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January 24, 2005

BY HAND
U.S. Department of Commerce
Central Records Unit, Room 1870
14th St. & Pennsylvania Ave, NW.
Washington, DC 20230

Attention: James J. Jochum
Assistant Secretary for Import Administration

Re: Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries
Our Reference: 10512-001 0001 I

Dear Assistant Secretary Jochum:

These comments are filed on behalf of the Government of the People's Republic of China ("China"), Bureau of Fair Trade for Imports & Exports ("BOFT"), Ministry of Commerce, in response to the U.S. Department of Commerce's Request for Comments on Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, as published in 69 Fed. Reg. 77,722 (December 28, 2004).

An original and six copies of China's comments are attached, as well as an electronic version in CD-ROM.

Please contact the undersigned if you or your staff has any questions regarding these comments.

Respectfully submitted,

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SUBMISSION OF

THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, BUREAU OF FAIR TRADE FOR IMPORTS & EXPORTS, MINISTRY OF COMMERCE

ON

SEPARATE RATES PRACTICE IN ANTIDUMPING PROCEEDINGS INVOLVING NON-MARKET ECONOMY COUNTRIES

JANUARY 24, 2005

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Submission Of The Government Of The People's Republic Of China ("China"), Bureau Of Fair Trade For Imports & Exports ("BOFT"), Ministry Of Commerce

I. INTRODUCTION

The Government of the People's Republic of China (hereinafter "China"), Bureau of Fair Trade for Imports & Exports ("BOFT"), Ministry of Commerce, hereby responds to the United States Department of Commerce's Request for Comments on its Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, as published in 69 Fed. Reg. 77,722 (December 28, 2004).

This is the Department of Commerce's ("Department" or "DOC") third Notice concerning this issue, and the third submission filed by the Government of China. In its response to the Department's initial notice, published in 69 Fed. Reg. 24119 (May 3, 2004), China reminded Commerce of the great importance it attaches to Sino-U.S. economic and trade relations, and asked the DOC to be mindful of the joint desire of the United States and China to develop a strong and lasting bilateral economic and trade relationship. In furtherance of this goal, China requested that the DOC refrain from adjusting its antidumping rules and policies in any manner that would negatively impact the progress made in Sino-U.S. economic and trade relations. China also reminded the DOC that its current presumption that all Chinese firms are controlled by the government with respect to export activities is wrong both in law and in fact. With the significant progress in Chinese Market-oriented reforms, Chinese firms have become sufficiently independent from government control over their manufacture, production, sale and other activities to be presumed to act in the same manner as companies located in market

economy countries, unless the Department is presented with substantial evidence to the contrary. This market orientation is guaranteed by national PRC laws relating to the export functions of Chinese firms, including the Company Law, Foreign Trade Law, Security Law of PRC, and PRC Laws on Joint Ventures Using Chinese and Foreign Investment, Wholly Foreign-Invested Enterprises and Chinese-Foreign Contractual Joint Ventures, etc. (In fact, the Department is well aware of these laws, since they many Chinese measures confirming market orientation are specified in the list of laws and regulations in the Department's draft Separate Rate Application Form, at Section III, question 5, on page 9). Consequently, in its previous comments, China requested that the Department eliminate reliance on an adverse facts available ("AFA") China-wide rate in Non-Market Economy ("NME") investigations.

Unfortunately, in its second Notice, dated September 20, 2004, the DOC failed to even acknowledge China's concerns and the substantial evidence submitted supporting its position. Instead, the Department's request for additional comments focused on the unsupported assertion that the current NME policy may "undermine the effect of ***other*** antidumping or countervailing duty margins the Department ***calculates***." (emphasis added). 69 Fed. Reg. 56188. In response, China reminded the Department that "other" antidumping margins for Chinese exporters are not "calculated" at all. Rather, as the Department is aware, they represent AFA rates as alleged by domestic petitioners who often use the AD law of the United States to create an absolute bar to Chinese exports. These rates are completely unrealistic. They unfairly discriminate against Chinese exporters, especially when compared to rates assessed other U.S. trading partners. They amount to harsh penalties that effectively prevent companies receiving AFA China country-wide rates from exporting to the United States.

In its third Notice, the Department once again has ignored these basic problems with its current practice. Instead, it has proposed two fundamental changes in United States law which will make it even more difficult than before for Chinese companies to avoid punitive AFA rates that will result in Chinese exporters being treated differently than exporters from market economy countries. China believes that these proposed new policies clearly violate United States international obligations as set forth in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("International Antidumping Code"). They also effectively nullify the benefits accruing to China upon its accession to the Word Trade Organization, as set forth in the Protocol on The Accession of the People's Republic of China to the WTO, Nov. 10, 2001. This Protocol only allows WTO members to treat China differently than market economy countries with respect to substantive determinations of price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement; it does not allow members to discriminate against China with respect to antidumping procedures, assessment rates and documentation submission requirements, which are the subject of the new procedures proposed by the Department. If implemented, these policies, therefore, would violate the express language of paragraph 15 of the Protocol and would impede the attainment of the Protocol's objective of granting China the same status in AD proceedings as market economy countries. Thus, if the United States ultimately decides to act in this manner, China could, if it desired, exercise its rights under Article XXIII, General Agreement on Tariffs and Trade 1994.

In light of the Department's stated justification for its two new proposals – i.e., to prevent the potential evasion of AD duties and to more effectively enforce the AD law - China again believes it necessary to remind the United States why AFA China-wide rates should be limited solely to those Chinese companies who truly impede the DOC's investigation.

II. THE DEPARTMENT'S CURRENT PRACTICE SHOULD BE LIBERALIZED

The prohibitive and discriminatory impact of the Department's China-wide rate policy from 1996 – April 2004 is apparent from reviewing the Tables attached to China's June 1, 2004, comments. These Tables reveal that in initial AD investigations: (1) the average China country-wide was 112.85%, three times higher than the average "all other" rate of 32.03% in market economy investigations; (2) the China country-wide rate often was 10 times greater than the rate applicable to Chinese companies whose sales were scrutinized by the DOC (i.e., the weighted average Section A rate)[1]; and (3) China-wide rates have exceeded market economy "all other" rates by significant amounts in AD investigations involving multiple countries or regions. [2]

The discriminatory impact of U.S. AD law on Chinese companies and the discriminatory manner in which the Department has administered the law has intensified in the past six months.

A prime example of this discrimination is evident by comparing the results of the Department's Final Determinations in cases involving Lumber from Canada (annual review) and Wooden Bedroom Furniture from China (initial investigation). In both of these cases, the Department was faced with requests for individual analysis by hundreds of individual companies. In Furniture, the Department selected six mandatory respondents, in Lumber, seven. The results for Canadian and Chinese companies subject to intensive analysis by the Department

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[1] See, e.g., Malleable iron pipe fittings 570-88, 11.18% compared to 111.36%; Polyvinyl alcohol 570-879, 6.91% compared to 97.86%; Ball bearings 570-874 7.8% compared to 59.3%, Automotive replacement glass windshields 570-867, 9.84% compared to 124.5%.

[2] Color Television Receivers 78.45% compared to 0.75%; Cold rolled carbon steel flat products 105.35% compared to 42.58%; Structural steel beams 89.17% compared to 6.14%; Hot rolled carbon steel 90.83% compared to 23.34 %. Steel wire rope 58% compared to 19.45% Collated roofing nails 118.41% compared to 2.68%.

was remarkably similar. In Furniture, the mandatory respondent rates ranged from 0.83 percent (de minimis) to 15.78 percent, for a weighted average rate of 6.65 percent; in Lumber, the mandatory respondent rates ranged from 0.92 percent (de minimis) to 10.59 percent, for a weighted average of 4.03 percent. However, the results for the remainder of the Chinese furniture and Canadian lumber industries were dramatically different. For Canada, 100 percent of the non-selected companies automatically qualified for the 4.03 percent weighted average rate obtained by mandatory respondents; **as a matter of U.S. law,** the rates for non-selected companies cannot be based on adverse facts available. In contrast, the China-wide rate in the furniture case was 198.08 percent, and this rate, based on AFA, applied to all companies which the Department determined, for a variety of reasons, did not affirmatively qualify for the mandatory respondent rate. [3]

The results of the recently concluded Shrimp investigation, set forth below, similarly reveal the gross inequities in the Department's methodology for calculating NME margins and its discrimination against China:

	Lowest rate	Highest rate	Section A rate	All other rate
Brazil	9.69%	67.80%	N/A	10.40%
Ecuador	2.35%	4.48%	N/A	3.26%
India	5.02%	13.42%	N/A	9.45%
Thailand	5.79%	6.82%	N/A	6.03%
Vietnam	4.13%	25.76%	4.38%	25.76%
China	0.07%	84.93%	55.235	112.81%

As this Chart demonstrates, notwithstanding the fact that one Chinese exporter had the lowest dumping rate for any mandatory respondent, and that a mandatory respondent from Brazil

[3] The reasons why the Department denied Section A status to Chinese companies included having "insufficient" business licenses, failing to provide documentation of price negotiations, and submitting allegedly deficient translations.

was subject to a 67.80 AFA rate, the "all other" rate applicable to Chinese respondents was at least ten times greater than the "all other" rate applicable to non-investigated exporters from market economy countries. These results obviously do not reflect real-life market conditions; rather, they reflect the inherent bias in U.S. antidumping law against NME's in general, and the particular bias of the Department toward China.[4]

As discussed in the Comments filed by China in response to the Department's two prior Notices, there are numerous factual, legal and policy reasons why the Department should make it less, rather than more, difficult for Chinese companies to qualify for separate rates. Thus, China is greatly disturbed that the Department has instead adopted and proposed modifications to U.S. law which will exacerbate a practice that already is patently unfair.

China's comments on the two Department proposals follows.

III. THE DEPARTMENT'S PROPOSED APPLICATION PROCESS VIOLATES UNITED STATES' INTERNATIONAL OBLIGATIONS AND U.S. LAW

A. DOC PROPOSAL: REJECTION OF INCOMPLETE APPLICATIONS WITHOUT OPPORTUNITY TO CORRECT DEFECTS

Under current DOC policy, Chinese companies qualify for the normally more favorable Section A rate (the weighted average rate of the mandatory respondents), by timely filing responses to Section A of the Department's Antidumping Questionnaire (normally due

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[4] Additional proof of discriminatory treatment in the Shrimp case is found in the fact that the Department rejected one-third of the requests of Chinese companies for Section A status (18 of 53) compared to the 12 percent rejection rate for Vietnam (4 of 33). The Department's determination that two Chinese companies were dumping at rates exceeding 80 percent also is not logical, since the Department calculated Chinese dumping margins by comparing Chinese export prices to the United States to Indian costs, and found that Indian margins averaged merely 9.45 percent, while Chinese prices to the U.S. were within 20 percent of Indian prices for comparable merchandise (merchandise classified in subheadings 0306130012 and 0306130015, HTSUSA, as reported on the USITC website). This result is clearly anomalous.

approximately 60 days after initiation of an investigation), and timely filing responses to the Department's requests for additional information or clarification of information previously submitted. While responding to a questionnaire is difficult, and generally requires the assistance of counsel in the United States, the Department is not allowed to summarily reject a Respondent's initial Section A response merely because all of the questions have not been completely answered.

The proposed application process provides that applications must be filed within 60 calendar days after initiation of the investigation and that "incomplete applications will be rejected for separate rate status without supplementary questionnaires." The Department states:

> If the Department finds that the certifications are not supported by the attached documents or are incomplete, the applicant will not have demonstrated that it qualifies for a separate rate.
>
> The Department will not consider incomplete applications, as an incomplete application will be considered prima facie evidence of non-cooperation given the public notice of the initiation and the application system in the Federal Register.

If implemented, the DOC proposal will place extraordinary pressure on Chinese companies to complete a detailed application (in English, with submission of detailed supporting documentation) in a very short time and will provide the DOC with an excuse to reject an Application for minor technical errors or omissions. Our review of DOC determinations in market economy investigations and administrative reviews indicates that the DOC's normal practice is to issue supplemental questionnaires, to provide the foreign respondents with an opportunity to clarify previously submitted information or data and supplement their submissions in order to satisfy the DOC. The decisions in AD cases involving market economy exports do not apply any policy that deems an incomplete or unclear original questionnaire response to be

"prima facie evidence of non-cooperation." Clearly, application of such a rule to Chinese companies would be discriminatory and illegal.

This proposal violates the International Antidumping Agreement. Annex II of the Agreement expressly prohibits WTO members from disregarding information which is "not ideal in all respects...provided the interested party has acted to the best of its ability," and (2) expressly requires WTO members to allow respondents time to supplement the record "within a reasonable period."[5] Thus, United States international obligations expressly prohibit the Department from turning the Section A application process into a trap for the unwary and unsophisticated, whereby a prospective respondent would be denied this status because of an inadvertent failure to complete a particular field in an application, or because of its inability to transmit data in the precise format suggested by the Department.

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[5] Paragraphs 1, 6 and 7 of Annex II, to the International Antidumping Code, are set forth below.

> 1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response.
>
> 6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.
>
> 7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection....

The Department's proposal similarly violates the Protocol for Admission of China into the WTO. When China gained admission into the WTO, it entered into a Protocol with other WTO members governing the manner in which those states would calculate AD margins for Chinese exports. China and existing WTO members agreed that China could apply for market economy status in AD cases at any time after its accession and that in no event could a WTO member deny China this status after 15 years. China also agreed that until WTO members granted China full market economy status, they could continue to calculate Chinese margins using a:

> methodology that is not based on a strict comparison with prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

Protocol on The Accession of the People's Republic of China, Nov. 10, 2001, WT/L/432, para. 15.

China expressed its concerns regarding the manner in which WTO members determine AD rates for Chinese products in the Report of the Working Party on the Accession of China, Oct. 1, 2001, WT/ACC/CHN/49, para. 151. In response, WTO members, including the United States, assured China that:

> (a) It had established in advance (1) the criteria that it used for determining whether market economy conditions prevailed in the industry or company producing the like product and (2) the methodology that is used to determine price comparability....
>
> (c) The process of investigation should be transparent and sufficient opportunities should be given to Chinese producers or exporters to make comments, especially comments on the application of a methodology for determining price comparability in a particular case.
>
> (d) The importing WTO member should give notice of information which it required and provide Chinese producers and exporters ample opportunity to present evidence in writing in a particular case.

(e) The importing WTO member should provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case.

Implicit in China's concession to allow WTO members, including the United States, to continue calculating AD margins on an alternative basis for no more than 15 years, and in the agreements memorialized in the Report of the Working Party, was the understanding that a WTO member would not unilaterally modify its existing AD margin calculation methodology, and effectively calculate margins for all Chinese companies – with the exception of a select few – on a more adverse basis than it had in the past. Any decision by the United States making it more difficult for Chinese companies to qualify for separate rate status would effectively nullify the benefits accruing to China upon its Accession to the WTO. It would impede the attainment of the Protocol's objective of granting China the same status in AD proceedings as market economy countries. Thus, if the United States ultimately decides to act in this manner, China could, if it desired, exercise its rights under Article XXIII, General Agreement on Tariffs and Trade 1994.

The Department's proposal also directly contravenes Section 782(d), Tariff Act of 1930, as amended, as interpreted by courts in the United States. In accordance with Section 782(d):

> the Department *shall not decline* to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Department, if -
> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is *not so incomplete that it cannot serve as a reliable basis* for reaching the applicable determination,
> (4) the interested party has demonstrated that it *acted to the best of its ability* in providing the information and meeting the requirements established by the [Department] with respect to the information, and (5) the information can be used without undue difficulties. (emphasis supplied.)
> 19 U.S.C. § 1677m(e).

Borden, Inc. v. United States, 22 C.I.T. 233, 4 F.Supp.2d 1221, 20 ITRD 1358 (CIT, 1998). See also Chia Far Indus. Factory Co., Ltd. v. United States, 343 F.Supp.2d 1344 (CIT, 2004). NSK Ltd. v. United States,--- F.Supp.2d ----, Slip Op. 04-105,Court No. 02-00627 Aug. 20, 2004 (CIT,2004).

In other words, "Commerce has an obligation to provide respondents with clear notice and an adequate opportunity to correct deficiencies in their submissions," and when the Department has failed to conform to this critical principal, United States courts have not hesitated to reverse the administrative determination. Ocean Harvest Wholesale, Inc. v. United States, 2002 WL 436945 (CIT), 24 ITRD 1449 CIT, 2002. See also Hyundai Electronics Industries Co., Ltd. v. United States, 342 F.Supp.2d 1141, 26 ITRD 1567 (CIT, 2004) ("If Commerce concludes that a party's response to a request for information did not comply with its request, then Commerce must notify the party of this deficiency and provide them with an opportunity to remedy or explain the deficiency.") Reiner Brach GmbH & Co. v. United States, 206 F.Supp.2d 1323, 24 ITRD 1580 (CIT 2002) ("Before Commerce may use facts available, 19 U.S.C. § 1677m(d) ... requires that Commerce give a party an opportunity to remedy or explain deficiencies in its submission.")[6]

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[6] China also is disturbed by the Department's apparent attempt to justify this radical proposal by designating its request for information as an "application process" as distinguished from a "questionnaire." This justification constitutes a transparent elevation of form over substance, a result which is clearly contrary to the most basic principles of United States law. See Franchise Tax Bd. of California v. Alcan Aluminum Ltd, 493 U.S. 331, 339, 110 S.Ct. 661 (1990); Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1347, 26 ITRD 1105 (Fed. Cir.2004); Tung Fong Indust. Co., Inc. v. United States, 318 F.Supp.2d 1321, 26 ITRD 1496 (CIT, 2004); Nihon Cement Co., Ltd. v. United States, 17 C.I.T. 400, 1993 WL 185208 (CIT), 15 ITRD 1558 (CIT, 1993); Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada 67 ITADOC 15545, 2002 WL 992554 (ITA) April 2, 2002 ("We decline to elevate form over substance."); Notice of Final Determination of Sales at Less than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From Argentina,60 FR 31953-01, 1995 WL

B. DOC PROPOSAL: APPLICATIONS MUST BE FILED BY ALL CHINESE COMPANIES REQUESTING SEPARATE RATE STATUS, INCLUDING AFFILIATES AND FOREIGN OWNED COMPANIES

According to the DOC's notice, the proposed application process will apply to all Chinese companies requesting separate rate status. While Chinese companies which are **owned wholly** by entities located in market-economy countries will not be required to answer certain questions relating to Chinese ownership and management, all other companies (including companies with a majority or significant minority of foreign ownership) will be required to answer all of the questions in the Application. Even companies which are wholly foreign-owned will be denied Section status if their "modified" application responses are not 100 percent complete.

The proposed application also states that Chinese companies applying for separate rate status must submit a list of all affiliated companies which exported subject merchandise to the United States, and that for a company to be eligible for a separate rate, "these affiliates must submit their own application for separate-rate treatment."

If implemented, these proposals would result in many companies which clearly qualify for separate status being subjected to the punitive China AFA rate. It often is difficult for a company to determine whether its business relationship with another company constitutes an "affiliation" as defined by the Department, and the Department's very broad definition of affiliation often results in companies unknowingly falling within this status. In addition, companies that are "legally" affiliated often have absolutely no control over the business decisions of their affiliates. For these reasons it is unfair for the Department to reject a

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360843 (F.R.) (June 19, 1995) ("It would have elevated form over substance and fruitlessly delayed the antidumping investigation")

respondent's otherwise "perfect" Section A application merely because an affiliate is not able or willing to submit its own "perfect" Section A application in the short time frame allowed by the Department.

It similarly is unnecessary and unreasonable for the Department to require "perfect" applications from companies whose majority ownership is foreign and to require "perfect" modified applications from companies which are 100 percent foreign-owned. Creating a strict "one strike and you're out" policy for these companies elevates form over substance and will undoubtedly result in companies which unquestionably are market oriented being subject to the China-wide AFA rates, because of inconsequential, immaterial errors in their applications.

C. DOC PROPOSAL: APPLICANTS MUST ANSWER 41 MULTI-PART QUESTIONS, MANY OF WHICH REQUIRE SUBMISSION OF SUPPORTING DOCUMENTATION

The DOC's draft application contains 41 multi-part questions, many of which are similar to the Questions in Section A of the DOC's antidumping questionnaire. These answers must be supplemented with supporting documentation, including:

- Documentation relating to the companies first and last sale during the POI, including Customs entry summary, FDA release (where applicable), bill of lading. PRC customs declaration, VAT application, sales contract, sales invoice, packing list, payment receipt, or an explanation why providing the documentation was not possible. (NOTE: Only those Chinese companies which can establish that they have a "sale" during the POI or a Customs "entry" during the POI will qualify for separate rate status);

- Original and translated copy of a PRC business license valid during the POI;

- Export certificate of approval valid during the POI;

- Original and translated copy of any sub national PRC laws affecting the company's export operations;

- Documents confirming ultimate ownership of the company;

- Documents supporting price negotiations with ultimate U.S. customer, including an affidavit signed by an unaffiliated U.S. customer for negotiations which are conducted by telephone;

- Documents confirming independence in selection of management; and

- Year end bank statements and financial statements covering all months of the POI.

As a review of this list reveals, the Department's proposed application policy requires submission of even more documentation at the beginning of an investigation than is currently required. Requiring Section A applicants to submit voluminous supporting documentation in support of their applications within 60 days of initiation serves no purpose other than to limit the number of successful applicants to large, sophisticated companies who can afford to hire American counsel to prepare "perfect" applications. There certainly is no reason why a Chinese separate rate applicant should be required to submit to the Department a copy of any Chinese law or regulation, since the Department already has copies of these documents in its files or can readily obtain a copy on the internet or directly from the Chinese government.

If the Department truly desired to streamline the Section A process, and avoid traps for the unwary, it would allow Chinese companies to certify that they, in fact, can set their own export prices free of Chinese government control within 60 days of initiation. Upon receipt of these applications, the Department could then determine whether all or some of the Section A applicants should submit additional documentation in support of their certifications, within a more reasonable time frame for both the companies and DOC personnel assigned to review the applications.

In addition, Section A applicants should not be artificially restricted to Chinese companies which have a sale or entry during the Period of Investigation ("POI"). As long as a company can satisfactorily demonstrate its independence from Chinese government control prior

to initiation of the investigation, the fact that it may have sold subject merchandise to the United States during an arbitrary six-month period (or had this merchandise entered for consumption during that period) should not be a relevant factor in the Department's analysis.

D. DOC PROPOSAL: SEPARATE RATE APPLICANTS MUST RESPOND TO THE DOC'S "Q&V" QUESTIONNAIRE AND SUBMIT ADDITIONAL INFORMATION WITHIN 30 DAYS OF THE DOC'S PRELIMINARY DETERMINATION

In addition to completing the DOC application, Chinese companies will only qualify for separate rate status if they respond to the Department's separate Quantity and Value ("Q&V") questionnaire and if they file additional information regarding their Customs entries within 30 days of the DOC's Preliminary Determination.

The fact that a Section A applicant may not have responded to the Department's Q&V questionnaire does not present sufficient reason for the Department to subject an independent Chinese company to the China-wide AFA rate. In this regard, in Shandong Huarong General Group Corp. v. United States, 2003 WL 22757937 (CIT 2003), the Court of International Trade expressly held that the Department's decision to deny separate rate status to a Chinese respondent could only be based on the failure to provide satisfactory evidence relating to the issues of state control, as distinguished from evidence relating to other issues. The Court reasoned:

> In support of its determination that the Companies would receive the PRC-wide antidumping duty margin based on facts available, Commerce stated that "due to the nature of [the Companies'] verification failures, and the inadequacy of [their] cooperation, the integrity of [the Companies'] reported data on the whole is compromised." . . . This reasoning, however, cannot be the basis for assigning the Companies the PRC-wide antidumping duty margin based on facts available, as it is clear the Companies did provide evidence of their entitlement to separate rates and there is no indication that any necessary information was missing or

> incomplete. . . .In other words, the findings that justified the use of facts available and a resort to adverse facts available with respect to the Companies' sales data and factors of production, cannot be used to accord similar treatment to issues relating to the Companies' evidence of independence from state control.

The Court continued:

> Here, the record shows that the Companies apparently kept records sufficient to satisfy Commerce of their independence from state control and supplied such records to Commerce in a timely fashion. Because findings with respect to data Commerce found to be "compromised"-i.e., the Companies' sales data and Huarong's factors of production data-are distinct from those related to state control, it is difficult to see how Commerce's determination with respect to the sales and factors of production data can form the basis for the use of adverse facts available with respect to independence from state control.

See also Shandong Huarong General Group Corporation v. United States, 2004 WL 2203486 (CIT 2004).

Similarly, as long as a Chinese company completes its Section A application in a manner which confirms its independence from state control, and supplies records to the Department in a timely fashion, in support of this determination, the absence of timely filed Q&V data cannot "form the basis for the use of adverse facts available with respect to independence from state control."

For the same reasons, the information which the Department has requested Section A companies provide within 30 days of the Preliminary Determination is not necessary to confirm independence from the Chinese government and qualification for separate rate status.

In short, the Department must determine margins for both selected and non-selected companies as accurately as possible, and ensure that its investigations are conducted in a fair and predictable manner. The Department may not resort to a "facts available" approach as an easy method to dispose of a case. To achieve these goals and to avoid applying prohibitive margins,

calculated on the basis of adverse facts available, to companies whose export prices are determined by market forces, the Department can only require submission of information reasonably necessary to confirm this fact. Requiring a company to submit additional, unnecessary information and penalizing non-compliance with resort to prohibitive margins calculated on the basis of adverse facts available would undermine these basic principles of law.

IV. THE DOC SHOULD WITHDRAW ITS PROPOSAL THAT COMBINATION RATES WILL APPLY TO ALL CHINESE RESPONDENTS

The Department has proposed that firms qualifying for a separate rate, including mandatory respondents and Section A applicants, must list all the suppliers whose merchandise they exported to the United States during the POI. The rate the Department would assign as a cash deposit to a Chinese company qualifying for a separate rate would only apply to merchandise produced by those suppliers that had supplied subject merchandise to the exporter for export to the United States during the POI.

The Department would issue instructions to Customs that this calculated rate would only apply to subject merchandise that is exported by the firm that has received that separate rate, and has been produced by one of the producers the firm certified as having supplied it during the period of investigation. Merchandise produced by other suppliers, but exported by the respondent, would receive the NME-wide cash deposit rate until completion of an administrative review. This would happen even if the producer(s) outside the combination had supplied a different respondent during the period of investigation. If an exporter desired to introduce a new supplier, it would have to make at least one sale of merchandise produced by that producer to the United States at the NME-wide cash deposit rate.

For the administrative review, the exporter would have the option to request that it be reviewed. During the review, the Department would collect factors information from the producers utilized during the initial investigation, as well as from the new supplier. Thus, the new cash deposit rate going forward would be based on information from all suppliers, and the combination would then be expanded to include the new producer.

The Department should not implement this proposed change in practice.

When an exporter receives a separate rate, the Department should apply that rate to all shipments from that exporter, regardless of whether a particular producer supplied subject merchandise to the exporter when the rate was established. Application of a separate rate to all shipments from a particular exporter is consistent with the fact that the Department has determined that the exporter is responsible for setting its own prices, regardless of the vendor from whom the exporter purchased the subject merchandise.

Attempting to segregate an exporter's rate into two or more rates would create significant administrative difficulties for importers and Customs officials, since a single line item on an exporter's invoice presented to Customs at time of entry would potentially be subject to multiple cash deposit rates.

Implementation of this proposal would be completely unfair to both Chinese exporters and their U.S. importer customers. The unfairness inherent in the proposal as to U.S. importers is evident from the fact that their sole contact is with a particular exporter, rather than the producer of the goods. The proposal's unfairness as to Chinese exporters stems from the fact that the proposal would force a "marriage" between the respondent and its original supplier, and effectively eliminate the respondent's ability to obtain product from new suppliers since the exporter might not be able to continue its business pending completion of an administrative

review. The final results of reviews typically are not issued by the DOC until 18 months after initiation since the DOC routinely extends its deadlines in AD cases involving China. It is not appropriate for the DOC to adopt a rule that interferes with a respondent's basic business decisions and which does not take into consideration the obvious fact that supplier relationships can and often do change as a result of circumstances that might be beyond the respondent's control.

Finally, mandating combination rates in NME cases would result in NME exporters being treated differently than exporters of subject merchandise from market economy countries. In market cases, the Department normally does not apply combination rates, since it correctly recognizes that such rates are unnecessary "when investigating or reviewing non producing exporters that are not trading companies, such as original equipment manufacturers," and are impractical "when there are a large number of producers, such as in certain agricultural cases." See 62 fed. Reg. at 27,303 (May 19, 1997, Comments to AD Regulations). By refusing to follow this same sensible approach for NME's, the Department would be unfairly discriminating against NME's, in direct contravention of U.S. international obligations.

In support of this proposal, the Department refers to two "powerful arguments." However, a review of the Department's justification for its new policy reveals that the real reason behind this propose change in current practice is the desire of Petitioners to substantially increase the quantity of Chinese merchandise subject to prohibitive China-wide AFA rates.

First, the Department expresses concern that qualifying exporters might increase their shipments to the U.S. market by "funneling" shipments through low rate exporters. Any concern the Department may have with respect to "funneling" are alleviated by the fact that Petitioners have the right to request that the Department conduct an Annual Review of a particular exporter.

Thus, importers who purchase large quantities of subject merchandise that has been allegedly "funneled" will face the possibility of substantial duty assessments upon completion of an Annual Review. This potential liability serves as a sufficient deterrent to importers (and their sureties) to ensure that they purchase goods from exporters and vendors who can successfully complete the Department's vigorous questionnaire and verification process.

Similarly misplaced is the Department's concern that "since the Department margin calculations are based on the factors of production of the producer that supplied the exporter during the period of investigation or review, the rates the Department assigns should only apply to those producers." For Section A respondents this statements is simply wrong. The AD rate for these companies reflect the weighted average rate of the mandatory respondents who were subject to individual scrutiny, rather than the factors of production of the particular producer that supplied the Section A exporter. For those mandatory respondents whose vendors were reviewed during the POI, the Department's proposal leads to the legally indefensible conclusion that the worst case, AFA factors of production proposed by Petitioners at the commencement of an investigation, more accurately reflect the experience of a non-reviewed vendors than the factors calculated and verified by the Department for Chinese vendors producing similar merchandise during the POI. This presumption is absurd on its face and is directly contrary to the principle that co-operative companies cannot be subjected to AFA treatment.

Moreover, by changing its long established practice at this time and creating a standard which subjects virtually all Chinese exports to AFA treatment, the Department would be ignoring its WTO obligations and the benefits accruing to China upon its Accession to the WTO, and would be impeding the objective of the Protocol of Accession to grant China the same status in AD proceedings as other market economy countries. Surely, the United States would strongly

and justifiably complain if one of its trading partners decided to modify a longstanding policy, for misplaced concerns regarding "effective enforcement," in which the modification's result was to effectively prevent numerous American companies, which had fully cooperated in an investigation, from exporting their goods to an important market.

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For all of these reasons, China asks the United States Department of Commerce to withdraw the two proposed changes in United States antidumping practice and procedure summarized in the Department's December 28, 2004 public notice.

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