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TO CLIENTS AND FRIENDS:

RE: Department of Commerce Requests Comments on Proposed Changes in Antidumping Proceedings Involving Non-Market Economy Countries

The Department of Commerce (“Commerce”) announced in the September 20th Federal Register that it is continuing review of its “Separate Rates Practice”, the policy in antidumping proceedings of presuming that all firms within a non-market economy (“NME”) country are subject to government control and should be assigned a single, country-wide rate, unless a respondent can demonstrate an absence of both *de jure* and *de facto* control over its export activities. A respondent demonstrating the absence of government control is assigned either its own individually calculated rate or, in the case of a non-investigated or non-reviewed firm, a weighted-average of the rates of the fully analyzed companies. Commerce is considering changes that may limit the circumstances in which exporters remain eligible for separate rates, **particularly in the case of middleman transactions**, and is requesting comments on the proposals.

Written comments (original and six copies) on the proposals must be submitted by October 15, 2004 to 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.

Currently, to request and qualify for a separate rate, an exporter must have exported the subject merchandise to the United States during the period of investigation or review, and it must provide information responsive to the following considerations:

1. Absence of *De Jure* Control: Commerce considers the following *de jure* criteria: (a) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (b) any legislative enactments decentralizing control of companies; and (c) any other formal measures by the government decentralizing control of companies.

2. Absence of *De Facto* Control: Commerce ordinarily considers the following *de facto* criteria: (a) Whether the export prices are set by, or subject to the approval of, a governmental authority; (b) whether the respondent has authority to negotiate and sign contracts and other agreements; (c) whether the respondent has autonomy from the central, provincial, or local governments in making decisions regarding the selection of its management; and (d) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

In an antidumping investigation or review, Commerce reviews requests for separate rates from NME country exporters who have not been selected as mandatory respondents, if they file a timely response to Section A of Commerce's antidumping questionnaire. Commerce has received increasing numbers of requests and is facing an exceptionally large number of such requests in current investigations (and if textile quotas on China are lifted as of January 2005, new requests in those actions may dwarf the current number). Commerce is seeking a more effective means of determining whether particular exporters are acting independently of the government in their export activities. Another consideration is to prevent diversion of exports through lower rate exporters by tying rates to both exporters and their usual producers. Before proceeding with changes, Commerce is requesting comments on whether various alternative procedures under consideration comply with the statute and regulations.

The first proposal under consideration is to change requirements for seeking a separate rate procedure by replacing the Section A questionnaire now used with an application process. Commerce would establish a list the documents required to substantiate an exporter's certification of *de jure* and *de facto* independence and require that the exporter provide original and translated copies of all those documents with its application. The notice does not specify what documents Commerce has in mind.

The second proposal is to change current NME practice under which Commerce ordinarily assigns exporter-specific separate rates, rather than exporter-producer combination rates. Commerce is proposing to utilize exporter-producer combination rates for all NME exporters. Under this change, only the specific exporter-producer combinations that existed during the period of investigation or review will receive the separate rate. Commerce seeks comments on the legal and administrative advisability of such combination rates and, if instituted, how best to construct them. In particular, the Department is interested in comments as to what rate should be assessed to exporters' merchandise from suppliers for which the Department has not established a combination rate.

The third proposal involves a change to policy and practice concerning third-country resellers of NME country product, *e.g.*, when producers in China sell subject merchandise through exporters located in Hong Kong or Taiwan. Commerce is considering replacing its current test, under which it seeks to establish whether the producer has knowledge that its goods are destined for the United States when Commerce determines which party's rate will apply, with a rebuttable presumption that NME producers shipping subject merchandise through third countries always know that their goods are destined for the United States. This would result in Commerce assigning to the producer, and not the reseller, the antidumping duty rates, unless evidence was presented to the contrary. Commerce requests comments as to whether there are grounds for creating such a rebuttable presumption.

Should you have any questions concerning the above issues, or middleman issues in general, please forward same to one of the firm contacts in this matter.

Firm Contacts: Robert Stack (rstack@tdllp.com); Lou Shoichet (lshoichet@tdllp.com)

Note: The above comments are intended for general information only, and not as legal advice. Legal advice can only be offered after a review of a client's specific facts and circumstances, which may affect the applicability of any general comments contained herein.