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January 24, 2005

PUBLIC DOCUMENT

DELIVERY BY HAND

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

Attn: Messrs. Lawrence Norton and Anthony Hill

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

Dear Mr. Secretary:

On behalf of Collier Shannon Scott, PLLC, we submit these comments in response to the December 28, 2004 notice seeking comments on the Department's announced change in practice and request for comments concerning proposed revisions to its separate-rates practice in antidumping proceedings involving non-market-economy ("NME") countries. See Separate-Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 77,722 (Dec. 28, 2004) ("Request for Comments").

I. INTRODUCTION

In its December 28, 2004 Request for Comments, the Department announced that it has provisionally decided to adopt an application process for evaluating separate-rate requests by

non-investigated firms and is considering instituting combination rates (also known as “chain” or “channel” rates) for all firms receiving a separate rate in NME cases. In conjunction with this announcement, the Department solicited comments concerning its draft separate-rates application and on the use of combination rates for all producer-exporter combinations in NME cases. Specifically, the Department solicited comments on whether the fields in its draft application and the supporting documents it requires are sufficient for a respondent to demonstrate its eligibility for a separate rate without being unnecessarily burdensome for the Department or for importers. Additionally, the Department solicited comments addressing how combination rates might work in practice, on whether there are obstacles to its effective implementation, and what the implications of combination rates might be for the Department or for respondents. We address these topics in turn below.

II. DRAFT SEPARATE-RATES APPLICATION

The draft application made available for review provides a sound vehicle for effectuating the Department’s expressed desire of streamlining the separate-rates qualifying process.¹ We believe that the draft application should be amended to reflect two additions. Consistent with administrative clarity, the Department should revise the draft application to notify applicants expressly that the Department retains the right to require additional information concerning the representations made. The Department also should amend the application to state specifically that the applicant’s information and representations remain subject to verification. Both

¹ As discussed in our June 2, 2004 and October 15, 2004 comments, we continue to submit that (a) the Department is under no legal obligation to award separate rates to NME respondents who are not specifically investigated and verified and (b) the Department should consider revising its practice to award separate rates only to entities whose factual and legal submissions are verified.

additions would be consistent with the Department's intent stated in the Request for Comments and would serve to provide clear and actual notice to applicants. See Request for Comments, 69 Fed. Reg. at 77,724 (inter alia, "While the Department reserves the right to issue supplemental questionnaires and verify applicants . . .").

III. USE OF COMBINATION RATES FOR ALL NME RESPONDENTS THAT RECEIVE SEPARATE RATES

We strongly support the Department's use of combination rates in NME cases for the subject merchandise of those respondents that have qualified for separate rates. In this regard, we refer to and adopt by reference the points presented in our October 15, 2004 submission. As noted in the Department's Request for Comments, this revision to the Department's NME practice would result in rates being assigned that reflect the actual production experience or experiences of the exporters and producers that have been given a separate rate. We respectfully submit that the concerns that parties opposed to this change identified in the Department's Request for Comments are unfounded and should not deter the Department from going forward with this proposed change.

The Department's Request for Comments specifically identified four arguments by parties opposed to the use of combination rates when separate rates have been granted. First is the contention that combination rates would place a difficult burden on the Department, U.S. Customs and Border Protection ("Customs"), and respondents. It is unclear how combination rates will impose a difficult burden, however, when such rates have been and are currently being used as a routine matter in other, non-NME proceedings. Thus, the Department and Customs already have experience with the administrative processes required to use combination rates and can draw upon this knowledge in order to use combination rates in NME cases.

Second, opposing parties assert that the use of combination rates in NME proceedings is contrary to the Department's desire to streamline the provisionally adopted separate-rates application process. Contrary to that suggestion, the use of combination rates in NME proceedings is consistent with a desire for administrative efficiency generally and with the introduction of a separate-rates questionnaire specifically. The use of combination rates for respondents assigned separate rates in NME proceedings would simplify the current administrative scheme that uses combination rates in some circumstances, while using exporter-only rates in other circumstances. In this way, revising the Department's practice to use only combination rates would facilitate the work done by Customs.

Third, parties opposing combination rates also argue that the use of combination rates would be regressive, particularly when in many industries it is common for exporters to source their merchandise from whichever producer is currently offering the lowest price. This argument, in fact, highlights the need for and propriety of combination rates. In contrast with dumping rates that are specific only to an exporter, combination rates will reflect the dumping margin for the actual entities that have been investigated and limit the benefit of separate rates to the subject merchandise of the producer and exporter in each instance that have qualified for a separate rate.

Finally, opponents of combination rates urge that whatever change in the dumping margin might result from a shift in supplier will be accounted for in the next administrative review. This argument, however, fails to provide any reason not to apply combination rates from the outset in an original investigation for purposes of setting cash deposits. Dumping margins typically will be adjusted in administrative reviews whether the Department uses combination

rates or non-combination rates, but, in the meantime, by employing combination rates to calculate cash deposits for the subject merchandise of each producer/exporter awarded a separate rate, the Department will achieve greater precision in estimating antidumping liability and will avoid, or least reduce the chances of, the sort of manipulation that can readily occur with “funneling” by high-margin exporters through low-margin exporters, as the Department has highlighted in its Request for Comments, 69 Fed. Reg. at 77,725.

With reference to the danger of “funneling,” the Department also described the reporting requirements and methodology to be used in conjunction with determination of a combination rate for an exporter using multiple producers or suppliers. Request for Comments, 69 Fed. Reg. at 77,725. Specifically, the Department would require an exporter to identify all suppliers whose merchandise was exported to the United States during the period of investigation. Only suppliers whose merchandise was exported through the relevant exporter during the POI would be eligible for coverage by that exporter’s combination rate. The combination rate would be calculated based upon the exporter’s U.S. sales and on its suppliers’ weighted factors of production. This approach is administratively reasonable and in accord with the antidumping duty law.

IV. A SINGLE, WEIGHTED-AVERAGE DUMPING MARGIN SHOULD BE ASSIGNED TO A PRODUCER’S SUBJECT MERCHANDISE IN CASES IN WHICH MIDDLEMAN DUMPING IS FOUND

In its request for comments, while principally addressing issues concerning separate rates and combination rates in NME cases, the Department also stated, “The Department is not ruling out additional changes to its separate rates practice, and will consider changes to its policy and practice in other areas.” Request for Comments, 69 Fed. Reg. at 77,722. Thereafter in its

request for comments, the Department cited middleman dumping as one occasion when the Department's current policy generally calls for combination rates. In the Department's words,

When a producer/exporter sells to an unaffiliated middleman with the knowledge of the ultimate destination of the merchandise, and that middleman subsequently sells merchandise to the United States at less than fair value, the Department will calculate a combination antidumping duty rate for the producer/exporter and middleman in many cases.

Request for Comments, 69 Fed. Reg. at 77,725.

It is appropriate that the Department revisit in the context of this request for comments the subject of combination rates in the situation where middleman dumping is present. The Department has never in specific and exact terms previously addressed in a rulemaking how antidumping duty rates should be set when middleman dumping is established.² Instead, the catalyst for the Department's current middleman policy was a pair of parallel antidumping duty investigations in the late 1990s with respect to stainless steel sheet and strip in coils and stainless steel plate in coils from Taiwan.

These proceedings gave rise to a consolidated decision in Tung Mung Development Co., Ltd. v. United States, 354 F.3d 1371 (Fed. Cir. 2004) ("Tung Mung"). During the two original investigations and then on remands during the appeals, the Department went between employing combination rates and single weighted-average rates with middleman dumping. At the end of this process, in which it was upheld by the Federal Circuit, the Department eventually opted for

² The Department, for instance, said nothing explicitly about middleman dumping rates in its rulemaking that was conducted in implementation of the Uruguay Round Agreements Act. See Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,302-05 (May 19, 1997) ("Preamble") (dealing with the setting of cash deposit rates under 19 C.F.R. § 351.107(b) in several other circumstances apart from middleman dumping).

combination rates, unless the producer was aware or should have been aware of the likelihood of dumping by its middleman, in which event the Department will apply a single weighted-average dumping rate to all of the producer's merchandise, both that sold to the United States through the middleman and that sold to the United States through any other channel.³ In this way, the Department explained, a producer will not be penalized for middleman dumping for which the producer has not been responsible and either will be encouraged to find a middleman that will not dump or will itself export directly to the United States without dumping. See Tung Mung, 354 F.3d at 1377-78.

In arriving at this outcome in the course of the litigation in Tung Mung, the Department expressed its willingness to reexamine this issue in the future. See Tung Mung, 354 F.3d at 1381.⁴ For the reasons next set forth, the Department should supersede the preference voiced in Tung Mung for combination rates and instead utilize single weighted-average rates when middleman dumping is involved.

1. The result of the Department's "knowledge" test as now structured is to place a well-nigh impossible burden on petitioners to demonstrate that the foreign producer knew or had

³ Especially given that this test was formulated by the Department only on appeal, neither the parties nor the Department considered whether any producer had actual or imputed knowledge of the likelihood or not of middleman dumping during the original investigations. In other words, during the original investigations themselves the Department had not yet created this "knowledge" test, and so the issue logically was not explored and the administrative record was not developed with respect to what any producer actually or impliedly knew or not of its middleman's intentions to dump. The Federal Circuit's opinion does not address this point.

⁴ Reconsideration of this matter in the context of a rulemaking is also in keeping with the understanding and encouragement of Congress that regulations on middleman dumping should be issued. See S. Rep. No. 249, 96th Cong., 1st Sess. 94 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 75 (1979).

reason to know at the time of sale that its middleman/exporter likely would engage in middleman dumping in its sale of the producer's subject merchandise to the United States. In the litigation leading to Tung Mung, the Department was unable to say with any helpful clarity what sort of evidence could be obtained and would be sufficient to satisfy its new "knowledge" test. Indeed, as a practical matter, petitioners and the Department are not privy to and are not in a position to ascertain otherwise whether a foreign producer would know or have reason to know its middleman might engage in middleman dumping of the producer's subject merchandise. Certainly a foreign producer and its middleman, the parties in possession and control of such sensitive commercial information, would have no incentive to shed any light on this question and invite an inquiry into middleman dumping as long as the burden of proof remains on petitioners and the Department.

2. The impetus for the Department's "knowledge" test appears to be concern that a foreign producer should not be punished for middleman dumping of which the producer is presumed to be unaware and over which the producer is presumed to have no influence. Put differently, the "knowledge" test reflects a construct that the antidumping law should hold accountable only the party responsible for the dumping and assumes that the producer is not responsible for dumping by its middleman absent contrary affirmative evidence that will most likely never be obtained by the Department. The antidumping law, however, operates against subject merchandise that has been dumped in the United States, not against the party or parties abroad that have caused the dumping. Jurisdiction in rem over the entered goods is the basis for the antidumping statute, not in personam jurisdiction that does not exist over the producer/exporter abroad. Moreover, it is the importer of record, not the foreign producer or

exporter, that is legally liable for the payment of antidumping duties, and it is for this reason that reimbursement by the foreign producer or exporter under 19 C.F.R. § 351.402(f) triggers additional antidumping duties corresponding to the amount of reimbursement. The concept of being solicitous of the foreign producer as to middleman dumping, therefore, is misplaced, and the “knowledge” test devised by the Department in the Tung Mung litigation is not warranted at all.⁵

3. When the Department’s basic stance on the assignment of dumping (and countervail) rates is considered generally, the picture that emerges is that – with the exception of rates where middleman dumping is involved – the Department historically has been guided in its choice of either combination rates or single weighted-average rates by which type of rate will

⁵ Two other observations should be made in this regard. First, when middleman dumping is not at issue in any given case, the Department computes dumping margins for the given producer or exporter that is selling into the United States. In that scenario, the amount of any dumping calculated is clearly attributable to that producer or exporter alone. Focused consideration or discussion of the matter of the statute’s jurisdictional base accordingly does not come into play, and so this practice should not be cited as evidence of a policy that the Department always attributes dumping only to the party that is shown to have been dumping. Second, in fact, the Department does not always attribute dumping only to the party that is shown to have been dumping. For example, when the Department computes dumping in the United States by a foreign producer A through three exporters (B, C, and D), producer A’s subject merchandise upon entry is assigned a single weighted-average dumping margin that applies to producer A’s subject merchandise, no matter through which exporter a particular shipment is made. The Department does so in the interest of preventing potential evasion of antidumping duties and manipulation from coming to pass. See Preamble, 62 Fed. Reg. at 27,303. If individual producer-exporter combination rates were assigned (for example, producer A-exporter B at 35 percent ad valorem, producer A-exporter C at 10 percent ad valorem, and producer A-exporter D at 0 percent ad valorem), it is evident that the temptation for producer A and its exporters B and C would be to send everything through exporter D. It is also apparent that, by assigning producer A’s subject merchandise a single weighted-average rate (for example, 23 percent ad valorem), that possibility is foreclosed and both producer A and exporter D are adversely affected by that rate even though producer A was found not to have dumped when it exported through exporter D.

better preclude wrongful avoidance of antidumping/countervailing duties in the particular factual setting of the case at hand. See Preamble, 62 Fed. Reg. at 27,303-305. The Department's preference for combination rates for the subject merchandise of producers/exporters assigned separate rates in NME cases, for example, appears to be predicated on this thinking. See Request for Comments, 69 Fed. Reg. at 77,725. This approach is both sensible and in consonance with the statute's focus on the subject merchandise, not on the respondents abroad, and is also consistent with the Department's responsibility and authority to prevent parties from evading and manipulating the antidumping and countervailing duty laws. See, e.g., Mitsubishi Elec. Corp. v. United States, 700 F. Supp. 538, 555 (CIT 1988), aff'd, 898 F.2d 1577 (Fed. Cir. 1990); and Sanyo Elec. Co., Ltd. v. United States, 86 F. Supp. 2d 1232, 1242-43, and 1243 n.14 (CIT 1999).

4. The danger of manipulation and avoidance of antidumping duties is considerable where middleman dumping is concerned and is exacerbated, rather than lessened, by combination rates. Middleman dumping is easy to mask and rarely investigated or scrutinized by the Department.⁶ A foreign producer and an unaffiliated exporter so inclined, for instance, can readily enough agree to have the foreign producer sell to the exporter without dumping its subject merchandise for shipment to the United States. Under those circumstances, the Department normally will investigate only the foreign producer for dumping, because the producer first knew or had reason to know its subject merchandise was to be shipped by the exporter to the United States. In this scenario, it would be very easy for the exporter to dump the foreign producer's subject merchandise in return for off-invoice reimbursement from the

⁶ There seem to have been only four middleman-dumping cases that have gone to term since the Department became the administering authority at the start of 1980.

