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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
U.S. Department of Commerce
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

PUBLIC DOCUMENT

**Re: Comments Regarding Surrogate Country Selection In Proceedings
Involving Non-Market Economy Countries**

Dear Mr. Spooner:

King & Spalding LLP submits these comments in response to the Department's July 25, 2007 request for comments on its methodology for the selection of an economically comparable market economy country to serve as a surrogate for a non-market economy ("NME") country under investigation or review.¹ *Surrogate Country Selection In Proceedings Involving Non-Market Economy Countries; Request For Comments*, 72 Fed. Reg. 40842 (July 25, 2007) ("*Request For Comments IP*"). This submission is consistent with the comments we filed on

¹ These comments are filed on behalf of the American Furniture Manufacturers Committee For Legal Trade and the Polyethylene Retail Carrier Bag Committee.

April 20, 2007 in response to the Department's earlier request for comments on the surrogate country selection process.

In its *Request For Comments II*, the Department asked parties to comment on certain aspects of its methodology for the selection of the surrogate country in an NME proceeding.

First, the Department requested comments on the statutory requirement that the surrogate country be "economically comparable." In particular, the Department asked for specific guidelines that it should follow in determining the economic comparability of potential surrogate countries. *Request For Comments II*, 72 Fed. Reg. at 48042. The Department asked commentators to suggest (1) how it should construct the initial list of economically comparable countries; (2) how this set of countries should be balanced; and (3) how many countries the initial list should contain. *Id.* at 48043.

Second, the Department invited comments on whether certain comparable countries should be excluded, at least initially, from the Department's analysis to determine the best surrogate country on the basis of a general lack of country-specific data. *Id.*

Finally, the Department asked for comments 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. *Id.*

I. GUIDELINES FOR THE DETERMINATION OF ECONOMIC COMPARABILITY

A. The Statute Does Not Require The Department To Select The Country That Is The Most Economically Comparable To The NME

The statute prescribes two criteria for the selection of the surrogate country in an NME antidumping proceeding. It provides that the Department

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.

19 U.S.C. § 1677b(c)(4). The statute, however, does not define economic comparability.

The regulations state that “in determining whether a country is at a level of economic development comparable to the nonmarket economy...the Secretary will place primary emphasis on *per capita* GDP as the measure of economic comparability.” 19 C.F.R. § 351.408(b).

Significantly, the regulations do not require the Department to rank order potential surrogate countries’ comparability according to how close their per capita GNI² is to the NME country or to select the surrogate country that is the *most* comparable to the NME country. *See Issues and Decision Memorandum for the 2004-2005 Administrative Review of Wooden Bedroom Furniture from the People’s Republic of China* (Aug. 8, 2007) at 27 (“*Furniture Issues and Dec. Memo.*”) available online at <http://ia.ita.doc.gov/ia-highlights-and-news.html>. *See also* Non-Market

² The Department now uses per capita GNI, rather than per capita GDP. *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates: Request For Comment*, 72 Fed. Reg. 13246, 13247, fn.2 (March 21, 2007).

Economy Surrogate Country Selection Process, *Import Administration Policy Bulletin 04.1*, March 1, 2004 (“*Policy Bulletin 04.1*”). In fact, the regulations do not provide any numeric parameters for the determination of economic comparability.³ The statute states that the “valuation of the factors of production shall be based on the best available information regarding the value of such factors in a market economy country or countries *considered to be appropriate by the administering authority.*” 19 U.S.C. § 1677b(c)(1) (emphasis added). Moreover, as the Department has noted, the determination of the surrogate country is a case-specific issue, because the range of available data and production of comparable merchandise vary with the product under investigation or review. *See Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates: Request For Comment*, 72 Fed. Reg. 13246, 13247 (March 21, 2007) (“*Request For Comment I*”).

Accordingly, the statute and regulations provide the Department with broad discretion to determine what constitutes economic comparability with respect to GNI in each case.

B. In Constructing The Initial List Of Potential Surrogate Countries, The Department Should Not Place A Numeric Limit On The Difference In GNI Per Capita

The Department requested comments and suggestions with respect to specific guidelines that the Department should follow in determining the economic comparability of countries in a given case. *Request For Comments*, 72 Fed. Reg. at 40842. We support the Department’s

³ The requirement of economic comparability is not even binding. The statute requires that the criteria be met only “to the extent possible.” 19 U.S.C. § 1677b(c)(4)

current methodology for selecting the appropriate surrogate country and do not believe that the adoption of strict guidelines would improve the process. In particular, the Department should not adopt a numeric limit for the comparison of the GNI of the potential surrogate countries and the GNI of the NME country. For example, the Department should not establish a specific point at which differences in per capita income of a potential surrogate country and the NME are “too large” to consider that country economically comparable.

First, the establishment of a strict numeric range for the difference in per capita GNI of a potential surrogate in comparison to the NME country is inconsistent with the statute and regulations. As explained above, the statute and regulations grant the Department discretion in the determination of economic comparability. Although the Department’s regulations provide that the Department will place “primary emphasis” on GNI per capita in determining the best surrogate country in an NME proceeding, the regulations do not require that the Department place sole emphasis on the GNI per capita. Nor do the regulations dictate numeric limits for the Department in determining whether the GNI per capita of a country is economically comparable to another.

Second, although the Department has stated that it uses the GNI per capita reported in the World Bank’s *World Development Report*, the statute and regulations do not require the Department to follow the classifications (*e.g.*, low income, low middle income, *etc.*) assigned to countries by the World Bank, as the respondents argued recently in the review of wooden bedroom furniture from China. If Congress intended for the Department to adhere to the

classification of countries by the World Bank, the statute would have been drafted to achieve that result.

Third, the Department should consider economic comparability and the per capita GNI in the context of the broad spectrum of economic development across the world. As the Department has noted, the determination of the economic comparability of two countries cannot be based solely on a comparison of the per capita GNI figures in a vacuum. *See 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) (“*Surrogate Country Selection Memorandum*”). In constructing the initial list of potential surrogate countries, the Department should not look at economic comparability narrowly, because “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 PRC than just the countries immediately closest to it in terms of per capita GNI.” *Id.* at 8. Although a disparity in the per capita GNI figures of the potential surrogate country and the NME country may seem large in absolute terms, in terms of economic development, they may still be economically comparable because they are at a fairly similar stage of development. *Id.* As the Department stated in the furniture case, “while [India and China] have more advanced economies than the world’s least-developed countries, both countries are also quite distant from the economies of the developed world and even from many middle-income countries.” *Id.* (providing a comparison of the per capita GNI figures of several countries to illustrate its point). Thus, India is “economically comparable” to

China in that the per capita GNI is in the same broad range as China's when the Department considers the range of all countries in the world, not just the countries that are closest to China.

Furthermore, there are other factors that should be considered in the determination of economic comparability. For example, the size of India's economy is closer to China's than any other economy. India's total GNI is 35.2 percent of China's, while Indonesia, for example, is the only other country that exceeds 10 percent of China's GNI. The Philippines, for example, is closer than India to China with respect to GNI per capita, but has a total GNI that is only 4.8 percent of China's total GNI. The size of India's total population is also more consistent with China than other countries that may have a GNI per capita that is closer to China's. For example, the population of the Philippines is only 6.4 percent that of China. Thus, the patterns of trade and the scale at which the economy tends to function are likely to be more similar between India and China than between China and some other countries that have a GNI per capita that is closer to that of China.

Furthermore, certain countries may have more similarities with respect to the business and cultural environments. For example, companies in other Asian countries may operate in a business environment that is more similar to China than a country in South America. The Department should not consider the per capita GNI of potential surrogate countries in isolation and reduce the analysis of economic comparability to a simple mathematical calculation. Such a narrow analysis does not demonstrate true economic comparability and is not consistent with the statute or regulations.

Accordingly, in determining which countries are economically comparable to the NME country, the Department should reject a narrow approach and continue to consider the per capita GNI figures in the context of the spectrum of economic development across the world.

C. The Department Should Select Countries With Per Capita Income Both Above And Below The NME Country's Per Capita Income

In its request for comments, the Department asked how the initial list of potential surrogate countries should be balanced. *Request For Comments II*, 72 Fed. Reg. at 40843. In selecting the initial list of potential surrogate countries that are economically comparable to the NME, the Department should select a balance of countries with adequate data that have per capita GNI figures that are both above and below the NME country's per capita income. In most cases involving NMEs, including the first administrative review of furniture, the list of potential surrogate countries provided by the Office of Policy included only countries with a per capita income below that of the NME. *See, e.g., Surrogate Country Selection Memorandum at Attachment 2; see also Administrative Review of Polyethylene Retail Carrier Bags ("Carrier Bags") from the People's Republic of China (PRC): Request for a List of Surrogate Countries, Memorandum From Ron Lorentzen to Mark Manning, at 2 (Dec. 21, 2006).*

There is no basis, however, in the statute or regulations to limit consideration of surrogate countries to countries with a per capita income that is below the per capita income of the NME country. Moreover, as explained above, the determination of economic comparability should be made in the context of the spectrum of economic development across the world and with regard to other aspects of economic comparability beyond the per capita GNI. The consideration of

potential surrogate countries with per capita income both above and below that of the NME country is consistent with this approach.

Accordingly, in compiling the initial list of potential surrogate countries, the Department should balance the list with countries with a per capita GNI both above and below that of the NME.

D. Number Of Countries On Initial List

The Department asked for comments on how many countries should be included on the initial list of potential surrogate countries. *Request For Comments II*, 72 Fed. Reg. at 40843. We do not advocate a specific number, because the designation of a required number of countries is unnecessarily limiting. Under its current practice, the Office of Policy selects five countries for inclusion on the initial list of potential surrogate countries. Although the Department uses the initial list from the Office of Policy as its starting point for the selection of the surrogate country, any party can suggest an economically comparable country that is a significant producer of comparable merchandise that is not on the list for the Department's consideration. *See Furniture Issues and Dec. Memo.* at 28 (Cmt. 1).⁴ Therefore, we suggest that the Office of Policy's initial list should contain a reasonable number of countries to ensure that the Department has a sufficient pool of countries to yield an appropriate surrogate.

Accordingly, the Department should not designate a required number of countries for its initial list.

⁴ As the Department noted, there is "no obstacle to parties suggesting other potential surrogate countries not on the Department's initial list, as long as they, too, are economically comparable." *Surrogate Country Selection Memorandum* at 9.

II. THE DEPARTMENT SHOULD CONSIDER DATA ISSUES IN ITS COMPILATION OF THE INITIAL LIST OF COUNTRIES

A. The Department Should Exclude Countries That It Determines Do Not Generally Provide The Data Necessary To Conduct An Antidumping Proceeding

As the Department has correctly noted “the Department does not consider a country’s level of economic comparability in isolation.” *Request For Comments I*, 72 Fed. Reg. at 13247. The statute does not require that the Department simply select the country with the closest GNI to the NME without any other consideration. Furthermore, neither the statute nor regulations require that the Department consider every country that may be economically comparable to the non-market economy country when it compiles a list of potential surrogates. See 19 U.S.C. § 1677b(c); 19 C.F.R. § 351.408(b). Accordingly, there are other factors that the Department should consider in selecting the initial list of potential surrogate countries. Specifically, the Department should consider whether a country can provide the data necessary to conduct an antidumping proceeding.

The Department recognized the importance of data considerations in the process of selecting the appropriate surrogate country in its Policy Bulletin. The Department stated that

data quality is a critical consideration affecting surrogate country selection. After all, 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.

See Policy Bulletin 04.1 at 4.

In the first review of wooden bedroom furniture from China, certain respondents asserted that the Department skipped over a number of countries closer to China in terms of GNI to reach

down to select India as a potential surrogate country. The ability to collect necessary data from a country, however, is highly relevant. Many of the “skipped” countries in the furniture review were not appropriate surrogates based on the availability of data. It would be nonsensical to ignore data considerations and place countries such as Angola, West Bank & Gaza, or Azerbaijan on the initial list of potential surrogates when there is absolutely no chance that such a country would be able to provide the necessary data.

Therefore, the Department should exclude countries that will not likely provide the necessary data to conduct an antidumping proceeding from the initial list of potential surrogate countries.

B. The Department Should Use The Availability, Reliability, And Accuracy Of Import Statistics As The Primary Measure Of A Potential Surrogate Country’s Data Quality

In determining whether adequate data is available in the surrogate country to value the factors of production, the Department should use the availability, reliability, and accuracy of import statistics reported in an official government publication as the primary measure of a country’s data quality. This is consistent with the Department’s established preference for the use of import statistics to calculate surrogate values. *See, e.g., Certain Cased Pencils from the People’s Republic of China*, 71 Fed. Reg. 38366, I&D Memo. Cmt. 1 (July 6, 2006); *Fresh Garlic from the People’s Republic of China*, 71 Fed. Reg. 26329, I&D Memo. Cmt. 8 (May 4, 2006); *Sebacic Acid from the People’s Republic of China*, 70 Fed. Reg. 16218, I&D Memo. Cmt. 5 (March 30, 2005). The use of import statistics to measure data quality is also consistent with the Department’s stated practice to use investigation or review period-wide price averages, prices

specific to the input in question, prices that are contemporaneous with the period of investigation or review, and publicly available data. *See Policy Bulletin 04.1.*

Furthermore, the use of import statistics as the primary measure of the adequacy of the data -- and, consequently, the suitability of the economically comparable potential surrogate countries -- promotes predictability and reliability in antidumping proceedings. It will prevent a “free-for-all” where parties attempt to offer self-serving and self-selected price quotes, domestic trade publications, and other sources that are not official government data in each proceeding.

Accordingly, the Department should use the availability, reliability, and accuracy of import statistics as the primary measure of a potential surrogate country’s data quality and its suitability as a surrogate.

III. WEIGHTING OF PRODUCTION EXPERIENCE AND DATA QUALITY

The Department requested comments on how it should evaluate and weight the production experiences and data availability of countries in cases where there may be more than one potential surrogate country with reliable data and production of comparable merchandise.

As an initial matter, we are unclear what the Department means by the phrase “production experiences.” *See Request For Comments II*, 72 Fed. Reg. at 40843. If the Department is referring to the size of the industry in the surrogate country that is producing the comparable merchandise, once the Department determines that a country is a significant producer of comparable merchandise as required by the statute, we believe that the relative size of the industry should not factor into the Department’s selection of the surrogate country. The size of the industry has no impact on the surrogate values that would be assigned to material and

energy inputs, because the surrogate values are based upon the usage of the inputs across all industries in the surrogate country.

If the Department is instead referring to the size of the producers of comparable merchandise in the surrogate country, we believe that this also should not be considered in the Department's determination of the appropriate surrogate country. Once a surrogate country has been determined to be a significant producer of comparable merchandise, relative production experiences should not be a factor in surrogate country selection. To the extent that the Department considers production processes in an antidumping proceeding involving an NME, it is with respect to the selection of the companies to provide financial statements to calculate the surrogate financial ratio. *See, e.g., Shanghai Foreign Trade Enters. v. United States*, 318 F. Supp. 2d 1339, 1348 (Ct. Int'l Trade 2004) ("To determine if a product produced by a company in the surrogate country is comparable, Commerce's established practice is to apply a three-part test that examines 'physical characteristics, end uses, and production processes'"). Accordingly, we do not believe that the Department should place any emphasis on "production experiences," regardless of the Department's meaning for that term, in the selection of the appropriate surrogate country.

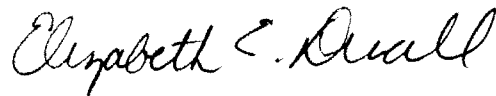
Instead, the Department should place greater emphasis on data availability. With respect to data considerations, the Department should prefer countries, such as India, in which it has had success in finding the necessary data for antidumping proceedings in the past. Such a preference also enhances predictability, which is one of the overarching goals of the Department in antidumping proceedings. *See Antidumping Duties; Countervailing Duties; Preamble To The*

The Honorable David Spooner
August 24, 2007
Page 14

Proposed Rule, 61 Fed. Reg. 7308, 7344 (Feb. 27, 1996); *Lasko Metal Prods. v. United States*,
43 F.3d 1442, 1446 (Fed. Cir. 1994); *Creatine Monohydrate From the People's Republic of
China*, 64 Fed. Reg. 71104, 71106 (Dec. 20, 1999).

Please contact us if you have any questions about these comments.

Respectfully submitted,

A handwritten signature in black ink that reads "Elizabeth E. Duall". The signature is written in a cursive style with a large initial "E" and a stylized "D".

Joseph W. Dorn
J. Michael Taylor
Elizabeth E. Duall