

**KELLEY DRYE**  
**COLLIER SHANNON**

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Mr. David Spooner  
Assistant Secretary for Import Administration  
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 – Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Selection and Separate Rates**

Dear Mr. Spooner:

On behalf of the Kelley Drye Collier Shannon (“KDCS”), this submission responds to the Department of Commerce’s (the “Department”) request for comments regarding the methodology by which it identifies economically comparable surrogate market economy countries in antidumping duty proceedings involving non-market economy (“NME”) countries. Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates, 72 Fed. Reg. 13,246 (Mar. 21, 2007) (the “Notice”). KDCS presents the following comments concerning the methodology used by the Department to identify countries that are economically comparable to a given NME country and thus potential surrogate countries in NME proceedings.

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**A. Identification of Economically Comparable Countries**

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. See Notice, 73 Fed. Reg. at 13,246 (quoting Administration Policy Bulletin 04.1, available at <http://ia.ita.doc.gov/policy/bull04-1.html>). 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 offered, in the Department's experience, the statistical sources and breadth of information that might make them suitable surrogate countries in the specific proceeding.

Notice, 72 Fed. Reg. at 13,246-247.

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. Id., 72 Fed. Reg. at 13,247. 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." Id. The issue of economic comparability, however, "does remain largely constant from case to case ...." Id.

In light of this, the Notice specifically requested that parties comment on "(1) how, given the requirement to base the determination on per capita income, the Department should determine which countries are economically comparable to a given NME country, and (2) whether and on what basis the Department should disregard certain economically comparable countries as lacking data suitable for valuing the factors of production." Id. at 13,247.

As a general matter, and subject to the suggestion provided below, 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 AD 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 not exclusive or 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 . . . .”<sup>1</sup> “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.*

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<sup>1</sup> 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).

The Department's existing practice, as discussed above, is appropriately flexible and should not be substantially altered at this time. In one area, however, KDCS believes that the Department should revise its existing practice. Specifically, 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-capital 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.<sup>2</sup>

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). Countries that are at a level of economic development comparable to a particular NME country include countries that are both less and more economically developed. In terms of GNI per

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<sup>2</sup> 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).

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 with those whose level of per capita GNI is less than that of the NME country at issue. This will ensure that no inadvertent bias exists in the process of identifying potential surrogate countries.

**B. Disregarding Certain Economically Comparable Countries As Lacking Data Suitable For Valuing The Factors Of Production**

The second issued presented for comment by the Department in the Notice was “whether and on what basis the Department should disregard certain economically comparable countries as lacking data suitable for valuing the factors of production.” Notice, 72 Fed. Reg. at 13,247.

As a general matter, KDCS believes that the Department should not use data from economically comparable countries (as defined above) to value the factors of production when (a) the country is not a significant producer of comparable merchandise, and/or (b) publicly available data to value the necessary factors of production (i.e., valuation data derived from values of domestic sales in the surrogate country, import data, or some combination of the two) are either unavailable or unreliable. These data should result, preferably, from a regularly administered program of data analysis and compilation, whether administered under the auspices of a government body or a private section body.

Consideration of economic comparability is only the threshold criterion, and is not required in every case. Logically, the more important factor – relative to the overriding directive to calculate dumping margins as accurately as possible (Rhone Poulenc, Inc. v. United States,

899 F.2d 1185, 1191 (Fed. Cir. 1990)) – is comparability of the merchandise. See Issues and Decision Memorandum for the 11/01/01-10/31/02 Administrative Review and New Shipper Reviews of the Antidumping Duty Order on Fresh Garlic from the People’s Republic of China (June 7, 2004) at Comment 1 (“It is our practice and policy to base surrogate valuations on product-specific information.”) When a potential surrogate country is not a significant producer of comparable merchandise, it will fail to satisfy the statutory requirements set forth in 19 U.S.C. § 1677b(c)(4)(B), and the Department would be statutorily precluded from using the country as a source of surrogate data.

As the Department recognizes in IA Policy Bulletin 04.1, economic comparability is relatively less important in cases involving “unusual or unique” subject merchandise:

Cases where particular emphasis on “significant producer of comparable merchandise” is warranted are generally those that involve subject merchandise that is unusual or unique (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. See *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 67 FR 63877 (October 16, 2002).

While the Policy Bulletin makes clear that there is no set formula for determining what constitutes “comparable merchandise” in a particular case, the Policy Bulletin does state that in valuing major inputs, comparability is best interpreted narrowly:

{W}here there are major inputs, *i.e.*, inputs that are specialized or dedicated or used intensively, in the production of the subject merchandise, *e.g.*, processed agricultural, aquatic and mineral products, comparable merchandise should be identified narrowly, on the basis of a comparison of the major inputs . . . .

Pursuant to this policy, Commerce has occasionally gone outside the list of preferred surrogate countries (based on economic comparability) to value individual factors of production using surrogate values from other countries while retaining one of the preferred surrogates (e.g., India) as the primary surrogate for valuing all other factors. See, e.g., Freshwater Crawfish Tail Meat From the People's Republic of China (using India as the primary surrogate, but valuing the major input (whole crawfish) using data from Portugal, Spain and Australia at various stages of the proceeding); Certain Cased Pencils From the People's Republic of China (using U.S. prices for the major input (basswood) over Indian prices, based on product comparability).<sup>3</sup> In both cases, data quality was a major consideration: in Crawfish, the Department suspended using the Spanish import data when import volume fell to low levels, and in Pencils, the agency ultimately rejected use of the Indian import data because the data covered a basket category of woods (rather than the single type of wood judged to be similar to that used in Chinese pencils). Thus, in appropriate cases, product comparability and data quality should trump economic comparability – at least in connection with the selection of surrogate values for major inputs.

In many NME cases, the Department utilizes official import data as the basis for surrogate values. While these data are often more reliable and representative than available public data on the values of inputs produced domestically in the chosen surrogate country, it is important for the Department not to take their reliability for granted. To its credit, the Department has had a longstanding practice of removing from the official import statistics any data pertaining to imports from NME countries, recognizing that such values improperly reduce

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<sup>3</sup> The Department's choice of surrogate values in Pencils was upheld by the Court of International Trade in Writing Instrument Manufacturers Association, Pencil Section v. United States, 21 C.I.T. 1185, 984 F. Supp. 629 (1997).



import average unit values. The Department should, however, recognize that in cases where NME imports into the surrogate country are substantial, the bias that they introduce into the import data cannot be removed simply by redacting the NME data from the total. In cases where NME imports into a potential surrogate country are substantial, they will necessarily suppress or even depress prices from competing suppliers. Because of this competitive impact, the Department should carefully consider whether official import data – even with the NME import data excluded – can reliably be used for surrogate valuation. Indeed, the price suppressive/depressive effect of NME imports may also warrant dismissing available data on the prices of domestically-produced inputs in the surrogate country in question, and opting for data from alternative surrogate countries.

Even when a country at a comparable level of economic development is a significant producer of comparable merchandise, circumstances nonetheless may counsel that the country not be identified as a possible surrogate country. KDCS believes that the Department's experience in this area reflects an appropriate level of administrative flexibility and judgment, and is aware of no administrative difficulties warranting the development of an additional standard for deciding which countries to include on the initial list of potential surrogate countries. The ability of any interested party to propose and advocate the use of a surrogate country not included on the list compiled by the Office of Policy provides a mechanism that fosters the development of a complete record on this issue, which the Department considers when reaching its determination in any given segment of a proceeding.

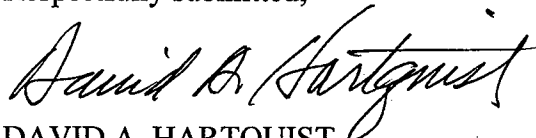
Whether and to what extent a potential surrogate country is likely to offer the necessary data for an antidumping proceeding is a matter that is case-specific, and whose resolution will

depend on the product under investigation or review. It would be difficult if not impossible to develop a standard in this area that would be meaningful without unduly limiting the Department's ability to consider and account for specific and frequently unique characteristics and needs in any given proceeding.

In the end, KDCS does not believe that attempting to develop a standard or to determine when a possible surrogate country is a sufficiently robust source of surrogate value data is necessary or warranted.

Please contact the undersigned if you have any questions regarding this submission.

Respectfully submitted,



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