

LAW OFFICES

TELEPHONE (202) 785-4185

STEWART AND STEWART

E-MAIL

TELECOPIERS

2100 M STREET, N.W.

GENERAL@STEWARTLAW.COM

(202) 466-1286/87/88

WASHINGTON, D.C. 20037

WWW.STEWARTLAW.COM

April 20, 2007

Honorable David Spooner  
Assistant Secretary for Import Administration  
U.S. Department of Commerce  
Central Records Unit, Room 1870  
Pennsylvania Ave. and 14<sup>th</sup> St., N.W.  
Washington, DC 20230

Re: Comments in Response to Federal Register Notice, *Antidumping Methodologies in Proceedings Involving Non-Market Economy Countries: Surrogate Country Selection and Separate Rates* ("Comment Invitation"), 72 Fed. Reg. 13246 (March 21, 2007)

Dear Assistant Secretary Spooner:

The Law Offices of Stewart and Stewart is responding to the solicitation for comments regarding the Department's methodologies for: (1) selecting a surrogate country for valuing factors of production from a non-market economy; and (2) determining that non-reviewed exporters from a non-market economy are entitled to an antidumping duty rate other than the country-wide rate. Our firm has participated in numerous antidumping and countervailing duty proceedings before the Department including numerous proceedings involving imports from non-market economies. We provide our comments on the two methodologies as follows.

**I. SURROGATE COUNTRY SELECTION**

**A. General**

The statute provides that the information to be used to value factors of production for a non-market economy ("NME") country when Commerce has decided that it cannot use prices in



Member International Society of Primerus Law Firms

the country for normal values shall be based on the best information available regarding those values that is available in a market country or countries. 19 U.S. C. §1677b(c)(1). The statute further specifies that the Department will utilize to the extent possible the prices or costs from a country with a market economy that: (1) is at a level of development comparable to that of the NME; and (2) has significant producers of comparable merchandise. 19 U.S. C. §1677b(c)(4).

By regulation, the Department has explained further that when choosing a surrogate country at a comparable level of development it will rely primarily on *per capita* gross domestic product (“GDP”). 19 C.F.R. § 351.408(b). The Department has explained in the captioned notice that it has modified this approach to use *per capita* gross national income (“GNI”) instead of GDP on the grounds that, while the measures are quite similar, the World Bank reports GNI across almost all countries and that it believes that GNI is the “single best measure of a country’s level of total income and thus level of economic development.” *See Comment Invitation*, 72 Fed. Reg. at 13246, n.2.

The Department has identified the rules that it will use for factor valuation: (1) it will normally use publicly-available information; (2) it will normally value all factors using values from a single country; (3) it will determine wage rates for the NME country using a regression-based analysis; and (4) it will normally determine factor values for manufacturing expenses, overhead, and profit using publicly-available information gathered from producers of the identical or comparable merchandise in the surrogate country. 19 C.F.R. § 351.408(c).

According to the Department's policy bulletin, the following process is used in a proceeding to develop the lists of potential surrogates that are ultimately released to the interested parties for comment. First, the operations team for a case sends a written request to Commerce's Office of Policy ("OP") for a list of potential surrogate countries.<sup>1</sup> In response, the OP provides a list to the operations team. It appears that, to make its selection, the OP looks primarily (or solely) at GNI, excluding only NME countries and countries that may technically be considered as having market economies but which in OP's judgment are unsuitable sources for surrogate values.<sup>2</sup> Second, OP identifies which countries among its initial list are producers of comparable merchandise.<sup>3</sup> Third, OP will look for countries with "significant" producers of the comparable merchandise.<sup>4</sup> Fourth, OP considers the data sources available for groups of economically-similar countries that have significant producers of subject merchandise.<sup>5</sup> OP chooses five of the countries that have been selected as the result of all of these steps, and the operations team then puts this list of countries on the record and provides the parties with the opportunity to comment on them. *See Comment Invitation*, 72 Fed. Reg. at 13247.

***B. Specific***

In its notice, the Department has asked two broad questions followed by more specific ones. *See Comment Invitation*, 72 Fed. Reg. at 13247. We present the questions first, followed by our answers.

---

<sup>1</sup> *See* Import Administration Policy Bulletin 04.1 at 2 (March 1, 2004) (available on line at <http://ia.ita.doc.gov/policy/bull04-1.html>).

<sup>2</sup> *See id.* n.3.

<sup>3</sup> *See id.* at 2.

<sup>4</sup> *See id.* at 3.

Broad Questions	Specific Questions
<p>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?</p>	<p>a. At what point should differences in per capita GNI of a potential surrogate and the NME be “too large” for the two to be considered economically comparable?</p> <p>b. Should the Department develop a standard for deciding which countries to include on the initial list of potential surrogate countries?</p> <p>c. What could be an appropriate standard for determining which countries are likely to offer the necessary data for conducting an antidumping proceeding?</p> <p>d. How should the Department’s initial list of five potential surrogates be constructed? Should the list be comprehensive (which may require that the Department and interested parties examine the extent of production of comparable merchandise in every economically comparable country), or could the list be limited in some way?</p>
<p>2. Whether and on what basis the Department should disregard certain economically comparable countries as lacking data suitable for valuing the factors of production?</p>	<p>e. Is there a broad measure of countries’ data quality (for example, the availability, reliability, and accuracy of import statistics) that the Department could use to determine at the outset of the proceeding a subset of the economically comparable countries for consideration as a primary surrogate?</p> <p>f. Should the Department consider whatever countries remain after applying these data screens, or should the Department ensure that the final list includes a balance of countries both above and below the NME’s per capita income?</p>

The Department’s questions raise issues both of procedure and substance. As a matter of procedure, the process described in the Department’s policy bulletin, as well as the notice inviting comment, show that the Department makes at least three substantive judgments before releasing its list of five candidate countries to the parties: (1) it selects a range of countries that are economically comparable to the NME country, excluding countries which are inappropriate (first list); (2) it determines which countries in this range are producers, and then which are

---

<sup>5</sup> See *id.* at 4.

significant producers of the subject merchandise (second list); and (3) it selects from among these countries those that have significant data sources (third list).

So far as we are aware, the Department has not documented what its current cut-off range is, nor has it identified which countries are routinely excluded for other reasons. Nor are we aware that the Department identifies complete lists of those countries identified as significant producers or, finally, which of those are deemed to have good data sources.

We recommend that, as a matter of procedure, the Department release the three successive lists that it creates in order to put its ultimate list of five countries on the record. As part of such a release, the Department should identify any tests used, such as cut-off points for determining economically-comparable countries. Such a release would improve the process by making it more transparent as well as providing the interested parties with benchmarks for each of the judgments that it makes. This, in turn, would allow the parties to make an informed judgment as to whether a country not on the list of five would nonetheless be a good candidate for selection as the surrogate.

Finally, we recommend that the Department make no further initial selection of countries as candidates for selection as a surrogate country than its third list: countries that are economically comparable, have significant producers of comparable merchandise, and have significant publicly-available data sources. By adding its three lists to the record and allowing the parties to make their recommendations based on the lists, the Department will then be able to make an informed decision as to the best surrogate country. This would be a more transparent process than that which Commerce currently follows.

As to substance, we recommend the following. We believe that the initial selection of countries for the Department's first list (those countries economically comparable to the NME country) should be broader rather than narrower. For example, in the *Tapered Roller Bearings from China* case, the country with the lowest *per capita* GNI was India with a GNI of \$530 as compared to the PRC's (then) GNI of \$1100.<sup>6</sup> On the upper end, we have seen the selection of a country (Turkey) whose *per capita* GDP for the two years included in the period of review was \$3160 in 1998 and \$2900 in 1999 while the GDPs for China were \$750 in 1998 and \$780 in 1999.<sup>7</sup>

We are familiar with instances where the majority of the five countries in the Department's lists have GNIs that are lower than the NME's.<sup>8</sup> Indeed in a recent New Shipper Review of *Honey from the People's Republic of China*, all five countries identified as potential surrogates by the Department had *per capita* GNIs for 2005 that were below the PRC's (a range of \$720 - \$1300 vs. \$1740 for the PRC).<sup>9</sup> While this system has worked reasonably well, we think that the Department could broaden the number of countries it examines initially by

---

<sup>6</sup> See *Antidumping Duty Administration Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished ("TRBs") from the People's Republic of China (PRC): Request for a List of Surrogate Countries*, Memorandum to Wendy Frankel from Ron Lorentzen (A-570-601 6/1/04-5/31/05) (October 11, 2005) at 2.

<sup>7</sup> See *Redetermination Pursuant to Court Remand, Yantai Oriental Juice Co., et al. v. United States and Coloma Frozen Foods, Inc. et al.*, CIT Court No. 00-07-00309, at 8.

<sup>8</sup> See, e.g., *Antidumping Duty Administration Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished ("TRBs") from the People's Republic of China (PRC): Request for a List of Surrogate Countries*, Memorandum to Wendy Frankel from Ron Lorentzen (A-570-601 6/1/04-5/31/05) (October 11, 2005) at 2 (four countries with lower GNIs, one with a higher one).

<sup>9</sup> See *New Shipper Review of Honey from the People's Republic of China: Request for a List of Surrogate Countries*, Memorandum to Christopher D. Riker from Ron Lorentzen (A-570-863 12/01/05-6/30/06) (March 13, 2007) at 2.

generally having countries both above and below the NME *per capita* GNI without decreasing the range of potentially acceptable countries for the first list.

The Department's selection of companies for its third list (those with significant data sources) is likely to be case dependent: the product being investigated or reviewed will dictate many of the surrogate values that must be selected. That said, it would be reasonable for the Department, on an ongoing basis, to develop a public list of those data sources that it will consider as important when assessing the suitability of a country for selection as a surrogate. In our view, the list should include the following data sources (all of which, of course, should be publicly-available): (1) Import Statistics; (2) Energy and Water Prices; and (3) Corporate Disclosure Materials.

In choosing values from a surrogate country's data, the Department often relies on values derived from import statistics for the surrogate country. When it uses import data, it excludes imports from NME countries. While this is a necessary step to ensure that surrogate values are not based on distorted prices, it is not a sufficient one. In those instances where there are significant imports of a particular product from an NME country, the prices of the NME imports are likely to affect the pricing of imports of that product from other countries. To avoid such skewing, the Department should not use import values where imports from an NME make up a significant part of the imports.

***C. India as a Surrogate for China***

We have made our recommendations regarding the surrogate selection process as a whole; we have one specific recommendation to make. At present, the Department frequently

selects India as a surrogate for the People's Republic of China. The Department finds that the two countries are economically comparable; as India has a varied economy, Commerce frequently is able to find significant producers of a comparable product, and there is a wide range of publicly-available data on most aspects of its economy. The consistent selection of the same surrogate has a number of advantages both for petitioners and importers. An industry that is being harmed by imports from China can estimate whether they are unfairly-traded, and an exporter from China can determine fair prices.

We do not advocate ignoring any factor that might make the use of factor values from India inappropriate in any particular case. However, we support the Department's continued reliance on India for surrogate values until such time as a significant change makes such values inappropriate.

## **II. SEPARATE RATES IN NME ANTIDUMPING PROCEEDINGS**

The Department has invited comments on two issues arising from the question of separate rates for NME producers. It asks: (1) whether it should consider alternatives to the current test used to identify producers in an NME country that qualify for separate rates; and (2) whether it should consider ways to reduce the administrative burden on both the Department and interested parties by "operationalizing" its (already) streamlined questionnaire requirements for demonstrating entitlement to a separate rate. *See Comment Invitation*, 72 Fed. Reg. at 13248.

Under current practice, the Department will find that an exporter in an NME country is entitled to a separate rate when it can demonstrate an absence of central government control,



both in law and in fact, with respect to exports.<sup>10</sup> The Department has explained that evidence supporting a *de jure* absence of control includes: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies. *Id.* *De facto* absence of control is based on two prerequisites: (1) whether the exporter sets its own prices independently of the government and other exporters; and (2) whether the exporter can keep the proceeds from its sales. *Id.* This was further elaborated upon in a later determination that identified other indicia of *de facto* absence of control: (1) the ability of the exporter to enter into contracts and other agreements; (2) the ability to select management independently without government control; and (3) the ability to determine what to do with profits and to finance losses.<sup>11</sup>

These tests probe the ability of a company in an NME country to act independently. The inability of any exporter to meet any of them provides grounds for deciding that the exporter is not independent and is under the control of the government. It is our view that the Department should continue to rely on this test so long as a country continues to be classified as having a non-market economy.

---

<sup>10</sup> See, e.g., *Sparklers from the People's Republic of China*, 56 Fed. Reg. 20588, 20589 (Dep't Commerce May 6, 1991) (final deter. LTFV sales).

<sup>11</sup> See *Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22585, 22587 (Dep't Commerce May 2, 1994) (notice of final deter. LTFV sales).

In its recent redetermination that the People's Republic of China continues to have a non-market economy, the Department analyzed the six factors it employs to determine NME status.<sup>12</sup>

The Department included the following in its Executive Summary:

As concerns factor four {the extent of government ownership or control of the means of production}, China has made progress in privatizing state-owned enterprises ("SOEs") and introducing limited market practices to state-owned firms. However, while the PRC government has made a decision to recede from state control over certain parts of the economy, it also intends to maintain and bolster state control in other areas, especially in the "core" or "pillar" industries. Further, private land ownership is prohibited in China, even though land-use rights can be held by individuals and firms. While the private market for land-use rights has grown, SOEs retain a significant amount of land-use rights that they received free of charge and commercial land-use rights are obtained illegally. In short, property rights remain poorly defined and weakly enforced.

With regard to factor five, *i.e.*, the government's control over allocation of resources, the Department notes that the era of China's command economy has receded and the majority of prices are liberalized. There is also evidence of some market-based resource allocations. The state-owned sector is shrinking in relative terms, with abundant labor being absorbed by other sectors. A limited number of SOEs are profitable and competitive. The growing private sector is productive, profitable, and increasingly driving economic growth. Bank lending to the private sector has increased at the margin, growing from nearly zero credit.

Nevertheless, the PRC government, at all levels, remains deeply entrenched in resource allocation. Importantly, as noted in the May 15<sup>th</sup> memorandum, the various levels of government in China, collectively, have not withdrawn from the role of resource allocator in the financial sector. As a general rule, investment funds do not flow to their best use at the firm, industry or sector level. Moreover, the underperforming SOE sector still accounts

---

<sup>12</sup> See *Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China – China's status as a non-market economy*, Memorandum to David M. Spooner from Office of Policy (A-570-901 Investigation) (August 30, 2006) ("China NME Memo") at 1-3.

for a disproportionate share of bank lending, fixed asset investment and other resources allocations.<sup>13</sup>

In such circumstances, where the state is heavily involved in direct control of certain economic sectors and is heavily involved in resource allocation, it is clear that application of the standard separate rate test is necessary in order to separate government entities from private actors.

In a similar way, the Department analyzed the Vietnamese economy when it determined that Vietnam was an NME:

However, in applying the factors required under section 771(18)(B) of the Act, we have found that Vietnam's economy remains in transition and does not yet qualify as a market economy under the antidumping law. Vietnam's currency, the *dong*, is not fully convertible for current account purposes and practically inconvertible for capital account purposes. This, and government regulation of the interbank FOREX market, frustrates the development of linkages *via* the exchange rate between Vietnamese and world markets.

Although FDI is encouraged, it is at the same time directed and channeled through licensing and registration requirements. Restrictions on corporate control and levels of permissible foreign ownership minimize the impact of foreign investment on large SOE-sector development. The government's stated objective is to continue protection of and investment in industrial state-owned enterprises to ensure that they retain a key role in what the government refers to as a socialist market economy. This policy promotes the development of SOES at the expense of foreign direct investment.

The industries in which these SOEs operate are not limited to traditional natural monopolies, but extend to food, wholesale trading, petrol and oil wholesale trading, information technology products, some mechanical and electronic products, ferrous and non-ferrous metal production, basic chemicals, fertilizers, cement,

---

<sup>13</sup> China NME Memo at 3.

construction, and pharmaceuticals. As a result of these policies, competition between the state and non-state sectors remains limited, despite other recent government efforts that have stimulated development of the private sector and increased foreign investment, with the percentd {sic} aim of increasing competitive pressure on large SOEs.

The limited extent of reform in other critical areas of Vietnam's economy raises similar concerns about continued significant government control over the economy. Despite recent banking sector reforms, the government retains overwhelming ownership and control over the commercial banking sector. This results in the opportunity for continued lending conducted on a non-commercial basis. Moreover, there are no private land ownership rights in Vietnam. While the government has de-centralized the allocation of land-use rights, such rights are not freely transferable and remain subject to local government approval.<sup>14</sup>

As with the information presented in the China case, there is a strong indication that market entities have to be separated from government-controlled entities so that the traditional analysis should be performed in cases involving imports from Viet Nam.

These two examples make it clear that there is a symmetry between a country's status as an NME and the test for determining a company's independence from the state that requires the continued use of the test until such time as a country is found to have a market economy. We urge the Department not to make changes but to continue following its present practice.

The final request in the Department's notice is whether the proper balance between efficiency and enforcement has been met under the current regime. *See Comment Invitation*, 72 Fed. Reg. at 13248. The Department asks the parties to "address the real possibility that

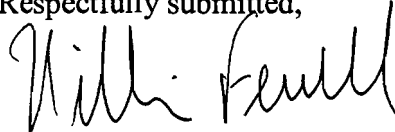
---

<sup>14</sup> *Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status*, Memorandum to Faryar Shirzad from Office of Policy (A-552-801 Investigation) (November 8, 2002) at 42-43.

streamlining the test might impact the enforcement goal of the test, that only firms operating independently of government control over their export activities become eligible for an individually calculated rate.” *Id.* With the high rate of acceptance of separate rate questionnaires submitted, we do not believe that there is any basis for reducing the rigor of the current system.

Thank you for your attention to these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William A. Fennell". The signature is written in a cursive, flowing style.

Terence P. Stewart  
William A. Fennell  
STEWART AND STEWART  
2100 M Street, NW  
Washington, DC 20037