

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000
FAX: (202) 393-5760
www.skadden.com

FIRM/AFFILIATE OFFICES

BOSTON
CHICAGO
HOUSTON
LOS ANGELES
NEW YORK
PALO ALTO
SAN FRANCISCO
WILMINGTON

BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
MUNICH
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO
VIENNA

August 24, 2007

Total Pages: 11

PUBLIC DOCUMENT

BY HAND DELIVERY

David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

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

Dear Assistant Secretary Spooner:

On behalf of United States Steel Corporation ("U.S. Steel"), we hereby respond to the July 25, 2007 request for comments issued by the Department of Commerce (the "Department") on "certain aspects of the methodology by which it selects an economically comparable market economy country to serve as a surrogate" in antidumping proceedings involving non-market economy ("NME") countries.¹ In particular, the Department requested comments and suggestions regarding: (1) "specific guidelines the Department should follow in determining the economic comparability of countries in a given case"; (2) "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";

¹ *Surrogate Country Selection in Proceedings Involving Non-Market Economy Countries; Request for Comment*, 72 Fed. Reg. 40842 (Dep't Commerce July 25, 2007) (request for comments).

and (3) "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."²

As demonstrated below, the Department should continue to rely primarily on per capita Gross National Income ("GNI") as the single best indicator of economic comparability between a NME country and a potential surrogate country. In addition, pursuant to Congress' intent, the Department should value factors of production based on the best available information and, therefore, avoid using an economically comparable country as a surrogate when the country in question lacks quality data. Finally, the Department should choose between possible surrogates with reliable data and significant production of comparable merchandise on a case-by-case basis.

I. The Department Should Continue to Determine Economic Comparability Between a NME Country and a Potential Surrogate Country Primarily on the Basis of GNI

In choosing a surrogate market economy country for an antidumping proceeding involving a NME, the statute requires the Department to select a country that, to the extent possible, is "at a level of economic development comparable to that of the {NME}."³ In turn, the Department's Policy Bulletin 04.1 provides for the Department to determine economic comparability between a NME and a potential surrogate primarily on the basis of GNI.⁴

² *Id.* at 40843.

³ 19 U.S.C. § 1677b(c)(4)(A) (2000).

⁴ Department of Commerce, *Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process* (Mar. 1, 2004) available at: <http://ia.ita.doc.gov/policy/bull04-1.html> (last visited Aug. 23, 2007) ("Policy Bulletin 04.1").

Specifically, pursuant to Policy Bulletin 04.1, the Department relies on GNI as reported in the most current annual issue of the *World Development Report* published by the World Bank.⁵

Importantly, the statute does not require that the Department use a surrogate that is at a level of economic development *most* comparable to the NME country.⁶ Rather, the statute requires only that the Department choose a surrogate that is at a level of economic development comparable to that of the NME country.⁷ For the reasons set forth below, the Department should continue its current practice of using GNI to determine whether a potential surrogate is economically comparable to the NME country.

First, the Department's use of GNI promotes transparency and reliability in the critical process of selecting a comparable surrogate. GNI data are publicly available from the World Bank via the internet and, consequently, are readily accessible to petitioners, respondents and all other interested parties. Indeed, one of the reasons that the Department relies on GNI rather than per capita Gross Domestic Product ("GDP") as provided for in its regulations⁸ is that "GNI is reported across almost all countries by an authoritative source (the World Bank)."⁹ In contrast, other possible indicators of economic comparability, especially those that rely on microeconomic

⁵ *Id.*

⁶ *Id.*; see also 19 U.S.C. § 1677b(c)(4) (2000).

⁷ Policy Bulletin 04.1.

⁸ See 19 C.F.R. § 351.408(b) (2006) (stating that "the Secretary will place primary emphasis on *per capita* GDP as the measure of economic comparability.").

⁹ *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13246, 13247 at n.2 (Dep't Commerce Mar. 21, 2007) ("Initial Request for Comments") (request for comments) (parenthesis in original).

indicators specific to the industry under review or investigation,¹⁰ may not be as readily available to interested parties. Such indicators also are unlikely to have the indicia of reliability provided by the GNI data from the World Bank.

In addition, the consistent use of GNI data, rather than *ad hoc* reliance on other possible indicators of economic development, limits the Department's administrative burden and, accordingly, helps it meet the mandatory deadlines established by Congress for completing reviews and investigations.¹¹ If the Department were to deviate from its current practice of relying primarily on GNI, it would promote collateral disputes between parties advocating self-serving, results-oriented indicators of economic comparability. Such collateral disputes regarding a fundamental decision that must be made early in the administrative process have the potential to greatly increase the Department's administrative burden and, consequently, make it more difficult for the Department to meet the Congressionally-imposed deadlines.

¹⁰ Prior to the current request for comments, the Department asked for comments regarding the concept of economic comparability in the selection of a surrogate country. *See id.* at 13246. In response, certain parties advocated the use of microeconomic indicators specific to the industry under review or investigation in determining economic comparability. Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to David Spooner on behalf of the Government of the People's Republic of China, Ministry of Commerce, *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates* (Apr. 20, 2007) available at <http://ia.ita.doc.gov/download/nme-surrogate-20070321/prc-mofcom-cmts-042007.pdf> (last visited Aug. 23, 2007) at 13. (proposing that the Department consider "whether the country's industry is similar to that of China in terms of production process" when selecting a surrogate); Letter from the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters to David Spooner, *Comments on Surrogate Country Selection and Separate Rate Application in Anti-Dumping Proceedings Involving Non-Market Economy Countries* (Apr. 19, 2007) available at <http://ia.ita.doc.gov/download/nme-surrogate-20070321/ccmc-cmts-042007.pdf> (last visited Aug. 23, 2007) at 1-2 (proposing analysis of "comparative advantage" in determining economic comparability) ("Letter from the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters").

¹¹ *See, e.g.*, 19 U.S.C. § 1675(a)(3)(A)(2000) (establishing mandatory time-limits for administrative reviews); *id.* § 1673b(b)(1) (2000) (defining mandatory time-limits for the preliminary determination in an investigation); *id.* § 1673d(a)(1) (2000) (setting mandatory time-limits for the final determination in an investigation).

Perhaps most importantly, reliance on other possible economic indicators, such as measures of a country's "comparative advantage,"¹² could result in the distortion of normal value, which is the very problem the NME methodology is designed to prevent. According to the World Bank, GNI is a macroeconomic calculation that captures the sum of value added by all resident producers.¹³ Therefore, GNI is less distorted by intra-country transfers of resources by the government than an economic indicator that determines comparability at a more microeconomic level, such as measures of a country's comparative advantage. Simply put, micro-level indicators run a greater risk than GNI of being distorted by the country's NME status.

For example, a NME's comparative advantage in a given product could be a function of government intervention in the economy by, for example, diverting resources to that industry. By relying on the NME's comparative advantage in selecting an economically comparable surrogate, the calculation of normal value would be heavily influenced by the NME government's intervention in the economy. Put another way, a NME's comparative advantage cannot be readily isolated from the pervasive control of the government over the economy. Allowing economic comparability to be influenced by government intervention runs contrary to

¹² In the prior round of comments, the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters ("China Chamber of Commerce") advocated that the Department "lay an emphasis on each country's comparative advantage in different factors of production, such as labor cost, materials, energy and capital cost." Letter from the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters at 1-2; *see also* Letter from Sidley Austin LLP to David Spooner on behalf of the Vietnam Textile and Apparel Association, *Response to Request for Comments Concerning Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries* (Apr. 20, 2007) available at <http://ia.ita.doc.gov/download/nme-surrogate-20070321/vitas-cmts-042007.pdf> (last visited Aug. 23, 2007) at 1 (proposing that the Department should "take into consideration whether a proposed surrogate country possesses the same resource mix as the NME country implicated in an antidumping investigation.").

¹³ World Bank, Definition of GNI, attached as Attachment 1 hereto.

the very purpose of the NME methodology, which is designed to remedy the fact that "sales of merchandise in {NMEs} do not reflect the fair value of the merchandise." ¹⁴

Indeed, the Department has previously rejected the use of economic indicators that could be influenced by the NME status of the country. For example, in Policy Bulletin 04.1, the Department stated that previous methodologies for surrogate country selection referenced the national distribution of labor between the agriculture and non-agriculture sectors.¹⁵ In deciding to no longer include this particular factor in its analysis, the Department found that the factor was not an appropriate consideration in the selection of an economically comparable surrogate country.¹⁶

For each of the above-stated reasons, the Department should continue its current practice of using GNI as "the single best measure of a country's level of total income and thus level of economic development."¹⁷

II. The Department Should Continue to Exclude Economically Comparable Countries From Serving as Surrogates If They Lack Quality Country-Specific Data

In addition to the requirement that the surrogate and the NME be economically comparable, the statute explicitly instructs the Department to value the factors of production in a given NME case 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 Department.¹⁸

¹⁴ 19 U.S.C. § 1677(18)(A) (2000).

¹⁵ Policy Bulletin 04.1.

¹⁶ *Id.*

¹⁷ Initial Request for Comments, 72 Fed. Reg. 13247 at n.2.

¹⁸ 19 U.S.C. § 1677b(c)(1) (2000) (emphasis added).

Furthermore, the legislative history behind the surrogate country provision illustrates Congress' intent that the Department use the "best available evidence" from an economically comparable country.¹⁹ Consistent with Congress' intent, the Department should continue its current practice of excluding economically comparable countries from serving as surrogates where such countries lack quality country-specific data.

According to Policy Bulletin 04.1, the Department may exclude economically comparable surrogates based on their unsuitability as a potential source for factor values. Specifically, after the Department creates a list of economically comparable countries, the Department selects five "that have offered, in the Department's experience, the statistical sources and breadth of information that might make them suitable countries in the specific proceeding."²⁰ As the Department has found, this practice of excluding economically comparable countries is justified by the fact that "a country that perfectly meets the requirements of economic comparability and significant producer is not of much use as a primary surrogate if crucial factor price data from that country are inadequate or unavailable."²¹

The Department's current practice of declining to include economically comparable but otherwise unsuitable surrogates is consistent with Congress' intent. If the Department were to use unreliable or insufficient data from a country merely because it was economically

¹⁹ H. Conf. Rep. 100-576 *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623 (stating that the NME's factors of production should be valued "from the best available evidence in a market economy country (or countries) that is at a comparable level of economic development as the country subject to investigation and is a significant producer of the comparable merchandise.").

²⁰ Initial Request for Comments, 72 Fed. Reg. 13246-47. For example, although Sudan has the most similar GNI to Vietnam, Sudan's internal conflicts mean that the country is unlikely to offer adequate data. *Id.* at 13247. Accordingly, the Department relies on other countries in valuing factors of production for Vietnam. *Id.*

²¹ Policy Bulletin 04.1.

comparable, then it would violate the clear Congressional mandate to use the best evidence available in valuing the NME's factors of production. Therefore, the Department should continue its current practice of excluding countries with unreliable or inadequate data from the list of countries that could serve as a possible surrogate.

III. The Department Should Choose Between Eligible Surrogates on a Case-By-Case Basis.

After the Department has placed a list of five possible surrogates on the administrative record for comment by interested parties, the Department selects a surrogate among the countries in question based on which country produces merchandise comparable to the subject merchandise in significant quantities and provides sufficient data.²² In determining comparable merchandise, the Department makes a judgment on a case-by-case basis.²³ Similarly, the Department's standard for significant production varies case-to-case.²⁴ Lastly, the Department must determine which country has the best data regarding the factors of production for the particular product involved in the case.²⁵

Based on the differences among industries and products, it is simply impossible to devise a categorical, bright line rule by which the Department must choose between otherwise adequate surrogates. Rather, the Department should continue its current practice of selecting between otherwise adequate surrogates on a case-by-case basis. In conducting its case-by-case analysis, the Department should be guided by the statutory requirement of using the best available

²² Initial Request for Comments, 72 Fed. Reg. at 13247.

²³ Policy Bulletin 04.1.

²⁴ *Id.* (observing that "the standard for 'significant producer' will vary from case to case.")

²⁵ *Id.*

evidence along with the fact that some countries have a proven track record of serving as reliable sources of information for a given product.²⁶

IV. CONCLUSION

For the reasons set forth above, the Department should continue to determine economic comparability based primarily on GNI. Moreover, consistent with Congressional intent, the Department should avoid using economically comparable countries as surrogates when such countries lack quality data. Finally, the Department should decide between possible surrogates with both reliable data and significant production of comparable merchandise on a case-by-case basis.

Respectfully submitted,



Robert E. Lighthizer, Esq.
John J. Mangan, Esq.
Jeffrey D. Gerrish, Esq.
Jared R. Wessel, Esq

Stephen F. Munroe, Director Of Int'l Trade

On behalf of United States Steel Corporation

cc: Lawrence Norton
Anthony Hill

²⁶ 19 U.S.C. § 1677b(c)(1) (2000).

ATTACHMENT A

NotesClose Window 

GNI per capita (formerly GNP per capita) is the gross national income, converted to U.S. dollars using the World Bank Atlas method, divided by the midyear population. GNI is the sum of value added by all resident producers plus any product taxes (less subsidies) not included in the valuation of output plus net receipts of primary income (compensation of employees and property income) from abroad. GNI, calculated in national currency, is usually converted to U.S. dollars at official exchange rates for comparisons across economies, although an alternative rate is used when the official exchange rate is judged to diverge by an exceptionally large margin from the rate actually applied in international transactions. To smooth fluctuations in prices and exchange rates, a special Atlas method of conversion is used by the World Bank. This applies a conversion factor that averages the exchange rate for a given year and the two preceding years, adjusted for differences in rates of inflation between the country, and through 2000, the G-5 countries (France, Germany, Japan, the United Kingdom, and the United States). From 2001, these countries include the Euro Zone, Japan, the United Kingdom, and the United States. World Bank national accounts data, and OECD National Accounts data files.