Slip Op. 09–64

SHANDONG MACHINERY IMPORT & EXPORT COMPANY Plaintiff, v. UNITED STATES, Defendant, and AMES TRUE TEMPER AND COUNCIL TOOL COMPANY, INC., Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 07–00355
Public Version

[Department of Commerce's final results sustained in part and remanded]

Dated: June 24, 2009

Hume & Associates LLC (*Robert T. Hume*) for plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Courtney E. Sheehan*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Nithya Nagarajan*), of counsel, for defendant.

Wiley Rein LLP (*Eileen P. Bradner, Timothy C. Brightbill* and *Maureen E. Thorson*), for defendant-intervenor Ames True Temper.

Kelley Drye & Warren, LLP (*Eric McClafferty*), for defendant-intervenor Council Tool Company, Inc.

OPINION AND ORDER

Eaton, Judge: This action is before the court on plaintiff Shandong Machinery Import & Export Company's ("SMC") USCIT R. 56.2 motion for judgment upon the agency record. *See* Pl.'s Mem. Supp. Mot. J. Agency R. ("Pl.'s Mem."). Defendant United States together with defendant-intervenors Ames True Temper and the Council Tool Company, Inc. oppose this motion. *See* Def.'s Resp. to Pl.'s Mot. for J. Agency R. ("Def.'s Resp."); Def.-Int.'s Br. in Resp. to Pl.'s Mot. for J. Agency R.; Resp. Br. of Def.-Int. Council Tool Company, Inc.

By its motion, SMC challenges the final results of the United States Department of Commerce's ("Commerce" or the "Depart-

ment") fifteenth administrative review of antidumping duty orders covering heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC") for the period of review beginning on February 1, 2005, and ending on January 30, 2006 ("POR"). *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 72 Fed. Reg. 51,787 (Dep't of Commerce Sept. 11, 2007) (final results) and the accompanying Issues and Decision Memorandum (Dep't of Commerce Sept. 4, 2007) ("Issues & Dec. Mem.") (collectively, "Final Results"). United States imports of HFHTs are subject to individual antidumping duty orders covering separate categories of goods, including those at issue here: bars/wedges; hammers/sledges; and axes/adzes. *Id*.

In the Final Results, Commerce found that plaintiff failed to rebut the non-market economy ("NME") presumption of government control.[1] As a result, Commerce applied country-wide antidumping duty rates ("PRC-wide rates") to SMC's exports. *See* Issues & Dec. Mem. at Comment 1; HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 72 Fed. Reg. 10,492 (Dep't of Commerce Mar. 8, 2007) ("Prelim. Results"). The PRC-wide rates assigned by Commerce were: 139.31 percent for bars/wedges, 45.42 percent for hammers/sledges, and 189.37 percent for axes/adzes.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006). For the following reasons, the court sustains Commerce's Final Results in part and remands the rate for hammers/sledges to Commerce for further findings consistent with this opinion.

STANDARD OF REVIEW

When reviewing Commerce's final antidumping determinations, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

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[1] A non-market economy includes "any foreign country that the administering authority [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A) (2006); *Shandong Huarong Gen. Group Corp. v. United States*, 28 CIT 1624, 1625 n.1, Slip Op. 04–117 at 3 n.1 (2004) (not reported in the Federal Supplement).

"Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C)(i) (2006). The PRC has been determined to be an NME country. The Department has treated the PRC as a non-market economy country in all past antidumping investigations. *Zhejiang Native Produce & Animal By-Products Imp. and Exp. Corp. v. United States*, 27 CIT 1827, 1834 n.14, Slip Op. 03–151 at 12 n.14 (2003) (not reported in the Federal Supplement) (citations omitted).

DISCUSSION

I. PRC-Wide Rate

A. Legal Framework

When conducting an investigation or review of an NME country, Commerce employs a presumption of state control. *See Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 100, 44 F. Supp. 2d 229, 242 (1999). To rebut this presumption and thus qualify for a separate rate, an exporter must "affirmatively demonstrate its entitlement to a separate, company-specific margin. . . ." *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) ("*Sigma*") (citation and quotation omitted).

To establish that a firm is sufficiently independent from government control to be entitled to a separate rate, the Department requires respondents to demonstrate the absence of both *de jure* and *de facto* government control over export activities. *See Peer Bearing Co.-Changshan v. United States*, 32 CIT ___ , ___ , 587 F. Supp. 2d 1319, 1324 (2008) ("*Peer Bearing*"); *see also Sparklers from the PRC*, 56 Fed. Reg. 20,588, 20,589 (Dep't of Commerce May 6, 1991) (final determination of sales at less than fair value).

> Absence of *de jure* government control can be demonstrated by reference to legislation and other governmental measures that decentralize control. Absence of *de facto* government control can be established by evidence that each exporter sets its prices independently of the government and of other exporters, and that each exporter keeps the proceeds of its sales.

Sigma, 117 F.3d at 1405 (citations omitted).

When a company fails to rebut the presumption of state control, Commerce employs that presumption and applies the PRC-wide rate to its products. *See Id.* at 1405.

B. Application of PRC-Wide Rate to SMC

In the Final Results, Commerce stated that SMC failed to "supply the Department with all the information and documentation necessary for it to demonstrate that it is eligible for separate rates." Issues & Dec. Mem. at Comment 1. Moreover, it found that

> [d]espite being given several opportunities, SMC failed to provide complete or consistent responses to our questions, rendering it impossible to adequately determine whether or not SMC's business operations are free from de jure or de facto government control. We are unable to definitively determine who

> owns SMC, who controls SMC, and the nature of SMC's relationship with the national, provincial, and local governments.[2]

Issues & Dec. Mem. at Comment 1. Accordingly, Commerce concluded that plaintiff failed to rebut the presumption of government control and failed to establish its eligibility for a rate separate from the PRC-wide rate.

By its motion, plaintiff contends that Commerce wrongfully applied the PRC-wide rates to its sales of bars/wedges, hammers/sledges and axes/adzes because it demonstrated absence of government control and qualified for separate rates. Pl.'s Mem. 12–16. Plaintiff makes several arguments to support its position. Specifically, the company states that the PRC Foreign Trade Law, PRC Whole People Law, its business license and its export license demonstrate *de jure* independence from state control. Pl.'s Mem. 13–14. Moreover, plaintiff asserts that it demonstrated *de facto* independence, particularly by producing proof that the Shandong Foreign Trade Economic Committee had no role in its export activities and that the Committee has never provided any capital to plaintiff. Pl.'s Mem. 16.

In response, Commerce first argues that it was unable to determine who owned or controlled plaintiff based on plaintiff's responses to a series of questionnaires. Def.'s Resp. 15. Commerce states that, in its original questionnaire, it asked plaintiff to "describe and explain" who owned the company, including the "full name and address of the individual(s), corporation(s), or entities that own your company." SMC's Resp. to Commerce's Section A Questionnaire dated May 11, 2006 ("Original Section A Resp.") 8. Plaintiff responded, "SMC is owned by its shareholders[,]" but failed to include the full name or address of any of these "shareholders." Original Section A Resp. 8.

Dissatisfied with plaintiff's response, Commerce then issued its first supplemental questionnaire. *See* SMC's Resp. to Commerce's Supp. Sections A, C, and D Questionnaires dated May 23, 2006 ("First Supp. Resp.") 3–4. The first supplemental questionnaire asked whether any other person or party had ever owned plaintiff, whether plaintiff traded publicly, how many shareholders plaintiff had, who held more than 1.99 percent of plaintiff's shares, and asked for a description of the classes of plaintiff's shares together with a "detailed text explanation of the ownership of SMC." First Supp. Resp. 3–4. Plaintiff responded to the first supplemental questionnaire by stating that it was "all-people owned, which means each member of SMC is responsible for his or her gain and loss. SMC is

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[2] Here, because the court finds that SMC has failed to demonstrate that it is free of national governmental control, it makes no finding with respect to provincial or local governmental control.

not a limited liability company. To the extent that shareholders refer to the employees at SMC; SMC currently has [a certain number of] employee 'shareholders.' " First Supp. Resp. 4. Plaintiff also stated that it was independent from the central and provincial governments, a "private enterprise," "not publicly traded," and that it did "not have classes of shares." First Supp. Resp. 3–4.

Commerce remained unsatisfied with plaintiff's questionnaire responses and issued a second supplemental questionnaire. In this second supplemental questionnaire, Commerce asked plaintiff whether "all-people owned" meant that "SMC [was] owned by all the people of the [PRC]." SMC's Resp. to Commerce's Supp. Sections A, C, and D Questionnaires dated Jan. 22, 2007 ("Second Supp. Resp.") 1. Plaintiff responded that "state-owned" and "all people-owned" had "the same meaning and [were] interchangeable." Second Supp. Resp. 1. With its response to the second supplemental questionnaire, plaintiff also included a letter from the Shandong Province Foreign Economic Trade Cooperation Bureau ("SPFETCB") "certifying the ownership status of SMC." Second Supp. Resp. 1. The letter states, "Shandong Machinery Import & Export Group Corp. is [an] all-people owned enterprise, the description shown on its business license is state-owned enterprise, all-people owned and state-owned enterprises are the same in term[s] of character." Second Supp. Resp. at Ex. 1.

In the second supplemental questionnaire, Commerce also asked plaintiff to "[p]rovide a detailed text explanation of the difference between the terms 'all-people owned' and 'whole people owned,' as cited in" plaintiff's response to the first supplemental questionnaire. Second Supp. Resp. 1. Plaintiff responded by referencing Article 6 of the PRC Constitution and stating that "all-people owned" meant "collective ownership by the working people." Second Supp. Resp. 1.

> According to Article 6 of the Constitution Law of the PRC, "the basis of the socialist economic system of the PRC is the socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people." The terms "state-owned" enterprise, "all people-owned" enterprise, and "whole people- owned" enterprise have the same meaning and are interchangeable. In order to clarify SMC's ownership status as an all people-owned enterprise, Shandong Province Foreign Economic Trade Cooperation Bureau has provided an official letter certifying the ownership status of SMC.

Second Supp. Resp. 2.

In addition, in the second supplemental questionnaire, Commerce asked plaintiff to explain material on certain websites that suggested SMC might be a "nationalized business," "state-owned business" or "state-owned enterprise." Second Supp. Resp. 2, 4–5. Rather than explaining the website material, plaintiff responded by refer-

encing Article 6 of the PRC Constitution and the SPFETCB letter. Second Supp. Resp. 2, 4–5. Additionally, in the second supplemental questionnaire, Commerce asked plaintiff to explain the word "private" in its first supplemental questionnaire response that it was an " 'all-people owned' private enterprise." Second Supp. Resp. 3. Plaintiff responded, "SMC regrets the use of the word 'private' in its prior response and hereby retracts the use of this word. SMC merely meant to convey that SMC is non-public." Second Supp. Resp. 3.

Further, in the second supplemental questionnaire, Commerce again asked plaintiff to "[l]ist and provide the address of any and every entity or person who holds more than 1.99 percent of the shares of SMC." Second Supp. Resp. 3. In its response, plaintiff referred to "Shandong Foreign Trade Economic Committee." Second Supp. Resp. 4.[3] Plaintiff attempted to qualify its response by stating that the Committee "merely provides a supervisory function to SMC." Second Supp. Resp. 4.

As the foregoing demonstrates, plaintiff failed to rebut the presumption of *de jure* government control, i.e., it has not demonstrated that it is not owned or controlled by the PRC. Indeed, rather than demonstrating the absence of state control, plaintiff's answers suggest that the company was, in fact, under state control. This being the case, because both *de jure* and *de facto* independence must be shown in order to qualify for a separate rate, the court need not address plaintiff's claims of *de facto* independence from governmental control. *See Peer Bearing*, 32 CIT at ___ , 587 F. Supp. 2d at 1324.

Because SMC has failed to rebut the presumption that it is controlled by the Chinese government it is not entitled to a separate rate. *See Shandong Huarong Gen. Group Corp. v. United States*, 27 CIT 1568, 1591, Slip Op. 03–135 at 37 (2003) (not reported in the Federal Supplement). As a result, Commerce may apply the PRC-wide rate to that company's exports. *Id.* at 38.

II. Selection of PRC-Wide Rates for Bars/Wedges, Hammers/Sledges, and Axes/Adzes

A. Legal Framework

In seeking a PRC-wide rate based on AFA, the Department may use information derived from the petition, a final determination in the investigation, any prior administrative review, or any other information placed on the record. *See* 19 U.S.C. § 1677e(b); Statement of Admin. Action accompanying the Uruguay Round Agreements Act, H.R. Rep. 103–316 at 870, reprinted in 1994 U.S.C.C.A.N. 4040, 4199 (stating that secondary information is"information derived from the petition that gave rise to the investigation or review, the fi-

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[3] Plaintiff stated that "Shandong Foreign Trade Economic Committee . . . is SMC's investor and the department in charge." Second Supp. Resp. 4.

nal determination concerning the subject merchandise, or any previous review under [19 U.S.C. § 1675] concerning the subject merchandise"). Where, as here, Commerce relies on secondary information such as calculated rates from previous reviews, rather than information obtained in the course of a current investigation or review, the Department must "to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c); *see* 19 C.F.R. § 351.308(d). To corroborate secondary information, Commerce must "examine whether the secondary information to be used has probative value." *See* 19 C.F.R. § 351.308(d).

Probative value means that the rate must be both a) reliable and b) relevant. *See Ferro Union, Inc. v. United States*, 23 CIT 178, 202, 44 F. Supp. 2d 1310, 1333 (1999) ("*Ferro Union*"). Commerce must do more than assume "any prior calculated margin for the industry is reliable and relevant." *Id.* at 204, 44 F. Supp. 2d at 1334. Indeed, "[i]n order to comply with the statute and the [Statement of Administrative Action]'s statement that corroborated information is probative information, Commerce must assure itself that the margin it applies is relevant, and not outdated, or lacking a rational relationship to [the respondent]." *Id.* at 205, 44 F. Supp. 2d at 1335.

Importantly, in the NME situation, there is no requirement that the rate based on AFA relate specifically to the individual company. *See Peer Bearing Co.*, 32 CIT at ___, 587 F. Supp. 2d at 1327. Rather, "the rate must be corroborated according to its reliability and relevance to the countrywide entity as a whole." *Id.* at ___, 587 F. Supp. 2d at 1327 (citation omitted). Thus, the rates Commerce selects in this case must be reliable and relevant to the PRC-wide entity,[4] not specifically to SMC.

B. Corroboration of Secondary Information

Commerce argues that the secondary information it used is reliable and relevant such that it has probative value. It states:

> [T]o corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used. However, unlike other types of information . . . there are no independent sources for calculated dumping margins. The only sources for calculated margins are administrative determinations. These rates are applied to the PRC-wide entity, i.e., only to companies not eligible for a separate rate with regard to the individual class or kind of merchandise. No information has been presented in the current re-

[4] In antidumping proceedings, the PRC-wide entity and all of its components are considered to be a single respondent. *See Sigma*, 117 F.3d at 1405–07.

> view that calls into question the reliability of the information used for these AFA rates. Thus, the Department continues to find that the information is reliable.

Issues & Dec. Mem. at Comment 3. Plaintiff challenges the reliability and relevance of the rates. Pl.'s Mem. 23. Specifically, plaintiff argues that the Department "did not utilize any measure to verify independently the reliability of the Bars/Wedges or Hammers/Sledges rates" and that the "Department failed to verify and corroborate the calculated PRC-wide and AFA rate" applied to axes/adzes. Pl.'s Mem. 31.

The court finds that substantial evidence supports the conclusion that two of the selected AFA rates, i.e., 139.31 percent for bars/wedges and 189.37 percent for axes/adzes, were properly corroborated as being reliable and, because of the application of AFA, are relevant to the PRC as a whole. As an initial matter, the court finds reasonable the Department's decision to base the PRC-wide rates on AFA. Each of the four respondents were found to have been subject to an AFA rate and nothing has been placed on the record to indicate that the country-wide entity would not similarly be found to be subject to AFA. *See* AFA and Corroboration Memo. for Company Rates dated Feb. 28, 2007 ("AFA and Corroboration Memo.") at 12.

With respect to the rates themselves, when faced with determining a country-wide rate based on what it calls "total AFA,"[5] Commerce faces a difficult task. Unlike rates that are calculated using responses to questionnaires, Commerce cannot calculate an AFA rate for the PRC as a whole, because there are no questionnaire responses from the PRC itself on which to rely. What the record does contain is the questionnaire responses from SMC and the other respondents in this review. However, because Commerce found all of the respondents to be subject to the application of total AFA, the responses themselves were deemed non-probative. Indeed, for Commerce, the only value of the responses is to confirm that this country-wide rate should be based on AFA. It is worth noting that the decision to apply AFA to the country-wide entity has not been contested by any party. Thus, the decision to apply an AFA rate to the PRC as a whole is reasonable and is sustained.

To determine an AFA rate, Commerce turned to its often used methodology of choosing the highest rate from the original investiga-

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[5] Commerce references "total adverse facts available," which is not referenced in either the statute or the agency's regulations. The phrase can be understood, within the context of this case, as referring to Commerce's application of adverse facts available not only to the facts pertaining to specific sales for which information was not provided, but to the facts respecting all of respondents' sales encompassed by the relevant antidumping duty order. *See Shandong Huarong Mach. Co. v. United States*, 30 CIT 1269, 1271 n.2, 435 F. Supp. 2d 1261, 1265 n.2 (2006), (citing *Gerber Food (Yunnan) Co., Ltd. v. United States*, 29 CIT ____ , ____ , 387 F. Supp. 2d 1270, 1285 n.3 (2005)).

tion or from prior reviews. *See* AFA and Corroboration Memo.; *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 360 F. Supp. 2d 1339 (2005) (upholding the AFA rate as application of the highest available dumping margin from a different respondent in a prior administrative review); *Kompass Food Trading Int'l v. United States*, 24 CIT 678, 683 Slip Op. 00–90 (2000) (not reported in the Federal Supplement) (affirming the Department's use of the highest available dumping margin from a different, fully cooperative respondent in the less than fair value investigation).

For bars/wedges, Commerce assigned the 139.31 percent rate as the PRC-wide margin. Def.'s Mem. 28; Issues & Dec. Mem. at Comment 3. This is the rate calculated using verified information provided by Tianjin Machinery Import & Export Corporation, another respondent, in the eighth administrative review of the bars/wedges order. *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 71 Fed. Reg. 54,269 at Comment 2 (Dep't of Commerce Sept. 14, 2006) (final results). Commerce recently found this AFA and PRC-wide rate to be sufficiently corroborated for use in the fourteenth administrative review. Def.'s Mem. 28; Issues & Dec. Mem. at Comment 3; HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 71 Fed. Reg. 54,269 at Comment 2 (Dep't of Commerce Sept. 14, 2006) (final results).

For axes/adzes, Commerce used the calculated 189.37 percent rate for Shandong Huarong Machinery Co., Ltd., based on its verified sales and production data from the fourteenth administrative review. *See* Def.'s Mem. 28; Issues & Dec. Mem. at Comment 2; HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 71 Fed. Reg. 54,269 at Comment 9 (Dep't of Commerce Sept. 14, 2006) (final results). Commerce then applied this rate as AFA for the PRC-wide entity here. *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 71 Fed. Reg. 54,269 at Comment 9 (Dep't of Commerce Sept. 14, 2006) (final results).

As noted, Commerce is required to corroborate secondary information "to the extent practicable." 19 U.S.C. § 1677e(c). Here, because the 139.31 percent rate for bars/wedges and the 189.37 percent rate for axes/adzes: (1) are from earlier reviews of the same categories of merchandise; (2) are based on verified information taken from similar companies; (3) have not been found either unsupported by substantial evidence nor contrary to law by any court; and (4) with the exception of plaintiff's subsidization argument, have not been challenged by any record evidence,[6] Commerce has satisfied its corrobo-

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[6] While it might seem a heavy burden on the plaintiff to anticipate the use of these rates for assignment pursuant to AFA, and to interpose objections to them, these rates have been used as AFA consistently in past reviews. *See, e.g.*, HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 71 Fed. Reg. 54,269 (Dep't of Commerce Sept. 14, 2006) (final results) (fourteenth review); HFHTs, Finished or Unfinished, With or Without

ration requirement. The court thus upholds Commerce's determination that the 139.31 percent rate for bars/wedges and 189.37 percent rate for axes/adzes are reliable.

In addition to its contentions as to the reliability and relevance of the assigned rates, plaintiff insists that the MUTT® scraper should be excluded from the calculated PRC-wide and AFA rate for axes/adzes. Pl.'s Mem. 30–31. That is, "[i]n effect, the . . . calculated rate [from the fourteenth review] for Axes/Adzes is based solely on the MUTT® scraper submitted to the Department for a scope review." Pl.'s Mem. 30. Plaintiff contends that there is "compelling evidence" that the manufacturing process used in creating the MUTT® scraper should preclude it from inclusion in the scope of the HFHTs category. Pl.'s Mem. 30. According to plaintiff, if the MUTT® scraper sales were eliminated from consideration, then Commerce would be required to find a lower rate for axes/adzes. However, as plaintiff also acknowledges, this Court has previously held that the MUTT is, in fact, subject to the terms of the axes/adzes order. Pl.'s Mem. 30; *see Tianjin Mach. Imp. & Exp. Corp. v. United States*, 31 CIT ___ , ___ , Slip Op. 07–131 at 17 n.4 (Aug. 28, 2007) (not reported in the Federal Supplement) ("*Tianjin*"). That being the case, there is no reason to exclude a rate based on MUTT® exports.

With respect to hammers/sledges, the court reaches a different conclusion. For this merchandise Commerce used the 45.42 percent rate calculated as the best information available ("BIA")[7] rate during a 1991 less than fair value ("LTFV") investigation of the China National Machinery Import & Export Corporation. *See* Def.'s Mem. 28; Issues & Dec. Mem. at Comment 3; HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 56 Fed. Reg. 241 (Dep't of Commerce Jan. 3, 1991) (final results). Commerce most recently used this rate as the AFA and PRC-wide rate during the fourteenth administrative review. *See* Def.'s Mem. 28; Issues & Dec. Mem. at Comment 3; HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 71 Fed. Reg. 54,269 (Dep't of Commerce Sept. 14, 2006) (final results).

The rate, however, was not corroborated. Rather, the rate, based on BIA, was calculated in the 1991 LTFV investigation of the China National Machinery Import & Export Corporation. *See* HFHTs, Fin-

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Handles, From the PRC, 70 Fed. Reg. 54,897 (Dep't of Commerce Sept. 19, 2005) (final results) (thirteenth review); HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 69 Fed. Reg. 55,581 (Dep't of Commerce Sept. 15, 2004) (final results) (twelfth review).

[7] BIA is the predecessor to AFA. In the Statement of Administrative Action of the Uruguay Round Agreements Act of 1994, Pub.L. No. 103–465, 108 Stat. 4809 (1994), Congress explained that the Uruguay Round amended the prior law, which "mandate[d] use of the best information available (commonly referred to as BIA) if a person refuse[d] or [was] unable to produce information in a timely manner or in the form required." H.R. Doc. No. 103–316 (1994) at 868, reprinted in 1994 U.S.C.C.A.N. 4040, 4198. *Shandong Huarong Mach. Co. v. United States*, 30 CIT 1269, 1282 n.9, 435 F. Supp. 2d 1261, 1274 n.9 (2006).

ished or Unfinished, With or Without Handles, From the PRC, 56 Fed. Reg. 241 (Dep't of Commerce Jan. 3, 1991) (final results) ("Because we have rejected CMC's questionnaire response and are using best information available for our determinations, we did not verify CMC's questionnaire response."). Rather than using verified information, the Department used information submitted by the petitioner. Specifically, Commerce calculated an average of the margins contained in the petition for each class or kind of merchandise, as adjusted for calculation errors in the petition. *See Id.* at Comment 4; HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 55 Fed. Reg. 42,420 (Dep't of Commerce Oct. 19, 1990) (preliminary determination). Therefore, Commerce took no steps to corroborate the information during the LTFV investigation. That being the case, Commerce failed to comply with the corroboration requirement found in 19 U.S.C. § 1677e(c) and 19 C.F.R. § 351.308(d). Consequently, the 45.42 percent rate is not reliable, and the court directs Commerce, on remand, to assign a different rate to hammers/sledges that has been "corroborated according to its reliability and relevance to the country-wide entity as a whole." *Peer Bearing*, 31 CIT at ___ , 587 F. Supp. 2d at 1327 (citation omitted).

C. The Bars/Wedges Rate Is Not Punitive

Plaintiff also contends that the 139.31 percent rate for bars/wedges is punitive. Pl.'s Mem. 27. In making its case, plaintiff argues that this Court invalidated the 139.31 percent rate for bars and wedges as punitive and aberrational in *Shandong Huarong Gen. Corp. v. United States*, 29 CIT 1227, Slip Op. 05–129 (2005) (not published in the Federal Supplement) ("*Huarong III*"). In fact, in *Huarong III*, this Court remanded Commerce's use of the rate not because the rate was unreliable or irrelevant to the PRC-wide entity, but because the rate lacked specific reliability and relevance to the individual companies that were parties to that case. *Huarong III*, 29 CIT at 1332, Slip Op. 05–129 at 12. The *Huarong III* plaintiffs qualified for separate rates. *Huarong III*, 29 CIT at 1228, Slip Op. 05–129 at 3. Here, SMC failed to qualify for a separate rate and Commerce has no obligation to corroborate the rate as to SMC itself. *See Peer Bearing*, 31 CIT at ___ , 587 F. Supp. 2d at 1327. Thus, *Huarong III* does not support plaintiff's contention. Moreover, plaintiff cites to no evidence on the record relating to what a calculated rate for the PRC-wide entity might be. As such, plaintiff has made no convincing argument that the assigned rate is punitive.

D. There Is No Evidence of Subsidization in the AFA/PRC-Wide Rates

Lastly, plaintiff contends that the Department must recalculate the margins from prior segments of these proceedings in order to corroborate the AFA/PRC-wide rates. Specifically, plaintiff contends

that "[t]he Department previously determined Indian export data cannot be used for surrogate values because of Indian subsidies and that South Korea, Thailand, and Indonesia maintain broadly available, non-industry specific export subsidies that may benefit all exporters to all export markets." Pl.'s Mem. 23–24 (citation omitted). Accordingly, plaintiff argues, the Department must exclude: "1) any Indian imports of steel from the United Kingdom, Belgium, Canada, or Germany in calculating the AFA/PRC-wide rate for Hammers/Sledges and 2) the Indian imports of steel from the United Kingdom, Belgium, and Germany in calculating the AFA/PRC-wide rate for Axes/Adzes." Pl.'s Mem. 24. In addition, plaintiff argues that the Department must also exclude United States data because the United States subsidizes exports. Pl.'s Mem. 25.

Despite plaintiff's contentions that the AFA/PRC-wide rates applied to sales of bars/wedges and hammers/sledges are distorted by subsidization, its claim must be rejected for two reasons: first, because it is well settled that the "record for judicial review should ordinarily not contain material from separate investigations, including records of separate administrative reviews arising out of the same antidumping duty order, as is the case here," (*Sanyo Elec. Co. v. United States*, 23 CIT 355, 361, 86 F. Supp. 2d 1232, 1239 (1999) (citations and quotation omitted));and second, because this Court has continually rejected this argument where, as here, plaintiffs have "provided no evidence to support their assertion" that "the surrogate value Commerce employed was distorted by subsidies." *See Tianjin*, 31 CIT at ___ , Slip Op. 07–131 at 40 ("While plaintiffs insist that the surrogate value Commerce employed was distorted by subsidies, they have provided no evidence to support their assertion. Thus, the court cannot credit plaintiffs' subsidy objection."). Accordingly, plaintiffs' assertion that the objected to values were subsidized must be rejected.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's final determination in part and remands for further findings, consistent with this opinion, with respect to the calculated 45.42 percent rate for hammers/sledges. The remand results shall be due on November 2, 2009; comments to the remand results shall be due on December 7, 2009; and replies to such comments shall be due on December 21, 2009.

Slip Op. 09−71

ARCH CHEMICALS, INC., AND HEBEI JIHENG CHEMICALS, CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and CLEARON CORPORATION AND OCCIDENTAL CHEMICAL CORPORATION, Defendant-Intervenors.

CLEARON CORPORATION AND OCCIDENTAL CHEMICAL CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and ARCH CHEMICALS, INC., AND HEBEI JIHENG CHEMICALS, CO., LTD., Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Consol. Court No. 08−00040

[The United States Department of Commerce's final results of administrative review are sustained in part and remanded.]

Dated: July 13, 2009

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OPINION AND ORDER

Eaton, Judge: This consolidated action is before the court on the motions for judgment on the agency record pursuant to USCIT Rule 56.2: of plaintiffs/defendant-intervenors Arch Chemicals, Inc. ("Arch") and Hebei Jiheng Chemical Company, Ltd. ("Jiheng"); and of plaintiffs/defendant-intervenors Clearon Corporation ("Clearon") and Occidental Chemical Corporation ("OxyChem"). Both motions challenge certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") final results of the first administrative review of the antidumping duty order on chlorinated isocyanurates from the People's Republic of China ("PRC"). *See* Chlorinated Isocyanurates from the PRC, 73 Fed. Reg. 159 (Dep't of Commerce Jan. 2, 2008) (notice of final results) (the "Final Results"); Chlorinated Isocyanurates from the PRC, 73 Fed. Reg. 9,091 (Dep't of Commerce Feb. 19, 2008) (notice of amended final results) (the "Amended Final Results"). The Final Results cover the period of review ("POR") December 16, 2004, through May 31, 2006, and incorporate by reference the Department's Issues and Decision Memoran-

dum. *See* Issues and Decision Mem. for the 2004 − 2006 Admin. Review of Chlorinated Isocyanurates from the PRC (Dep't of Commerce Dec. 14, 2007) (the "I&D Mem."). Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(b)(1)(B)(i).

For the reasons that follow, Arch and Jiheng's motion is granted and Clearon and OxyChem's motion is denied. Accordingly, the Final Results are sustained in part and remanded.

BACKGROUND

In June 2005, Commerce published an antidumping duty order on chlorinated isocyanurates[1] from the PRC. *See* Chlorinated Isocyanurates from the PRC, 70 Fed. Reg. 36,561 (Dep't of Commerce June 24, 2005) (notice of antidumping duty order) (the "Order"). The following year, in June 2006, the Department published a notice of opportunity to request an administrative review of the Order. *See* Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Admin. Review, 71 Fed. Reg. 32,032 (Dep't of Commerce June 2, 2006) (notice). Among others, Clearon and OxyChem, petitioners in the original investigation, asked Commerce to conduct an administrative review of foreign producer/exporter Jiheng's sales and entries of chlorinated isocyanurates during the POR. *See* Chlorinated Isocyanurates from the PRC, 72 Fed. Reg. 39,053, 39,053 (Dep't of Commerce July 17, 2007) (notice of preliminary results) (the "Preliminary Results"). Jiheng also asked the Department to review its sales of subject merchandise. *Id*. Consequently, in July 2006, the Department initiated an administrative review with respect to Jiheng. *See* Initiation of Antidumping and Countervailing Duty Admin. Reviews and Request for Revocation in Part, 71 Fed. Reg. 42,626 (Dep't of Commerce July 17, 2006) (notice).

Commerce published the Preliminary Results of its review in July 2007, and its Final Results in January 2008, as amended in February 2008. *See* Preliminary Results, 72 Fed. Reg. at 39,053; Final Results, 73 Fed. Reg. at 159; Amended Final Results, 73 Fed. Reg. at 9,091.

STANDARD OF REVIEW

The court must uphold a final determination by the Department in an antidumping proceeding unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19

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[1] "Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s-triazine triones. . . . [They are] available in powder, granular, and tableted forms." *See* Chlorinated Isocyanurates from the PRC, 72 Fed. Reg. 39,053, 39,054 (Dep't of Commerce July 17, 2007) (notice of preliminary results) (explaining the scope of Commerce's antidumping duty order).

U.S.C. § 1516a(b)(1)(B)(i). Thus, "Commerce's findings must be reached by reasoned decision-making, including . . . a reasoned explanation supported by a stated connection between the facts found and the choice made." *Rhodia, Inc. v. United States*, 28 CIT 1278, 1283, 185 F. Supp. 2d 1343, 1349 (2001) (citations and quotations omitted).

DISCUSSION

I. Arch and Jiheng's Motion

Arch and Jiheng argue that Commerce committed three errors that led to its improper decision to reject Jiheng's by-product offset claims. First, they claim that Commerce erred by concluding that Jiheng's factors of production ("FOPs") were reported net of its by-product consumption. Next, they insist that the Department improperly calculated normal value using a new practice without providing notice to Jiheng. Last, they argue that Commerce erred by finding that there was insufficient information on the record to identify the portions of purchased sulfuric acid and recovered sulfuric acid used to produce ammonium sulfate.

A. Legal Framework for By-Product Offset Claims

The antidumping statute "does not mention the treatment of by-products," and Commerce has not filled the statutory gap with a regulation. *See Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1422, 460 F. Supp. 2d 1365, 1373 (2006). Generally, however, the Department's practice has been to grant an offset to normal value,[2] for sales of by-products generated during the production of subject merchandise, if the respondent can demonstrate that the by-product is either resold or has commercial value and re-enters the respondent's production process. *See Ass'n of Am. School Paper Suppliers v. United States*, 32 CIT ___ , ___ , Slip Op. 08−122 at 17 (Nov. 17, 2008) (not reported in the Federal Supplement). Thus, the burden rests with the respondent to substantiate by-product offsets by providing the Department with sufficient information to support its claims. *See id.* at ___ , Slip Op. 08−122 at 18−23.

B. Arch and Jiheng's By-Product Reporting

Arch and Jiheng's first complaint is that the Department erred in concluding that "the costs reported [by Jiheng] were net of the costs

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[2] Normal value or home market value is defined as

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price. . . .

19 U.S.C. § 1677b(a)(1)(B)(i).

of the by-product production." *See* Mot. J. Agency R. of Arch and Jiheng ("Arch/Jiheng Br.") 11. They insist that this conclusion was wrong and that Jiheng reported its FOPs to include the "costs" in producing the by-products for which Jiheng claimed offsets. *See* Arch/Jiheng Br. 11. In other words, they argue that Commerce erred by failing to recognize that Jiheng did not deduct amounts used to produce by-products from its FOP reporting.

With respect to this argument, defendant concedes the Department's error. It states: "Jiheng correctly notes that Commerce made an error when it reviewed Jiheng's calculations and determined that Jiheng had reported its costs net of the costs of the by-product production." Def.'s Opp'n to Pls.' and Def.-Ints.' Mots. J. Agency R. ("Def.'s Br.") 29–30.

It is apparent that Commerce erred in its conclusions with respect to the reporting of these costs. On remand, in addition to those instructions set out below, the Department is directed to calculate Jiheng's claimed by-product offsets consistent with its recognition that Jiheng did not report its costs net of the costs of by-product production.

C. Alleged Change in Commerce's Practice

In the original investigation and in the Department's Preliminary Results for this first administrative review, Commerce accepted the sales documentation provided by Jiheng as sufficient to substantiate its claimed by-product offsets. In the Final Results, however, Commerce determined that Jiheng's questionnaire responses were insufficient and rejected Jiheng's claims.

By their motion, Arch and Jiheng argue that the Department acted unlawfully by providing neither notice nor explanation when it allegedly changed the practice by which it grants by-product offsets. They maintain that "principles of fairness" prevent the Department's action because Jiheng was given no notice and no "opportunity to provide the precise information required," and instead first learned of Commerce's change in practice in the Final Results. *See* Arch/Jiheng Br. 14 (quoting *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 421 (1992)). They further assert that Commerce's claimed questionnaire change was insufficient to alert the company that it must provide additional data to support its by-product production. *See* Arch/Jiheng Br. 14−16. Arch and Jiheng acknowledge that Commerce may change course if it explains its reason for doing so, but assert that here the Department acted unfairly, unlawfully, and without a proper explanation. *See* Arch/Jiheng Br. 14.

As noted, Arch and Jiheng insist that the Department's argument that a new question put Jiheng on notice of a change in practice is without merit. For them, Commerce's various questionnaires gave no notice that the Department had changed its practice. Rather, they

claim that the company reasonably believed that Commerce was only seeking more detailed information than it had previously and there was no indication that Jiheng needed to provide production data for claimed by-products. *See* Arch/Jiheng Br. 21. Moreover, they maintain that, "[d]espite the Department's alleged change in practice, the Department accepted the data provided as adequate for the purpose of the Preliminary Results without any discussion of a change in practice." Arch/Jiheng Br. 20−21.

Furthermore, Arch and Jiheng argue that Commerce failed to provide an adequate explanation for its change in practice. They insist that it was insufficient for the Department to simply cite one past investigation, *Certain Lined Paper Products From the PRC*, 71 Fed. Reg. 53,079 (Dep't of Commerce Sept. 8, 2006) ("*Certain Lined Paper*"),[3] that purportedly had previously "clarified" its practice. *See* Arch/Jiheng Br. 20.

For its part, Commerce contends that it lawfully denied Jiheng's claimed offsets because the company did not submit documents demonstrating the amount of by-products produced during the POR, despite the clear directions in the questionnaires to do so. The Department argues that its questionnaires contained a new variable that specifically sought such information. It maintains that Jiheng failed to submit production data and instead "provided evidence demonstrating *sales* of downstream products that were produced using by-products, and stated that it derived the amount of by-products produced during the [POR] using sales invoices." Def.'s Br. 28 (citations omitted). Thus, according to Commerce, although the Department granted the offsets in the original investigation and the Preliminary Results, it determined, "after reviewing parties' briefs," that it was unable to grant the by-product offsets in the Final Results because it could not determine the amount of by-product produced by Jiheng during the POR. *See* Def.'s Br. 29.

In addition, the Department states that it recognized that it was changing its position from the Preliminary Results and provided the necessary reasoned explanation. It maintains: "Commerce is generally at liberty to discard one methodology in favor of another where necessary to calculate a more accurate dumping margin; however, Commerce must explain the basis for its change of methodology and demonstrate that its explanation is in accordance with law and supported by substantial evidence." Def.'s Br. 30 (citation omitted). According to the Department, the Final Results explained that Commerce was changing course in order to act in a manner consistent

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[3] In *Certain Lined Paper*, Commerce found that "there was not enough documentary evidence at verification to successfully demonstrate that the[ ] two companies actually received the income from their waste paper sales." *See* Issues and Decision Mem. for the Less-Than-Fair-Value Investigation of Certain Lined Paper Prods. from the PRC at Comment 11 (Dep't of Commerce Sept. 8, 2006).

with its policy of requiring respondents to demonstrate not only that by-products were sold or reintroduced into the production process during the POR, but actually produced during that period. *See* Def.'s Br. 30−31.

1. Jiheng's Previous By-Product Reporting

Given the nature of the parties' dispute, a detailed review of the history of Jiheng's by-product reporting is warranted. In its original investigation, the Department issued a questionnaire to Jiheng that read in pertinent part:

> Please report the amount of byproducts or co-products produced per unit of subject merchandise. Please report each co- or by-product in separate columns. Identify only those co- or by-products that do not reenter the production process.

Arch/Jiheng Br. 17 (quoting Section D: Factors of Prod. Questionnaire, Pub. R. Doc. No. ("PR") 157 at D−6). Jiheng responded to the questionnaire and Commerce's preliminary determination granted the company its claimed offsets. The Department explained:

> Both respondents reported certain by-products in producing the subject merchandise which each either re-sold or re-used to produce the subject merchandise during the [period of investigation]. Therefore, in those instances where the respondent provided documentation to support its by-product claim, we allowed a recovery/by-product credit. Our treatment of by-products in this proceeding is in accordance with the Department's practice.

Chlorinated Isocyanurates From the PRC, 69 Fed. Reg. 75,294, 75,301 (Dep't of Commerce Dec. 16, 2004) (notice of preliminary determination) (citing Certain Hot-Rolled Carbon Steel Flat Products From the PRC, 66 Fed. Reg. 49,632 (Dep't of Commerce Sept. 28, 2001) (notice), and accompanying Issues and Decision Mem. at Comment 3)). Thus, in its preliminary determination during the investigatory phase, Commerce acknowledged that it was basing its allowance of the by-product offset on sales—not production—data. That is, even though the questionnaire asked for production information, Commerce accepted sales information. In doing so, Commerce stated that it was acting "in accordance with the Department's practice." Chlorinated Isocyanurates From the PRC, 69 Fed. Reg. at 75,301.

Following verification, Commerce continued to grant Jiheng its claimed by-product offsets to normal value in its final results. *See* Chlorinated Isocyanurates From the PRC, 70 Fed. Reg. 24,502 (Dep't of Commerce May 10, 2005) (notice of final determination), adopting Issues and Decision Mem. for the Final Determination in the Antidumping Duty Investigation of Chlorinated Isocyanurates from the

PRC − Oct. 1, 2003, through Mar. 31, 2004, at Comment 6 (Dep't of Commerce May 10, 2005) (the "Investigation I&D Mem."). The Department concluded that

> . . . Jiheng and Nanning have provided necessary information for their claim of by-products, including production re-use and/or sale information. We have fully examined these companies' information at verification and confirmed, with one exception (i.e., Nanning's chlorine gas. . .), that the by-products at issue were compensated or were re-used in production. Therefore, we continue to grant, where applicable, by-product offsets to Jiheng and Nanning in the final determination.

Investigation I&D Mem. at Comment 6 (footnote omitted). In other words, Commerce found that Jiheng's questionnaire responses, which provided calculations of the amount of by-products claimed and documented sales of by-products and/or downstream products, sufficient to justify an offset in accordance with its practice.

During the now disputed first administrative review, the Department issued an initial questionnaire which had the following question:

> Please report the amount of by-products or co-products produced per unit of merchandise under consideration. Explain why you have defined the products as by-products or co-products, as applicable. Describe the disposition of the by-products or co-products (*e.g.*, sold, returned to production of the merchandise under consideration, discarded). If sold or returned to production, provide evidence thereof. State whether you are claiming an offset to production costs for the by-product or co-product, and show how you calculated the amount claimed. If you are claiming an offset, explain any further processing of the by-product or co-product, and list the factors and quantities thereof used in the further processing.

Arch/Jiheng Br. 17−18 (quoting Request for Info., PR 12 at D−9). This question, expanding upon the question in the analogous question asked by Commerce in the original investigation, appears to be the new "variable" alleged by Commerce. Yet, as in the original investigation, the Department asked for production information, but gave no indication that it was seeking information materially different from that found sufficient in the original investigation.

In response to this question, Jiheng "identified the by-products unavoidably created as a result of the production of the intermediary products that are used in the production of subject merchandise," and "provided both the calculations of the amount claimed and documentation of sales of the by-product or downstream product, as applicable." Arch/Jiheng Br. 6 (quotations and citations omitted).

Jiheng insists that this method of responding was identical to that accepted by the Department in the original investigation. Arch/ Jiheng Br. 6−7.

Commerce followed up on Jiheng's by-product reporting in its Second Supplemental Questionnaire:

> You stated . . . that you are claiming offsets for four by-products that are created during the production of the intermediate products used to produce subject merchandise. Does your reported raw material consumption already account for the claimed by-product offset? With respect to sodium hypochlorite, hydrogen gas and ammonium sulfate, which you state were sold, were any sales made to unaffiliated customers? Provide documentation to support your claimed quantities of recovered by-products.

Second Suppl. Questionnaire dated Mar. 6, 2007, PR 63 at 15. Notably, this question requests information relating to re-use and sales—not production.

In its April 2007 response, Jiheng stated that "[t]he raw materials reported in the FOPs chart have all reflected all raw materials entering into the production, and also account for the claimed by-product offset generated during the production." Arch/Jiheng Br. 7 (quoting Jiheng Chemical, Resp. to Second Suppl. Questionnaire dated Apr. 5, 2007, Confidential R. Doc. No. ("CR") 14, at SS−37). Arch and Jiheng note that Jiheng provided the Department with "monthly total sales, identified all invoices within a sample month, and provided sample invoices for that month." Arch/Jiheng Br. 7 (citation omitted). Further, "[t]o document the claimed quantities of recovered by-products, Jiheng Chemical supplied the formulae used (the same formulae verified and accepted in the [original] investigation) and documented the sales quantities to which these formulae were applied, the same methodology used in the investigation." Arch/ Jiheng Br. 7 (internal citation omitted).

Subsequently, in its Fourth Supplemental Questionnaire, the Department once again inquired about Jiheng's by-product reporting. It asked Jiheng to provide information about its different production lines, about whether non-subject merchandise production generates the same by-products as that of subject merchandise, to submit worksheets about one of its plant's by-product production, and to provide source documentation supporting its recovered sulfuric acid claim. *See* Fourth Suppl. Questionnaire dated May 17, 2007, PR 82, at 5−6. Further, Commerce specifically asked: "*Please explain the way Jiheng Chemical keeps by-products records in the normal course of production*." *See* Fourth Suppl. Questionnaire dated May 17, 2007, PR 82, at 5 (emphasis added).

In response to the inquiry about its by-product record keeping, Jiheng wrote:

> Jiheng Chemical used the sales invoices to determine the recovered volume of the by-products, which is kept in the accounting department. As explained . . . [in a prior] submission, Jiheng Chemical claimed the offset of the volume of by-products (1) directly sold to market, such as hydrogen gas; and (2) entering into the production of the merchandise, which was sold to the market, such as hydrochloric acid, sodium hypochlorite and ammonium sulfate. Therefore, Jiheng used the sales invoices . . . [and] samples of such sales have been provided in Jiheng Chemical's [prior] submission.

Jiheng Chemical, Resp. to Fourth Suppl. Questionnaire, June 8, 2007, CR 24, at FSR−24. Again, according to Arch and Jiheng, this reporting methodology was identical to what was accepted by Commerce in the original investigation. *See* Arch/Jiheng Br. 8.

The Department's Preliminary Results accepted Jiheng's reported by-product offsets. *See* Arch/Jiheng Br. 8 (citing Preliminary Results, 72 Fed. Reg. at 39,053 ("We used the FOPs reported by respondents for materials, energy, labor, by-products, and packing.")). Notably, the Preliminary Results were published on July 17, 2007, nearly a year after the publication of *Certain Lined Paper*, which Commerce claims "clarified that, without . . . documentation [of by-product production], Commerce has no way of knowing whether the quantity of by-product claimed was actually produced during the period of review, or the amount of income or savings that were actually realized by respondent through the sale or reintroduction of the by-product." Def.'s Br. 31 (citation omitted).

In the Final Results, however, Commerce changed course and rejected Jiheng's claimed offsets. Commerce's Issues and Decision Memorandum explains:

> We acknowledge that the Department granted Jiheng Chemical's claimed by-product offsets in the original investigation. However, since then, the Department has changed its standard questionnaire to include a separate variable for claimed by-product offsets, and has also clarified its practice in granting such offsets. In Lined Paper Products . . . the Department clearly articulated its position: "The mere fact that a company demonstrates that it sold scrap has been rejected by the Department in the past as a justification for allowing a scrap offset." The Department added that in order to be able to grant an offset, "it is the Department's practice to require that respondents provide sufficient documentation of the actual {by-product} produced and the amount of the {by-product} reintroduced into the production process."

> . . . [We are] unable to allow the offset in this segment of the proceeding, however, because Jiheng Chemical failed to provide documentation of the actual amount of the by-products generated from the production of subject merchandise.

I&D Mem. at Comment 15 (footnotes and citations omitted).

2. The Department's By-Product Offset Determinations is Remanded

The Final Results, when viewed in the context of Jiheng and Commerce's interactions during the course of the proceedings leading up to the Final Determination, demonstrate that the methodology used by Commerce amounts to an unannounced and inadequately explained change in practice. As such, the issue of Jiheng's by-product offsets must be remanded for reconsideration.

Commerce generally has discretion to discard one methodology in favor of another in order to calculate more accurate dumping margins. *See Fujian Mach. and Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1169, 178 F. Supp. 2d 1305, 1327 (2001). This discretion, however, is subject to two limitations. First, "Commerce may not make minor but disruptive changes in methodology where a respondent demonstrates its specific reliance on the old methodology used in multiple preceding reviews"; second, "in every instance where an agency changes tack, it must provide a reasoned explanation for doing so." *Id.* at 1169−70, 178 F. Supp. 2d at 1327 (citation omitted); *see also Nippon Steel Corp. v. U.S. Int'l Trade Comm'n*, 494 F.3d 1371, 1378 n.5 (Fed. Cir. 2007) ("When an agency decides to change course . . . it must adequately explain the reason for a reversal of policy.") (citation omitted).

In support of their arguments, Arch and Jiheng cite *Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 795 F. Supp. 417 (1992) ("*Shikoku*"), where this Court held that reliance on prior administrative practice can, in certain circumstances, be sufficient to prevent Commerce from changing course without providing notice. In *Shikoku*, plaintiffs challenged Commerce's final results of the fifth and sixth administrative reviews of an antidumping duty order. In those final results, Commerce employed a different methodology than it used in the original investigation and the first four administrative reviews. *Id.* at 384, 795 F. Supp. at 418. Plaintiffs argued that they were being unfairly penalized by Commerce's decision to use a new methodology because they relied on the Department's old practice.

Commerce insisted that plaintiffs "had no right to rely on the continuation of a particular calculation methodology." *See id.* at 384, 795 F. Supp. at 420. Moreover, the Department maintained that, even if the court found Commerce to have changed its methodology, its final determination should still be upheld because it was explained ad-

equately and supported by substantial evidence. *Id.* at 384, 795 F. Supp. at 419.

The *Shikoku* Court concluded that Commerce acted unreasonably and did not provide a sufficient explanation for changing methodologies:

> Principles of fairness prevent Commerce from changing its methodology at this late stage. Commerce is required to administer the antidumping laws fairly. Adherence to prior methodologies is required in some circumstances. . . .

Id. at 388, 795 F. Supp. at 421 (footnote and citation omitted).

Shikoku involved a longer period of reliance than in this case, but the logic underpinning its holding remains useful here. Thus, for the court, as in *Shikoku*, "principles of fairness" prevent the Department from modifying its by-product offset analysis without giving Jiheng notice of the change. *See NEC Corp. v. United States*, 151 F.3d 1361, 1371 (Fed. Cir. 1998) ("[T]here inheres in a statutory scheme such as this an expectation that those charged with its administration will act fairly and honestly."); *Budd Co., Wheel & Brake Div. v. United States*, 14 CIT 595, 602, 746 F. Supp. 1093, 1099 (1990) (stating that the Federal Circuit has made clear that "fairness is the touchstone of Commerce's duty in enforcing the antidumping laws"). This is particularly the case given that the Department's questionnaires in this first administrative review did not seek materially different information from that sought in the original investigation.

Moreover, no serious argument can be made that *Certain Lined Paper* provided either notice of or an explanation of Commerce's changed practice. First, an examination of the final results and accompanying Issues and Decision Memorandum in that investigation reveals that at no point does the Department state that henceforth only production information would be sufficient to justify a by-product offset. Second, any claim that *Certain Lined Paper's* results informed Jiheng of a change in practice is discounted by the fact that Commerce's own personnel did not take *Certain Lined Paper* into account in preparing the Preliminary Results.

Accordingly, the court finds that Commerce did not act reasonably under the circumstances and remands this matter to the Department for reconsideration. On remand, the Department shall reopen the record and provide Jiheng with sufficient opportunity to submit documentation relevant to the methodology Commerce employs in its by-product analysis. Commerce shall notify Jiheng precisely what information it expects Jiheng to produce. Commerce shall then complete its by-product offset analysis accordingly.

II. Clearon and OxyChem's Motion

Domestic companies Clearon and OxyChem challenge the Department's calculation of surrogate values for urea, sea salt, and steam

coal, each of which is used in Jiheng's production of the subject merchandise. For the reasons set forth below, the Department's surrogate value calculations are sustained.

A. Legal Framework for Calculating Surrogate Values

In determining whether the subject merchandise is being, or is likely to be, sold at less than fair value, 19 U.S.C. § 1677b(a) requires Commerce to make "a fair comparison . . . between the export price[4] or constructed export price[5] and normal value." When merchandise that is the subject of an antidumping investigation is exported from a nonmarket economy country,[6] such as the PRC, Commerce, under most circumstances, determines normal value by valuing the FOPs used in producing the merchandise using surrogate data.[7] The statute directs Commerce to value the FOPs "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the [Department]. . . . " 19 U.S.C. § 1677b(c)(1). "Specifically, Commerce's task in a nonmarket economy investigation is to calculate what a producer's costs or prices would be if such prices or costs were determined by market forces." *Tianjin Mach. Imp. & Ex. Corp. v. United States*, 16 CIT 931, 940, 806 F. Supp. 1008, 1018 (1992).

B. Surrogate Value for Urea

Clearon and OxyChem argue that the Department did not use the

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[4] The "export price" is "the price at which the subject merchandise is first sold . . . by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States," as adjusted. 19 U.S.C. § 1677a(a).

[5] "Constructed export price" is "the price at which the subject merchandise is first sold . . . in the United States . . . by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter," as adjusted. 19 U.S.C. § 1677a(b).

[6] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A). "Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise." *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 481, 318 F. Supp. 2d 1339, 1341 (2004). Therefore, because the subject merchandise comes from the PRC, Commerce constructed normal value by valuing the FOPs using surrogate data from India. *See* 19 U.S.C. § 1677b(c)(4).

[7] Section 1677b(c)(4)(A) requires that:

> The administering authority, in valuing factors of production [to determine normal value of the subject merchandise exported from a nonmarket economy], shall utilize, to the extent possible, the 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. . . .

"best available information" in selecting the source of a surrogate value for urea. 19 U.S.C. § 1677b(c)(1). As a surrogate value, the Department used the weighted-average unit value of Indian imports from the World Trade Atlas ("WTA"), which included data from the Oman India Fertilizer Company ("OMIFCO"). Clearon and OxyChem assert that "Commerce erred by including in its calculations the value of imports of urea to India from Oman. . . . [when the] record revealed these data to consist solely of imports by the Government of India from a joint venture controlled by the governments of India and Oman [OMIFCO]." Mot. J. Agency R. Clearon and OxyChem ("Clearon/OxyChem Br.") 2.

According to Clearon and OxyChem, the OMIFCO prices were anomalous because the joint venture did not sell urea on the open market, but rather "has committed to sell all of its urea output for 15 years to the Government of India under a declining, price-fixed contract irrespective of changes in the market price for urea." Clearon/OxyChem Br. 15. Thus, they maintain that Commerce's acts were "inconsistent with a broad array of judicial and administrative precedent directing Commerce to avoid the use of prices that have been distorted by government involvement." Clearon/OxyChem Br. 15. For Clearon and OxyChem, the Department erroneously based the decision to use these prices on whether the OMIFCO data was "aberrational." They assert that the data should have simply been rejected outright, because the prices were not determined by the market.

Clearon and OxyChem additionally claim that Commerce's decision to employ an "aberrational" price analysis for the OMIFCO imports was "compounded by factually inaccurate statements in support of its conclusion." Clearon/OxyChem Br. 23. They argue: "Commerce's stated basis for refusing to exclude the Oman import values − that the Oman imports were at comparable or higher prices than other imports of urea to India − was factually incorrect."[8]

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[8] WTA data for imports of urea from December 2004 through May 2006 was as follows:

Country	Quantity (KG)	Average Value (Rupees/KG)
United Kingdom	3,000	6.67
Oman	1,291,398,509	6.99
Bahrain	21,997,000	11.53
Saudi Arabia	135,027,000	11.60
United Arab Emirates	139,815,134	11.65
Ukraine	245,524,000	11.85
Qatar	142,167,000	11.87
Bangladesh	20,999,000	12.27
Kuwait	16,497,000	12.32
Russia	66,702,000	12.58
Germany	760	30.26
Total	2,080,130,403	8.83

Clearon/OxyChem Br. 6 (footnote and citation omitted).

Clearon/OxyChem Br. 3. Accordingly, they ask that the court to remand the determination to the Department for further consideration.

Commerce argues that, by comparing the weighted-average unit value for all Indian imports of urea to that of OMIFCO, and determining that the OMIFCO data was not aberrational, it complied with section 1677(b)(c)(1)'s "best available information" standard. It states that it "compared the weighted-average unit value for urea imports from Oman with the values of imports from other market-economy countries, and found that, contrary to Clearon's allegations, the value for imports from Oman was within the range of imports of urea from other market-economy countries." Def.'s Br. 11 (citing I&D Mem. at Comment 1). Having found that the value of the Omani imports was not aberrational, Commerce argues that it was correct not to exclude this data. Def.'s Br. 12 (citing *Allied Tube & Conduit Corp. v. United States*, 32 CIT ___ , ___ , 556 F. Supp. 2d 1350, 1353 (2008)).

With respect to Clearon and OxyChem's argument that Commerce was factually incorrect in finding that Omani imports were "comparable" to other imports of urea into India, Commerce notes that, "[a]lthough the Omani value was the second lowest" of all imports, "this fact alone does not indicate an aberrational price, because the quantity of Omani imports was far larger than all other Indian imports of urea." Def.'s Br. 12 (citation omitted). Apparently, Commerce is arguing that the Omani price was at the low end of the range because it would be subject to a volume discount. The Department also insists that it is appropriate to include these imports notwithstanding Clearon and OxyChem's argument concerning government control because "Oman is a market economy country and, therefore, its imports would not be excluded based upon Commerce's non-market practices," particularly given that Commerce determined that the prices were not aberrational. *See* Def.'s Br. 14−15. Therefore, the Department asks the court to sustain its calculation of the surrogate value for urea.

The court finds that Commerce acted reasonably by declining to exclude the OMIFCO data when selecting the surrogate value for urea. Although not a hard-and-fast rule,[9] when selecting surrogate

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[9] For example, Commerce may use non-public information when doing so is consistent with its duty of calculating a more accurate dumping margin.

> As the United States Court of Appeals for the Federal Circuit has explained. . . , actual prices paid for inputs on the international market are more accurate and indicative of actual input cost than surrogate values and therefore are preferable as they yield a more accurate dumping margin. Actual input prices paid, however, are not necessarily public information.

See Allied Pac. Food (Dalian) Co. v. United States, 30 CIT 736, 761−62, 435 F. Supp. 2d 1295, 1317−18 (2006) (citing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994)).

data, Commerce has a longstanding preference to "use public, country-wide data, where it is available," and will also consider the "quality, specificity and contemporaneity of the data." *See Mittal Steel Galati S.A. v. United States*, 31 CIT ___ , ___ , 502 F. Supp. 2d 1295, 1298 (2007) (citations omitted). This preference has been sustained by numerous decisions of this Court. *See Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1492, 460 F. Supp. 2d 1338, 1349 (2006) ("The Court has consistently sustained Commerce's preference for publicly-available information representative of the industry norm."); *Wuhan Bee Healthy Co. v. United States*, 31 CIT ___ , ___ , Slip Op. 07−113 at 25 (July 20, 2007) (not reported in the Federal Supplement).

Here, the WTA data is from a publicly available source for the POR. Additionally, Commerce analyzed that data to ensure that "value for imports from Oman to India was not aberrational, and was comparable to imports from other market economy countries." Def.'s Br. 11 (citation omitted). As has been seen, the Omani value was within the range of values examined, though at the low end, and was close to the average value, i.e., 6.99 rupees/KG for Oman and 8.83 rupees/KG for the average of all data sets. Furthermore, as Arch and Jiheng point out, the Department has previously engaged in analyses to determine if surrogate value data is aberrational and thus there is nothing novel about its methodology. *See* Arch/Jiheng Opp'n Br. 11 (citing Certain Hot-Rolled Carbon Steel Flat Prods. from Rom., 70 Fed. Reg. 34,448 (Dep't of Commerce June 14, 2005) (notice of final results), adopting Issues and Decision Mem. for the 2002−03 Antidumping Duty Admin. Review: Certain Hot-Rolled Carbon Steel Flat Prods. from Rom., at Comment 2 (Dep't of Commerce June 6, 2005) (analyzing allegations of aberrational surrogate value data)). In addition, Commerce acted reasonably in concluding that "economies of scale is one factor contributing to OMIFCO's price [being lower than that of other urea imports into India], given the quantity of imports from Oman into India." *See* I&D Mem. at Comment 1; Def.'s Br. 12 (noting that "the quantity of Omani imports of urea was higher than the quantity of all other Indian imports of urea combined"). Thus, having found that the OMIFCO data was "within the normal range" and taking into consideration the large quantity of OMIFCO imports, it cannot be said that Commerce was unreasonable in using this information.

Moreover, the court is unconvinced that Commerce erred by not excluding the OMIFCO data as tainted by reason of government involvement. Oman and India are market economy countries and there is no evidence that, at the time the contract was entered into, the prices set were not market-driven. In addition, Commerce could reasonably find that, the mere fact that a product is sold to a single purchaser pursuant to a long-term contract, does not necessarily make

the price anomalous. Further, there was no record evidence demonstrating that urea sales made subject to the contract were distorted.

Therefore, the court sustains Commerce's surrogate value calculation for urea. "Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was reasonable." *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1190, Slip Op. 04−88 at 9−10 (2004) (not reported in the Federal Supplement) (quotation omitted).

C. Surrogate Value for Sea Salt

Salt is a key component in Jiheng's production process, during which sea salt is used to create chlorine gas and caustic soda—two of the "principal inputs" in the production of subject merchandise. *See* Clearon/OxyChem Br. 11. Clearon and OxyChem take issue with the Department's selection of the WTA import data for rock salt as a surrogate value for the sea salt actually used by Jiheng. Rather than the rock salt value, they maintain that Commerce should have used vacuum salt pricing data, as published in the Indian publication *Chemical Weekly*. Clearon/OxyChem Br. 29.

Clearon and OxyChem assert that Commerce's decision to reject the *Chemical Weekly* pricing data and rely on the International Trade Commission's ("ITC") determination in *Rock Salt From Canada* was erroneous. *See* Rock Salt From Can., USITC Pub. 1658, n.6, No.731−TA−239 (Mar. 1985). In support of their position, they argue that Commerce improperly "disregard[ed] the evidence that rock salt is produced through a completely different process [involving mining] than the evaporative methods [involving evaporating salt-containing brine] used to produce sea salt and vacuum salt." Clearon/OxyChem Br. 28. In addition, they insist that Commerce failed to fully consider the vacuum salt pricing data contained in *Chemical Weekly*. *See* Clearon/OxyChem Br. 31. It is worth noting at the outset, however, that they never make clear why this distinction is important. If not vacuum salt, Clearon and OxyChem alternatively claim that Commerce should have used WTA import data under the Harmonized Tariff Schedule ("HTS")[10] subheading "other salts of pure sodium chloride" because it was "the only import category that actually covered the input in question − sea salt." *See* Clearon/OxyChem Br. 29.

Commerce argues that it properly selected rock salt as a surrogate because it is the "most similar" to the sea salt used by Jiheng in its production process. Def.'s Br. 16. Specifically, "Commerce found that [imports under the] the HTS [subheading] for 'rock salt' was the

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[10] The Harmonized Tariff Schedule ("HTS") referred to herein is that of the Republic of India.

most appropriate surrogate for Jiheng's input, because [rock salt] is most similar in purity and crystal size" to sea salt. Def.'s Br. 16−17 (citing I&D Mem. at Comment 2).

Commerce acknowledges that certain types of salts may have overlapping applications (for example, can be used for both food and industrial purposes), but notes that it arrived at its determination to use rock salt based on specific evidence provided by Jiheng demonstrating that it used "industrial grade sea salt, which is manufactured by allowing sea water to evaporate, and which does *not* undergo further processing to be sold as 'high purity' vacuum salt." Def.'s Br. 19 (citing I&D Mem. at Comment 2). In other words, Commerce argues that although rock salt and vacuum salt can both be used in the production of chemicals, it determined that rock salt was the most similar to the salt actually used by Jiheng because vacuum salt is more processed and refined.

Furthermore, as to Clearon and OxyChem's contention that Commerce did not fully consider the domestic *Chemical Weekly* data, the Department argues that those companies did not raise this argument at the administrative level and therefore failed to exhaust their administrative remedies. *See* Def.'s Br. 20 (citations omitted). Moreover, even if the court were to consider the issue, Commerce argues, it is within its power to use import data instead of domestic data when it explains the reasons for its decision. *See* Def.'s Br. 20−21 (citing *Wuhan Bee Healthy Co. v. United States*, 29 CIT 587, 601, 374 F. Supp. 2d 1299, 1311 (2005)). Finally, as to its decision not to use WTA import data from the HTS category "other salts of pure sodium chloride" as a surrogate value, the alternative proposed by Clearon and OxyChem, Commerce argues that its policy is to avoid using "overly broad HTS categories for surrogate values where a more product-specific surrogate value is available." *See* Def.'s Br. 21 (citation omitted).

The court finds that the Department acted reasonably under the facts presented. In its Issues and Decision Memorandum, Commerce explained that it relied on the ITC's investigation in *Rock Salt from Canada* for guidance concerning the different types of salt, salt usage, and salt mining, because "after a thorough examination of all of the evidence on the record," it considered this determination to be the most persuasive and informative information placed on the record by the parties. *See* I&D Mem. at Comment 2 (citations omitted). *Rock Salt from Canada*, though not precisely on point, is instructive in several ways.

First, *Rock Salt from Canada* made clear that a "significant percentage" of rock salt shipped to the U.S. is used in the chemical industry for the manufacture of chlor-alkalis, of the type made by Jiheng. I&D Mem. at Comment 2 (citations omitted). Next, relying upon *Rock Salt from Canada*, Commerce noted that "solar salt"

(meaning sea salt that is produced by solar evaporation) "has about the same purity and crystal size as rock salt." *Id*. (footnote and quotation omitted).

Further, the court agrees with Commerce that the similarities in purity and crystal size not only supports the use of rock salt, but discourages reliance on the *Chemical Weekly* data for vacuum salt. This is because "Jiheng demonstrat[ed] that it uses industrial grade sea salt, which is manufactured by allowing sea water to evaporate. . . . " Def.'s Br. 19 (citations omitted). On the other hand, vacuum salt undergoes "further processing" in order to be sold as "high purity" vacuum salt. Def.'s Br. 19 (citing I&D Mem. at Comment 2). Therefore, considering the differences and structural similarities of the proposed surrogate sources, it is apparent that rock salt represented the "best available information." Moreover, although the court finds that the *Chemical Weekly* data was from a domestic source, which is typically preferable to import data, the court "is mindful that Commerce does not have an unconditional preference for using domestic prices over import prices when valuing surrogates." *See Wuhan Bee Healthy Co.*, 29 CIT at 601, 374 F. Supp. 2d at 1311 (citation omitted). This should particularly be the case where, as here, other factors such as the similarities between the surrogate and the input actually used weigh in favor of the imported input.

Finally, the court notes that, by placing the domestic vacuum salt data (*Chemical Weekly*) on the record before Commerce and arguing that it should be used as a surrogate value, Clearon and OxyChem exhausted their administrative remedies, and thus this matter is properly before the court. *See Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT 741, 743, 155 F. Supp. 2d 801, 805 (2001) ("The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court."). Nonetheless, it was reasonable for Commerce to reject import data under HTS subheading 2501.00.90 covering "other salts of pure sodium chloride" because that category of imports was overbroad as it is a "basket" provision. *See* I&D Mem. at Comment 2. Citing to *Certain Preserved Mushrooms from the People's Republic of China*, the Department noted that it "does not prefer an overly broad HTS category where a more product-specific surrogate value is available." *See* I& D Mem. at Comment 2 (citing Certain Preserved Mushrooms from the PRC, 72 Fed. Reg. 44,827 (Dep't of Commerce Aug. 9, 2007)).

In addition, as Commerce points out, it would be improper to rely on this data because no party put "information [on the record] describing the type of salt included in the basket category." *Id*. As a result, while Commerce knew what was actually imported under HTS subheading 2501.00.20, it had no way of knowing what was imported under HTS subheading 2501.00.90. Thus, the Department reasonably relied on record evidence that WTA Indian import data included

in HTS subheading 2501.00.20 for rock salt was more representative of Jiheng's reported input, and therefore more product-specific. *See* I&D Mem. at Comment 2; *Polyethylene Retail Carrier Bag Comm. v. United States*, 29 CIT 1418, 1443−44, Slip Op. 05−157 at 43 (2005) (not reported in the Federal Supplement) (stating that "Commerce recognized that import statistics based on a basket tariff category are inappropriate if a more representative alternate surrogate is available").

The Department made its decision based upon a reasoned review of the record evidence, considered the alternatives before it, and supported its determination with substantial evidence. As such, the court will not disturb Commerce's findings. *See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 481, 59 F. Supp. 2d 1354, 1357 ("The statute requires Commerce to use the best available information, but does not define that term.") (footnote omitted). Accordingly, the court sustains Commerce's surrogate value calculation for sea salt.

D. Surrogate Value for Steam Coal

Clearon and OxyChem object to the Department's selection of a surrogate value for steam coal. As a surrogate, the Department used domestic Indian price data from the Tata Energy Research Institute's Energy Data Directory and Yearbook (the "TERI data") from Coal India Ltd., the state-owned producer of coal in India. *See* Def.'s Br. 5. Commerce's choice rested on its conclusion that the TERI data were the most specific to Jiheng's actual reported coal input. *See* I&D Mem. at Comment 7. That is, Commerce determined that it would use the TERI data because Jiheng "provided the Department with information on the specific types of coal it uses and their UHV [("useful heat value")]," and the "TERI Data are categorized by major types of coal and UHV value whereas WTA import data are listed under 'steam coal' without further specificity." *Id.* (footnote omitted).

Clearon and OxyChem, however, insist that the Department used the TERI data only because it has used it in other reviews, and it never "actually analyz[ed] the implication of new factual information and arguments presented for the first time in the context of this review." Clearon/OxyChem Br. 25. Clearon and OxyChem primarily argue that they have placed on the record evidence that the steam coal prices included in the TERI data were available only to certain "core sector" purchasers,[11] a group they allege does not include chemical producers like Jiheng.

Clearon and OxyChem further argue that non-"core sector" purchasers generally purchase coal through auctions "in which prices

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[11] According to Clearon and OxyChem, "[t]he industries classified as 'core sector' consumers of coal are power, defense, railway, fertilizer, metallurgic, cement, aluminum, and paper." Clearon/OxyChem Br. 10 (citation omitted).

routinely exceeded the listed prices in the TERI data by 50% or more." Clearon/OxyChem Br. 10. To support this claim, Clearon and OxyChem cite record evidence including two Internet news articles (one from "The Hindu Business Line"[12] and one from an indecipherable source[13]), which they insist demonstrate inequality in coal availability at TERI data prices. *See* Clearon/OxyChem Br. 26 (citations omitted). Thus, they argue that Commerce failed to choose the surrogate value that most "accurately reflects the coal consumption pattern of producers in the relevant industry." *See* Clearon/OxyChem Br. 10 (quotations omitted). Given their insistence that the prices represented by the TERI data would not be available to Jiheng, Clearon and OxyChem argue that the WTA import data necessarily represented the best available information for valuing steam coal. *See* Clearon/OxyChem Br. 25.

The Department argues in response that it properly used the TERI data to calculate the surrogate value for steam coal because it was the most representative data of Jiheng's reported coal input. That is, comparing the UHV of coal in the TERI data to that actually used by Jiheng, Commerce concluded that the TERI data was the "best available information" for valuing steam coal. *See* Def.'s Br. 23 (citing I&D Mem. at Comment 7).

In addition, Commerce insists that there is no conclusive record evidence to substantiate the claim that only "core sector" consumers could take advantage of the TERI data prices. Def.'s Br. 23. The Department explains:

> Although Clearon cites evidence of non-core sectors paying higher prices for the coal, the evidence cited does not specify

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[12] This article noted that the Supreme Court of India had recently held that "[t]he differential pricing of coal that was being practised by [Coal India Ltd.] through the e-auction system violated the right to equality guaranteed in the Constitution. . . . " BioLab Inc.'s Submission of Factor Value Data dated Aug. 6 2007, PR 606 at Ex. 3. It went on:

> [W]hile core sector consumers like power plants, cement and steel manufacturers continued to receive coal supplies at the Government notified prices, non-core sector consumers ended up paying much higher prices as the base price for each auction was being fixed by the coal companies based on the highest realisation in the previous auction. There had been several occasions when buyers had to pay anywhere between 30 to 50 per cent more than the notified prices, sources said.
>
> The customers in the non-core sector are of three types − linked customers, non-linked customers, and small and tiny industries.

Id.

[13] The second article, entitled "Glitches in coal e-auction," also discusses the Supreme Court's decision. Curiously, this article contains the following sentence: "The entry of these coal guzzlers [referring to certain Indian companies mentioned earlier in the article] in the core sector like power, steel *and chemicals* boosted the price of coal, [and] endangered the existence of small players." BioLab Inc.'s Submission of Factual Info. dated Dec. 15, 2006, PR 480 at Ex. 2 (emphasis added). This seems to imply that chemical companies, like Jiheng, may be considered "core sector" consumers. At the very least, the article is ambiguous as to whether chemical companies are in the "core sector."

> the type of coal available at these prices. Without such evidence, Commerce could not determine whether the type of coal being sold at these elevated prices was the type used by Jiheng. By contrast the Coal India Ltd. documents clearly specified that the type of coal used by Jiheng had been deregulated in 1996 and has been sold at market prices since 2000. Thus, Commerce chose to use the TERI data to value steam coal, because there was no evidence that the prices for the type of coal used by Jiheng were distorted or non-market.

Def.'s Br. 24 (internal citation omitted). Based on the assertion that the type of coal used by Jiheng was available to all purchasers and its finding that coal prices in the TERI data were representative of Jiheng's reported input, the Department maintains that this surrogate price is the best available information.

The court finds that Commerce acted reasonably in using the TERI data to value steam coal. Commerce explained that Jiheng provided it "with information on the specific types of coal it uses and their UHV." I&D Mem. at Comment 7. The Department further observed that "TERI Data are categorized by major types of coal and UHV value whereas WTA import data are listed under 'steam coal' without further specificity." *Id.* Thus, for Commerce, examining the information placed on the record, the TERI data was the most "product specific" surrogate available, and therefore the most representative of Jiheng's actual coal input. Def.'s Br. 23. This was reasonable under the facts of this case.

Furthermore, the court finds that Commerce supported its determination with substantial evidence and adequately explained the manner by which it reached its result. Thus, to address Clearon and OxyChem's arguments about the limitations of the TERI data, Commerce's Issues and Decision Memorandum notes that Jiheng has provided it with Coal India, Ltd. documents stating that the Government of India has deregulated the price of steam coal used by Jiheng. *See* I&D Mem. at Comment 7; Prelim. Results Surrogate Value Mem., PR 94, at Att. III (Dep't of Commerce July 2, 2007). Specifically, the evidence revealed that deregulation occurred in 1996 and that the coal used by Jiheng has been sold at market prices since 2000. *See* Prelim. Results Surrogate Value Mem., PR 94, at Att. III (Dep't of Commerce July 2, 2007) (noting that, effective January 1, 2000, Coal India, Ltd. "was free to fix the prices of such grades of coal in relation to the market prices"). As to Clearon and OxyChem's claims that certain articles support its contention that only "core sector" purchasers may buy coal from Coal India, Ltd. and that non-"core sector" purchasers pay more, one article is at best equivocal on this question (noting that "customers in the non-core sector a
re of three types − linked customers, non-linked customers, and small and tiny industries"), while the other article appears to support Commerce's position (referencing companies being "in the core

sector like power, steel and *chemicals*. . . . "). *See* BioLab Inc.'s Submission of Factor Value Data dated Aug. 6 2007, PR 606 at Ex. 3; BioLab Inc.'s Submission of Factual Info. dated Dec. 15, 2006, PR 480 at Ex. 2 (emphasis added).

Additionally, to further justify its reliance on the TERI data as a surrogate value for a chemical producer such as Jiheng, Commerce cited its recent determination in *Saccharin from the PRC*, 72 Fed. Reg. 51,800 (Dep't of Commerce Sept. 11, 2007) (final results of the 2005−2006 antidumping duty administrative review) ("*Saccharin*"). In *Saccharin*, the Department found the TERI data to be a more appropriate surrogate to value steam coal than Indian WTA data. *See* Issues and Decision Mem. for the 2005−2006 Admin. Review of the Antidumping Duty Order on Saccharin from the PRC, at Comment 3 (Dep't of Commerce Sept. 11, 2007). The Department noted that saccharin is a chemical and the POR in the *Saccharin* investigation overlapped with eleven of the twelve months of the POR here. *See* I&D Mem. at Comment 7. In other words, although the *Saccharin* investigation did not explicitly address the "core" versus non-"core" distinction, Commerce reasoned that, given that saccharin is a chemical, the *Saccharin* determination is further evidence that the coal represented by the TERI data was available to chemical producers such as Jiheng during the POR.

The court finds that the evidence cited by Commerce meets the substantial evidence test. Put another way, the Department has shown that: (1) the TERI data represents most closely the coal actually used by Jiheng, and (2) Clearon and OxyChem's claim that TERI data prices were unavailable to chemical manufacturers like Jiheng is, at best, subject to conflicting interpretations of the record evidence. *See Technoimportexport, ECF Am. Inc. v. United States*, 16 CIT, 13, 18, 783 F. Supp. 1401, 1406 (1992) ("When Commerce is faced with the decision to choose between two reasonable alternatives and one alternative is favored over the other in their eyes, then they have the discretion to choose accordingly."). Accordingly, the court finds the Department's explanation to be reasonable and sustains Commerce's surrogate value calculation for steam coal.

CONCLUSION

For the reasons stated, Commerce's Final Results of administrative review are sustained in part and remanded. In light of the ordered remand, the court has not separately addressed Jiheng's claimed by-product offset for recovered sulfuric acid. On remand, the Department shall reexamine each of Jiheng's claimed by-product offsets consistent with the instructions herein. Remand results are due on or before October 12, 2009. Comments to the remand results are due on or before November 11, 2009. Replies to such comments are due on or before November 25, 2009.

Slip Op. 09–72

QHD SANHAI HONEY CO., LTD., Plaintiff, v. **UNITED STATES,** Defendant, and **THE AMERICAN HONEY PRODUCERS ASSOCIATION AND THE SIOUX HONEY ASSOCIATION,** Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 08–00257

JUDGMENT

The court's orders of April 23, 2009 and June 19, 2009 afforded plaintiff full notice and ample opportunities to obtain new counsel as required for the continued prosecution of this action. No counsel has entered an appearance in response to those orders. In consideration of plaintiff's failure to prosecute and all papers and proceedings herein, after due deliberation, and pursuant to USCIT Rules 41(b)(3) and 58, it is hereby

ORDERED that this action be, and hereby is, DISMISSED.