







Antidumping Duties: Separate Rate

Staying Ahead of the Trading Curve

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| People's Republic of China | | United States of America | |
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| Manufacturer |  | Importer |  |
| Exporter |  | U.S. Department of Commerce |  |

This paper explores the Chinese experience with the separate rate antidumping duties. While the antidumping duties can be viewed as politically motivated and economically unjustified, the separate rate practice may offer an opportunity to Chinese companies to retain their presence in the United States market. The paper seeks to find out whether separate rate provisions in the United States antidumping regime present opportunities for the Chinese private companies to avoid or significantly lower the effect antidumping tariffs.

INTRODUCTION

Antidumping policies have attracted a lot of attention in domestic and international trade circles because of their strong ability to affect trade flows and production. The antidumping practice dominates World Trade Organization (WTO) agenda and is regarded as one of the prevalent barriers to international trade. Antidumping tariffs have the effect of canceling out regular tariffs, which have been on decline as a result of bilateral trade negotiations between nations and multilateral forums such as General Agreement on Tariffs and Trade and its successor body - WTO. Increased antidumping influence on trade and production requires businesses to become more aware about how antidumping may affect their business landscape. This paper aims to fulfill the awareness requirement for businesses in a sub-area of the United States antidumping practice – the separate rate, specifically focusing on non-mandatory participants. While the separate rate non-mandatory participation applies to any antidumping measure, the focus here is on the Chinese - United States trade.

Antidumping trade barriers are erected to counter the effect of dumping. Dumping “occurs when imported merchandise is sold in, or for export to, the United States at less than the normal value of the merchandise.”¹ The dumping margin, which may also be equivalent of the tariff duty that importer pays for a dumped product, “is the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.”² By way of example, if the “normal” value of Chinese bicycle is \$100, but that Chinese bicycle is sold for \$75 in the United States market, that bicycle is dumped at the margin of 25 percent. It is

¹ The definition is provided by the U.S. Department of Commerce, which has the responsibility for calculating antidumping duty margins. Available at <http://ia.ita.doc.gov/glossary.htm> (visited April 4, 2011)

² *Id.*

important to note in the outset that the bicycle does not have to be actually worth \$100 in China. In fact, it may worth \$60 or even \$50, thereby allowing Chinese businesses to realize \$15-\$25 gain on sale to the United States. The focus, however, is on the concept of “normal” value, which may indeed be \$100, since the calculation methodology may not correspond to the cost actually incurred by Chinese businesses.³

The United States has been a strong proponent of antidumping measures. Reasons for antidumping justifications include a mixture of domestic economic policies and political influences. In the United States the antidumping laws existed for more than ninety years, but only since 1970s the antidumping measures took shape of considerable proportions. The United States steel industry was a pioneer in taking full advantage of the antidumping laws and to this day remains largely insulated from foreign competition. In 1990s, as the United States economy was going through structural changes, the manufacturing sector experienced a large decline due to production outsourcing and a systemic shift towards a service sector dominated economy. The United States manufacturers have increasingly found themselves unable to compete with foreign markets in increasing numbers. Substantial labor costs disparity, as well as the price increase of raw materials contributed to the outsourcing trend. Struggling manufacturers followed the example of the United States steel industry and petitioned for the imposition of antidumping duties.⁴ The United States government favorably responded to

³ In China, the “normal value” is constructed using producers’ factors of production. These factors of production are then valued in a third country (usually India) market terms, where these factors may be significantly higher. The higher production cost, is then superimposed as the “normal” value on the Chinese product. Thus, if the Chinese factors of production in a third country terms translate into a bicycle of \$100, while in Chinese terms it was only \$50-\$60, the “normal” value would be deemed \$100. See Section 773(c)(3) of the Tariff Act; see also Factors of Production at <http://ia.ita.doc.gov/glossary.htm>

⁴ See Bown, Chad P. (2010) "[Global Antidumping Database](#)," United States (listing U.S. antidumping filing history from 1979-2010), available at <http://econ.worldbank.org/ttbd/gad/> (visited Apr. 4, 2011)

domestic petitions. Many domestic producers whose products were protected by the antidumping tariffs are still around today largely due to the antidumping protections.

The largest single beneficiary of the United States manufacturing decline was the People's Republic of China. Even before China's 2001 entry in the World Trade Organization, China enjoyed most favored nation status with the United States for sometime.⁵ While China is the United States largest trading partner, China is also the most frequent subject country of new antidumping investigations.⁶ China receives unique treatment under the United States antidumping laws. Officially being a communist country, China is regarded as a "non-market economy" under the United States antidumping laws. It is much easier to successfully establish antidumping duties against a non-market economy, as opposed to a market economy, because, among other things,⁷ of the prevailing presumption that every entity in the country under "non-market economy" label belongs or is otherwise affected by the government. Under non-market economy rubric, the burden of proof is shifted on individual Chinese companies to demonstrate that their enterprises are independent of the Chinese government control.⁸ These individual companies can be either specifically named by Commerce, or can participate voluntarily.

⁵ See Vladimir N. Pregelj, *Most-Favored-Nation Status of the People's Republic of China (2001)* ("After having been suspended in 1951, China's MFN tariff status with the United States was restored in 1980 conditionally under Title IV of the Trade Act of 1974 ***"), available at <http://www.au.af.mil/au/awc/awcgate/crs/r130225.pdf> (last visited March 19, 2011)

⁶ See Bown, Chad P. (2010) "[Global Antidumping Database](#)," United States (listing 4 out of 4 investigations against China in 2010; 12 out of 20 investigations in 2009; 11 out of 18 investigations in 2008 and similar China-dominated list for the preceding years), available at <http://econ.worldbank.org/ttbd/gad/> (visited Apr. 17, 2011); see also Piyush Chandra & Cheryl Long, [Anti-Dumping Duties and its Impact on Exporters: Firm Level Evidence from China](#), 1 (2010) ("Among the flurry of AD investigations initiated and duties imposed in recent years, China has become one of the most frequently targeted country."), available at <http://www9.georgetown.edu/faculty/ludemar/ADChina-draft-2010-Oct.pdf> (visited Apr. 17, 2011).

⁷ Notably, the non-market economy status allows Commerce to use "surrogate" or third country for calculation of input production factors, which may be substantially higher than that of China, effectively increasing the "normal" value of the investigated product.

⁸ See [Appendix D](#), *De Jure / De Facto Analysis of Government Control*

Chinese companies that are singled out by Commerce are known as mandatory respondents. Companies that voluntarily participate in the antidumping investigation are non-mandatory respondents. This paper focuses on the latter group: non-mandatory respondents / voluntary participants and aims to explore obstacles faced by them at various stages of investigation.

If Chinese companies, whether voluntary or mandatory, are successful in persuading the United States government of their market independence, the United States Department of Commerce (“Commerce”) grants these companies a separate rate status or altogether excludes them from antidumping duties if *de minimis* rate is established.⁹ Separate rate status generally gives individual companies an opportunity to import their products in the United States at the lower antidumping rate than to other non-participating companies. While Commerce usually picks largest companies as mandatory respondents, smaller companies have the opportunity to participate as on a voluntary basis and secure lower antidumping rate.

For the Chinese companies the United States separate rate antidumping treatment has been a blessing and a curse. Commerce’s separate rate practice has been criticized as too burdensome, unpredictable, and possibly illegal.¹⁰ On the other hand, separate rate presents an opportunity to continue to conduct trade by individual Chinese businesses which lack resources and cooperation necessary to withstand the imposition of antidumping duties

⁹ *De minimis* rate refers to a margin of less than 0.5 percent. 19 C.F.R. §351.106 (2011) (“*** the Secretary will treat as *de minimis* any weighted-average dumping margin or countervailable subsidy rate that is less than 0.5 percent ad valorem, or the equivalent specific rate”).

¹⁰ See Aaron Ansel, [Reassessing an Outdated Anti-Dumping Policy Towards the People’s Republic of China](#), 35 Brooklyn J. Int’l L. 883 (2010) (arguing that the current non-market economy antidumping approach for China is inadequate and of dubious legality); see also Daniel Ikenson, [Nonmarket Nonsense: U.S. Antidumping Policy toward China](#) (2005) (arguing that Commerce’s antidumping duty calculation methodology for non-market economies is “absurd”), available at <http://chongbanphagia.vn/beta/files/Nonmarket%20Nonsense%20-%20US%20versus%20China.pdf> (visited Apr. 17, 2011)

collectively as one industry.¹¹ Some Chinese companies successfully exploited the separate rate niche and even monopolized the export market for their products. Others, not so successful, have been forced to withdraw their products from the United States market altogether, or shift their production elsewhere outside of China. The separate rate procedures under the United States law have also changed in response to opportunities the law created for the Chinese companies. One change was the restriction on the applicability of the separate rate to the producer of the product. Before the restriction, the Chinese companies were able to take an advantage of the separate rate ambiguities and could "funnel" their products through an established separate rate producer, sharply decreasing the effect that antidumping laws meant to accomplish.

This paper explores the Chinese experience with the separate rate antidumping duties focusing on voluntary participants in the United States antidumping investigations. While the antidumping duties can be viewed as politically motivated and economically unjustified, the separate rate practice may offer an opportunity to Chinese companies that are relatively weak financially to retain their presence in the United States market. The paper seeks to find out whether separate rate provisions in the United States antidumping regime present opportunities for the Chinese private companies to avoid or significantly lower the effect antidumping tariffs in the capacity of non-mandatory respondents.

1. KEY PARTIES

¹¹ See Tanczos, Francis, Unfair Play: Examining the U.S. Anti-Dumping 'War' Against China, Washington Undergraduate Law Review, Vol. II, No. 3, pp. 77-93, 89 (Spring 2008) (arguing that the collective organization of United States industries is one of the greatest disadvantages for China in antidumping cases because Chinese industries lack the kind of associationalism and collective lobbying historically present in the United States), available at SSRN: <http://ssrn.com/abstract=1371384> (visited Apr. 2011).

The separate rate process primarily involves four parties: (1) a manufacturer and (2) an exporter on the Chinese side; and (3) an importer with (4) the United States Department Commerce (“Commerce”) on the other side. Other parties play a lesser role. These parties include freight forwarders, sureties, and government agencies such as Customs and Border Protection (“Customs”).

An exporter is the primary party responsible for filing documents and complying with Commerce’s policies. Commerce will assign a separate rate to the exporter only. An exporter and manufacturer may be the same entity. If the exporter does not make any products on its own, the separate rate may be tied to a manufacturing facility that supplied the goods for export during the period of antidumping investigation. This Commerce’s practice is also known as a combination rate. The separate rate may also be assigned to the exporter only, provided that the exporter is also a manufacturer of products subject to the investigation.

An importer is another key party in the investigation process. Without the importer there would be no exporter. While the separate rate investigation focuses on the exporter, the importer feels a direct impact of the investigation because it is the importer who must pay antidumping duties at the rate required by Commerce. Antidumping duties may not be reimbursed by the exporter. Unlike regular duties, the importer is often required to post a bond or make a cash deposit, which may substantially constraint the importer’s business cash flow. Antidumping duties are retrospective and subsequent Commerce reviews may increase the cash deposit requirements. The increases may be so substantial that the importer can be forced out of business.

The International Trade Administration of the United States Department of Commerce is an administrative organ that is responsible for calculation of separate rate margins and gathering relevant data. Commerce administers antidumping laws and promulgates relevant rules.

2. BENEFITS OF THE SEPARATE RATE

Data for antidumping duty investigations indicates that a separate rate for non-mandatory respondents is generally lower than “all other” country wide rate.¹² In many cases the separate rate is lower by a significant margin. The rate is based on a weighted-average margin that is individually calculated for the mandatory antidumping investigation participants.¹³ If the rate for the mandatory respondents is zero, *de minimis*, or is based entirely on facts available, it is excluded from the weighted-average calculation. The substantially lower antidumping rate poses a great incentive for the Chinese exporters to take advantage of the separate rate provisions. The separate rate status would ensure access to the world’s largest consumer economy at the lower duty rates, while at the same time leaving other Chinese exporters - those without a separate rate status - unable to compete on equal footing.

3. SEPARATE RATE QUALIFICATION CRITERIA – PRELIMINARY ASSESSMENT

Qualified separate rate applicants must have sold or exported the investigated product during the period of review. Period of review is the time frame chosen by Commerce to

¹² See Appendix A

¹³ Commerce usually picks several companies representative for the largest volume of export to the United States and designates them for mandatory participation. Participation of all other exporters is voluntary. If either voluntary or mandatory exporter does not participate in the Commerce’s investigation, the highest antidumping rate will be assigned upon finding of antidumping duties.

conduct an antidumping investigation for a specific product or line of products. An invoice date normally determines the date of sale,¹⁴ while a shipment date determines the date of exportation. Commerce will not consider the date of entry in the United States as the qualified date for the “period of review” purposes.¹⁵ Also, if an applicant wishes Commerce to consider a date of sale to be the date that is different from the invoice date, that applicant “bears the burden of producing sufficient evidence to satisfy the Department that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.”¹⁶

Separate rate applicant is required to have made a sale to an unaffiliated third party during the antidumping investigation period. If the applicant made sales to affiliated parties, then evidence of first sale to an unaffiliated United States customer by the affiliated party is required. The sale transaction to an unaffiliated party must carry an arms-length commercial purpose not designed merely to qualify an exporter for the separate rate. In other words, the transaction must carry a *bona fide* commercial character. Commerce has no set rule in place to determine whether a particular transaction has *bona fide* commercial character. Rather, Commerce employs a totality of circumstances test. As with any totality of circumstances test, Commerce set’s out a number of factors to be applied under specific circumstances. The goal of these factors is to establish that sale is not being made to circumvent an antidumping duty order. These factors include: (1) the timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; (5)

¹⁴ 19 C.F.R. §351.401(i) (2011) (“in identifying the date of sale of the merchandise under consideration or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer’s records kept in the normal course of business.”)

¹⁵ Companies Not Receiving a Separate Rate, Wire Decking from the People’s Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 Fed. Reg. 1,597, 1,601-1,602 (Jan. 12, 2010)

¹⁶ Allied Tube & Conduit Corp. v. United States, 132 F. Supp. 2d 1087, 1090 (Ct. Int’l Trade 2001)

whether the transaction was made on an arms-length basis. These are very important factors to reckon with for those exporters that would like to become separate rate participants. Of specific concern are those participants that are new comers to the market and who have yet to establish their eligibility for the separate rate. Commerce calls new market entrants a new shippers. It is helpful for the separate rate applicants to be aware of Commerce's prior findings where transactions were found to lack *bona fide* character and be careful not to make mistakes that others have made. One such transaction involved the antidumping investigation of honey.

In the *Honey* investigation,¹⁷ Commerce found one Chinese exporter - Dongtai Peak Honey Industry Co., Ltd. - ineligible for the separate rate because the exporter's transactions were not *bona fide*. Among leading reasons for Commerce's conclusion were "difference in the sales prices and subsequent entered values of Dongtai Peak's entries to the United States during the POR [period of review] as compared to the entered values of other U.S. entries of honey during the POR [period of review]," "quantities of Dongtai Peak's POR sales as compared to the quantities of other U.S. entries of honey during the POR," and "information regarding Dongtai Peak's U.S. customer during the POR."¹⁸ Thus, the inquiry focuses, *inter alia*, on prices and quantities and their relationship to other separate rate applicants.

4. SEPARATE RATE QUALIFICATION CRITERIA – LEVELS OF GOVERNMENTAL CONTROL

Wholly Chinese privately owned and state owned entities, or any combinations of private-government owned enterprise are presumed to be under the government control. The burden is on the applicant to prove that government control, as defined by Commerce, does

¹⁷ Seventh Administrative Review of Honey from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind, In Part, 74 Fed. Reg. 68,249 (Dec. 23, 2009)

¹⁸ *Id.* at 68,251

not apply. Only if the applicant is not a wholly market-economy owned enterprise, the presumption of government control does not apply. The level of control is divided along the following lines: (1) wholly state-owned exporters / manufacturers and exporters / manufacturers whose stock is partially owned by the government; (2) wholly Chinese owned private companies; (3) joint ventures between Chinese and foreign companies; and (4) wholly market economy owned companies.

4.1 Wholly State-Owned Exporters/Manufacturers & Exporters/Manufacturers Whose Stock is Partially Owned by a Government

The state owned entities must demonstrate the absence of government control over export activities under *de jure* and *de facto* Commerce analyses. The Chinese government ownership alone does not warrant denial of a separate rate. Thus, a mere state ownership will not preclude the separate rate applicants from successfully obtaining a separate rate.¹⁹ The Commerce's separate rate test is not concerned, in general, with macroeconomic or border-type controls, including export licenses, quotas, and minimum export prices, particularly if these controls are imposed to prevent dumping.²⁰ The test focuses on controls over the investment, pricing, and output decision-making process at the individual firm level.²¹

Accordingly, Commerce would grant a separate rate to the government controlled entities upon finding of “(1) An absence of restrictive stipulations associated with the individual

¹⁹ See Separate Rate Recipients, Certain Steel Grating From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 Fed. Reg. 847, 850-851 (Jan. 6, 2010)

²⁰ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China, 63 Fed. Reg. 72,255, 72,256 (Dec. 31, 1998)

²¹ See Notice of Final Determination of Sales at Less than Fair: Value Certain Cut-to-Length Carbon Steel Plate from Ukraine, 62 Fed. Reg. 61,754, 61,758 (Nov. 19, 1997); see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 61,276, 61,279 (Nov. 17, 1997).

exporter's business and export licenses; (2) the applicable legislative enactments decentralizing control of the companies; and (3) any other formal measures by the government decentralizing control of companies.”²²

Following these principles, Commerce granted the Chinese exporter - Xinhua Metal - a separate rate in *Prestressed Concrete Steel Wire Strand* investigation despite the fact that Xinhua Metal's parent company is state owned.²³ Another Chinese entity in the same investigation - Fasten Group I&E - also demonstrated its separate rate eligibility despite its control by the government owned parent corporation.²⁴

4.2 Wholly Chinese Owned Private Companies

In separate rate applications the highest level of scrutiny is given to wholly owned Chinese companies. These companies are presumed to be non-market economy entities and are not eligible for a separate rate unless they can overcome the non-market economy presumption of government control. Rebuttals are generally done through the separate rate applications, which are posted on the Commerce’s website and also mailed out to potential applicants identified in the petition. Successful separate applicants must meet *de jure* and *de facto* absence of government control that is established through the questionnaire completion.

4.3 Joint Ventures Between Chinese and Foreign Companies

Joint ventures may carry a higher burden for foreign market-economy companies because they can also be required to establish absence of *de jure* and *de facto* government control. Absent the joint venture, a market-economy based foreign company would not need

²² See *Prestressed Concrete Steel Wire Strand From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 74 Fed. Reg. 68,230, 68,235 (Dec. 23, 2009)

²³ *Id.*

²⁴ *Id.*

to establish absence of government control because Commerce presumes the absence. In a joint venture, however, the foreign company may need to do go through a separate application process with its Chinese partner. If the joint venture partner meets the definition of affiliated party,²⁵ both parties may be treated as the single entity, or in Commerce's jargon "collapsed."²⁶

In the recent antidumping investigation involving *Woven Electric Blankets*, Commerce collapsed a joint venture among a wholly owned Hong Kong²⁷ company and a partially Chinese owned company because they shared a high level of common ownership, shared a general manager and a board member, and shared production facilities and employees.²⁸

4.4 Wholly Market-Economy Owned Companies

Wholly foreign owned companies are presumed independent from Chinese government control and therefore not required to go through *de jure* and *de facto* analysis. If Commerce finds no evidence indicating that market economy owned company is under Chinese government control, the company would be excused from the separate rate analysis.²⁹ The wholly market-economy owned enterprises still need to complete the separate rate application process, albeit with a lesser degree of scrutiny than the collapsed joint ventures and Chinese owned entities.

5. CONCERN OVER DISCLOSURE OF PROPRIETARY INFORMATION

²⁵ 19 C.F.R. §351.102(a)(3) (2011)

²⁶ See 19 C.F.R. 351.401(f) (2011) (setting a prerequisite criteria for collapsed treatment)

²⁷ Hong Kong is treated as a separate economic zone and is afforded a market economy status.

²⁸ See Separate Rate Applicants, Certain Woven Electric Blankets From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 Fed. Reg. 5,567, 5,570 (Feb. 3, 2010)

²⁹ See Separate Rates Determination for Dixon, Certain Cased Pencils From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 74 Fed. Reg. 68,047, 68,048-68,049 (Dec. 22, 2009)

The separate rate applicants are required to provide financial and ownership information to Commerce and “interested” private parties.³⁰ Required information may include materials considered sensitive or confidential by some. Knowledge about the type of information that applicant would be required, but not willing, to disclose prior to start of the application process will not only save time and expenses (associated with initiation and withdrawal from application process) but also uncomfortable and possibly embarrassing moments.

For preliminary information requiring disclosure, potential applicant should check *Separate Rate Application and Quantity & Value Questionnaire* of the investigated product. Commerce usually publishes these documents under “Highlights and News” section of its website.³¹ The usual list of required documents includes financial statements, distribution of profits, share transfer agreements, director meeting minutes, and appointment letters. Applicants are required to indicate the relationship between managers and board members to the Chinese government. Certain personnel are also required to indicate their three year history in the government involvement. An applicant must also provide a written documentation about price negotiation techniques, which is often regarded as an inherently

³⁰ An interested party, as defined for the purposes of the Tariff Act, includes "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise." 19 U.S.C. §1677(9)(A). The term "party to the proceeding" is not defined in the statute. Commerce has promulgated a set of definitions that, among other things, define "terms that appear in the Act but are not defined in the Act." 19 C.F.R. §351.102(a)(1) (2009). In these definitions, Commerce has determined "party to the proceeding" to mean "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding." 19 C.F.R. §351.102(b)(36).

³¹ <http://www.trade.gov/ia/> (last visited March 19, 2011)

private domain, to Commerce.³² Furthermore, the applicant must provide banking records, which include bank's name and address and bank account numbers.

All submissions to Commerce must also be served to all interested parties.³³ Interested parties are generally private entities that have a stake in the outcome of the Commerce's antidumping determination. Although separate rate applicants have a certain degree of control over the information disclosure to private entities through proprietary treatment request,³⁴ certain information may not be treated as "proprietary." Accordingly, names and contact information of all producers and suppliers whose merchandise the separate rate applicant had exported to the United States are required to be made public.³⁵ Public versions must meet "adequate summary" threshold. Numerical data, in order to be adequately summarized, must be grouped in terms of indices or figures ranged within ten percent of the actual figure. But "voluminous" data must have ranged figures for at least one percent of the voluminous portion. Furthermore, under administrative protective order, parties' representatives can obtain access to the business proprietary information.

6. ADMINISTRATIVE BURDENS

An applicant should have established good recordkeeping practices, where marks and numbers of related documents match. Exporter's records need to track suppliers and manufacturers from whom the product for sale in the United States market was sourced.

³² Examples of documentations include faxes, emails between U.S. customer and applicant, logs of negotiations conducted over the telephone. *Id.*

³³ *Supra* note 22

³⁴ See 19 C.F.R. §351.305 (2011); *see also* 19 C.F.R. §351.304(a)(2) (2011)

³⁵ Quantity & Value Questionnaire (AD), China Kitchen Appliance Shelving and Racks, 8 n.1 (Aug 21, 2008), available at <http://ia.ita.doc.gov/download/nme-sep-rates/prc-kasr/prc-kasr-ad-init-qv-090808.pdf> (last visited March 20, 2011), *citing* DOC Policy Bulletin 05.1: Separate-Rates Practice and Applications of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries (April 5, 2005)

Additionally, all required documents must be translated to English. While this request is reasonable, it can impose a substantial burden on parties wishing to participate because documents attesting to intra-country and intra-company transactions are likely to be in Chinese language.

7. POSSIBILITY OF MANDATORY DESIGNATION

Every separate rate applicant bears the risk of being selected as a mandatory participant by Commerce. Mandatory participants are selected pursuant to criteria outlined under §777A(c)(2) of the Tariff Act, as amended.³⁶ Normally, this means that Commerce would select exporters accounting for the largest volume of the subject merchandise. If Commerce selects the separate rate applicant as a mandatory participant in the investigation, the applicant must either (1) comply and receive its own separate rate which is not based on weighted-average ratio, or (2) withhold responses and become ineligible for separate rate. Mandatory participants face a heavier administrative burden because they need to provide more data and information than their non-mandatory counterparts. This in turn, may be more costly or require level of disclosure the applicant is not willing (or not able) to provide. Accordingly, while the applicant in non-mandatory separate rate capacity is usually required to provide information regarding company, bookkeeping, and sales practices, the mandatory participant

³⁶ Tariff Act of 1930, §777A(c)(2) (“If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to: (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.”)

would be required to list sales transactions in the home markets,³⁷ sales in the United States market,³⁸ and the information about manufacturing process along with costs of production.³⁹

Procedural history of separate rate applications has documented examples where applicants were not willing to go through burdens associated with mandatory applications, but were willing to be considered for non-mandatory review process. During the administrative review of *Wooden Bedroom Furniture*, one Chinese exporter - Aosen - was designated by Commerce as the mandatory Participant. Aosen asked Commerce to qualify for separate rate as a non-mandatory participant. Commerce declined Aosen's request, noting that "once selected as a mandatory respondent, a company may not choose to participate in an administrative review solely for the purposes of demonstrating its eligibility for a separate rate."⁴⁰ Thus once designated as mandatory, the separate rate applicant must fully participate in the review to qualify for the separate rate status. In *Aosen* example, Commerce had assigned "PRC-wide" (highest antidumping duty) rate to Aosen for failure to accept mandatory designation. In another, more recent, investigation involving *Prestressed Concrete Steel Wire*, Commerce selected Silvery Dragon PC Steel Products Group Co., Ltd. ("Silvery Dragon Steel") as a mandatory respondent in the investigation. Silvery Dragon Steel filed a letter declining to

³⁷ The information is usually requested via "Section B Questionnaire" in order to determine the normal value of the foreign like products.

³⁸ The information is usually requested via "Section C Questionnaire" for determination of export price or constructed export price.

³⁹ Commerce requests production costs and details through "Section D Questionnaire."

⁴⁰ *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part*, 75 Fed. Reg. 5,952, 5,959 (Feb. 5, 2010)

participate as a mandatory applicant. Commerce treated Silvery Dragon Steel's letter as a failure to respond pursuant to Section 776(a)(2) of the Tariff Act 1930, as amended.⁴¹

Conversely, an applicant may request to participate as a "voluntary" participant. When Commerce selects a "voluntary" applicant, the participant will be subject to a higher scrutiny and will receive a separate rate. The separate rate for the voluntary respondent is not based on a weighted-average ratio of mandatory respondents, but rather has its own designated rate independent of other participants. Furthermore, the rate for voluntary applicant would have no effect on non-mandatory participants. The voluntary applicant rate is a stand alone margin determination. In *Prestressed Concrete Steel Wire Strand* investigation, an exporter - WJMP - submitted a letter to Commerce requesting participation as a voluntary applicant. Commerce granted the request because one of the two mandatory applicants declined to participate, and Commerce decided to select voluntary respondent due to "time constraints."⁴²

8. APPLICANT'S RELATIONSHIP WITH MANUFACTURERS

If an exporter does not make any products the separate rate may be tied to a manufacturing facility that produced goods for export during the period of review. This practice is known as a combination rate. The practice was adopted to prevent "funneling." Funneling is the term describing antidumping circumvention practice where entities without separate rate qualifications source their products through the entity that has a separate rate

⁴¹ Tariff Act of 1930, §776(a)(2) provides that, if an interested party (A) withholds information that has been requested by the Department, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the antidumping statute, or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

⁴² *Prestressed Concrete Steel Wire Strand From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Respondent Selection*, 74 Fed. Reg. 68,230 (Dec. 23, 2009)

status with Commerce. The separate rate applicants who merely export the goods without actually producing them will be tied to entities that make the merchandise. Same combination rate applies to producers and manufacturers of goods who also export goods that are not of their own making.⁴³ If the separate rate applicant sourced and exported merchandise from more than one manufacturer, than “one rate is calculated for the exporter and all of the producers which supplied the subject merchandise to it during the period of investigation.”⁴⁴

After Commerce adopted a combination rate policy in 2005,⁴⁵ it became more important than ever for non-producing exporters to maintain good relationship with their supplying factories. In China the exporter-manufacturer relationships are strengthened by domestic laws that require an export license for a company engaged in international exports. Commerce’s combination rate policy made the relationship even more paramount. If business ties go sour and the exporter is no longer able to source the product from an established producer, the exporter would not be able to take advantage of separate rate unless that exporter has more than one manufacturer listed with Commerce as eligible for the separate rate. Furthermore, the exporter may be required to provide pricing information, if chosen as a mandatory applicant. At the very least, the applicant will be required to provide a full name and contact information of the manufacturer, which is asked on the separate rate application. Another adverse affect of a combination rate policy for the exporter is a production capacity constraint. If one manufacturer reaches its production capacity limits, exporter may not place production order with another independent factory and take advantage of a favorable separate

⁴³ For example, a manufacturer-exporter acting as an exporting entity for a different manufacturer.

⁴⁴ See Combination Rates, Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries, 6 (Apr. 5, 2005), *available at* <http://ia.ita.doc.gov> (last visited March 20, 2011)

⁴⁵ *Id.*

rate. Addition of a new independent production source would require a start of a new separate rate application process.

9. APPLICANT'S RELATIONSHIP WITH THE UNITED STATES IMPORTER

Cooperative business relationship with the United States importer would help a separate rate applicant in the application process. Commerce requires the applicant to provide the U.S. Customs documents, such as the entry summary, evidencing that importation in fact took place. In the alternative, the exporter has an opportunity to explain the failure to provide the required import documentation. The Chinese exporter is not likely to take part in the customs declaration process aside from providing commercial and shipping documents to the importer or the importer's agent. Therefore, if the importer is willingly helping the exporter with customs documentation as required by Commerce, it would help the exporter with a separate rate process.

If an applicant has established relationship with the importing party, the applicant should discuss risks and benefits since it would be the importing party - importer of record - who would be responsible for payment of antidumping duties. The scope of discussions should include preparedness to (1) unpredictability of the investigation's outcome, (2) constraints on the cash flow due to high duties and cash deposit requirements, and (3) developing a preparedness plan to mitigate the risks of antidumping duty investigations.

9.1 Unpredictability of the Separate Rate Review

Importers of goods subject to antidumping duty investigation have no direct control over outcome of investigation. An importer may facilitate the separate rate process of exporting party by helping the exporter with customs entry documents or helping with

communication or representation of the exporter before Commerce. Too close of relationship, however, may be detrimental to the exporter because Commerce may require information about the exporter's suppliers and pricing that importer can take advantage of during the price negotiations.

9.2 Cash Deposit / Bond Requirements

Every United States importer is required to post a bond for the imported merchandise with Customs.⁴⁶ The bond involves three parties: Customs, importer, and surety. Surety is a specially designed party,⁴⁷ certified by the United States Department of Treasury, which underwrites the bond for the importer at the amount determined by Customs. The bond system allows quick release of the merchandise by Customs into the importer's custody, while keeping a security against the amounts owed. In antidumping duty investigations, the final amounts owed are determined long after - usually more than a year - the merchandise has been released to the importer. If Commerce determines that the antidumping duty owed is higher than it previously determined, Customs will bill the importer for additional duties. If the importer fails to pay the additional amount, Customs will treat the payment as the breach of contract and demand payment from both, the importer and a surety, holding both parties "jointly and severally" liable.⁴⁸

⁴⁶ 19 C.F.R. §113.13 (2010)

⁴⁷ See Treasury Department Circular 570, *available at* www.fms.treas.gov/c570/c570_a-z.html (visited on March 20, 2011) (Only those parties listed in the Treasury Department Circular 570 may act as a surety)

⁴⁸ See Questions and Answers on CBP Bonds, *available at* http://www.cbp.gov/linkhandler/cgov/trade/trade_programs/bonds/qa_bonds.ctt/q_and_a_bonds.doc (visited on March 20, 2011) ("Joint and several" liability in this context means that Customs will accept payment from either party, surety or the importer. If surety satisfies the payment, Customs would no longer be a party to a transaction, and the importer is liable to surety only.)

In early 2000s Customs faced a growing collection problem in light of increased antidumping investigations. As a result of Commerce's antidumping findings, especially in the agriculture and aquaculture sectors, importers were defaulting on hundreds of millions of dollars in duties. These duties were not sufficiently covered by bonds, so that even sureties' coverage would not ensure Customs full collection of duties owed.⁴⁹ To improve revenue collection system Customs revised its antidumping related bond requirements, effectively shifting the risk burden on the importer. Under new requirements, the importer is required to post a bond amount equal to the product of Commerce's margin in place (whether preliminary or final) and the value of merchandise brought by the importer during the previous twelve month period. If the importer has no prior history, the bond amount is determined by the "estimated annual import value."⁵⁰

New bonding mandate had the effect of putting many importers out of business.⁵¹ Sureties were required to raise the bond amount. In order to meet new requirements, sureties requested importers to provide irrevocable collateralized letters of credit. The letters of credit put a burden on asset-based credit lines of importers. An excerpt from the opinion by U.S. Court of International Trade Judge Stanceu is a well described summary of the detrimental effect of bonding requirements on downstream marketing chain:

⁴⁹ See United States Customs Bond Directive For Merchandise Subject to Anti-Dumping / Countervailing Duties (WT/DS345), ¶¶ 1-2 (May 11, 2007), *available at* http://ustraderep.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file162_11183.pdf (visited on March 20, 2011)

⁵⁰ See Current Bond Formulas (Jan. 1, 2005), *available at* http://www.cbp.gov/xp/cgov/trade/trade_programs/bonds/pilot_program/ (visited on March 20, 2011)

⁵¹ Nat'l Fisheries Inst., Inc. v. United States Bureau of Customs & Border Prot., 30 C.I.T. 1838, 1847, 465 F. Supp. 2d 1300, 1308 (Ct. Int'l Trade 2006) ("Some of the 27 plaintiffs were unable to secure continuous bonds in the amounts requested by Customs, and as a result these plaintiffs ceased their importation of some or all types of subject shrimp")

Because plaintiffs "rely heavily on their lines of credit to conduct their business[es]," ... [they] all reduced their on-hand inventories and declined to pursue tangible business opportunities. [*Citation omitted*] In some instances, plaintiffs dropped product lines or scaled back existing or planned product lines. [*citation omitted*] Effects on cash flow resulting from posting collateral to secure irrevocable letters of credit led some plaintiffs to forgo opportunities to supply, develop, and market new products. [citation omitted] In several instances, some plaintiffs lost spot sales and declined to bid on major orders from supermarket chains and major retail customers because of the restrictions associated with the new bond requirements.[*citation omitted*] In other instances, some plaintiffs were forced to import shrimp on a delivered duty-paid basis, which reduces profit margins. [citation omitted] For a period spanning 2005 and 2006, one of the plaintiffs was unable to secure a sufficient bond and temporarily was forced out of the importing business. [citation omitted]⁵²

9.3 Mitigating the Risks (Lessons of Shrimp Litigation)

Importers liabilities and cash flow restrictions place a financial burden, which is exacerbated by uncertainties of the future Commerce's determination. Until Commerce determines the final margins and Customs liquidates the entries subject to antidumping, the importers' letters of credit supporting the bond will not be extinguished. This unpredictable climate is a shaky ground for an established importer who relies on lines of credit, planned production, and long term contracts to expand its business.

The antidumping climate, however, provides additional opportunities for the new type of legal person. Judge Stanceu briefly talked about eroding margins to products being imported under Duty Delivered Paid (DDP) terms. Under DDP, the "seller delivers the goods to

⁵² Nat'l Fisheries Inst., Inc. v. United States Bureau of Customs & Border Prot., 30 C.I.T. 1838, 1856, 465 F. Supp. 2d 1300, 1313 (Ct. Int'l Trade 2006)

the buyer, cleared for import, and not unloaded from any arriving means of transport at the named place of destination. The seller has to bear all the costs and risks involved in bringing the goods thereto including, where applicable, any duty.”⁵³ In the antidumping context, this means that the importer of record (a legal person responsible for payment of duties) would be a third party willing to assume all risks and liabilities of antidumping order review. One must be careful to structure a DDP transaction in a way, where the transaction does not run counter to the duty absorption policies.

10. DUTY ABSORPTION

The goal of antidumping duties is to prevent dumping; that is to prevent sales in the United States at the value that is less than “normal” value in China. If Chinese exporter or manufacturer absorbs the antidumping duty, then that entity in effect circumvents the United States antidumping laws. While the argument can be made that the very act of absorption of antidumping duties can have a “normalizing” effect on the value through sufficient increase on the cost of the United States bound exports, the argument is constrained by the framework of federal laws and regulations. Pursuant to regulations,⁵⁴ a “domestic interested party” may request Commerce to conduct a review to see whether an exporter or a producer have absorbed antidumping duties. While such requests are limited to time and scope,⁵⁵ it is a factor that separate rate exporters and producers, as well as their United States customers should be well aware.

⁵³ ICC Publication 560, Incoterms 2000, *available at* <http://www.iccwbo.org/incoterms/preambles/pdf/DDP.pdf>

⁵⁴ 19 C.F.R. §351.213(j) (2010), *codifying* §751(a)(4) of the Tariff Act of 1930, as amended

⁵⁵ The absorption investigation is limited only to administrative reviews for first through fourth anniversaries, and sunset reviews.

Commerce conducts duty absorption investigations presuming that exporter absorbed duties. The presumption can be rebutted with evidence of duty payment by the importer of subject merchandise, or documentation showing that an unaffiliated United States purchaser will pay the duty in full.⁵⁶

11. APPLICANT'S DEGREE OF CONTROL IN A SEPARATE RATE INVESTIGATION

Non-mandatory separate rate applicant has no control or influence over a separate rate margin. Even if the applicant can demonstrate that his enterprise and affiliates are not involved in the dumping of Chinese goods to the United States market, the applicant's ability is not relevant. The rate assigned to non-mandatory separate rate applicants is a weighted average rate of mandatory respondents. For non-mandatory separate rate participants this is a double edged sword. On one hand, if the mandatory respondent fails to provide information due to timing considerations, inaccuracies, or other causes, the Commerce may apply "adverse facts available" (AFA) rate, which is the highest margin available. When Commerce finds that due to failure of a mandatory participant to provide information the participant becomes part of "PRC-wide" entity, that participant is no longer a part of weighted average equation applicable to the separate rate applicants that are not subject to individual investigations. This, in turn, may lead to overall lower margins for separate rate applicants, as it happened in *Oil Country Tubular Goods* investigation.⁵⁷

⁵⁶ See *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part, Duty Absorption*, 75 Fed. Reg. 5,952, 5,955 (Feb. 5, 2010)

⁵⁷ *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 Fed. Reg. 20,335 (Apr. 19, 2010)

In *Tubular Goods* investigation Commerce selected two mandatory participants. One of the participants - Changbao - failed to timely submit required information. Using a strong language Commerce applied adverse facts available to Changbao and assigned a “PRC-wide” status:

“Changbao withheld information that had been requested, significantly impeded this proceeding, and provided information that could not be verified, pursuant to sections 776(a)(1) and (2)(A), (C) and (D) of the of Act. As a result, the Department has determined to apply the facts otherwise available. Further, because the Department finds that Changbao failed to cooperate to the best of its ability, pursuant to section 776(b) of the Act, the Department has determined to use an adverse inference when applying facts available in this review. In addition, we have concluded that the nature of Changbao's unreliable submissions calls into question the reliability of the questionnaire responses in their entirety as submitted by Changbao in this investigation, including Changbao's claim of eligibility for separate rate status. Thus, we find that Changbao is part of the PRC-wide entity for purposes of this investigation.”⁵⁸

Without Changbao, Commerce could base its findings only on one remaining mandatory respondent, who received a 29.94 percent antidumping margin. Consequently, all other 37 separate rate respondents received same 29.94 percent margin. Had the Changbao remained in the investigation with the margin higher than 29.94 percent, this would effectively raise the margin for all other separate rate respondents by the weighted average ratio.

On other end of the spectrum, a situation can arise when there are no rates other than *de minimis* or those based on AFA for mandatory respondents. In these situations, non-mandatory separate rate applicants will receive a rate based on the simple average between PRC-wide rate (AFA rate) and the *de minimis* rate of the mandatory respondent. Such scenario

⁵⁸ *Id.* at 20,339

occurred in *Woven Ribbons* investigation, where one mandatory respondent received *de minimis* rate while other was assigned the PRC-wide AFA rate.⁵⁹

12. SEPARATE RATE CONTINUOUS PARTICIPATION

Once a separate rate is established, companies continue to pay that rate for the imported product. The rate, however, is deemed preliminary until Commerce issues a final determination. This is because the United States uses a “retrospective” system of the antidumping liability assessment. The final determination may come in two forms. First, it can remain unchanged. For that to occur, no request of administrative review must be made.⁶⁰ Second, the duty may change as the result of the review outcome.

In administrative review Commerce selects several mandatory respondents, based on the largest importation volume during period of review in question. Then, Commerce “weight-averages the rates calculated for the mandatory respondents, excluding zero and *de minimis* rates and rates based entirely on adverse facts available (“AFA”), and applies that resulting weighted-average margin to non-selected cooperative separate-rate respondents.”⁶¹

Separate rate exporter bears the burden of overcoming the presumption of non-market economy status *each* time the administrative review is initiated.⁶² One recent example involves *Frozen Warm Water Shrimp* review, where only one non-mandatory respondent out of 475

⁵⁹ Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Margins for Separate Rate Recipients, 75 Fed. Reg. 7,244, 7,249 (Feb. 18, 2010)

⁶⁰ 19 C.F.R. §351.212(c)

⁶¹ Fourth Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results, Preliminary Partial Rescission of Antidumping Duty Administrative Review and Intent Not to Revoke, In Part, Rate for Non-Selected Companies 75 Fed. Reg. 11,855, 11,859 (March 12, 2010)

⁶² *Id.* at 11,858 (“It is the Department's policy to assign all exporters of the merchandise subject to *review* in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control”)

submitted the required documentation to overcome the presumption.⁶³ The lack of response resulted in duties (ultimately borne by the importers) amounting to 112.81 percent. Had the remaining 474 exporters responded and successfully established their non-market economy status, the antidumping duty applicable to their product would have been 1.36 percent, an impressive 111.45 percent difference.

In another example involving *Ironing Tables* investigation a Chinese exporter - Foshan Shunde - contested Commerce's decision to revoke Foshan's status as a separate rate respondent during the second administrative review. Commerce revoked the Foshan's separate rate status asserting a lack of cooperation and applied adverse facts available establishing "PRC-Wide" (highest) duty rate applicability. Commerce noted that "each segment of the proceeding is separate with separate administrative records."⁶⁴ Thus, in each segment it is proper for Commerce to analyze whether a respondent is entitled to a separate rate. According to Commerce, basis for AFA application were "inaccurate reporting of steel inputs, its failure to completely provide 'production notes' in a timely manner, and Foshan Shunde's failure to adequately detail and explain the role which an affiliated party has played in the sale of the subject merchandise."⁶⁵

Commerce requires all separate rate applicants to file certifications of separate rate with the Department in each segment of the proceeding. If applicant's data is questionable or unreliable, applicant may face an unpleasant determination as Foshan Shudle faced in *Second Administrative Ironing Tables Review*.

⁶³ *Id.* at 11859

⁶⁴ Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Department's Position, 75 Fed. Reg. 3,201, 3,203 (Jan. 20, 2010)

⁶⁵ *Id.*

13. CONCLUSION - SEPARATE RATE TODAY: MISSED OPPORTUNITIES OR DELIBERATE

AVOIDANCE?

The review of laws, regulations, and administrative notices portray opportunities and advantages for Chinese exporters in the separate rate antidumping provisions. When the Chinese exporter succeeds in obtaining a separate rate, that exporter has a substantial competitive advantage over his fellow country exporters. Appendix A demonstrates that advantage can translate into lower antidumping duties by as much as two hundred percent. The separate rate, however, comes at the price. An exporter has to confront numerous procedural and substantive obstacles including cooperation from the exporter's United States trading partners and Commerce's administrative burdens. Appendix B demonstrates numerous procedural failures of the applicants that were fatal to their separate rate application. The procedural complexities are heightened by the communication barrier. The source of the communication barrier may lie in cultural differences or in logistical difficulties. The official data compiled in Appendix C suggests that the communication barrier does exist and the barrier is of substantial proportions.⁶⁶

While domestic industries and interest groups are probably quite happy with communication barrier and its effect of excluding otherwise eligible entities from the separate rate status, the legal framework provides opportunities to improve communications. One entity, which is best positioned to enhance the awareness of the separate rate eligibility, is the Chinese government. Federal Regulations require Commerce to provide a copy of the petition

⁶⁶ See A-570-893 in Appendix C, where Commerce requested 477 companies to respond, and received only three responses.

(public version) to the foreign government representative.⁶⁷ The petitioner for imposition of the antidumping duties is required to provide “names and addresses of each person the petitioner believes sells the subject merchandise at less than fair value.”⁶⁸ Thus, the Chinese government has the information from the United States sources, in addition to its own about the entities who can take advantage of separate rate provisions. The responsibility of Chinese government role is heightened in light of absence of associationalism and collective lobbying.⁶⁹ Industry associations in the United States wield a political and economic influence which translates in imposition of antidumping duties against China entrenched in the United States.⁷⁰ In China, the type of associationalism is historically absent, and Chinese government presents an ever more important common denominator for collective opposition to the United States antidumping regime. Yet, Appendix B indicates that the Chinese government is still unable to persuade its businesses to “respond en masse to U.S. antidumping investigations.”⁷¹

⁶⁷ 19 C.F.R. §351.202(f) (2010)

⁶⁸ 19 C.F.R. §351.202(b)(7)(i)(A) (2010)

⁶⁹ See Tanczos, Francis, *Unfair Play: Examining the U.S. Anti-Dumping 'War' Against China*, *Washington Undergraduate Law Review*, Vol. II, No. 3, pp. 77-93, 89 (Spring 2008) (arguing that the collective organization of United States industries is one of the greatest disadvantages for China in antidumping cases because Chinese industries lack the kind of associationalism and collective lobbying historically present in the United States), available at SSRN: <http://ssrn.com/abstract=1371384> (visited Apr. 2011).

⁷⁰ Industrial cohesiveness and support for associationalism are deeply rooted in the United States antidumping laws. Accordingly, any antidumping petition must meet the minimum criteria, which requires domestic producers or workers who support the petition account for: 1) at least 25 percent of the total production of the domestic like product; and 2) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for the petition. Section 732(c)(4) of the Act; *see also* *Initiation of Antidumping Duty Investigation: Certain Lined Paper Products From India, Indonesia, and the People's Republic of China*, 70 FR 58374 (Oct. 6, 2005). The domestic production support is generally attained through associations. For example, USA Apple Association in Non-Frozen Apple Juice Concentrate petition, or American Honey Producers Association in Honey petition. *See* Tanczos, Francis, *Unfair Play: Examining the U.S. Anti-Dumping 'War' Against China*, *Washington Undergraduate Law Review*, Vol. II, No. 3, pp. 77-93, 86, 87 (Spring 2008), available at SSRN: <http://ssrn.com/abstract=1371384> (visited Apr. 2011).

⁷¹ *See* Priya Alagiri, *Reform, Reality, and Recognition: Reassessing U.S. Antidumping Policy Toward China*, 26 *Law & Pol'y Int'l Bus.* 1061, 1068 n.28 (1994-1995), *quoting* Leonard E. Santos & Thomas V. Vakerics, *Chinese Importers Face Tough Anti-Dumping Rules*, *The Nat'l L.J.* at C13 (Sept. 14, 1994)

Another possibility to improve the separate rate awareness is to freely disseminate the public version of an antidumping petition with list of names and addresses over the internet. The dissemination will help other interested members of the international trade community to fill the void left by the Chinese government. This community is comprised of international trade attorneys, consultants and commerce chambers on both sides of the ocean. Members of the trade community are professionals who utilize knowledge and information to promote the international trade. If the list of names and addresses of potential separate rate beneficiaries is made available to these professionals, the communication barrier, with their help, can be substantially lessened.

The petitioner for the imposition of antidumping duties is required to file copies with International Trade Commission and Commerce.⁷² Review of websites of both United States agencies revealed no electronic availability of the petition. Chinese government is another source for the petition. The review of the website of the Chinese Embassy in the United States, however, produced no results. Another potential source is the Chinese Ministry of Foreign Trade and Economic Cooperation (MOFTEC). MOFTEC took active role in identification of potential respondents in early antidumping investigations. For example, MOFTEC identified potential exporters in the Cased Pencils antidumping investigation.⁷³ The review of MOFTEC website also yielded no readily available information with respect to the filed petitions.⁷⁴

One may also receive petition by becoming a part of the service list. Pursuant to 19 C.F.R. §351.303(f) (2010), “a person filing a document with the Department simultaneously

⁷² 19 C.F.R. §351.202(c) (2010)

⁷³ See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China, 59 Fed. Reg. 30,911, 30,914 (June 16, 1994) (“Potential exporters identified by the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) have failed to respond to our questionnaire”)

⁷⁴ <http://english.mofcom.gov.cn/>

must serve a copy of the document on all other persons on the service list by personal service or first class mail.” To become part of the service list, the party must be an interested party, which means it must have a stake in the outcome. The provision, however, does not help the exporter who is not aware of his or her stake.

As antidumping policies continue to gain momentum, excluding a growing number of Chinese exporters from the United States market, the separate rate provisions provide a venue for exporters to continue trade engagement with the United States. Separate rate participation requires greater “savviness” on the part of exporters and a closer cooperation and planning with their United States trading counterparts. Many eligible exporters are excluded from the process due to communication barriers and administrative burdens. However, those exporters that succeeded in gaining separate rate status would have access to the United States market at substantially lower duty rates than their Chinese colleagues and therefore are staying ahead of the trading curve.

APPENDIX A

Antidumping Duty Rate Comparisons: Separate Rate Not Higher than PRC-Wide Rate

| Investigation | Date of Notice | Separate Rate for NMNI ⁷⁵ Applicants | Separate Rates for Investigated Applicants | Country Wide (All Others) Rate |
|-------------------------|----------------|---|--|--------------------------------|
| A-570-958 ⁷⁶ | 05/06/2010 | 60.27 | 30.82, 89.71 | 135.8 |
| A-570-956 ⁷⁷ | 04/28/2010 | 62.16 | 32.39, 91.93 | 98.37 |
| A-570-954 ⁷⁸ | 03/12/2010 | 218.71 | 132.74, 304.67 | 349 |
| A-570-893 ⁷⁹ | 03/12/2010 | 1.36 | 0.01, 1.36 | 112.81 |
| A-570-890 ⁸⁰ | 02/05/2010 | 20.36 | 20.36 | 216.01 |
| A-570-951 ⁸¹ | 02/03/2010 | 90.32 | 90.32 | 174.85 |
| A-570-949 ⁸² | 01/12/2010 | 46.78 | 42.61, 50.95 | 289 |
| A-570-947 ⁸³ | 01/06/2010 | 14.36 | 14.36 | 145.18 |
| A-570-945 ⁸⁴ | 12/23/2010 | 151.44 | 37.72 ⁸⁵ , 151.44 | 193.55 |
| A-570-943 ⁸⁶ | 11/17/2009 | 36.53 | 0, 36.53 | 99.14 |
| A-570-904 ⁸⁷ | 11/10/2009 | 16.40 | 14.58, 18.22, 18.40 | 228.11 |

⁷⁵ See 75 Fed. Reg. 847, 851 (Jan. 6, 2010) (Non-Mandatory Non-Investigated Applicants. Separate Rate applicants may not have following rates: zero, *de minimis*, or based entirely on adverse facts available ("AFA")).

⁷⁶ Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 Fed. Reg. 24,892 (May 6, 2010)

⁷⁷ Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination, 75 Fed. Reg. 22,372, 22,382 (April 28, 2010)

⁷⁸ Certain Magnesia Carbon Bricks From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Combination Rates, 75 Fed. Reg. 11,847, 11,854 (March 12, 2010)

⁷⁹ Preliminary Results of the Review, Fourth Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results, Preliminary Partial Rescission of Antidumping Duty Administrative Review and Intent Not To Revoke, In Part, 75 Fed. Reg. 11,855, 11,861 (March 12, 2010)

⁸⁰ Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part, 75 Fed. Reg. 5,952, 5,963 (Feb. 5, 2010)

⁸¹ Certain Woven Electric Blankets From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 Fed. Reg. 5,567, 5,574 (Feb. 3, 2010)

⁸² Wire Decking from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 Fed. Reg. 1,597, 1,606 (Jan. 12, 2010)

⁸³ Certain Steel Grating From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 Fed. Reg. 847, 851 (Jan. 6, 2010)

⁸⁴ Prestressed Concrete Steel Wire Strand From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 74 Fed. Reg. 68,230, 68,240 (Dec. 23, 2009)

⁸⁵ Voluntary Respondent

⁸⁶ Certain Oil Country Tubular Goods From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination, 74 Fed. Reg. 59,117, 59,129 (Nov. 17, 2009)

⁸⁷ First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 Fed. Reg. 57,995, 57,997 (Nov. 10, 2009)

APPENDIX B

Separate Rate Response Failure / Success Excerpts: Non-Mandatory Applicants including (1) those failing to demonstrate qualification for separate rate, and (2) those successfully demonstrating their applicability.

| Outcome | Investigation | Commerce Findings |
|----------------------------------|---------------|---|
| Good response | A-570-954 | Commerce received timely and complete separate rate applications from the Separate Rate Respondents, who are exporters/producers of bricks from China, and were not selected as a mandatory respondent in the investigation. Through the evidence in their applications, these companies have demonstrated their eligibility for a separate rate. See the "Separate Rates" section above. Consistent with Commerce's practice, as the separate rate, Commerce had established a margin for the separate rate respondents based on the rates calculated for the mandatory respondents, excluding any rates that are zero, <i>de minimis</i> , or based entirely on AFA ⁸⁸ |
| Response failure (admin. review) | A-570-893 | Only one non-mandatory respondent, out of 475 submitted information timely as requested by Commerce. ⁸⁹ |
| Response failure (investigation) | A-570-952 | Non-mandatory separate respondents submitted Q&V questionnaires, but did not provide the separate rate application. ⁹⁰ |
| Response failure (admin. review) | A-570-890 | 34 companies failed to provide separate rate certification or application during the administrative review. Nor did the companies respond to the Commerce's Q&V questionnaire. Commerce posted documents on the web and sent out the information to entities individually. These companies received a PRC-Rate treatment. ⁹¹ |
| Response failure (admin. review) | A-570-951 | Two exporters, Zhejiang Hwei Knitting Technology Co., Ltd. and Ningbo Zhonglei Maofangzhi Ranzheng Co., submitted timely responses to the Commerce's Q&V questionnaire but did not provide separate rate applications, and, therefore, have not demonstrated their eligibility for separate rate status in this investigation. As a result of failure, Commerce is treating these Chinese exporters as |

⁸⁸ Certain Magnesia Carbon Bricks From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Margin for the Separate Rate Companies, 75 Fed. Reg. 11,847, 11,851 (March 12, 2010)

⁸⁹ Fourth Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results, Preliminary Partial Rescission of Antidumping Duty Administrative Review and Intent Not to Revoke, In Part, Rate for Non-Selected Companies, 75 Fed. Reg. 11,855, 11,859 (March 12, 2010)

⁹⁰ Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Companies Not Receiving a Separate Rate, 75 Fed. Reg. 7,244, 7,249 (Feb. 18, 2010)

⁹¹ Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part, Companies Not Receiving a Separate Rate, 75 Fed. Reg. 5,952, 5,958 (Feb. 5, 2010)

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| | | part of the PRC-wide entity and assigns a highest antidumping duty margin. ⁹² |
| Response failure (initial review) | A-570-949 | Brynick Enterprises Limited and Shanghai Hesheng Hardware Products Co. submitted Q&V response, but failed to submit separate rate application. ⁹³ |
| Scope failure (initial review) | A-570-947 | Applicant, Shenyang Yuanda, exported merchandise outside of type or class covered by scope of the review. ⁹⁴ |
| Response failure | A-570-945 | Liaonin TongDa Building Material Industry Co., Ltd. did not respond to supplemental questionnaire and therefore is not eligible for the separate rate. ⁹⁵ |
| Response failure, Deficient application | A-570-945 | Tianjin Shengte filed a deficient Section A questionnaire and failed to respond to Commerce's request for more information. ⁹⁶ |
| Affirmative Withdrawal, Response failure | A-570-863 | Anqiu Friend and Weifang Shennong affirmatively stated on the record that each was no longer participating in this administrative review. Tianma Freezing did not respond to the Commerce's original questionnaire, and Anqiu Friend and Weifang Shennong each did not respond to the Commerce's supplemental questionnaires. ⁹⁷ |
| Revocation of Separate Rate Status | A-570-904 | Hebei Foreign's separate rate status was based upon incorrect information. ⁹⁸ |
| Response failure | A-570-904 | Ningxia Mineral & Chemical Limited did not submit either a separate-rate application or certification. ⁹⁹ |
| Response failure | A-570-894 | Vietnam Quijiang Paper Co., Ltd. and Guilin Qifeng Paper Co., Ltd. did not qualify for a separate rate, as neither company responded to the Commerce's requests for information (including a separate-rate application and/or certification). ¹⁰⁰ |

⁹² Certain Woven Electric Blankets From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Companies Not Receiving a Separate Rate, 75 Fed. Reg. 5,567, 5,571 (Feb. 3, 2010)

⁹³ Wire Decking from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Companies Note Receiving a Separate Rate, 75 Fed. Reg. 1,597, 1,601-1,602 (Jan. 12, 2010)

⁹⁴ Certain Steel Grating From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Companies Not Receiving a Separate Rate, 75 Fed. Reg. 847, 851 (Jan. 6, 2010)

⁹⁵ Prestressed Concrete Steel Wire Strand From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Separate Rate Applications, 74 Fed. Reg. 68,230 (Dec. 23, 2009)

⁹⁶ *Id.* at 68,236

⁹⁷ Seventh Administrative Review of Honey from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind, In Part, Application of Facts Available to Anqiu Friend, Tianma Freezing, and Weifang Shennong, 74 Fed. Reg. 64,677, 64,681-64,683 (Dec. 23, 2009)

⁹⁸ First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Separate Rates, 74 Fed. Reg. 57,995, 57,997 (Nov. 10, 2009)

⁹⁹ *Id.*

¹⁰⁰ Certain Tissue Paper Products From the People's Republic of China: Final Results and Partial Rescission of the 2007-2008 Antidumping Duty Administrative Review and Determination Not To Revoke in Part, Separate Rates, 74 Fed. Reg. 52,176, 52,177 (Oct. 9, 2009)

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| Information Accuracy Failure | A-570-888 | Foshan Shunde provided inaccurate and unreliable information concerning its production costs and factors of production including its steel inputs and the long products utilized in the manufacturing process. Additionally, there was evidence that Foshan Shunde has failed to completely recount the role that an affiliated company played in selling the subject merchandise. The deficiencies in Foshan Shunde's responses gave rise to concerns about the reliability of Foshan Shunde's entire response, including Foshan Shunde's claim of eligibility for the separate rate status. ¹⁰¹ |
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¹⁰¹ Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Use of Adverse Facts Available, 74 Fed. Reg. 46,083, 46,085 (Sept. 8, 2009)

APPENDIX C

Separate Rate Applicant Response Rate: Respondent Selection (and respondent response), which includes those applicants to whom Commerce sent out the invitation to respond, and number of companies that accepted Commerce's invitation.

| Investigation | Companies whose response was requested by Commerce | Number of companies replied |
|--------------------------|---|---|
| A-570-962 ¹⁰² | 60 (preliminary selection) | 11 |
| A-570-954 ¹⁰³ | 35 (preliminary selection) | 16 |
| A-570-893 ¹⁰⁴ | 477 (Administrative review. 2 companies were mandatory respondents) | 3 (two of which were mandatory respondents) |
| A-570-952 ¹⁰⁵ | 86 (preliminary selection) | 19 |
| A-570-951 ¹⁰⁶ | 30 (preliminary selection) | 7 |
| A-570-949 ¹⁰⁷ | 83 (potential exporters) | 9 |
| A-570-947 ¹⁰⁸ | 16 (preliminary selection) | 6 |
| A-570-945 ¹⁰⁹ | 22 (preliminary selection) | 8 |
| A-570-493 ¹¹⁰ | 212 (preliminary selection) | 43 |

¹⁰² Certain Potassium Phosphate Salts From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 75 Fed. Reg. 12,508 (March 16, 2010)

¹⁰³ Certain Magnesia Carbon Bricks From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 Fed. Reg. 11,847 (March 12, 2010)

¹⁰⁴ Fourth Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results, Preliminary Partial Rescission of Antidumping Duty Administrative Review and Intent Not To Revoke, In Part, 75 Fed. Reg. 11,855 (March 12, 2010)

¹⁰⁵ Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Supplementary Information, 75 Fed. Reg. 7,244, 7,245 (Feb. 18, 2010)

¹⁰⁶ Certain Woven Electric Blankets From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Background, 75 Fed. Reg. 5,567 (Feb. 3, 2010)

¹⁰⁷ Wire Decking from the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Companies Not Receiving a Separate Rate, 75 Fed. Reg. 1,597, 1,602 (Jan. 12, 2010)

¹⁰⁸ Certain Steel Grating From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, Background, 75 Fed. Reg. 847 (Jan. 6, 2010)

¹⁰⁹ Prestressed Concrete Steel Wire Strand From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Application of Adverse Facts Available, the PRC-Wide Entity and PRC-Wide Rate, 74 Fed. Reg. 68,230, 68,236 (Dec. 23, 2009)

¹¹⁰ Certain Oil Country Tubular Goods From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination, Respondent Selection, 74 Fed. Reg. 59,117, 59,118 (Nov. 17, 2009)

APPENDIX D

De Jure / De Facto Analysis of Government Control

Factors influencing absence of *De Jure* Government Control

1. An absence of restrictive stipulations associated with the individual exporter's business and export licenses.¹¹¹
2. The applicable legislative enactments decentralizing control of the companies:¹¹²
 - a. The Company Law of the People's Republic of China (effective as of January 1, 2006).¹¹³
 - b. Foreign Trade Law of the PRC (effective as of July 1, 2004).¹¹⁴
 - c. Administrative Regulations of the PRC Governing the Registration of Legal Corporations.¹¹⁵
 - d. PRC's Enterprise Legal Person Registration Administrative Regulations (June 13, 1998).¹¹⁶
 - e. Law of the PRC on Chinese-Foreign Cooperative Joint Ventures.¹¹⁷
 - f. Regulation Governing Rural Collectively-Owned Enterprises of the PRC of 1990.¹¹⁸
 - g. Law of the PRC on Industrial Enterprises Owned by the Whole People ("The Industrial Enterprise Law" April 13, 1988).¹¹⁹
 - h. Regulations for Transformation of Operational Mechanisms of State-Owned Industrial Enterprises of 1992 ("Business Operation Provisions").¹²⁰
 - i. The Organic Law on Village Communities in the PRC ("Village Committee Law").¹²¹
3. Any other formal measures by the government decentralizing control of companies.¹²²

¹¹¹ Prestressed Concrete Steel Wire Strand From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 74 Fed. Reg. 68,230, 68,235 (Dec. 23, 2009), *citing* Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China, 56 Fed. Reg. 20,588, 20,589 (May 6, 1991)

¹¹² *Id.*

¹¹³ PRC Separate Rate Application, Seamless Refined Copper Pipe and Tube from the People's Republic of China, 12-13, available at <http://ia.ita.doc.gov/ia-news-2009.html> (visited on March 20, 2011)

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

Factors influencing absence of *De Facto* Government Control

1. Whether the export prices are set by or are subject to the approval of a governmental agency.¹²³
2. Whether the respondent has authority to negotiate and sign contracts and other agreements.¹²⁴
3. Whether the respondent has autonomy from the government in making decisions regarding the selection of management.¹²⁵
4. Whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.¹²⁶

¹²³ See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China, 59 Fed. Reg. 22,585, 22,586-22,587 (May 2, 1994); see also Notice of Final Determination of Sales at Less Than Fair Value: Furfural Alcohol From the People's Republic of China, 60 Fed. Reg. 22,544, 22,545 (May 8, 1995), cited in Prestressed Concrete Steel Wire Strand From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 74 Fed. Reg. 68,230, 68,236 (Dec. 23, 2009)

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*