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April 20, 2007

Mr. David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street NW
Washington, DC 20230

Subject: Response to Request for Comments Concerning Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates (72 Fed. Reg. 13246)

Dear Mr. Spooner:

On behalf of the Vietnam Textile and Apparel Association (VITAS), which represents 600 manufacturers in Vietnam,[1] we hereby respond to the request for public comments by the Department of Commerce concerning two issues implicated by the methodologies used in antidumping proceedings involving non-market economy (NME) countries: surrogate country selection and separate rates.[2] This response is filed within the thirty-day period established in the request for comments.

Issue One: Surrogate Country Selection

We respectfully submit that Commerce's economic comparability analysis should take into consideration whether a proposed surrogate country possesses the same resource mix as the NME country implicated in an antidumping investigation.

As explained in the request for comments, Commerce currently focuses its economic comparability analysis on a comparison of per capita gross national income (GNI). Although this is an important quantitative indicator of a country's economy, GNI reveals little about the manner in which a country's wealth is actually developed. This one-dimensional analysis is unusual among Commerce's antidumping methodologies, which typically seek to obtain a richer understanding of the enterprise-, industry- or country-specific factors influencing the pricing and export of subject merchandise to the United States.

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[1] VITAS' members include 470 Vietnamese owned and operated enterprises and 130 foreign direct investment enterprises.

[2] *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13246 (Dep't Commerce Mar. 21, 2007) (request for comments).

Commerce should augment its existing economic comparability analysis, which is focused solely on a quantitative assessment, with a more qualitative evaluation of the economies of proposed surrogate countries. A key consideration in such a qualitative assessment would be the relative domestic availability of major inputs used to produce subject merchandise. A truly comparable surrogate country would possess these inputs in approximately the same quantities or with roughly the same degree of availability and at comparable levels of quality as that of the NME country under consideration. Commerce has implicitly recognized the importance of having similar resource mixes between surrogate countries and NME countries when stating its preference to use domestic input prices over import data from surrogate countries when possible.[3] Underlying this preference is the recognition that the presence of a comparable resource mix within a surrogate country helps to ensure that the market channels and production experience of producers in the surrogate country more closely resemble that of producers in NME countries. Similarly, the U.S. Court of Appeals for the Federal Circuit has acknowledged that "the relationship between the market structure of the surrogate country and a hypothetical free-market structure of the NME producer under investigation" plays an important role in identifying the "best available information" by which to value factors of production in antidumping investigations involving NME countries.[4] By including qualitative economic comparability in its surrogate country selection process, Commerce can improve the likelihood that resulting surrogate values constitute representative and reliable information upon which to base antidumping calculations.

We recognize that Commerce has already included qualitative comparability in other aspects of its surrogate values analysis; however, Commerce could greatly improve the quality of available surrogate values simply by addressing this issue earlier in its proceedings. For example, when choosing among the financial statements of surrogate producers of subject merchandise for the purpose of developing financial ratios used in NME antidumping calculations, Commerce routinely "consider[s] the representativeness of the production experience of the surrogate producers in relation to the respondent's own experience."[5] In

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3 *See Ferrovanadium and Nitrided Vanadium from the Russian Federation*, 62 Fed. Reg. 65656, 65661 (Dep't Commerce Dec. 15, 1997) (final determination) ("[Commerce] has also articulated a preference for a surrogate country's domestic prices over import values."); *Urea from the German Democratic Republic*, 52 Fed. Reg. 19549 (final determination) ("[Commerce] believe[s] there remains a substantive distinction between a country which has a contractual arrangement to obtain gas and one which has its own captive gas supplies."); *see also Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 366 F. Supp. 2d 1264, 1274 (Ct. Int'l Trade 2005) (noting that "the preference for domestic data is most appropriate where the circumstances indicate that a producer in a hypothetical market would be unlikely to use an imported factor in its production process").

4 *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

5 Issues and Decision Memorandum for the 2000-2001 Antidumping Duty Administrative Review of Persulfates from the People's Republic of China, A-570-847 (Dep't Commerce Feb. 3, 2003), at 21, *available at http://ia.ita.doc.gov/frn/summary/prc/03-3285-1.pdf*; *see also* Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Bulk Aspirin from the People's Republic of China, A-570-853 (Dep't Commerce May 17, 2000), at Comment 4, *available at http://ia.ita.doc.gov/frn/summary/prc/00-13095-1.txt*.

Commerce's own estimation, the representativeness of production experience includes consideration of factors such as the type, quantity and purpose of material inputs purchased by surrogate producers. Although this producer-specific representativeness analysis is valuable, it would be significantly enhanced if the surrogate country from which surrogate producers are identified has already been "pre-screened" from the perspective of qualitative economic comparability. Logic dictates that a country with natural resources and other domestic inputs similar to that of the NME country under consideration is more likely to feature producers of subject merchandise with production experiences similar to that of respondents. By considering qualitative factors earlier in its surrogate selection process – at the point of initial surrogate country selection – Commerce could develop a better data set from which to identify surrogate financial ratios, as well as other surrogate values.

Commerce could also achieve greater consistency in its antidumping determinations by addressing qualitative economic comparability as part of its surrogate country selection process. If Commerce made clear that it considered qualitative issues when selecting surrogate countries, petitioners would likely begin to include information concerning the qualitative comparability of proposed surrogate countries in their antidumping petitions. (Commerce could even consider making the provision of such information a new requirement for petitions.) Receipt of information from petitioners on this issue would prompt respondents to address the qualitative comparability of proposed surrogate countries earlier in antidumping proceedings as well. Commerce would therefore have a more fully developed record on this issue at an early point in the proceedings. This would allow Commerce to make more informed and consistent selections of surrogate countries with respect to this issue. Commerce would then be able to avoid making many of the *ad hoc* determinations that it is currently compelled to make concerning the representativeness of particular surrogate values or financial ratios.

In addition, Commerce could achieve greater efficiencies by addressing qualitative comparability earlier in antidumping proceedings. If the surrogate countries identified by Commerce have similar resource mixes, it is less likely that Commerce will have to disqualify particular surrogate values obtained from such countries as aberrational and not bearing a "rational and reasonable relationship to the factor of production it represents . . . ."[6] As a result, Commerce may not have to resort to use of second and third surrogate country data as frequently, thereby limiting the data collection undertaken by the agency (and the high potential for distortions resulting from use of data from multiple surrogate countries). Commerce would also be able to avoid the time-consuming disputes which commonly result from the mid-investigation disqualification of a particular surrogate value.[7] Commerce could then use the

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[6] *Globe Metallurgical, Inc. v. United States*, 350 F. Supp. 2d 1148, 1160 (Ct. Int'l Trade 2004) (noting that "[c]hoosing to disregard primary surrogate country values based upon aberrationally low import quantities is consistent with a past practice of Commerce").

[7] *See id.*

agency resources liberated from extraneous data collection and unnecessary disputes to explore other, more substantive areas of an antidumping proceeding.

Another likely outcome of considering qualitative comparability in the surrogate country selection process is the selection of surrogate countries from the same general geographic region as the NME country implicated in an antidumping investigation or review. It is logical that, in many cases, geographic proximity leads to greater similarities in resource mix and market structures.[8] To the extent that a qualitative assessment indicates that countries from the same geographic region are comparable with respect to a particular industry, Commerce should select these countries in lieu of more geographically distant surrogate countries.

In sum, qualitative economic comparability is a critical factor in identifying appropriate surrogate values for use in an antidumping investigation or review. Commerce would be better positioned to identify appropriate surrogate values by addressing this important issue earlier in antidumping proceedings when surrogate countries are initially identified.

Issue Two: Separate Rates in NME Antidumping Proceedings

We respectfully submit that Commerce should fundamentally reconsider the practice by which it requires individual respondent exporters to apply for and demonstrate their eligibility for separate rate status. Rather, Commerce should establish a presumption of respondents' eligibility for separate rate status in antidumping proceedings involving NME countries or, in the alternative, greatly restrict the situations in which exploration of the separate rate issue is necessitated.

The requirement that parties demonstrate their eligibility for separate rate status is an anachronism, developed by Commerce for a bygone era when NME countries were structured as centralized, Soviet-style economic systems, manifested through government ownership and regulation of virtually all aspects of the economy. During that earlier period, independent conduct by companies within NME countries was permitted on only an exceptional basis. Fast-forwarding to 2007, this situation has changed significantly. Like the United States' other NME trading partners, "[t]he China of today is not the China of years ago."[9] Foreign investment has

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[8] *See Freshwater Crawfish Tail Meat from the People's Republic of China*, 62 Fed. Reg. 41347 (Dep't Commerce Aug. 1, 1997) (final determination) ("There are a number of factors, including production and *regional demand and supply functions* as well as the availability of input substitutions, which may impact substantially upon the ultimate market price for a particular imported product.") (emphasis added); *cf.* Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, A-552-801 (Dep't Commerce June 23, 2003), at 84 ("the Bangladeshi water data is derived from the same source as the Indian data . . ., the Asian Development Bank's Second Water Utilities Data Book: Asian and Pacific Region (1997)"), *available at http://ia.ita.doc.gov/frn/summary/vietnam/03-15794-1.pdf.*

[9] *Commerce Applies Anti-Subsidy Law to China* (Dep't Commerce Mar. 30, 2007) (noting that "[j]ust as China has evolved, so has the range of [Commerce's] tools"), *available at*

expanded dramatically in the NMEs that have become important trading partners with the United States.[10] The foreign enterprises engaging in such investment activity have relocated many of their operations to NME countries, injecting into these economies, market-oriented principles along with their funds.[11] As Commerce acknowledged only a month ago with respect to China, "many more companies' export activities are independent from the [Chinese] government in comparison with the early- to mid-1990s."[12] As early as 2002, Commerce recognized that market-oriented change was taking place within Vietnam as well. Commerce observed that "[m]ost new jobs in Vietnam are created in the private sector. Since 2000, the private sector has experienced particularly strong growth in the export sector and has become a major source of currency earnings for Vietnam."[13] In the midst of this profound economic change, Commerce has also witnessed a dramatic increase in the number of separate rate applications. This is no coincidence. Separate rate applications have increased precisely because the exporters in NME countries, like China and Vietnam, are now independent from government control.

Commerce's recognition of the change that has taken place within NME countries is incompatible with its requirement that individual exporters demonstrate their eligibility for separate rates. As explained in the request for comments, Commerce begins its separate rates analysis with the assumption that all companies operating within an NME country are subject to government control. This is exactly the opposite of actual conditions in these economies. Where Commerce has determined that "private industry now dominates many sectors of the . . .

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http://www.commerce.gov/opa/press/Secretary_Gutierrez/2007_Releases/March/30_Gutierrez_China_Anti-subsidy_law_application_rls.html.

[10] *See, e.g.*, Foreign Investment in China, *U.S.-China Business Council*, Feb. 2007 ("In 2006, China maintained its position as one of the world's top destinations for foreign direct investment (FDI). Foreign-invested enterprises (FIEs) play a large role in China's economy, accounting for 27 percent of value-added production, 4.1 percent of national tax revenue, and more than 58 percent of foreign trade."), *available at http://www.uschina.org/info/forecast/2007/foreign-investment.html;* Vietnam's foreign investment surges in first quarter, *People's Daily Online,* Mar. 23, 2007 ("Vietnam is estimated to entice over 2.5 billion U.S. dollars in foreign direct investment (FDI) in the first three months of this year, a year-on-year rise of 22 percent . . . .").

[11] *See, e.g.*, China's 2004 foreign trade to grow 30%, *China Daily*, Dec. 31, 2004 ("Foreign companies have established more than 700 research and development centers in China and the country is home to more than 30 regional headquarters of multi-national companies."); Foreign direct investment in Vietnam on pace to hit record for year, *International Herald Tribune*, Nov. 27, 2006 ("As of Nov. 20, overseas companies have agreed to invest US$8.27 in Vietnam, set to open up its economy after it joins the World Trade Organization next month. That's up 47.4 percent from the same period last year, thanks to major projects like Intel's US$1 billion chip plant in Ho Chi Minh City.").

[12] Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy, C-570-907 (Dep't Commerce Mar. 29, 2007), at 10, *available at http://ia.ita.doc.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf.* Hereinafter, "Georgetown Applicability Memorandum."

[13] Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam – Determination of Market Economy Status, A-552-801 (Dep't Commerce 2002) at 38, *available at http://www.ia.ita.doc.gov/download/vietnam-nme-status/vietnam-market-status-determination.pdf.*

economy, and entrepreneurship is flourishing,"[14] it is inconsistent to begin the separate rates analysis with the presumption of government control. Market-oriented reforms have drastically changed the economic landscape in those NME countries that trade regularly with the United States, namely China and Vietnam. In these countries, independence of exporters from government control has become the rule, rather than the exception. For example, the Vietnamese textile and apparel industry which VITAS represents regularly attracts major foreign investment projects and features significant investment from various market economy countries, including Hong Kong, Singapore and South Korea.[15] This industry consists of over 2,000 enterprises. Of these, only 10 are state-owned, and 450 are foreign direct investment enterprises.[16] It would be inappropriate to characterize such a robust, internationally-competitive industry as government-controlled; nonetheless, if subject to an antidumping investigation, VITAS' members would be presumed to operate under traditional NME principles. The existing separate rates methodology compels Commerce to reach this illogical conclusion – notwithstanding Commerce's own observations of the market-oriented changes that have occurred in NME countries.

For these reasons, we submit that Commerce should eliminate the requirement that each individual exporter must apply for and demonstrate its eligibility for a separate rate in antidumping proceedings involving NME countries. Respondents from NME countries and market economies should be afforded the same treatment with respect to their eligibility for separate rates, in order to reflect the economic reality of modern NME countries.

In the alternative, if Commerce believes that conditions compel the continued use of a separate rates test in antidumping investigations involving NME countries, Commerce should nonetheless greatly limit its application. Specifically, Commerce should reverse the presumption employed in its separate rates methodology and begin its analysis with the presumption that *all* companies within an NME country are independent from government control (or at least all companies that participate in an investigation or review). As discussed above, reversing this presumption would help to update and better conform the separate rates methodology to Commerce's own observations concerning the market orientation of NME countries.

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14 Georgetown Applicability Memorandum, at 10.

15 Vietnam's Textile Sector Registers Rise in Foreign Investment, *Yahoo Asia*, Jan. 3, 2007 ("The Phong Phu Company has signed a contract with ITG from the US to develop a garment and textile complex worth US$80 million in Hoa Khanh industrial zone in central Da Nang city. A number of Vietnam's large garment companies, such as Nha Be, Viet Tien, Garment 10 and Phuong Dong, have also co-operated with Japan's Mitsui for the production of suits and trousers . . . . Indonesia's Pamatex Berhad has invested over $100 million in the construction of a factory in the Chu Lai economic zone in central Quang Nam Province. Meanwhile, the Daewon Company, from the Republic of Korea, has built an $8 million garment factory for export in the Hoa Khanh industrial zone, a plant in Ho Chi Minh City's Vinh Loc industrial zone and a textile factory in the Nhon Trach I industrial zone of the southern Dong Nai Province.").

16 The 2006 Commercial Counsellors Report On Vietnam, European Union and Commercial Counsellors, at 43, reported that 50 enterprises were state-owned, but there has been further privatization since that report was published a year ago. VITAS anticipates that there will be no remaining state-owned enterprises by the end of 2007.

Reversing the presumption would not prevent Commerce from identifying aberrational companies whose export activities are controlled by the government of an NME country during the course of an investigation or review. Commerce could, for example, require respondents to certify as to the lack of government ownership and control over their export operations. Such a certification could be included in the Quantity and Value Questionnaire issued by Commerce at the start of an antidumping proceeding. The certification could be similar in form to the Separate Rate Certification currently used by Commerce with respect to respondents that have qualified for separate rates in previous proceedings. If a respondent were unable to provide a simple certification as to the lack of government ownership or control, then Commerce could require the respondent to provide a more detailed explanation of the independence of its export operations, in a manner similar to the existing Separate Rate Application. Commerce would evaluate these Separate Rate Certifications and Separate Rate Applications (if any) in the same manner as it accepts and considers other information submitted by respondents during the course of an antidumping proceeding. Commerce would still be able to engage in its normal, intensive investigation of mandatory respondents, including on-site verification of questionnaire responses. If Commerce uncovered substantial evidence of government control over export operations while examining a particular respondent, Commerce could then designate that respondent as part of the NME entity implicated in the antidumping investigation.

Such a process would not create any new or additional administrative burden on Commerce. After all, Commerce currently analyzes the degree of government control over respondent export operations throughout the course of its investigations or reviews, as new facts are uncovered. The fact-finding and verification of government control is now a routine part of antidumping proceedings. Commerce could rely on this fact-finding and verification in the same way that it relies on these effective investigative tools for other aspects of antidumping investigations or review. For example, Commerce relies on these tools to develop the factual information necessary to calculate the dumping margins of mandatory respondents. If Commerce may develop the factual record necessary to make these most fundamental calculations without the use of presumptions, then Commerce should likewise be able to make government control determinations based on the evidence adduced during the course of an investigation or review.

Operationalizing the separate rates test in this manner also would not compromise the enforcement goals ostensibly underlying use of separate rates. In addition to the information naturally uncovered through antidumping questionnaire responses and verification, petitioners have proven highly adept at identifying evidence of government control over respondent export operations.[17] Petitioners will continue to have a strong incentive to identify such evidence, so that Commerce may appropriately identify any remaining aberrational companies that form part

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[17] *See Brake Rotors from the People's Republic of China*, 70 Fed. Reg. 24382, 24387 (Dep't Commerce May 9, 2005) (preliminary results of review) (relying on information submitted by petitioner in concluding that separate rate was inappropriate for respondent).

of NME government entities. This is the same incentive that petitioners have to bring antidumping petitions in the first instance. The antidumping statute relies in large part on petitioner fact-finding and advocacy in authorizing the initiation of antidumping investigations by Commerce. Commerce's reliance on petitioner involvement throughout the resulting antidumping proceedings is also anticipated by statute.[18] Commerce would therefore have a statutory basis for relying on evidence uncovered by petitioners, as well as Commerce itself, with respect to identifying particular instances of government control of mandatory respondents in order to achieve antidumping enforcement goals.

Finally, reversing the existing separate rates presumption could free up scarce agency resources to focus on other, more substantive aspects of an antidumping investigation or review. Instead of undertaking scores of individual separate rate determinations, Commerce could eliminate much of this "make work" and focus only on the Separate Rate Applications of the few aberrational respondents unable to easily certify as to the absence of government ownership or control. Once this limited number of separate rates determinations had been made, Commerce could use its available resources to examine other aspects of the antidumping investigation or review.

One area where Commerce may consider re-deploying these liberated resources is in the application of the MOI methodology in antidumping investigations. In light of the agency's recent observations concerning the more liberalized nature of NME countries (particularly China and Vietnam), Commerce will almost certainly experience an increase in requests for MOI treatment by the industries that are the subjects of its antidumping investigations. Reversing the presumption would enable Commerce to assign needed agency resources to the task of reconsidering the test by which an industry may be determined to be an MOI in countries in which Commerce has recognized significant reforms in the economic landscape.

In sum, the "large and increasing numbers of requests for separate rates status"[19] driving Commerce's current reevaluation clearly demonstrate why the separate rates application process should be abandoned or, at a minimum, used in only exceptional cases. Commerce should therefore revise its approach to separate rates consideration in order to modernize its treatment of NME countries under the antidumping law.

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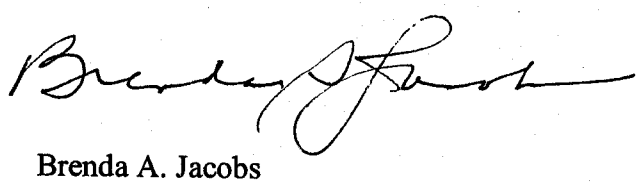
[18] *See id.* § 1677c(a)(1) (requiring Commerce to hold hearings with interested parties, including petitioners); *id.* § 1677f(a)(3) (requiring Commerce to maintain records of *ex parte* meetings with, *inter alia*, petitioners who provide "factual information in connection with a proceeding").

[19] *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. at 13248.

On behalf of VITAS and its member companies, we appreciate the opportunity to provide comments concerning these two issues implicated by the antidumping methodologies applied to imports from NME countries.

Sincerely,



Brenda A. Jacobs
Counsel to VITAS

cc: Le Quoc An, Chairman, VITAS