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April 20, 2007

BY HAND

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

Attention: David Spooner
Assistant Secretary for Import Administration

Re: Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates
Our Reference: 10512

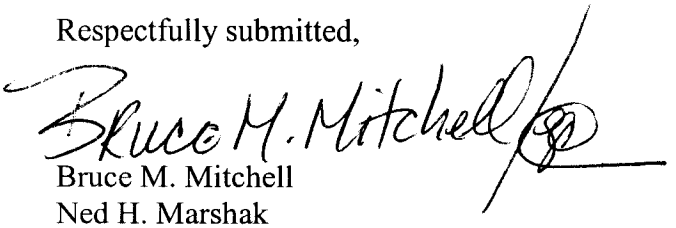
Dear Assistant Secretary Spooner:

These comments are filed on behalf of the Government of the People's Republic of China ("China"), Ministry of Commerce ("MOFCOM"), in response to the U.S. Department of Commerce's Request for Comments on Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates, as published in 72 Fed. Reg. 13,246 (March 21, 2007).

An original and six copies of China's comments are attached and an electronic version has been sent via email to the webmaster.

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

Respectfully submitted,



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SUBMISSION OF

THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, MINISTRY OF COMMERCE

ON

ANTIDUMPING METHODOLOGIES IN PROCEEDINGS INVOLVING NON-MARKET ECONOMY COUNTRIES: SURROGATE COUNTRY SELECTION AND SEPARATE RATES

APRIL 20, 2007

Submission Of The Government Of The People's Republic Of China ("China"), Ministry Of Commerce

I. INTRODUCTION

The Government of the People's Republic of China ("China"), Ministry of Commerce ("MOFCOM"), hereby responds to the United States Department of Commerce's (hereinafter "Commerce" or "Department") Request for Comments on Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates, as published in 72 Fed. Reg. 13,246 (March 21, 2007).

This Notice represents the fifth time within the past three years that the Department has requested comments regarding antidumping duty ("ADD") methodologies in proceedings involving Non-Market Economy ("NME") countries.[1] Notwithstanding its belief that China should have been treated as a market economy in all ADD proceedings, MOFCOM submitted Comments to the Department in response to all of these Notices. MOFCOM reasonably believed that Commerce would adopt fair and reasonable methodologies and procedural rules with respect to the manner in which it calculates ADD rates and conducts administrative proceedings for NME imports, giving due consideration to China's cooperation in furthering the development of a healthy Sino-U.S. economic and trade relationship and the ongoing reforms in China's economy.

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[1] Separate Rate Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 24,119 (May 3, 2004); Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries, 70 Fed. Reg. 30,418 (May 26, 2005); Timing of Assessment Instructions for Antidumping Duty Orders Involving Non-Market Economy Countries, 70 Fed. Reg. 35,634 (June 21, 2005); Expected Non-Market Economy Wages: Request for Comments on Calculation Methodology, 70 Fed. Reg. 37,761 (June 30, 2005).

The Department, however, rejected all of MOFCOM's proposals. Rather than implementing any of the reforms recommended by MOFCOM (and many other commentators), Commerce has used these Notice and Comment proceedings to take a giant step backward. Basing its decisions on the need for "efficiency and enforcement," and an-ill conceived, hypothetical fear that NME exporters are somehow attempting to "game the system" and "manipulate" margins, Commerce has implemented policies designed to increase already prohibitive ADD margins for NMEs. In so doing, Commerce has lost sight of its obligation to make a "fair comparison between the export price and normal value,"[2] by determining ADD margins as "accurately as possible" based on the "best available information."[3]

The facts speak for themselves. In Comments filed with Commerce on June 1, 2004, MOFCOM noted that from 1995 through April 2004, the China country-wide rate exceeded 100 percent ad valorem in one-half of the Department's ADD investigations, with an average rate of 112.85 percent, and a mean rate of 105.35 percent. In the Department's 16 ADD investigations from April 2004 through March 2007, the China-wide rate has exceeded 200 percent in 7 cases, with an average rate of 192.76 percent and a mean rate of 198.08 percent. See **Attachment** to these comments. During this recent three-year period, the average China-wide rate (192.76 percent) has been 3 ½ times greater than the 53.85 percent average rate for those Chinese respondents qualifying for Separate Rate status.[4]

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[2] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, ("GATT94, Article VI") at Article 2.4; see generally United States – Measures Relating to Zeroing and Sunset Reviews, AB-2006-5, Report Of The Appellate Body, WT/DS322/AB/R (9 January 2007).

[3] Shakeproof Assembly Components Div. of Ill. Tool Works v. United States, 268 F.3d 1376, 1381-1383 (Fed. Cir. 2001); see also Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990); Lasko Metal Prods. v. United States, 43 F.3d 1442, 1446 (Fed. Cir. 1994).

[4] From 1995 through April 2004, the average China Separate Rate was 44.15 percent.

A comparison of the China-wide rates, China Separate Rates and market economy "all other" rates in recent ADD investigations involving competitive products from multiple countries reveals the following commercially unrealistic results:

PRODUCT	MARKET ECONOMY CASES ON COMPETITIVE PRODUCTS (NUMBER OF COUNTRIES)	MARKET ECONOMY AVERAGE ALL OTHER RATE	CHINA SEPARATE RATE	CHINA COUNTRY WIDE RATE
Lined Paper Products	2 (India, Indonesia)	13.76% (non-AFA)	78.38%	258.31%
Diamond Sawblades	1 (Korea)	16.39%	21.43%	164.09%
Chlorinated Isocyanurates	1 (Spain)	24.83%	137.69%	285.63%
Magnesium Metal	1 (Russia)	21.45%	49.66%	141.49%
Shrimp	4 (Brazil, Ecuador, India, Thailand) (and Vietnam, NME)	6.69%	53.68%	112.81%
Carbazole Violet Pigment 23	1 (India)	27.48%	N/A	217.94%
Color Television Receivers	1 (Malaysia)	0.75%	22.94%	78.45%
Polyethylene retail carrier bags	2 (Malaysia, Thailand)	2.80% (non-AFA)	25.69%	77.51%

As this Chart reveals, in the eight multiple country investigations completed in the past 3 years, the China-wide rate has averaged 167.03 percent, 3 times greater than the China Separate Rate (55.63 percent) and 13 times greater than the average market economy "all other" rate (12.38 percent). In addition, the China Separate Rate (55.63 percent) has been 4 1/2 times greater than the average "all other" rate (12.38 percent) of market economy imports.

These dramatic differences between China-wide rates, China Separate Rates and market-economy all-other rates do not reflect market realities. Chinese goods are sold in the United States at prices comparable to prices of competitive products from market economy countries

subject to companion ADD investigations; Chinese production costs obviously are not significantly higher than production costs in these market economy countries.

The prohibitive and discriminatory ADD margins applicable to Chinese exports arise from the facts that: (1) the United States calculates NME margins by a different set of rules than the methodology used to calculate market economy margins; and (2) the Department has adopted a margin maximizing strategy when calculating Chinese ADD margins. Rather than relying on the best information available to calculate Chinese ADD margins in the accurate and fair manner required by law, the Department has denied Chinese exporters their right to a level playing field.

First, unlike market economy ADD cases, in which a company subject to investigation has control over its U.S. and home market prices, ADD margins in NME cases reflect a comparison of a company's U.S. prices, which can be controlled, and surrogate values, which cannot. Surrogate values are unpredictable; they vary widely; they ignore the NME's comparative cost advantages; and they make it impossible for an NME producer to price its goods in the U.S. market to avoid the imposition of antidumping duties. It is for these reasons that MOFCOM again asks that the Department calculate Chinese ADD rates based on market-economy principles to the maximum extent allowed by law.[5]

Second, the surrogate value methodology has allowed the Department - with its considerable discretion to pick and choose among a variety of surrogate value placed on the

[5] In Shakeproof Assembly Components Div. of Ill. Tool Works v. United States, 268 F.3d 1376, 1381-1383 (Fed. Cir. 2001), the Court discussed this important principle as follows: "Commerce may depart from surrogate values when there are other methods of determining the "best available information" regarding the values of the factors of production." The Court then held that "the best available information on what the supplies used by the Chinese manufacturers would cost in a market economy country was the price charged for those supplies on the international market." Inexplicably, in its Notice published on October 19, 2006 (71 Fed. Reg. 61,716), the Department abandoned this basic principle by adopting a 33 percent threshold requirement in order to apply market economy purchase prices to value all inputs of a particular vendor.

record - to achieve its avowed goal of "aggressively" and "vigorously" enforcing the ADD law,[6] by selecting surrogate values which maximize margins. It is for this reason that dumping margins on Chinese products have increased dramatically in the past three years – both absolutely and relative to ADD margins in market economy cases. However, the Department's goal (and the inflated margins it has calculated) has done violence to the overriding objective of the antidumping law; that is, to calculate margins as accurately and as fairly as possible.[7] And while the Department's decisions can be, and in many instances have been, reversed by the U.S. Courts and/or a World Trade Organization Panel, reversal is often too late to undue the harm caused by failure to base decisions on substantial evidence and to comply with the clear requirements of the dumping law. When the Department selects prohibitively high surrogate values, United States importers will not buy a Chinese product until litigation has concluded – an event which often does not take place until at least several years (and normally much longer) after the Department issued the challenged determination. Accordingly, MOFCOM again asks the Department to conform its policy to U.S. law and U.S. international obligations and to calculate the most accurate ADD margins possible, rather than the highest margins which can possibly be calculated.

Third, the Department has a choice as to how to calculate the so-called "China-wide" rate. The Department has the discretion to conclude – as it did in the past - that this rate should reflect the average rate of the Chinese companies examined in detail during the course of an

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[6] See Commerce News, "Commerce Applies Anti-subsidy Law to China," (March 30, 2007).

[7] See, e.g., Shandong Huarong Gen. Corp. v. United States, 25 C.I.T. 834, 838-839 (2001) ("Despite the broad latitude afforded Commerce and its substantial discretion in choosing the information it relies upon, the agency must act in a manner consistent with the underlying objective of 19 U.S.C. § 1677b(c) -- to obtain the most accurate dumping margins possible. . . .This objective is achieved only when Commerce's choice of what constitutes the best available information evidences a rational and reasonable relationship to the factor of production it represents.").

investigation – the so-called "mandatory respondents."[8] This methodology makes economic sense. In its June 1, 2004, comments, MOFCOM asked the Department to reverse its current discriminatory practice and to restore its prior practice. The Department ignored these comments, and has continued to calculate China-wide rates based on the prohibitively high, unverified rates alleged by Petitioners (which, as noted above, have been even higher in the past 3 years than they have been in the past). As discussed below, MOFCOM again requests that the Department calculate the China-wide rate as required by law; that is, based on the average rate of Chinese mandatory respondents.

Finally, unlike non-investigated market economy companies, who automatically qualify for the rates applicable to companies under investigation (which, by law, cannot include rates based, in whole or in part, on adverse facts available), non-investigated Chinese companies are required to affirmatively qualify for this status by demonstrating that they are not under control of the Chinese government. The Department has implemented an Application process, making it more difficult for less sophisticated and smaller Chinese companies to avoid the prohibitive China - wide rates. As discussed below, MOFCOM believes that qualification for Separate Rates should be virtually automatic; reflecting the significant changes in the Chinese economy since 1978.

In this regard, during the same period of time in which the Department has maximized Chinese ADD margins by "vigorously" and "aggressively" administering U.S. ADD law, China

[8] See Transcom, Inc. v. United States, 294 F.3d 1371 (Fed. Cir. 2002) ("Before 1991, Commerce used the combination of individual rates and an all others rate for antidumping investigations of imports not only from market economy countries, but also from countries with nonmarket economies ('NMEs') such as China. In 1991, however, Commerce reversed course and decided that individual rates were not appropriate in an NME setting . . . Instead, Commerce determined that NME exporters would be subject to a single, countrywide antidumping duty rate unless they could demonstrate legal, financial, and economic independence from the Chinese government (referred to by Commerce as 'the NME entity'))."

has transformed its economy by "progressively giving greater rein to market forces."[9] The changes in the Chinese economy are well documented. The Report by the Secretariat, Trade Policy Review, People's Republic of China, WT/TPR/S/161 (28 February 2006) summarized the current state of Chinese economic development as follows:

> China's economic reforms, which began in 1978, have gradually opened up the economy to both international trade and foreign direct investment (FDI) and allowed the emergence alongside the public sector of a private (non-public) sector, whose contribution to GDP reached nearly 60% in 2003. (page ix, at para 1);
>
> As a result of economic reforms, direct government intervention in the economy has declined . . . .The reform of state-owned enterprises (SOEs) has been ongoing since the late 1970s. . . .the reforms have thus far reduced the number of SOEs by almost half since the late 1990s, and improved profitability among those remaining. (page xii, paras. 16 – 17);
>
> The private sector now accounts for well over half of China's GDP and three-quarters of its exports, the bulk of which are produced by foreign-controlled companies. (page 4, para 5).

The Department, just last month, itself recognized these significant structural changes in the Chinese economy:[10]

> The PRC Government has eliminated price controls on most products; market forces now determine prices of more that 90 percent of products traded in China. Coated Paper CVD Decision at 5.
>
> China's currency . . . .is freely convertible on the current account today. . . . Domestic and foreign companies and individuals are free to acquire, hold and sell foreign exchange and foreign companies are free to repatriate capital and remit profits. Id. at 6.
>
> Starting in the 1990s, the PRC Government began to allow the development of a private industrial sector, which today dominates most of the industries in which the PRC Government has not explicitly preserved a leading role for SOEs. Id. at 6 – 7.

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[9] OECD Observer, "Economic Survey of China, 2005," at 2 (September 2005).

[10] Department of Commerce, "Countervailing Duty Investigation on Coated Free Sheet Paper from the People's Republic of China – Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy," C—570-907 (March 29, 2007) ("Coated Paper CVD Decision").

> The PRC Government has dismantled its monopoly over foreign trade and finally extended trading rights to all FIEs in accordance with its WTO accession obligations. Id. at 7.
>
> Private enterprises in China today have significant discretion over these business decisions ([e.g., wages and input prices, investment, production quotas, sales prices]). Id. at 7.

Unfortunately, and contrary to what MOFCOM reasonably anticipated would occur, these significant transformations in China's economy have not led the Department to liberalize its ADD policy toward Chinese exports. Instead, the Department has relied on these changes to justify its decision to reverse a twenty-year old policy, which has been expressly approved by the U.S. Congress and the U.S. judiciary, that NMEs cannot be subject to countervailing duties ("CVD").

MOFCOM has strongly protested the application of the CVD law to Chinese exports. If the Department persists in refusing to recognize that China is a market economy for ADD purposes, it cannot assess countervailing duties on Chinese exports[11]; on the other hand, if the Department concludes that China, in fact, is a market economy whose exports are subject to the CVD law, then it must calculate ADD based on market economy principles.[12]

MOFCOM believes that since the Department itself has recognized the significant structural changes in the Chinese economy, such changes should also be recognized by the

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[11] As discussed in detail in MOFCOM's Comments, dated January 16, 2007, United States law is clear: the United States "Congress has decided that the proper method for protecting the American market against selling by nonmarket economies at unreasonably low prices is through the antidumping law. . . . If that remedy is inadequate to protect American industry from such foreign competition . . . it is up to Congress to provide any additional remedies it deems appropriate." Georgetown Steel Corp. v. United States, 801 F. 2d 1308, 1318 (Fed. Cir. 1986). Moreover, as also discussed in MOFCOM's comments, the Department's determination violates the international obligations of the United States.

[12] See, e.g., GATT94, Ad Article VI, paragraph 1.2, which limits reliance on a surrogate value methodology to "imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State." In its decision that the Georgetown Steel Corp. rationale no longer applies to China, the Department has implicitly recognized that it no longer can apply its surrogate value methodology to China exports.

Department with respect to the manner in which it administers the ADD law. The United States must conform its ADD methodology to its international obligations, and to U.S. law, by relying on the best information available to assess ADD as accurately and fairly as possible. The United States is required, to the maximum extent possible, to allow NME exporters to compete in the United States market on a level playing field with exporters from countries whom the United States already has recognized have market economies. MOFCOM urges the United States to return to these basic principles of international and United States law.

II. THE DEPARTMENT'S SURROGATE COUNTRY SELECTION PROCESS SHOULD REFLECT ITS OBLIGATION TO CALCULATE ACCURATE SURROGATE VALUES

In its request for comments, the Department asks a series of questions as to how it should select the surrogate countries from which it will ultimately select the surrogate values to apply to NME factors of production in order to calculate Normal Value in NME ADD proceedings. Prior to commenting on the Department's specific questions, MOFCOM believes that it is important to re-emphasize the ultimate objective of the Department's surrogate country selection process.

The Department is required to calculate dumping margins as accurately as possible. See, e.g., Shakeproof Assembly Components, 268 F.3d at 1382. Its broad discretion in determining what constitutes the "best available information" to be used as surrogate values "is constrained by the underlying objective of the statute; to obtain the most accurate dumping margins possible." CITIC Trading Co., Ltd. v. United States, 27 CIT __, __, Slip Op. 03-23 at n.12 (2003) (*citations omitted*). The Department cannot be said to have applied the "best available information" if the surrogate values it selects produce less accurate results than the potential surrogate values the Department did not select. Id.

Commerce can only determine which surrogate values produce the most accurate results through a **comparison** of the relative merits of competing surrogate values, **weighing all relevant characteristics of the data**. See, e.g., Dorbest Ltd. v United States, 462 F. Supp. 2d 1262, 1268 (Ct. Int'l Trade 2006) ("The term 'best available' is one of comparison, i.e., the statute requires Commerce to select, from the information before it, the best data for calculating an accurate dumping margin. The term 'best' means 'excelling all others'. . . This 'best' choice is ascertained by examining and comparing the advantages and disadvantages of using certain data as opposed to other data . . ."); Allied Pac. Food (Dalian) Co. v. United States, 435 F. Supp. 2d 1295, 1320 (Ct. Int'l Trade 2006) ("The court finds that Commerce failed to subject the SEAI data and the Nekkanti financial statement data to a fair comparison according to the record evidence and its own criteria. . . . The Department's analysis did not progress to a fair comparison of the ACC data and the Nekkanti financial statement data under Commerce's own criteria.").

Commerce is required to "discard as unreliable proposed surrogate market values that are aberrational compared to other market values on the record." Shanghai Foreign Trade Enterprises Co., Ltd. v. United States, 318 F. Supp. 2d 1339, 1350 (Ct. Int'l Trade 2004). The Department, therefore, cannot rely on a surrogate value which leads to anomalous results. Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States, 27 CIT __, __, 2003 WL 23015952 (2003); Dorbest Ltd., 462 F. Supp. 2d at 1269 ("If the proxy values selected prove unrepresentative, reliance on them defeats their purpose, namely, to derive a dumping margin that is as accurate as possible. . . . Hence, if Commerce selects a particular data set that is demonstrably unrepresentative or distortional, a reasonable mind may rightly question how such a selection could be the 'best.'").

To avoid reliance on anomalous data, Commerce should compare surrogate values to benchmark prices. See Timken Co. v. United States, 26 C.I.T. 434, 446 (2002) ("A comparison of surrogate data to that of market economy in order to determine the reliability of such surrogate data is within 'Commerce's statutory authority and consistent with past practice'"); see also Guangdong Chems. Imp. & Exp. Corp. v. United States, 414 F. Supp. 2d 1300, 1312-1313 (Ct. Int'l Trade 2006) ("Guangdong identified for Commerce a number of logical inconsistencies in its surrogate value for sebacic acid that should have prompted Commerce to examine its own data. . . . Having failed to consider whether the $15,826.30 figure derived from the basket category was aberrational despite evidence of its wide variation from the value of the same basket category in another year, Commerce failed to present substantial evidence supporting its surrogate value for sebacic acid.").

Commerce also should rely on as broad and representative data as is available and reliable, rather than limit its selection of surrogate values to information obtained from a single producer or a single region in a surrogate country. See Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States, 28 CIT __, __, 2004 WL 1918933 (2004) ("{T}he court finds proper Commerce's decision to reject the average raw honey price calculated from MHPC's 1999-2000 financial statement, on the grounds that the value for raw honey reported on the financial statement represents the value for raw honey as experienced by a single processor of honey in a particular region of India"). As the Department expressly stated in Comments to its surrogate value regulations:

> In general, we believe that more data is better than less data, and that averaging of multiple data points (or regression analysis) should lead to more accurate results in valuing any factor of production.

Antidumping Duties, Countervailing Duties, Final Rule, 62 Fed. Reg. 27,295, 27,367 (May 19, 1997).

Thus, the Department cannot rely on simplistic canons of construction or alleged difficulties in conducting its investigations as reasons for failing to undertake a careful analysis, on a case by case basis, as to which of the competing surrogate values placed on the record in a proceeding lead to the most accurate result. "While Commerce may establish criteria in order to guide its data selection process, this does not relieve Commerce of the obligation to evaluate the relative accuracy of domestic and import data in valuing factors of production . . . Scrutiny of surrogate values is important because they are proxies -- they are not actual costs but estimates based on the best available information. If the proxy values selected prove unrepresentative, reliance on them defeats their purpose, namely, to derive a dumping margin that is as accurate as possible." Dorbest Ltd, 462 F. Supp. 2d at 1269-1270, 1278-79.[13]

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[13] See also Yantai Oriental Juice Co. v. United States, 26 C.I.T. 605, 617-618 (2002) ("While the data relied upon by Commerce may be 'more contemporaneous' with the POR and not 'aberrational or unreliable,' these facts do not naturally lead to the conclusion that such data is an accurate reflection of the price paid for coal by domestic Indian AJC producers during the POR."); Anshan Iron & Steel Co. v. United States, 2003 Ct. Intl. Trade LEXIS 109, 26-27 (Ct. Int'l Trade 2003) ("Commerce has therefore failed to provide any evidence that this alleged difficulty in conducting an investigation into a respondent's factors of production for self-produced intermediate inputs is any more complex than any other factors of production analysis conducted in previous investigations. Commerce's rationale would unfairly disadvantage any NME producer wishing to produce its own inputs."); Luoyang Bearing Corp. v. United States, 347 F. Supp. 2d 1326, 1339 (Ct. Int'l Trade 2004) ("Because the paramount goal in normal value calculations is to calculate as accurately as possible the product's normal value as "it would have been if the NME country were a market economy country," the preference in favor of using domestic data does not require that domestic data be used in circumstances where it would conflict with the goal of accuracy."); Hebei Metals & Minerals Imp. & Exp. Corp. v. United States, 366 F. Supp. 2d 1264, 1272-1273 (Ct. Int'l Trade 2005) ("Because Commerce drew no rational connection between its surrogate value and the coal used in production of the subject merchandise, its broad versus narrow distinction is arbitrary."); Polyethylene Retail Carrier Bag Comm. v. United States, 2005 Ct. Intl. Trade LEXIS 175, 66-69 (Ct. Int'l Trade 2005) ("although the Department maintains preferences for using particular data sources, courts have held that no one source will always provide the best available information. . . . .Although Commerce expresses a strong preference for obtaining all factor values from a single surrogate source, both case law and Commerce's determinations are filled with instances in which Commerce used a blend of sources and surrogates to determine FMV."); Sichuan Changhong Elec. Co. v. United States, 460 F. Supp. 2d 1338, 1345-1346 (Ct. Int'l Trade 2006) ("Thus, Commerce is not bound by its preference for a particular source, rather its charge is to use the best available information."); Dorbest Ltd. v. United States, 462 F. Supp. 2d 1262, 1306-1307 (Ct. Int'l Trade 2006) ("In weighing the arguments on this issue, the court notes that Respondents are certainly correct in claiming that a firm's size may affect certain of its financial ratios - after all, that is why economies of scale are beneficial in certain settings. Indeed, as is recorded in the legislative history of the antidumping statute, Commerce should seek to use, if possible, data based on production of the same general class

Accordingly, while MOFCOM believes that it is important that the Department select a primary surrogate country – taking into consideration the country's level of economic development and significance of production of the subject merchandise – at an early stage in each ADD investigation/Annual Review, the Department should always recognize that the accuracy of the result is the ultimate goal of the selection process. Selecting surrogates from a country of comparable economic development with the NME is merely one means of achieving the correct – i.e., the most accurate - result.

Based on these basic principles, MOFCOM now comments on the Department's specific questions.

> ***COMMERCE QUESTION: "At what point should differences in per capita GNI of a potential surrogate and the NME be "too large" for the two to be considered "economically comparable?'***

MOFCOM RESPONSE: Differences in per capita GNI should not constitute a per se prohibition against selecting a country as a source for a particular surrogate value. In selecting a primary surrogate country, the Department should consider a variety of relevant factors in addition to per capita GNI, including, but not necessarily limited to: (1) whether the country is a significant producer of the product; (2) whether the country's industry is similar to that of China in terms of production process; (3) whether the country has upstream production of inputs (where the Chinese industry purchases primarily domestic materials); (4) whether average labor costs are similar to labor costs in China; and (5) whether the average export values of finished product are comparable to NME values (particularly where the surrogate country is not the subject of a parallel dumping investigation).

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or kind of merchandise using similar levels of technology and at similar levels of volume as the producers subject to investigation.")

The most comparable GNI may not always be the most critical element of the selection. In fact, the Court of International Trade reasoned in Dorbest Ltd., 462 F. Supp. 2d at 1293-1294:

> It may be the case that . . . .accuracy would be greatly enhanced by using a broader data set of nations than just those at a comparable level of development to the PRC. Under such circumstances, using a broader data set may constitute the "best available information" and recourse to a broader range of market economy countries could be "appropriate" in advancing one of the antidumping statute's purposes, i.e., to calculate the dumping margin as accurately as possible.

Therefore, when appropriate, the Department should broaden its search for primary surrogate countries beyond the comparability of a potential surrogate's GNI to the GNI of China. At the same time, however, the more developed market economy countries that the Department has always excluded from surrogate country selection, should continue to be excluded from the analysis as to whether a particular country should be the primary surrogate. In all cases, the Department shall only select as potential primary surrogate countries those developing countries whose economies are comparable to China.

> ***COMMERCE QUESTION "Furthermore, should the Department develop a standard for deciding which countries to include on the initial list of potential surrogate countries?"***

MOFCOM RESPONSE: As noted above, the Department's initial list of potential surrogate countries should take into consideration a variety of factors, in addition to per capita GNI. The Department should recognize that unless accurate surrogate values from a potential surrogate country are available, it is irrelevant whether a country's GNI is comparable to the NME's GNI, or whether the country is a significant producer of comparable merchandise. Thus, any initial list of potential surrogate countries should not be created in a vacuum; rather, the list itself should reflect the probability that the Department can obtain accurate surrogate values for particular factors of production. See, e.g., Dorbest Ltd., 462 F. Supp. 2d at 1283 ("Commerce is

not obligated to value its factors of production from just one surrogate country. . . the antidumping duty statute does not preclude consideration of pricing or costs beyond the, surrogate country if necessary.").

Moreover, taking into account the difficulty of evaluating at the outset of an investigation which country ultimately will qualify as the primary surrogate country, MOFCOM believes that the Department should publish the full list of countries and GNI per capita figures, without expressing an opinion as to which ones should be considered economically comparable. After this list is published, the Department would request comments on the appropriate primary surrogate country. By proceeding in this manner, the Department would avoid the issue of potentially choosing as a surrogate those countries that are left off the list.

Finally, the Department should not filter the selection to economically comparable countries at the outset of the investigation, before hearing comment from the parties.

COMMERCE QUESTION "What could be an appropriate standard for determining which countries are likely to offer the necessary data for conducting an antidumping proceeding?"

MOFCOM RESPONSE: In attempting to create a standard, the Department should recognize that "necessary data" consists solely of "accurate data;" in other words, data which is fair, which does not lead to anomalous results, and which accurately represents costs which an NME respondent would incur if it were operating in a market economy environment. For this reason, a one size fits all standard does not exist.[14]

[14] It is undisputed that Commerce's selection of appropriate surrogate values is not limited to data obtained from countries whose GNIs are comparable to the NME whose exports are subject to investigation. By providing that Commerce should rely on surrogates from economically comparable countries only **"to the extent"** that it was **"possible"** to do so (see Section 773(c)(4), Tariff Act of 1930, as amended), Congress correctly recognized that Commerce's NME choice was subservient to the over riding necessity of calculating accurate and fair ADD margins based on the best available information. It is for this reason that in enacting its NME Regulations, Commerce adopted a regression based analysis for valuing labor rates: "Finally, regarding the argument that proposed paragraph (c)(3) ignores the significant manufacturer criterion for surrogate selection, we believe that the regression-

For example, with respect to surrogate financial ratios, which represent overhead, SG&A, and profit as a percentages of labor and fabrication costs (as distinguished from absolute costs), the most accurate data may be found in a surrogate country in which publicly traded companies produce subject merchandise, rather than a country with a GNI comparable to the NME, but in which financial ratios of comparable companies are not publicly available.

Similarly, for a surrogate cost of an input such as packing material, slavish reliance on data obtained from a particular country often has led to arbitrary and totally inaccurate results (e.g., where publicly available domestic costs are unavailable and the Department relies on "basket category" import values, or import values of obviously noncomparable merchandise). In this case, the most accurate data may be found in product specific export data, or from databases reflecting accurate costs in countries with GNIs different from the NME.

For surrogate costs of major inputs, the Department should never elevate GNI comparability over accuracy and fairness. If accurate data is not publicly available in a GNI comparable country, the Department should look elsewhere for "necessary data," rather than relying on data which leads to inaccurate, unfair and anomalous results.[15]

Moreover, in certain proceedings, the market economy country which the Department chooses as having the most comparable GNI to the NME may itself be subject to an ADD investigation or may be a direct competitor with the NME on sales of subject merchandise to the United States. In these cases, the NME's direct competitors may refuse to make public relevant

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based wage rate significantly enhances the accuracy, fairness, and predictability of our AD calculations in NME cases, all of which were attributes highlighted by the Court in Lasko" See Comments on Proposed ADD Regulations, 62 Fed. Reg. 27,296, 27,364 – 27368 (May 19, 1997). In Dorbest, the CIT upheld the Department's decision that it should construe Section 773(c)(4) liberally in order to achieve an accurate result. Dorbest Ltd., 462 F. Supp. 2d at 1270.

[15] In fact, GNI comparability often is not fulfilled; the Department normally selects India as the primary surrogate country and India is far from being economically comparable to China.

information, or may somehow attempt to "manipulate" data which is publicly available, to gain a competitive advantage over the NME exporter. At the same time, if a chosen surrogate country is subject to a parallel antidumping investigation, the Department will ordinarily have access to actual manufacturing cost data for multiple respondents in that surrogate country. In such case, the Department should ordinarily use the weight-average actual cost data of the mandatory respondents, taken from the record in the parallel antidumping investigation, to value inputs in the NME country, unless data of equal quality is publicly available in the surrogate country or elsewhere.

Thus, while the Department should continue to select a primary surrogate country based on comparability of GNI, significance of production of comparable merchandise and the additional factors proposed above, the Department should always be mindful of the fact that with respect to any country ultimately selected as a primary surrogate country, "necessary" data for the surrogate value of each factor of production must be limited to accurate data which leads to fair results.

COMMERCE QUESTION "Should this [initial list of potential surrogates] be comprehensive (which may require that the Department and interested parties examine the extent of production of comparable merchandise in every economically comparable country), or could the list be limited in some way"?

MOFCOM RESPONSE: As discussed above, the Department's initial list of potential primary surrogate countries should take into consideration a variety of factors designed to obtain accurate results. This list of potential primary surrogate countries should not include those countries which the Department has always excluded from consideration due to obviously higher levels of economic development.

However, in the event that an accurate surrogate value of a particular factor of production cannot be obtained from a primary surrogate, the Department should examine data from other countries. As noted, by creating an artificially small list of potential surrogates for all factors of production, the Department risks abandoning accuracy and fairness for expediency, in direct contravention of U.S. law and international obligations.

> ***COMMERCE QUESTION "Is there a broad measure of countries' data quality (for example, the availability, reliability, and accuracy of import statistics) that the Department could use to determine at the outset of the proceeding a subset of the economically comparable countries for consideration as a primary surrogate?"***

MOFCOM RESPONSE: It is not unreasonable for the Department to consider the probability that accurate data can be obtained from a particular country in deciding whether that country would qualify as an acceptable primary surrogate country.

However, as noted, relying on the primary country for all surrogate costs often has led to gross inaccuracies and anomalous results in prior Department proceedings. The Department should never elevate expediency over accuracy and fairness. The Department should not hesitate to look beyond a "primary surrogate" if accurate data for a particular input (e.g., financial ratios, packing material) cannot be obtained from that country.

> ***COMMERCE QUESTION "Should the Department consider whatever countries remain after applying these data screens, or should the Department ensure that the final list includes a balance of countries both above and below the NME's per capita income?"***

MOFCOM RESPONSE: Application of data screens is a useful exercise in selecting a primary surrogate country. However, limiting the selection of surrogate values to the primary surrogate potentially could result in the elimination of the most accurate surrogates for a particular factor of production. Thus, as discussed above, the selection of a primary surrogate

country, or a list of countries with comparable GNIs to China, should never take precedence over the ultimate goal of the ADD law – to calculate margins as accurately and fairly as possible.

III. SEPARATE RATES IN NME ANTIDUMPING PROCEEDINGS

In the second section of its March 21, 2007, Notice, the Department asks for Comments "on the separate rates test as a whole and how its implementation could be further improved." Specifically, the Department asks:

> Whether alternatives to its current separate rates test should be considered, *i.e.*, on whether a reconsideration of the test as outlined in Sparklers and Silicon Carbide is warranted.
>
> Whether the Department should consider revisions in the implementation of the current test, particularly on the proper balance between efficiency and enforcement in the implementation of the separates rates test, *i.e.*, on whether the Department can reduce the administrative burden on both the Department and on interested parties in operationalizing the test.

The Department also requests that "parties address the real possibility that streamlining the test might impact the enforcement goal of the test, that only firms operating independently of government control over their export activities become eligible for an individually calculated rate."

While MOFCOM welcomes the opportunity to submit comments on separate rate issues, it is disturbed by the Department's emphasis on "efficiency and enforcement," rather than accuracy, fairness, and compliance with U.S. law and U.S. international obligations.[16] Simply stated, MOFCOM respectfully submits that the Department's separate rate policy in Chinese

[16] For example, the Department's recent practice of severely limiting the number of NME companies able to obtain company specific rates is directly contrary to the United States obligation to determine individual margins for any company who submits the necessary information. The United States Department of Commerce should allocate sufficient resources to examine more then 2 -3 mandatory respondents in an Annual Review and should not be able to claim that it would be "unduly burdensome" to examine a greater number. See GATTT94, Article VI, at 6.10.2. At the very least, the Department should treat NME countries no differently than market economy countries in deciding how many companies will be allowed to determine their own fate.

ADD proceedings is contrary to United States law, United States' international obligations, and the current state of Chinese economic development. There is no legal or economic justification for the Department to treat Chinese companies differently than companies in other market-economy countries. At the very least, therefore, the Department should modify its current practice: (1) by calculating the "all other" rate for Chinese companies not entitled to a separate rate in the same manner as the "all other" rate is calculated in market economy ADD cases; that is, by relaying on the average rate for mandatory, separate rate respondents; and (2) by creating a rebuttable presumption that all Chinese exporters qualify for separate rates.

MOFCOM advocated these reforms in comments it filed with the Department on June 1, 2004. Since that time, the Department has determined that Chinese exporters were properly claiming separate rate status (or, in certain cases, the Court of International Trade has found that the Department improperly denied this status to separate rate applicants) and, most recently, the Department has correctly recognized that "market forces now determine the prices of more than 90 percent of products traded in China," "China's currency is freely convertible," and "private enterprises in China today have significant discretion over their business decisions." See Coated Paper CVD Decision. Thus, it is even more appropriate than it had been in 2004, that the Department liberalize its separate practice in the manner suggested by MOFCOM.

A. THE DEPARTMENT SHOULD ELIMINATE RELIANCE ON A COUNTRY-WIDE ADVERSE FACTS AVAILABLE RATE IN NME INVESTIGATIONS

In comments filed with the Department on June 1, 2004, MOFCOM presented the Department with the reasons why the Department's calculation of the Chinese country-wide rate on the basis of the adverse facts available ("AFA") rates alleged by Petitioners is clearly contrary to --

> U.S. international obligations, as set forth in Articles 6 and 9, International Antidumping Code;
>
> The Protocol on the Accession of the People's Republic of China to the World Trade Organization; and
>
> The overriding purpose of U.S. law to assess AD duty in an amount no greater than is necessary to equalize competitive conditions between the exporter and affected American industries.[17]

It is for these reasons that MOFCOM again asks the United States to modify its NME policy, by eliminating the "adverse facts available" China country-wide rate, and instead calculating an "all other" rate for Chinese companies not subject to intensive individual analysis, in the same manner as the "all other" rate is calculated in market economy AD cases; that is, by utilizing the average rates applicable to all investigated companies, except for those companies with zero or *de minimis* rates or companies whose rates are calculated on the basis of facts available. Modification of current policy would constitute an important step in the United States bringing its ADD law into compliance with its international obligations, until such time as China is treated as a market economy.

In this regard, pursuant to paragraph 6.10, International Antidumping Code, the United States, as well as other WTO members, are allowed to limit their examination of known exporters or producers of subject merchandise to

> a reasonable number of interested parties or products by using samples that are statistically valid on the basis of the information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

When selecting companies to examine under this methodology, WTO members are required to choose the exporters and/or producers to be examined "in consultation with and with the consent

[17] C.J. Tower & Sons v. United States, 71 F.2d 438 (1934); Imbert Imports, Inc. v. United States, 67 Cust. Ct. 569, 576 note 10 (1971), aff'd, 475 F.2d 1189 (1973). The purpose of the statute is solely remedial. Chaparral Steel Co. v. United States, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990).

of the exporters, producers or importers concerned." Id. para. 6.10.1. In addition, members must "take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable." Id. para. 6.13.

ADD duty assessed on goods imported from companies which have not been selected for individual examination must be assessed in accordance with the principles set forth in paragraph 9.4; that is, the duty assessed "shall not exceed (i) the weighted average margin of dumping established with respect to the selected exporters or producers." Id. para. 9.4. In determining the weighted average margin to apply, WTO members must "disregard... any zero or de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6;" that is, margins established on the basis of "facts available" because an "interested party refuses to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." Id. paras. 9.4, 6.8.

In other words, as a matter of law, the Department is required to calculate the margins of Chinese companies on the basis of the weighted average rate of selected exporters, and, as a matter of law, the Department cannot calculate rates for these companies based on adverse facts available.

The significance of this basic principle was reinforced by the WTO Appellate Body decision in United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001). In this proceeding, the Appellate Body upheld a Panel determination that the United States' statutory method for calculating a rate of anti-dumping duty for those exporters and producers who were *not* individually investigated, as well as the

Department's application of that method in this case, were inconsistent with Article 9.4 of the International Antidumping Code.

Recognizing that Article 9.4 did "not prescribe any method that WTO Members must use to establish the 'all others' rate that is actually applied to exporters or producers that are not investigated," the Appellate Body nevertheless concluded that the United States policy of ignoring "the relevant ceiling" was contrary to its international obligations. The Appellate Body reasoned:

> Nothing in the text of Article 9.4 supports the United States' argument that the scope of this prohibition should be narrowed so that it would be limited to excluding only margins established "entirely" on the basis of facts available. As noted earlier, Article 6.8 applies even in situations where only limited use is made of facts available.

Id. para. 122. The Appellate Body then discussed the reasons why this conclusion was consistent with the basic purposes of the International Antidumping Code:

> Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters. This objective would be compromised if the ceiling for the rate applied to "all others" were, as the United States suggests, calculated – due to the failure of investigated parties to supply certain information – using margins "established" even in part on the basis of the facts available.

Id. para. 123. It concluded that U.S. law, as administered by the Department, conflicted with U.S. international obligations:

> As section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, requires the inclusion of margins established, in part, on the basis of facts available, in the calculation of the "all others" rate, and to the extent that this results in an "all others" rate in excess of the maximum allowable rate under Article 9.4, we uphold the Panel's finding that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is inconsistent with Article 9.4 of the *Anti-Dumping Agreement*. . . .We further uphold the Panel's finding that the United States' *application* of the method set forth in section 735(c)(5)(A) of the Tariff Act of 1930, as amended, to determine the "all others" rate in this

> case was inconsistent with United States' obligations under the *Anti-Dumping Agreement* because it was based on a method that included, in the calculation of the "all others" rate, margins established, in part, using facts available.

Id. para. 129. MOFCOM is of the opinion that this precedent prohibits the United States from calculating an ADD rate for cooperative Chinese companies based on the adverse facts available rate alleged by Petitioners.

Moreover, U.S. courts have expressly held that the Department may not apply AFA in a manner that leads to "punitive, aberrational, or uncorroborated margins." F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000). Commerce cannot rely on "the petition rate (or other adverse inference rate), when unreasonable," and cannot "overreach reality in seeking to maximize deterrence." Id. In all cases, an AFA rate selected by Commerce must be "a reasonably accurate estimate of the respondents' actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." Id.; see also Kaiyuan Group Corp. v. United States, 343 F. Supp. 2d 1289 (Ct. Int'l Trade 2004) (rejecting the Department's decision to assign the punitive China-wide rate as AFA, reasoning that in assigning AFA, Commerce "must balance the statutory objective of finding an accurate dumping margin and inducing compliance, rather than created an overly punitive result."); Gerber Food (Yunnan) Co., Ltd. v. United States, 387 F. Supp. 2d 1270 (Ct. Int'l Trade 2005) (finding that the Department's application of the PRC-wide rate as "total adverse facts available" ignored evidence on the record unfavorable to its desired outcome and explaining that the Department may consider deterrence when invoking adverse inferences, but it may do so only "so long as the rate chosen has a relationship to the actual sales information available."); Shandong Huarong General Group Corp. v. United States, Slip Op. 2007-4, 2007 Ct. Intl. Trade

LEXIS 3, *8 (Jan. 9, 2007) (noting that "Commerce must assure itself that the margin it applies is relevant, and not outdated, or lacking a rational relationship to [the respondent].").

Accordingly, the Department may not blindly apply the increasingly excessive and aberrant AFA rates alleged by Petitioners, but instead should apply the Separate Rate to the China-wide entity.

B. THE DEPARTMENT SHOULD CREATE A REBUTTABLE PRESUMPTION THAT ALL CHINESE EXPORTERS QUALIFY FOR SEPARATE RATE STATUS

Assuming that the Department declines to eliminate the prohibitive China-wide AFA rate from its ADD methodology, the Department should create a rebuttable presumption that all Chinese exporters are not under the control of the government (either *de jure* or *de facto*), unless Petitioners submit substantial evidence to reverse the presumption.

The Department should allow Chinese exporters to qualify for this status by filing a simple, one page certification with the Department, confirming that: (1) export prices are not set by a governmental authority, and are not subject to the approval of a governmental authority; (2) the exporter has authority to negotiate and sign contracts and other agreements; (3) the exporter has autonomy from the central, provincial, or local governments in making decisions regarding the selection of its management; and (4) the exporter retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.[18]

If the Department (based on the suggestion of Petitioners), has reasonable grounds to believe that a particular certification is not accurate, the Department could then ask that a particular respondent submit additional information, similar to the information currently submitted by separate rate applicants. If further verification establishes that the initial

[18] In its decision to initiate a CVD investigation on Chinese exports, the Department recognized that Chinese exporters are not subject to de jure control by the Chinese government. Thus, there no longer is a valid reason for Chinese exporters to provide data to the Department on this issue.

certification was not accurate, the Department would then be able to penalize the respondent by denying separate rate status.

That it is appropriate to implement these liberalized procedures in 2007 should not be subject to serious dispute.

First, as previously noted, the Department already has concluded that the Chinese economy is sufficiently market oriented. Significantly, the facts upon which that CVD determination was based are substantially similar to the facts upon which the Department relies in deciding whether Chinese companies are eligible for separate rate status. Thus, there simply is no reason why Chinese companies should be required to continue to submit extensive documentation confirming the existence of economic factors which the Department already recognizes exist for Chinese export industries.

Second, during the entire period of time in which the Department's Separate Rate practice has been in effect, 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 Chinese exporters' Separate Rate responses, when subjected to verification, accurately reflect the manner in which the companies conducted their export businesses. Indeed, in virtually every case in which a Chinese company's claim for separate rates treatment has been subjected to scrutiny, the Department has found that the company, in fact, qualified for this status. In those isolated instances in which the Department denied separate rate status, the Department's decision was based on the failure of the applicant to timely provide certain documentation requested, not because the Department affirmatively found that the applicant's pricing and sales practices were

state controlled. In fact, in such instances, the Court of International Trade has repeatedly remanded the Department's adverse findings for further analysis, leading the Department to ultimately reverse its original decision and to allow separate rate status for the Chinese exporters.

For example, in the initial investigation involving Frozen Warmwater Shrimp from China, the Department rejected separate rates for several companies, for various, reasons - some had not provided sufficient evidence of price negotiation (the Department determined that it no longer considered a purchase order and invoice sufficient), some did not submit sufficient explanations of their affiliations, some did not provide sufficient translations and others merely had typographical errors on their questionnaire responses. The Chinese Respondents appealed this decision to the Court of International Trade. Beihai Zhengwu Industry, Ltd. et al. v. United States, Court No. 05-00182 (July 28, 2006). Shortly after oral argument in this Civil Action, the Department changed its prior position – based on the clear indication by the Court that it would reverse the Department's initial determination – and "voluntarily" found that all of the Chinese plaintiffs were now entitled to Separate Rates. Notice of Second Amended Final Determination of Sales at Less Than Fair Value of Certain Frozen Warmwater Shrimp from the People's Republic of China, 71 Fed. Reg. 47,484 (Aug. 17, 2006); see also Fujian Machinery and Equipment Import & Export Corp. v. United States, 178 F. Supp. 2d 1305 (Ct. Int'l Trade 2001); Decca Hospitality Furnishings, LLC v. United States, 391 F. Supp. 2d 1298 (Ct. Int'l Trade 2005), after remand, 412 F. Supp. 2d 1311 (Ct. Int'l Trade 2005); Guangzhou Maria Yee Furnishings, Ltd. v. United States, 412 F. Supp. 2d 1301 (Ct. Int'l Trade 2005), after remand Slip Op. 2006-44, 2006 Ct. Intl. LEXIS 78 (Ct. Int'l Trade April 5, 2006). As these cases reveal, when challenged, the Department has correctly recognized (or has been required by the Court to

recognize) that it had unfairly denied Separate Rate status to those companies which the Department found had not fully complied with the Department's complex questionnaires.

Thus, the history of the Department's Separate Rate analysis supports the conclusion that: (1) economic conditions in China have advanced to a position where Chinese exporters no longer should be required to submit extensive documentation in support of their Separate Rate claims; and (2) the Department has acted contrary to law in those cases when it has denied Separate Rate status for minor procedural deficiencies in an applicant's request.

Finally, by implementing the liberalized Separate Rate application procedure proposed by MOFCOM, the Department would be advancing its goals of balancing "efficiency and enforcement." The process proposed by MOFCOM obviously is more efficient for respondents and the Department, and by eliminating an unnecessary time consuming application process, the Department would be freeing its staff for more important "enforcement" issues and hopefully making fairness and accuracy of results more likely.

C. ASSUMING THE DEPARTMENT DOES NOT ABANDON ITS CHINA-WIDE RATE, IT SHOULD MAINTAIN THE SPARKLERS/SILICON CARBIDE TEST

Assuming that the Department decides that this Notice and Comment proceeding does not constitute the appropriate forum for abandoning its policy of calculating country-wide margins in NME proceedings based on prohibitive AFA rates proposed by Petitioners, the Department should maintain the substantive test upon which it has relied since 1991 in determining whether a Chinese exporter qualifies for Separate Rate status (with the important procedural modification, as discussed above, that the Department should presume that all Chinese exporters qualify for separate rates, upon submission of statements confirming that they meet the Sparklers/Silicon Carbide criteria).

In this regard, the four factors specified in the Department's current test should not be modified. Any company which sets its own prices, negotiates and signs contracts, selects its own management, retains proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses clearly is sufficiently free of Government control with respect to export pricing to qualify for separate rate status. The Court of International Trade has upheld the Department's "separate rate" analysis as being supported by substantial evidence. Air Products and Chemicals Inc. v. United States, 22 C.I.T. 433 (1998).

Finally, in the Report of the Working Party on the Accession of China, Oct. 1, 2001, WT/ACC/CHN/49, para. 151, 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....
>
> (b) 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.
>
> (c) 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.
>
> (d) The importing WTO member should provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case.

Accordingly, a decision by the United States to make 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, and would impede the attainment of the objective of the Protocol of Accession to grant China the same status in AD proceedings as other market economy countries. Thus, if the United States ultimately decides to act in this manner, China

could, if is desired, exercise its rights under Article XXIII, General Agreement on Tariffs and Trade 1994.

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The Government of China appreciates the opportunity to submit these Comments. Notwithstanding certain recent decisions by the Department which have made the playing field for Chinese exporters even more unbalanced than it had been in the past, China remains hopeful that responsible Department officials ultimately will recognize that it is in the best interests of the United States to administer its ADD law in accordance with the United States' international obligations and United States law. China looks forward to the time when the Department will create a truly level playing field, by treating China as a market economy for antidumping purposes, and by calculating Chinese margins in the fair and equitable manner in which margins are calculated for exports from other countries. Until that time, China asks that the Department liberalize its NME policies in the manner discussed in these Comments.

EXHIBIT 1

ANTIDUMPING DUTY ORDERS: 2003 – March 2007

PRODUCTS SUBJECT TO ORDERS	**31**
PRODUCTS SUBJECT TO ORDERS FROM CHINA	**22**
CHINA ONLY	**13**
CHINA WITH OTHERS	**9**

DATE OF ORDER(S)	PRODUCT SUBJECT TO ORDER(S)	CHINA	OTHERS
10/26/06	Lined Paper Products	Yes	2
6/1/06	Artist Canvas	Yes	0
3/9/06	Orange Juice	No	1
12/22/05	Superalloy degassed chromium	No	1
7/11/05	Carboxymethylcellulose	No	4
6/24/05	Chlorinated Isocyanurates	Yes	1
4/15/05	Magnesium	Yes	1
3/30/05	Tissue Paper	Yes	0
1/27/05	Warm-water shrimp	Yes	5
1/25/05	Crepe paper	Yes	0
12/29/04	Wooden bedroom furniture	Yes	0
12/29/04	Carbazole violet pigment 23	Yes	1
12/2/04	Hand trucks	Yes	0
8/9/04	Polyethylene retail carrying bags	Yes	2
8/6/04	Ironing tables	Yes	0
8/6/04	Tetrahydrofurfuryl alcohol	Yes	0
6/3/04	Color television receivers	Yes	1
2/4/04	Prestressed concrete steel wire strand	No	6
12/30/03	Ceramic station post insulators	No	1
12/12/03	Malleable iron pipe fittings	Yes	0
11/19/03	Refined brown aluminum oxide	Yes	0
10/23/03	Hard red spring wheat	No	1
10/1/03	Barium carbonate	Yes	0
10/1/03	Polyvinyl alcohol	Yes	2
8/12/03	Frozen fish fillets	No	1
8/11/03	DRAMS	No	1
7/9/03	Saccharin	Yes	0
6/12/03	Lawn and garden fence posts	Yes	0
4/7/03	Non-malleable cast iron pipe fittings	Yes	0
3/26/03	Silicon metal	No	1
1/28/03	Ferrovanadium	Yes	1

DEPARTMENT OF COMMERCE, FINAL DETERMINATIONS OF SALES AT LESS THAN FAIR VALUE ("LTFV")

IMPORTS FROM CHINA, 1996 – MARCH 2007:

COMPARISON OF MARGINS – MANDATORY RESPONDENTS, SEPARATE COMPANIES, COUNTRY-WIDE RATES

Fed. Reg. Date	Case	Product	Separate Rate companies	No. of mandatory respondents	Individual rate - low	Individual rate - high	Average Separate Rate	PRC-wide rate
2006 - 2007								
a 3/30/2007 3/2/2007	570-904	Activated Carbon	19	3	61.95	228.11 AFA	67.14	228.11
a 9/28/2006 8/08/2006	570-901	Lined Paper Products	27	3	76.7	98.91	78.38	258.31
a 6/22/2006 5/22/2006	570-900	Diamond Sawblades & Parts Thereof	26	3	2.82	48.50	21.43	164.09
a 5/8/2006 3/30/2006	570-899	Artist Canvas	8	4	77.90	264.09	77.90	264.09
2005								
5/5/2005	570-898	Chlorinated Isocyanurates	4	2	75.78	285.63	137.69	285.63
a 3/29/2005 2/24/2005	570-896	Magnesium Metal	2	2	49.66	49.66	49.66	141.49
a 3/30/2005 2/14/2005	570-894	Tissue Paper	9	2	112.64 AFA	112.64 AFA	112.64 AFA	112.64
a 9/17/2006 a 2/1/2005 12/4/2004	570-893	Warm water shrimp	39	4	0.07	82.27	53.68	112.81
a 1/4/2005 11/8/2004	570-890	Wooden Bedroom Furniture	117	6	0.83	15.78	6.65	198.08
2004								
12/3/2004	570-895	Crepe Paper	5	2	266.83 AFA	266.83 AFA	266.83 AFA	266.83
11/17/2004	570-892	Carbazole violet pigment 23	4	4	5.51	217.94 AFA	N/A	217.94
a 11/12/2004 10/18/2004	570-891	Hand trucks	5	3	26.49	46.48	32.76	383.60

Fed. Reg. Date	Case	Product	Separate Rate companies	No. of mandatory respondents	Individual rate low	Individual rate high	Average Separate Rate	PRC rate
a 8/6/2004 6/24/2004	570-888	Ironing tables	5	2	9.47	157.68 AFA	72.29	157.68
a 7/15/2004 6/18/2004	570-886	Retail carrier bags	26	7	0.24	41.28	25.69	77.57
6/18/2004	570-887	Tetrahydrofurfuryl alcohol	1	1	136.86 AFA	136.86 AFA	136.86 AFA	136.86
4/16/2004 a 5/19/2004	570-884	Color television receivers	13	4	5.22	26.37	22.94	78.45
2003								
a 11/24/2003, 10/28/2003	570-881	Malleable iron pipe fittings	5	3	7.35	15.92	11.18	111.36
a 9/2/2003, 8/11/2003	570-879	Polyvinyl alcohol	1	1	6.91	6.91	6.91	97.86
9/26/2003	570-882	Refined brown artificial corundum or brown fused alumina	1	1	135.18 AFA	135.18 AFA	135.18 AFA	135.18
8/6/2003	570-880	Barium carbonate	1	1	34.44	34.44	34.44	81.3
a 6/13/2003, 5/20/2003	570-878	Saccharin	3	3	249.39	291.57	N/A	329.94
4/25/2003	570-877	Lawn and garden steel fence posts	3	3	0	6.6	N/A	15.61
3/6/2003	570-874	Ball bearings and parts thereof	48	3	7.22	10.59	7.8	59.3
2/18/2003	570-875	Non-malleable cast iron pipe fittings	2	2	6.34	7.08	N/A	75.5
a 1/28/2003, 11/29/2002	570-873	Ferrovanadium	1	1	12.97	12.97	12.97	66.71
2002								
10/3/2002	570-872	Cold-rolled carbon steel flat products	1	1	105.35 AFA	105.35 AFA	105.35 AFA	105.35
a 6/18/2002, 5/20/2002	570-869	Structural Steel Beams	1	1	15.23	15.23	15.23	89.17

Fed. Reg. Date	Case	Product	Separate Rate companies	No. of mandatory respondents	Individual rate low	Individual rate high	Average Separate Rate	PRC rate
a 5/16/2002, 4/24/2002	570-868	Folding Metal Tables and Chairs	4	2	0	13.72	13.72	70.71
5/24/2002	570-870	Circular Welded Carbon-Quality Steel Pipe	8	3	0	3.87	3.87	36.42
a 3/15/2002, 2/12/2002	570-867	Automotive Replacement Glass Windshields	7	2	3.71	11.8	9.84	124.5
2001								
a 12/5/2001, 11/20/2001	570-866	Folding Gift Boxes	2	2	1.67	8.9	N/A	164.75
a 12/10/2001, 10/4/2001	570-863	Honey	7	3	25.88	57.13	45.46	183.8
a 9/17/2001, a 8/31/2001, 7/31/2001	570-862	Foundry Coke Products	4	4	48.55	105.91	N/A	214.89
9/27/2001	570-864	Pure Magnesium in Granular Form	1	1	24.67	24.67	24.67	305.56
9/28/2001	570-865	Hot-Rolled Carbon Steel Flat Products	5	3	64.2	90.83	65.59	90.83
a 8/20/2001, 6/22/2001	570-860	Steel Concrete Reinforcing Bars	1	1	132.53 AFA	132.53 AFA	132.53 AFA	132.53
2/28/2001	570-859	Steel Wire Rope	8	2	0.02	42.23	42.23	58
2000								
6/27/2000	570-853	Bulk Aspirin	2	2	10.85	16.51	N/A	144.02
a 6/19/2000 5/3/00	570-856	Synthetic Indigo	7	1	79.7	79.7	79.7	129.6
a 6/5/2000 4/13/2000	570-855	Certain non-frozen apple juice concentrate	10	6	0	27.57	14.88	51.74

Fed. Reg. Date	Case	Product	Separate Rate companies	No. of mandatory respondents	Individual rate low	Individual rate high	Average Separate Rate	PRC rate
5/31/2000	570-854	Certain Cold-rolled flat-rolled carbon quality steel products	N/A	N/A	N/A	N/A	N/A	23.72
1999								
12/20/1999	570-852	Creatine Monohydrate	6	5	0	58.1	N/A	153.70
5/11/1999	570-827	Certain cased pencils	4	4	0	19.36	N/A	53.65
a 2/19/1999 12/31/1998	570-851	Certain Preserved Mushrooms	12	3	121.47	162.47	142.4	198.63
1997								
11/20/1997	570-849	Cut-to-length Carbon Steel Plate	5	5	17.33	128.59	N/A	128.59
10/1/1997	570-850	Collated roofing nails	2	2	0	0	0	118.41
a 9/15/1997 8/1/1997	570-848	Freshwater Crawfish Tail Meat	8	4	91.5	156.77	122.92	201.63
a 7/7/1997 5/19/1997	570-847	Persulfates	3	3	32.22	34.97	N/A	119.02
a 4/2/1997 2/28/1997	570-846	Brake Rotors	13	5	0	16.07	8.51	43.32
1/13/1997	570-844	Melamine Institutional Dinnerware Products	4	4	0.04	2.74	2.74	7.06
1996								
a7/1/1996 4/30/1996	570-843	Bicycles	9	9	0	2.95	N/A	61.67
3/29/1996	570-842	Polyvinyl alcohol	2	2	0	116.75	N/A	N/A

NOTE: "a" denotes Amended Final Determination to correct Department of Commerce clerical errors