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October 15, 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 (September 20, 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 the Department's revised options for changes it might make to its "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. 56,188 (September 20, 2004). This most recent request 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.

PROPOSED CHANGES

The changes the Department has proposed, as we understand them, can be summarized as follows:

1. To replace the Section A questionnaire process with an application process.

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) receives the benefit of the antidumping cash deposit rate calculated for that exporter-producer combination.

3. To assume that NME producers shipping through third countries set the price to the United States, and to assign to them, and not the reseller, an antidumping duty rate, unless evidence is submitted to the contrary.

In its request for comments on these proposed changes, the Department has asked (a) whether the changes are consistent with the statute and (b) whether they would effectively redress the problems the Department has identified, specifically (i) the increased burdens associated with receiving multiple requests for separate rate treatment and (ii) the alleged evasion of AD duty rates by NME producers once an order is in place. 69 Fed. Reg. at 56,189.

GENERAL COMMENTS

As a general matter, our comments remain the same as those we submitted on June 1: that the Department has unnecessarily created its own resource problems by treating non-mandatory respondents in NME cases (starting in 1991) differently from they 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 evasion) 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.

Indeed, the implication in the Department's request for comments that companies located in NME countries are somehow more likely to try to evade antidumping duties than are companies in ME countries is unfair. Why is the Department not considering similar policies for ME cases? There are often wide variations in the antidumping duty rates in ME cases, which could lead companies with high rates to sell through companies with lower rates, or to transship their product through other countries Why are NME countries being treated differently? Is this a veiled attempt to provide some additional protection from NME countries where no such additional protection would be permitted by the ME members to the WTO? Even if the Department's concerns with regard to China are legitimate, based on its experience in past cases, we fail to see the relevance of this for Vietnam. Why are we being punished for the actions of companies located in another country?

To the extent this policy is actually motivated by geopolitical concerns, it is worth noting that relationships between the United States and these countries -- including both Vietnam and China -- are much improved as compared with the time when the separate rate policy was instituted in 1991. China is now a member of the WTO; Vietnam is soon to become a member of the WTO, and economic relations between Vietnam and the United States have vastly improved since the signing of the U.S.-Vietnam Bilateral Trade Agreement. So, although the relationships have changed, the antidumping policies vis a vis these countries have not. Indeed, they appear to be getting worse rather than better.

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

DOC Proposal #1: To replace the Section A questionnaire process with an application process.

The Department proposes to change its separate rates process from a Section A response process to an application process. In the application form, the Department would list the documents required of an applicant that wishes to receive a separate rate, and would reject any application that is incomplete. In order to streamline the process, the application form would focus on only the information most relevant to separate rate eligibility.

Although we agree that an application process of this sort would be better than the current Section A process, we have several reservations about the Department's proposal.

First, we cannot applaud the Department's proposal -- even though it is better than the current system -- because we continue to believe that the entire separate rate policy is unfair and unnecessary and should be either eliminated or severely truncated. There are at least three policy changes that would be better than the Department's current proposal, each of which we discussed in detail in our June 1 comments:

Option 1: Abandon the countrywide-rate assumption. The Department could best avoid the administrative burden of issuing and reviewing either applications or questionnaires by completely abandoning the countrywide-rate assumption and instead determine non-mandatory rates in NME cases just as the Department determines them in ME cases, as it did before 1991.

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 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.

Option 3: 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 our June 1 comments for a more detailed discussion of these three 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.

In the event one of these options is not adopted, the Department's proposal is certainly better than nothing. It is difficult, however, to comment in any detail about the proposal without actually seeing the application the Department envisions, or knowing what standard the Department would use to determine whether an application is "complete" or not. We wholeheartedly agree with the idea of reducing the amount of information requested of separate rate candidates, and the Department appears to contemplate focusing on the information that is most critical to the questions of *de jure* and *de facto* independence. However, the Department has not provided the specific items it will request; rather, the proposal says that "the Department would conserve resources by receiving and reviewing only the information most relevant to separate rate eligibility, *such as* ...". 69 Fed. Reg. at 56189 (emphasis added). In other words, the Department apparently has not yet chosen precisely what information it will request in the application. We propose, therefore, to have another opportunity to comment on the application once a draft is prepared.

In the meantime, we offer the following guidelines:

- We propose that the Department refrain from seeking documentation from the respondents that exceed the scope of Question 2 of the NME Section A questionnaire or do not otherwise directly relate to the *Sparklers* criteria that are set forth in the Department's notice. 69 Fed. Reg. at 56,188-56,189.

- We urge the Department to eliminate its policy requiring separate rate candidates to have exported to the United States during the period of investigation in order to be eligible. This policy, which the Department appears to intend to continue (see Department's Appendix (1), first paragraph, 69 Fed. Reg. at 56,189), 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.

- We recommend that the Department take care not to establish too strict a policy with regard to the documentation it requires in its application. There may be instances in which a company does not maintain the specific records the Department ideally wants, but the company may have other documentation that proves the same thing. (A good example would be evidence of price negotiation, which for some companies is conducted mostly by telephone.)

Assuming these guidelines are followed, we think the application process -- though not ideal -- represents an improvement as compared with current policy.

DOC Proposal #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) receives the benefit of the antidumping cash deposit rate calculated for that exporter-producer combination.

As discussed in our general comments above, we see no reason why NME countries should be treated any differently from ME countries with regard to producer-exporter transactions, and we do not know of any changes the Department is making with regard to ME countries concerning this issue. Rather, we assume the Department will continue to police transactions between producers and exporters in ME countries the same way they have always been policed -- that is, to collect duties based on the producer of the product (if the producer has knowledge of where the product is going), and to ensure again during the course of administrative reviews that the correct duties are collected for whichever company produced the product (again, assuming the producer knows the product's destination).

A company's entitlement to separate rate status should not be defined by which company produced the product. After all, it is the exporter's independence from the government that matters, as it is that company's business operations and export pricing practices that are at issue in determining separate rate status. Indeed, the notion of a "combination separate rate" makes little sense. Why would a company's independence from the government change simply because it purchases product from a company that it did not do business with during a six month period of investigation? Indeed, rather than being a method to crack down on "evasion," this particular proposal is essentially an expansion on the Department's policy of prohibiting companies that did not ship to the United States during the period of investigation from obtaining separate rate status -- a policy which, as discussed above, should be eliminated.

Determination of separate rate status -- if it must exist at all-- should remain a clean, substantive analysis based on the *Sparklers* criteria. An exporter would receive a separate rate only if it demonstrated its independence from government control. Who it does business with should be largely immaterial, unless for some reason an analysis of the manner in which such business is undertaken leads to the conclusion that the exporter is subject to government control.

We note too that this proposed policy change would create more work for the Department, which is ironic given that the original motivation for its proposed separate rate policy changes is to reduce the burden on the Department. This proposal would only increase the Department's workload, as exporters would be required to file more documents to prove the identity of each of their suppliers during the period of investigation. Looking behind each exporter for every shipment of merchandise would increase the strain on the Department to determine separate rate eligibility. It would also make it significantly more difficult for Customs to administer the correct duty rate at the border.

We are not proposing that the Department ignore the issue of evasion. The Department already has a method by which to police such practices. The administrative review process provides the Department with a method by which to ensure that it captures all of the shipments an exporter receives from its suppliers, each of which will be required to submit to the Department's factors of production verification. The Department can also determine at that time, as it does in ME cases, whether the producer knew the destination of the product it sold to the exporter. This should be sufficient to address any evasion concerns the Department has with regard to producer/exporter transactions.

DOC Proposal #3: To assume that NME producers shipping through third countries set the price to the United States, and to assign to them, and not the reseller, an antidumping duty rate, unless evidence is submitted to the contrary.

Again, if the Department simply eliminated the separate rate policy, consideration of these types of proposals would be unnecessary. With such elimination, new approaches to the separate rate analysis would become moot, and the automatic wide variation in duty rates would also disappear. NME countries would thus become like ME countries, in which such wide variations do occur, but not as often. The Department should acknowledge that it is the victim of its own flawed policy, as instituted in 1991, and that the best policy would be to treat NME countries the same way it treats ME countries.

Having said that, we think this proposal -- like the second proposal discussed above -- deviates from the whole point of the separate rate analysis as set forth in the *Sparklers* case. What matters is whether the seller to the U.S. customer is independent of the government. The exception to this that already exists is in those situations where the seller is in a third country and the seller's supplier knows to which market the product is ultimately shipped. If the supplier does not know where the product is shipped, of what relevance is this company to the *Sparklers* criteria? If the company is not setting prices to the United States, why would its pricing practices matter to the Department? We submit that they should not matter at all.

If the Department is concerned with evasion, changes to its separate rate policy does not appear to be the answer. Rather, the Department needs to develop a policing system -- that can be used equally in both NME and ME situations -- so as to prevent companies with high antidumping duty rates from selling to the United States through companies with low rates. This sort of evasion has nothing to do with the question posed by the *Sparklers* criteria. Companies seeking separate rate status should not become the scapegoat for a supposed "evasion" problem the Department perceives that has nothing to do with whether or not companies are independent of the government of the country in which the product is produced.

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

Respectfully submitted,

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Matthew R. Nicely

On Behalf of the VASEP Shrimp Committee