be shifted to petitioners. Rather, it is the respondent NME producer and/or the reseller that possesses this critical information and the burden, consequently, fairly rests with the respondent to produce the information and with the agency, in its investigative role, to verify the accuracy thereof.

The Department indicates that it is attempting to reduce its burden in NME cases due to the complexities and administrative difficulties encountered in examining NME producers and their affiliation to third country resellers.[15] Yet, these difficulties are not so different from those encountered in the market economy context. In both contexts, complex affiliations are examined and reseller issues arise. Reducing the administrative burden (i.e., streamlining the process) is contrary to the statute when the affect prevents investigation of a critical aspect of dumping – the U.S. sales dataset. Invoking a rebuttable presumption will thwart the agency's statutory mandate and prohibit petitioners from obtaining and analyzing critical information in the prosecution of the case. The statute and due process considerations cannot be cast aside simply to ease an administrative burden.

Shrimp Petitioners urge the Department not to employ the rebuttable presumption under consideration based on the legitimate and serious concerns described above. It is a blunt instrument and once engaged, will prove difficult, if not impossible, to terminate. Rather, it may

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[14] It would be a rare, if non-existent, case indeed where the merchandise is manufactured by a single NME producer or only a handful of producers. Yet only in such a circumstance would aggregate U.S. import statistics prove meaningful.

[15] Separate-Rates Practice, 69 Fed. Reg. at 56,190.

be more appropriate for the agency to require at the outset of a proceeding that the third country reseller and the NME producer provide all relevant information about U.S. sales, which would be subject to verification. In that case, if the NME producer affirmatively claimed that all (or most) of its sales to the third country reseller were U.S. sales, this claim would not be taken on its face as true and accurate, but would be verified. In this way, the Department could have confidence that the reported U.S. sales dataset is comprised of U.S. sales and not sales to other third country markets. If, on the other hand, the NME producer indicated that it does not know the destination of its export sales, then the agency could also examine the third country reseller. No matter how the agency proceeds, however, it should act in a manner that ensures with a high degree of accuracy that only U.S. sales are included in the U.S. sales dataset and in a manner that does not shift the burden of determining the accuracy of the U.S. sales dataset to petitioning industries.

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

Respectfully submitted,

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cc: Lawrence Norton, Room 2837
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