TELEPHONE (202) 785-4185
TELECOPIERS
(202) 466-1286/87/88

LAW OFFICES
STEWART AND STEWART
2100 M STREET, N.W.
WASHINGTON, D.C. 20037

E-MAIL
GENERAL@STEWARTLAW.COM
WWW.STEWARTLAW.COM

October 15, 2004

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

Re: Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 56,188 (Sept. 20, 2004); Public Comments, Stewart and Stewart.

Dear Secretary Jochum,

We are filing these comments in response to the Federal Register Notice identified in the caption. Our firm practices before the Commerce Department and frequently represents American producers in antidumping cases, including cases involving non-market economy countries ("NME"s).

Stewart and Stewart strongly supports the Commerce Department's efforts to increase the rigor of its separate rate analysis and to close loopholes that have allowed some respondents to reduce the antidumping duties they pay on subject merchandise without demonstrating their entitlement to such a reduction. We consider the three proposals identified by Commerce in the Appendix to its FR Notice.

I. Separate Rate Application

Commerce proposes to use an application form instead of a questionnaire for NME respondents seeking a separate rate. *Separate-Rates Practice in Antidumping Proceedings*

Involving Non-Market Economy Countries 69, Fed. Reg. at 56,189. We are mindful that the present approach has proven to be burdensome to the Department in cases involving large numbers of foreign producers. However, it is important for the Department's assessment of its treatment of non-mandatory respondents that it keep in mind that following an original investigation that results in the imposition of an order, any producer or exporter has the opportunity to request a review of its imports and may demonstrate that it has not sold them at less than fair value.

The use of a form, of course, suggests a less rigorous, *pro forma*, approach to review of such request, rather than a more rigorous one. If the Department does go to an application approach, it should ensure that applications are rigorously examined. The Department should also design an application form that will capture the detailed and specific information that will enable it to make an informed decision about separate rate status. The Department should solicit comment on its application form design and also be willing to enhance and improve the form as it gains experience in its use.

In our June comments on separate rates,[4] we recommended that the Department obtain the following additional information from respondents: (1) a list of recently hired and dismissed employees including documentation on dismissals, (2) an identification of any unions to which a respondent employees belong, and a (3) a description of the respondent's access to capital. We recommend that an application form obtain this information.

[4] Stewart and Stewart Comments at 5-6 (6/2/2004) (filed in response to Commerce's May 3, 2004 notice soliciting comments on this subject (69 Fed. Reg. 241,119))

As we also suggested in our comments,[5] we continue to believe that Commerce should obtain complete questionnaire responses, including factor and sales information, from respondents seeking separate rates. While the Department may not have the resources to analyze sales data, domestic parties to the proceeding who may have particular concerns about specific foreign producers, would be able to analyze the sales data and provide information to the Department that would enhance its separate rate analysis. Thus, even if Commerce adopts a form approach for Section A, it should also require separate rate applicants to complete its standard Section C and D questionnaires.

As we also recommended, we urge the Department to adopt as a policy the practice of selecting one or more of the respondents seeking separate rate status as mandatory respondents. If a respondent so selected does not demonstrate its entitlement to a separate rate and provide a full questionnaire response, then all non-mandatory applicants for a separate rate should be denied the combination rate. By adopting such a policy, the department will put all such separate rate seekers on notice that they may be required to demonstrate more fully their entitlement to a separate rate. Given such notice, the Department may reasonably rely under its 19 U.S.C. 1677f-1 authority on its experience with one such non-mandatory respondent as representative of all applicants for a separate rate. Again, because all such applicants can demonstrate that they are not dumping in an administrative review, such a policy is entirely reasonable.

II. **Exporter-Producer Combination Rates**

We support Commerce's proposal to change its practice from assigning exporter-specific separate rates to assigning producer-exporter combination rates. The Department

[5] *Id.* at 2.

must address this change both for exporters filing only a Section A response who seek to qualify for the "combination" rate[6] and for exporters whose imports are actually reviewed by Commerce. We consider the issues for the two separately.

A. **Exporters Seeking the Section A Combined Rate**

Commerce should assign the combination rate to exporters filing only a Section A response only if the producers whose products they exported have obtained individual rates. Because both the exporters and the producers whose products they export have demonstrated their independence, it is reasonable under 19 U.S.C. § 1677f-1(c)(2) for Commerce to assign a rate based on the sample consisting of the exports that it has reviewed, the combination rate. Such a rate is based on a sample of exports that are representative of the producer/exporter combination seeking a separate rate.

If the producer of some or all of the products exported by an exporter has not demonstrated its entitlement to a separate rate, the exporter should not be entitled to any rate other than the country-wide rate for its exports of products made by such a producer or producers. Because Commerce presumes that the products of a producer that is considered to be part of the country-wide enterprise are not products created under market forces, it would not be reasonable for Commerce to presume that any exporter can transform such non-market products into market products.

B. **Reviewed Exports**

When the Department reviews the U.S. sales of an NME exporter, the results should be limited to the producer/exporter combination or combinations reviewed. This rate should not be changed unless the exporter requests a subsequent review. For the same reasons that

[6] *I.e.*, the rate calculated as the average of all actual non-zero, non-*de minimis* rates.

Commerce does not alter the all other rate, the rate assigned to the producer/exporter should not change unless one or more of the producers is assigned the NME country-wide rate as the result of another review. If that happens, then the exporter's exports of that producer's products should be assigned the country-wide rate.

The exporter's subsequent exports of any other producer's products should be addressed as described above for Exporters Seeking a Separate Rate: (1) if the exporter has qualified for its own rate and exports unreviewed goods from a producer that is also so entitled, then the combination rate should be applied, and (2) if the exporter has qualified for its own rate and exports unreviewed goods from a producer that is not entitled to its own rate, then the NME country rate should be applied.

III. **Third Country Resellers**

The Department states its intention to adopt a rebuttable presumption that NME producers shipping subject merchandise through third countries are aware that their goods are bound for the U.S.[7] It also notes that in its experience "the relationship between Chinese producers, in particular, and resellers outside China can be complex and difficult to assess given the limited resources of the Department."[8] Finally, the Department requests comments as to whether there are grounds for such a presumption.[9]

Because the presumption is rebuttable, the Department's experience and the fact that the exports in question did, in fact, come to the U.S., are sufficient reasons for it to adopt the presumption. The Department regularly employs presumptions about respondent behavior so

[7] 69 Fed. Reg. at 56,190.
[8] *Id.*
[9] *Id.*

as to reduce the time and resources needed to perform its investigations and reviews.[10] Because such presumptions are rebuttable, the respondent has the opportunity to correct any mistaken assumptions during the course of the proceedings. If the Department's experience with a particular country or countries is like its experience with China, it may reasonably employ such a presumption.

Regardless of the approach it takes to third country resellers, we strongly urge the Department to adopt its proposal to change its practice from assigning exporter-specific rates to assigning producer-exporter combination rates. Thank you for your consideration of these comments.

Respectfully submitted,

STEWART AND STEWART

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Terence P. Stewart
William A. Fennell

[10] Throughout a proceeding, the Department makes a series of presumptions which may be rebutted. Under its affiliated party sales test for ordinary course of trade sales, the Department presumes that sales to an affiliated party at prices that fall outside of a band of prices to non-affiliated parties (98% - 102%) are not in the ordinary course of trade. *See Antidumping proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186 (Dep't Commerce 2002). The Department presumes that reported sales prices in both markets should not be adjusted n a manner favorable to the respondent (upwards for EP and CEP prices and downwards for normal value) unless the respondent demonstrates its entitlement to an adjustment. *See* 19 U.S.C. 351.401(b). The Department also presumes that prices should not be adjusted for quantity differences unless quantity discounts have been granted on 20% or more of sales or the respondent demonstrates that discounts represent savings specifically attributable to the production of different quantities. *See* 19 U.S.C. 351.409(b)