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VIA HAND DELIVERY

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

Re: Response to Request for Comments Dated May 3, 2004 (69 Fed. Reg. 24,119) on Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries

Dear Mr. Jochum:

On May 3, 2004, the International Trade Administration, Department of Commerce (the "Department"), published a Notice requesting comments concerning the Department's separate rate policy and practice in non-market economy ("NME") cases. *See* 49 Fed. Reg. 24,119. Maria Yee, Inc., an importer of furniture from the People's Republic of China, submits the following comments in response to the Department's request. These comments include both general comments concerning the Department's current separate rate policy and practice, as well as specific comments concerning items 4 and 7 listed in the Appendix to the Notice.

Introduction/General Comments

It is important to have a separate rates policy and practice in NME cases, but the Department's development of that practice has not met the requirements of U.S. antidumping law or the United States' international obligations. Rather, the Department's current separate rates policy and practice in NME cases is flawed, especially as regards the distinction between cooperative and uncooperative companies and the application of facts available. First, the Department must provide adequate public notice before applying such a policy and practice

during an investigation or review. The Department currently provides no notice. Second, if the current policy and practice is to be applied in any case, potential respondents must be given a reasonable period in which to file a voluntary Section A response. The period currently allotted by the Department, the same as for Section A responses by mandatory respondents, is insufficient, especially in the absence of any notice of the policy and practice. Third, when the Department receives information indicating that a substantial number of exporters and producers in an investigation are not controlled by the government, the Department may not reasonably presume that potential respondents that do not submit a voluntary Section A response are government-controlled and assign a rate based on facts available to such companies. The Department currently applies this presumption automatically and without regard to the facts presented in each case. Fourth, an exporter or producer that does not submit a voluntary Section A response but is not uncooperative should not be assigned a rate based on facts available, such as is assigned to non-cooperative respondents from whom the Department requested information but received an inadequate (or no) response. The Department under its current practice may apply a facts available based rate to both.

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 stipulates that:

> 1. All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question (Article 6.1) (emphasis added);
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> 2. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation,...determinations...may be made on the basis of the facts available. (Article 6.8); and

> 3. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of facts available (Annex II, Paragraph 2.).

The U.S. antidumping law, consistent with the Agreement, authorizes determinations on the basis of facts available only when an interested party withholds or fails to provide information requested by the Department or otherwise significantly impedes the proceeding. *See e.g.*, 19 U.S.C. §§1677m(c), 1677m(g), and 1677e. Section 1673d(c)(5) of the antidumping law specifically enumerates the methods to be used by the Department in determining estimated all-others rates. This Section nowhere provides for the determination of an all-others rate based on facts available and adverse inferences. Indeed, Section 1673d(c)(5), even when the margins for all exporters and producers individually investigated are determined on the basis of facts available, provides only that the Department may use any reasonable method for determining the estimated all-others rate. Nothing in Section 1673d(c) (5) or other provisions of the antidumping law suggests that it is reasonable to merely apply a facts available, adverse inferences based rate to all-others, especially when such "others" have not been given a chance to cooperate or not.

When viewed in light of the above provisions, it is clear that the Department must modify its current "separate rate" policy and practice of the Department in NME cases to be consistent with the Agreement and authorized under the U.S. antidumping law. Any policy and practice of the Department must take into account fairness as well as administrative efficiency, and it is practicable, even in NME cases with a substantial number of potential respondents, to do both.

First, the Department must provide adequate public notice, including in published investigation notices, of any policy and practice imposing procedures and deadlines that impact the determination of deposit or duty rates for any group of potential respondents. The current

policy and practice imposes such procedures and deadlines without notice. The failure to provide adequate public notice of the current Department practice prejudices potential respondents, especially those new to the antidumping investigation or review process, that might otherwise avail themselves of the option to submit a voluntary Section A response. Such prejudice is what Article 6.1 of the Agreement sought to avoid.

Second, in the case of the Department's current policy and practice, companies must be given a fair and reasonable period of time in which to file voluntary Section A responses. Along with adequate notice, Article 6.1 dictates that parties be allowed adequate opportunity to provide relevant and responsive information. The Department's current, unannounced deadline for voluntary Section A responses does not allow non-mandatory potential respondents such an opportunity. Especially in the absence of a published notice by the Department of its practice in the course of an investigation, the deadline must be beyond that established for mandatory respondents, which directly receive both the questionnaire and a notice of deadline for response. Indeed, given the limited purpose of voluntary Section A responses (assessing whether there is government control rather than obtaining pricing data to be used in calculating a separate rate), there is no reason to establish a deadline in advance of the last date upon which information is accepted in the investigation.

Third and fourth, the Department's presumption that all companies not submitting voluntary Section A responses are government controlled may not be reasonable in every case, and regardless of that presumption respondents (or potential respondents) that have not been uncooperative should never be assigned a rate based on facts available such as are assigned to uncooperative respondents. Although the antidumping law allows for the determination of rates

based on facts available and adverse inferences when a respondent is uncooperative, the law does not authorize the arbitrary extension of such rates to other parties or the utilization of such a rate as the basis for an all-others rate. Under the antidumping law, any determination of an all-others rate must be based on a reasonable method.

The Department's current practice is to presume that any company not filing a voluntary Section A response is government controlled. As a result of that presumption, the Department automatically subjects such potential respondents to a country-wide rate which, if any mandatory respondent has been uncooperative, may be based on adverse inferences. In cases where information has been presented to the Department indicating that presumption is incorrect (such as through voluntary Section A responses, or otherwise), the automatic application of the presumption potentially leads to the arbitrary assignment of a facts available based rate to companies that are not government controlled.

Further, the extension of a facts available based rate to respondents (and potential respondents) that have not been uncooperative, under the guise of applying an all-others rate, is inappropriate under any circumstances. Regardless of whether an exporter or producer provides a voluntary Section A response and regardless of the validity of the Department's determination or presumption as to government control, companies that have not been uncooperative may not be assigned a rate based on facts available and adverse inferences, such as is assigned a non-cooperative respondent from whom the Department requested information but received an inadequate (or no) response. There is no legal basis for assigning an exporter or producer that has not been requested to provide any information (and which the Department has discouraged from voluntarily submitting information) a facts available, adverse inferences based rate

calculated pursuant to Section 1677e. Instead, as required by Section 1673d(c)(5), which establishes the parameters for determining all-other rates, the rate assigned to such companies must be determined using a reasonable method, would include: (1) assigning the rate currently used for voluntary Section A responders to both Section A responders and potential respondents that have not been uncooperative; (2) assign a rate to voluntary Section A responders that is based on the weighted average of the estimated weighted average margins determined for exporters and producers individually investigated, including those with de minimis or zero rates, and assign the rate currently used for Section A responders to other potential respondents that have not been uncooperative; or (3) assign other companies that have not been uncooperative a rate based on either an average or weighted average of the estimated weighted average dumping margins for the exporters and producers individually investigated, including any zero, de minimis or facts available based rates.

The Department is legally required to bring its separate rates policy and practice into conformity with the U.S. antidumping law and international obligations as soon as possible by making the changes discussed in these comments. Accordingly, the Department should immediately modify its policy and practice and apply the new policy and practice to all pending and future NME antidumping investigations. This means in the cases of *Wooden Bedroom Furniture from the People's Republic of China* and *Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China, and the Socialist Republic of Vietnam*, and any other pending investigations, the Department must extend the deadline for voluntary Section A responses, re-evaluate its presumption as to potential respondents being subject to government control and establish a separate rate other than one

based on facts available and adverse inferences for companies that have not been uncooperative even in the absence of a voluntary Section A response. Failure to effectuate this change immediately will result in the assignment of particularly flawed rates to a significant number of companies, contrary to law.

Response to Questions 4 and 7 in the Appendix to the Notice

(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?

The Department should not institute an earlier deadline for voluntary Section A submissions. To the contrary, the Department should provide a longer deadline for parties filing Section A submissions who are requesting a non-government controlled rate as compared to the deadline for mandatory respondents and should provide notice of the opportunity to submit a Section A response. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 6.1 (All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question (emphasis added)).

In proceedings involving a large number of potential respondents, the Department does not send a Section A questionnaire to every producer and exporter. Further, neither the investigation notice nor the Department's respondent selection memoranda even discuss its Section A respondent practice. Thus, potential respondents have no notice of their ability to submit a voluntary response, even if they obtain the respondent selection memorandum. To the

contrary, the respondent selection memoranda typically dissuade companies from submitting voluntary responses of any kind by stating in no uncertain terms that the Department will not review the response of any voluntary respondent unless a mandatory respondent fails to cooperate. *See e.g., Certain Color Television Receivers from the People's Republic of China Respondent Selection Memorandum* (June 22, 2003); *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China Respondent Selection Memorandum* (Sept. 15, 2003); and *Wooden Bedroom Furniture from the People's Republic of China Respondent Selection Memorandum* (Feb. 2, 2004). Thus, a potential respondent that has not been selected as a mandatory respondent and has not receive a questionnaire from the Department does not have sufficient notice of its ability to submit a Section A response and potentially be treated as a Section A respondent.

This lack of notice is compounded by the Department's early deadline for submission of Section A responses which generally is within 21 days of the issuance of the questionnaire. Even if the company becomes aware of the Section A respondent practice, it is often too late for the company to submit a Section A Response that will be accepted by the Department.

Because the Section A submissions do not impose the burden on the Department of a full review, the Department should use its deadline for submission of factual information as the deadline for responding to Section A for potential respondents. *See* 19 C.F.R. §351.301(b). This longer deadline would provide the Department with enough time to provide appropriate notice of its "Section A respondent" practice so that all companies interested in filing a Section A response can do so.

(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?

The Department should develop an additional rate category beyond country-wide, individually calculated, and the average of the non-zero, non-de minimis, non-adverse rates (*i.e.*, Section A Respondents' rate), or it should expand the applicability of the average of the non-zero, non-de minimis, non-adverse rates to all companies that have not been uncooperative. The Department's current country-wide rate calculation is contrary to the statute because it applies a presumption that all manufacturers and exporters are government controlled, even in the face of facts suggesting otherwise (for example, such as a determination that a substantial number of the mandatory respondents and most if not all of the Section A respondents are not government controlled), and it penalizes companies that have not received any requests for information from the Department by requiring them to pay the higher country-wide rate. The current practice goes against the purpose of antidumping duties, which are intended to be remedial, not punitive, compensatory, or retaliatory. *See e.g.*, *Chaparral Steel Co. v. U.S.*, 901 F.2d 1097 (Fed. Cir. 1990); *Timken U.S. Corp. v. U.S.*, 2004 WL 415248 (CIT 2004); *Allied Tube & Conduit Corp. v. U.S.*, 24 CIT 1357 (CIT 2000).

In most cases, the Department calculates the country-wide rate using adverse facts available based on its conclusion that the mandatory and other respondents do not account for all of merchandise according to U.S. import statistics and therefore certain exporters did not respond. *See e.g., Certain Color Television Receivers from the People's Republic of China*, 68 Fed. Reg. 66,800, 66,805 (Nov. 28, 2003); *Floor-Standing, Metal-Top Ironing Tables and*

Certain Parts Thereof from the People's Republic of China, 69 Fed. Reg. 5127-01 (Feb. 3, 2004); *Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 Fed. Reg. 3544-01 (Jan. 26, 2004); *Certain Malleable Iron Pip Fittings from the People's Republic of China*, 68 Fed. Reg. 33,911 (June 6, 2003). Because these non-responding companies are considered to be under government control, their action (or inaction, more appropriately), is relied upon as justification to use adverse facts available in calculating the country-wide rate. The Department's standard practice is to assign as the country-wide rate the higher of: 1) the highest margin stated in the notice of initiation (*i.e.*, the recalculated petition margin); or 2) the highest margin calculated for any respondent in the investigation. *Certain Color Television Receivers from the People's Republic of China*, 68 Fed. Reg. 66,800 (Nov. 28, 2003).

When there are many potential respondents, however, the Department is not able to send a request for information to every producer and exporter. As a result, certain producers and exporters do not receive a request for information from the Department (and thus have not been given an opportunity to cooperate) and yet will be considered by the Department to be subject to the adverse, country-wide rate as though they received a request but did not cooperate.

The Department's current practice with respect to applying the adverse, country-wide rate to companies from whom the Department never requested information is contrary to the statute. Section 776(b) of the Tariff Act of 1930, as amended, provides that the Department may use adverse facts available only if it finds that an "interested party has failed to cooperate by not acting to the best of its ability to comply with the request for information...." 19 U.S.C. §1677e(b); *see also* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 6.8 (In cases in which any interested party refuses access to, or

otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation,...determinations...may be made on the basis of the facts available). A company from whom the Department has not requested information should not be deemed "uncooperative" and should not be subject to a country-wide rate calculated using an adverse inference. Companies who were never sent a request for information by the Department should be distinguished from companies who were sent requests for information by the Department and failed to properly respond. The Department's practice has been to treat those that have been approached by the Department, and have not properly responded as uncooperative, and this treatment is in accordance with law. *See e.g.*, *Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 Fed. Reg. 3544-01 (Jan. 26, 2004) (applying an adverse rate to a mandatory respondent that refused to file a response to the Department's supplemental questionnaire and withdrew its participation); *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 69 Fed. Reg. 5127-01 (Feb. 3, 2004) (applying an adverse rate to a voluntary respondent that failed to timely file a Section A Response). But the same adverse rate cannot be applied to companies from whom the Department did not request information. The Department presumes that, unless exporters affirmatively files a Section A Response and qualifies for a separate rate, then they constitute a single enterprise under the control of the government, subject to any adverse inferences applicable to companies that did not cooperate with a request for information. But this presumption cannot fairly be applied to those who were never sent a request for information by the Department.

Thus, a company from whom the Department has not requested information should be subject to a cooperative rate, possibly the "Section A Respondents' rate" or a country-wide rate calculated without the use of an adverse inference. Either rate would be a more legally justifiable alternative to an adverse country-wide rate for a company that was never contacted by the Department to provide information.

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Please contact the undersigned if you need additional information.

Sincerely,

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