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August 24, 2007

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

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**Subject: Response to Request for Comments Concerning Surrogate Country Selection in Proceedings Involving Non-Market Economy Countries (72 Fed. Reg. 40842) (July 25, 2007)**

Dear Mr. Spooner:

Sidley Austin LLP ("Sidley") hereby responds to the request for public comments by the Department of Commerce concerning surrogate country selection in antidumping proceedings involving non-market economy (NME) countries.<sup>1</sup> This response is filed within the thirty-day period established in the request for comments.

In its request, the Department identified three topics of specific interest in the selection of surrogate countries in NME proceedings: (1) determining the economic comparability of countries; (2) excluding certain comparable countries based on data availability; and (3) evaluating multiple potential surrogate countries based on production experiences and data availability. Each of these topics is discussed below.

**Issue One: Determining the Economic Comparability of Countries**

With respect to the Department's request for comments on appropriate guidelines for determining the economic comparability of countries, we respectfully submit the following suggested revision to the Department's current surrogate country selection process.

Under existing practice, the Department's Office of Policy (OP) develops a list of potential surrogate countries that are considered to be at a comparable level of economic development to the NME country under investigation or review.<sup>2</sup> OP makes its economic comparability determination on the basis of per capita gross national income (GNI) as reported

<sup>1</sup> See *Surrogate Country Selection in Proceedings Involving Non-Market Economy Countries*, 72 Fed. Reg. 40842 (Dep't Commerce July 25, 2007) (request for comments).

<sup>2</sup> See *Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process* (Dep't Commerce Mar. 1, 2004), available at <http://ia.ita.doc.gov/policy/bull04-1.html>.

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by the World Bank. The Department places OP's list of countries on the administrative record and invites comment from interested parties, who may also suggest that the Department consider other economically comparable surrogate countries.<sup>3</sup> From this list, as potentially expanded by interested parties, the Department attempts to identify countries with producers of comparable merchandise and then countries which constitute significant producers of that comparable merchandise.

We believe that the Department's surrogate country selection process could be streamlined by eliminating the initial identification of potential surrogate countries. Instead, the Department should consider beginning the surrogate country selection process by requesting that interested parties submit recommendations for potential surrogate countries within thirty days of initiation of an antidumping investigation or review. The Department could require interested parties to support their recommendations by reference to evidence demonstrating the economic comparability of suggested countries to the NME country under investigation or review with respect to both quantitative factors, such as GNI, and qualitative factors demonstrating comparability.<sup>4</sup> Although, as noted above, the Department currently permits interested parties to suggest surrogate countries in addition to those identified on the OP list, the revised process would place the initial burden for identifying potential surrogate countries on the interested parties in an investigation or review.

Such a process would be similar to the Department's current practice in selecting surrogate countries for investigations or reviews involving "unusual or unique [subject merchandise] (with correspondingly unusual or unique inputs or other unique aspects of the cost of production), e.g., crawfish, which is produced by only a few countries."<sup>5</sup> In those

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<sup>3</sup> See *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13246, 13247 (Dep't Commerce Mar. 21, 2007) (request for comments).

<sup>4</sup> We believe that the Department should augment its existing economic comparability analysis with a qualitative assessment of the economies of proposed surrogate countries. Such an evaluation would include an analysis of the relative domestic availability of major inputs used to produce the subject merchandise and/or the country of origin of imports of such inputs. The goal of this analysis would be to ensure the identification of economically comparable countries with respect to resource mix and geographic location as well as GNI.

<sup>5</sup> *Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process*. The Department has further noted that "[p]articular emphasis on 'significant producer of comparable merchandise' is also generally warranted where major inputs are not widely traded internationally, e.g. electricity, which is used intensively in the production of magnesium." *Id.* (citing *Pure Magnesium and Alloy Magnesium from the People's Republic of China*, 59 Fed. Reg. 55424, 55426 (Dep't Commerce Nov. 7, 1994) (preliminary determination); see also *Urea Ammonium Nitrate Solutions from the Russian Federation*, 67 Fed. Reg. 62008 (Dep't Commerce Oct. 3, 2002) (preliminary determination) (emphasizing significant producer

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proceedings, the Department consults with interested parties to ensure that the “significant producer of comparable merchandise” selection criterion is met by surrogate country candidates *before* the “economic comparability” criterion is considered by the Department.<sup>6</sup> In other words, the Department has recognized the utility of relying on interested party comments in the initial surrogate country selection process for those particularly challenging proceedings. Moreover, in those instances, the Department has successfully incorporated early involvement by interested parties in surrogate country selection, while maintaining necessary agency control over the process and ultimate country selection.<sup>7</sup>

The Department’s standard surrogate selection process could be similarly aided by the enhanced involvement of interested parties at an earlier stage. Like OP, interested parties are capable of reviewing GNI data published by the World Bank to identify potential surrogate countries on that basis. Further, interested parties are normally better positioned than the Department to make initial, broad-brush judgments concerning the qualitative economic comparability of potential surrogate countries with respect to such factors as domestic resource mix, domestic production of major inputs, import trends of major inputs, etc. These factors are necessarily specific to the subject merchandise under investigation or review, which are best understood by the domestic and foreign parties actually involved in its production. The Department should leverage this knowledge held by interested parties to develop the initial list of potential surrogate countries.

Adoption of the suggested surrogate country selection process would likely reduce the administrative burden on the Department in antidumping proceedings involving NME countries. Most obviously, OP would no longer be charged with developing the initial list of surrogate country candidates, thereby freeing up valuable agency resources. In addition, there is no reason to believe that initial country identification by interested parties would lead to a longer list of potential surrogate country candidates than the five or six countries typically identified by OP. To the contrary, it would be in the best interest of each interested party to suggest only one or two surrogate country candidates in order to concentrate on presenting the best case for the selection of an identified country. Further, it is likely that similarly positioned interested parties would recommend some of the same surrogate country candidates, which would also have the effect of reducing the number of countries subject to evaluation by the Department. In any event, the Department could expressly limit the number of permissible recommendations to one

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requirement in light of natural gas-intensive nature of urea ammonium nitrate production). The Department currently benefits from earlier party involvement in the surrogate country selection process in these investigations and reviews as well.

<sup>6</sup> *Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process.*

<sup>7</sup> *See, e.g., Freshwater Crawfish Tail Meat from the People’s Republic of China*, 67 Fed. Reg. 63877 (Dep’t Commerce Oct. 16, 2002) (preliminary results of review) (identifying surrogate country after initial input received from interested parties in review involving unusual or unique subject merchandise).

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or two countries per interested party, thereby ensuring that only a reasonable number of potential surrogate countries are initially identified.

After a comment period, the Department could then conduct its typical evaluation of potential surrogate countries – an evaluation which would be greatly aided by the interested party comments already placed on the record during the recommendation process. Because the Department will have already received evidence and argument from the interested parties concerning the surrogate country candidates, the Department will be positioned to make an informed and expeditious determination as to the most appropriate surrogate country candidate based on the remaining statutory criteria.

### **Issue Two: Excluding Certain Comparable Countries Based on Data Availability**

We concur with the Department's proposal to exclude certain countries from initial consideration as possible surrogate countries based on a general lack of country specific data, based on the understanding that the Department would employ a rebuttable presumption that such countries were inappropriate surrogate country candidates because of data concerns. If a respondent in a given investigation or review were able to demonstrate that adequate data from such a country were available, we understand that the Department would make a case-specific determination as to whether that country should be considered for use as a surrogate country.

However, we note that if the Department were to adopt the revised approach to the initial surrogate country identification described above, there would be no need to employ this rebuttable presumption. The Department would be able to focus its analysis on a select number of countries pre-screened by the parties. It would be contrary to a party's best interests to recommend potential surrogate countries which lack complete and reliable factor evaluation data, because such data weaknesses could be readily used by the Department to reject a suggested surrogate country. From an early stage, the Department would be presented with a list of potential surrogate countries which would likely satisfy the Department's data availability and reliability requirements (or at least present a colorable argument in this regard).

### **Issue Three: Evaluating Multiple Potential Surrogate Countries Based on Production Experiences and Data Availability**

With respect to the Department's request for comments on how to evaluate and weigh the production experiences and data availability of countries in cases where there may be more than one potential surrogate country, Sidley respectfully offers the following proposal.

We recognize that, as a practical matter, the Department uses data availability and reliability as the primary means of distinguishing among potential surrogate countries that

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generally satisfy all selection criteria.<sup>8</sup> Data considerations are unquestionably an important aspect of any surrogate country determination. However, as between two countries with relatively reliable and comprehensive factor valuation data, the Department should not focus on nominal differences in country-specific data when making its ultimate surrogate country selection. For example, where substantial surrogate value data contemporaneous with the period of investigation or review is available from multiple surrogate country candidates, the Department should not distinguish among the candidates based on small differences in the level of specificity of Harmonized Tariff Schedule data or the unavailability of surrogate values for only minor factors of production. While it is true that the Department normally favors valuing all factors of production using data which is from a single surrogate country and corresponds to the same or closely analogous inputs,<sup>9</sup> the purpose of this preference is to reduce the distortions which result from use of data from multiple surrogate countries. This purpose is not furthered by the selection of a surrogate country candidate with only marginally better surrogate data if other, more substantive reasons exist to favor a different candidate. Such a focus on data minutiae, to the exclusion of substantive concerns, would run counter to the Department's prior rejection of a "narrow approach" to identifying comparable countries in its surrogate selection process.<sup>10</sup>

Instead, in its final selection process, the Department should distinguish among potential surrogate country candidates based on the production experiences in those countries. That is, the Department should uniformly favor a surrogate country most similar to the NME country under investigation or review with respect to production factors. The Department's approach in *Pure Magnesium and Alloy Magnesium from the People's Republic of China* demonstrates the importance of production experience as a selection criterion.<sup>11</sup> Because magnesium production involves an unusually large amount (or intensive use) of electricity, the Department recognized the importance of selecting a surrogate country that was a significant producer of magnesium or another product whose production was similarly electricity-intensive. As the Department soundly determined, failure to consider this production factor in the selection process would have resulted in the use of significantly distorted surrogate values derived from India, a country whose resource mix was apparently incomparable to the People's Republic of China with respect to

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<sup>8</sup> See, e.g., *Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process; 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 10-11 (Dep't Commerce Jan. 22, 2007) (copy on file at the Central Records Unit).

<sup>9</sup> See 19 C.F.R. § 351.408(c)(2) (describing the Department's preference for using surrogate data from a single country).

<sup>10</sup> *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 6/24/01-12/31/05* at 8.

<sup>11</sup> See *Pure Magnesium and Alloy Magnesium from the People's Republic of China*, 59 Fed. Reg. at 55426.

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magnesium production. The Department should recognize that consideration of production experience is a universally important factor in the selection of appropriate surrogate countries for all types of subject merchandise and not just those products which involve novel inputs or specific input-intensive manufacturing processes.

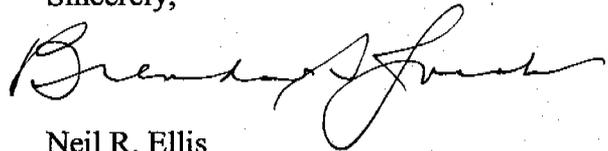
Similarly, the Department's evaluation of production experiences should also consider the sources of major inputs of the subject merchandise. Whether an input is sourced domestically or through imports can have a significant impact on production, with potential ramifications with respect to cost, quality and timeliness of supply. The country of origin of imported inputs can also affect production experience in these same ways. On that basis, where producers in one potential surrogate country source their inputs from suppliers more similar to suppliers for the manufacturers in the NME country under investigation or review, that potential surrogate should be given preference in the Department's selection process.

Thus, although multiple countries may each appear to be a reasonable surrogate country candidate based on quantitative economic comparability, the significance of production of subject merchandise and data quality, an evaluation of production experiences may reveal important differences among them. The Department should consider production experience, including sourcing patterns for major inputs, when distinguishing among potential surrogate countries and should use this as the dispositive factor in its final selection process.

\* \* \*

Sidley appreciates the opportunity to provide comments concerning the selection of surrogate countries in proceedings involving NME countries.

Sincerely,



Neil R. Ellis  
Brenda A. Jacobs  
Jill Caiazzo