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BY HAND DELIVERY

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

Re: Comments on Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries

Dear Mr. Secretary:

The Consuming Industries Trade Action Coalition (CITAC) submits comments in response to the Notice of May 3, 2004 (69 Fed. Reg24119) regarding the practice of determining separate rates in antidumping investigations involving certain firms in non-market economy countries. These comments are submitted because of the importance of this issue to U.S. consuming industries that rely on imports that could be unduly restricted through the imposition of incorrect and excessive antidumping duties.

The Interest of American Consuming Industries in this Issue

U.S. companies are increasingly subject to international competition in their product markets. Most consuming companies are small businesses. Most cannot effectively limit competition through the filing of antidumping or countervailing duty petitions; product markets are often too fragmented to make antidumping petitions a practical remedy for import-competing industries. Thus, trade remedies effectively benefit a few companies and industries. Other American manufacturers too often suffer the ill effects of trade remedies, through restricted availability of raw materials and components that are subject to antidumping and countervailing duties, without enjoying the benefits that accrue to others.

The practice of prescribing separate rates for firms in non-market economies ("NMEs") that are not controlled by government is an essential part of maintaining

a fair balance between the interests of antidumping petitioners and U.S. consumers. An excessive deposit rate not only harms foreign producers but U.S. consumers as well. This point can be illustrated by examining the calculation of an "all others" rate in a market-economy antidumping investigation. There, exporters and producers that are not individually investigated are covered by the suspension of liquidation and order; but their deposit rate is the average of the rates of all investigated firms (except those that are not based entirely on "facts available.") 1/

In an NME case, the Department indulges a presumption that all firms are subject to the direction and control of the government of the country involved. This presumption is no longer true in most cases, especially in China, but also in other NMEs such as Vietnam.

However, the policy change under review could deny respondents in NMEs the chance to receive "all other" margin rates based on the average of rates for investigated firms. The rate applied instead would be a "country wide" rate at a much higher level. The higher rate would unduly restrict trade and hurt American consumers. It might also violate U.S. law and U.S. WTO obligations.

The Department should avoid the application of the often-prohibitive country wide rate to independent firms. The language of the statute strongly suggests that the imposition of excessive deposit rates for independent firms in NMEs would be contrary to law. Application of the country wide rate in such cases could violate the statute as well as U.S. obligations under the WTO Antidumping Agreement. Such a policy shift would also impair the competitiveness of U.S. firms that would be denied access to imports of products from independent firms in NMEs.

China and other NMEs today are not the monolithic, centrally-planned economies that were presumed to exist during the Cold War. The Department has noted the volume of Section A responses in NME cases; this is itself a manifestation of the fact that a considerable number of firms in China and other NMEs are not under de jure or de facto government control. A change in policy that would foreclose independent firms from receiving antidumping margin rates based on the

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1/ Congress has not yet implemented a World Trade Organization finding (Hot-Rolled Steel from Japan) that "all others" rates must not include rates from investigated firms that are based in part on "facts available." The statute only excludes firms where the individual rate was based wholly on facts available. *See* 19 U.S.C. § 1673d(c)(5).

average of investigated firms would create an irrebuttable presumption that is not only unfair but manifestly inaccurate.

A. Background

1. Calculation of Deposit and Assessment Rates

Estimated AD duty deposits are collected, and AD duties are assessed, based on the dumping rates that the DOC calculates in the original AD investigation and in subsequent administrative reviews. Based on detailed information collected from one or more non-U.S. producers and/or exporters during the course of an investigation, 2/ DOC calculates deposit rates that then apply prospectively to entries on and after the date upon which the DOC instructs Customs to suspend liquidation of entries of products within the scope of the investigation. 3/ The deposit rates calculated in a preliminary dumping determination apply until publication of the final dumping determination. Thereafter, the deposit rates calculated in the investigation's final dumping determination apply until publication of a final determination in a subsequent administrative review.

In the first instance, the amount of AD duties to be assessed depends upon whether an administrative review is requested of the entries upon which estimated AD duty deposits have been paid during the period of review ("POR"). If no review is requested, the entries are automatically liquidated, and AD duties are assessed at the deposit rate. 4/ If a review is requested, the DOC again collects detailed information during the course of the review and, in simple terms,

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2/ Non-U.S. producers and/or exporters that participate in an AD proceeding are referred to as "respondents."

3/ Suspension of liquidation typically occurs concurrently with the publication of the DOC preliminary dumping determination, though it may occur earlier in instances where the DOC determines that "critical circumstances" exist. 19 U.S.C. § 1673b(d), (e).

4/ 19 C.F.R. § 351.212(c) The automatic assessment rate methodology, as applied to market economy respondents, has recently undergone a significant substantive modification. See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 Fed. Reg. 23,954 (Dep't Commerce) (May 6, 2003) (notice of policy).

calculates an assessment rate for each exporter/importer combination, based on such information. 5/

In calculating deposit and assessment rates, if it determines that a respondent has not acted to the best of its ability to provide requested information, DOC may apply an adverse inference with respect to facts that otherwise are available. Application of "adverse facts available" invariably increases the applicable deposit and assessment rates. The rates can be so high that exports to the U.S. become financially impractical.

2. Calculation of Separate and Country-Wide Rates

In investigations involving products from market economy countries, 6/ DOC presumes that each producer/exporter acts independently. Accordingly, the DOC generally calculates a separate deposit rate for each participating producer/exporter based on the information collected from that party. All of the other producers/exporters in that country that did not participate in the investigation are subject to the "all others" rate, which DOC calculates by weight-averaging the dumping margins calculated for investigated producers, exclusive of (1) *de minimis* margins and (2) margins determined *completely* on the basis of facts available. 7/ Unless and until a producer/exporter subject to the country-wide "all others" rate obtains its own deposit and assessment rates by participating in an administrative review, its products remain subject to estimated AD duty deposits and assessed AD duties at the "all others" rate.

5/ 19 C.F.R. § 351.212(b).

6/ The DOC treats two or more affiliated market economy producers/exporters as a single entity subject to a single dumping rate if (1) the producers/exporters "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities;" and (2) the DOC "concludes that there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1). In assessing whether there is a significant potential for the manipulation of price or production, the DOC may consider the following (and other) factors: (1) the level of common ownership; (2) the extent to which the affiliates' directors, officers and employees overlap; and (3) the extent to which the affiliates' operations are intertwined. *Id.* at § 351.401(f)(2).

7/ 19 U.S.C. § 1673d(c)(5). The WTO has ruled that it is unlawful to include margins in the weighted average if any part of the margin is determined based on facts available. *United States – Anti-dumping Measures on Certain Hot-rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001).

Whereas in market economy cases the Department presumes the independence of exporters unless proven otherwise, in NME cases DOC presumes that all of the exporters in the NME country 8/ are under governmental control. Accordingly, unless an NME exporter demonstrates that it is not subject to de jure and de facto government control, it will be subject to the NME country-wide rate, even if it participates in the underlying AD proceeding. 9/

In NME cases the DOC relies on the NME government to identify all of the exporters of the covered products and to submit a consolidated questionnaire response for the exporters that cannot establish their independence from government control. If – as is usually the case – one or more exporters fails to provide requested information, the DOC deems the questionnaire response to be incomplete and calculates a single China-wide rate based on adverse facts available. 10/

B. Current Legal Authority

Though it defines the term "nonmarket economy country" 11/ and prescribes a methodology for determining the "normal value" of subject merchandise

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8/ In NME cases the DOC calculates rates for exporters. If an exporter is a trading company, its rate is calculated based on its supplier's costs.

9/ In an investigation, even if it is not selected as a mandatory respondent upon whose data the dumping rate will be calculated, an NME exporter may seek to qualify for an "all others" average rate based on the weighted-average rates of the mandatory respondents by voluntarily responding to Section A of the DOC's questionnaire and establishing that it is not subject to governmental control, as described in more detail below. See Coalition for Preservation of Amer. Brake Drum and Rotor Aftermarket Mfgrs. v. United States, 44 F.Supp.2d 229, 248 (CIT 1999). Although not further addressed herein because it applies equally to market economy and NME producers, another problematic practice is DOC's refusal to calculate margins for more than a handful of respondents in a particular case. In accordance with Art. 6.10 of the WTO AD Agreement, the DOC is supposed to calculate individual margins for "each known exporter," although sampling is permitted where the number of potential respondents is so large as to make this impractical. That said, the DOC's frequent refusal to accept voluntary questionnaire responses where only three or four "mandatory" respondents are being investigated appears to abuse that discretion.

10/ See, e.g., Ball Bearings at 63,612.

11/ 19 U.S.C. § 1677(18).

from NME countries, 12/ the AD statute does not specifically address whether and, if so, under what circumstances it is appropriate to calculate country-wide rates for imports from NME countries. However, the statute requires that "all others" rates be calculated from the average of the rates of investigated firms. The DOC's regulations provide in relevant part that "{i}n an AD proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers." 13/

In adopting this regulation, the DOC expressly declined to codify its presumption of applying a single country wide rate in NME cases. 14/ While it also declined to promulgate rules defining the circumstances under which an NME exporter qualifies for a separate rate – stating that it "intend{ed} to continue developing {its} policy in this area" – the DOC specifically noted that it intended "to grant separate rates in appropriate circumstances . . . ." 15/

C. Historical Overview

Because the evolution of "separate rates" analysis has developed principally in cases concerned with the People's Republic of China, we briefly review the evolution of the "separate rates" policy as applied to imports from China.

Until 1988 the question of whether to apply a country-wide rate to all Chinese exporters did not arise. 16/ During this period U.S. parties did not raise

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12/ Id. at § 1677b(c).

13/ 19 C.F.R. § 351.107. The regulations also provide that, in an AD proceeding involving imports from an NME country, a new shipper review request must include a certification that the exporter's export activities are not controlled by the central government. Id. at § 351.214. The rules relating to the posting of bonds in new shipper reviews were recently revised. See Import Administration Policy Bulletin 03.2 (Dep't Commerce, 1993) < http://ia.ita.doc.gov/policy/bull03-2.html>, accessed June 8, 2003.

14/ See AD/CVD Final Rule, 62 Fed. Reg. at 27,304.

15/ Id. at 27,304-05.

16/ See generally Linda A. Andros, The Commerce Department Speaks on International Trade and Investment 1994: Separate Rates in Nonmarket Economies, 864 PLI/Corp 175; Aligiri, Reform, Reality and Recognition at 199. See also Porcelain-on-Steel Cooking Ware from the PRC, 51 Fed. Reg. 36,419 (Dep't Commerce) (October 10, 1986) (final determination); Tapered Roller Bearings from the PRC, 52 Fed. Reg. 19,748 (Dep't Commerce) (May 27, 1987)

the issue of denying separate rates to Chinese exporters, and the DOC calculated separate rates for Chinese respondents even though they were national companies.

The DOC first addressed this question in Certain Headwear from the PRC. 17/ In that case the U.S. industry argued that the DOC should apply a single country-wide rate because "the State owns and controls all PRC trading companies . . . ," and separate rates with large margin differences "facilitate{} circumvention in a state-controlled economy where exports can be easily directed and diverted among the trading companies by the State." 18/ The DOC disagreed with these arguments, stating:

> The former branches of the national trading companies have separated from the national companies and we found no evidence that the prices the branches charge for exports to the United States are set by or coordinated through the national trading companies. Therefore, it is appropriate to calculate separate margins for each of the now independent trading companies. Moreover, in past findings where different national trading companies exported to the United States, we calculated separate rates for these trading

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(final determination); Petroleum Wax Candles from the PRC, 53 Fed. Reg. 47,742 (Dep't Commerce) (November 25, 1988) (final determination); Barium Chloride from the PRC, 49 Fed. Reg. 33,916 (Dep't Commerce) (August 27, 1984) (final determination); Chloropicrin from the PRC, 49 Fed. Reg. 5982 (Dep't Commerce) (February 16, 1983) (final determination); Shop Towels of Cotton from the PRC, 50 Fed. Reg. 26,020 (Dep't Commerce) (June 24, 1985) (final determination); Potassium Permanganate from the PRC, 48 Fed. Reg. 57,347 (Dep't Commerce) (December 29, 1983) (Final determination); Certain Small Diameter Welded Carbon Steel Pipes and Tubes from the PRC, 51 Fed. Reg. 25,078 (Dep't Commerce) (July 10, 1986) (final determination); Natural Menthol, 46 Fed. Reg. 24,614 (Dep't Commerce) (February 1, 1981) (final determination); Natural Bristle Paint Brushes and Brush Heads from the PRC, 50 Fed. Reg. 52,812 (Dep't Commerce) (December 26, 1985) (final determination); Greige Polyester/Cotton Printcloth from the PRC, 48 Fed. Reg. 34,312 (Dep't Commerce) (July 28, 1983) (final determination).

17/ Certain Headwear from the PRC, 54 Fed. Reg. 11,983 (Dep't Commerce) (March 23, 1989) (final determination) ("Headwear").

18/ Id. at 11,986.

companies even though we treated China as a state-controlled economy. 19/

In 1991 the DOC for the first time denied separate rate treatment to Chinese exporters in Heavy Forged Hand Tools from the PRC. 20/ In that case three regional branches of a national trading company – the China National Machinery Import and Export Corporation, which exported the covered products to the United States – argued that they had separated from the central company and should be treated as independent exporters, citing Headwear, wherein the DOC afforded regional branches separate treatment. 21/ The U.S. industry disagreed, arguing that the evidence indicated that these branches had not separated from the national company and that, even if the branches previously had been independent, "both the mechanism and policy of the Chinese government now exist to bind them back together." 22/ Because the branches could not provide a copy of the government order that formally divided them into separate, independent entities, the DOC found insufficient evidence to demonstrate that the branches were legally or economically separate from the national trading company, and accordingly calculated a single rate for all three branches. 23/

Later that year, in Iron Construction Castings from the PRC, 24/ the DOC adopted what became known as the "China Inc." policy, whereby all Chinese exporters were presumed to be controlled by the Chinese central government (and therefore subject to a single country-wide rate) unless they could make "a clear showing of legal, financial and economic independence" from the Chinese central government. 25/

19/ Id.

20/ Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the PRC, 56 Fed. Reg. 241 (Dep't Commerce) (January 3, 1991) (final determination).

21/ Id. at 244.

22/ Id.

23/ Id.

24/ Iron Construction Castings from the PRC, 56 Fed. Reg. 2742 (Dep't Commerce) (January 24, 1991) (final determination).

25/ Id. at 2744.

In Sparklers from the PRC, 26/ the DOC enunciated criteria by which an exporter could establish sufficient independence from the Chinese central government to justify obtaining a separate rate. In that case the Chinese exporters argued that they should receive separate rates because they were "legally and factually independent entities" and because no direct evidence of central control existed. 27/ As evidence of independence from the Chinese central government, the exporters offered official explanations that they had separated from the "national head office" and business licenses indicating that the companies maintain their own accounts. 28/ In response the U.S. industry argued that the DOC should apply a single country-wide rate because China's status as a state-controlled economy meant the government owned the companies, "creating a strong presumption of central government control." 29/ Thus, the U.S. industry argued, the Chinese central government would be able to "funnel" output through the exporter assigned the lowest margin. 30/

In deciding to calculate separate rates for the exporters, the DOC articulated the criteria by which the "China, Inc." presumption could be rebutted:

> We have determined that exporters in [NME] countries are entitled to separate, company-specific margins when they can demonstrate an absence of central government control, both in law and in fact, with respect to exports. Evidence supporting, though not requiring, a finding of de jure absence of central control includes: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal

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26/ Sparklers from the PRC, 56 Fed. Reg. 20,588 (Dep't Commerce) (May 6, 1991) (final determination).

27/ Id. at 20,589.

28/ Id.

29/ Id.

30/ Id.

> measures by the government decentralizing control of companies. De facto absence of central government control with respect to exports is based on two prerequisites: (1) whether each exporter sets its own export prices independently of the government and other exporters; and (2) whether each exporter can keep the proceeds from its sales. 31/

The de jure part of the Sparklers test was intended to ensure that a Chinese exporter legally was independent from the national export trading company. As corroboration, an exporter could submit evidence of the laws and regulations that eliminated the national export trading company's control over the exporter, as well as company-specific documentation showing that the exporter had become legally independent from the national company. 32/ The de facto part of the test was intended to ensure that, with regard to exports, a Chinese exporter actually operated as a separate company, independently from the national export trading company.

From May 1991 until July 1993 the DOC applied the above-described Sparklers test – which the CIT reviewed and upheld 33/ – in all AD determinations involving products from China. Notably, in each of these determinations Chinese exporters were able to establish their eligibility for a separate rate. 34/ As

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31/ Id.

32/ Id.

33/ Sigma Corp. v. United States, 841 F.Supp. 1255, 1266 (CIT 1993); Tianjin Mach. Import & Export Corp. v. United States, 806 F. Supp. 1008 (CIT 1992).

34/ See Oscillating Fans and Ceiling Fans from the PRC, 56 Fed. Reg. 55,271, 55,275-76 (Dep't Commerce) (October 25, 1991) (final determination); Shop Towels of Cotton from the PRC, 56 Fed. Reg. 60,969, 60,970 (Dep't Commerce) (November 29, 1991) (final determination); Tapered Roller Bearings from the PRC, 56 Fed. Reg. 67,590, 67,597 (Dep't Commerce) (December 31, 1991) (final determination); Refined Antimony Trioxide from the PRC, 57 Fed. Reg. 6801 (Dep't Commerce) (February 28, 1992) (final determination); Certain Iron Construction Castings from the PRC, 57 Fed. Reg. 10,644 (Dep't Commerce) (March 27, 1992) (final determination); Certain Carbon Steel Butt-Weld Pipe Fittings from the PRC, 57 Fed. Reg. 21,058 (Dep't Commerce) (May 18, 1992) (final determination); Certain Iron Construction Castings from the PRC, 57 Fed. Reg. 24,245, 24,246 (Dep't Commerce) (June 8, 1992) (final determination); Shop Towels of Cotton from the PRC, 57 Fed. Reg. 43,695, 43,696 (Dep't

discussed below, though it was later rejected for state-owned companies, the Sparklers test has been reinstated, albeit in modified form.

In Certain Compact Ductile Iron Waterworks Fittings and Accessories Thereof from the PRC, the DOC modified its "separate rates" policy, determining that an exporter owned by the Chinese central government could not obtain a separate rate even if the Sparklers criteria had been met. 35/ In denying separate rates to the state-owned exporters, the DOC effectively equated ownership with control, asserting that state ownership of a company necessarily allows the state to manipulate prices: "an entity cannot be completely free of central government control with respect to exports if it is owned by the central government, regardless of whether the indicia set forth in Sparklers have been met." 36/ Accordingly, the DOC began to deny separate rates for any enterprise that was state-owned (also referred to as "ownership by all the people" (discussed below)).

In Certain Helical Spring Lock Washers from the PRC, 37/ the case immediately following CDIW, the DOC retreated from the enunciated policy in CDIW of "government ownership presumes government control." That case involved Chinese enterprises that were owned by various provincial governments, not the Chinese central government. In considering whether these enterprises were eligible for separate rates, the DOC stated that an enterprise owned by a regional government or by local entities is less subject to "direct control" by the Chinese central government. 38/ Accordingly, the DOC determined that provincially- or locally-owned enterprises could have, as groups, separate rates from the group of centrally-owned enterprises entities if they could demonstrate an absence of central

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Commerce) (September 22, 1992) (final determination); Sulfur Dyes from the PRC, 58 Fed. Reg. 7537 (Dep't Commerce) (February 8, 1993) (final determination).

35/ Certain Compact Ductile Iron Waterworks Fittings and Accessories Thereof from the PRC, 58 Fed. Reg. 37,908, 37,909 (Dep't Commerce) (July 14, 1993) (final determination) ("CDIW").

36/ Id.

37/ Certain Helical Spring Lock Washers from the PRC, 58 Fed. Reg. 48,833 (Dep't Commerce) (September 20, 1993) (final determination) ("Lock Washers").

38/ Id. at 48,834.

government control based on the Sparklers criteria. 39/ After applying the Sparklers test, the DOC determined that the entities requesting separate rates were de jure and de facto independent from the Chinese central government and therefore eligible for separate rates. 40/

Thus, after CDIW and Lock Washers, an entity owned by a regional or local government was eligible to obtain a separate rate under the Sparklers criteria, while an entity owned by the Chinese central government was deemed to be under the direct control of the government and, therefore, ineligible to obtain a separate rate.

In Silicon Carbide from the PRC ("Silicon Carbide"), 41/ the DOC again modified its policy, returning to the pre-CDIW policy based on an amplified version of the Sparklers test. In that case Chinese officials succeeded in persuading the DOC that the policy set forth in CDIW was based upon a flawed understanding of the Chinese economy and the meaning of ownership in China. After analyzing the information submitted during the proceeding, the DOC determined that the phrase "ownership by all the people" on the respondents' business licenses did not necessarily constitute central, provincial or local government control and that state ownership or "ownership by all the people" does not require the application of a single rate, if the exporter establishes the absence of de jure and de facto government control. 42/ To determine whether the respondents were eligible for separate rates, the DOC then applied an amplified version of the de jure and de facto control criteria first enunciates in the Sparklers case.

D. Current U.S. Practice

The May 3 Federal Register notice describes the DOC's current practice of permitting separate rates through the submission of Section A

39/ Id. That said, before a Sparklers analysis could be applied, all companies owned by a particular level of government would have to fully cooperate in the investigation. Were it otherwise, the DOC reasoned, other levels of government in China could funnel production through a chosen company within their jurisdiction.

40/ Id.

41/ 59 Fed. Reg. 22,585 (Dep't Commerce) (May 2, 1994) (final determination).

42/ Id. at 22,586.

questionnaire data establishing independence of firms from de jure or de facto central control. The DOC Antidumping Manual also discusses the application of separate rates in NME cases. 43/ In this regard, the Antidumping Manual reconfirms that NME exporters will be subject to a country-wide rate unless they "pass a 'separate rate' test to receive their own, individual dumping margins." 44/ The Antidumping Manual further confirms that the elements of the current "separate rate" test are set forth in Sparklers, as amplified by Silicon Carbide. 45/

According to the May 3 Federal Register notice, the current "separate rate" test

> essentially requires that the exporter demonstrate that its export activities, on both a de jure and de facto basis, are not subject to government control. Evidence supporting, a finding of de jure absence of government control over export activities would include (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. 46/
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> Relevant evidence for the de facto determination includes: 1) whether the export prices are set by or are subject to the approval of a government authority, 2) whether the respondent has the authority to negotiate and sign contracts and other agreements, 3) whether the

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43/ Antidumping Manual, Ch. 8, Section XVI at 91 (Dep't Commerce) (February 10, 1998). As noted above, though the Antidumping Manual is not strictly legal authority and, by its terms, cannot be cited as precedent to establish DOC practice, it nevertheless is instructive in clarifying the DOC's interpretation of the AD law.

44/ Id.

45/ Id.

46/ 69 Fed. Reg. at 24120. See also Antidumping Manual, ch. 8, Section XVI at 91. With respect to the de jure part of the test, there is a third related factor: "(3) any other formal measures by the government decentralizing control of companies." Coalition for Preservation of Amer. Brake Drum and Rotor Aftermarket Mfgrs. v. United States, 44 F.Supp.2d 229, 242 (CIT 1999), citing Sparklers, 56 Fed. Reg. at 20,589. See also Certain Malleable Iron Pipe Fittings from the PRC, 68 Fed. Reg. 33,911, 33,914 (Dep't. Commerce) (June 6, 2003) (preliminary determination).

respondent has autonomy from the government in making decisions regarding the selection of management, and 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. The DOC has found that "ownership by all the people," where private property/ownership does not yet exist on a large scale, does not itself imply anything about government control over export activities. 47/

In recent cases the DOC has applied, 48/ and the courts have affirmed, 49/ this test in deciding whether a Chinese exporter is eligible for a separate rate.

E. Consistency with WTO Obligations

Article 6.10 of the WTO Antidumping Agreement states that "{t}he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." 50/ The Antidumping Agreement further provides that alternative assessment methodologies are acceptable "{i}n cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination

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47/ Id.

48/ See, e.g., Manganese Metal from the PRC, 63 Fed. Reg. 12,440, 12,441 (Dep't Commerce) (March 13, 1998) (final determination); Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the PRC, 62 Fed. Reg. 61,276, 61,279 (Dep't Commerce) (November 17, 1997) (final determination); Sulfanilic Acid from the PRC, 67 Fed. Reg. 1962 (Dep't Commerce) (January 15, 2002) (final determination); Brake Rotors from the PRC, 66 Fed. Reg. 37,211, 37,212 (Dep't Commerce) (July 17, 2001) (final determination); Ball Bearings at 10,685.

49/ See, e.g., Sigma Corp. v. United States, 117 F.3d 1401, 1405 (Fed.Cir.1997); Fujian Machinery and Equipment Import & Export Corp. v. United States, 178 F.Supp.2d 1305 (CIT 2001); Air Products and Chemicals, Inc., v. United States, 14 F.Supp.2d 737, 742 (CIT 1998); Transcom, Inc. v. United States, 5 F.Supp.2d 984, 989 (CIT 1998), rev'd on other grounds, 182 F.3d 876 (CAFC 1999); Writing Instrument Manufacturers Association, Pencil Section v. United States, 984 F.Supp. 629, 642 n. 3 (CIT 1997).

50/ This principle is extended to administrative reviews by Article 18.3 of the WTO AD Agreement, which states that "the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a member of the WTO Agreement."

impracticable. . . ." 51/ In such cases, the WTO AD Agreement permits national authorities to "limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated." 52/

The DOC's practice of calculating country-wide rates for NME respondents is arguably inconsistent with WTO obligations, given the broad language of Article 6.10 and the single narrow exception for cases involving large numbers of potential respondents or products.

F. The U.S. Statute

The U.S. antidumping statute provides that an "all others" rate shall be the

> weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title ["facts available"].
> 19 U.S.C. § 1673d(c)(5)(A).

There is no statutory exemption for determining the deposit rates for firms in NME cases. Thus, the Department must continue to provide NME companies with a real opportunity to receive an average of the calculated non-zero,

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51/ WTO AD Agreement at Article 6.10.

52/ Id. Nonetheless, even in cases where a limited subset of respondents are examined, the Agreement urges national authorities to accept voluntary responses. See WTO AD Agreement at Article 6.10.2 ("In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.").

non-adverse, and non-de minimis margins. Abandoning this practice would carry a serious risk of violation of the statutory requirement for calculating an "all others" rate in antidumping cases.

The statute is similarly violated where NME companies are not provided with any practical ability to establish that they are sufficiently free of state control to be entitled to the average investigated rate. It is not only unfair, but unlawful for the Department to ignore the Section A responses that have been submitted simply due to lack of resources. This approach, in effect, establishes an irrebutable presumption that NME exporters or producers are not entitled to separate rates. The Department's long history of recognizing that companies in NMEs, especially in China, can be and often are independent of state control precludes DOC from making such a finding.

Response to DOC Questions

The Federal Register notice of May 3 requested responses to ten specific questions. CITAC's responses are below:

(1) Is Section A of the NME questionnaire sufficiently detailed to allow the Department to make complete, accurate, and informed determinations regarding exporters' eligibility for ***separate rates****? If not, what would you recommend that the Department change with respect to its section A questionnaire? For example, should the Department request further information pertaining to de jure control, or lack of control, by the NME entity?*

Response: The statute requires that there be an "all others" rates for uninvestigated firms. If the Department has difficulty finding resources to evaluate all of the Section A responses that are currently submitted in NME cases, DOC should streamline the Section A questionnaires.

(2) What new procedures or approaches should be followed at verification to ensure a rigorous examination of whether a respondent qualifies for a ***separate*** *rate?*

Response: There is no requirement that the Department verify every single Section A questionnaire response in cases where such responses are numerous Sampling questionnaire responses would be adequate. The Department should presume independence in most cases, especially where there are large numbers of firms claiming that they qualify for separate rates treatment.

(3) Due to the number of possible section A respondents in many cases and the Department's resource constraints, should the Department establish a process whereby exporters seeking a ***separate*** *rate must prepare a request and satisfy established requirements before the Department seeks additional information through the questionnaire process? What requirements would you recommend the Department establish?*

Response: As noted above, since the Department is unable to handle the current workload in many of the current NME cases, the best response is to simplify the process rather than to add complexity. The Department should issue an abbreviated Section A questionnaire and make a commitment to review every Section A questionnaire that is submitted. Where the Department has established that investigated firms are sufficiently free of government control, it is reasonable to presume that other firms in that same industry are likewise free of government control.

(4) Should the Department institute an earlier deadline for parties filing section A submissions who are requesting only a ***separate*** *rate (as opposed to a full review), in relation to the deadline for mandatory respondents? When should this deadline be?*

Response: No. If the Department abbreviates the Section A questionnaire, as recommended above, it will not be necessary to institute an earlier date for Section A responses.

(5) In light of the Department's limited resources, should the number of section A respondents be limited and, if so, upon what basis should the Department limit its examination? For example, should the Department limit the examination to a specific number of parties, base this decision upon a percentage of the number of overall respondents requesting separate rates treatment, or develop an entirely different test to limit its examination?

Response: CITAC opposes such limitations. The deposit rate established for firms seeking separate rates is based on actual information from investigated firms. As noted above, if the Department needs to conserve its resources, it should presume entitlement to separate rate treatment in this context and/or abbreviate the process rather than assuming non-entitlement.

(6) Under current practice, the Department maintains three rate categories: country-wide, individually calculated, and the average of the non-zero, non-de minimis, non-adverse rates. Does the Department have the authority to eliminate entirely the rate category that is based on the average of the calculated non-zero, non-adverse, and non-de minimis margins? This rate category is currently applicable to section A respondents, as well as to non-investigated respondents providing full questionnaire responses. If the Department has authority, should it eliminate this category and upon what basis?

Response: As discussed above, the Department does not have the authority to eliminate the category of non-zero, non-de minimis, non-adverse rates as doing so would be inconsistent with 19 U.S.C. § 1673d(c)(5)(A). If any category is to be eliminated, it should be the country-wide rate category, which is not explicitly recognized in the statute.

(7) Should the Department develop an additional rate category beyond country-wide, individually calculated, and the average of the non-zero, non-de minimis, non-adverse rates? This additional rate category could be assigned to cooperative firms denied a separate rate under options (5) or (6) above, as an alternative to assigning them the country-wide rate. How should the duty rate for this fourth rate category be calculated?

Response: The statutory rate for non-zero, non-diminimis, non-adverse rates appears to be the most supportable category. It is unnecessary for the Department to adopt an additional category if the Department adopts the streamlined approach outlined above.There should be more administratively workable methods for achieving this rate in NME cases, as is done in market economy cases.

(8) Once a separate rate has been awarded, should the Department apply it only to merchandise from producers that supplied the exporter when the rate was granted? In that case, should merchandise from all other suppliers shipped through an exporter with a separate rate receive the country-wide rate, the average of the non-zero, non-de minimis, non-adverse reviewed respondents' margins, or another duty rate altogether?

Response: CITAC supports the maximum use of the statutory non-zero, non-deminimis, non-adverse rate for exporters. We do not support the limitations stated in this question. Such a limit would deny eligible producers and exporters the benefit of the separate rates calculated as directed by the statute.

(9) Should the Department extend its separate-rates analysis to exporter-producer combinations, i.e., should the Department consider any government control exercised on an exporter through a producer?

Response: The key issue is whether a combination of an exporter and a producer necessarily implies central government control such that the combination is not freely pricing its products, or that it is not free to pay market prices for its inputs. The scenario presented does not suggest the presence of central government control over production and pricing and therefore would not seem to justify the application of country wide rates in an NME case.

(10) Please provide any additional views on any other matter pertaining to the Department's practice pertaining to separate rates.

Response: The letter above provides additional comments.

Conclusions

The contemplated changes to DOC policy concerning the treatment of NME respondents should be substantially revised. Any new policy should be based on fundamentally sound premises, including:

1. Firms in NMEs are likely to be free of government control in many if not most cases, based on the accumulated knowledge of the DOC in antidumping cases, especially involving firms in the People's Republic of China.

2. DOC should not impose unrealistic or illogical presumptions in order to inflate antidumping duty rates. Nor should the DOC impose unreasonable burdens on firms that seek to demonstrate that they are free of government control.

3. NME firms that have responded to the Department's Section A response should not be included in the Department's country-wide rate (which includes "facts available" margins) simply because the Department does not have the resources to evaluate their submissions.

4. Unless there is a good reason (and generally there would not be), non-investigated firms in NME cases should be given an "all others" rate, based on the statutory requirement that it be the weighted average of all investigated firms

other than those receiving zero or deminimis rates, or firms given a rate solely from "facts available."

We appreciate the opportunity to comment on this practice. We look forward to working with the Department to further its objectives and to ensure the fairness of antidumping proceedings.

Sincerely,

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