



MINISTRY OF TRADE

THE SOCIALIST REPUBLIC OF VIETNAM

Free Translation

August 1, 2005

The Honorable Carols M. Gutierrez

Secretary of Commerce
U.S. Department of Commerce
Washington, D.C. 20230

Attn: **Mr. Joseph Spetrini**

Acting Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, NW
Washington, D.C. 20230

Re: Comments on the Department's Calculation of Wages in NME
Antidumping Proceedings

Dear Secretary Guterrez,

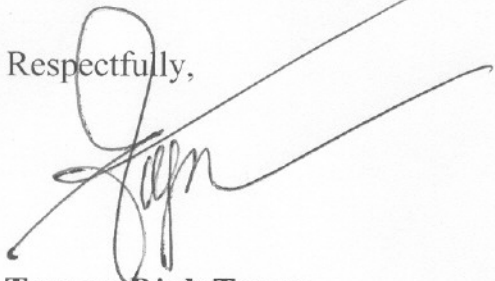
The Government of Vietnam appreciates the Department's consideration of interested parties' views on its administration of antidumping cases against products from countries considered by the Department to be nonmarket economies or "NMEs". We hope that these comments provide the Department with the information necessary to implement policies that will make the administration of its NME antidumping proceedings as accurate and predictable as possible.

We believe that the Department's methodology of valuing labor in NME antidumping proceedings does not conform to the general principles of its surrogate value methodology. The Government of Vietnam believes that the Department should revise its regulations and eliminate the requirement of a regression-based analysis to determine the per-hour surrogate

value for labor. Instead, the Department should use publicly available information from the surrogate countries to value labor as it does with the other factors of production.

We appreciate your consideration of these comments.

Respectfully,

A handwritten signature in black ink, appearing to read 'Trung Dinh Tuyen', is written over a large, sweeping diagonal line that extends from the top left towards the middle right of the page.

Trung Dinh Tuyen
Minister
Ministry of Trade
Socialist Republic of Vietnam

**United States Department of Commerce
International Trade Administration — Import Administration**

**Comments on the Department's Valuation of Labor
in NME Antidumping Proceedings**

**Government of Vietnam
Ministry of Trade**

August 1, 2005

The Department's methodology of valuing labor in NME antidumping proceedings is specified in its regulations at 19 C.F.R. 351.408(c)(3). The Government of Vietnam believes that the labor rates calculated according to the regression-based analysis are not as accurate as the labor rate values that would be derived using only information from the surrogate countries. The Department should revise its regulations and eliminate the requirement of a regression-based analysis to determine the per-hour surrogate value for labor. Instead, the Department should rely only on publicly available information from the surrogate countries to value labor.

In valuing labor, the Department should follow its practice of valuing all other factors of production with only data from the surrogate countries.

In determining whether respondents in countries considered by the Department to be NMEs have dumped subject merchandise in the United States, the Department employs a "factors of production" methodology. The general purpose of the factors of production methodology is to determine what the normal value of the subject merchandise would have been if the NME respondents were operating in a market-economy country. Under this methodology, the Department calculates normal values for NME respondents by first determining all of the inputs used to produce the subject merchandise — including labor, profit, overhead, and selling and general items. With the exception of labor, the Department values these inputs with pricing and cost data from market-economy countries considered to be at comparable levels of economic development as the NME.

The Antidumping Statute specifically requires that the Department include “hours of labor” in the factors of production used to produce the subject merchandise.¹ In valuing these labor hours and the other factors of production, the Antidumping Statute provides that

the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a *market economy country or countries considered to be appropriate by the administering authority*.²

As incorporated in its regulations, the Department has adopted a regression-based analysis to determine the appropriate per-hour surrogate value for labor. Specifically, the Department's regulations provide that

{f}or labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in *market economy countries*. The Secretary will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.³

The Department's regulations broadly allow for the use of information concerning wages from *any* market-economy country. In practice, the Department uses wage rate data from countries as economically diverse as India and Switzerland. This contradicts the Statute's general objective of determining accurate antidumping margins by only using data from countries that are at similar levels of economic development as the NME country.

¹ 19 U.S.C. § 1677b(c)(3)(A).

² 19 U.S.C. § 1677b(c)(1)(B)(emphasis added).

³ 19 C.F.R. § 351.408(c)(3)(emphasis added).

The Department acknowledged the importance of economic comparability in determining which countries are appropriate surrogates in its elaboration of its final rules and regulations adopted to conform to the Uruguay Round Agreements Act. Specifically, the Department stated that “{w}hen looking at a surrogate country to obtain labor rates, we believe it is appropriate to place less weight on the significant producer criterion, because economic comparability is more indicative of appropriate labor rates.”⁴ The Department has adequate information from those countries that it considers to be most economically comparable to the NME country. It does not need to include data from other market-economy countries in its valuation of labor. In fact, doing so only increases the likelihood of distorted labor values.

In conforming its regulations to the Uruguay Round Agreements Act, the Department considered many issues about whether to value labor under a regression-based analysis. Ultimately, the Department decided that using a regression-based analysis “significantly enhances the accuracy, fairness, and predictability of {the Department’s} AD calculations in NME case.”⁵

The Department’s administration of NME cases over the years clearly demonstrates that using the regression-based analysis has not resulted in better decisions in NME antidumping proceedings. The regression-based analysis has resulted in more inaccurate labor rates which have often been two or three times greater than the rates for the appropriate surrogate countries. In addition, while using the regression-based analysis has resulted in greater predictability in NME proceedings, we do not believe that

⁴ *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27,296, 27,367 (Dep’t Commerce May 19, 1997)(explanation of adopted regs.).

⁵ *Id.*

predictability should take precedence to accuracy in the Department's determinations. Moreover, the Department asserted that "by combining data from more than one country, the regression-based approach will yield a more accurate result."⁶ The Department's determinations in numerous NME proceedings in which it has been forced to select appropriate surrogate values for production factors clearly demonstrate that using more data does not necessitate a more accurate result.

While the Department may have felt that adopting a regression-based analysis to value labor would result in more accurate and fairer determinations in NME antidumping proceedings, the Department's administration of NME cases over the years has proven otherwise. The Department should revise its regulation to provide for the use of data only from the surrogate countries in valuing labor in the same way that it values the other factors of production.

The Department's regression-based methodology of valuing labor in NME antidumping proceedings incorporates data from countries that are not "appropriate" for surrogate valuation purposes.

In NME antidumping proceedings, the Department determines through a selection process those market-economy countries that may serve as appropriate surrogates for the particular NME country. The Department's general purpose in selecting the particular surrogate countries is to define those countries that are at the same economic level at which the NME country would be operating if it were a market economy. These surrogate countries serve as sources for pricing and cost data to value the factors of production for the particular NME country.

⁶ *Id.*

The Department clarified its procedures for selecting the appropriate primary surrogate country and other appropriate surrogate countries in a March 1, 2004 policy bulletin.⁷ The first step in selecting the appropriate surrogate countries occurs when Import Administration's Office of Policy determines those market-economy countries that are economically comparable to the NME country in terms of per capita gross national income. Based on its analysis, the Office of Policy officially decides which countries are appropriate surrogates and issues a list of these countries in a memorandum to the Import Administration operations team that is responsible for a particular NME case.⁸ The Department considers the countries on its list of surrogate countries to be equivalent in terms of their economic comparability and determines from this list the country that is the most appropriate primary surrogate country for purposes of valuing the factors of production.⁹

The Department has explicitly defined a procedure for determining whether market-economy countries are "appropriate" sources for surrogate values. Consequently, the use of pricing and cost information from countries not on the list of "appropriate" surrogate countries contravenes the general intent of the Statute. As the Department's experience with the regression-based labor valuation methodology demonstrates, the labor rates derived from this theoretical analysis do not appropriately reflect the labor rates that would have existed in the NME if it were a market economy.

⁷ Import Administration Policy Bulletin 04.1 "Non-Market Economy Surrogate Country Selection Process" (Mar. 1, 2004) at <http://ia.ita.doc.gov/policy/bull04-1.html>.

⁸ *Id.*

⁹ *Id.*

The Courts have upheld the Department's decisions to restrict the sources of surrogate data to those countries that have been deemed "appropriate" surrogate countries. In a 2002 remand redetermination, the Department stated that it had limited its consideration of certain prices used as surrogate values.¹⁰ Specifically, the Department limited consideration of Japanese export prices in this case to the prices of those exports destined for either India or Indonesia, two of the surrogate countries in the NME antidumping proceeding. The Department stated that by limiting its consideration of prices to only these two countries, it would be "relying on an Indian or an Indonesian value, i.e., a value from a surrogate country which is economically comparable to" the particular NME country.¹¹ The U.S. Court of International Trade upheld the Department's decision to restrict consideration of surrogate data to only those "appropriate" surrogate countries, even though the Department could have considered data from other market-economy countries.¹²

In the same remand redetermination, the Department also refused to value the particular steel scrap generated in the NME producer's production process with prices from *American Metal Market*. The Department's rationale for refusing to use U.S. prices to value the scrap in this case, as provided below, is identical to the rationale the Department should embrace in revising its labor valuation methodology. Specifically, in that case, the Department stated that

¹⁰ *Final Results of Remand Redetermination Pursuant to Court Remand in the Case of Timken Company v. the United States*, Court No. 98-12-03235 at 4 (July 22, 2002).

¹¹ *Id.*

¹² *The Timken Company v. United States*, CIT Slip. Op. 02-104, Court No. 98-12-03235 (Sept. 3, 2002).

section 773(c)(4) of the Tariff Act of 1930, as amended, requires that the Department value the factors of production in a market economy country that is at a comparable level of economic development to the nonmarket economy under investigation and that is a significant producer of comparable merchandise, to the extent possible. In TRBs X, both India and Indonesia were found to meet these criteria. While the Department may use values from the United States or other countries not at a comparable level of development for individual factors, our practice is to do so only if we cannot find reliable, non-aberrational values in an economically comparable economy that produces comparable merchandise.¹³

Again, the U.S. Court of International Trade upheld the Department's decision to ignore prices from other market economies (namely, the United States) and, instead, to rely exclusively on data only from those countries deemed to be "appropriate" surrogate countries at comparable levels of economic development.¹⁴

As its experience using the regression-based analysis demonstrates, the Department's methodology of valuing labor in NME antidumping proceedings under its regulations does not accurately reflect what labor rates would be in the NME country if it were a market economy. The Statute requires that the Department value the factors of production with information from countries considered "appropriate" for such purposes. The Department has a long-standing practice, recently explained in a policy bulletin, of considering countries "appropriate" primarily on the basis of economic comparability but also with regards to factors such as whether the countries produce comparable merchandise and have sufficient pricing data.

¹³ *Final Results of Remand Redetermination Pursuant to Court Remand in the Case of Timken Company v. the United States*, Court No. 98-12-03235 at 4 (July 22, 2002).

¹⁴ *The Timken Company v. United States*, CIT Slip. Op. 02-104, Court No. 98-12-03235 at (Sept. 3, 2002).

Yet, with regards to labor, the Department has made an exception to its general rule and adheres to a regulation that allows the Department to use data from market-economy countries that are not considered “appropriate” surrogate countries for any other factors of production. The regulation as implemented has resulted in the use of data from countries that have not been deemed “appropriate” sources for other factors of production and has resulted in inaccurate surrogate values for labor in NME proceedings. This regulation should be amended to conform to the Statute’s mandate of using data from only “appropriate” surrogate countries.

The Department should amend its regulations so that only information from the primary surrogate country or “appropriate” surrogate countries is considered in valuing labor hours.

The Statute requires that the Department determine dumping liability and calculate antidumping margins as accurately as possible. The Court of Appeals for the Federal Circuit has stated that determining “margins as accurately as possible” is the general purpose of the Statute.¹⁵ In order to obtain the most accurate result in NME antidumping proceedings, the Statute requires that the Department value the factors of production with the

best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.¹⁶

With the exception of labor, the Department’s regulations provide that the factors of production should be valued, when possible, with data from a single surrogate

¹⁵ *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1991).

¹⁶ 19 U.S.C. § 1677b(c)(1).

country.¹⁷ This has also been the Department's long-standing practice.¹⁸ Using one country, when possible, as the source of surrogate value data increases the likelihood that the most contemporaneous information that is most specific to the particular industry subject to the antidumping proceeding will be used. This approach best satisfies the Statute's mandate of calculating antidumping margins as accurately as possible and using the best available information.

The Government of Vietnam questions the necessity of a regression-based methodology to determine the appropriate surrogate value for the labor hours. What is so different or special about determining the value of labor hours that the Department must resort to a complicated regression-based analysis between wages and national income? The Department relies on publicly available information to value all of the material inputs used to produce the subject merchandise by NME respondents. The Department also determines the appropriate surrogate financial ratios based on the financial statements of select companies in the surrogate countries. If the Department can rely on such information to value *every other production factor*, it should also be able to rely on such information to value labor hours in NME proceedings.

¹⁷ 19 C.F.R. § 351.408(c)(2). Recognizing that prices from *actual transactions* result in more accurate antidumping determinations and margin calculations, the Department's regulations also require the Department to use prices paid by an NME respondent to a market-economy supplier for an input to value all of an NME respondent's consumption of the input. See 19 C.F.R. § 351.408(c)(1). See also Government of Vietnam's Ministry of Trade, June 24, 2005 submission, *Comments on the Department of Commerce's Consideration of Changes to Its Long-Standing Practice in Non-Market Economy Proceedings of Using Actual Market-Economy Prices to Calculate Normal Values*, available online at <http://ia.ita.doc.gov/download/market-economy-inputs/vnmot-meip-cmt.pdf>.

¹⁸ See *Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Romania*, 70 Fed. Reg. 7,237 (Dep't Commerce Feb. 4, 2005)(rev. final results issues memo at cmt. 1) (stating "it is the preference of the Department normally to value the factors of production in a single surrogate country, in accordance with the Department's regulations....").

The Department's regulation on valuing labor in NME antidumping proceedings does not satisfy the Statute's mandate to calculate antidumping margins in the most accurate manner. The Department should use the NME respondents' actual pricing and cost data because NMEs as originally envisioned by the Department no longer exist.¹⁹ However, short of this, the Department should revise its regulations so that labor is valued in the same manner as the other factors of production — that is, with information from the primary surrogate country. On those occasions when data on hourly wages is unavailable in the surrogate country, the Department could rely on information from the other countries considered to be at the same levels of economic development to value the labor consumed to produce the subject merchandise.

Using labor information from the primary surrogate country or the other countries identified by Import Administration's Office of Policy as appropriate surrogates will result in more accurate dumping calculations for several reasons. First, using data from the primary surrogate country or countries considered to be appropriate surrogates will more accurately reflect the actual labor rate in the country subject to the NME proceeding. The Department's regression-based analysis reflects data for over 50 countries. Consideration of wage data from countries such as Switzerland, which had a US\$ 18.24 per hour wage rate in 2001, is unacceptable when determining appropriate wages for countries such as Vietnam.

The Department seems to have lost sight of the proverbial forest and has focused instead on the many variations of trees. Such a difficult regression-based analysis is

¹⁹ See *Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19,370 (Dep't Commerce May 7, 1984) (fin. cvd det.); *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19,374 (Dep't Commerce May 7, 1984) (fin. cvd det.).

unnecessary when data are available for the surrogate countries selected by the Department. It is also not the best way to satisfy the Department's Statutory mandate for accurately determining antidumping margins using the best available information.

Second, information on wages from the primary surrogate country or surrogate countries selected by the Office of Policy may be more specific to the particular industry whose product is subject to the antidumping investigation. Actual, publicly available wage rates submitted on the case record by either interested parties or the Department for the particular industry, or even for general workers in the NME country, would be more accurate than data derived from a regression-based analysis based on data from countries at vastly different levels of development.

Third and finally, using actual publicly available wage rate data from the surrogate countries would result in the Department using more contemporaneous, and therefore more accurate, information to value labor hours. If interested parties are allowed to submit publicly available information on labor rates in the surrogate countries, these parties would submit more contemporaneous data than has been used by the Department in its regression-based analysis.

Under its current regression-based labor valuation methodology, the Department is forced to rely on data that are several years old. The most recent data used by the Department to determine wages is from 2001.²⁰ The use of data that is over four years old to value a factor of production, when more recent and country-specific data are available, violates the Antidumping Statute's mandate of using the best available information.

²⁰ See *Import Administration's website* at <http://ia.ita.doc.gov/wages/02wages/02wages.html>.

The Government of Vietnam references the Department's final determination in the investigation of frozen shrimp from Vietnam in order to demonstrate how considering publicly available data only from the surrogate countries would have resulted in more accurate dumping determinations. In last year's investigation of frozen shrimp from Vietnam, the Department used a surrogate wage rate of US \$0.70 per hour to value the labor consumed by the mandatory respondents to produce frozen shrimp.²¹ Instead, the Department should have used information from the five countries that the Department's Office of Policy determined were economically comparable to Vietnam. These countries were Bangladesh, India, Indonesia, Pakistan, and Sri Lanka.²²

Optimally, the Department could have requested that the interested parties submit information about wage rates from the primary surrogate country and the other selected surrogate countries. Alternatively, the Department could have relied on the wage rates published by the International Labour Organization's Yearbook of Labour Statistics ("ILO Yearbook") for only these countries. Because the Department had selected these five countries as the most economically comparable to Vietnam, data from these countries would have been the best available information for valuing labor.

Although the ILO did not provide 2001 data for Bangladesh, the primary surrogate country for the investigation of frozen shrimp from Vietnam, it did provide data for three of the surrogate countries — India, Pakistan, and Sri Lanka. Using data from these three surrogate countries would have resulted in an average per-hour labor rate of

²¹ *Frozen Shrimp from Vietnam: Factor Valuations Memorandum*, Memorandum from Paul Walker to the File (Nov. 29, 2004).

²² *See Frozen Shrimp from Vietnam: Selection of a Surrogate Country*, Memorandum from Alex Villanueva to the File (Jun. 9, 2004).

US\$ 0.24 before inflation as compared with the rate of US\$ 0.70 that it used in the final determination.

The Department must revise its regulations to use information from the countries that it determines are at the same economic level as the NME respondent country. The Department must also end the practice of using artificially inflated surrogate values for labor that are calculated with data from countries that are not considered to be at the same level of economic development as the NME country.

Conclusion

The Department has stated that it is considering whether it should expand the number of countries whose data are included in its labor regression analysis.²³ Rather than considering whether to expand the number of countries included in the regression analysis, the Department should instead focus its energies on rewriting its regulation on the valuation of labor hours.

The Government of Vietnam believes that the Department's regulation on valuing labor hours should be rewritten so that labor rates are not calculated using a regression-based analysis. Instead, the Department should only consider publicly available data from the countries that the Department considers to be economically equivalent to the NME country to calculate an average per-hour surrogate value for labor.

Such a revision is necessary in order for the Department to satisfy the Department's Statutory mandate of using the best available information to calculate the

²³ *Wooden Bedroom Furniture from China*, 69 Fed. Reg. 67,313 (Dep't Commerce Nov. 8, 2004)(inv. final det. issues memo at cmt. 23). Specifically, the Department stated that "a recalculation of the regression analysis may require the Department to expand the basket of countries it includes in its regression analysis." *Id.*

most accurate antidumping margins. Using information only from the surrogate countries would be more specific to the NME country and industry subject to an AD action. Such information would also be more contemporaneous. Moreover, such information would be more readily subject to public scrutiny and enhance the Department's goals for greater transparency in its antidumping proceedings.