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June 1, 2004

PUBLIC DOCUMENT

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

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

Dear Assistant Secretary Jochum:

In a Federal Register notice published on May 3, 2004, the Department of Commerce (the "Department") requested comments regarding its separate rates policy and practice in antidumping proceedings involving non-market economy ("NME") countries.[1] On behalf of United States Steel Corporation ("U.S. Steel"), we hereby submit comments in response to the Department's request.

[1] Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 24119 (Dep't Commerce May 3, 2004) (request for comments) ("Request for Comments Regarding Separate Rates Practice").

I. INTRODUCTION

In antidumping proceedings involving NMEs, the Department begins with a rebuttable presumption that all companies within the country are subject to governmental control and should be assigned a single antidumping duty rate (i.e., the country-wide rate).[2] To be entitled to a separate rate, a company must demonstrate the absence of both *de jure* and *de facto* governmental control over its export activities.[3] The Department's current separate rates test is not concerned with macroeconomic border-type controls such as export licenses, quotas, and minimum export prices. Rather, the test focuses on controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level.[4] As the Department has stated, "{t}he analysis is focused narrowly on an individual company" and that company's "independence in its export activities."[5]

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2 Bicycles from the People's Republic of China, 61 Fed. Reg. 19026, 19027 (Dep't Commerce Apr. 30, 1996) (final determ.).

3 Id.

4 Certain Color Television Receivers From the People's Republic of China, 68 Fed. Reg. 66800, 66804 (Dep't Commerce Nov. 28, 2003) (prelim. determ.) ("Color TVs from China Prelim. Determ."); Certain Cold-Rolled Carbon Steel Flat Products From the People's Republic of China, 67 Fed. Reg. 31235, 31236 (Dep't Commerce May 9, 2002) (prelim. determ.).

5 Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China, 62 Fed. Reg. 61276, 61279 (Dep't Commerce Nov. 17, 1997) (final

(continued...)

Specifically, in determining whether there is an absence of *de jure* governmental control of a company's export activities, the Department considers the following: (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.[6] And in determining whether there is an absence of *de facto* governmental control of a company's export activities, the Department considers whether the company: (1) sets its own export prices; (2) retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government in making decisions regarding the selection of management.[7] The Department does not and will not consider evidence of any other form of governmental manipulation or control over a company's operations, no matter how substantial and extensive that form of manipulation or control may be.[8]

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5 (...continued)
results) ("TRBs from China").

6 Certain Cut-to-Length Carbon Steel Plate From Ukraine, 62 Fed. Reg. 61754, 61758 (Dep't Commerce Nov. 19, 1997) (final determ.) ("Cut-to-Length Plate from Ukraine").

7 See id.

8 See Hand Trucks and Certain Parts Thereof From the People's Republic of China, 69 Fed.
(continued...)

Moreover, under the Department's policy and practice, an NME company seeking a separate rate need not respond in full to the Department's antidumping duty questionnaire. Instead, if the company is not selected as a mandatory respondent, it need simply submit a request for separate rates treatment along with a response to Section A of the questionnaire. Typically, the Department will grant such a company a separate rate based solely on these submissions.[9] The companies in question are the so-called "Section A respondents."[10]

As the Department has acknowledged, its separate rates policy and practice has raised two serious concerns. One such concern is that the Department has received increasingly large numbers of requests for separate rates from Section A respondents in recent years, and the Department simply lacks the resources necessary to analyze and evaluate all of the requests being made.[11] Moreover, many parties have raised the concern that the Department's implementation of the separate rates test is a flawed means of determining whether companies act independently

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8 (...continued)
Reg. 29509, 29512 (Dep't Commerce May 24, 2004) (prelim. determ.) ("Hand Trucks from China"); Decision Memorandum in Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China, 66 Fed. Reg. 49632 (Dep't Commerce Sept. 28, 2001) (final determ.) ("Decision Memo in Hot-Rolled Steel from China"), at Comment 1 (Public Document).

9 See Color TVs from China Prelim. Determ., 68 Fed. Reg. at 66805.

10 Request for Comments Regarding Separate Rates Practice, 69 Fed. Reg. at 24120.

11 Id.

of the government and, therefore, are entitled to a separate antidumping duty rate from the country-wide rate.[12]

To address these concerns, the Department should modify its separate rates policy and practice in two significant respects. First, it should no longer permit companies to obtain separate rates treatment based simply on submitting a request for such treatment and a Section A response. In other words, the Department should not grant separate rates treatment to Section A respondents. Second, the Department should revise the requirements that must be satisfied for other respondents to be assigned separate rates. These changes are discussed more fully below.

II. THE DEPARTMENT SHOULD NO LONGER PERMIT SECTION A RESPONDENTS TO OBTAIN SEPARATE RATES

One change that can and should be made to the Department's policy and practice is to no longer permit Section A respondents to obtain separate antidumping duty rates. This aspect of the Department's policy and practice is not required by law and creates significant problems for the Department as well as enormous opportunities for abuse.

The Department's policy and practice with respect to Section A respondents is not required or even envisioned under the U.S. antidumping statute or the Department's regulations. In fact, there is nothing in either the statute or the regulations that addresses this situation.

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12 See id.

The only potentially applicable provisions of U.S. law are Sections 777A(c) and 782(a) of the Tariff Act of 1930, as amended (the "Act"). Section 777A(c) addresses the selection of respondents by the Department and provides as a general rule that the Department shall determine an individual dumping margin for each known exporter and producer of the subject merchandise.[13] However, where, as is often the case, this is not practicable, the Department may limit its examination and calculation of individual margins to a sample of exporters and producers.[14] Beyond this, Section 777A(c) of the Act does not address the calculation of separate rates for companies from an NME country and certainly does not provide any special rules for companies submitting only a response to Section A of the Department's questionnaire.

Section 782(a) of the Act governs the treatment of voluntary responses to the Department's antidumping duty questionnaire. Under Section 782(a), where the Department has selected a limited number of mandatory respondents, it must calculate individual antidumping duty rates for companies that are not selected as mandatory respondents but that submit all of the information requested from the mandatory respondents, including complete and timely responses to all sections of the Department's questionnaire.[15] However, the Department need not do so

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13 19 U.S.C. § 1677f-1(c)(1).

14 Id. § 1677f-1(c)(2).

15 See id. § 1677m(a).

where the number of such voluntary respondents is so large that calculating individual dumping margins for such companies would be unduly burdensome and would inhibit the timely completion of the investigation.[16] In other words, Section 782(a) of the Act addresses the Department's obligations in certain instances where voluntary respondents submit complete responses to the Department's questionnaire and all other information requested from mandatory respondents. Once again, this provision says nothing about separate rates for companies that only submit a response to Section A of the Department's questionnaire.

Accordingly, the Department's separate rates policy and practice, particularly with regard to Section A respondents, is not required or even envisioned by the antidumping statute or the Department's regulations. Indeed, as the Department has stated, its policy and practice originated in its determination in Sparklers From the People's Republic of China and was then modified in Silicon Carbide from the People's Republic of China.[17] In other words, it is solely a creature of administrative practice.

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16 See id.

17 See Request for Comments Regarding Separate Rates Practice, 69 Fed. Reg. at 24120 (citing Sparklers From the People's Republic of China, 56 Fed. Reg. 20588 (Dep't Commerce May 6, 1991) (final determ.); Silicon Carbide From the People's Republic of China, 59 Fed. Reg. 22585, 22587 (Dep't Commerce May 2, 1994) (final determ.); Polyethylene Retail Carrier Bags from the People's Republic of China, 69 Fed. Reg. 3544, 3547 (Dep't Commerce Jan. 26, 2004) (prelim. determ.) ("Bags from China") (same).

Nor is the Department's policy and practice required by the provisions of the WTO Anti-Dumping Agreement (the "AD Agreement"). The provisions of Articles 6.10 and 6.10.2 of the AD Agreement are virtually identical to Sections 777A(c) and 782(a) of the Act, respectively,[18] and there is no other provision of the AD Agreement that is even arguably applicable here. Thus, the Department's policy and practice with respect to Section A respondents is not required or even envisioned by U.S. law or the AD Agreement. As a result, the Department is free to change this policy and practice as long as it has an adequate justification for doing so.

There are a number of reasons justifying a change in the Department's policy and practice of allowing Section A respondents to obtain separate rates. First, this policy and practice has created enormous and intractable resource allocation problems for the Department. It has led to ever increasing numbers of requests for separate rates from Section A respondents. Indeed, in several recent cases, the Department has faced extraordinarily large numbers of such requests.[19]

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18 See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, arts. 6.10, 6.10.2. Indeed, Sections 777A(c) and 782(a) of the Act were intended to implement Articles 6.10 and 6.10.2 of the AD Agreement. See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act at 872-73, reprinted in 1994 U.S.C.C.A.N. 4040, 4200-4201.

19 See, e.g., Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China, et al., 69 Fed. Reg. 3876 (Dep't Commerce Jan. 27, 2004) (initiation); Bags from China, 69 Fed. Reg. at 3547-48; Wooden Bedroom Furniture From the People's Republic

(continued...)

The Department simply lacks the resources necessary to handle these requests. This problem is one of the very reasons that gave rise to the request for comments issued by the Department here.[20]

Second, in granting Section A respondents separate rates, the Department is rewarding them for not providing complete responses to the questionnaire. Under the Department's policy and practice, Section A respondents can obtain separate rates based merely on a request for such treatment and a Section A response. In other words, these companies are allowed to overcome the presumption of governmental control in an NME country by basically showing up and asking for a separate rate. They are not subjected to the scrutiny received by an investigated company or even a voluntary respondent that has submitted a complete response to the Department's questionnaire. This special treatment for Section A respondents provides no incentive for companies to provide all of the information requested by the Department. In fact, it provides an incentive for companies to do just the contrary.

Finally, the Department's policy and practice is rife with the potential for abuse. The meager procedural requirements and showing that must be made for Section A respondents to be entitled to separate rates treatment opens the floodgates for companies to request and

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19 (...continued)
of China, 68 Fed. Reg. 70228 (Dep't Commerce Dec. 17, 2003) (initiation).

20 See Request for Comments Regarding Separate Rates Practice, 69 Fed. Reg. at 24120.

receive such treatment, whether they are truly entitled to it or not. This could result in artificially low antidumping duty rates for such companies, thereby subverting the effectiveness of the order.

In sum, the Department's policy and practice with respect to granting separate rates to Section A respondents is neither required by law nor justified from a policy perspective. Accordingly, the Department should discontinue that policy and practice in all cases.[21]

III. THE DEPARTMENT SHOULD SIGNIFICANTLY MODIFY THE REQUIREMENTS THAT MUST BE SATISFIED FOR RESPONDENTS TO BE ENTITLED TO SEPARATE RATES

As noted above, the Department's current separate rates test focuses narrowly on an individual company and its independence in its export activities.[22] In adopting this "narrow" focus, however, the Department's test ignores what is often the NME government's pervasive manipulation of and control over a company's or an industry's overall operations. As a result, the Department's test fails to resolve the question of whether an NME company is truly independent of the government and is therefore entitled to a separate antidumping duty rate from the country-

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21 It is important to note that such a change in the Department's policy and practice would not eliminate the ability of Section A respondents to obtain their own antidumping duty rate. To the contrary, these companies would have the opportunity to request an administrative review and obtain their own rates after an order is issued in a case. See Decision Memorandum in Certain Color Television Receivers From the People's Republic of China, 69 Fed. Reg. 20594 (Dep't Commerce Apr. 16, 2004) (final determ.) ("Final Determ. Decision Memo in Color TVs from China"), at Comment 2 (Public Document).

22 See TRBs from China, 62 Fed. Reg. at 61279.

wide rate. The Department's test must be expanded to constitute a true measure of the government's ability to manipulate and control an NME company. Specifically, there is no reason for the difference between the tests employed by the Department in determining whether a company is entitled to a separate antidumping duty rate and whether the industry producing the subject merchandise is a market-oriented industry ("MOI"), and the Department should adopt the broader MOI test for its separate rates determinations.

Indeed, in applying its current separate rates test in a number of cases, the Department has completely disregarded the significant and extensive involvement of the NME government in the operations of the industry or companies in question.[23] For example, in Hot-Rolled Steel from China, the Department determined that the respondents were entitled to separate rates despite the pervasive involvement of the Chinese government in all aspects of the steel industry in that country. The record evidence established that this involvement included import restrictions and export subsidies, price and production controls, direct government investment in the steel industry, subsidization of industry sectors that provided raw material

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23 See, e.g., Hand Trucks from China, 69 Fed. Reg. at 29512; Decision Memorandum in Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 37116 (Dep't Commerce June 23, 2003) (final determ.), at Comment 5 (Public Document) ("Decision Memo in Frozen Fish Fillets from Vietnam"); Decision Memo in Hot-Rolled Steel from China at Comment 1 (Public Document).

inputs for steel, state-orchestrated mergers, and government-encouraged cartel activity.[24]

Nevertheless, the Department determined that

> while this information arguably provides evidence of Chinese government control over the Chinese steel industry, it does not necessarily presuppose company-specific government control over export activities. Specifically, the government measures identified in these documents range from production targets for individual steel producers to very specific industry targets for utilization rates of steel inputs such as water per ton, energy used per ton, and man hours per ton. Although these measures suggest extensive government management of the Chinese steel industry, we find that this form of government control does not implicate the four prongs of the Department's de facto separate rates test.[25]

The Department's recent determination in Hand Trucks from China also vividly demonstrates that the Department's current separate rates test does not constitute a true measure of whether a company is independent of government control and, therefore, is entitled to a separate rate. In that case, the petitioners submitted information showing that there was significant government control over the establishment and structure of the hand trucks industry by the central, provincial, and municipal governments in China. The petitioners showed that this extensive government involvement resulted in the hand trucks industry in a particular province attaining its giant size and production capabilities.[26] However, the Department found this information to be irrelevant to its analysis of whether the respondents were entitled to separate

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24 Decision Memo in Hot-Rolled Steel from China at Comment 1 (Public Document).

25 Id.

26 See Hand Trucks from China, 69 Fed. Reg. at 29512.

rates. In so doing, the Department stated that "{t}he Department's current separate rates test . . . does not examine the types of government control alleged by the petitioners."[27]

And although the Department's separate rates test is purportedly focused on government control over a company's export activities, the Department has granted separate rates treatment to companies even in the face of significant government involvement and control in that area.[28] Indeed, in Cut-to-Length Plate from Ukraine, the Department determined that the respondents were entitled to separate rates notwithstanding the fact that the government had set minimum export prices for certain categories of goods, including cut-to-length plate, and that the respondents admitted at verification that "prior to, and during the POI they were required by Ukrainian Customs officials to sell subject merchandise at the minimum price published monthly by {the Ministry of Foreign Economic Relations and Trade (MFERT)} for all sales to the U.S. market."[29] Similarly, in Honey from China, the Department determined that export quotas and mandatory minimum export prices set by the Chinese government to control worldwide prices of

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27 Id.

28 See, e.g., Decision Memo in Frozen Fish Fillets from Vietnam at Comment 5 (Public Document); Cut-to-Length Plate from Ukraine, 62 Fed. Reg. at 61758-59; Honey From the People's Republic of China, 60 Fed. Reg. 14725, 14727 (Dep't Commerce Mar. 20, 1995) (prelim. determ.) ("Honey from China").

29 Cut-to-Length Plate from Ukraine, 62 Fed. Reg. at 61758-59.

exported honey did not preclude the respondents from receiving separate rates under the Department's test.[30]

Furthermore, the Department determined that the respondents in Frozen Fish Fillets from Vietnam were entitled to separate rates even though the petitioners showed government control of the respondents' export activities through an organization committed to coordinating the activities of Vietnamese producers and exporters of the subject merchandise.[31] In so doing, the Department determined that even in cases where the government's control is directly related to the respondents' export activities, it will still grant separate rates treatment as long as the control is macroeconomic in nature (i.e., the control is exerted through means such as export licenses, quotas, and minimum export prices).[32]

Accordingly, the Department's current separate rates test simply does not account for the full effect of an NME government's manipulation of and control over a company's overall operations and the marketplace itself. It is not an accurate reflection of whether a company is truly independent of the government in making its pricing and output decisions and, therefore, is entitled to an antidumping duty rate separate from the country-wide rate. The Department's test should be expanded to account for all significant and pervasive forms of governmental involve-

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30 Honey from China, 60 Fed. Reg. at 14727.

31 Decision Memo in Frozen Fish Fillets from Vietnam at Comment 5 (Public Document).

32 See id.

ment, influence, and control in an industry or with respect to a particular company. The burden should be placed squarely on a company seeking a separate rate to demonstrate that these forms of governmental involvement, influence, and control do not impact its operations and that it is truly independent from the government.

Specifically, in making separate rates determinations, the Department should employ the broader test of government involvement that it uses in making MOI determinations.[33] If the Department fails to broaden its separate rates test in this regard, its use of the country-wide rate will fail to serve its essential purpose of preventing NME governments from circumventing antidumping orders by directing the flow of subject merchandise through exporters that have the lowest antidumping duty rates.

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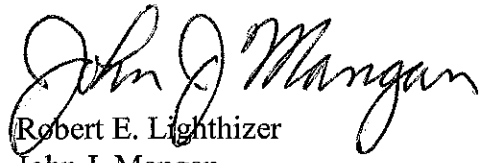
33 Under the MOI test, an NME company must show that: (1) there is virtually no government involvement in production or prices for the industry in question; (2) the industry is marked by private or collective ownership that behaves in a manner consistent with market considerations; and (3) producers pay market-determined prices for all major inputs and for all but an insignificant proportion of minor inputs. See Final Determ. Decision Memo in Color TVs from China at Comment 1 (Public Document).

IV. CONCLUSION

The Department should modify its separate rates policy and practice in the two respects described above. These changes are critical to ensure the continued effectiveness of the Department's policy and practice and to preserve the ability of the antidumping law to counteract the pervasive governmental manipulation and control of the marketplace in an NME country.

Respectfully submitted,



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