January 24, 2005

The Honorable Donald L. Evans
Secretary of Commerce
U.S. Department of Commerce
Washington, D.C. 20230.

Att. Mr. Joseph Spetrini
Acting 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 (December 28, 2004)

Dear Secretary Evans:

This letter is submitted on behalf of the Government of Vietnam's Ministry of Trade to comment on the Department's announcement of a change in its "separate rates" practice for non-market economy (NME) investigations. Separate Rates Practice in Antidumping Proceedings Involving Non-Market Economy Countries, 69 Fed. Reg. 77,722 (December 28, 2004). This most recent request -- the third in a series of requests -- follows the Department's initial request for comments on the same subject dated May 3, 2004 (69 Fed. Reg. 24,119), to which we responded on June 1, 2004, as well its second request dated September 20, 2004 (69 Fed. Reg. 56,188), to which we responded on October 15, 2004. We appreciate being granted another opportunity to comment on this issue as the Department continues to consider the best options for addressing changes to its separate-rate policy.

PROPOSED CHANGES

The changes the Department has proposed are essentially the same as those proposed in its second (September 20, 2004) announcement, though they have now been described in greater detail and reflected in a model application. Specifically, the Department proposes:

1. To replace the Section A questionnaire process with an application process, a draft copy of which has now been provided for comment.

2. To assign exporter-producer combination rates to NME exporters receiving a separate rate so that imports only from the specific exporter-producer combination(s) that existed during the period of investigation (or review) receive the benefit of the antidumping cash deposit rate calculated for that exporter-producer combination.

We offer the comments below to address both whether the specific changes the Department proposes to undertake are consistent with the statute and regulations, as well as whether they constitute sound public policy.

GENERAL COMMENTS

As a general matter, our comments remain the same as those we submitted on June 1 and October 15, 2004: that the Department has unnecessarily created its own resource problems by treating non-mandatory respondents in NME cases (starting in 1991) differently from the way the Department treats non-mandatory respondents in market economy ("ME") cases. The best approach would therefore be to eliminate the requirement to prove *de jure* and *de facto* independence from the Government, and to eliminate the unfair, adverse -- and usually market prohibitive -- countrywide rate. Once this is done, the other changes the Department proposes (concerning combination rates) would become moot -- or, at least, they *should* become moot, as there would no longer be any reason to consider treating companies located in NME countries any differently than companies that are located in ME countries. As discussed in our October 15, 2004, comments, as well as in comments provided by the Shrimp Committee of the Vietnam Association of Seafood Exporters and Producers ("VASEP Shrimp Committee" or "VSC"), there is no reason to assume that evasion of AD duties is more likely in cases involving NME countries than those involving ME countries, and the Department has presumably already concluded that it has the necessary mechanisms to police such activity for ME countries.

Short of taking this step, there are at least two other policy changes that remain better choices than the Department's current proposal, each of which was discussed in detail in previous comments submitted by us and the VSC:

> *Reverse the presumption of government control*. Short of abandoning the countrywide-rate assumption altogether, the Department should reverse the presumption of government control for the NME-designated countries 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.

> *Presume independence for voluntary respondents*. Under this option, the Department would require voluntary respondents to file only a limited, *pro forma* application 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 that 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.

We refer the Department to the VSC's June 1 comments for a more detailed discussion of these various options. Any of them would clearly be better than the Department's current proposal, both in terms of addressing the Department's resource concerns, as well as basic fairness.

Although we maintain our position that the entire "separate rate" and "countrywide rate" policies should be eliminated, we offer our responses to the Department's specific proposals below.

COMMENTS ON SPECIFIC PROPOSALS

Comment #1: Treatment of Incomplete or Unsatisfactory Applications

The Department proposes to change its separate rates process from a Section A response process to an application process. In its draft application form, the Department seeks to streamline the process by limiting the number of questions to those that are most relevant to the *de jure/de facto* government control issues that are relevant to obtaining separate rate status. The application also simplifies the process for both prospective respondents and the Department, by both shortening the questionnaire, and creating a "multiple choice" approach to some of the more basic questions. We wholeheartedly applaud these improvements.

That being said, the Department's intentions with the application process are problematic, in that the proposed process -- as described in the *Federal Register* notice -- appears to focus almost entirely on easing the resource burdens on the Department, with very little concern shown for the difficulties respondents might face, or the honest mistakes a respondent might make in completing the application. Consider, for instance, the following passage from the Department's notice:

> In particular, by explicitly detailing which documents the Department will accept to substantiate a separate rates claim, the application should minimize the need for the extensive supplemental questionnaires that have proven to be so burdensome and time-consuming. Since firms will have clear notice of what is required to document a separate rates claim, firms submitting incomplete applications will be rejected for separate rates status without supplementary questionnaires.

69 Fed. Reg. 77,722, 77,724. This passage, though perhaps on its face seemingly reasonable, ignores two important factors -- one practical, one statutory.

The practical factor is that the application itself is not, in fact, so "clear" as to what is required to document a separate rates claim, because the Department has in multiple instances included an "other" category for respondents to choose if other options to not apply. While we support the idea of including an "other" category for this very reason, the notion that the Department will reject an application out of hand -- without supplemental questionnaires -- if it believes the "other" documentation does not meet its standards is rather draconian.

The statutory factor is that the Department's intent is flatly illegal. Consider the following:

- First, 19 U.S.C. §1677m(c)(2) requires the Department to "take account of any difficulties experienced by interested parties, particularly small companies, in supplying information requested … in connection with investigations and reviews under this subtitle, and shall provide to such interested parties any assistance that is practicable in supplying such information." No such effort is being taken if the Department carries out its intent as stated in its *Federal Register* notice.

- Second, 19 U.S.C. §1677m(d) says "If the [Department] determines that a response to a request for information under this subtitle does not comply with the request, the [Department]… shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle." No such opportunity is being afforded to respondents if the Department carries out its intent to simply reject an application and ask no follow up questions.

- Finally, the Department appears to forget that the application of the countrywide rate to a company that has applied for separate rate status represents a decision by the Department to apply adverse facts available. According to 19 U.S.C. §1677e(b), adverse facts available can only be applied when the Department determines that the interested party "failed to cooperate by not acting to the best of its ability to comply with a request for information from the [Department] … in reaching the applicable determination." The Department cannot, in turn, find that a party failed to cooperate to the best of its ability if it does not provide the party with an opportunity to fix its response, as required by 19 U.S.C. §1677m(d).[1]

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[1] The U.S. statute essentially follows the approach set forth in the AD and SCM Agreements under the WTO. *See, e.g.,* Annex II of the AD Agreement. The approach contemplated by the Department's proposal would most certainly not pass muster under Annex II, given that the Department does not plan to provide parties with an explanation of why an application is unsatisfactory, as well as the time necessary to fix it (Annex II, paragraph 6);

There are good policy reasons for the rules that require the Department to provide opportunities to respondents to fix their responses. Submission of additional information through supplemental questionnaires is effectively a method by which the agency permits companies to exhaust their administrative remedies before seeking judicial review. The effect of not providing companies this opportunity is severe, as the countrywide rates the Department chooses are usually so prohibitively high as to lock the company out of the U.S. market while it is seeking judicial review, which sometimes (depending on the judge and possible appeals to higher courts) can take many years. For companies that have come to depend on the U.S. market for their livelihood -- and who are never specifically found to be trading unfairly -- this can literally put them out of business, resulting in layoffs and, in turn, poverty for its workers. There is no reason to think of companies and workers in these countries as somehow different from companies and workers in so-called ME countries. These companies should not be punished with adverse facts available simply because they failed to mark a box in a separate rate application.

Comment #2: Treatment of Companies with No Sales During the POI

Despite our previous urgings, the Department's draft application maintains the requirement that separate rate candidates must have exported to the United States during the period of investigation ("POI") in order to be eligible. This policy unfairly prohibits companies that normally sell to the United States, or that may have plans to sell to the United States, from obtaining separate rate status simply because they did not have shipments to the United States during a recent six-month period. It is unfair for such companies to automatically receive the adverse countrywide rate, which effectively bans them from the U.S. market. It is conceivable that a company did not ship to the United States during a six-month period for legitimate reasons, such as refurbishing a production facility. Under the Department's policy, such companies must wait to ship to the United States (in commercial quantities, at least) for two years or more while it waits for the first review to conclude (even a new shipper review requires a long wait). There is no reason why this arbitrary policy should remain in place if a company can show, on the basis of shipments made in an earlier or later period, that it operated independently of the government.

The same is true for the combination rate procedures the Department appears poised to adopt. It could be true that a company normally does business with another firm, but that during the POI the two companies did not do business together, for perfectly legitimate reasons. But, simply due to the timing of the petition -- over which they have no control -- those two companies can no longer do business together because the exporter's separate rate status cannot include shipments of the other company's product. Or, alternatively, it may be impossible for an exporter to demonstrate that it sold a certain producer's products to the United States during the POI if the exporter does not record withdrawals from inventory on a producer-specific basis.

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nor does the Department appear to give itself an opportunity to discern whether a party has acted to the best of its ability (Annex II, paragraph 5).

Denial of separate rates to such producer-exporter "chains" makes no sense under such circumstances and, for the same reasons set forth above, should be reconsidered.

Comment #3: Treatment of Affiliates

The Department must revise the manner in which it addresses affiliated parties in the draft application to ensure that its provisions are in accordance with the Department's statutory and regulatory authorities.

First, the Department has overstepped its legal authority in the draft application by requiring a company seeking separate-rate status to, in turn, ensure that any other "affiliated" company also submits such an application. Specifically, the Department states in the footnoted text on page 13 of the NME application that all affiliates of the company applying for a separate rate must also submit applications for separate-rate status in order for the applicant to be eligible for such treatment. Such a requirement violates basic due process concerns and also exceeds the Department's rationale regarding its "affiliated party" methodology.

The primary consideration in the Department's determination of affiliation is a party's ability to control another party. Section 771(33)(G) of the Tariff Act of 1930, as amended, provides a basic understanding of "affiliated persons" as any party that controls another party and the controlled party. The Department assumes for purposes of its draft NME application that all affiliated parties "control" other parties with which they are affiliated under the Department's definitions to such an extent as to be in a position to compel the other company to comply with the Department's requests for a separate-rate application. Such an assumption does not comply with U.S. due process concerns of affording a party the opportunity to explain why it may be unable to compel completion of such an application by an "affiliated" party. In many cases, the Department's definition of "affiliated parties" does not mirror the business reality of the degree to which a company can compel a company with which it has a close business relationship or an "affiliation" under the Department's regulations. The Department's NME application should be revised to allow for an applicant to be granted separate-rate status in those cases in which such an applicant can demonstrate its inability to compel an "affiliated" party to submit a NME application.

In addition, the Department provides at page 5 of its draft NME application that an applicant must certify that it "made a shipment of merchandise that was entered for consumption in the United States *or sold the subject merchandise to an unaffiliated customer* during the period of this segment under its own name…."(emphasis added) As currently drafted, the Department's NME application could result in the denial of separate-rate status to all NME companies that only sell the subject merchandise under CEP sales terms during the POI. The Department should revise Question 3(b) of the NME application's Section II to clarify that a company qualifies for separate rate treatment upon certification that during the POI it either made a shipment of merchandise that was entered for consumption in the United States or that it sold subject merchandise to the United States for ultimate consumption by an unaffiliated party.

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If you have any questions about these comments, please do not hesitate to contact us.

Respectfully,

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Minister
Ministry of Trade
Socialist Republic of Vietnam