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June 1, 2004

James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

Re: Comments in Response to Federal Register Notice, Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries (May 3, 2004)

Dear Mr. Jochum:

This letter is submitted on behalf of the Shrimp Committee of the Vietnam Association of Seafood Exporters and Producers ("VASEP Shrimp Committee" or "VSC") to comment on potential changes to the Department's "separate rates" policy and practice for non-market economy (NME) investigations. Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 24,119 (May 3, 2004). It is hard to believe that the Department would consider backtracking in its separate rates policy at a time when market reforms are taking hold and moving forward in Vietnam and other major NME-designated countries. Indeed, it is astonishing that the Department is proposing to treat independent companies more harshly than the Department treated state enterprises in NME countries during the height of the Cold War, when there was no punitive countrywide-rate assumption. It appears that the more NME-designated countries like Vietnam reform economically, the harsher the Department will treat them. This is unacceptable and unsupportable. We oppose any change that would make it more difficult for an independent company to receive a separate rate in an NME investigation, or that would create an alternative method for calculating Section A respondent rates that differs from the statutory all-others rate methodology. We are especially alarmed that the Department may apply such troublesome changes to ongoing investigations, and we respectfully request that the Department refrain from doing so.

Rather than making it more difficult to receive separate rate status, we believe the Department can achieve its objectives by liberalizing rather than restricting the procedures required to obtain such status.

The Department has identified two key considerations underpinning its request for comments: (1) the need to conserve its scarce resources, and (2) the need to reach accurate determinations in NME antidumping proceedings.[1] Id. at 24,120. We recognize these are both necessary and worthy objectives that may at times conflict. Only a delicate balance of policy approaches will achieve each objective without needlessly penalizing innocent companies. We are at a loss to understand how the Department's proposed changes in separate rates policy would achieve this delicate balance. In fact, most of the Department's proposals would impose a greater and unnecessary workload on the Department while reducing the accuracy of separate rate determinations. Instead of the ill-considered approach that the Department appears to be suggesting, we have identified five options that would better achieve this balance. The options are numbered in order of our preference. They recognize the economic progress in NME countries like Vietnam and ensure that Department policy reflects this reality. At the same time, each approach (other than *status quo* Option 5) would improve the accuracy of separate rate determinations, while shepherding Department resources more effectively. These are the only rational options available to the Department:

Option 1: Abandon the countrywide-rate assumption. The Department could best achieve its objectives by completely abandoning the countrywide-rate assumption and instead determine NME rates just as the Department determines market economy rates, as it did before 1991. This would relieve the Department from reviewing Section A questionnaires from voluntary respondents altogether, and it would accurately reflect the reforming nature of these economies.

Option 2: Reverse the presumption of government control. Short of abandoning the countrywide-rate assumption altogether, the Department should reverse the presumption of government control for those NME-designated countries, including Vietnam, that have implemented laws that the Department recognizes generally establish the lack of *de jure* government control over businesses. Under this approach, the Department would presume entities in these countries are independent, and the burden would lie with the Petitioners to establish that a particular entity was in fact subject to government control.

Option 3: Presume independence for voluntary respondents. Under this option, the Department would require voluntary respondents to file only a limited, *pro forma* request for a separate rate, which would be automatically approved absent clear evidence or knowledge that the respondent is not independent from government control. This would ensure that all respondents who are entitled to a separate rate receive a separate rate, and would appropriately limit the amount of information the Department would need to review to make a separate rate determination.

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[1] Indeed, the United States Court of Appeals for the Federal Circuit has noted that the basic purpose of the antidumping statute is to determine current margins as accurately as possible. Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Option 4: Reduce Section A questionnaire for voluntary respondents. At a minimum, the Department must revamp the Section A questionnaire for voluntary separate rate respondents by eliminating irrelevant questions and requests for information, allowing the Department to focus its inquiry on the information most critical to its determination. The Department should also eliminate the policy that an entity is entitled to a separate rate only if it exported the subject merchandise to the United States during the period of investigation. No independent entity should receive the countrywide rate, regardless of the date of its exports to the United States.

Option 5: Change nothing. If the Department does not implement any of the above policy improvements, it must at least maintain the statutory all-others rate methodology for all non-investigated, independent respondents as required by law. In addition, the Department should apply the statutory all-others rate methodology to all shipments from non-investigated, independent exporters, regardless of their suppliers.

The Department would not achieve its objectives by making it harder for respondents to establish their independence when reforms in Vietnam and other NME-designated countries have significantly increased the number of independent companies. In fact, the Department would sacrifice its objectives by doing so. It would also undermine the broader U.S. policy of supporting the continued implementation of market reforms in these economies. We urge the Department to continue its constructive NME policy evolution and not to retreat in the face of progress. While these reforms may not be moving ahead at the pace the Department would prefer, they are progressing, and it is important that Department policy continue to reflect this reality, thereby encouraging further progress.

Should the Department make the unfortunate decision to make it more difficult for respondents to qualify for a separate rate, or change its methodology to increase the voluntary independent rate above the statutory all-others rate, we ask that the Department refrain from applying the new policy to ongoing cases. We recognize that the Department generally has authority to apply some changes in policy to current investigations. However, applying such significant changes as those contemplated by the Department to its separate rates policy would be counterproductive and unfair to respondents.

The independent respondents we represent made a good-faith effort to cooperate with the Department's Shrimp investigation, based on the Department's existing policy. These companies expended significant time and resources to supply the information required to demonstrate their eligibility for a separate rate. Many of these companies could hardly afford this effort. Yet, they have done so with the understanding that they would receive, if deemed eligible, a separate rate under the Department's current policy and methodology. Thus, these companies understood that the high expense of participating would be offset by a clear benefit based on years of Department precedent. It would be unjust for the Department to pull the rug out from under these businesses by changing the separate rate rules in the middle of the investigation in a way prejudicial to those that most relied on those rules. These respondents have already absorbed the costs of participating in the Department's investigation. It would be unconscionable to reduce or eliminate any potential benefit of their participation after the fact.

We also note that some of the policy changes the Department is considering, such as deviating from the statutory all-others rate methodology for voluntary non-investigated entities, would be contrary to the Tariff Act of 1930. In these circumstances, a reviewing court would not defer to the Department's decision, which would be susceptible to overrule.[2] We therefore believe it is in all parties' interests to abstain from applying any policy change that would be adverse to respondents to ongoing investigations.

We are now pleased to provide our detailed responses to the Department's questions.

DOC Question 1: Is Section A of the NME questionnaire sufficiently detailed to allow the Department to make complete, accurate, and informed determinations regarding exporters' eligibility for separate rates? If not, what would you recommend that the Department change with respect to its section A questionnaire? For example, should the Department request further information pertaining to *de jure* control, or lack of control, by the NME entity?

As noted in the introduction to this letter, we believe the Department should abandon the countrywide-rate assumption, or at least implement one of the alternative approaches that would actually achieve the Department's stated objectives in a way that is consistent with economic reality in Vietnam and other NME-designated countries.

Should the Department continue to require that voluntary respondents submit a Section A questionnaire, however, it is clear that Section A is sufficiently detailed to permit the Department to make complete, accurate, and informed determinations regarding the exporters' eligibility for separate rates. In fact, Section A is overly broad for this purpose and could be streamlined by eliminating superfluous requests for information. We urge the Department to request only that information that is truly necessary for a separate rate determination. Requesting anything more only increases the strain on Department resources, while unnecessarily burdening respondents.

Under current Department policy, an entity must have exported the subject merchandise to the United States during the period of investigation and establish its independence from government control in order to request and qualify for a separate rate. The Department currently determines independence from government control by applying *de jure* and *de facto* tests. Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 Fed. Reg. 20,588 (May 6, 1991), as modified by, Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 Fed. Reg. 22,585, 22,587 (May 2, 1994). See also Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 24,119, 24,120 (May 3, 2004). To determine the absence of *de jure* control, the Department looks at three factors: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any

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[2] See Ta Chen Stainless Steel Pipe v. United States, 2001 Ct. Intl. Trade LEXIS 150, Slip Op. 2001-143, at 4 ("It is hornbook administrative law that an agency may change its policy, practice or legal interpretation, subject only to the constraint that it explain the reason for its change and that *the new policy remains consistent with the governing statute*.") (emphasis added).

legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. Id. To determine the absence of *de facto* control, the Department typically considers four factors: (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 government 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. Id. These factors are commonly referred to as the "Sparklers criteria."

Question 2 in the Section A questionnaire contains approximately 56 individual sub-questions and requests for explanations or information in order to allow the Department to determine *de facto* or *de jure* control of the respondent by the government. At least one sub-question, and typically several sub-questions, request information that directly go to each Sparklers criterion. This detailed examination is more than sufficient to allow the Department to apply the Sparklers tests to determine government control over respondents. Any additional questions would only have tangential, if any, relevance to the Sparklers criteria. In particular, the Department has determined that existing laws in Vietnam and China generally establish the absence of *de jure* government control of state-owned entities in these countries.[3] See Memorandum to Joseph A. Spetrini, Deputy Assistant Secretary for AD/CVD Enforcement Group III, from Joseph Welton, Case Analyst, through Edward Yang, Director, Office IX and James C. Doyle, Program Manager: Separate Rates for Exporters that Submitted Questionnaire Responses, Preliminary Determination; Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, dated January 24, 2003 at 8 ("[E]ach respondent submitted copies of the legislation of the Socialist Republic of Vietnam [*e.g.*, Law on Enterprises, Law on State Enterprises, and Commercial Law] demonstrating the statutory authority for establishing the *de jure* decentralized control over the export activities and the absence of government control associated with its business registration.") and 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, 22,587 (May 2, 1994) ("Three enactments that have been placed on the record in this case indicate that the responsibility for managing state-owned enterprises has been shifted from the government to the enterprise itself. These are the 'Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People,' adopted on April 13, 1998; 'Regulations for Transformation of Operational Mechanism of State-owned Industrial Enterprises,' approved on August 23, 1992; and the 'Temporary Provisions for Administration of Export Commodities,' approved on December 21, 1992.... The existence of these laws indicate that respondents...are not subject to de jure control."). Neither Department resource constraints nor large numbers of Section A respondents are relevant reasons to reverse these general determinations; in fact, these

[3] We mention China because the Department's decision on this issue will be motivated, in large part, by the Department's experience with China, due to the large number of cases that now involve China. China's laws, however, like Vietnam, establish *de jure* independence to both private and state-owned enterprises.

considerations strongly support the Department's general recognition of no *de jure* control by the government in these countries.

It is not clear how the remaining nine questions of the Schedule A questionnaire assist the Department in determining whether a respondent is independent from government control, and thus eligible for a separate rate. Section A Question 1 requests information about the quantity and value of the respondent's sales in the United States during the period of investigation. This question clearly helps the Department determine threshold eligibility for a separate rate. However, establishing whether an entity exported the subject merchandise to the United States during the period of investigation in order to qualify for a separate rate is unnecessary and unwarranted.

In determining a separate rate, the critical issue is whether an entity is under the control of the government or is independent from government control. Whether an entity exported the subject merchandise precisely during the period of investigation, or only one day before or one day after the period of investigation, is immaterial to establish the entity's relationship with the government. We see no justification for subjecting an independent entity to the adverse inference countrywide rate simply because that entity did not export the subject product during the period of investigation. In the market-economy context, an exporter that did not export the relevant merchandise to the United States during the period of investigation would receive the all-others rate in the event it exports the product after the imposition of antidumping duties. The same logic applies in the NME country context. An independent exporter that did not export the good in question during the period of investigation should receive the statutory all-others rate (*i.e.*, Section A respondents separate rate) if it exports the good to the United States after the imposition of antidumping duties, while an entity subject to government control (that did not demonstrate its independence during the investigation) might appropriately receive the countrywide rate.

Shortening the Section A questionnaire for companies seeking separate rate status is the only treatment that achieves the Department's stated objectives. Such a policy would be internally consistent and fair to all involved, and would improve the accuracy of the Department's antidumping determinations. Under this treatment, independent companies would receive the independent all-others rate, while entities controlled by the government would receive the countrywide rate. This is an accurate and fair result. It would also reduce the strain on the Department's budget. Instead of spending its limited time and resources reviewing and verifying irrelevant information, the Department could hone in on the information critical to its determination.

In the event the Department decides to retain this threshold period-of-investigation shipment requirement, despite its clear superfluity, the response to Section A Question 1 provides sufficient information to establish whether the company had exported the subject merchandise to the United States during the period of investigation. The Department requires no additional information to make this determination for separate rate eligibility.

Unlike Section A Question 1, the remaining Section A questions bear no clear relation to the Department's current separate-rate determination policy. Question 3 concerns the corporate structure and affiliations; Question 4 concerns the sales process; Question 5 concerns accounting and financial practices; Question 6 concerns merchandise; Question 7 concerns further manufacturing in the United States; Question 8 concerns exports through intermediate countries; Question 9 concerns sales of merchandise under investigation supplied by an unaffiliated producer; and Question 10 concerns exports through trading companies. Together, these questions contain approximately 47 sub-questions and requests for explanations or information, none of which appear to go directly to the Sparklers criteria. The Department could conserve its resources by dropping these questions for Section A respondents and focusing only on questions relevant to its inquiry; namely, whether the entity is subject to the control of the government. This would also allow the Department to spend more time analyzing and verifying the relevant information provided by respondents in answer to Section A Question 2, thereby improving the accuracy of Department determinations.

It should be apparent that requesting even more information from respondents would not help the Department conserve resources, particularly when nine of the ten questions the Department already asks are largely irrelevant to its separate rate inquiry. It serves no purpose to request even more information of marginal or limited value, or that largely duplicate information requested in a separate question. It would only stretch limited Department resources even further and would cause additional burden to respondents, with little corresponding benefit.

Therefore, in sum, should the Department continue to require that voluntary respondents seeking a separate rate[4] submit a Section A questionnaire, we urge the Department to: (1) eliminate its policy requiring an entity to have exported to the United States during the period of investigation in order to request a separate rate; (2) drop Section A Questions 1 and 3 through 10 for non-investigated companies seeking a separate rate; and (3) not to pose additional questions that do not seek information directly related to the Sparklers criteria.

DOC Question 2: What new procedures or approaches should be followed at verification to ensure a rigorous examination of whether a respondent qualifies for a separate rate?

As noted in the introduction to this letter, we believe the Department should abandon the countrywide-rate assumption, or at least implement one of the alternative approaches that would actually achieve the Department's stated objectives in a way that is consistent with economic reality in Vietnam and other NME-designated countries. Under most of these approaches, Department verification of voluntary independent respondents would be unnecessary, significantly conserving Department resources.

Should the Department insist on maintaining some verification procedure, however, the Department should not waste its time verifying information that does not directly establish

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[4] In this letter, the term "separate rate" refers to a rate other than the countrywide rate.

whether a company is independent from government control. This means that the Department should neither request nor verify any information related to Questions 1 and 3 through 10 of the current Section A questionnaire for voluntary respondents. Instead, the Department should focus exclusively on verifying information provided in responses to Section A Question 2. This is the question that provides the information necessary to satisfy the Sparklers criteria. By sharpening its focus during verification, the Department could verify a larger number of respondents in each investigation, and it could examine those respondents subject to verification more closely. This approach would allow the Department to achieve both of its stated goals: improving the accuracy of Department separate rate determinations and conserving resources.

DOC Question 3: Due to the number of possible section A respondents in many cases and the Department's resource constraints, should the Department establish a process whereby exporters seeking a separate rate must prepare a request and satisfy established requirements before the Department seeks additional information through the questionnaire process? What requirements would you recommend the Department establish?

Again, we believe the Department should abandon the countrywide-rate assumption, or at least implement one of the alternative approaches that would actually achieve the Department's stated objectives in a way that is consistent with economic reality in Vietnam and other NME-designated countries. Under the first two of these approaches, the Department would not require any information from voluntary respondents, so this question would be moot.

In any case, it is clear that the Department should not establish a separate process for respondents seeking a separate rate that would be *on top of* the Section A questionnaire process. This would make no sense given the Department's serious resource concerns, and it would not improve the accuracy of Department separate rate determinations. Undertaking more work of limited value is not the answer.

However, if the Department established a new process *in lieu of* the existing Section A questionnaire process, the Department could make progress in achieving its twin goals. Rather than require that all entities requesting a separate rate submit a Section A questionnaire, the Department could instead require such entities to prepare a limited, *pro forma* request for separate rate treatment, which would be automatically approved absent clear evidence or knowledge that the respondent is not independent from government control (Option 3 above). Such an approach would be consistent with both the ongoing and deep market reforms in NME countries and the evolution in Department treatment of respondents requesting a separate rate.

The Department could choose to randomly verify a portion of the *pro forma* separate rate requests. Only the chosen entities would prepare a full Section A questionnaire (consisting only of Section A Question 2 as stated above), which would be the basis for Department verification. This procedure would limit the amount of information the Department would be required to review for separate rate status, without penalizing respondents that are not subject to government control by arbitrarily assigning them the punitive countrywide rate.

Random verification decisions should be made on a case-by-case basis, depending on the Department's workload and resources at the time, the number of respondents seeking separate rate treatment, and any Department experience with the country, industry, or entities under investigation. In some instances, verification may be limited to a specific number of respondents, while verifying a predetermined percentage may be appropriate in cases with smaller numbers of respondents seeking a separate rate. Whatever method the Department chooses, its decision should be reasonable, supportable, and based on the circumstances of the case at issue. By reducing the number of Section A questionnaires, and eliminating the unnecessary questions, the Department could significantly improve its ability to rigorously verify the chosen respondents.

DOC Question 4: Should the Department institute an earlier deadline for parties filing section A submissions who are requesting only a separate rate (as opposed to a full review), in relation to the deadline for mandatory respondents? When should this deadline be?

If the Department retains its current Section A questionnaire format and process, the Department should not impose an earlier deadline on respondents who are only requesting a separate rate than it imposes on mandatory respondents. The deadline for the same material should be the same for all respondents. After all, the time necessary to complete Section A fully and accurately is no different for voluntary respondents than it is for mandatory respondents. It makes no sense to arbitrarily bifurcate the Section A deadline.

The only instance in which an earlier deadline for voluntary respondents would make sense is in respect to the deadline for submission of the *pro forma* request for a separate rate proposed in Option 3 and detailed under the response to DOC Question 3 above. If the Department implemented this sensible approach, it could reasonably establish an earlier deadline for submission of these *pro forma* requests, because the information necessary to complete the request would be limited. This would give the Department time to review the *pro forma* separate rate requests and then choose those that will be subject to verification. Ideally, the Section A responses for separate rate requestors subject to verification would coincide with the deadline for Section A responses from mandatory respondents. However, the deadline for voluntary respondents could come after that for mandatory respondents given that Section A for voluntary respondents would consist only of current Section A Question 2, which would require significantly less time for the Department to review.

DOC Question 5: In light of the Department's limited resources, should the number of section A respondents be limited and, if so, upon what basis should the Department limit its examination? For example, should the Department limit the examination to a specific number of parties, base this decision upon a percentage of the number of overall respondents requesting separate rates treatment, or develop an entirely different test to limit its examination?

In order to conserve Department resources in making separate rate determinations, the clear resolution is to eliminate the countrywide-rate assumption, which would relieve the Department from reviewing Section A responses altogether. The other alternatives discussed in the introduction to this letter would also remove the need to resort to such arbitrary devices as the Department suggests by this question. Denying a separate rate to an independent respondent,

as proposed by this question, would obviously not improve the accuracy of Department separate rate determinations.

In any case, as more fully explained in the answer to DOC Question 6 below, the Tariff Act of 1930 prohibits the Department from denying a separate rate—either an individually calculated rate or the statutory all-others rate—to a respondent simply because the Department chose not to review the respondent's Section A questionnaire (or other satisfactory request for a separate rate). Thus, the Department may not limit the number of Section A respondents and assign left-out respondents the countrywide rate, or any rate other than the statutory all-others rate.

DOC Question 6: Under current practice, the Department maintains three rate categories: country-wide, individually calculated, and the average of the non-zero, non-*de minimis*, non-adverse rates. Does the Department have the authority to eliminate entirely the rate category that is based on the average of the calculated non-zero, non-adverse, and non-*de minimis* margins? This rate category is currently applicable to section A respondents, as well as to non-investigated respondents providing full questionnaire responses. If the Department has authority, should it eliminate this category and upon what basis?

If the Department maintains the countrywide/separate rate distinction, the Department does not have the authority to eliminate the rate category that is based on the average of the calculated non-zero, non-*de minimis*, and non-adverse margins, currently used for cooperative Section A respondents in NME antidumping cases. The Tariff Act of 1930 authorizes the Department to calculate only two antidumping rates: individual rates based on full investigations (or facts available in certain circumstances, such as for uncooperative entities) or a single all-others rate. §§733(d)(1)(A), 735(c)(1)(B)(i), 776, and 777A(c). While the Act generally requires the Department to calculate an individual rate for each known exporter, §777A(c)(1), it provides an exception in cases where individual examination of all exporters is not practical because of their large numbers. §777A(c)(2). If the Department does not calculate an individual rate for an entity or entities, the Act requires the Department to calculate an all-others rate for those non-investigated exporters. §§733(d)(1)(A)(ii) and 735(c)(1)(B)(i)(II). The Court of International Trade has stated that "Congressional support for the 'all-others' rate [is] without distinction for NME or non-NME contexts." UCF America Inc. v. United States, 20 C.I.T. 320, 326-27 (Feb. 27, 1996).

The Department must use a specific methodology when calculating the all-others rate, namely the weighted average of the estimated weighted average dumping margins of the individually investigated entities, excluding any zero and *de minimis* margins, and any margins determined entirely on the facts available. §735(c)(5)(A). The only permitted exception to this rule is when *all* of the individually investigated entities had zero or *de minimis* weighted average dumping margins, or where all the margins were determined entirely based on facts available.

Prior to 1991, the Department determined rates in NME country investigations just as it determined rates in a market-economy investigation. The Department issued separate rates for all reviewed companies, and issued a fairly calculated (*i.e.*, non-adverse) all-others rate for unreviewed companies. See UCF America, supra, at 323 (quoting the Department's discussion

of its NME policy change from its Redetermination on Remand) and Tapered Roller Bearings From the People's Republic of China; Final Determination of Sales at Less Than Fair Value, 52 Fed. Reg. 19,748, 19,751 (May 27, 1987). In 1991, the Department began to presume that all exporters are subject to government control, and thus should be assigned a single, adverse, countrywide rate. See Final Results of Antidumping Duty Administrative Review: Iron Construction Castings From the People's Republic of China, 56 Fed. Reg. 2742, 2744 (Jan. 24, 1991). This policy was based on the theory that all firms in an NME country are subject to common ownership and control, and thus are in reality one entity.[5] See, e.g., UCF America, supra, at 322 (quoting from the Department's Redetermination on Remand that the Department presumes all non-market economy exporters constitute "a single enterprise controlled by the central government"). The Department has permitted companies to rebut this presumption if they can establish an absence of both *de facto* and *de jure* government control over their export activities. See, e.g., Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 Fed. Reg. 22,585, 22,587 (May 2, 1994). When entities are able to demonstrate their independence from the government, the Department assigns an individually calculated rate for each of the fully investigated firms, and a weighted average of the individually calculated rates, excluding any rates that were zero, *de minimis*, or based entirely on facts available for non-investigated entities.

The Department's early applications of the 1991 policy were not clear and consistent. In some investigations, the Department appeared to determine individual rates only for exporters that were fully investigated and eligible for a separate rate, while referring to the countrywide entity as "all others." See, e.g., Sparklers from China, supra, at 20,591 (referring to the non-individually investigated entities as "All Others"); Final Results of Antidumping Duty Administrative Review: Tapered Roller Bearings and Parts Thereof From the People's Republic of China, 56 Fed. Reg. 67,590, 67,597 (Dec. 31, 1991) (referring to the non-individually investigated entities as "All Others"); and Final Determination of Sales at Less Than Fair Value: Certain Helical Spring Lock Washers From the People's Republic of China, 58 Fed. Reg. 48,833, 48,849 (Sep. 20, 1993) (referring to the non-individually investigated entities as "All Other PRC Manufacturers, Producers and Exporters"). The Department stated that the use of the "All Others" terminology in these early cases was imprecise, and that it did not reflect a practice of equating the countrywide rate to the all-others rate. See UCF America, supra, at 323 (quoting

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[5] This treatment is analogous to the Department's treatment of companies under common ownership in a market-economy investigation. As the Department stated in Bicycles from China, "[W]e assign a single NME rate to the NME entity just as we assign a single rate to exporters or producer [sic] in a market economy that are deemed to comprise a single enterprise. Also, as in all cases in which multiple exporters are treated as a single entity, the response must include data from all companies that comprise the collapsed entity. If any company fails to respond, the entire entity receives a rate based on facts available." Bicycles from China, infra, at 19036.

the Department as stating that in Tapered Roller Bearings Administrative Review it should have referred to the countrywide rate as the "PRC rate" and not an "all others" rate).[6]

In the mid-1990s, when the number of entities requesting a separate rate increased, the Department began to make clear that the countrywide rate and the all-others rate were distinct.[7] In Honey from the People's Republic of China, the Department appeared to determine individual rates for fully investigated entities and the countrywide rate for the government-controlled entity. However, the Department appeared to apply an all-others rate methodology that complied with the all-others rate statutory provision, Section 735(c)(5)(A). Notice of Preliminary Determination of Sales at Less Than Fair Value: Honey From the People's Republic of China, 60 Fed. Reg. 14,725, 14,729-30 (Mar. 20, 1995). Soon after the Honey case, the Department clarified that the "NME-wide" rate was determined pursuant to Section 735(c)(1)(B)(i)(I) for individually investigated entities and not the all-others methodology of Section 735(c)(5). Notice of Final Determination of Sales at Less Than Fair Value: Bicycles From the People's Republic of China, 61 Fed. Reg. 19,026, 19,035-36 (Apr. 30, 1996).

Since Bicycles, the Department has confirmed that it applies the statutory all-others rate methodology only to Section A respondents:

> The "all others" category in a non-market economy proceeding, unlike the "all others" category in a market-economy investigation, only includes companies that demonstrated entitlement to separate rates and expressed a willingness to participate in the proceeding, but whose responses were not examined due to limited Department resources.

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[6] Although the CIT disapproved of the Department's use of a "PRC-rate" in lieu of an "all-others" rate, UCF America at 327, the Department has noted its disagreement with the Court's reasoning, Final Court Decision and Amended Final Results: 1989-90 Administrative Review of Tapered Roller Bearings and Parts Thereof from the People's Republic of China, 61 Fed. Reg. 29,345, 29,346 (June 10, 1996), and has continued to apply an "NME-wide rate." See, e.g., Notice of Final Antidumping Duty Determination of Sales Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 37,116, 37,120 (June 23, 2003) (referring to "Vietnam Wide Rate" in table of margins).

[7] We note that the CIT, in dicta, stated that in NME cases, where "all exporters or producers either qualify for a separate company-specific rate...or remain part of the NME entity and receive the NME rate," it is unnecessary to calculate "an all others rate, as all exporters and producers have been, at least in theory, reviewed." Transcom, Inc. v. United States, 22 C.I.T. 315, 321, 5 F. Supp. 2d 984, 989 (1998) rev'd on other grounds, 182 F.3d 876 (Fed. Cir. 1999). The situation addressed in the Department's request for comments, a separate rate for Section A respondents, is clearly distinguished from Transcom. In Transcom, the Department individually investigated all entities requesting a separate rate; there were no individual, but non-investigated respondents, so in theory all exporters were covered in that case. Where there are individual, but non-investigated respondents, however, the NME-wide rate and individual rates do not cover all exporters. In this circumstance, an all-others rate is required.

Notice of Final Determination of Sales at Less Than Fair Value: Steel Wire Rope from India and the People's Republic of China; Notice of Final Determination of Sales at Not Less Than Fair Value: Steel Wire Rope from Malaysia, 66 Fed. Reg. 12,759, 12,671 n. 3 (Feb. 18, 2001). Even more recently, the Department confirmed this practice in a series of remands and redeterminations concerning apple juice concentrate from the People's Republic of China. In its first remand redetermination, the Department confirmed that it had followed the statutory all-others rate methodology for determining the rate for the four non-selected respondents. Yantai Oriental Juice Co. v. United States, Redetermination 1, 14 (Nov. 15, 2002).

The Court of International Trade has implicitly held that the Department lacks the authority to apply an all-others rate methodology that differs from the statutory all-others rate, Section 735(c)(5). UCF America, supra, at 325-26. In UCF America, the court rejected a "PRC-rate" in lieu of an "all-others" rate, noting that the Department had pointed to no authority for establishing a "PRC-rate." Although this holding may confuse somewhat the Department's position that the "NME-wide" rate is determined pursuant to Section 735(c)(1)(B)(i)(I), it does suggest that the Court sees no alternative to the statutory all-others rate for non-investigated independent entities.[8] While the CIT has not explicitly held more recently that the Department must use the all-others methodology for such non-investigated independent respondents, the Court has implicitly approved of the Department's practice. See Yantai Oriental Juice Co. v. United States, CIT Slip Op. 03-33 (Mar. 21, 2003) (noting that the Department determined that it would continue to calculate the Cooperative Respondent's margin following the all-others methodology and holding that the Department must apply the methodology consistently with the Act).

The current Department practice is consistent with, indeed is required by, the Act. If the Department is unable to fully investigate all entities that request separate-rate status, the Department is faced with two potential options for non-investigated exporters. First, such respondents could be placed in the all-others category and be assigned the all-others rate. Second, they could be treated as part of the government-controlled entity and be assigned the countrywide rate. The Act provides no third option. However, given their cooperation in providing the information necessary to prove their independence from the government-controlled entity, the only permissible option under the Act for such respondents is the all-others category.

Section 782(e) of the Act requires the Department to consider information voluntarily submitted by exporters as long as certain threshold conditions have been met. In other words, the Department cannot ignore information from NME exporters that establishes their independence from the government. Once the Department accepts that these cooperating entities are not subject to the *de jure* and *de facto* control of the government, the Department may not treat them as part of the countrywide entity and subject them to the countrywide rate. The Court of International Trade has confirmed this, holding that the Department may not "reject

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[8] This view is bolstered by the Court's statement above that Congress did not distinguish between NMEs and market economies in supporting the statutory all-others rate.

[respondents'] separate rates evidence, and, thus, assign them the PRC-wide antidumping margin based on the presumption of state control."[9] Shandong Huarong General Group Corp. and Liaoning Machinery Import & Export Corp. v. United States, 2003 Ct. Intl. Trade LEXIS 153, CIT Slip Op. 2003-135 at 41 (Oct. 22, 2003). The Department also recognized this requirement when it stated, "[I]t would not be appropriate for the Department to refuse to consider a request for an examination of separate rates status, and assign to the cooperative firms the rate for the non-cooperative firms (which in this case is an adverse margin based on facts available)...." Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Preserved Mushrooms From the People's Republic of China, 63 Fed. Reg. 41,794, 41,798 (Aug. 5, 1998). "Given this, we believe that the only reasonable approach *consistent with the statute* is to assign these respondents a weighted-average dumping margin based on the calculated margins for those respondents examined." Memorandum to Barbara R. Stafford, Deputy Assistant Secretary, Import Administration, from Magd A. Zalok, Brian C. Smith, Gabriel Adler, Jennifer Stagner, Linda Chang, and Lynn Barden, through Gary Taverman, Director, Office of AD/CVD Enforcement: Selection of Respondents, Antidumping Duty Investigation of Brake Drums (A-570-845) and Brake Rotors (A-570-846) from the People's Republic of China, dated July 19, 1996 (emphasis added). Thus, the Act requires a statutory all-others rate for Section A respondents.

Although the Department may not eliminate the statutory all-others rate for Section A respondents, it may abandon the countrywide rate and place the government-controlled entity into the all-others category. Of course, should the Department choose to do this, Section 735(c)(1)(B)(i)(II) would still require calculating the all-others rate by using the weighted average of the fully investigated rates, excluding any zero, *de minimis*, or rates based entirely on facts available for non-investigated entities. The Department may use an alternative methodology only if *all* of the investigated rates were zero, *de minimis*, or based entirely on facts available. §735(c)(5)(B). In addition, should the Department choose to use facts available under this exception, the Department could not apply adverse inferences to develop a punitive all-others rate that is equivalent to the former countrywide rate. The Department may draw adverse inferences only when a party fails to cooperate with the investigation. §776(b). Section A respondents cannot be deemed uncooperative if they have provided all the information necessary to prove their independence. The Department could not calculate an adverse inferences-based all-others rate, therefore, because the all-others category would include cooperative entities. As

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[9] The CIT ordered the Department to:

> (1) consider the separate rates evidence submitted by the Companies, (2) determine whether the assignment of separate rates for the Companies is warranted, i.e., that the Companies have demonstrated an absence of state control both in law and in fact, and (3) if Commerce finds that the assignment of separate rates is warranted, calculate separate antidumping margins for [respondents].

Shandong at 45.

the Department recognized in Certain Preserved Mushrooms from China, cooperative entities may not be punished as an uncooperative entity. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Preserved Mushrooms From the People's Republic of China, 63 Fed. Reg. 41,794, 41,798 (Aug. 5, 1998).

Policy Considerations

In addition to the legal rationale above, there are strong policy reasons for maintaining the separate rate status of Section A respondents, and abandoning the policy of assuming one countrywide rate for NME countries. The economic reforms in NME designated countries have not regressed, they have deepened. The U.S.-Vietnam Bilateral Trade Agreement and the accession of China to the WTO provide strong evidence of this progression. As discussed in the response to DOC Question 1 above, Vietnam and China have implemented laws that the Department has recognized generally create sufficient independence to assume the lack of *de jure* control of most government-owned businesses by their respective governments. More broadly, the Department has acknowledged Vietnam's progress:

> The Department is cognizant of the positive changes, both in law and on the ground, that Vietnam has experienced over the past 15 years. The Government of Vietnam has undertaken significant market reforms in its *doi moi* initiative and passed legislation to promote the market-based development of its economy. Wage rates are largely market-based. The government has also encouraged the development of small- and medium-sized enterprises through legal reforms that have led recently to the impressive growth of the private commercial (non-farm) business sector.

Memorandum for Faryar Shirzad, Assistant Secretary, Import Administration, from Shauna Lee-Alaia, George Smolik, Athanasios Mihalakas, and Lawrence Norton, Office of Policy, Import Administration, through Albert Hsu, Senior Economist, Office of Policy, Import Administration: Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status, dated November 8, 2002 at 42. These are strong reforms. It makes no sense for the Department to consider altering its NME policies in a way that is contrary to the direction of these reforms in Vietnam and China.

Regression in Department separate-rate policy would undermine the broader U.S. policy of supporting market-based reforms. It would warn trading partners that even if countries make the structural adjustments the United States has pressed, the U.S. Government may not reward them, indeed, it may punish them. Eliminating separate-rate status for Section A respondents would discourage rather than encourage continued reform and would particularly harm the small exporters that are crucial to future economic development in Vietnam and China.

The significant expansion in Section A respondents in recent cases is indicative of the market reforms these countries have implemented, and, until now, the Department's treatment of entities requesting separate rates reflected this reality. When the Department promulgated its current antidumping regulations, it declined to codify the one-countrywide-rate assumption. The Department cited "the changing conditions in those NME countries most frequently subject to AD proceedings," adding that in would be "[in]appropriate to promulgate the [one-countrywide-rate] presumption...in these regulations." 62 Fed. Reg. 27,295, 27,304 (May 19, 1997). The Department added that it intended to continue developing its policy in this area. Id. Indeed, under the Department's current practice, there is relatively little difference between NME investigations and market economy investigations in terms of applying the all-others rate methodology. Extinguishing these vestiges by abandoning the countrywide rate assumption is the logical next step, rather than regression. In this way, the Department could address its legitimate workload concerns consistently with the economic reality in these countries. Alternatively, should the Department choose not to abandon the countrywide-rate assumption, the Department could implement our proposed Option 2 or Option 3 above as a modest step to reduce the Department's workload related to separate rate determinations that reflects the realities of economic reform in these countries.

DOC Question 7: Should the Department develop an additional rate category beyond country-wide, individually calculated, and the average of the non-zero, non-*de minimis*, non-adverse rates? This additional rate category could be assigned to cooperative firms denied a separate rate under options (5) or (6) above, as an alternative to assigning them the country-wide rate. How should the duty rate for this fourth rate category be calculated?

As discussed in the response to DOC Question 6 above, the Department does not have the authority to create a new rate category, such as that implied by this question. The Act provides authority only for two rates: an individually calculated rate or an all-others rate. Cooperative, non-investigated entities must be assigned the statutory all-others rate, whether the Department abandons the countrywide-rate assumption as we suggest above or under any alternative policy.

DOC Question 8: Once a separate rate has been awarded, should the Department apply it only to merchandise from producers that supplied the exporter when the rate was granted? In that case, should merchandise from all other suppliers shipped through an exporter with a separate rate receive the country-wide rate, the average of the non-zero, non-de minimis, non-adverse reviewed respondents' margins, or another duty rate altogether?

As noted in the introduction to this letter, we believe the Department should abandon the countrywide-rate assumption, or at least implement one of the alternative approaches that would actually achieve the Department's stated objectives in a way that is consistent with economic reality in Vietnam and other NME-designated countries. By eliminating the countrywide-rate assumption, the Department would also be eliminating the issue raised by this question because all non-investigated exporters would receive the statutory all-others rate.

Under any alternative policy, the Department should apply a separate rate to merchandise from all producers that supplied the exporter, regardless of whether the producer supplied the

exporter when the separate rate was granted. Any other treatment would not further the Department's twin objectives.

An exporter receives a separate rate only if it is independent from government control. It makes little sense to apply a rate affixed to an unaffiliated entity to an exporter, simply because that unaffiliated entity supplied the exporter. It is the exporter's price to the United States that is material to the dumping margin, not the producer's price to the exporter. Furthermore, it is possible that the producer itself received a separate rate. In this instance, why would an exporter receive anything other than a separate rate, when both it and its supplier were subject to a separate rate?

This is another example of where the Department's proposal would only exacerbate its budget concerns. Looking behind each exporter for every shipment of merchandise would increase the strain on the Department to determine separate rate eligibility and make it significantly more difficult to administer these determinations at the border.

This complexity provides further support for abandoning the one countrywide-rate assumption altogether, or at least focusing only on the exporter, without regard to the supplier. This would achieve the most accurate result, and would conserve Department resources for higher-priority activities.

DOC Question 9: Should the Department extend its separate-rates analysis to exporter-producer combinations, i.e., should the Department consider any government control exercised on an exporter through a producer?

Again, by eliminating the countrywide-rate assumption, the Department would also be eliminating the issue raised by this question because all non-investigated exporters would receive the statutory all-others rate. However, if some form of the separate rate approach is maintained, the Department should not extend its separate-rates analysis to exporter-producer combinations. In an NME investigation, an exporter would receive a separate rate only if it demonstrated its independence from government control. By definition, therefore, it makes no sense to waste limited Department resources seeking to find government influence over an exporter that the Department has already found is not subject to such government influence.

Again, this appears to be an instance where the Department is losing sight of its twin objectives. Such an investigation would not only consume significant resources, it would be fruitless. If an exporter were subject to the *de facto* control of the government through a producer, it would not receive a separate rate in the first place.

Similar to the issue raised in DOC Question 8, this complexity provides additional support for abandoning the one countrywide-rate assumption, or at least focusing only on the exporter, without regard to the supplier. This would achieve the most accurate result, and would best conserve Department resources.

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If you have any questions about these comments, please do not hesitate to contact Matthew Nicely at (202) 303-1113.

Respectfully submitted,

William H. Barringer
Matthew R. Nicely

On Behalf of the VASEP Shrimp Committee