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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. 24119 (May 3, 2004)

Dear Mr. Jochum:

I. INTRODUCTION

The American Furniture Manufacturers Committee for Legal Trade (“Committee for Legal Trade” or “the Committee”) submits these comments regarding the Department’s separate rates practice in antidumping investigations involving non-market economy (“NME”) countries.¹ As the Department recognized in the Federal Register notice requesting comments, in recent cases increasingly large numbers of exporters not selected for individual investigation -- “non-

¹ Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 24119 (May 3, 2004) (“Request For Separate Rate Comments”). The Department’s notice established June 1, 2004 as the deadline for comments. Because of a fire at the Department on June 1, however, comments could not be filed on that day. This document was filed with the Department on June 2, 2004.

mandatory respondents”-- have requested separate rate treatment on the basis of the submission of a Section A questionnaire response. In the pending investigation of wooden bedroom furniture from the People’s Republic of China (“PRC”), for example, over 120 non-mandatory respondents have requested a separate rate. It is critical, therefore, that the Department’s separate rates policy in NME investigations is consistent with the NME provisions of the statute.

In addition, the Department’s separate rates analysis has become perfunctory and virtually automatic, as both mandatory and non-mandatory respondents routinely obtain a separate rate by submitting standardized responses. The Department’s analysis of this extremely important, threshold issue is generally to “rubber stamp” information submitted by a respondent. We are unaware of a single case in which the Department denied a separate rate based on a finding of *de jure* or *de facto* government control.² The Department’s separate rates “test” has become meaningless.

Moreover, although the statute does not require the Department to assign a separate rate to non-mandatory respondents in NME investigations, the Department calculates and assigns an all others rate to non-mandatory respondents that respond to Section A of the questionnaire and demonstrate that they are not controlled by the government in law or in fact. Request For Separate Rates Comments, 69 Fed. Reg. at 24120. This policy is derived from the statutory requirement to calculate an all others rate that applies to non-mandatory respondents in market economy investigations and was designed to balance concerns of equity and fairness for non-

² There are isolated instances in which the Department could not verify information submitted in response to Section A, and the Department denied a separate rate on that basis. There are, however, no examples available of circumstances under which the Department has found *de facto* government control.

mandatory respondents with the strong presumption that all NME exporters and producers are controlled by the government.

To rectify the problems with its separate rate analysis, the Department should (1) require non-mandatory respondents to submit full questionnaire responses that demonstrate the absence of government control, (2) conduct random verifications of non-mandatory respondents to ensure honest, meaningful questionnaire responses, (3) require respondents to submit all applicable national, provincial and local laws on the record so that the Department can analyze all levels of government control in its *de jure* and *de facto* analysis, and (4) consider the extent to which a respondent is dependent on government subsidies in its *de facto* control analysis. Furthermore, producers in the PRC that are affiliated with a company in Hong Kong, or any other market economy, should not automatically receive a separate rate. Finally, the Department should clarify that it will not assign a separate rate to companies that fail to respond, or that file an untimely response, to the Department's mini Section A questionnaire.

The Department's current practice has veered badly off course in recent years and is no longer consistent with its original purposes. The Department should 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.

II. THE DEPARTMENT'S CURRENT SEPARATE RATE ANALYSIS IS FLAWED, INADEQUATE, AND CONTRARY TO THE STATUTE

A. The Department's Section A Questionnaire Has Become A Mere Formality

In NME cases, the Department presumes that all exporters and producers are under the control of the government until they "affirmatively demonstrate" the absence of government

control. Coalition for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States, 44 F. Supp. 2d 229, 248 (Ct. Int'l Trade 1999) ("Brake Drums and Rotors"); Hand Trucks and Certain Parts Thereof From the People's Republic of China, 69 Fed. Reg. 29509, 29511 (May 24, 2004) (prelim.) ("Hand Trucks"). To be consistent with the Department's statutory presumption that all companies within an NME are part of the NME entity the analysis of whether there is government control must not be a meaningless formality. The Department's current test focuses on whether there is *de jure* or *de facto* control of the company by the government.³ The current "test" to establish the absence of government control, however, is no test at all, because the Department has granted virtually all such separate rate requests since instituting the policy.

In theory, under the Department's current practice, mandatory and non-mandatory respondents are required to demonstrate the absence of government control in their response to the Department's Section A questionnaire. In practice, respondents frequently provide responses that are simply copied from other responses on file at the Department, including identical exhibits in support of their request. For example, in the ongoing investigation of wooden bedroom furniture from the PRC, in response to a question about losses on export sales, Dongguan Great Reputation Furniture Co. Ltd. refers to a different company:

As demonstrated in its Business License attached as Exhibit 3, Long Range Furniture was incorporated in April, 2003.

³ Sparklers from the People's Republic of China, 56 Fed. Reg. 20,588 (May 6, 1991), and amplified by Silicon Carbide from the People's Republic of China, 59 Fed. Reg. 22,585, 22,586-87 (May 2, 1994) ("Silicon Carbide").

As a new company, Great Reputation Furniture suffered losses in 2003. The losses were reflected in its income statements as a reduction of the owner's equity. Long Range Furniture did not obtain or attempt to obtain any loans from any bank to finance the losses.

See Section A Response (Public Version) of Dongguan Great Reputation Furniture Co., Ltd., dated March 1, 2004, Question 2.0, at A-11 (emphasis added) ("Great Reputation Section A").

This obvious typo indicates that answers to Section A are often cut and pasted from one company to another because the answer replicates verbatim the answer provided to the question in the Section A response of Long Range Furniture Co., Ltd., except for the insertion of the wrong name.⁴ See Section A Response (Public Version) of Long Range Furniture Co., Ltd., dated March 1, 2004 at A-11 ("Long Range Section A"). Further comparison of these responses reveals that many of the answers are identical, but for the name of the respondent. Compare Great Reputation Section A, at A-4 through A-11 and Long Range Section A, at A-4 through A-11. Non-mandatory respondents submit "form" responses because the Department does not closely scrutinize or verify their responses. The Department must stop awarding a separate rates based on standardized responses that purport to be "affirmative" demonstrations of the absence of government control.

⁴ Both Great Reputation and Long Range are represented by the same law firm. This law firm represents several of the non-mandatory respondents in the wooden bedroom furniture investigation. A comparison of the responses of the companies it represents demonstrates that the answers provided are standardized. For a list of companies represented by Hunton & Williams, see the APO service list for the investigation available at <http://web.ita.doc.gov/ia/webapotrack.nsf/4773e69949fcb53c852569df00718b70/cd1a6cc9106751cf85256e9f00638fc5!OpenDocument>.

In addition, virtually all of the non-mandatory respondents in the wooden bedroom furniture investigation provide the same laws of the PRC in response to Question 2.d. of the Department's questionnaire, which requests a copy of any legislation or formal enactments that centralize or decentralize control of the export activities of the company. In fact, to save paper, counsel for the companies submitted one set of these documents to apply to all of the non-mandatory respondents that the firm is representing in the investigation. See, e.g., Great Reputation Section A, at Exhibit 2. Thus, the Department's investigation of *de jure* control has become meaningless.

In order to encourage respondents to provide meaningful, honest questionnaire responses, the Department should verify the responses of some non-mandatory respondents. Although this would require additional administrative resources, it is necessary to ensure the submission of accurate separate rate information. As explained above, currently non-mandatory respondents submit "form" responses and yet receive a separate rate from the Department. With a random verification system non-mandatory respondents would not know in advance whether their responses would be verified. Because they would be required to be available for verification, all non-mandatory respondents would have an added incentive to file complete, verifiable questionnaire responses.

B. The Statute Requires The Department To Consider Government Control At Local And Provincial Levels

As the Court of International Trade recently stated, 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). That case involved a new shipper review where the Department determined that the parent company of the subject producer – a “collectively owned enterprise” that was “owned and controlled by the Pancajun village committee” – was not *de jure* or *de facto* controlled by the PRC government. Slip Op. 04-31, at 3-7.

On appeal, the Court remanded to the Department with directions to evaluate and analyze the applicable Organic Law of the Village Committee of the PRC, which was not provided to the Department, to determine if *de jure* or *de facto* control existed. Id. at 18. The Court found that the Department had not considered the village committee law in prior proceedings and that the investigation of other laws pertaining to enterprises owned by the whole people “does not foreclose necessary inquiry as to a different kind {of Chinese people’s business}, not yet considered by the agency *de jure*.” Id. at 14. Thus, the Court could not “conclude that the ITA’s refusal to even look at the PRC law that may well govern the kind of enterprise under review for the first time herein was in accordance with the law governing this case.” Id. at 14-15. Moreover, the Court also concluded that a searching *de facto* analysis was required. Id. at 18. The Court, however, stated that “without the content of that law and the ITA’s analysis of the meaning thereof on the record herein” it was unable to affirm the Department’s reasoning that *de facto* control was lacking. Id.

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 all of the 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.

C. In Its *De Facto* Control Analysis, The Department Should Consider The Extent To Which The Respondent Is 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. In its recent notice requesting comments, the Department flatly states that NME government control over the economy is irrelevant to its separate rates analysis:

The Department's separate-rates test is not concerned, in general, with macroeconomic border-type controls (*e.g.*, export licenses, quotas, and minimum export prices), particularly if these controls are imposed to prevent the dumping of merchandise in the United States. Rather, the test focuses on controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level.

See Request For Separate Rate Comments, 69 Fed. Reg. at 24120. 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. 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. The Jinhua municipal government of Zhejiang province announced in 2003 that it "will continue its consistent policies of encouraging and supporting export expansion." It offered incentives including a reward of RMB 0.03 – 0.05

Yuan for every US \$1 worth of export.⁵ This reward is increased at the county level by the Wuyi County government, which offers RMB 0.04 – 0.08 Yuan for every US \$1 worth of export.⁶ In addition, the Jinhua municipal government will grant annual rewards of up to RMB 30,000 Yuan to companies with over US \$100,000 in exports.⁷ Similarly, a news article reports that the Qingdao municipal government of Shandong province will release export promotion funds ahead of the original schedule to expedite the development of local export-oriented industries and to support exporting companies in the attendance of international trade shows, the achievement of international standards for exported products, and the participation in antidumping investigations by foreign authorities.⁸

Various export subsidies have also been adopted by local governments in the PRC under the “Western Region Development” program initiated by the central government during the Ninth Five-Year Plan. For example, the Gansu provincial government has adopted the “Preferential Policy To Implement The Western Regional Development Program.”⁹ Logically, if the receipt of subsidies is contingent upon exports, this would influence the NME exporter’s decision-making process.

⁵ See website of Jinhua Municipal Government at <http://www.jinhua.gov.cn/0706/5803.htm>.

⁶ See website of Zhejiang Investment Invitation Net at <http://www.invest.zj.com/policy/jinhua/100994.html>.

⁷ See *supra*, note 5

⁸ See website of Xinhua News, Shandong channel at http://www.sd.xinhuanet.com/news/2003-03/21/content_320764.htm.

⁹ See “China Associated Technology and Economy Net” at <http://www.cpc-info.com/cpcinfozc/wz/zc2001xb42.html>.

Accordingly, if there is evidence on the record that extensive reliance on government export subsidies pervade 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 made in the pending 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 preliminarily rejected the petitioners' request, however, 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 should revise this aspect of its separate rate analysis. 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. Any analysis that disregards this fact is necessarily arbitrary and capricious. 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.

D. The Department Should Not Automatically Assign Separate Rates To Chinese Manufacturers That Have An Affiliate In Hong Kong

The Department currently treats Chinese manufacturers with an affiliate located in Hong Kong entity as market economy companies and does not require a separate rate analysis. For example, 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, 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. 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 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 VOLUNTARY ALL OTHERS RATE IS NOT REQUIRED BY THE STATUTE OR LEGISLATIVE HISTORY

A. Origins Of The "Voluntary All-Others" Rate

The Department first calculated a "voluntary all-others" rate for non-mandatory NME respondents in Honey From the People's Republic of China, 60 Fed. Reg. 14725, 14729 (March 20, 1995) (prelim.) ("Honey"). In Honey, the Department sent full questionnaires to the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") of the PRC. Id. MOFTEC transmitted the questionnaires to all PRC companies that processed and exported honey to the United States during the period of investigation ("POI"). Id. In total, 28 Chinese exporters and their respective producers returned the questionnaire with full responses to all sections of the questionnaire, and all 28 requested a separate, company-specific rate. Id. at 14725-26. Each of the 28 parties also cooperated with the Department's subsequent requests for responses to a supplemental questionnaire and submitted publicly available information concerning surrogate values for valuing the factors of production for honey. Id. at 14726.

In selecting respondents for investigation, the Department believed that the "administrative burden of analyzing and verifying" all 28 cooperating respondents was too great. Id. Therefore, the Department determined that a full analysis and verification of the four largest

exporters during the POI would provide an adequate basis to calculate a margin for purposes of collecting duties. Id.

For the other 24 cooperating respondents that had also applied for a separate rate, but whose responses could not be individually verified, the Department developed a new methodology based on the “particular circumstances of the case.” Id. at 14729. Prior to Honey, the Department had been able to verify the questionnaire responses of all respondents who had requested verification, and NME exporters whose responses had not been individually verified were assigned the PRC-wide rate. The Department explained its rationale for the change in practice as follows:

This change in methodology was necessitated by the particular circumstances of this case. The parties who responded but were not analyzed have applied for separate rates, and provided materials for the Department to consider in this request. Although the Department is unable, due to administrative constraints, to consider the request for separate rates status, and to calculate a separate rate for each of these named parties, there has been no failure on the part of these firms to provide requested information. Because it would not be appropriate for the Department to refuse to consider an affirmative documented request for an examination of whether these companies were independent of any non-respondent firms and then assign to the cooperative firms the rate for the noncooperative firms . . . the Department has assigned a special single rate for these firms.

Honey, 60 Fed. Reg. at 14729-30. The “special single rate” calculated by the Department was the “weighted-average of the rates of the four fully analyzed companies.” Id. at 14729.

B. The Court Of International Trade Affirmed The Department's Voluntary All-Others Practice

The Court of International Trade upheld the Department's voluntary all others rate policy as it was applied in the investigation of brake drums and rotors from the PRC. Coalition for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States, 44 F. Supp. 2d 229, 247-52 (Ct. Int'l Trade 1999) ("Brake Drums and Rotors"). In the underlying investigation, 18 cooperating respondents submitted timely responses to the entire questionnaire. Brake Drums and Brake Rotors From the People's Republic of China, 61 Fed. Reg. 53190 (Oct. 10, 1996) (prelim.) ("Brake Drums and Rotors From the PRC"). Those 18 respondents also responded to the Department's request to provide published information for valuing the factors of production and for surrogate country selection. Id. Because of limited administrative resources, the Department decided to analyze only the responses of the seven largest brake rotor exporters and the five largest brake drum exporters to the United States. Id.

Consistent with the methodology applied in Honey, in the final determination the Department assigned the non-mandatory, fully cooperative respondents an all-others rate that was a weighted-average dumping margin based on the calculated margins of selected respondents that were not zero, *de minimis*, or based on facts available for non-selected brake rotor respondents, and a rate based on the simple average of the dumping margins determined for the exporters and producers individually investigated for non-selected brake drum respondents.¹⁰

¹⁰ The Department used a simple average for the non-selected brake drum respondents because all of the respondents' margins were zero, *de minimis*, or based on facts available. The Department, therefore, used "any reasonable method" under 19 U.S.C. §1673d(c)(5)(B).

Brake Drums and Rotors From the PRC, 62 Fed. Reg. 9160, 9173-74 (Feb. 28, 1997) (final).

The only difference between the mandatory respondents and the non-mandatory respondents in Brake Drums and Rotors From the PRC was that the Department did not require non-mandatory respondents to reply to a supplemental questionnaire. The Court, as explained more fully below, upheld the Department's methodology first announced in Honey as applied in Brake Drums and Rotors From the PRC as a reasonable interpretation of the statute supported by "the weight of fairness and common sense." Brake Drums and Rotors, 44 F. Supp. 2d at 251.

C. The Department Is Not Required By The Statute Or Legislative History To Apply An All-Others Rate For Non-Mandatory Respondents In NME Investigations

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.

The Court of International Trade, in its review of Brake Drums and Rotors From the PRC, addressed the plaintiff's objection to the Department's calculation of a voluntary all-others rate based on the "analogous" all others determination in a market economy case pursuant to 19 U.S.C. § 1673d(c)(5) (1994). Brakes Drums and Rotors, 44 F. Supp. 2d at 249-50. The Court recognized that an NME exporter normally receives either the separate rate for which it qualified or a country-wide rate, thus obviating the need for an all others rate calculation. Id. at 248. In the brake drums investigation, however, the Department assigned dumping margins to an

additional category of “respondents responding fully to questionnaires but not investigated” who received an averaged non-adverse all others rate. Id. (emphasis added). The Court then considered, but rejected, the plaintiff’s argument that section 1673d(c)(5) was not intended for use in the NME context, stating that “the statute’s silence mandates a reasonableness analysis of statutory interpretation of assignment of an ‘all-others’ averaged rate to non-selected NME respondents.” Brake Drums and Rotors, 44 F. Supp. 2d at 250 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

Additionally, the Court noted that the legislative history made no mention of a distinction between the NME and non-NME context. Id. Applying Chevron, the Court affirmed the Department’s practice in Honey and Brake Drums and Rotors From the PRC and held that the Department’s interpretation of the statute was reasonable, because “it would be inequitable . . . to assign an adverse facts available rate” to respondents that had made “best efforts to cooperate” in proving eligibility for a separate rate. Brake Drums and Rotors, 44 F. Supp. 2d at 251. Thus, the court held that the Department’s practice reflects a reasonable interpretation of the statute. In finding that neither the statute nor the legislative history requires the Department to grant separate rates to non-mandatory respondents under any circumstances, the Court nevertheless recognized that the Department has the authority and discretion to assign separate rates to non-mandatory respondents under certain circumstances. The Department, however, must provide clear guidelines for the application of an all others rate to non-mandatory respondents in NME investigations.

IV. THE DEPARTMENT SHOULD RETURN TO ITS PRACTICE OF REQUIRING PRODUCERS AND EXPORTERS THAT REQUEST A SEPARATE RATE TO SUBMIT A RESPONSE TO THE DEPARTMENT'S FULL QUESTIONNAIRE

The Department originally assigned the all-others rate to cooperative respondents that were not selected for individual investigation because "it would not be appropriate for the Department to refuse to consider an affirmative documented request for an examination of whether these companies were independent of any non-respondent firms and then assign to the cooperative firms the rate for the noncooperative firms." Honey, 60 Fed. Reg. at 14729-30; accord Freshwater Crawfish Tail Meat from the People's Republic of China, 62 Fed. Reg. 41347, 41350 (Aug. 1, 1997) ("it would be inappropriate to assign these fully cooperative respondents a rate based on adverse facts available."(emphasis added)) ("Crawfish").¹¹ Significantly, in Honey, Crawfish, and Brake Drums and Rotors, all of the respondents that received the all-others rate submitted complete and timely responses to the full questionnaire. Crawfish, 62 Fed. Reg. at 41347, 41350; Brake Drums and Rotors From the PRC, 61 Fed. Reg. at 53194; Honey, 60 Fed. Reg. at 14726, 14729-30. The Department's original policy required full cooperation to establish eligibility for an all-others rate in an NME investigation. This is the methodology that the Court upheld in Brake Drums and Rotors.

In another early investigation, the Department rejected the request of 12 uninvestigated exporters to receive an all others rate solely on the basis of the submission of Section A questionnaire responses:

¹¹ See supra Section II.

In order to perform a separate rates analysis, the Department needs to have not only the Section A separate rates questionnaire response but also complete pricing data from each exporter. The separate rates analysis focuses on the relationships between exporters and the government, export prices and who sets them, and control over export revenue. While the Section A response may contain information on the ownership and control structures of the entities being examined, the Department must also have complete pricing data in order to analyze whether export pricing and business decisions of a NME exporter are being made at the direction of the NME government. As we stated above, the Department has never granted a separate rate to any exporter without first receiving a full questionnaire response. *See e.g., Honey.*

Bicycles From the People's Republic of China, 61 Fed. Reg. 19026, 19037 (April 30, 1996)

(“Bicycles”). The Department concluded in Bicycles that “the only situation where the Department would apply a weighted-average margin to an NME exporter not specifically investigated is one in which the exporter provides a complete questionnaire response and makes a claim, and establishes eligibility, for separate rates.” *Id.* (emphasis added).

In more recent investigations, however, the Department has departed radically from the original justification for granting separate rates to fully cooperative respondents and has granted separate rates to respondents that only respond to Section A of the questionnaire.¹² Significantly,

¹² *See e.g., Certain Ball Bearings and Parts Thereof from the People's Republic of China*, 67 Fed. Reg. 63609, 63612 (Oct. 15, 2002) (“For those exporters . . . who submitted a timely response to Section A of the Department's questionnaire, but were not selected as mandatory respondents . . . we assigned a weighted-average of the rates of the fully analyzed companies . . .”); Certain Automotive Replacement Glass Windshields From the People's Republic of China, 66 Fed. Reg. 48233, 48241 (Sept. 19, 2001) (“For those PRC producers and exporters . . . that provided separate rates information, we have calculated a weighted-average margin based on the rates calculated for those . . . selected to respond.”); Certain Non-Frozen Apple Juice Concentrate From the People's Republic of China, 64 Fed. Reg. 65675, 65678 (Nov. 23, 1999) (“For those PRC producers/exporters that responded to our separate rates questionnaire but did not respond to the full antidumping questionnaire (because they were not selected to respond or

in the pending investigation involving PRCBs from China, the Department stated that a respondent that merely submits a Section A questionnaire response with no intention of cooperating fully in the investigation by submitting complete responses to the Department's questionnaire may be entitled to a separate rate.¹³ The Department has not explained how it is now able to determine eligibility for a separate rate based solely on the Section A response when it stated clearly that it could not do so in Bicycles.

The current policy is fundamentally flawed and must be corrected. Respondents that are not selected as mandatory respondents can unilaterally opt out of the investigation and yet still receive a cooperative rate instead of the country-wide rate. Moreover, the current policy encourages potential respondents to game the system. Evidence of this can be found in the PRCBs investigation where two respondents informed the Department that they refused to file complete responses but, regardless, expected to be eligible for the all-others rate.¹⁴

because they did not submit a voluntary response), we have calculated a weighted-average margin based on the rates calculated for those producers/exporters that were selected to respond. . . .").

¹³ See PRCBs from the People's Republic of China, Letters from Laurie Parkhill to All Interested Parties dated September 23, 2003 and September 24, 2003, attached as **Exhibit 1**. In the September 23, 2004 letter, the Department stated that "a respondent who can potentially support a claim for a separate rate does not automatically receive nonadverse rate status without full participation in the underlying antidumping investigation." The next day, however, the Department sent a letter to clarify the September 23, 2003 letter. In this letter the Department stated that firms wishing to be considered voluntary respondents must submit full questionnaire responses but "Section A responses which have been received on a timely basis will still be evaluated for possible entitlement to separate rates." These letters highlight the lack of clarity and presence of substantial confusion regarding the Department's separate rate policy.

¹⁴ See PRCBs from the People's Republic of China, Guangdong Esquel Packaging Co., Ltd.'s ("GEP") September 15, 2003 Letter and Dongguan Zhongqiao Combine Plastic Bag Factory's ("Dongguan Zhongqiao") September 22, 2003 Letter. In the letters both GEP and Dongguan Zhongqiao withdrew their requests to be treated as a voluntary respondent in the investigation. **Exhibit 2**.

Originally, as explained above, the Department justified the voluntary all others rate because the non-mandatory respondents demonstrated that they were willing to be individually investigated by the Department and to provide full questionnaire responses to the Department. The only difference between the mandatory and non-mandatory respondents, therefore, was that the Department was unable to individually investigate the non-mandatory respondents due to lack of administrative resources, as opposed to the current policy where a non-mandatory respondent is permitted to respond to Section A of the questionnaire with no intention of cooperating further. The Department's current approach permits respondents to receive the benefit of a separate rate based on a Section A response which, as explained above, is virtually a formality.

Based on the Department's own justification for the voluntary all others category, only two options should be available to non-mandatory respondents. One option is for a non-mandatory respondent to submit a full questionnaire response to demonstrate that it is willing to take the place of a mandatory respondent and receive a company-specific rate. The other option is decline to submit a full questionnaire response and receive the country-wide rate. If a non-mandatory respondent submits a full questionnaire response and the Department is unable to individually investigate all companies because of administrative constraints, then, and only then, should a non-mandatory respondent be entitled to the voluntary all others rate. There is no justification to allow a non-mandatory respondent to "self-select" an additional category in which it does not receive the country-wide rate but declines to cooperate fully and demonstrate its entitlement to a company-specific rate. This "self-selection" encourages respondents to game

the system. Furthermore, as the Department recognized in Bicycles, a separate rate based solely on the company's Section A questionnaire response lacks information necessary to evaluate the company's export pricing and business decisions and, accordingly, the extent to which it may be subject to government control.

The number of non-mandatory respondents requesting a separate rate in future investigations undoubtedly will continue to increase given the Department's extremely low threshold for obtaining a separate rate. The Department should recall its original justification for the assignment of a separate rate to non-mandatory respondents and return to its original methodology under which all non-mandatory respondents were required to demonstrate that they are fully cooperative and truly entitled to a separate rate by submitting a full questionnaire response.

V. PRODUCERS AND EXPORTERS THAT FAIL TO RESPOND, OR FILE AN UNTIMELY RESPONSE, TO THE DEPARTMENT'S MINI SECTION A QUESTIONNAIRE SHOULD NOT RECEIVE A SEPARATE RATE

The Department must issue a clear policy statement with respect to producers or exporters that fail to respond to the Department's mini Section A questionnaire. The Department issues mini Section A questionnaires requesting quantity and value information regarding sales of subject merchandise to all producers and exporters named in the petition and those identified in confidential data obtained from the Bureau of Customs and Border Protection ("Customs"). Analysis of these data enables the Department to determine the largest exporters and identify a group that accounts for a significant percentage of imports of the subject merchandise. See, e.g., Hand Trucks, 69 Fed. Reg. at 29510; PRCBs from the PRC, 69 Fed. Reg. at 3545. Thus, the

mini Section A questionnaire serves a critical role in providing necessary information to identify potential mandatory respondents in an investigation. To ensure compliance with its requests for information, the Department must make clear to respondents that it will not reward the failure to respond to a request for information in a mini Section A questionnaire, and it also will not accept untimely responses to mini Section A questionnaires. Moreover, the Department must make clear that a failure to respond to a mini section A questionnaire cannot be “cured” by a subsequent submission of a Section A questionnaire response any more than a response to some of the Department’s requests for information can “cure” a company’s failure to respond to other requests. Because the Department has not made its policy clear to this point, however, respondents continue to argue that they can fail to respond to the Department’s mini Section A questionnaire, or submit an untimely response, and still receive a separate rate if they submit a Section A questionnaire response.

In an NME investigation, the Department fulfills its notice requirement by informing the NME country’s appropriate governmental authority and by sending the questionnaire to all parties identified by the petitioner and listed in the petition. The Department’s notification policy is reasonable and is based on the presumption that all companies in an NME are part of the NME entity unless they demonstrate the absence of government control. Accordingly, notification of the NME government constitutes notice to all NME producers and exporters.

The Department has applied adverse facts available in past cases to respondents that failed to file mini Section A questionnaire responses. See, e.g., PRCBs from Malaysia, 69 Fed. Reg. 3557, 3559 (Jan. 26, 2004) (prelim.) (“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”); PRCBs from Thailand, 69 Fed. Reg. 3522, 3554 (Jan. 26, 2004) (prelim.) (“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) (prelim.) (applying the PRC-wide rate to exporters who failed to respond to mini Section A questionnaires).

The Department has also applied adverse facts available based on the untimely submission of mini Section A questionnaire responses. See Certain Stainless Steel Wire Rods From India, 58 Fed. Reg. 41729, 41731 (Aug. 5, 1993) (prelim.) (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 explained:

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 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.). The reasoning applies equally to non-mandatory respondents that fail to respond, or file an untimely response, to the Department's mini Section A questionnaire. The Department needs the information from the mini Section A responses to select the appropriate mandatory respondents in an investigation. If an NME company could ignore the Department's mini Section A questionnaire, yet subsequently submit a response to full Section A and still receive a separate rate, it would encourage respondents to game the system, particularly if a company believed it would receive a higher dumping margin if it were individually investigated. In contrast, a clear statement that the Department will not tolerate the failure to respond to its mini Section A questionnaire or the untimely filing of a response to the mini Section A questionnaire will encourage parties to respond to the Department's requests for information and to comply with its deadlines, and it will discourage frivolous arguments to excuse the failure to submit a timely response.

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

The Department should assign a combination separate rate to producer and non-producing exporter combinations in order to prevent circumvention of antidumping duty orders.

The Department's current combination rates policy is as follows:

{I}f sales to the United States are made through an NME trading company, we assign a noncombination rate to the trading company regardless of whether the NME producer supplying the trading company has knowledge of the destination of the merchandise.

One exception to this NME practice occurs where we find no dumping and exclude an exporter from an AD order. Where exclusions are involved, we publish a combination rate to address the same concerns described above regarding redirection of exports through an excluded trading company. Nothing in section 351.107(b)(1) is intended to change our policy for assigning rates in NME proceedings.

Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27295, 27303 (May 19, 1997) (“Preamble”). The Department’s policy recognizes the opportunity for circumvention when the Department finds no dumping or excludes an exporter from an antidumping duty order. The policy differentiates, however, 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. Moreover, the Department’s practice has not always been consistent. For example, in Brake Drums and Rotors from the PRC the Department addressed the possible circumvention of an order by producer-exporter combinations other than those specifically investigated:

Therefore, the exclusion of the above-mentioned companies from an antidumping duty order (should one be issued) applies only to subject merchandise sold through the exporter/producer combinations noted above. Merchandise that is sold by an above-mentioned exporter but manufactured by producers not noted above for that exporter will be subject to the order, if one is issued (see Notice of Final Determination of Sales At Less Than Fair Value: Cased Pencils from the People’s Republic of China, 59 FR 55625 (November 8, 1994) and Drawer Slides). Entries of such merchandise will be subject to the “China-wide” rate.

62 Fed. Reg. at 9173. The Department should apply this approach uniformly to prevent exporters that receive a separate rate from shipping merchandise from a manufacturer that is subject to the country-wide rate.

The Department has a duty to apply its law in a manner as 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)). Assigning combination rates to non-mandatory respondents will prevent circumvention, yet it will not inhibit or deter legitimate trade. 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).

Granting a separate rate is an exception to the Department's presumption that all companies in an NME are part of the NME entity and are subject to the country-wide rate. Exceptions to this rule should be limited. Thus, the Department should only award a separate rate to companies that have applied for a separate rate and demonstrated that they are eligible. When the producer and exporter are different entities, the Department should require both to demonstrate that they are free of government control.

The Honorable James J. Jochum
June 2, 2004
Page 27

VII. CONCLUSION

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

Respectfully submitted,



Joseph W. Dorn
Stephen A. Jones

Counsel to the American Furniture Manufacturers
Committee for Legal Trade

cc: Lawrence Norton

EXHIBIT 1



UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

SEP 24 2003

A-570-886
Investigation
Public Document
G103: TES

TO ALL INTERESTED PARTIES:

Dear Sirs,

I am writing to you regarding the antidumping investigation on polyethylene retail carrier bags from the People's Republic of China. This letter clarifies our September 23, 2003, letter to voluntary respondents. The purpose of that letter was to notify those companies that wanted to be a voluntary respondent to replace any mandatory respondents that did not respond to our questionnaire that they must submit their full questionnaire responses by September 29, 2003. Firms not providing a response by September 29 will no longer be considered as voluntary respondents. However, subject to possible verification by the Department, Section A responses which have been received on a timely basis will still be evaluated for possible entitlement for separate rates.

If you have any questions, please contact Thomas Schauer at (202) 482-0410 or Richard Rimlinger at (202) 482-4477.

Sincerely,

Laurie Parkhill
Office Director
AD/CVD Enforcement





UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

SEP 23 2003

A-570-886
Investigation
Public Document
G103: TES

TO ALL VOLUNTARY RESPONDENTS:

Dear Sirs,

I am writing to you regarding the antidumping investigation on polyethylene retail carrier bags from the People's Republic of China.

A respondent who can potentially support a claim for a separate rate does not automatically receive nonadverse rate status without full participation in the underlying antidumping investigation. Although no voluntary respondents have yet been selected as a mandatory respondent in this investigation, in the absence of a complete voluntary response, the Department may be unable to assess any claim it might make for a separate nonadverse rate accurately.

Although we have received responses to Section A of our questionnaire from a number of firms, none of those firms have responded to Sections C, D, or E of our questionnaire. If you wish to be considered as a voluntary respondent entitled to a nonadverse rate and have already submitted a response to Section A of our questionnaire, we require that you submit responses to Section C, D, and E of our questionnaire, as applicable, no later than September 29, 2003. No extensions to this deadline will be granted.

If you have any questions, please contact Thomas Schauer at (202) 482-0410 or Hermes Pinilla at (202) 482-3477.

Sincerely,

Laurie Parkhill
Office Director
AD/CVD Enforcement



EXHIBIT 2

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CONSULTING SERVICES

September 15, 2003

The Honorable Donald L. Evans
Secretary of Commerce
Attention: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Inv. No. A-570-886
Total Pages: 3
AD Investigation
POI: 10/1/02-3/31/03
Group I, Office 3

PUBLIC DOCUMENT

Attention: Laurie Parkhill, Hermes Pinilla, Tom Schauer

Re: **Withdrawal of Request for Voluntary Participation**
Polyethylene Retail Carrier Bags From the People's Republic of China

Dear Mr. Secretary:

On behalf of Guangdong Esquel Packaging Co., Ltd. ("GEP"), we hereby withdraw GEP's request for voluntary participation in the above investigation. Since the Department has not selected or officially accepted any "voluntary" respondents in the investigation—and indeed no other respondents expressed such an interest—there is no prejudice to the parties.¹ We note, however, that GEP did timely file its response to Section A of the Department's Questionnaire,

¹ As indicated in the Department's September 3, 2003 letter, the Department, in granting GEP an extension to September 11, 2003 to file its Section A questionnaire response, specifically stated that it had not committed to

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Page 2

establishing its entitlement to a separate rate in the investigation.

Should you have any questions or require further information, please do not hesitate to call the undersigned.

Sincerely,
SANDLER, TRAVIS & ROSENBERG, P.A.

By: 

Philip S. Gallas

Gregory S. Menegaz

Mark R. Ludwikowski

selecting GEP as a voluntary respondent in this investigation.

CERTIFICATE OF SERVICE

Public Document

I hereby certify that a copy of the foregoing Response of Guangdong Esquel Packaging Co., Ltd. was served by hand delivery, on this 15th day of September, 2003 on the following:

Representative of The Polyethylene Retail Carrier Bag Committee and its individual members, PCL Packaging, Inc., Sonoco Products Company, Superbag Corp., Vanguard Plastics, Inc. and Inteplast Group Ltd.

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On Behalf of Nantong Huasheng Plastic Products Co., Ltd.

William J. Clinton, Esq.
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Representative of Sea Lake Polyethylene Enterprise Ltd., Xiamen Ming Pak Plastics Co., Ltd, and Senetex Trading Ltd.

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September 22, 2003

ITA Case No. A-570-886
Total Pages: 3
Initial Investigation
Group I/Office 3

PUBLIC DOCUMENT

BY HAND DELIVERY

The Hon. Donald Evans
Secretary of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
14th Street and Pennsylvania Avenue, NW
Washington, DC 20230

Re: **Polyethylene Retail Carrier Bags from China;**
Dongguan Zhongqiao Combine Plastic Bag Factory's Withdrawal
Of Its Request To Be Considered As A Voluntary Respondent

Dear Mr. Secretary:

We represent Dongguan Zhongqiao Combine Plastic Bag Factory ("Dongguan"), a Chinese producer of polyethylene retail carrier bags. By letter dated September 5, 2003, Dongguan requested that the Department consider it a voluntary respondent in this proceeding. By letter, dated September 6, 2003, the Department confirmed Dongguan's status as a voluntary respondent. On September 11, 2003, Dongguan filed its response to Section A of the Department's questionnaire.

Dongguan hereby withdraws its request to be a considered voluntary respondent by the Department in this proceeding. Dongguan therefore does not intend to file a response to Sections C and D of the Department's questionnaire, currently due on September 29, 2003. However, having filed its



G A R V E Y S C H U B E R T B A R E R

September 8, 2003

Page 2

response to Section A of the Department's questionnaire, Dongguan will respond to any supplemental questionnaire the Department may issue with respect to its September 11, 2003 Section A Response.

Thank you for your attention to this matter. Should you have any questions concerning Dongguan's withdrawal of its request to be considered a voluntary respondent in this proceeding, please contact the undersigned counsel.

Respectfully submitted,

William E. Perry
Ronald M. Wisla

cc: Tom Schauer, Room 4203
Mr. Hermes Pinilla, Room 4203

DC_DOCS:613194.1

PUBLIC CERTIFICATE OF SERVICE

ITA Case No. A-570-886
Polyethylene Retail Carrier Bags from China
Original Investigation

I, Ronald M. Wisla, hereby certify that a copy of the foregoing PUBLIC DOCUMENT was served upon the following parties by first class mail, postage prepaid, on this the 22nd day of September 2003:

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