citba.org
Customs and International Trade Bar Association
Spring 2016
Volume 14, Issue 2

Upcoming Programs

Celebrate the Career of the Honorable Nicholas Tsoucalas
JUNE 16
8th Floor Library
US Court of International Trade
One Federal Plaza
New York, NY

As he steps down from the bench, the US Court of International Trade invites you to join its judges and staff in celebrating the past half century's judicial service of the Honorable Nicholas Tsoucalas on courts of the City and State of New York, and of the United States of America.

RSVP Acceptance Only By June 8, 2016
elizabeth_cognata@cit.uscourts.gov
212-264-4484

How Customs, ICE, and DOJ Combat Evasion and the Enforce Act's Effects
JUNE 8
12:00pm-2:00pm
King & Spalding
1700 Pennsylvania Ave, NW
Suite 200
Washington DC 20006

This panel will discuss how CBP and Immigration & Customs Enforcement (ICE) work with the Department of Justice (DOJ) combat duty evasion through CBP's and ICE's administrative and investigative functions with the assistance of DOJ in litigation and investigations, including False Claims Act investigations. The panel also will offer insight into the Enforce Act.
http://www.dcbar.org/marketplace/event-details.cfm?productcd=121618INTC

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Links of Interest:

CITBA Homepage
US CIT Homepage
US Court of Appeals for the Federal Circuit Homepage
US Customs and Border Protection
Bureau of Industry and Security
Office of Foreign Assets Control
International Trade Administration
US International Trade Commission

Stay Connected:

Cuba Sanctions and Policy Update 2016
MAY 25
12:00-2:00pm
Troutman Sanders LLP Conference Room
401 9th Street NW
Washington DC 20004

Key U.S. government officials will discuss recent U.S.-Cuba regulatory, policy and legislative developments, and what activities and trade are permissible for U.S. businesses and individuals. Private practitioners and the National Foreign Trade Council will also share insights from industry on Cuba opportunities and challenges.
http://www.dcbar.org/marketplace/event-details.cfm?productcd=121617INTC

Past CITBA Events

Spring Panel on Trade and Agriculture
MAY 3
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

The panel covered all things trade and agriculture from different angles including policy, negotiations, and law. Specific topics included TPP, TTIP, recent WTO dispute settlement decisions, Doha Round developments and the important trade barriers facing industry.
http://citba.org/downloadDoc.php?t=eventDoc&key=85

CITBA Annual Meeting and Reception (Including Election of Officers and Directors)
APRIL 21
US Court of International Trade
One Federal Plaza
New York, NY 10278

The CITBA annual meeting was preceded by a CLE seminar program including two panels, "Stream-lining Litigation Before the Court," and "Trade Facilitation and Trade Enforcement Act of 2015 ."
http://citba.org/downloadDoc.php?t=eventDoc&key=86
http://citba.org/downloadDoc.php?t=eventDoc&key=87

37th Anniversary Georgetown International Trade Update
FEBRUARY 25-26
Georgetown University Law Center

Hart Auditorium
600 New Jersey Avenue, NW
Washington, DC 20001

CITBA's Young Lawyer Committee Membership

Interested in becoming more engaged with international trade?! Are you under 40 years old, feel young, or know someone that fits the bill? If so, please join or nominate someone to join the CITBA Young Lawyers Committee! We are especially looking to expand our membership outside of the DC/NY area. The Committee meets by phone once a month and seeks to create opportunities for young lawyers to create and participate in events and publications. If you or anyone you know is interested in contributing to the committee, please contact Alex Hess (alexandra.hess@hugheshubbard.com) or Shama Patari (spatari@barnesrichardson.com).

Announcements

NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE

By Stephen Swindell & Scott Warner*

It's a Small Claims World After All

For the next 18 months or so, the Court will be conducting a pilot to help determine whether a small claims process would benefit the parties, the bar and the Court. Based upon the small claim procedures followed in other federal courts and designed to promote faster litigation of such cases, the Court and Advisory Committee have prepared a Rule X and a Stipulated Discovery Plan and Scheduling Order for interested parties to follow during this pilot. Highlights of these procedures include parties being limited to only two depositions, no written interrogatories and completion of discovery in 6 months. For more information on the process and how to participate in the pilot, look to the Court's website at: Small Claims Pilot.

Quintuple the Filing Size Fun!

To make it even easier for folks to file large documents on CM/ECF, the Court has increased the filing size limit of documents from 10 MB to 50 MB. This means that your main document and any attachments can each be up to 50 MB in size. We do, however, ask that your docket entries not exceed 500 MB in total size as they may cause unwanted hiccups. And who likes hiccups?

Multi-case Machinations

To make CM/ECF even more user-friendly, the Clerk's Office has given multi-case docketing functions to the following events: Status report, Joint Status Report,

Joint Status Report and Proposed Briefing Schedule, Proposed Scheduling Order, Letter, Form 7 Notice of Dismissal 41(a)(1)(A)(i), Form 7 Notice of Dismissal 41(a)(1)(A)(ii) and Form 9 Stipulation on Agreed Statement of Facts. Go forth and multi-case!

**Stephen Swindell is the Supervisor and Scott Warner is the Operations Manager for Case Management at the Court of International Trade.*

Federal Circuit and CIT Case Summaries

By Claudia Burke*

** Claudia Burke is an attorney with the Department of Justice, Civil Division, National Courts Section. These summaries are not a document of the U.S. Department of Justice, nor does it represent the official views of the Department of Justice.*

Customs

Federal Circuit Reverses Customs and Border Protection's Interpretation of "Trademark." JBLU, Inc. v. U.S. [Moore, Taranto, Stoll, JJ]. The Court of International Trade deferred to U.S. Customs and Border Protection's (CBP) definition of the term "trademark" for purposes of 19 CFR 134.47, a country of origin marking regulation, as applying to only marks that are registered with the U.S. Patent and Trade Office (PTO) or for which an application is pending. Because certain jeans from the importer bore marks that were not registered with the PTO or were the subject of a pending application, the Court of International Trade examined the jeans under the more stringent marking regulation, 19 CFR 134.46. The Court of International Trade held that the subject jeans were not marked in accordance with 19 CFR 134.46. On March 2, 2016, the Court of Appeals for the Federal Circuit reversed and remanded, finding that the term "trademark" within the meaning of 19 CFR 134.47 unambiguously included all marks, whether registered or not, or the subject of a pending application.

AD/CVD

Federal Circuit Reverses Court of International Trade and Sustains Commerce's Original Minor Alteration Analysis. Deacero S.A. DE C.V. v. United States [Renya, Bryson, Chen]. Commerce issued an antidumping duty order on steel wire rod from certain countries, defining the scope as rod with a cross sectional diameter of 5.00 mm or more but less than 19.00 mm. Deacero, a Mexican manufacturer, imported rod that was 4.75 mm. Upon request to initiate an anti-circumvention inquiry, Commerce determined that Deacero's rod should be included in the order as a minor alteration of the merchandise. The Court of International Trade held that Commerce's circumvention determination lacked substantial evidence because the rod fell outside the literal scope language and was commercially

available at the time of the investigation. The government appealed. On April 5, 2016, the Federal Circuit reversed the Court of International Trade, holding that the court erred when it determined an article not expressly included in an order cannot be subject to an anti-circumvention inquiry and holding that Commerce's determination was supported by substantial evidence.

Federal Circuit Sustains Commerce's Use of Thailand as a Surrogate Country for Steel Threaded Rod from China. Jiaxing Brother Fastener Co. v. United States [O'Malley, Reyna, Chen, JJ]. In the second administrative review of steel threaded rod from China, Commerce chose Thailand as the appropriate surrogate country to value factors of production. Jiaxing, a Chinese manufacturer of steel threaded rod, challenged the choice, arguing that Commerce's decision to exclude India as a choice was erroneous, and that the selection of Thailand was arbitrary and unsupported by substantial evidence. On April 21, 2016, the Federal Circuit sustained Commerce's choice on all fronts, noting the wide discretion under the statute and noting Commerce's ability to change its surrogate country selection notwithstanding a past practice of choosing another country.

Federal Circuit Holds Unreasonable Commerce's Method to Establish Dumping Margins for Nonreviewed Companies from China. Albemarle Corp. v. United States [Lourie, Bryson, Dyk, JJ]. In annual reviews of antidumping duty orders, Commerce frequently lacks resources to examine all companies individually. Commerce's practice has been to select the two or three largest foreign producers and average those companies' dumping margins to apply to all other companies in the review. The statute states that Commerce may not to include any zero or *de minimis* rates in this average, nor can it use any rates derived from adverse inferences. If the only rates available are zero, *de minimis*, or adverse, Commerce may use "any other reasonable method" to derive a rate for all the other non-reviewed companies. Here, Commerce chose two companies to examine individually, both of which received *de minimis* margins. Commerce assigned the previous year's dumping margin to all the other non-reviewed companies, finding that it was the only way to reasonably reflect potential dumping margins of those companies. The trial court held the determination to be unreasonable and the government appealed. On May 2, 2016, the Federal Circuit affirmed the trial court's judgment, holding that it was unreasonable for Commerce to choose old data without first attempting to use contemporaneous data

Court of International Trade Dismisses Challenge to Department of Commerce's Ongoing Administrative Review. *CP Kelco (Shandong) Biological Co. v. United States* [Kelly, J.]. On February 9, 2016, the Court of International Trade dismissed a challenge to Commerce's ongoing administrative review concerning xanthan gum from China. A Chinese producer of the merchandise asked Commerce to be considered as a voluntary respondent, which would allow it to receive its own antidumping duty rate. After Commerce denied the request, the Chinese producer brought suit, alleging jurisdiction under the Court's residual jurisdiction statute. The Court held that it did not possess jurisdiction to entertain the case because the Chinese producer may challenge the administrative review in court after Commerce completes the review.

Court of International Trade Denies Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction Against CBP's Imposition of a Bonding Requirement on Imports of Fresh Garlic from China. Premier Trading, Inc. v. United States

[Gordon, J.]. On February 11, 2016, the Court of International Trade denied the motion for a temporary restraining order and preliminary injunction filed by plaintiff, Premier Trading, Inc. Fresh garlic from China is subject to antidumping duties. Based on information concerning Premier's relationship to dissolved or delinquent importers, CBP required Premier to post single transaction bonds in excess of Premier's current antidumping duty margin, to protect against the possibility that Premier would follow this pattern. The Court denied Premier's motion to preliminarily enjoin this bonding requirement, holding that Premier failed to meet its burden on the four factors for injunctive relief. The Court explained that (1) CBP has authority to impose additional security based on an importer's potential antidumping duty liability, (2) the record did not establish irreparable harm, (3) the equities favored the government, and (4) the public interest favored denying the motion.

Court of International Trade Sustains Department of Commerce's Calculation Of Countervailing Duties on Imports of Chlorinated Isocyanurates from China. Heibei Jiheng Chemicals Co. v. United States [Pogue, S.J.]. On February 18, 2016, the Court of International Trade denied the motion for judgment upon the administrative record filed by Heibei Jiheng, a Chinese producer of chlorinated isocyanurates, chemicals used to clean pools and spas. Heibei Jiheng challenged Commerce's calculation of countervailable benefits from China's provision of electricity to Heibei Jiheng for less than adequate remuneration. The Court rejected Heibei Jiheng's arguments that Commerce had misinterpreted the pricing data in the record and had improperly used the rates for large industry rather than the rates for chlor-alkali products, holding that Commerce's determination was supported by substantial evidence.

Following Remand, Court of International Trade Sustains Commerce's Determination to Impose Countervailing Duties on Oil Products from Turkey. Maverick Tube Corp. v. United States [Musgrave, S.J.]. On February 22, 2016, the Court of International Trade sustained Commerce's remand redetermination in the investigation of whether the Turkish government subsidizes oil country tubular goods (OCTG) exported to the United States. The Court earlier had remanded the final investigation for Commerce to reconsider its finding that the level of government involvement in the Turkish hot rolled steel market was sufficiently significant to distort the market, and that it could not use Turkish prices in its calculations. The Court also had remanded for Commerce to reconsider its application of an adverse inference when selecting the quantity of Turkish producer Borusan's steel purchases, as well as its calculation of a land subsidy for Turkish producer Toscelik. On remand, Commerce reversed its market distortion finding as well as its calculation of Toscelik's land subsidy, but it continued to apply an adverse inference when calculating Borusan's steel purchases because Borusan had not supported its claim that certain of these purchases were to produce non-OCTG merchandise, as required. The Court sustained Commerce's remand redetermination in full, holding that Commerce acted within its discretion when requiring Borusan to submit full quantities of its hot rolled steel purchases and that Borusan did not act to the best of its ability when refusing to provide that information.

Court of International Trade Sustains Commerce's Final Results of Antidumping Duty Administrative Review Covering Graphite Electrodes from China. Fushun Jinly

Petrochemical Carbon Co. v. United States [Musgrave, S.J.]. On March 23, 2016, the Court of International Trade sustained Commerce's final results of its administrative review of the antidumping duty order of Chinese small diameter graphite electrodes. To calculate the dumping margin for companies from non-market economy countries, Commerce compares a company's United States price to the sum of the various inputs that go into the merchandise's production and offsets that amount by any byproducts reintroduced into production. In its calculations here, to value the importer's byproduct, Commerce used an average of Ukrainian imports. Chinese producers argued that the Ukrainian value was unrepresentative of its byproduct because there were other substantially lower values from other countries in the record. The Court rejected the producers' arguments as speculative and faulted them for failing to introduce evidence as to either the makeup of their byproduct or the makeup of the Ukrainian imports. The Court further rejected the producers' challenge to Commerce's change in its practice to include Chinese unrefunded value-added tax in its calculations. The Court also sustained Commerce's application of an adverse inference to the producers, to reject their application to obtain a dumping rate separate from the Chinese government, because they submitted misleading and incomplete sales documentation. Finally, the Court refused to award equitable relief to one of the producers' importers and reliquidate the importer's merchandise at a rate from another review.

Court of International Trade Sustains Antidumping Duty for Steel Ironing Tables from China. Foshan Shunde Yongjian Housewares & Hardware Co., LTD. v. United States [Eaton, J.]. In 2010, Commerce determined that a Chinese manufacturer of steel ironing tables had provided deficient and unreliable information regarding its sales and production process, and Commerce therefore applied an adverse inference in calculating a 157.68 percent antidumping duty rate for the manufacturer. During the course of the litigation, the Court of International Trade remanded the matter to Commerce three times, and Commerce ultimately adjusted the rate to 72.29 percent, a rate that the Court sustained on April 7, 2016, over the objections of the Chinese manufacturer as well as the domestic industry. Commerce relied upon a broader data set in calculating the 72.29 percent rate, though it continued to apply adverse inferences based on the Chinese producer's lack of cooperation.

Court of International Trade Concludes that Chinese Exporter Failed to Demonstrate Substantial Prejudice Necessary to Upset Antidumping Duty Results. Suntec Indus. Co. v. United States [Musgrave, S.J.]. On April 21, 2016, the Court of International Trade granted the government's motion for summary judgment, holding that Suntec, a Chinese exporter of steel nails subject to antidumping duties, had failed to establish substantial prejudice stemming from the domestic nail industry's failure to properly serve its request that Commerce conduct an antidumping duty administrative review. Commerce regulations require parties requesting reviews to serve copies of their requests on all interested parties, and Commerce then publishes notice of such requests in the Federal Register to initiate its proceedings. The Court held that Suntec had received constructive notice of the proceeding through Commerce's Federal Register publication and had failed to establish that it was substantially prejudiced by its lack of notice during the period between when it should have been served the request, and the Federal Register publication.

Court of International Trade Sustains in part the Department of Commerce's Final Determination in the Antidumping Duty Investigation of Indian Oil Products. U.S. Steel Corp. et al., v. United States [Kelly, J.]. On May 5, 2016, the Court of International Trade sustained in part and remanded in part Commerce's final determination of its investigation of certain oil country tubular goods from India. Consolidated plaintiffs, a U.S. manufacturer and an Indian producer, raised seven issues in challenging the determination. The court sustained Commerce's findings with respect to three of the seven issues, including the granting of a duty drawback adjustment under an advance license export program operated by the Indian government; the collapsing of certain affiliated producers for purposes of Commerce's calculations; and the finding that certain home market sales occurred within the same level of trade as their United States counterparts. Amongst the findings that were not sustained, the court remanded Commerce's determination with respect to its differential pricing analysis, i.e., the methodology that Commerce employs to determine whether there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time in calculating a respondent's dumping margin.

BYRD AMENDMENT

Court of International Trade Rejects Argument that "Acquisition Clause" of Byrd Amendment Violated Fifth Amendment. The Barden Corp. v. United States [Stanceu, C.J.; Carman, Gordon, J.J.]. On February 10, 2016, a three-judge panel of the Court of International Trade rejected The Barden Corporation's motion for judgment on the administrative record and entered judgment for the government. Barden, a domestic producer of anti-friction bearings, challenged the government's denial of its claim for distribution payments pursuant to the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA, also known as the Byrd Amendment). Pursuant to the CDSOA, the government annually distributes antidumping duties collected on imports; these duties are provided to domestic producers that supported the industry petition that resulted in the relevant antidumping duty order. The CDSOA's so-called "acquisition clause" prohibits payments to any entity that had been acquired by a company that opposed the investigation. The government denied Barden's claim because, although Barden had supported the relevant antidumping duty petition, Barden was later acquired by a German producer whose U.S. affiliate had opposed the investigation. Barden argued that the denial violated the Fifth Amendment's due process clause and equal protection guarantee. The Court held that the CDSOA rationally promoted the government's legitimate interest to ensure that those domestic producers who had opposed the successful petition (and, thus, had not supported the government's fair trade laws) not benefit, directly or indirectly, from the CDSOA disbursements.

Feature Article

Commerce's Shifting Policy on the Economic Comparability Criteria for Selecting the Primary Surrogate Country

By Dharmendra Choudhary*

In US antidumping ("AD") proceedings against non-market economy ("NME") countries, (*i.e.*, China and Vietnam), the US Department of Commerce ("DOC" or "Department" or "Commerce") determines the normal value of subject merchandise based on a factors of production ("FOP") methodology, in which the unit consumption quantities of each of the material and non-material inputs are multiplied by their corresponding surrogate values and then aggregated. Commerce obtains surrogate values from acceptable surrogate countries. In light of the potentially wide disparity in surrogate values, the Department's choice of acceptable surrogate countries, from which it selects its primary surrogate country (the source of the majority of surrogate value data) is critical to the outcome of AD NME cases.

This article first summarizes the recent history of agency and judicial precedent on this pivotal issue and then exposes a recent development that has largely gone unnoticed and which is likely to have a significant impact on the results of AD cases on goods imported from China and Vietnam.

Legal Underpinnings and Longstanding Agency & Judicial Precedent

Pursuant to Section 773(c)(1), Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(c)(1), the Department values the factors of production in NME proceedings "based on the best available information regarding the values of such factors in a market economy country or countries" which the Department considers "to be appropriate". The Department's decision as to the "best information available" to select "surrogate values" begins with its determination of which market economy countries 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 Department's selection of the appropriate surrogate countries is an essential predicate to calculating surrogate values based on the "best information available" because 19 U.S.C. § 1677b(c)(4)(A) requires that surrogate values must be based on data from economically comparable countries "to the extent possible". This statutory language constitutes "a clear statement that Congress intended to require use of data from economically comparable countries except in situations where such data were not available or were irretrievably tainted by some statistical flaw." Dorbest Ltd. v. United States, 604 F.3d 1363, 1371-72 (Fed. Cir. 2010).

An initial step in selecting surrogate values is for the Department's Office of Policy ("OP") to create a list of economically comparable countries. The OP list is the starting point for ultimately selecting the primary surrogate country. This list typically includes six countries whose per capita GNI are proximate to those of the NME country subject to investigation and countries with the highest and lowest GNIs on the list are considered "bookends," thereby defining those countries that are considered as economically comparable to the NME being investigated. The Department solicits comments from parties to the proceeding as to the appropriate surrogate countries on the OP list from which surrogate values can be selected and then solicits publically available surrogate value information from such countries.

Analysis of recent NME AD cases reveals that with isolated exceptions (in which no

usable data was available from the listed countries), the DOC has invariably selected a primary surrogate country from the OP list of potential surrogate countries. Until 2010, India was the DOC's default surrogate country choice for China AD investigations and in all cases, India was listed as one of the six potentially acceptable countries on the OP list. However, towards the end of 2010, the World's Bank's most recently published per capita GNI data revealed a chasm between China and India, and India was removed from the OP list of economically comparable countries. After India's removal, Commerce refused to select India as a surrogate country in China AD cases, even when both Petitioners and Respondents requested that India be designated as the primary surrogate country. The Court of International trade consistently affirmed the Department's decision that India was no longer an appropriate surrogate country.

As such, the fact that economic comparability based on per capita GNI data (as evidenced by the OP list) is a necessary prerequisite to the selection of a surrogate country became one of the few enduring loadstars among the multiple ever changing factors affecting the outcome of NME AD cases.

Commerce's Redefinition of the "Economic Comparability" Criteria

The statutory criteria of "economic comparability," which was a settled proposition with well-defined boundaries embodied by the GNI bookends on the OP list, was transformed by Commerce in the ninth administrative review of the AD Order on Frozen Fish Fillets from Vietnam. Through the seventh administrative review of this AD Order, the OP list included Bangladesh and Indonesia. In the eighth review, Commerce selected Indonesia as the primary surrogate country, ignoring the fact that Indonesia had been removed from a revised OP list because its per capita GNI had galloped outside of the GNI bookends. Commerce justified its choice of Indonesia by refusing to consider the revised OP list and, instead, by relying on a prior list. In Vinh Hoan Corporation, et al. v. United States, Slip Op. 15-16 (February 19, 2015), the CIT found that the Department's rationale for rejecting the revised list did not conform to law.

In the ninth review, the solitary OP list of six countries available on the record unambiguously did not include Indonesia. Notwithstanding this express exclusion, in Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2011-2012, 79 Fed. Reg. 19053 (April 7, 2014), and accompanying IDM, at Cmt. IA, Commerce selected Indonesia as the primary surrogate country, reasoning as follows:

> The Department's long standing practice has been to identify those countries which are at a level of economic development similar to Vietnam based on GNI data reported in the World Development Report provided by the World Bank. Using 2011 GNI data, the Department provided parties with a list of potential surrogate countries found to be at Vietnam's level of economic development, including Bangladesh, Bolivia, India, Nicaragua, Pakistan, and the Philippines. Given that the surrogate country list is non-exhaustive, as explained in the surrogate country memo, interested parties identified another surrogate country, Indonesia, for consideration. In the Preliminary Results, the Department found Indonesia to be at a "higher and, thus, less comparable level of economic development than that represented by the six

countries on the initial surrogate country candidate list, but still comparable to that of Vietnam."

As explained in the Department's Policy Bulletin 04.1, "{t}he surrogate countries on the list are not ranked." This lack of ranking reflects the Department's long-standing practice that, for the purpose of surrogate country selection, the countries on the list "should be considered equivalent" from the standpoint of their level of economic development based on GNI as compared to Vietnam's level of economic development and recognition of the fact that the concept of "level" in an economic development context necessarily implies a range GNI, not a specific GNI. This long-standing practice of providing a non-exhaustive list of countries at the same level of economic development as the NME country fulfills the statutory requirement to value factors of production using data from "one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country . . .".In this regard, "countries that are at a level of economic development comparable to that of the nonmarket economy country" necessarily includes countries that are at the same level o f economic development as the NME country. Because the non-exhaustive list is only a starting point for the surrogate country selection process, the Department also considers other countries at the same level of economic development that interested parties propose, as well as other countries that are not at the same level of economic development as the NME country, but nevertheless still at a level comparable to that of the NME country, such as Indonesia in this review. The latter countries are considered when data or significant producer considerations potentially outweigh the fact that these countries are not at the same level of economic development as the NME country.

Indonesia satisfies the statute's requirement that the surrogate country be at a comparable level of economic development. Further, the data considerations, explained in greater detail below, weigh in favor of Indonesia's selection over any of the countries that were initially identified.

In subsequent annual and new shipper reviews of the Vietnamese Fish Fillets AD Order, Commerce has applied the identical rationale and has continued to select Indonesia as the primary surrogate country, even though the OP list excluded Indonesia.

The rationale proffered by the Department for selecting Indonesia arguably is contrary to the plain language of the statute and controlling judicial precedent. While overtly paying homage to its OP List, which is based on the World Bank's GNI data, the Department appears to have diluted its relevance, characterizing the document as merely providing a non-exhaustive list of countries.

The Department's justification for including "other countries that are not at the same level of economic development as the NME country, but nevertheless still at a level comparable to that of the NME country, such as Indonesia in this review," appears to be driven by a misunderstanding of the statutory scheme, which mandates that the surrogate country selected be at a "level of economic development comparable to that of the nonmarket economy country." 19 U.S.C. §

1677b(c)(4). Under this scheme, countries are segregated into two categories - "comparable" and "non-comparable." Based on the OP List, which, in turn, is based on the relative per capita GNIs of each potential surrogate country, Indonesia failed to qualify as an economically comparable country. In order to circumvent this problem and to facially conform to the statutory provision, the Department created an entirely new category - "same" (in place of comparable) - and herded all not-same countries under the category of "comparable". In this manner, the Department mutated economically non-comparable countries, including Indonesia, into economically comparable countries. If the Department's interpretation is accepted, then any and all countries will have to be considered as economically comparable in the first instance, and, consequently, the surrogate value data from all countries would need to be comparatively evaluated prior to selection of the primary surrogate country. The OP List would be rendered meaningless.

Commerce's Selection of Countries which are not Economically Comparable to China or Vietnam

In selecting a non-economically comparable country, Indonesia, as the surrogate country, Commerce appears to have ignored the 4-step sequential process articulated in Policy Bulletin 04.1, and affirmed in Clearon Corp. v. United States, 36 Int'l Trade Rep. (BNA) 788 (Ct. Int'l Trade July 24, 2014):

1. Commerce's Office of Policy creates a list of potential surrogate countries, based on per capita GNI data.
2. Commerce determines which of the above countries are producers of comparable merchandise.
3. Of the countries satisfying steps (1) and (2), Commerce determines which of the countries are significant producers.
4. If more than one country survives the selection process, Commerce chooses the country with the best factors data quality.

Accordingly, economic comparability is the first criteria while the quality of surrogate value data is the last criteria. As such, where a country fails to fulfill the first criteria, it is removed from consideration and, consequently, its choice as the primary surrogate country cannot be affirmed by relying on the last criteria, when other countries on the OP list afford realistic surrogate value data.

In Jiaxing Brother Fastener Co. v. United States, 961 F. Supp. 2d 1323, 1329-32 (Ct. Int'l Trade 2014), the Court addressed a similar situation, affirming the agency's decision to reject the choice of India (which was not on the OP list) as the primary surrogate country, rejecting arguments that India's alleged superiority of surrogate value data overcame its lack of economic comparability.

> Plaintiffs also argue that Commerce should have selected India as the primary surrogate country because of an alleged primacy of Indian over Thai data. .... India though cannot be a suitable primary surrogate country on this administrative record because it is not economically comparable to the PRC. See Decision Memorandum at 3-4. During the administrative review, as an alternative to Indian data, Plaintiffs proffered data from the Philippines, which the OP listed as economically comparable to the PRC. India therefore

> could never be a reasonable choice because at least one country, the Philippines, satisfies the statutory criterion of economic comparability, whereas India does not. Plaintiffs' argument about the qualitative superiority of Indian data compared to Thai data ultimately concentrates on a false choice. Commerce's only real choice was not between India and Thailand, but between Thailand and the Philippines. (emphasis added).

Similarly, the Court rejected the choice of India in at least three other cases, after India was taken off the OP list: Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States, 896 F. Supp. 2d 1313, 1322 (Ct. Int'l Trade 2013); Clearon Corp. v. United States, 36 Int'l Trade Rep. (BNA) 788 (Ct. Int'l Trade 2014) and Dupont Teijin Films v. United States, 997 F. Supp. 2d 1338, 1340 (Ct. Int'l Trade 2014).

Based on these decisions, the Department's attempt to focus the selection of the primary surrogate country based on the quality of surrogate value data, while ignoring the threshold issue of economic comparability, appeared to be contrary to judicial precedent, and, accordingly, contrary to law.

Commerce's Unobtrusive Change of Policy in Recent Notices designating the OP List of Economically Comparable Countries

In conjunction with its new policy, the Department has altered the language in its notices circulating the list of potential surrogate countries. Beginning in 2014, the Memorandum from the Office of Policy discreetly amended its operative language, stating that the list of potential surrogate countries included therein were at the same level of economic development as the NME country and that interested parties could also propose other economically comparable countries based on data considerations. Compare, for instance, the Notice regarding a request for a list of surrogate countries from Director, OP, dated July 29, 2013, in the sixth administrative review of Activated Carbon from China (IAACESS Bar Code 3148148-01), with the corresponding Notice dated June 27, 2014, issued in the subsequent review (IAACESS Bar Code 3217567-01). While the former notice provided a list of countries which were economically comparable to China, the latter sought to provide a list of countries that were at the same level of economic development as China.

The latter notice appears to be inconsistent with Commerce's Policy Bulletin 04.1, which provides that the Office of Policy should issue a list of potential surrogate countries that are at a comparable level of economic development to the NME country, and that economic comparability is determined on the basis of per capita GNI. Furthermore, Commerce fails to provide any other guidelines for identifying economically comparable countries.

In sum, as the foregoing discussion reveals, recent changes in the manner in which Commerce selects the primary surrogate country will have a significant impact of the calculation of dumping margins in NME proceedings for the foreseeable future.

** Dharmendra Choudhary is a Foreign Trade Counsel at Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP in Washington, D.C.*

JOB POSTINGS

U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement & Compliance

Attorney Positions

CC-TEC is seeking attorneys for permanent positions. Candidates should have a background in international trade, administrative law or litigation and, ideally, some knowledge of or demonstrated interest in antidumping and/or countervailing duty law. Applicants for permanent positions must be barred in at least one state or the District of Columbia and must be U.S. citizens. Applications should include a cover letter explaining their interest in CC-TEC, a resume, law school transcript, and writing sample (litigation sample if possible). Applications are accepted on a rolling basis and should be sent to CC-TEC's Hiring Attorney at "hiringattorney@trade.gov." NOTE: In the subject line of the e-mail, please state "Staff Attorney Position." E-mails that do not use this language may not be opened or considered in a timely manner. If an electronic version of one of these documents is unavailable, you may fax these items to the attention of the Hiring Attorney at (202) 482-4912 or (202) 501-8045.

For more information, visit the CC-TEC website at:
http://www.commerce.gov/os/ogc/trade-enforcement-and-compliance

CITBA ONLINE

Please look for further announcements and copies of past newsletters at: http://www.citba.org/

MEMBERSHIP

CITBA now allows dues payment through PayPal. PayPal allows members to send money without sharing financial information, with the flexibility to pay for membership using their account balances, bank accounts or credit cards. PayPal is an eBay company and is made up of three leading online payment services. More information about Pay Pal can be found at: https://www.paypal.com/home.

Not a CITBA member? Apply for membership now! CITBA offers different membership levels - active, associate and retired/student. For additional information, check out the CITBA website: Join CITBA or Renew.

Are you already a member, but late in paying your dues? Need to update your contact information? Get current today and enjoy the benefits of membership. Contact William J. Maloney at wmaloney@rode-qualey.com for details.