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July 15, 2005

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

Attention: Joseph A. Spetrini
Acting Assistant Secretary for Import
Administration

Re: Timing of Assessment Instructions for Antidumping Duty Orders
Involving Non-Market Economy Countries
Our Reference: 10512

Dear Acting Assistant Secretary Spetrini:

These comments are filed on behalf of the Government of the People's Republic of China, Bureau of Fair Trade for Imports & Exports, Ministry of Commerce ("MOFCOM"), in response to the U.S. Department of Commerce's Request for Comments on Timing of Assessment Instructions for Antidumping Duty Orders Involving Non-Market Economy Countries, as published in 70 Fed. Reg. 35,634 (June 21, 2005).

An original and six copies of China's comments are attached. These comments also are submitted by email.

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

Respectfully submitted,

Grunfeld Desiderio Lebowitz
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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

TIMING OF ASSESSMENT INSTRUCTIONS FOR ANTIDUMPING DUTY ORDERS INVOLVING NON-MARKET ECONOMY COUNTRIES

JULY 15, 2005

SUBMISSION OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, BUREAU OF FAIR TRADE FOR IMPORTS & EXPORTS, MINISTRY OF COMMERCE("MOFCOM")

The Government of the People's Republic of China, Bureau of Fair Trade for Imports & Exports, Ministry of Commerce (hereinafter "MOFCOM"), responds to the United States Department of Commerce's ("Department" or "DOC") Request for Comments on Timing of Assessment Instructions for Antidumping Duty Orders Involving Non-Market Economy Countries, published in 70 Fed. Reg. 35,634 (June 21, 2005).

This is the third Notice in what appears to be the Department's decision to conduct a comprehensive review of the manner in which it administers the United States' antidumping duty ("AD") law with respect to merchandise imported from non-market economy countries ("NME").

In its initial Notice, dated May 3, 2004, 69 Fed. Reg. 24,119, the Department requested comments regarding its "separate rate practice," based on its concern that it had become too easy for NME companies to escape punitive, adverse facts available ("AFA") country-wide rates and too difficult for the Department to determine whether individual NME companies qualified for more realistic "Section A" status. MOFCOM filed extensive comments in response to this Notice, as well as two subsequent public notices on this topic, published as 69 Fed. Reg. 56,188 (September 20, 2004) and 69 Fed. Reg. 77,722 (December 28, 2004). In these comments, MOFCOM reminded the Department of the great importance that China 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, MOFCOM requested that the DOC refrain from adjusting its antidumping rules and policies in any manner that would negatively impact progress in this area. MOFCOM also reminded the DOC that its presumption that all Chinese firms are controlled by the government with respect to export activities is wrong both in law and in fact, and that with the significant progress in Chinese market-oriented reforms, Chinese businesses 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.

Unfortunately, in its ultimate determination on the separate rates issues, dated April 5, 2005, 70 Fed. Reg. 17,233, the DOC failed to even acknowledge MOFCOM's concerns and the substantial evidence which MOFCOM had submitted to the DOC supporting its position. Instead, the Department adopted two fundamental changes in United States law which may make it even more difficult than it previously had been for market-oriented Chinese companies to avoid punitive AFA rates. MOFCOM believes that these new policies 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 Agreement"), and 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, WT/L/432 ("Protocol on Accession"). This Protocol 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; however, it does not allow members to discriminate against China with respect to antidumping procedures, assessment rates and document submission requirements. Thus,

MOFCOM takes this opportunity to ask that the Department reconsider its April 5, 2005, determination that effectively restricts the number of Chinese companies qualifying for Section A separate rates.

In its second Notice, dated May 26, 2005, 70 Fed. Reg. 30,418, the Department expressed its concern that its current practice of using actual transaction prices from market economy suppliers to value the total quantity consumed by the company buying the input is too liberal, allegedly facilitating manipulation of AD surrogate values and AD margins. MOFCOM again filed extensive comments opposing the Department's proposed change of practice, noting that, if implemented, the Department's proposal would be contrary to express statements of both the Department and the Court of Appeals for the Federal Circuit that "using surrogate values when market-based values are available would, in fact, be contrary to the intent of the laws." MOFCOM also reminded the Department of its obligation to abide by the terms of Article 15 of the Protocol on Accession and the International Antidumping Agreement and to refrain from taking any measures which would place Chinese respondents at an even greater disadvantage vis a vis market economy suppliers than currently exists. In its comments, MOFCOM requested that the Department liberalize its current practice and value material inputs for all NME respondents based on the actual market economy purchase prices of any respondent in an NME AD proceeding. MOFCOM asks the Department to remember that it is required to strive for accuracy, fairness and predictability in its AD determinations, rather than administering this law in a manner which will maximize NME margins.

The Department's third Notice, which is the subject of these comments, does not, on its face, suggest that the Department intends to unfairly discriminate against NME exporters in the same manner as the two prior Notices discussed above. Consistent with its previous comments

urging the Department not to adopt rules and practices that discriminate against Chinese exporters and producers, MOFCOM believes that the Department's assessment practice should be the same for NME and market economy countries, and that the Department should send out its assessment instructions for those entities for which a review has not been expressly requested (including, where applicable, the NME entity whose exports are already subject to punitive adverse facts available ("AFA") rates) shortly after an Administrative Review initiation notice is issued. By proceeding in this manner, the Department: (1) would be conforming its NME practice to Article 9.3.1 of the International Antidumping Agreement, which mandates that "where the amount of anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible. . .," and (2) would be allowing U.S. importers of subject merchandised to close their books on entries of merchandise subject to antidumping duty liability without unnecessary delay. Adoption of these procedures in NME cases should not be controversial.

Nevertheless, MOFCOM notes its concern that representatives of U.S. petitioners in antidumping proceedings might attempt to use this third Notice as a vehicle for making it even more difficult for NME companies to export goods subject to an AD Order into the United States. Thus, in deciding when to issue assessment instructions to NME companies whose exports are not subject to review, MOFCOM asks the Department to consider the following basic principles.

I. IMPORTERS OF MERCHANDISE SOURCED FROM NME COMPANIES WHICH HAVE NOT BEEN NAMED AS RESPONDENTS IN AN ANNUAL REVIEW SHOULD NEVER BE REQUIRED TO PAY MORE AD DUTY THAN THE NME COUNTRY-WIDE RATE IN THE INITIAL FAIR VALUE INVESTIGATION

In market economy cases, as a matter of law, "when no interested party requests an administrative review, the Department will instruct Customs to liquidate the entries for that

review period at the rate deposited at the time of entry." Department of Commerce, Final Rule, Antidumping Duties, 54 Fed. Reg. 12,742, 12,757, 1989 WL 275625 (March 28, 1989); see also Section 351.212(c), Commerce Regulations. In addition, unless an exporter was a mandatory respondent in the Department's initial fair value investigation, or has been expressly named as a respondent in an Annual Review, subject merchandise shipped by that exporter will be assessed duty at the "all other" rate determined during the course of the Department's initial fair value investigation. These policies were adopted by the Department, and approved by United States' courts, to "reduce unnecessary administrative burdens" and to conform to the general rule that the Department must provide an importer "with some form of notice that the administrative review may result in an increase in the importer's liability by affecting the antidumping duty rates applicable to its foreign exporters." Department of Commerce, Final Rule, Antidumping Duties, 54 Fed. Reg. 12,742, 12,756 – 12,757, 1989 WL 275625 (March 28, 1989); Transcom, Inc. v United States, 182 F. 3d 876, 884 (Fed. Cir. 1999). As the Court of International Trade stated in Federal Mogul Corp. v United States, 17 C.I.T. 442, 822 F. Supp. 782, 15 ITRD 1512 (CIT 1993):

> As to the merits of this issue, this Court finds that the statutory framework for administrative reviews clearly anticipates that in cases where a company makes cash deposits on entries of merchandise subject to antidumping duties, and no administrative review of those entries is requested, the cash deposit rate automatically becomes that company's assessment rate for those entries. . . .This Court also finds that 19 U.S.C. § 1675(a)(2)'s requirement that the ITA's determination of a company's antidumping duty assessment rate during an administrative review "shall be the basis ... for deposits of estimated duties" requires the ITA to use the assessment rate determined in an administrative review as the new cash deposit rate for that company. In a situation where a company's entries are unreviewed, the prior cash deposit rate from the LTFV investigation becomes the assessment rate, which must in turn become the new cash deposit rate for that company.

These policies makes sense and conform to the requirement in Article 6.2, International Antidumping Agreement, that "throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests." Such opportunity clearly would not exist if a WTO member decided to assess additional anti-dumping duty on an importer whose goods were not subject to an Annual Review, and who reasonably believed that its ultimate liability was fixed with certainty by the absence of a request for examination of its importations.

The Department's current policy in NME investigations does not conform to these basic principles. In this regard, in its notices initiating Annual Reviews of NME Orders, the Department inserts the following footnote:

> If one of the named companies does not qualify for a separate rate, all other exporters of . . . {subject merchandise} . . . from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

The Department inserted this Note in its Annual Review initiation notices so that it could recalculate NME country-wide rates during the course of an Annual Review whenever a single company named as a respondent in the Review did not qualify for an individual rate. See Transcom, Inc. v United States, 294 F. 3d 1371 (Fed. Cir. 2002).

The Department has relied on this Notice and this policy to increase the original NME country-wide rate during an Annual Review. See, e.g., Issues and Decision Memorandum for the Administrative Review of Certain Cased Pencils from the People's Republic of China; Final Results, 67 ITADOC 48612, 2002 WL 1732817 (ITA) (July 25, 2002) ("However section 776(b)(4) of the Act permits the Department to use as AFA "any information placed on the record" thus, in selecting an adverse facts available rate for the PRC-wide entity, the Department's practice is to assign the highest rate from any segment of the proceeding,

including the current segment. . . .Thus, in keeping with the Department's practice, for the final results of this review we have assigned the PRC-wide entity the higher of the highest rate determined in this review or any prior segment of this proceeding."); Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Preliminary Results of Administrative Reviews and Preliminary Partial Rescission of Antidumping Duty Administrative Reviews70 FR 11934-03, 2005 WL 547872 (F.R.) (March 10, 2005) ("The rate selected as AFA for the PRC-wide entity's sales of axes/adzes and picks/mattocks wedges are the highest calculated rates in the instant review."); Notice of Final Results and Rescission, in Part, of the Antidumping Duty Administrative Review: Petroleum Wax Candles From the People's Republic of China, 69 FR 12121-02, 2004 WL 483036 (F.R.) (March 15, 2004).

As the foregoing discussion reveals, the DOC's policy with respect to NME rates is obviously different from, and more onerous to importers than, its policy with respect to market economy countries. Importers of subject merchandise from market economy countries are accorded certainty in their business practices – they know that if the company from whom they purchase subject merchandise does not have an individual company specified they will be required to pay, at time of entry, AD duty at the rate calculated by the DOC as the "all other" rate in the initial fair value investigation. They also know that if this exporter is not named as a respondent in an Annual Review then their entries will be liquidated "as entered" at the "all other" rate determined in the initial fair value investigation.

In contrast, American importers of subject merchandise from NME countries cannot make business plans for the future. The Department has decided that it has the authority to increase the initial NME country wide rate for all NME exporters subject to the country-wide

rate solely because one exporter failed to co-operate in an Annual Review. And the possibility exists that the Department could decide that it has the authority to actually liquidate an importer's entries with an increase in AD duties, notwithstanding the fact that the company from whom the importer purchased subject merchandise was not named as a respondent in an Annual Review and, accordingly, did not participate in the Annual Review proceeding.

MOFCOM submits that this policy clearly discriminates against NME exporters as well as American companies who purchase goods from NMEs. There is absolutely no reason why the Department should continue to administer U.S. law in this unfair manner, since the Department undeniably has the discretion to apply the same "no change" policy to NME's as it does in market economy cases. Importers of subject goods from NMEs should be accorded the same considerations as importers of goods from market economy countries and should not be denied the certainty that the Department accords its market economy competition.

Moreover, the difference in the manner in which the Department treats unnamed NME exporters and unnamed market economy exporters constitutes a clear violation of the Protocol on Accession. In this Protocol, at Article 15, China agreed that for a period of 15 years after the date of accession WTO members 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." However, with respect to all other antidumping procedures, WTO members were required to treat Chinese exports in the same manner as exports from market economy countries. This principle was confirmed in the Report of the Working Party on the Accession of China,

WT/ACC/CHN/49, para. 151 (Oct. 1, 2001), in which WTO members, including the United States, assured China that:

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

None of these conditions is satisfied by the Department's discriminatory policy of increasing the NME country-wide rate for exporters who were not named as respondents in an Annual Review and, accordingly, did not themselves participate in the review.

In sum, the Department's policy of increasing the NME country-wide rates during an Annual Review proceeding unfairly discriminates against NME exporters, and is contrary to United States international obligations and U.S. law, by creating the possibility that a United States importer will be required to pay additional duty upon liquidation without having the opportunity to defend its interests during the course of an Annual Review. Thus, an NME country-wide rate should be accorded the same status as a market economy "all other" rate, and once established in an initial investigation should not be subject to an increase while an AD Order remains in effect.[1]

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[1] MOFCOM also is of the opinion that the Department's current position to apply a punitive NME-wide rate based on information submitted by Petitioners in the initial fair value investigation is contrary to the International Antidumping Agreement's Best Information Available requirements (Annex II). NME-wide rates should reflect rates derived from individual

II. MERCHANDISE EXPORTED BY AN NME COMPANY WHICH HAS QUALIFIED FOR SEPARATE STATUS SHOULD BE LIQUIDATED "AS ENTERED" UNLESS THE COMPANY IS EXPRESSLY NAMED AS A RESPONDENT IN AN ANNUAL REVIEW

In the Department's initial fair value investigations, an NME exporter can qualify for separate rate status by providing the DOC with information confirming that the company is "sufficiently independent from government control in its export activities." See DOC Policy Bulletin Number 05.1 of April 5, 2005 ("Separate Rate Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries"). For companies qualifying for separate rates who are not selected as mandatory respondents, the Department will assign "a weighted-average of the rates individually calculated for the mandatory respondents, excluding any rates that were zero, de minimis, or based entirely on facts available." Id. These rates will apply to all subject merchandise exported by the "separate rate" company.[2]

Pursuant to current Department practice, the weighted average rates in question will continue to apply to a separate rate exporter, unless and until that exporter is expressly named as a respondent in an Annual Review. See, e.g., Certain Helical Spring Lock Washers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 70 Fed. Reg. 28274 (May 17, 2005) ("For a company previously found to be entitled to a separate rate

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exporters subject to the initial investigation, rather than the margin maximizing rates alleged by Petitioners.

[2] For investigations initiated on and after April 5, 2005, separate rate status will be specific to producers that supplied the exporter during the period of investigation. Thus, the "cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question and produced by a firm that supplied the exporter during the period of investigation." ." DOC Policy Bulletin Number 05.1 of April 5, 2005 ("Separate Rate Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries"). For reasons discussed in its prior submissions to the Department, MOFCOM believes that this new policy is contrary to United States law and United States' international obligations.

and for which no review was requested, the cash deposit rate will be the rate established in the most recent review of that company."); Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review 70 Fed. Reg. 6836 (February 9, 2005) ("For previously reviewed or investigated companies not listed above that have separate rates, the cash-deposit rate will continue to be the company-specific rate published for the most recent period.").

Unlike the Department's unfair and legally impermissible practice of increasing an NME country-wide rate during the course of an Annual Review, its practice of allowing a separate-rate company to maintain the same rate throughout the course of AD Order, unless a company specific Annual Review of that company has been requested, is consistent with the Department's practice in market-economy proceedings. Petitioners in AD proceedings have the right to request that the Department review the pricing practices of any and all named respondents if they are not satisfied with previously assigned rates. See Section 351.213(b), Department of Commerce Regulations. Exporters also have the right to request an Annual Review of their own pricing practices. Since the absence of a request confirms that all parties are satisfied with the rate assigned to a named exporter, for both cash deposit and assessment purposes, there is absolutely no reason why the Department should change this policy at this time.

III. AD ASSESSMENTS SHOULD NEVER EXCEED AD MARGINS.

MOFCOM is concerned that representatives of American manufacturers may attempt to convince the Department to use its current notice as a vehicle to modify the manner in which the Department instructs Customs officials to assess AD duty upon liquidation of entries subject to

AD Annual Reviews. As expressly required by Article 9.3, International Antidumping Agreement, "the amount of the anti-dumping duty shall not exceed the margin of dumping . . ."

Given the complexity of the United States' retrospective dumping system (especially in those instances in which margins are calculated based on constructed export price, pursuant to Section 772(b), Tariff Act of 1930, as amended, and Article 2.3, International Antidumping Agreement), the Department must be careful to ensure that AD assessments do not exceed dumping margins. MOFCOM requests that the Department administer the U.S. AD law to avoid this unlawful result and to resist any pressure from American producers to attempt to collect more duty than the Department calculates is due after it has compared United States prices with normal value.

IV. THE BYRD AMENDMENT SHOULD BE REPEALED

The United States should immediately repeal Section 754, Tariff Act of 1930, as amended (Continued Dumping and Offset Act, commonly known as the "Byrd Amendment"), pursuant to which antidumping duties paid by importers are distributed to certain American producers of subject merchandise. By decision dated January 16, 2003, WT/DS217/AB/ R and WT/DS234/AB/R, a World Trade Organization Appellate Body determined that the Byrd Amendment was contrary to Article 18.1 of the International Antidumping Agreement ("No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 19994, as interpreted by this Agreement") and that the United States, therefore, had failed to comply with Article 18.4 by taking the "all necessary steps . . .to ensure" that United States law conformed to the WTO Agreement. Notwithstanding this decision, the United States continues to distribute antidumping assessments to American

producers, thereby placing pressure on the Department to maximize its collection of antidumping duties and to distribute duty to American producers as expeditiously as possible.

While MOFCOM believes that the antidumping liability of companies not expressly named in an Administrative Review should be finalized as soon as possible after the Review is initiated for named companies, MOFCOM remains concerned that the presence of the Byrd Amendment may lead to excessive assessments. Thus, the Department should reject any attempts by American producers to persuade the Department to unfairly maximize collections of AD duties contrary to basic principles of fairness and United States international obligations.

In conclusion, the Department's review of antidumping assessment practices in NME proceedings should not lead to even more onerous and discriminatory polices than currently exist. The Department should remember that antidumping duty laws are intended to be remedial, not penal, in nature, and that they are designed to remedy international price discrimination, and not constitute an absolute barrier to trade in merchandise subjected to an Order. The manner in which the Department currently calculates normal value in NME proceedings is sufficiently unpredictable to dissuade many U.S. importers from purchasing Chinese-made goods. The Department's decision to change its separate rate practice by adopting an application process for non-investigated firms and of assigning exporter-producer combination rates in NME investigations initiated after April 5, 2005 (see 70 Fed. Reg. 17,233) has made an already unfair policy worse. Similarly, the Department's suggestion, in its Notice of May 26, 2005 (70 Fed. Reg. 30,418) that it may limit reliance on market economy inputs in calculating normal value has increased MOFCOM's concerns as to the Department's intentions with respect to the Notice subject to the comments filed by MOFCOM today. Thus, MOFCOM asks that the Department refrain from turning its review of its policy concerning the timing of collection of AD duties for

companies not named as respondents in an Annual Review into an excuse to increase the differences between market economy and NME proceedings to the detriment of NME exporters as well as American companies purchasing subject merchandise from NMEs. Instead, MOFCOM believes that the Department should use this Notice as a vehicle to equalize treatment of NME and market economy exporters subject to antidumping duty proceedings in the United States.

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