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BY HAND DELIVERY

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

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

Dear Assistant Secretary Spooner:

We submit the following comments in response to the request of the U.S. Department of Commerce (the "Department") for public comment on certain aspects of the methodology by which the Department selects an economically comparable market economy country to serve as a surrogate for the non-market economy ("NME") country under investigation or review.¹

Specifically, the Department has requested comment on the following issues:

- (1) 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.

¹ Surrogate Country Selection in Proceedings Involving Non-Market Economy Countries: Request for Comment, 72 Fed. Reg. 40,842 (July 25, 2007) ("Request for NME Comments").

- (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.
- (3) How to evaluate and weigh the production experiences and data availability of countries in cases where there may be more than one potential surrogate with reliable data and significant production of comparable merchandise.²

In soliciting comments on these issues, the Department described its current surrogate country selection process in NME antidumping proceedings as follows:

{T}he Department currently formulates a non-exhaustive list in each proceeding of about five countries economically comparable to the NME country that, in the Department's experience, are most likely to offer data necessary to conduct the proceeding. In its subsequent analysis of potential surrogate countries, the Department then examines the production of comparable merchandise, whether production is significant, and the availability of data in the countries on this initial list. If parties suggest the consideration of another economically comparable country that did not appear on this initial list, the Department will consider the appropriateness of using that country in its analysis.³

We have litigated numerous NME antidumping proceedings before the Department. With the benefit of that experience, we believe that the Department's current surrogate country selection process should be revised and refined, in the manner discussed herein. This submission responds to each of the issues on which the Department has requested comment.

² Id. at 40,843.

³ Id. at 40,842.

I. THE DEPARTMENT SHOULD CONSTRUCT A BALANCED INITIAL LIST OF ECONOMICALLY COMPARABLE COUNTRIES THAT INCLUDES A SIGNIFICANT NUMBER OF COUNTRIES WHOSE PER CAPITA GDI IS BOTH ABOVE AND BELOW THE PER CAPITA GDI OF THE NME COUNTRY

The Department should revise its current practice in NME antidumping proceedings of formulating a non-exhaustive list of about five countries economically comparable to the NME country that, in the Department's experience, are most likely to offer data necessary to conduct the proceeding. The Department's current practice results in an initial list that is small, that is under-inclusive, and that is normally skewed toward countries with a per capita gross domestic income ("GDI") lower than the per capita GDI of the NME country. To rectify these flaws, the Department should construct its initial list of economically comparable countries as follows:

- To ensure that the list is inclusive, the Department should not limit the initial list to five countries, but should instead broaden the list by allowing a larger number of countries, as the facts warrant. As explained in detail below, the Department should abandon its preference for an initial list containing a handful of economically comparable countries and instead cast its net widely.
- To ensure that the initial list is balanced, the Department should include on the initial list countries whose per capita GDI is both above and below the per capita GDI of the NME country -- and abandon its current apparent preference for only countries whose per capita GDI is below the per capita GDI of the NME country. Countries whose per capita GDI is above the per capita GDI of the NME country are no less economically comparable than countries whose per capita GDI is below the per capita GDI of the NME country.

- In formulating the initial list of a significant number of countries whose per capita GDI is above and below the per capita GDI of the NME country, the Department should not adhere to strict numerical parameters (e.g., five countries whose per capita GDI is below the NME country's per capita GDI, and five countries whose per capita GDI is above the NME country's per capita GDI). Fixed numerical parameters do not account for "bunching" of per capita GDI's. For example, if the fixed numerical parameter were five countries above and five countries below the NME country's per capita GDI of \$1,000, the five countries above the NME country's per capita GDI might be arrayed at \$1,200, \$1,500, \$1,800, \$2,300, and \$2,400, respectively, whereas the five countries below might be "bunched" at \$950, \$930, \$920, \$910, and \$900 -- while additional economically comparable countries whose per capita GDI is below \$900 are ignored altogether.
- For these reasons, the number of countries whose per capita GDI is above and below the per capita GDI of the NME country should be determined based on either a set dollar amount above and below the NME country's per capita GDI or a fixed percentage above and below the NME country's per capita GDI. For example, if the NME country's per capita GDI is \$2,000, the initial list could contain countries whose per capita GDI is \$1,000 above and \$1,000 below the NME country's per capita GDI, or alternatively, 50 percent above or 50 percent below the NME country's per capita GDI. A set dollar or percentage parameter would obviate the "bunching" problem, and would also further the threshold

requirement that the Department cast its net widely in formulating its inclusive and balanced initial list of economically comparable countries.

- In compiling the initial list, the Department should establish these parameters in a manner that captures economically comparable countries whose per capita GDI is above and below the per capita GDI of the NME country, and are likely to have the data necessary to conduct the antidumping proceeding. (The Department should be cautious not to sua sponte exclude countries from the initial list without clear evidence that they lack the necessary data. In the event that the Department does decide to exclude a country on that basis, it should explain the reason for the exclusion in detail in the memorandum designating the initial list of suggested surrogate countries.)⁴
- In compiling the initial list, the Department should exclude only those economically comparable countries that do not have an industry that produces the merchandise under investigation or review (or that have insignificant production of comparable merchandise).

⁴ In the highly unlikely event that all of the countries on the Department's broad, balanced initial list lack data suitable for valuing the factors of production in the NME country, then per the Department's practice, interested parties would have the opportunity to suggest the consideration of another country that did not appear on the initial list, and the Department would consider the appropriateness of using that country in its surrogate country analysis. Of course, the likelihood of such an occurrence is diminished significantly where the initial list is both broad and balanced, in the manner described above.

II. IN CONSTRUCTING THE INITIAL LIST, THE DEPARTMENT SHOULD INCLUDE ALL ECONOMICALLY COMPARABLE COUNTRIES THAT HAVE AN INDUSTRY THAT PRODUCES THE MERCHANDISE UNDER INVESTIGATION OR REVIEW, RATHER THAN SELF-SELECT A HANDFUL OF ECONOMICALLY COMPARABLE COUNTRIES

As a general matter, economically comparable countries should not be excluded from the initial list unless, as explained in Comment I, the country in question does not have an industry that produces the merchandise under investigation or review (or has insignificant production of comparable merchandise).

For the reasons explained in Comment I, the Department should start from a broader base of economically comparable countries. In constructing this initial list, the Department should include all economically comparable countries (subject to the no-industry limitation), rather than self-select a handful of economically comparable countries.

In other words, the Department should not anticipate what interested parties might say in objecting to a given economically comparable country as the appropriate surrogate. Rather, the Department should formulate a list of economically comparable countries with significant production of comparable merchandise. The Department should then allow interested parties, through their comments on the initial list, to explain which country is the most appropriate surrogate country on the basis of reliable country-specific data (and why other countries are less appropriate or inappropriate surrogates on the basis of a general lack of such country-specific data).⁵

⁵ The criteria for assessing the reliability of a potential surrogate country's data are discussed in Comment III.

III. THE DEPARTMENT SHOULD CAREFULLY EVALUATE AND WEIGH THE RELIABILITY AND SUFFICIENCY OF EACH POTENTIAL SURROGATE COUNTRY'S DATA; AND IF TWO POTENTIAL SURROGATE COUNTRIES HAVE EQUALLY RELIABLE DATA, THEN THE DEPARTMENT SHOULD NOT DISREGARD THE POSSIBILITY OF A "TIE"

We agree that in selecting the appropriate surrogate country, the Department should evaluate each economically comparable potential surrogate on the basis of production of comparable merchandise and the reliability of their data.

The Department's methodological lodestar is the determination of the most accurate dumping margin based on the most reliable surrogate country data. In assessing the reliability of a potential surrogate country's data, the Department should take into consideration the following:

- (1) The Department should ensure that the surrogate country has reliable, regularly compiled import data gathered from a broad range of exporting countries, which bear the imprimatur of the surrogate country's trade ministry or comparable government agency.⁶
- (2) The Department should determine a potential surrogate country's domestic pricing data to be reliable only if those data are regularly compiled from a broad and representative range of sources.
- (3) The Department should determine a potential surrogate country's financial statements to be reliable only if those statements are audited, regularly published,

⁶ Government data are not necessarily the only source of reliable data. Non-government data may be an alternative data source provided that they manifest indicia of reliability.

and detailed, and importantly, include breakouts of depreciation overhead and non-depreciation overhead.

- (4) The Department should determine a potential surrogate country's data for significant inputs to be reliable only if those data are regularly published, detailed, and inclusive of all significant inputs.

We would reiterate that these qualitative assessments of each surrogate country's data should follow the publication of a broad, balanced initial list of economically comparable countries -- not precede it.

If at the conclusion of its searching, individualized surrogate country assessment process, the Department were to determine, based on the totality of the above-described criteria, that in fact two potential surrogate countries have equally reliable data, then the Department should not disregard the possibility of a "tie," or feel compelled to select one potential surrogate over the other. There is nothing talismanic about "breaking the tie." Rather, the Department should consider averaging the data of the two tied surrogates for valuing the factors of production in the NME country where those data are considered equally reliable, representative, and current.

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Please contact any of the undersigned should you require clarification of any aspect of this submission.

The Honorable David Spooner
August 24, 2007
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In accordance with the Department's instructions, we are submitting the original and six copies of these comments, and are transmitting an email copy to the Import Administration Webmaster.

Respectfully submitted,

A handwritten signature in black ink that reads "Bradford L. Ward". The signature is written in a cursive style with a large, prominent 'B'.

Bradford L. Ward
Rory F. Quirk
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