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August 24, 2007

DELIVERY BY HAND

Secretary of Commerce
U.S. Department of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Re: Request for Comments: Surrogate Country Selection in Proceedings Involving Non-Market Economy Countries

Dear Mr. Secretary:

On behalf of Kelley Drye Collier Shannon (“KDCS”), this submission responds to the Department of Commerce’s (the “Department”) request for comments regarding the identification and selection of surrogate countries in proceedings involving non-market economy (“NME”) countries. Surrogate Country Selection in Proceedings Involving Non-Market Economy Countries; Request for Comment, 72 Fed. Reg. 40,842 (July 25, 2007) (the “Notice”).

The Department’s Notice solicited a second round of comments following an earlier request for comments on certain aspects of the methodology by which it selects an economically comparable market economy country to serve as a surrogate for the NME country that is under investigation or review in the segment of the proceeding at issue. In that earlier request for comments, the Department requested

public comment on what range of per capita income should be considered comparable to a given NME country. The Department also requested comment on whether and on what basis the Department should generally disregard certain economically comparable countries as lacking data suitable for valuing the factors of production. In other words, the Department was interested in public comment on whether and how the Department can limit its initial analysis of countries that are economically comparable to a sub-group of countries more likely to have the data necessary to conduct an antidumping duty proceeding (72 FR 13246, March 21, 2007).

Notice, 72 Fed. Reg. 40,842. In response to this request, the Department received 11 sets of comments addressing these issues. Id.

Following submission of these comments, the Department has requested additional public comment in three general areas. First, the Department requested comment “focusing on the statutory concept of economically comparable,” with emphasis on “specific guidelines the Department should follow in determining the economic comparability of countries in a given case.” Notice, 72 Fed. Reg. 40,842. In particular, the Department requested “suggestions on how it should construct the initial list of economically comparable countries, how this set of countries should be balanced, and how many countries it should contain.” Notice, 72 Fed. Reg. at 40,843.

Second, the Department requested comment on

whether certain comparable countries should be excluded, at least initially, from the Department’s analysis of which country is the best possible surrogate in a given proceeding on the basis of a general lack of country specific data. With regard to this issue, if the Department were able to determine that a group of countries does not generally offer the data necessary to conduct an antidumping proceeding, both the Department and parties would be relieved of the burden of examining those countries as potential surrogates in every proceeding. Please note, however, that parties would retain the ability to advocate the consideration of a country

that would otherwise not be considered if they determined that there were case-specific arguments for doing so.

Notice, 72 Fed. Reg. at 40,843.

Third, the Department requested comment “on how it should evaluate and weigh the production experiences and data availability of countries in cases where there may be more than one potential surrogate country with reliable data and significant production of comparable merchandise.” Notice, 72 Fed. Reg. at 40,843.

A. Guidelines for Determining Economic Comparability of Countries

The Department first has requested comment “focusing on the statutory concept of economically comparable,” with emphasis on “specific guidelines the Department should follow in determining the economic comparability of countries in a given case.” Notice, 72 Fed. Reg. 40,842. In particular, the Department requested “suggestions on how it should construct the initial list of economically comparable countries, how this set of countries should be balanced, and how many countries it should contain.” Notice, 72 Fed. Reg. at 40,843.

Section 773(c)(1)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(c)(1)(B), requires that an NME producer’s factors of production be valued using “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.” In turn, section 773(c)(4) of the Act, 19 U.S.C. § 1677b(c)(4), requires that:

The administering authority, in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are –

(A) at a level of economic development comparable to that of the nonmarket economy country, and

(B) significant producers of comparable merchandise.

The term “economic comparability” is not defined in the Act. The Department’s regulations state that “the Department will place primary emphasis on per capita GDP as the measure of economic comparability.” Administration Policy Bulletin 04.1 elaborates on the Department’s practices, describing in detail the process by which the Department identifies economically comparable countries and develops a list of potential surrogate countries. The Office of Policy “determines economic comparability on the basis of per capita gross national income, as reported in the most current annual issue of the World Development Report (The World Bank).”

In constructing {its} list, the Department orders the per capita gross national income (“GNI”) figures as reported in the latest available published edition of the World Bank’s World Development report, disregarding countries designated as NMEs during the period of review. From among the remaining group of countries, the Department selects approximately five with similar levels of economic development to the NME that have been offered, in the Department’s experience, the statistical sources and breadth of information that might make them suitable surrogate countries in the specific proceeding.

Administration Policy Bulletin 04.1 (available at <http://ia.ita.doc.gov/policy/bull04-1.html>).

Parties to a proceeding remain free to propose that other countries not identified on the Department’s list are suitable and perhaps preferable surrogate countries. Notice, 72 Fed. Reg. at 40,843. Indeed, as noted by the Department, “the selection of an appropriate surrogate country is, in large part, necessarily a case-specific issue, since the range of available data and production of comparable merchandise vary with the product under investigation or review.” 72 Fed. Reg. 13,246, 13,247. The issue of economic comparability, however, “does remain largely constant from case to case” Id.

1. **Development of the Initial List of Economically Comparable Countries**

With regard to the manner in which the Department should construct the initial list of economically comparable countries, as discussed in our April 20, 2007 comments, KDCS believes that the Department's current approach to identification of potential surrogate countries, memorialized in Policy Bulletin 04.1, provides an appropriate and necessary amount of administrative discretion and flexibility when identifying potential surrogate countries in an NME proceeding. The Department's existing approach permits it to identify a varied selection of potential surrogate countries and does not, for example, require the Department to use some arbitrary criterion such as "most similar in terms of per-capita GNI", which is neither contemplated nor required by the statute or regulations, to identify the pool of potential surrogate countries.

On its face, the Act requires the Department to rely upon "prices or costs of factors of production in one or more market economy countries that are . . . at a level of economic development comparable to that of the nonmarket economy country" 19 U.S.C. § 1677b(c)(4). The statutory language does not require that the Department use the "most" economically comparable country. The Department thus possesses administrative flexibility when identifying potential surrogate countries. In practice, the Department has placed primary – but neither exclusive nor controlling – emphasis on per capita GNI, which provides a broad-based, reliable, but not exclusive indicator of economic development.

This is appropriate and administratively reasonable, for while per capita GNI provides a useful basis for determining economic comparability, as recently noted by the Department, "the vast disparities in economic development across the world and the simplification inherent in a

single figure mean that a broader group of countries can be considered to be ‘economically comparable’ to the {NME country at issue} than just the countries immediately closest to it in terms of per capita GNI”¹ “An excessive focus on the exact ranking of each country on the list would only provide an illusion of precision and distort the appropriate purpose of using per capita GNI as a primary indicator, which is to give a general sense of the level of economic development of the country in question.” Id.

In constructing its initial list of surrogate countries, while being guided by the per-capita GNI of any candidate country, the Department must remain mindful of the practical consequences of its ultimate determination. Whether or not a candidate country is economically comparable to the NME country at issue, or is even the most economically comparable by some measure, its utility in the NME proceeding is only as good as the quality and specificity of the surrogate data that are available. As a practical matter, and as discussed in detail below, the Department should exercise the administrative discretion not to include countries which, while arguably economically comparable to the NME country at issue and having producers of identical or comparable merchandise, do not provide robust, contemporaneous, and specific surrogate data. Exercising the Department’s administrative discretion in this manner would be an appropriate way by which to conserve resources. Moreover, because interested parties always retain the ability to argue that a country not identified in the Department’s initial list is more

¹ Memorandum From Paul Stolz, International Trade Compliance Analyst, Through Wendy J. Frankel, Director, AD/CVD Operations, Office 8 and Robert Bolling, Program Manager, AD/CVD Operations, Office 8, To The File, First Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People’s Republic of China: Surrogate Country Selection – Period of Review 6/24/04 – 12/31/05 at 8 (Jan. 22, 2007).

appropriate for use as the surrogate country in the NME proceeding, this approach would not prejudice any party.

2. How the Set of Candidate Countries Should be Balanced

In our April 20, 2007 comments, KDCS suggested that the Department alter one aspect of its current practice, with respect to the manner in which the initial set of potential surrogate countries should be balanced. Specifically, we noted that when identifying economically comparable countries, the Department primarily has identified countries whose level of economic development only is lower than that of the NME country at issue. For example, in the 2004-2006 annual administrative review of Wooden Bedroom Furniture from the PRC, the list of five potential surrogate countries identified by the Office of Policy included four countries with levels of economic development (as measured by per-capita GNI) lower than that of China, but only one whose level of economic development (as measured by per capita GNI) was higher than that of China. See id. at Attachment 2.²

By primarily identifying as potential surrogates only countries that are less economically developed than the NME country in question, the Department arguably falls short of fulfilling its statutory mandate to identify potential surrogate countries that are “at a level of economic development comparable to that of the nonmarket economy country.” 19 U.S.C. § 1677b(c)(4).

² This is consistent with other NME proceedings. See, i.e., Memorandum from Catherine Bertrand, Senior International Trade analyst, AD/CVD Operations, Office 9, Through James Doyle, Director, AD/CVD Operations, Office 9 and Christopher Riker, Program Manager, AD/CVD Operations, Office 9, To The File, Antidumping Duty Administrative Review of Certain Tissue Paper Products from the People’s Republic of China: Selection of a Surrogate Country Attachment 1 at 2 (Apr. 2, 2007) (Case no. A-570-894); Memorandum from Ron Lorentzen, Director, Office of Policy, To Alex Villanueva, Program Manager, AD/CVD Enforcement, Office 9, New Shipper Reviews of (“Fresh Garlic”) from the People’s Republic of China (PRC): Request for a List of Surrogate Countries at 2 (Aug. 7, 2006) (Case A-570-831).

Countries that are at a level of economic development comparable to that of a particular NME country include countries that are both less and more economically developed. In terms of GNI per capita, countries that are comparable to the NME country will fall within a range above and below the NME country's per capita GNI.

KDCS believes that when identifying potential surrogate countries, the Department should ensure that countries whose per capita GNI exceeds that of the NME country at issue are afforded equal consideration as those whose level of per capita GNI is less than that of the NME country at issue. This balanced approach will ensure that no inadvertent bias exists in the process of identifying potential surrogate countries.

3. The Number of Countries Included in the Initial List

KDCS believes that the Department's current approach remains administratively appropriate and flexible. An initial list of potential surrogate countries that includes approximately five countries provides a workable set of options for interested parties to consider. As a matter of law, we note that the Department does not view or treat its initial list as having any sort of presumption of propriety or special status in the context of selection of a surrogate country.

Ultimately, any interested party may advocate that the Department use any potential surrogate country, notwithstanding the countries identified in the Department's initial list. This ability allows any party to present all information and argument supporting its position for the Department's consideration. In light of the flexibility of the Department's overall approach, the Department's practice of selecting a relatively modest number of candidates is appropriate and need not be altered.

B. Exclusion of Otherwise Comparable Countries That Lack Adequate Country-Specific Data from the Initial List

Second, the Department requested comment on “whether certain comparable countries should be excluded, at least initially, from the Department’s analysis of which country is the best possible surrogate in a given proceeding on the basis of a general lack of country specific data.”

Notice, 72 Fed. Reg. at 40,843.

The Department’s current practice of initially identifying potential surrogate countries by reference to per capita GNI neither contemplates nor prohibits consideration of other factors when developing the initial list. Indeed, when discussing the Department’s approach to identifying countries that are producers of comparable merchandise, the Department’s current statement of policy recognizes the importance, in appropriate circumstances, of screening potential surrogate countries to verify the availability of robust surrogate value data in the candidate country. Specifically, when a country is at a comparable level of economic development but is not a producer of identical merchandise, and where production of the subject merchandise involves inputs that are specialized or dedicated or used intensively in the production of the subject merchandise, the Department will identify non-identical “comparable merchandise” narrowly in the course of its analysis. See Policy Bulletin 04.1.

KDCS believes that the Department may and should actively consider the availability of robust, specific, and contemporaneous surrogate data when identifying potential surrogate countries. As a practical matter, early analysis of this critical consideration will promote administrative efficiency by declining to include potential surrogate countries whose utility is limited or negated by a lack of quality surrogate value data.

In this context, in its request for comment, the Department noted that “{w}ith regard to this issue, if the Department were able to determine that a group of countries does not generally offer the data necessary to conduct an antidumping proceeding, both the Department and parties would be relieved of the burden of examining those countries as potential surrogates in every proceeding.” Notice, 72 Fed. Reg. at 40,843. We believe that the Department reasonably may include early evaluation of the nature and quality of the surrogate data available from any potential surrogate country as part of its initial screening. Early consideration of the extent to which surrogate data are available and of high quality will focus the analysis on appropriate candidates, though KDCS notes again that interested parties remain free to advocate that the Department should select a surrogate country not included on the initial list.

In doing so, the Department should consider the specificity of public information available in candidate countries. In some cases, even where a county produces merchandise identical or comparable with the merchandise produced in the NME country, the public data that are available may not be as accurate or specific as the proceeding requires. In particular, where surrogate values for major inputs are concerned, the quality of the data will be determined by their specificity, e.g., whether data exist concerning particular grades of steel billets or wire, or concerning particular formulas or solution strengths of specific chemicals. Early consideration of data specificity by country will assist the Department in attaining the statutory goal “to determine margins as accurately as possible, and to use the best information available to it in doing so.” Lasko Metal Prods., Inc. v. United States, 43 F.3d 1442, 1443 (Fed. Cir. 1994).

C. **Weighing Data Where More Than One Candidate Country is Economically Comparable**

The Department's third request for comments concerned "how it should evaluate and weigh the production experiences and data availability of countries in cases where there may be more than one potential surrogate country with reliable data and significant production of comparable merchandise." Notice, 72 Fed. Reg. at 40,843.

In presenting this request, the Department specifically cited to Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Reviews and Notice of Partial Rescission, 72 Fed. Reg. 6201, 6208 (Feb. 9, 2007). In that review, the Department considered two possible surrogate countries, India and Philippines. See id.; see also Memorandum To The File, First Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China: Surrogate Country Selection – Period of Review 6/24/04 – 12/31/05 (Jan. 22, 2007) ("Selection Memorandum"). Both India and the Philippines had been identified by the Office of Policy as economically comparable, notwithstanding differences between their per-capita GNI and that of the PRC, and thus properly were included in the initial list of potential surrogate countries. Selection Memorandum at 7-9. Both were significant producers of comparable merchandise. Id. at 9-10.

Given the similar qualifications with respect to economic comparability and production of identical or similar merchandise, the Department considered the availability of the factors data. Id. at 10. After considering the availability and quality of potential factors data, the Department determined that India was the more appropriate choice as the primary surrogate

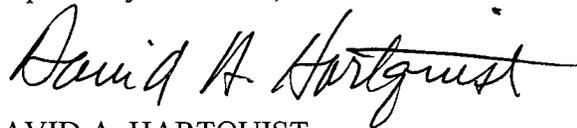
country, finding that “India provides the best opportunity to use contemporaneous publicly-available data to value all FOPs.” Id. at 11.

The Department’s determination in Wooden Bedroom Furniture reasonably effectuated the requirements of the statute, relevant policy considerations, and the realistic need to select a primary surrogate country that provides quality, contemporaneous, and specific data. Any given proceeding, and any segment of any proceeding, may present different circumstances that need to be weighed and considered. The Department’s focus on the nature and quality of the available data is entirely consistent with its legal obligation to calculate the most accurate margins possible, and we believe is not an inappropriate basis for proceeding in the future. It is foreseeable that future segments of proceedings will give rise to similar but different considerations and issues, which will be addressed and decided as they arise. KDCS believes that as the Department gathers more experience with this issue, it will be able to consider whether formalizing additional policies and practices when this situation arises is warranted.

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Thank you for the opportunity to provide these comments. Please contact the undersigned with any questions.

Respectfully submitted,



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