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Assistant Secretary for Import Administration

Central Records Unit, Room 1870

U.S. Department of Commerce

14th Street and Constitution Avenue, NW

Washington DC, 20230

Re: Separate-Rates Practice in Antidumping Proceeding involving Non-Market Economy Countries

Dear Assistant Secretary:

As a company providing antidumping consultation services for many Chinese exporters, we hereby submit these comments pursuant to the Department's September 20, 2004 notice entitled "Separate-Rates Practice in Antidumping Proceeding involving Non-Market Economy Countries", 69 Fed. Reg. 56188. In that notice, the Department states that it is considering three changes to its current separate rates policy and practice, as set forth in the Appendix to the notice. These changes are: 1) changing the Department's separate rates process from a Section A response process to an application process; 2) extending the Department's practice of assigning exporter-producer combination rates to NME exporters receiving a separate rate; 3) changing the Department's policy and practice concerning third-country resellers. The following are our comments on these proposed changes.

1. It is unnecessary to change the separate rates process from a Section A response process to an application process. However, if the Department decides to make such a change, it should comply with the following principles: (1) the Department should not make the separate rates application more difficult, complex and burdensome than the NME Section A questionnaire; (2) the application formulated by the Department should be consistent with the long-standing rules and practice developed in the context of the NME Section A response separate rates process; (3) the application must ameliorate current NME Section A questionnaire and reflect changing economic reality in NME countries such as China.

As an initial matter, we don't think it necessary to change the separate rates process from a Section A response process to an application process because the Department's standard NME Section A questionnaire has provided it with ample opportunities to address separate rate issues. The NME Section A questionnaire currently requires NME exporters to provide information responsive to the following questions:

(1) Their owners and controllers.

(2) Their relationship with the national, provincial and local governments, including ministries or offices of those governments.

(3) Their relationship with other producers or exporters of the subject merchandise.

(4) Whether the entities own or control them also own or control other exporters of the subject merchandise.

(5) In the case where they are owned or controlled by a provincial or local government, identify other producers/exporters of the subject merchandise in their province or locality.

(6) Provide any legislative enactments or other formal measures by the government that centralize or decentralize control of the export activities of them.

(7) Provide copies of any business licenses held by them.

(8) Describe any controls on exports of the subject merchandise to the United States.

(9) Describe how they set the prices of the merchandise they export to the United States.

(10) Whether they coordinate with other exporters in setting prices or in determining which companies will sell to which markets, what role the Chamber of Commerce plays in coordinating the export activities of them.

(11) Describe how they negotiate sales to the United States of the subject merchandise.

(12) Whether they, or any manager of them, are expected to achieve foreign exchange targets set by any governmental authority.

(13) Describe how the management of them is selected.

(14) Identify the people who currently manage them and explain how they were selected for these positions.

(15) Whether there are any restrictions on the use of their export revenues.

(16) Explain how their export profits are calculated, what is the disposition of these profits and who decides how the profits will be used.

(17) Whether they suffered losses on export sales in the past two years, how their losses were financed, in the case where they obtained loans from a bank, or attempted to obtain loans from a bank, describe the loan application process.

In our view, these information is in detail for the Department to decide whether NME exporters are sufficiently independent from government control in their export activities to be entitled to separate rates, based on the *Sparklers* test as amplified in *Silicon Carbide*, because these information is directly related and most relevant to the real issue assessed by the amplified *Sparklers* test: whether NME exporters are *de jure* and *de facto* independent of government control with respect to their exports. Thus, one of the goals of the proposed separate rates application (the recommended successor to the NME Section A questionnaire soliciting these information) announced by the Department, i.e., to focus the analysis on those issues most relevant to separate rate eligibility, has already been achieved by its “predecessor”. The other goal of the application, i.e., to streamline the separate rates process for NME exporters and the Department, could also achieved by amending the questions

contained in the NME Section A questionnaire. Therefore, it is unnecessary to use a separate rates application in lieu of the NME Section A questionnaire.

However, if the Department insists that current separate rates process should be changed, we recommend complying with the following principles:

First, although the Department has the authority to reduce its administrative burdens, it should not do so by simply shifting its burdens to the NME respondents, therefore making its burdens and the respondents' burdens unbalanced, for administrative burdens on its face means those burdens borne by an administrative agency, not by interested parties. In our view, the best way for the Department to reduce its administrative burdens in the context of separate rates process is not to reduce its burdens alone regardless of the consequences, but to adequately evaluate the burdens that might be borne by itself and the NME respondents after the proposed changes, and try to keep the balance between these two burdens. Thus, if the Department decides to introduce the separate rates application instead of the NME Section A questionnaire, it should not make the successor more difficult, complex and burdensome than the predecessor. For example, in current Section A response process, if a respondent's response to Section A questionnaire does not comply with the Department's request for information, the Department will normally provide it with an opportunity to remedy the deficiency by issuing supplemental questionnaires to it, as required by 19 U.S.C. § 1677m(d). As such, if the Department decides that it normally will not give such an opportunity to respondents in the forthcoming application process (this seemingly might be inferred from the Department's statement that it 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), it certainly should make the application easier and simpler. Otherwise, the original balance kept by the NME Section A questionnaire between the Department's and the NME respondents' burdens will be broken by the new application, and these respondents' incomplete, disorderly responses will make the Department's administrative burdens heavier, not lighter than before.

Second, although the separate rates process may be changed, the core of the Department's separate rates test, i.e., whether the NME exporters operate *de jure* and *de facto* independently of the government remains the same. For this reason, the new application formulated by the Department should be consistent with the long-standing

rules and practice developed in the context of the NME Section A response separate rates process. Thus, for those issues that have been settled by these rules and practice, it is unnecessary for the application to assess them again. For example, the Department has repeatedly stated in many antidumping proceedings involving China that no separate-rate analysis is required for exporters 100% owned by foreign nationals (e.g., Hong Kong, Taiwan nationals). See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Wooden Bedroom Furniture From the People's Republic of China, 69 FR 35312 (June 24,2004) (where the Department stated that "[f]urther consistent with our practice, we do not conduct a separate-rates test for respondents wholly owned by companies outside the PRC"),and Folding Metal Tables and Chairs From the People's Republic of China: Preliminary Results of First Antidumping Duty Administrative Review, 69 FR 40602 (July 6, 2004) (where the Department stated that "Based on a review of the responses we have concluded that Shichang is owned by a Taiwanese national and incorporated in the British Virgin Islands. Therefore, we determine that no separate-rate analysis is required for this company"). Since this practice has been in operation for a long time and works well, the Department's proposal that the application would require 100% foreign-owned exporters to certify their *de jure* and *de facto* independence of the government is an unreasonable departure from this practice and would create undue burdens on these exporters.

Moreover, the new application must ameliorate current NME Section A questionnaire and reflect the changing economic reality in NME countries such as China. It is widely recognized that through twenty-five years' reform, Chinese exporters are no longer subject to any level of government control, whether central, provincial or local. As the Ministry of Commerce of China expressly pointed out, "China's economy today is very different from the centrally planed and controlled economy of decades ago", "the Chinese government has significantly decreased its ownership and control of the means of production", "for the vast majority of products and services, the market, not the government, decides the allocation of resources, and enterprises make their price and output decisions based on market considerations". [1]For this reason, it is unnecessary for the Department to ask questions regarding government control,

[1] Ministry of Commerce, People's Republic of China, Recognition of China as a Market Economy for Purposes of U.S. Antidumping Law (May 19,2004), available at http://www.ia.ita.doc.gov/download/us-china-jcctwg/04-10053.txt.

including the proposed questions about provincial or local government control over the NME exporters in the new application again.

2. The Department's proposed new exporter-producer combination rates practice does nothing better than its current practice and will place heavier burdens on itself and the NME exporters/producers. It is therefore unnecessary for the Department to institute such practice.

At first glance, the Department's proposal, i.e., to assign 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, seems attractive.

However, careful analysis of this proposal reveals that the Department's purpose in introducing this new exporter-producer combination rates, i.e., to prevent potential evasion of antidumping duties, is a mission impossible. Assuming, that Company A is both a producer and exporter of subject merchandise sold to the United States, and it produced part of its subject merchandise itself and purchased the remainder from Company B. Company B is also a producer and exporter of subject merchandise and it also produced part of its subject merchandise itself and sourced the remainder from Company A. Then under the new exporter-producer combination rates practice, if the Department determines that Company A and Company B have passed the separate rates test and assigns them 100% and 5% antidumping duty rate respectively, the 100% rate would apply to Company A (exporter and producer of subject merchandise) and the specific Company A (exporter)-Company B (producer) combination, the 5% rate would apply to Company B and the specific Company B-Company A combination. Nevertheless, this new practice is unable to prevent Company A (who received a high rate) from shipping its merchandise through Company B (whose rate was lower), because as a supplier of Company B, Company A may make use of the 5% exporter-producer combination rate legally to export its subject merchandise. In fact, this new practice will only be valuable in cases where exporters are exporters and producers are producers (in China, this was the case many years ago, because

most producers didn't have foreign trade powers at that time). In the event that exporters also produce subject merchandise and producers also export subject merchandise (this is the case in China today, because all enterprises have the right to trade), this policy is of low value because it could easily be evaded by exporters through sourcing from one another and becoming one another's producers. For this reason, the Department's proposed new exporter-producer combination rates practice does nothing better than its current practice and will place heavier burdens on itself and the NME exporters/producers. It is therefore unnecessary for the Department to institute such practice.

3. The Department's proposed new policy concerning third-country resellers in antidumping proceedings involving NMEs is not in accordance with law, therefore, the Department is barred from introducing this policy.

The Court of International Trade has held that

[t]o determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue."…

If, after employing the first prong of Chevron, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the question for the Court becomes whether Commerce's construction of the statute is permissible. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. …

Peer Bearing Company v. United States, Slip Op. 01-125 at 6-8 (Ct. Int'l Trade October 25,2001) (citations omitted).

In our view, for the reasons discussed below, the Department's proposed new policy concerning third-country resellers in antidumping proceedings involving NMEs (i.e., when NME producers sell subject merchandise through exporters located outside the NME country, the Department will employ a rebuttable presumption that these producers are aware that their goods are bound for the United States and assign to

them, not the reseller, antidumping duty rates, unless evidence are presented to the contrary) is not in accordance with law, therefore, the Department is barred from introducing this policy.

First, the Department's policy concerning third-country resellers, the so-called "knowledge test" is based on the definition of "purchase price" in the Statement of Administrative Action ("SAA") accompanying the Trade Agreements Act of 1979, which "makes clear that if the producer knew or had reason to know the goods were for sale to an unrelated U.S. buyer…the producer's sales price will be used as 'purchase price' to be compared with that producer's foreign market value". [2] Since the SAA is silent with respect to the meaning of the phrase "knew or had reason to know", the Department has interpreted this phrase to mean that the producer has actual or constructive knowledge of the final destination of its exports, and this interpretation has been upheld by the Court of International Trade as a reasonable construction of the statute. [3]Thus, if the Department chooses to change its policy, its new policy should still be in conformance with this interpretation. This, however, seems impossible because under the Department's new policy, even if the producer has no actual or constructive knowledge of the final destination of its exports, the Department may still determine that it "knew or had reason to know " the ultimate destination of the merchandise is the United States, based on the rebuttable presumption mentioned above. The inconsistency between the Department's new policy and the purchase price's definition has made this policy no longer a permissible interpretation of the statute and therefore not in accordance with law.

Second, the Department's current practice clearly shows that in cases where the controlling statute or regulations do not provide otherwise, the Department normally will apply the same policy to market and non-market economy producers without

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[2] H.R. Doc. No. 96-153, at 411 (1979). Although Congress later changed the term "purchase price" to "export price", it made clear that the two terms are coextensive. See The Uruguay Round Agreement Act, Statement of Administrative Action, H.R. Doc. 103-316,at 822-23 (1994) ("Notwithstanding the change in terminology, no change is intended in the circumstances under which export price (formerly 'purchase price') versus construed export price (formerly 'exporters sales price') are used. ").

[3] See Allegheny Ludlum Corp. v. United States, 24 CIT___, ___, 215 F.Supp.2d 1322 (2000); The Timken Company v. United States, Slip Op. 01-96 (Ct. Int'l Trade August 9,2001); Wonderful Chemical Industrial, Ltd., et al. v. United States, Slip Op. 03-26 (Ct. Int'l Trade March 12,2003).

distinguishing between them. For example, in Notice of Final Determination of Sales at Less than Fair Value: Bicycles From the People's Republic of China, 61 FR 19026 (April 30,1996), the Department decided to make a CEP deduction in NME cases because "[the] statute provides no exception for cases involving non-market-economy countries." Id., at 19031.[4] In Notice of Final Determination of Sales at Less than Fair Value: Steel Concrete Reinforcing Bars from the People's Republic of China, 66 FR 33522 (June 22,2001), the Department decided that the same principles with regard to profit calculation applied in a market economy case were reasonably applied in a non-market case.[5] Since the Department has applied the knowledge test equally to both market and non-market economy producers for a long time and this long-standing approach accords with its normal practice, the Department's proposal that this test be amended in the NME antidumping proceedings context is contrary to its consistent practice and therefore is not in accordance with law.

Moreover, the Department's new policy is inconsistent with the dictionary definition of the term "presumption". Black's Law Dictionary defines "presumption" as "[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption".[6]This definition makes clear that a presumption must be based on the existence of some other fact. Thus, if the Department decides to change its policy and institutes a presumption that NME producers shipping subject merchandise through third countries are aware that their goods are bound for the United States, at the least it must show the existence of the following facts, i.e., in a NME country, most producers selling subject merchandise through resellers located outside that country have knowledge that the ultimate destination of their goods is the United States, or in most cases, the resellers are used by the producers as channels to export their goods to the United States. Absent these facts, the Department should not employ such a

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[4] This decision was upheld by the CIT in Peer Bearing Company v. United States, Slip Op. 01-125 (Ct. Int'l Trade October 25,2001).

[5] This decision was upheld by the CIT in Rhodia Inc., v. United States, Slip Op. 02-109 (Ct. Int'l Trade September 9,2002).

[6] BLACK's LAW DICTIONARY1203-1204 (7th ed. 1999).

presumption. The Department's assertion in the Appendix to its notice, i.e., "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", is not a fact required by the presumption at all and thus can not serve as a valid basis for this presumption. Since the necessary facts do not exist, the Department therefore is prevented from instituting the aforementioned presumption and should not change its current policy.

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Pursuant to the Department's requirements, we submit an original and six copies of this submission.

Please do not hesitate to contact the undersigned should you have any questions regarding this submission.

Respectfully submitted

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