

Import Administration Policy Bulletin

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Topic: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries

Signed

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Statement of Issue

This policy bulletin describes the Department's application process for separate rates status in non-market economy ("NME") investigations and explains the Department's policy of assigning specific exporter-producer "combination rates" to both mandatory respondents and non-investigated NME exporters that meet the Department's criteria for separate rate status in investigations.

Background

In an NME antidumping investigation, the Department presumes that all companies within the NME country are subject to governmental control and should be assigned a single antidumping duty rate unless an exporter demonstrates the absence of both *de jure* and *de facto* governmental control over its export activities. See *e.g.*, Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China, 61 FR 19026, 19027 (April 30, 1996). If an NME entity demonstrates this independence with respect to its export activities, it is eligible for a rate that is separate from the NME-wide rate. This separate rate is usually either an individually calculated rate or a weighted-average rate based on the rates of the investigated companies, excluding any rates that are zero, *de minimis*, or based entirely on facts available. The Department's separate rates test is not concerned, in general, with macroeconomic border-type controls (*e.g.*, export licenses, quotas, and minimum export prices). Rather, the test focuses on controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level. See, *e.g.*, Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine, 62 FR 61754, 61757 (November 19, 1997); and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 62 FR

61276, 61279 (November 17, 1997).

To establish whether a firm is sufficiently independent from governmental control in its export activities to be eligible for separate rate status, the Department analyzes each exporting entity under a test arising from the Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20588 (May 6, 1991), as modified in the Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22585, 22587 (May 2, 1994) (Silicon Carbide). Under this test, the Department assigns separate rate status in NME cases only if an exporter can demonstrate the absence of both *de jure* and *de facto* governmental control over its export activities. See Silicon Carbide and Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China, 60 FR 22544, 22545 (May 8, 1995). In order to request and qualify for separate rate status in an investigation, a company must have exported the subject merchandise¹ to the United States during the period of investigation, and it must provide information responsive to the following considerations:

1. Absence of *De Jure* Control: The Department considers the following *de jure* criteria in determining whether an individual company may qualify for a separate rate: 1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; 2) any legislative enactments decentralizing control of companies; and 3) any other formal measures by the government decentralizing control of companies.
2. Absence of *De Facto* Control: Typically, the Department considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions:
 - 1) whether the export prices are set by, or subject to the approval of, a governmental authority;
 - 2) whether the respondent has authority to negotiate and sign contracts and other agreements;
 - 3) whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

In an antidumping investigation, the Department previously has assigned a weighted-average of the rates individually calculated for the mandatory respondents, excluding any rates that were zero, *de minimis*, or based entirely on facts available, to exporters who or which have requested a separate rate but who (or which) have not been selected as mandatory respondents. In order to qualify for this rate, they were previously required to fulfill two requirements. First, they had to submit a request for separate rates treatment, along with a timely response to section A of the Department's questionnaire. Second, the Department had to have determined, after reviewing the requesting companies' submissions, that separate rates treatment was warranted. See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Carbon-Quality Steel Pipe from the People's Republic of China, 67 FR 36570, 36571 (May 24, 2002).

The Department has faced a growing administrative burden in analyzing requests for

¹For purposes of this document, the term "subject merchandise" refers to the merchandise described in the petition of the investigation. This shorthand term is not intended to make any conclusions as to the definition of the final scope of the order.

separate rate status (especially inadequate submissions requesting separate rates treatment). For example, the Department has faced a large number of separate rate requests in three recent investigations involving two NME countries. See Notice of Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture from the People's Republic of China, 69 FR 67313 (November 17, 2004) (PRC Furniture); Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China, 69 FR 70997 (December 8, 2004) (PRC Shrimp); and Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam, 69 FR 71005 (December 8, 2004) (Vietnam Shrimp).

While the Department analyzed the large number of separate rate requests in these three investigations, it has become clear that these requests consume an inordinate amount of the Department's resources. The Department also has concerns regarding the effectiveness of its current test in determining whether a company is properly eligible for separate rate status. Various parties have questioned whether the Department's separate rates test, as currently constructed, offers the most effective means of determining whether exporters act independently of the government. Some parties have argued that the current separate rates test does not go far enough in analyzing whether a firm acts both *de jure* and *de facto* independently of the government in its export activities, whereas others have argued that the test already goes beyond what is necessary and poses an unnecessary burden on respondents and on the Department.

Another issue that has been raised concerns the potential evasion of duties. Under current practice, separate rates are assigned only to exporters, and this assigned rate applies to all of the firm's exports regardless of the entity that produces the subject merchandise. Various interested parties argued that this practice is unfair, because while the margins the Department calculates are based on information from certain individual producers, the cash deposit rate applies to subject merchandise exported by the exporter in question, regardless of whether it was produced by the same producers whose information was submitted in the investigation. Those arguing in favor of revising the Department's methodology contend that this is a shortcoming of the current practice, since entities not eligible for a separate rate of their own can simply "funnel" their merchandise through those firms that have received a separate rate. Advocates of revising the Department's methodology in this area argue further that the current practice of accounting for any shifts in sourcing patterns in administrative reviews that are conducted subsequent to the issuance of the order is unsuitable for industries that see rapid shifts in production and where producers can easily enter and depart the industry. Finally, in certain instances where the antidumping duty rates the Department assigns vary widely from exporter to exporter, exporters assigned high rates can easily shift their shipments of subject merchandise to other exporters assigned lower rates. Such diversion undermines the effectiveness of the antidumping order and the significance of the other antidumping duty rates the Department assigns to the various exporting entities.

Statement of Policy

Application for Separate Rates

When an NME antidumping investigation is initiated, the initiation notice will announce

that NME exporters of the subject merchandise under investigation can apply for a separate rate by completing an application for separate rates, which will be posted for each investigation on the Import Administration website at the following address: <http://ia.ita.doc.gov/>. The application for each investigation will be tailored to some extent for that case, depending, for example, on the NME country involved in the investigation. For firms not selected as mandatory respondents by the Department, but which nonetheless seek a separate rate, the application will replace the requirement that they respond to Section A of the Department's questionnaire. Firms that the Department selects to be mandatory respondents will continue to be required to respond to the complete questionnaire. Because NME firms will have the opportunity to respond to the separate rates application immediately upon initiation of the investigation and before the Department selects mandatory respondents, it is possible that an entity the Department selects to be a mandatory respondent already will have submitted an application for a separate rate. In such cases, the firm may refer to its already submitted separate rate application for the section of the questionnaire that deals with separate rates.

The separate rates application does not change the long-established standard for eligibility for receiving a separate rate (see Background section above), which remains whether a firm can demonstrate an absence of both *de jure* and *de facto* governmental control over its export activities. Rather, the application clarifies the Department's previous practice by giving more explicit instructions on how the requirements can be fulfilled, is limited to addressing a firm's independence in its export activities, and requires various company-specific information in order for the Department to determine with certainty that the firm meets the criteria for receiving separate rate status. In addition, firms seeking separate rate status must adhere to the following conditions:

1. The Department will not consider applications that remain incomplete by the deadline date established in paragraph 6 below.
2. The Department will, however, notify firms whose applications are incomplete or otherwise deficient, if those applications are filed within thirty calendar days after the publication of the initiation notice, giving such firms an opportunity to resubmit a corrected application, as long as the resubmitted applications are received by the deadline set forth in the header to the application.
3. Firms must submit the specific application that has been posted for each case, because the application may vary from case to case (depending, for example, on the NME country and product being investigated).
4. Firms to whom the Department sends a Quantity and Value ("Q&V") questionnaire, which is used in certain investigations to select mandatory respondents, must respond to the Q&V questionnaire to receive consideration for a separate rate. This is necessary to ensure that the Department has the necessary information to appropriately select mandatory respondents.
5. All applicants must identify in the application any affiliates in the NME country that exported to the United States during the period of investigation the merchandise described in the petition, as well as any affiliates located in the United States involved in

the sale of the subject merchandise.

6. All applications are due sixty calendar days after publication of the initiation notice. This deadline applies equally to NME-owned and wholly foreign-owned firms for completing the applicable provisions of the application and for submitting the required supporting documentation.
7. All shipments to the United States declared to U.S. Customs and Border Protection must identify the exporter by its legal business name. This name must match the name that appears on the exporter's business license/registration documents, a copy of which shall be provided to the Department as part of the exporter's request for separate rate status.
8. All information in the application and supporting documentation is subject to verification, and the Department reserves the right to issue supplemental questionnaires, if necessary.
9. Each applicant must submit a separate individual application regardless of any common ownership or affiliation between firms and regardless of foreign ownership.
10. NME exporters that ultimately are wholly owned by entities located in market-economy countries² have different requirements for completing the application than do non-wholly market-economy owned NME exporters. NME exporters not wholly owned by entities located in market-economy countries must fill out the application in its entirety to receive consideration for a separate rate.
11. NME exporters that are wholly owned by market-economy entities which are in turn owned or controlled by entities located in a non-market economy are required to fill out the complete application.
12. NME exporters that are ultimately wholly-owned by entities located in market economy countries are only required to:
 - A. Fill out the certifications requested in the application and provide supporting documentation for fields in the application marked with an asterisk.³ These marked fields pertain to the firm's eligibility for separate rate status by having sold subject merchandise to the United States during the POI and establishing the firm's claim that it is, in fact, ultimately wholly owned by a market-economy entity. This information is also necessary for administration once a separate rate is issued.
 - B. Report, in addition to the affiliates identified in paragraph 5 above, *any other* affiliations with other firms in the NME country involved in the *production or sale* of the subject merchandise as described in the petition, including merchandise that is produced solely for domestic consumption.

²Exporters claiming to be wholly owned by a market economy entity must report the identity and location of the individual(s) or firm(s) with ultimate ownership or control over the market economy entity.

³This includes firms that are ultimately wholly owned by Hong Kong or Taiwan entities.

The Department's application is designed to be a more thorough approach to evaluating a firm's eligibility for separate rate status. It is meant to clarify and streamline the separate rates process for both the Department and for respondents. Since firms will have notice of the types of documents required for making a separate rate claim, firms submitting incomplete applications by the deadline referred to in paragraph 6 above will not be eligible for separate rate status in the investigation. Because substantiation of a separate rate claim is required and subject to verification, the application process is a meaningful test of a firm's eligibility for a separate rate.

This practice will be effective for all NME antidumping investigations initiated on or after the date of publication in the Federal Register of the notice announcing this policy. This practice only applies to antidumping investigations.

Combination Rates

As noted above, in NME investigations, the Department assigns separate rates only to exporters that have demonstrated their independence from *de jure* and *de facto* government control over their export activities (see Background section above). While continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the weighted-average of the individually calculated rates. This practice is referred to as the application of "combination rates" because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise *both* exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation. This practice is similar to the Department's established practice in cases where firms are excluded from an antidumping duty order (i.e., due to zero or *de minimis* margins) and in new shipper reviews, both of which use exporter-producer combination rates. See Sections 733(b)(3) and 735(a)(4) of the Tariff Act of 1930, as amended, and 19 CFR 351.107(b)(1) and Import Administration Policy Bulletin 03.2: Combination Rates in New Shipper Reviews, dated March 04, 2003.

The Department's separate rates analysis and test is *not* being extended to producers. Firms that produce the subject merchandise are not required to demonstrate their eligibility for separate rate status unless they also export the merchandise to the United States. The Department's separate rates test, which focuses exclusively on the respondent's *export* activities, is not being altered by the extension of combination rates to all NME exporters receiving a separate rate.

In either their questionnaire responses or applications for separate rates or (depending on whether the firm is a mandatory respondent or a non-investigated exporter), exporters are required to provide the Department with the names and contact information of all the producers whose merchandise they exported to the United States during the period of investigation. In the case of a non-producing exporter, the exporter's "separate" cash deposit rate only applies to

merchandise supplied by the producer(s) reported to the Department in the investigation. In the case of an exporter (that qualified for a separate rate) that also produced all the subject merchandise it exported to the United States during the period of investigation, the cash deposit rate the Department assigns to that entity applies only to merchandise both exported and produced by that entity. If an exporter receiving a separate rate sourced from multiple producers (including itself) during the period of investigation, and provided the Department with the required information about each of these producers, the exporter's cash-deposit rate will be applied to merchandise it sourced from *any* combination of its identified producers without restriction. In other words, the Department will not assign combination rates to an exporter and *individual* producers, but rather to an exporter and its producers *as a group*.

This practice is necessary to prevent the avoidance of payment of antidumping duties by firms shifting exports through exporters with the lowest assigned cash-deposit rates. The Department's previous practice of accounting for changes in producers during administrative reviews is not sufficient to prevent these activities, because in many industries, producers can appear and disappear frequently prior to the administrative review. Only by limiting the application of the separate rate to specific combinations of exporters and one or more producers can the Department prevent the "funneling" of subject merchandise through the exporters with the lowest rates.

As with the application for separate rates discussed above, this practice is effective in all NME antidumping investigations initiated on or after the date of publication in the Federal Register of the notice announcing this policy. This practice also applies only to investigations. The Department is currently evaluating the extension of these changes in practice to administrative reviews.