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October 15, 2004

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. 56188 (Sept. 20, 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 have 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

OCTOBER 15, 2004

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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 U.S. 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. 56188 (September 20, 2004).

This is the U.S. Department of Commerce's ("Department" or "DOC") second Notice concerning this issue, and the second 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.

Consequently, China discussed its rationale for suggesting that the United States modify its current practice in Antidumping Duty ("AD") investigations by eliminating reliance on an adverse facts available ("AFA") China-wide rate in Non-market Economy ("NME")

investigations. Comments filed by China and other interested parties confirm that the DOC's reliance on AFA China-wide rates is inconsistent with market conditions in China today, and places the United States far behind other nations who have already recognized that many Chinese industries qualify for market-economy treatment. AFA China-wide rates are based on an anachronistic presumption that the export sales of Chinese companies are controlled by the central government; the DOC presumes, in the absence of voluminous document submissions; that a Chinese company is controlled by the Government. At the very least, this presumption should be reversed, with individual rates the norm and AFA China-wide rates the exception.

Unfortunately, in its September 20, 2004, Notice, the DOC failed to even acknowledge China's concerns and the substantial evidence submitted supporting its position. Instead, the DOC's request for additional comments focuses 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.

As the Department itself is aware, the "other" antidumping margins for Chinese exporters are not "calculated" at all. Rather, they represent AFA rates as alleged by American petitioners who use the AD law of the United States to create an absolute bar to Chinese exports. These rates, however, are completely unrealistic. The use of AFA rates for all "other" Chinese exporters constitutes unfair discrimination, especially when compared to rates assessed against companies exporting goods subject to AD Orders from 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.

Therefore, China feels that it must again remind the DOC why it should take all necessary steps to limit application of the AFA China-wide rate to only those Chinese companies who truly impede the DOC's investigation.

II. THE DEPARTMENT'S CURRENT PRACTICE SHOULD BE LIBERALIZED

A. The Department's Current Practice Unfairly Discriminates Against China

The prohibitive impact of AFA China-wide rates is apparent from reviewing the Tables attached to China's June 1, 2004, comments, as summarized below.[1]

Average China country-wide rate (investigations 1996 – 2004):	112.85%
Mean China country-wide rate (investigations 1996 – 2004):	105.35%
China country-wide rate greater than 100 percent:	18/36
China country-wide rate greater than 50 percent:	31/36

The China-wide rate clearly does not reflect the experience of Chinese companies whose rates are individually calculated. The table below, which shows a comparison between the China-wide rate and average Section A rate in selected investigations in which the average Section A rate was not based on AFA, demonstrates this inequality.

CASE	SECTION A RATE	PRC RATE
Malleable iron pipe fittings 570-881	11.18%	111.36%
Polyvinyl alcohol 570-879	6.91%	97.86%
Ball bearings 570-874	7.8%	59.3%
Structural steel beams 570-869	15.23%	89.17%
Automotive replacement glass windshields 570-867	9.84%	124.5%

[1] The Appendix to China's June 1, 2004, submission contained an analysis of DOC Final Determinations in initial AD investigations from 1996 through April 2004. From May – August 2004, the DOC issued three additional Final Determinations in AD investigations, in which AFA China-wide rates were 77.57% (Case 570-886) , 136.86% (Case 570-887) and 157.68% (Case 570-888), compared to rates as low as 0.20% (Case 570-886) and 9.47% (Case 570-888) for mandatory Section A respondents, who were capable of expending the time and resources to respond to the DOC's voluminous AD questionnaires.

The fact that the DOC's NME policy unfairly discriminates against Chinese companies compared to companies located in other countries is evident from reviewing the following facts:

Average China country-wide (investigations 1996 – 2004): 112.85%
Average "all other" rate (market economy investigations 1996 – 2004): 32.03%

This differential treatment is underscored by a review of the results in selected ADD investigations involving multiple countries or regions.

PRODUCT	MARKET ECONOMY CASES COMPETITIVE PRODUCTS (NUMBER OF COUNTRIES/ REGIONS)	MARKET ECONOMY AVERAGE ALL OTHER RATE	CHINA COUNTRY WIDE RATE
Color Television Receivers	1 (Malaysia)	0.75%	78.45%
Cold rolled carbon steel flat products	18[2]	42.58%	105.35%
Structural steel beams	6 (Italy, Luxembourg, Spain, Taiwan, Germany, South Africa)	6.14%	89.17%
Hot rolled carbon steel flat products	7 (India, Netherlands, Indonesia, Taiwan, Thailand, Argentina, South Africa)	23.34%	90.83%
Steel wire rope	2 (India, Malaysia)	19.45%	58%
Collated roofing nails	2 (Korea, Taiwan)	2.68%	118.41%

The discriminatory impact of U.S. law on Chinese companies was highlighted in the Department's recent preliminary decisions in Softwood Lumber from Canada and Wooden Bedroom Furniture from China – cases in which the DOC selected a limited number of mandatory respondents (8 from Canada and 7 from China) from hundreds of applicants.[3] See 69 Fed. Reg. 33235 (June 14, 2004); 69 Fed. Reg. 35312 (June 24, 2004), amended at 69 Fed. Reg. 47417 (Aug. 5, 2004).

	LUMBER CANADA	FURNITURE CHINA

[2] Argentina, Belgium, Brazil, France, Germany, Korea, Netherlands, New Zealand, South Africa, Spain, Taiwan, Turkey, Venezuela, Australia, India, Japan, Sweden, and Thailand.

[3] Chinese furniture was a Pre-Order investigation; Canada lumber was a post Order Annual Review, in which requests for reviews were filed by petitioners and respondents.

No. companies applying for Section A (China) or Weighted Average ("WA") (Canada) rate	340	120
No. companies qualifying for Section A or WA rate	340	74
No. companies denied Section A or WA rate status	0	46
Section A/WA rate	3.98	10.92
Rate for companies not subject to Section A/WA rate	8.43	198.08

These results accentuate the inequities in the DOC's determination of AD margins for companies that request, but are denied mandatory respondent status. For Canada and other market economy countries, non-selected companies automatically qualify for the rates obtained by mandatory respondents; **as a matter of U.S. law,** the rates for non-selected companies cannot be based on adverse facts available. By contrast, rates for non-selected Chinese companies will be based on "adverse facts available" if the companies do not affirmatively qualify for the mandatory respondent rate.

In the past, non-selected Chinese companies usually qualified for the Section A rate after submitting substantial documentation to the DOC to support their claim to this status. However, in its Preliminary Determination in the Wooden Bedroom Furniture investigation, the DOC departed from its existing practice of carefully considering Section A responses based on an analysis of all data submitted, and denied the 10.92% Section A rate to 46 Chinese companies, instead subjecting these companies to the 198.08 percent AFA China-wide rate. This unprecedented number of failures is the result of an apparently deliberate effort by the DOC to find any possible excuse for denying Chinese companies separate rate status.[4]

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[4] In its Preliminary Determination on Chinese shrimp, the DOC denied separate rate treatment to the majority of the Chinese shrimp exporters who had submitted Section A responses (32 of 53

1. Section A Respondents With Insufficient Business Licenses

The DOC denied "Section A" status to six companies for allegedly "insufficient" business licenses. These companies had business licenses with no end term. The DOC stated in their analysis memorandum that "[i]t is the Department's experience that it is unusual that a business license would not have an expiration date." DOC Memorandum from Eugene Degnan to Laurie Parkhill, "Separate Rates for Exporters," at 11 (June 17, 2004) (hereinafter Separate Rates Memo). The DOC concluded, therefore, that "these companies have not demonstrated the business licenses were valid during the POI" and determined that they did not prove *de jure* independence. Id. This conclusion, however, is highly flawed. First, the Department has imposed its own "experience" of how Chinese business licenses are issued to invalidate licenses that were duly issued by the Chinese authorities. Thus, the DOC is basically saying that the Chinese Government improperly issued these licenses. However, it is not the DOC's function to interpret matters of Chinese law. Second, the DOC's factual conclusion about "open ended" business licenses disregards key facts indicating that the licenses were issued immediately prior to the POI, and that Chinese respondents reported that the license must be renewed annually.

2. Insufficient Evidence of Price Negotiation

The DOC also denied Section A status to eleven companies that did not provide **documentation** of price negotiations. That is, the Department found that these companies failed to demonstrate that price negotiations occurred independently of PRC government involvement. Separate Rates Memo, at 11. The eleven companies asked to provide this information stated that price negotiations occurred by telephone or at in-person meetings; therefore, they could

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Section A respondents were denied the separate rate). See Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 Fed. Reg. 42654 (July 16, 2004).

provide no written correspondence to prove how prices were negotiated. The documentation did not exist. Yet the Department concluded, "The Department is not granting a separate rate to these exporters because they have not provided evidence of price negotiations." Thus, the Department applied the "PRC Wide" rate to these companies based solely on their inability to provide documentation that did not exist. The U.S. "facts available" law is clear that the Department cannot require a company to provide information that does not exist. *See* Olympic Adhesives, Inc. v. United States, 799 F. 2d 1565, 1572 (Fed. Cir. 1990) (respondent did not "refuse" or "was unable" to supply information within the meaning of 19 U.S.C. § 1677e(b) (1982) by responding that there was no data to provide); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 20 CIT 1426, 1435-36, 951 F. Supp. 231, 239 (1996) (unreasonable to penalize failure to submit data that do not exist). The Department's application of facts available to companies who did not provide information that does not exist was unlawful.

3. Respondents With Illegible or Untranslated Submissions

The Department rejected eight companies for allegedly deficient translations. We are not aware of any prior case where the Department seized upon deficiencies in translations to deny separate rate status. Since the denial of separate rates status has catastrophic ramifications for these companies, the Department's draconian application of the law was highly unreasonable.

As the foregoing facts confirm, the manner in which the United Sates currently administers its AD law has made it extraordinarily difficult for Chinese companies to continue to ship their products to the United States. China-wide AFA rates are prohibitively high. These rates have absolutely no relation to Section A rates for mandatory Chinese respondents, or to rates for both mandatory respondents and non-selected companies in market economy AD cases.

Most disturbingly, in the past year, the United States has made it more difficult than ever for Chinese companies to qualify for Section A rates.

As summarized below, for numerous factual, legal and policy reasons, the Department should make it less, rather than more, difficult for Chinese companies to qualify for separate rates.

B. Liberalization of the Department's Current Practice is Required by Law and Some Public Policy

1. Consistency with International Antidumping Code

In United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001), the WTO Appellate Body upheld a Panel determination that the U.S. statutory method for calculating the anti-dumping duty rate for those exporters and producers who were *not* individually investigated was inconsistent with Article 9.4 of the International Antidumping Code. The Appellate Body determined that rates for non-investigated companies could not be based, in whole or in part, on adverse facts available.

The DOC's China-wide rate policy is subject to the same considerations. The China country-wide rate is calculated solely on the basis of adverse facts available; Chinese companies have provided the Department with all the information necessary to qualify for individual rates and individual analysis. The Department's decision not to subject these companies to a complete analysis is based on its determination that it is impractical to examine all known exporters or producers. Accordingly, international law precludes the Department from calculating margins for non-selected, cooperative companies, based on a rate derived, in whole, or in part, from adverse facts available.

2. Consistency with 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 ADD margins for Chinese exports. China and existing WTO members agreed that China could apply for market economy status in ADD 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 on 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 ADD 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 ADD 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 ADD 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 ADD 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.

3. Consistency with Basic Principles Underlying U.S. Antidumping Laws

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.

4. Consistency with Experience

Over the last ten years and **until recently**,[5] the Department has confirmed, through exhaustive verifications of numerous Chinese companies in a wide variety of industries, that Chinese export pricing policies are market driven and that individual Chinese companies, in fact, qualify for separate rates. A review of Department decisions confirms that the information contained in the companies' initial Section A responses, when subjected to verification, accurately reflected the manner in which the companies conducted their export businesses. In virtually every case in which the DOC scrutinized a Chinese company's claim for Section A status, the Department found that the company, in fact, qualified for this status.

5. Consistency with Department Workload Requirements

The Department's stated rationale for reconsidering its current practice – workload difficulties – is inconsistent with the Department's implicit suggestion that Chinese companies should be required to submit additional information to qualify for a separate rate and the Department's experience in prior NME cases. A Department concerned about its workload should be striving to reduce reporting requirements; a Department concerned with adherence to precedent should recognize that requiring Chinese companies to submit additional information to establish the obvious – i.e., that Chinese exporters are market driven – is counterproductive.

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[5] As discussed above, in the recent Preliminary Determination on Wooden Bedroom Furniture (as well as the recent Preliminary Determination on Freshwater Shrimp), the DOC adopted a new practice of rejecting separate rates applications based upon spurious, hyper-technical grounds. This new policy prevents non-selected companies from obtaining separate rates, which effectively prevents them from continuing to ship to the United States until such time as they can apply for an administrative review and obtain their own rate.

Accordingly, both workload constraints and precedent suggest that the Department should reduce its reporting requirements for Chinese companies requesting separate rate status.

6. Consistency with needs of U.S. exporters

A decision by the United States to make it more difficult for non-selected companies to qualify for separate status will send a strong signal to other WTO members that they can administer their own AD laws to effectively bar American made exports. Surely, the United States would strongly and justifiably complain if one of its trading partners decided to modify a 10 year old policy, solely for concerns regarding its own workload and administrative convenience, 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.

7. Consistency with U.S. judicial decisions

Any decision by the DOC to render it more difficult for Chinese exporters to qualify for separate rate status would be contrary to U.S. law, as interpreted by the United States Court of International Trade. For example, in Coalition for the Preservation Of American Brake Drum And Rotor Aftermarket Manufacturers v. United States, 44 F. Supp. 2d 229 (Ct. Int'l Trade 1999), the Court expressly upheld the Department's current practice of calculating non-selected respondent rates on the basis of the weighted average of rates calculated for mandatory respondents, while questioning the Department's ability to assign these companies the punitive adverse facts available Chinese rate. Similarly, in Nat'l. Knitwear & Sportswear Assoc. v. United States, 15 CIT 548, 558, 779 F.Supp. 1364, 1372-73 (1991), the Court held that the application of a punitive, or even quasi-punitive, rate to innocent parties would be contrary to the intent that the antidumping law be remedial.

These judicial decisions effectively preclude the Department from calculating the rate for non-selected respondents based on the punitive AFA China-wide rate.

Accordingly, for all of these reasons, China again requests that the DOC modify its current policy, by eliminating reliance on an AFA China wide- rate, or at the very least, by creating a rebuttable presumption that all Chinese companies qualify for separate rate status.

However, assuming that the Department does not adopt this suggestion, the United States should not modify its current policy in any manner which would result in subjecting additional Chinese companies to an AFA China country-wide rate. By acting in this manner, the Department would be moving backward in time. It would be rejecting the progress which China has made in transforming itself from a centrally planned economy to a market economy. It would be undermining the ongoing negotiations between China and the United States designed to grant China market economy status in ADD proceedings. It would be creating more, unnecessary work for its staff, at a time when the Department is concerned about its workload. It would be ignoring its own experience and precedent, in which the Department has uniformly found, after vigorous examination, that Chinese companies qualify for separate rate status. Under no circumstances should the Department act in this manner.

III. RESPONSE TO SPECIFIC PROPOSALS

China's comments on the Department's three proposals are set forth below.

PROPOSAL NUMBER ONE

1) The Department is considering a change in its separate rates process from a Section A response process to an application process. . . .For example, in such an application, all exporters, including those that are 100% foreign-owned, would be required to certify their eligibility for separate rates (i.e., to certify that they exported subject merchandise to the United States and that they operate de jure and de facto independently of the government), as well as to potentially identify any affiliates involved in the production or sale of the subject merchandise and the producers from whom they sourced the merchandise during the period of investigation. The Department would also list the documents required to substantiate these certifications and require

that the applicant provide original and translated copies of all those documents with the application. The Department would not consider any application for separate rate eligibility unless all of the necessary fields of the application were completed and the required evidence and certifications were submitted. Moreover, the Department would continue to reserve the right to issue supplemental questionnaires and verify applicants if necessary. .. . . Moreover, in the application, the Department could ask questions not addressed currently by its standard NME Section A questionnaire that are pertinent to separate rates eligibility, including questions about provincial or local government control over exporters. Such an application system could streamline the process of applying for a separate rate and provide a procedure which is less demanding of the Department's resources and time. . . .After a transition period, the Department would require that parties complete and submit this form electronically on the Import Administration website.

RESPONSE: China agrees in principal with the DOC's desire to streamline the process by which Chinese companies qualify for separate rate status. At the same time, however, China is concerned that the changes suggested by the DOC may result in a more difficult and burdensome process.

Regardless of the DOC's decision, it must accord Chinese companies applying for a separate rate all of the rights accorded all parties participating in an AD investigation. The Department must adhere to all of the principles set forth in Annex II, to the International Antidumping Code, as 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.
>
> 2. ... The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.
>
> 3. ... If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in

paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

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. ...

Thus, the Department cannot turn 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.

In addition, there does not appear to be any reason why the Department should require that Section A applicants submit with their applications "original and translated copies all...documents" which the Department believes are necessary to substantiate a certification for separate rate status. A company which certifies that it is not subject to *de jure* or *de facto* control and responds to a series of questions should not be required to submit voluminous translated documents in support of its certification, especially documents which are publicly available or

previously on file with the DOC. The Department should not dissuade companies from applying for separate rate status by making it even more difficult than it is now to complete the initial questionnaire/application.

Finally, China is concerned that the Department may broaden the scope of its initial questionnaire beyond the current inquiry as to whether a company has demonstrated "the absence of both de jure and de facto government control over its export activities," by focusing on "the decision making process on export related investment, pricing, and output decisions at the individual firm level." The questions currently posed by the Department in this area are sufficient to ascertain whether a company sets its own export prices, free of government control. Asking additional questions regarding production activities and affiliated parties is unnecessary.

PROPOSAL NUMBER TWO

(2) Under current NME practice, the Department assigns exporter-specific separate rates, and not exporter-producer combination rates, with three exceptions. . . .The Department is considering extending this practice of assigning exporter-producer combination rates to NME exporters receiving a separate rate so that only the specific exporter-producer combination that existed during the period of investigation or review receives the calculated rate for establishing the cash deposit rate for estimated antidumping duties. That is, if an exporter qualifying for a separate rate during an investigation sourced its subject merchandise from three producers during the period of investigation, the separate rate it receives would only apply as a cash deposit to merchandise produced by any of the three suppliers that had supplied the exporter during the period of investigation. While the exporter would be free to adjust its sourcing from among the three suppliers that supplied it during the investigation, merchandise sourced from new suppliers would fall outside the combination rate. This combination rate would change as the result of subsequent administrative reviews establishing changes to the sourcing of the subject merchandise provided to the exporter. However, for cash deposit purposes, these combination rates would apply until the next administrative review.

The Department welcomes comments on the legal and administrative advisability of combination rates and, if instituted, how best to construct them. In particular, the Department is interested in comments as to what rate it should assign to exporters' merchandise from suppliers for which the Department has not established a combination rate.

RESPONSE: The Department should not change its current policy. Applicants for separate rates should not be treated any differently than the mandatory respondents. 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 Customs, without enhancing the Department's mandate to calculate rates as accurately as possible.

Implementation of this proposal would be completely unfair to U.S. importers, whose sole contact is with a particular exporter, rather than the producer of the goods.

Any concerns the Department may have about qualifying exporters increasing their shipments to the U.S. market are alleviated by the fact that Petitioners always have the option of requesting that the Department conduct an Annual Review of a particular exporter.

PROPOSAL NUMBER THREE

3) The Department is also considering changing its policy and practice concerning third-country resellers, i.e., when NME producers sell subject merchandise through exporters located outside the NME country (for example, Hong Kong, Taiwan, or Malaysia). Under current practice, the Department applies a knowledge test to determine the entity to which the rate applies, only where there is evidence that the producer knows that the ultimate destination of the merchandise is the United States does the Department apply a rate to the NME producer. Otherwise, the Department considers the third-country reseller to be the exporter and assigns it an antidumping duty rate. Recent antidumping investigations indicate that the relationship between Chinese producers, in particular, and resellers outside China can be complex and difficult to assess given the limited resources of the Department. Therefore, the Department is considering instituting a rebuttable presumption that NME producers shipping subject merchandise through third countries are aware that their goods are bound for the United States. In other words, the Department would assume that NME producers shipping through third countries set the export price to the United States and assign to them, and not the reseller, antidumping duty rates, unless evidence were presented to the contrary. In accordance with standard practice, the NME producer/exporter would be required to demonstrate lack of de facto and de jure government

control in order to receive a separate rate. The Department is interested in comments as to whether there are grounds for such a rebuttable presumption.

RESPONSE: The Department should continue its current practice of granting separate treatment to third country resellers in the absence of evidence that a Chinese producer knows that the ultimate destination of the merchandise is the United States. It should withdraw its proposal to create a rebuttable presumption that NME producers "shipping goods through third countries are aware that that their goods are bound for the United States."

By implementing this proposal the Department would be increasing its workload in direct contradiction to its concern that it "lacks the resources to evaluate the typically large number of section A Respondents which request a separate rate," and its desire to streamline the administrative process by establishing the "most effective means of determining whether exporters act, de facto, independently of the government in their export activities."

In addition, by presuming that Chinese producers know that merchandise sold to a third country reseller is destined for the United States, the DOC would be ignoring its own well established precedent that a "very high standard" exists before the DOC will impute knowledge to a producer of the ultimate destination of merchandise sold through a reseller. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results Admin. Reviews, 1996 WL 719370 (Fed. Reg.) (December 17, 1996).[6] Thus, a third country reseller of fungible subject

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[6] The Department determined that Respondent, FAG, was correct in noting that, in deciding whether to impute knowledge that bearings sold to a HM customer were ultimately destined for the United States, the standard for imputing such knowledge is high." It stated that "the cases FAG Germany cites to support this position state this clearly." FAG had argued "citing Television Receivers, Monochrome and Color, from Japan; Final Results of Antidumping Administrative Review, 58 FR 11211 (February 24, 1993), and Oil Tubular Good from Canada; Final Results of Antidumping Administrative Review, 55 FR 50739 (December 10, 1990), that where the Department cannot say with objective certainty that 100 percent of a reseller's goods

merchandise which it purchases from vendors in market economy countries and NMEs, for sale to the United States and around the world, would be faced with two diametrically opposite results. It would be designated as Respondent with respect to the merchandise procured from its market economy supplier, and as a purchaser of the goods produced in the NME.[7]

An equally improper result would be created if the DOC determined, at the beginning of the investigation, that the reseller had not rebutted the presumption of knowledge, resulting in the producer being selected as a mandatory respondent, and then turned around, and for margin calculation purposes, applied its normal test of requiring substantial evidence to support the conclusion that the Chinese producer should be designated as the exporter. Proceeding in this manner has the potential of totally distorting the DOC's mandatory respondent selection process and the margins themselves, as the DOC potentially could select as a Respondent Chinese producers which, in fact, sold little, if any, subject merchandise to the United States.

Creation of this presumption also would place an extremely difficult burden on third country resellers at the commencement of an investigation, by requiring that they prove a

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go to a known destination, then the Department has not held that the supplier "should have known" the disposition of the goods. FAG contends that, beyond having a very high standard for imputing knowledge that the manufacturer knew at the time of the sale that the goods were not for home market consumption, the Department requires objective information that can be corroborated by the administrative record.

[7] An equally absurd result would be created if the DOC determined at the beginning of the investigation that the reseller had not rebutted the presumption of knowledge, resulting in the producer being selected as a mandatory respondent, and then turned around and, for margin calculation purposes, applied its normal test of requiring substantial evidence to support the conclusion that the Chinese producer should be designated as the exporter. Proceeding in this manner has the potential of totally distorting the DOC's mandatory respondent selection process and the margins themselves, as the DOC potentially could select as a Respondent Chinese producers who, in fact, sold little, if any, subject merchandise to the United States.

negative (i.e., rebut the presumption of knowledge) with respect to knowledge of a vendor, to whom they are not affiliated and have no control. [8]

Finally, by changing a long established practice and creating a standard in NME cases which differs from the standard used for market economy producers, 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.

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[8] The DOC could remedy the problem it proposes to create by allowing a third country reseller to rebut the presumption merely by certifying, upon submission of its request for separate rate treatment, that to the best of its knowledge and belief its NME vendors did not know that the subject merchandise sold to the reseller would be exported to the United States, or that, in fact, not all of the subject merchandise purchased from NME vendors was ultimately shipped to the United States by the reseller.