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January 31, 2011

Docket No. ITA-2010-00010

**VIA FEDERAL E-RULEMAKING PORTAL**

The Honorable Gary F. Locke  
Secretary of Commerce  
Attn: Wendy J. Frankel, Director, Office 8  
Antidumping and Countervailing Duty Operations  
Room 1870, Import Administration  
U.S. Department of Commerce  
14th Street and Constitution Avenue, N.W.  
Washington, D.C. 20230

**Re: Comments on De Facto Criteria for Establishing a Separate Rate in Antidumping Proceedings Involving Non-Market Economy Countries**

Dear Secretary Locke:

On behalf of the Southern Shrimp Alliance (“SSA”), we hereby submit the following comments as requested by the U.S. Department of Commerce (the “Department”) on the *de facto* criteria for establishing a separate rate in antidumping proceedings involving non-market economy (“NME”) countries.<sup>1</sup>

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<sup>1</sup> De Facto Criteria for Establishing a Separate Rate in Antidumping Proceedings Involving Non-Market Economy Countries, 75 Fed. Reg. 78,676 (Dec. 16, 2010) (“Request for Comments”).

The domestic shrimp industry currently benefits from antidumping duty orders on certain frozen warmwater shrimp imports from two NME countries – the People’s Republic of China and the Socialist Republic of Vietnam.<sup>2</sup> In the administrative reviews of these antidumping duty orders, the Department has analyzed the appropriateness of the grant of separate rate status consistent with its policy in antidumping proceedings regarding NME countries, pursuant to

a test arising from Final Determination of Sales at Less Than Fair Value: Sparklers from the People’s Republic of China, 56 FR 20588 (May 6, 1991), as modified in the Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People’s Republic of China, 59 FR 22585, 22587 (May 2, 1994) (Silicon Carbide).<sup>3</sup>

With regard to the Department’s inquiry into whether there is an absence of *de facto* control over an applicant’s export activities, the agency currently considers four factors under its existing test:

- (1) whether the export prices are set by, or subject to the approval of, a governmental authority;
- (2) whether the applicant has authority to negotiate and sign contracts and other agreements;
- (3) whether the applicant has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and (4) whether the applicant retains

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<sup>2</sup> See Certain Frozen Warmwater Shrimp from the People’s Republic of China, 70 Fed. Reg. 5,149 (Feb. 1, 2005) (Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order) and Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 70 Fed. Reg. 5,152 (Feb. 1, 2005) (Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order).

<sup>3</sup> Import Administration Policy Bulletin #05.1, *Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries* (April 5, 2005), at 2.

the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.<sup>4</sup>

In practice, the Department has found that the factors support the grant of separate rate status as a matter of course based on assertions made by an applicant with minimal documentary support. The agency's determinations granting separate rate status emphasize the assertions made by applicants,<sup>5</sup> and, at times, these assertions are on their own considered sufficient to establish *prima facie* evidence of a lack of *de facto* governmental control over export activities.<sup>6</sup> The agency's practice, coupled with the fact that separate rate applications are rarely denied due to an applicant's inability to demonstrate a lack of *de facto* governmental control over export activities, gives credence to the following observation in the agency's Request for Comments:

The Department's current practice focuses on direct government involvement in a firm's export activities and, to that extent, it may not take sufficient account of the

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<sup>4</sup> See, e.g., Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 75 Fed. Reg. 12,206, 12,211 (Mar. 15, 2010) (Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review).

<sup>5</sup> See, e.g., Certain Cased Pencils from the People's Republic of China, 76 Fed. Reg. 2,337, 2,340 (Jan. 13, 2011) (Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review) ("Rongxin has asserted the following: (1) It establishes its own export prices; (2) it negotiates contracts without guidance from any government entities or organizations; (3) it makes its own personnel decisions; and (4) it retains the proceeds of its export sales, uses profits according to its business needs, and has the authority to sell its assets and to obtain loans. Additionally, Rongxin's questionnaire responses indicate that its pricing during the POR was not coordinated with other exporters. As a result, there is a sufficient basis to preliminarily determine that Rongxin has demonstrated a *de facto* absence of government control of its export functions and it is entitled to a separate rate.").

<sup>6</sup> See, e.g., Fresh Garlic from the People's Republic of China, 75 Fed. Reg. 80,458, 80,461-62 (Dec. 22, 2010) (Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review).

government's role in the NME and how that role may impact an exporter's behavior with regard to its export activities and setting prices.<sup>7</sup>

In response to this identified deficiency, the Department "is considering modifying the *de facto* criteria to look beyond direct government control of export activities in assessing whether an entity should be granted separate rate status."<sup>8</sup> SSA supports the agency's efforts to improve the *de facto* criteria employed to determine whether separate rate status is appropriately granted and concurs with the submission of the Committee to Support U.S. Trade Laws ("CSUSTL") in response to the Request for Comments. CSUSTL's submission accurately identifies fundamental problems with the entirety of the separate rate test currently employed by the Department.

At base, the objectives of the test utilized by the Department regarding the grant of separate rate status are frustrated because: (1) in practice, the Department has not applied a presumption of governmental control and, instead, has granted separate rate status on the basis of the submission of minimal supporting documents that bear little relevance to the question of whether the entity's exporting activities are, in fact, under the control of the government; and (2) the Department has granted separate rate status even where the applicant is owned by the government.<sup>9</sup> Responding to criticism of its separate rate test – particularly to assertions that the

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<sup>7</sup> Request for Comments at 78,677.

<sup>8</sup> Id.

<sup>9</sup> See Qingdao Taifa Group Co. v. United States, 637 F. Supp. 2d 1231, 1242-43 (Ct. Int'l Tr. 2009) ("Indeed, as Commerce stated in the *Preliminary Results*, 'government ownership by itself is not dispositive in determining government control.' . . . Commerce previously has applied separate rates, rather than PRC-wide rates, in instances where a government entity has an ownership interest in the respondent but does not exercise *de facto* control over the respondent's prices or export activities. . . . Commerce has also applied separate rates in instances where a government entity owns shares of the

agency has not properly applied a presumption of government control in cases involving applicants owned or controlled by State-owned Assets Supervision and Administration Commissions (“SASAC”) in the People’s Republic of China – the Department recently stated that it intends “to closely follow developments in this area” and will “carefully analyze relevant facts and information that are placed on the recording in future antidumping proceedings . . . .”<sup>10</sup> Nevertheless, the Request for Comments sidesteps these issues in favor of a consideration of adjustments to the Department’s *de facto* criteria.

The Department’s willingness to grant separate rate status to companies owned by governmental entities in NMEs and, separately, the agency’s unwillingness to consider “macroeconomic border-type controls” in favor of a narrow focus on “export decisions made at the individual firm level”<sup>11</sup> undermine the separate rate analysis. Department practice stacks the odds of separate rate determinations heavily in favor of the applicant, regardless of the actual facts attached to the applicant’s operations. The absurdity resulting from the Department’s approach has been underscored in litigation relating to the antidumping duty order on hand trucks from the People’s Republic of China. In that case, the Court of International Trade has relied upon the agency’s prior determinations that government ownership is not dispositive to find that it would be

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respondent’s stock but does not vote the shares or otherwise exercise operation control over the respondent’s business. . . .” (citations omitted)) (“Qingdao 2009”).

<sup>10</sup> See Issues and Decision Memorandum (Cmt. 2) accompanying Cut-to-Length Carbon Steel Plate from the People’s Republic of China, 75 Fed. Reg. 8,301 (Feb. 24, 2010) (Final Results of Administrative Review) (“CTL Steel Plate IDM”).

<sup>11</sup> See, e.g., Issues and Decision Memorandum (Cmt. 3) accompanying Certain Magnesia Carbon Bricks from the People’s Republic of China, 75 Fed. Reg. 45,467 (Aug. 2, 2010) (Final Determination of LTFV Sales).

inappropriate to deny separate rate status even where an applicant falsely provided information that it was not, in fact, government-owned.<sup>12</sup> Similarly, the practice of granting separate rate status to companies owned by the government and the Department's general reluctance to apply a meaningful presumption of governmental control appears to be, in part, the basis of the Court's further remand of the Department's decision to continue to decline separate rate status to that applicant.<sup>13</sup> The decisions repeatedly remanding the Department's decision to deny separate rate status appear to indicate that the Department's practice of granting separate rates is so permissive that the agency cannot deny separate rate status to a company that submits incorrect and false information regarding its ownership without some specific demonstration that the government entity owning the enterprise, in fact, controls the applicant's export activities.

As currently conceived, the Department's separate rate test does not address what the test purports to address: whether there is an absence of government control over an applicant's export activities. As such, the Department should revisit the test in its entirety and take steps to improve the relevance of the analysis to the question of governmental control over a company's export

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<sup>12</sup> See Qingdao 2009 at 1244 (“... Commerce’s decision to apply AFA to the facts of Taifa’s control because Taifa’s ownership documents could not be verified was apparently based on the flawed assumption that town government ownership alone establishes governmental control sufficient to trigger application of a China entity rate.”).

<sup>13</sup> See Qingdao Taifa Group Co. v. United States, 2010 Ct. Intl. Trade LEXIS 131, \*10-18 (Nov. 12, 2010).

The Court appears to question whether the stated presumption of governmental control is appropriate in the first instance. In response, the Department has opined: “{T}he Department respectfully disagrees with the implied premise of the Court’s remand instruction which shifts the burden of proof in the application of the Department’s separate rate test away from the respondent claiming a separate rate.” CTL Steel Plate IDM (Cmt. 2).

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activities. If the agency's willingness or ability to address this discrepancy is limited only to addressing the *de facto* criteria employed, the Department should, at a minimum, require far more substantial documentary support for the assertions made by applicants and align the information required in response to a separate rate certification more closely with the information required to be provided in response to a separate rate application.

We are grateful for the opportunity to provide our comments on the Department's separate rate test and look forward to the agency's additional efforts to improve the efficacy of our antidumping laws.

Sincerely,

A handwritten signature in black ink, appearing to read "John Williams". The signature is written in a cursive, flowing style.

John Williams  
Executive Director