U.S. Court of International Trade

Slip Op. 16–106

JIANGSU TIANGONG TOOLS COMPANY LIMITED, Plaintiff, v. UNITED STATES, Defendant, and SSAB ENTERPRISES LLC et al., Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Court No. 16–00140

[Granting Defendant's motion to dismiss for lack of jurisdiction.]

Dated: Dated: November 17, 2016

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Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Mercedes C. Morno*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

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Alan H. Price, Christopher B. Weld, and *Stephanie M. Bell*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor Nucor Corporation.

OPINION

Choe-Groves, Judge:

This matter is before the court on Defendant's motion to dismiss for lack of jurisdiction. *See* Def.'s Mot. Dismiss Lack Jurisdiction, Aug. 22, 2016, ECF No. 23. Plaintiff Jiangsu Tiangong Tools Company Limited ("Plaintiff") brings this action pursuant to 28 U.S.C. § 1581(i)(4) (2012)[1] for judicial review of several decisions made by the U.S. Department of Commerce ("Commerce") during an ongoing antidumping investigation into imports of certain carbon and alloy steel cut-to-length plate from the People's Republic of China ("PRC"). *See* Compl., July 29, 2016, ECF No. 5. Plaintiff's Complaint alleges that

[1] All citations to Title 28 of the U.S. Code are to the 2012 edition.

Commerce's decisions to reject Plaintiff's Quantity and Value ("Q&V") questionnaire response, separate rate application, voluntary questionnaire responses, and request for individual examination were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. *See* Compl. ¶¶ 35–46. Plaintiff asserts that the court has jurisdiction pursuant to 28 U.S.C. § 1581(i) because the remedy provided under 28 U.S.C. § 1581(c) would be manifestly inadequate. *See* Compl. ¶¶ 5–8; Pl.'s Resp. Def.'s Mot. Dismiss Lack Jurisdiction 9–16, Sept. 1, 2016, ECF No. 32 ("Pl.'s Resp."). For the reasons set forth below, the court finds that it lacks subject matter jurisdiction to hear Plaintiff's claims and grants Defendant's motion to dismiss for lack of jurisdiction.

BACKGROUND

On April 8, 2016, Commerce received a petition from ArcelorMittal USA LLC, Nucor Corporation, and SSAB Enterprises LLC (collectively, "Defendant-Intervenors") to conduct an antidumping investigation into imports of certain carbon and alloy steel cut-to-length plate from several countries, including the PRC. *See Certain Carbon and Alloy Steel Cut-To-Length Plate From Austria, Belgium, Brazil, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, the People's Republic of China, South Africa, Taiwan, and the Republic of Turkey*, 81 Fed. Reg. 27,089, 27,089–90 (Dep't Commerce May 5, 2016) (initiation of less-than-fair-value investigations) ("Initiation Notice"). Subsequently, Commerce initiated the antidumping duty investigation of such imports on April 28, 2016. *See id.* at 27,094–95. The Initiation Notice stated that Commerce intended to issue the Q&V questionnaire directly to potential respondents and make the Q&V questionnaire available electronically for those exporters or producers who did not receive a Q&V questionnaire by mail. *See id.* at 27,095. The Initiation Notice also stated that the Q&V questionnaire responses were due no later than May 12, 2016 and that respondents must timely submit both a response to the Q&V questionnaire and a separate rate application to receive consideration for a separate rate. *See id.*

On May 14, 2016, two days after the deadline set by Commerce, Plaintiff submitted its Q&V questionnaire response with a request that Commerce extend the deadline and accept Plaintiff's late response. *See* Compl. Ex. 2. On May 23, 2016, Commerce rejected Plaintiff's Q&V questionnaire response as untimely and refused to extend the deadline. *See id.* at Ex. 4. On the same day, Plaintiff immediately filed a request asking Commerce to reconsider the rejection of Plaintiff's Q&V questionnaire response. *See id.* at Ex. 5.

Commerce rejected this request on June 2, 2016. *See id.* at Ex. 7. Plaintiff filed its separate rate application on June 6, 2016, *see id.* at Ex. 14, which Commerce rejected on June 14, 2016 because Plaintiff's Q&V questionnaire response was untimely. *See id.* at Ex. 15. On June 24, 2016, Plaintiff submitted voluntary responses to Commerce's Section A Questionnaire, and on July 15, 2016, Plaintiff submitted voluntary responses to Commerce's Sections C, D, and E Questionnaires. *See id.* at Exs. 16, 18. Commerce rejected both submissions on June 29, 2016 and July 18, 2016, respectively. *See id.* at Exs. 17, 19. Commerce scheduled the preliminary determination to be issued on November 4, 2016. *See* Def.'s Reply Pl.'s Resp. Def.'s Mot. Dismiss Lack Jurisdiction 11 n.3, September 8. 2016, ECF No. 30.

Plaintiff commenced this action on July 29, 2016, asserting, *inter alia*, that the court has jurisdiction to hear the case pursuant to 28 U.S.C. § 1581(i)(4). *See* Compl. On August 3, 2016, Plaintiff filed a consent motion to expedite briefing and the court's review in this action, *see* Consent Mot. Expedite, Aug. 3, 2016, ECF No. 8, which the court granted on August 8, 2016. *See* Order, Aug. 8, 2016, ECF No. 17. On August 22, 2016, Defendant filed a motion to dismiss for lack of jurisdiction pursuant to USCIT Rule 12(b)(1). *See* Def.'s Mot. Dismiss Lack Jurisdiction. Defendant-Intervenors submitted briefs supporting Defendant's argument that the court lacks jurisdiction under 28 U.S.C. § 1581(i)(4). *See* Br. Supp. Def.'s Mot. Dismiss, Aug. 22. 2016, ECF No. 24; SSAB's Br. Supp. Def.'s Mot. Dismiss, Aug. 22. 2016, ECF No. 25; Br. Supp. Def.'s Mot. Dismiss, Aug. 29. 2016, ECF No. 30. Plaintiff subsequently filed a response brief on September 1, 2016 arguing that jurisdiction was proper under 28 U.S.C. § 1581(i)(4). *See* Pl.'s Resp. Defendant replied to Plaintiff's response on September 8, 2016. *See* Def.'s Reply Pl.'s Resp. Def.'s Mot. Dismiss Lack Jurisdiction.

JURISDICTION

The U.S. Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (quoting *King Iron Bridge & Mfg. Co. v. Otoe Cty.*, 120 U.S. 225, 226 (1887)). The party invoking jurisdiction must "allege sufficient facts to establish the court's jurisdiction," *id.* at 1318 (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and therefore "bears the burden of establishing it." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). It is well-settled that a party may not invoke jurisdiction under 28 U.S.C. §

1581(i) "when jurisdiction under another subsection of 28 U.S.C. § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (citations omitted).

DISCUSSION

Plaintiff contends that the court has jurisdiction pursuant to the residual jurisdiction clause under 28 U.S.C. § 1581(i)(4), which provides:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
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> (1) revenue from imports or tonnage;
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> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
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> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

28 U.S.C. § 1581(i). Plaintiff's action challenges several decisions made by Commerce during an ongoing antidumping investigation. 28 U.S.C. § 1581(c) provides the court with jurisdiction over actions challenging Commerce's final determination and attendant decisions

in an antidumping duty investigation. *See* 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(2)(B)(i)–(ii) (2012).[2] A remedy under 28 U.S.C. § 1581(c) may be available to Plaintiff after Commerce issues a final determination, and this remedy can adequately address Plaintiff's claims. Therefore, the court cannot exercise jurisdiction over this action pursuant to 28 U.S.C. § 1581(i)(4).

"[T]he party asserting § 1581(i) jurisdiction has the burden to show how [the potentially available] remedy would be manifestly inadequate." *Miller & Co.*, 824 F.2d at 963 (citations omitted). Plaintiff asserts several reasons to support its position. *See* Compl. ¶¶ 5–8; Pl.'s Resp. 9–16. As discussed below, however, Plaintiff's arguments do not establish the court's jurisdiction under 28 U.S.C. § 1581(i).

First, Plaintiff avers that Commerce's rejection of Plaintiff's Q&V questionnaire response and subsequent submissions will result in the assessment of a PRC-wide duty rate that will cause "immediate and irreparable harm through the loss of significant sales volume to unrelated U.S. buyers," Compl. ¶ 6, and ultimately result in the loss of Plaintiff's "entire U.S. market, which averages between five and ten million dollars per year." Pl.'s Resp. 5. Because Plaintiff could be subject to the PRC-wide rate if Commerce issues an affirmative preliminary determination, Plaintiff argues that the immediate economic harm renders any remedy under 28 U.S.C. § 1581(c) manifestly inadequate. *See id.* at 5, 12–13. Plaintiff has failed, however, to cite any dispositive cases. Rather, for the purpose of establishing jurisdiction under 28 U.S.C. § 1581(i), "mere allegations of financial harm . . . do not make the remedy established by Congress manifestly inadequate." *Miller & Co.*, 824 F.2d at 964 (citation omitted). Therefore, even if the court were to accept Plaintiff's allegations of financial harm as true, Plaintiff's argument does not establish jurisdiction in this case.

Second, Plaintiff argues that the delay inherent in waiting for Commerce to complete the underlying administrative proceeding before seeking redress under 28 U.S.C. § 1581(c) makes that remedy manifestly inadequate. *See* Pl.'s Resp. 13–16. To support this proposition, Plaintiff relies on *U.S. Cane Sugar Refiners' Ass'n v. Block*, 683 F.2d 399 (C.C.P.A. 1982). *See* Pl.'s Resp. 13. Plaintiff's argument is inapposite. In a footnote addressing jurisdiction, the Court of Customs and Patent Appeals summarily affirmed the lower court's reasoning on jurisdiction, while only noting the potential for harm to the plaintiff in waiting for a prospective remedy under 28 U.S.C. §

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition.

1581(a). *See U.S. Cane Sugar Refiners' Ass'n.* , 683 F.2d at 402 n.5. In holding that the court had jurisdiction under 28 U.S.C § 1581(i), the lower court did not determine that another remedy would be manifestly inadequate, but rather that the statutory scheme did not provide the plaintiff with a remedy under 28 U.S.C. § 1581(a).[3] *See U.S. Cane Sugar Refiners' Ass'n v. Block,* 3 CIT 196, 201–02, 544 F. Supp. 883, 886–87 (1982). In any event, the Court of Appeals for the Federal Circuit has further clarified that the delay in waiting for the appropriate time to assert a claim under an enumerated jurisdictional grant does not confer jurisdiction pursuant to 28 U.S.C. § 1581(i). *See Int'l Customs Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2012) ("[D]elays inherent in the statutory process do not render [the available relief] manifestly inadequate."). Therefore, the delay that Plaintiff must endure until Commerce completes the administrative proceeding does not grant the court jurisdiction over Plaintiff's action.

Third, Plaintiff asserts that it cannot obtain full relief from a challenge of Commerce's final determination under 28 U.S.C. § 1581(c). *See* Pl.'s Resp. 15. Plaintiff argues that:

> Full relief for [Plaintiff] is not an *ex post* determination of its deposit rate, and attendant refund after the conclusion of this investigation. Full relief for the harm that [Plaintiff] has suffered, and will imminently suffer, is for Commerce to accept [Plaintiff's] quantity and value questionnaire response and provide a determination that reflects due consideration of that information.[4]

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[3] In *U.S. Cane Sugar Refiners' Ass'n v. Block*, the plaintiff challenged a Presidential Proclamation that imposed quotas on the importation of sugar into the United States. 3 CIT 196, 200–02, 544 F. Supp. 883, 886–87 (1982). Defendant asserted that the plaintiff was required to follow the statutory scheme and exhaust administrative remedies under 19 U.S.C. §§ 1514 and 1515 before challenging under 28 U.S.C. § 1581(a). *See id.* The court noted, however, that such an exercise would be unreasonable because it would "require plaintiff's members to attempt to import over-quota sugar simply in order to obtain a protestable exclusion of the merchandise from entry under 19 U.S.C. § 1514 before seeking judicial review of the validity of the proclamation imposing the quota in a suit for injunctive and declarative relief." *Id.* at 201, 544 F. Supp. at 887. Further, the court recognized that a protest could not provide the plaintiff with relief at the administrative level because "Customs officials, who would review a protest claiming that [the proclamation was] invalid, obviously [had] no authority to override the presidential proclamation and admit over-quota sugar." *Id.* Therefore, the court determined that no remedy would be available under 28 U.S.C. § 1581(a) and, as such, jurisdiction under 28 U.S.C. § 1581(i) was proper. *See id.*

[4] Plaintiff further asserts that a remedy under 28 U.S.C. § 1581(c) would not be informed by Plaintiff's Q&V questionnaire response and separate rate application as Commerce has removed all of Plaintiff's submissions from the administrative record. *See* Pl.'s Resp. 12. This argument is unconvincing because the content of Plaintiff's Q&V questionnaire response and separate rate application is not necessary for the court to address Plaintiff's claims.

Id. Despite this argument, Plaintiff's ultimate goal is to avoid the PRC-wide duty rate and instead be assigned a rate based on either an individual examination or a separate rate application. Plaintiff argues that a remedy under 28 U.S.C. § 1581(c) could not provide such relief. However, the court has the ability to grant appropriate relief in cases involving review under 28 U.S.C. § 1581(c). For example, in *Artisan Mfg. Corp. v. United States*, the court found that Commerce's decision to assess a PRC-wide rate against a plaintiff who had filed an untimely Q&V questionnaire response was an abuse of Commerce's discretion. 38 CIT ___, ___, 978 F. Supp. 2d 1334, 1341–49 (2014). The court subsequently set aside Commerce's final determination with respect to the plaintiff and remanded the issue to Commerce for redetermination. *See id.* at ___, 978 F. Supp. 2d at 1350. Similarly, here, Plaintiff may have access to a remedy under 28 U.S.C. § 1581(c) if Commerce issues an affirmative final determination that results in the publication of an antidumping order. If, at that time, the court determines that Commerce has abused its discretion in rejecting Plaintiff's filings, then the court may remand the case to Commerce for redetermination. Such a remedy could provide Plaintiff with the relief that it seeks; therefore, an effective statutory remedy under 28 U.S.C. § 1581(c) would be available to Plaintiff at a later date under the appropriate circumstances.

Fourth, Plaintiff argues that asserting jurisdiction under 28 U.S.C. § 1581(i) would "avoid wasting the resources of the Department of Justice, Commerce, this Court and the other parties," and would save Plaintiff the costs of "any subsequent litigation." Pl.'s Resp. 14. However, neither the claims of efficiency nor the burdens of litigation render the statutorily enumerated remedies insufficient. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.") (citations omitted); *Am. Air Parcel Forwarding Co. v. United States.*, 718 F.2d 1546, 1551 (Fed. Cir. 1983) (quoting *J.C. Penney Co. v. U.S. Treasury*, 439 F.2d 63, 68 (2d Cir. 1971) ("[T]he mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate.")). Therefore, even if the court were to take Plaintiff's claims of expediency and efficiency as true, this argument does not establish jurisdiction in this case. Plaintiff has failed to demonstrate that the remedy under 28 U.S.C. § 1581(c) is manifestly inadequate and, as such, the court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i)(4).

Defendant's motion to dismiss further argues that the court lacks jurisdiction because Commerce's rejections of Plaintiff's filings are not final decisions, and therefore Plaintiff's claims are not ripe for deci-

sion under 28 U.S.C. § 1581(i). *See* Def.'s Mot. Dismiss Lack Jurisdiction 12–16. Plaintiff contends that Commerce's repetitive refusal of Plaintiff's filings demonstrates that Commerce has made a final decision on the issue and therefore the court has jurisdiction. *See* Pl.'s Resp. 16–20. The court notes that Commerce has neither issued a final determination in this matter, nor assessed the PRC-wide duty rate against Plaintiff. It is not necessary, however, for the court to resolve the question of whether Commerce's denial of Plaintiff's filings amounts to a final decision at this time. It is clear that jurisdiction under 28 U.S.C. § 1581(i) is unavailable in this case because another statutorily enumerated remedy may be available and Plaintiff has not met its burden to show how that remedy would be manifestly inadequate.

CONCLUSION

For the foregoing reasons, a remedy may be available under 28 U.S.C. § 1581(c) following Commerce's issuance of a final determination, and such remedy is not manifestly inadequate. Therefore, the court lacks jurisdiction under 28 U.S.C. § 1581(i) and the Complaint is dismissed.

Judgment will be entered accordingly.

Dated: November 17, 2016
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 16–107

CALGON CARBON CORPORATION, AND CABOT NORIT AMERICAS, INC., Plaintiffs, v. UNITED STATES, Defendant, ALBEMARLE CORPORATION, NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., NINGXIA GUANGHUA CHERISHMET ACTIVATED CARBON COMPANY, LTD., CARBON ACTIVATED CORPORATION, JACOBI CARBONS AB, AND JACOBI CARBONS, INC., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 14–00326

[Commerce's final results of redetermination in antidumping duty periodic review sustained in part and remanded in part.]

Dated: November 18, 2016

David A. Hartquist, John M. Herrmann II, Melissa M. Brewer, and *R. Alan Luberda*, Kelley Drye & Warren, LLP, of Washington, DC, for plaintiffs.

Peter A. Gwynne, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were

Benjamin C. Mizer, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Michael T. Gagain*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

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Gregory S. Menegaz, J. Kevin Horgan, and *Alexandra H. Salzman*, deKieffer & Horgan PLLC, of Washington, DC, for defendant-intervenor Carbon Activated Corporation.

Daniel L. Porter, Claudia D. Hartleben, and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for defendant-intervenors Jacobi Carbons AB and Jacobi Carbons, Inc.

OPINION

Restani, Judge:

Before the court are the Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, ECF No. 97 ("*Remand Results*"), concerning the sixth annual administrative review of the antidumping ("AD") duty order on certain activated carbon from the People's Republic of China ("PRC"). *See Notice of Antidumping Duty Order: Certain Activated Carbon from the People's Republic of China*, 72 Fed. Reg. 20,988, 20,988 (Dep't Commerce Apr. 27, 2007). The court previously remanded Commerce's selection of a surrogate value ("SV") for anthracite coal and Commerce's assignment of an all-others rate to Shanxi DMD Corporation ("Shanxi DMD"). *Calgon Carbon Corp. v. United States,* 145 F. Supp. 3d 1312, 1328 (CIT 2016) ("*Calgon*") (remanding Commerce's decision in *Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 79 Fed. Reg. 70,163, 70,163 (Dep't Commerce Nov. 25, 2014) ("*Final Results*")). For the reasons stated below, Commerce's *Remand Results* are sustained in part and remanded in part.

BACKGROUND

The court presumes familiarity with the facts of the case as discussed in *Calgon*, 145 F. Supp. 3d at 1316–19; however, for convenience, the court summarizes below the facts relevant to the *Remand Results*.

To calculate the dumping margin in antidumping ("AD") duty cases involving a non-market economy ("NME"), Commerce compares the

goods' normal value,[1] derived from factors of production ("FOPs") as valued in a surrogate market economy ("ME"), to the goods' export price.[2] 19 U.S.C. § 1677b(c). Commerce must use the "best available information" in selecting surrogate data for which to value FOPs. *Id.* The surrogate data must "to the extent possible" be from an ME country that is "at a level of economic development comparable to that of the [NME] country" and is a "significant producer[] of comparable merchandise." 19 U.S.C. § 1677b(c)(4)(A)–(B).

For this review, Commerce selected Jacobi Carbons AB ("Jacobi") and Ningxia Guanhua Cherishmet Activated Carbon Co., Ltd. ("Cherishmet") as the two mandatory respondents for the period of review ("POR") of April 1, 2012, through March 31, 2013. *See Certain Activated Carbon from the People's Republic of China: Preliminary Results of Antidumping Administrative Review; 2012–2013*, 79 Fed. Reg. 29,419, 29,419 (Dep't Commerce May 22, 2014) ("*Preliminary Results*"); Decision Memorandum for the Prelim. Results of Antidumping Duty Administrative Review: Certain Activated Carbon from the People's Republic of China at 3–4, PD 265 (May 16, 2014) ("*Preliminary I&D Memo*").

In the *Preliminary Results*, Commerce selected the Philippines as the primary surrogate country and selected an SV for anthracite coal, the main input in activated carbon, by using Global Trade Atlas ("GTA") data contemporaneous with the present sixth POR ("POR6-contemporaneous"), resulting in an SV of $1.19 per kilogram. *Calgon*, 145 F. Supp. 3d at 1317; *Preliminary I&D Memo* at 16. Based on this SV, Commerce calculated Jacobi's and Cherishmet's AD rates as $3.77 per kilogram and $2.05 per kilogram, respectively, resulting in a separate rate of $3.13 per kilogram. *Calgon*, 145 F. Supp. 3d at 1318. Commerce continued to select a PRC-wide rate of $2.42 per kilogram. *Id.*

For the *Final Results*, Commerce switched from using POR6-contemporaneous Philippine GTA data to a value of $0.05 per kilogram, which was derived from Philippine GTA data contemporaneous

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[1] Normal value is

> the price at which the foreign like product is first sold . . . 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,

"at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(A), (B)(i).

[2] Export price is "the price at which the subject merchandise is first sold . . . before the date of importation 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[.]" 19 U.S.C. § 1677a(a).

with the fifth POR ("POR5-contemporaneous"). *Id.* at 1317; *see also*-Certain Activated Carbon from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Sixth Antidumping Duty Administrative Review at 37–38, PD 310 (Nov. 18, 2014) ("*I&D Memo*"). Commerce made this change because of new information suggesting that the type of anthracite coal underlying the POR6-contemporaneous Philippine GTA data was not specific to the type used by the mandatory respondents, and no one had challenged the POR5-contemporaneous Philippine GTA value in the previous review. *Calgon*, 145 F. Supp. 3d at 1317–18. Thus, the SV for anthracite coal fell from $1.19 per kilogram to $0.05 per kilogram. *Id.* at 1317. For this reason, Jacobi's and Cherishmet's dumping margins dropped from $3.77 per kilogram and $2.05 per kilogram, respectively, to $0.04 per kilogram each. *Id.* at 1318. Similarly, the resulting separate rate decreased from $3.13 per kilogram to $0.04 per kilogram. *Id.* The PRC-wide rate remained at $2.42 per kilogram. *Id.*

Although Shanxi DMD had filed a separate rate certification in the fifth administrative review, it did not do so for the present sixth administrative review. *Id.* at 1322. After Commerce determined in the *Preliminary Results* that the presumption of state control applied to Shanxi DMD and thereby assigned Shanxi DMD the PRC-wide rate, which at the time was a more favorable rate than the separate rate, no party contested Commerce's state control determination prior to the *Final Results. Id.* at 1318, 1322. Thus, in the *Final Results*, Commerce, in addition to calculating a new separate rate, continued to find that "[t]he PRC-wide entity include[d] Shanxi DMD...." *Id.* at 1318 (quoting *Final Results*, 79 Fed. Reg. at 70,164 n.26).

The parties made several challenges to Commerce's *Final Results*. Respondent Carbon Activated Corporation ("CAC") challenged Commerce's *Final Results* in court on the basis that, among other things, Commerce's presumption of state control applied to Shanxi DMD was not supported by substantial evidence. *Id.* Plaintiffs Calgon Carbon Corp. ("Calgon") and Cabot Norit Americas, Inc. ("Cabot") (collectively "Petitioners") also challenged Commerce's selection of the POR5-contemporaneous Philippine GTA SV for anthracite coal. *Id.* at 1323–28. On the presumption of state control issue, the court agreed with CAC, holding that the government's and Petitioners' decision not to address the merits of CAC's arguments by briefing the issue as required by court rules, or by taking other opportunities to rectify the omission, left the court with no other option than to sustain CAC's challenge. *Id.* at 1322. And, on the SV issue, the court ruled that "Commerce improperly selected the SV derived from POR5-contemporaneous Philippine GTA data (1) without placing any of the

underlying data on the record to support the value and (2) without addressing contemporaneous surrogate data on the record from non-primary surrogate country sources." *Id.* at 1328. For these reasons, the court remanded the *Final Results* for Commerce to assign Shanxi DMD a separate rate and to "reconsider its selection of an SV for anthracite coal." *Id.*

Upon remand and under protest, Commerce complied with the court's instruction and assigned a separate rate to Shanxi DMD. *Remand Results* at 19. Also, Commerce reconsidered the SV for anthracite coal and, in doing so, found the POR6-contemporaneous GTA –Thai import data under HS 2701.11 "Anthracite Coal, Not Agglomerated" with a price of $0.33 per kilogram, to be the best available information for valuing the mandatory respondents' input. *Id.* at 4, 14, 49. In making this determination, Commerce chose not to put the underlying POR5-contemporaneous Philippine GTA data on the record, but rather chose to examine the POR6-contemporaneous GTA data from Thailand, South Africa, Ukraine, Colombia, and Indonesia, and further concluded that all but the Indonesian data were reliable. *Id.* at 15, 24. Moreover, Commerce determined that the four remaining countries had data of "equal reliability." *Id.* at 15. Commerce, therefore, decided "to select the anthracite coal SV based on which alternative surrogate country is the most significant producer of comparable merchandise." *Id.* at 15–16. Commerce reasoned, "the greater the significant production of activated carbon, the greater the intensity of the industry within a particular country, and thus the greater potential of broad-based demand for import of the inputs used in the production of the comparable merchandise." *Id.* at 16. As a result, Commerce calculated rates of $0.51 per kilogram for Jacobi and $0.52 per kilogram for Cherishmet, both of which represent an increase from the *Final Results*. *Id.* at 49. Commerce then calculated a separate rate of $0.51 per kilogram. *Id.* at 50–51.

Although no party, including CAC, contests Commerce's assigning of a separate rate to Shanxi DMD, *see* Carbon Activated Corp. in Opp'n to the Dep't's Remand Results 1, ECF No. 105 ("CAC Cmts."), the parties do bring four major challenges. First, Defendant-Intervenors Cherishmet, CAC, Albemarle Corp. ("Albemarle"), Ningxia Huahi Activated Carbon Co., Ltd. ("Huahui"), and Jacobi (collectively, "Respondents") all argue that Commerce should have selected the POR5-contemporaneous Philippine value as the SV for anthracite coal. Cherishmet Cmts. in Resp. to the Dep't of Commerce's Final Results of Redetermination 24–27, ECF No. 103 ("Cherishmet Cmts."); CAC Cmts. at 1–4; Def.-Intervenors Albemarle Corp. and Ningxia Huahui Activated Carbon Co., Ltd. Cmts. on Final Re-

sults of Redetermination Pursuant to Court Remand 2–9, ECF No. 106 ("Albemarle & Huahui Cmts.");[3] Jacobi's Cmt. on the Commerce Dep't's Remand Results 2–4, ECF No. 110 ("Jacobi Cmts."). Second, Cherishmet and Jacobi challenge Commerce's rejection of other SV sources ultimately not relied upon by Commerce, namely a U.S. value. Cherishmet Cmts. at 27–30; Jacobi Cmts. at 17–26. Third, Respondents all challenge Commerce's determination that POR6-contemporaneous Thai GTA data are the best available information for calculating an SV for anthracite coal. Cherishmet Cmts. at 9–15; CAC Cmts. at 9–13; Albemarle & Huahui Cmts. at 9–10; Jacobi Cmts. at 5–15. Fourth, Respondents also contend that Commerce's use of a "tie-breaking" methodology, in which Commerce selected the surrogate country that is the most significant producer of activate carbon to eventually select the Thai SV over other otherwise equal SVs, was unlawful. Cherishmet Cmts. at 15–21; CAC Cmts. at 4–9; Albemarle Cmts. at 10–11; Jacobi Cmts. at 15–17.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court upholds Commerce's determination in an administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Assignment of a Separate Rate to Shanxi DMD

In the prior decision, the court remanded the *Final Results* with instructions for Commerce to assign Shanxi DMD a separate rate. *Calgon*, 145 F. Supp. 3d at 1328. Under protest, Commerce did so, assigning Shanxi DMD the separate rate, which Commerce calculated as $0.51 per kilogram. *Remand Results* at 20. "Specifically, [Commerce] assigned Shanxi DMD a rate calculated using the ranged total U.S. sales quantities from the public versions of the submissions from the individually-examined respondents with weighted-average dumping margins that are not zero or de minimis . . . ." *Id.* at 20. Commerce asserts that this method was consistent with its typical practice. *Id.* at 50–51; *see Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1374 (Fed. Cir. 2013) (noting that in the NME context, "[t]he separate rate for eligible non-mandatory respon-

[3] Albemarle and Huahui "adopt and incorporate by reference any comments filed by the other . . . respondents on the" *Remand Results*. Albemarle & Huahui Cmts. at 12. Thus, although the court indicates which party or parties have explicitly advanced each argument below, it notes here that Albemarle and Huahui also assert arguments made by the other defendant-intervenors.

dents is generally calculated following the statutory method for determining the 'all others rate' under [19 U.S.C.] § 1673d(c)(5)(A)"). Petitioners continue to disagree with the court's previous decision regarding the application of a separate rate to Shanxi DMD, but both Petitioners and the government recognize that Commerce properly complied with the court's remand order on this issue. Def.'s Resp. to Def.-Intrvnrs.' Cmts. on Remand Redetermination 4–5, ECF No. 124 ("Gov't Resp."); Pls.' Cmts. in Supp. of the Dep't of Commerce's Remand Redetermination 5 n.4, ECF No. 125 ("Pet'rs Resp."). Because no party objected to this determination and because Commerce's decision is in accordance with the law, Commerce's assignment of a separate rate to Shanxi DMD is sustained. The court, however, clarifies that because it is remanding the issue of Commerce's selection of the SV for anthracite coal, as discussed below, any resulting changes to the value of the separate rate should be reflected in the rate ultimately assigned to Shanxi DMD.

II. Commerce's Selection of a Surrogate Value for Anthracite Coal

In selecting surrogate data, Commerce must use the "best available information." 19 U.S.C. § 1677b(c)(1)(B). Because there is no statutory definition of "best available information," Commerce enjoys broad discretion over what factors satisfy this criterion. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011); *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). Commerce's discretion, however, is limited by the statute's objective of "obtain[ing] the most accurate dumping margins possible," meaning Commerce's choice of the best available information "must evidence a rational and reasonable relationship to the factor of production it represents" to be supported by substantial evidence. *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1191 (2004). Commerce "must defend its surrogate choices when confronted with data undermining the surrogate's reliability." *Blue Field (Sichuan) Food Indus. Co. v. United States*, 949 F. Supp. 2d 1311, 1326 (CIT 2013); *see also Mittal Steel Galatai S.A. v. United States*, 31 CIT 1121, 1135, 502 F. Supp. 2d 1295, 1308 (CIT 2007).

Commerce itself has established a practice, in assessing data sources, to select data with (1) "period-wide price averages," (2) "prices specific to the input in question," (3) "prices that are net of taxes and import duties," (4) "prices that are contemporaneous with the period of investigation or review," and (5) "publicly available data." Policy Bulletin 04.1, Non–Market Economy Surrogate Country Selection Process (Mar. 1, 2004), *available at* http://enforcement.trade.gov/policy/bull04–1.html (last visited Nov. 14,

2016) ("Policy Bulletin 04.1"); *see Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *Remand Results* at 5. Commerce's stated "preference is to satisfy the breadth of the aforementioned selection criteria." *Remand Results* at 5. A reviewing court evaluates "whether a reasonable mind could conclude that Commerce chose the best available information." *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1340 (Fed. Cir. 2011) (quoting *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)).

A. Potential Surrogate Value Sources

This appeal challenges Commerce's rejection of the POR5-contemporaneous Philippine GTA value and the U.S. Energy Information Agency ("EIA") value and also challenges Commerce's determination that the POR6-contemporaneous Thai GTA value is reliable. The court addresses each SV source in turn.[4]

1. Philippine Value

On remand, Commerce considered the POR6-contemporaneous GTA data from other economically comparable countries before considering the POR5-contemporaneous Philippine GTA value, recognizing that the latter data's lack of contemporaneity made it inherently unequal as compared to the former data. *Remand Results* at 4, 5, 24–25. Commerce refused to reopen the record so that interested parties could place the underlying data supporting the POR5-contemporaneous Philippine GTA value on the record, or placing it on the record itself, and instead considered the POR6-contemporaneous GTA data. *Id.* at 24–25. The court sees no issue in Commerce's reasoning.

Respondents all argue[5] that Commerce failed to comply with the court's remand order and erred by not reopening the record to then consider the underlying data from which the Philippine value was

[4] With respect to the other countries considered, Commerce found that POR6-contemporaneous Ukranian and South African GTA data met the SV criteria where no party challenged this data's reliability. *Remand Results* at 12–15. Commerce did so after determining that Ukraine is at a level of comparable economic development to the PRC because, even though it was not included in the initial list of potential surrogate countries, its Gross National Income ("GNI") falls within the range of the other economically comparable countries. *Id.* at 12–14. Commerce also concluded that the POR6-contemporaneous Indonesian GTA value was unreliable and, therefore, inappropriate to use as an SV for anthracite coal. *Id.* at 9. No party challenges these determinations.

[5] Cherishmet, CAC, Albemarle, and Huahui also attempt to re-litigate many of the issues decided prior to remand relating to the anthracite coal SV. *See, e.g.*, Cherishmet Cmts. at 26–27; CAC Cmts. at 3–4; Albemarle & Huahui Cmts. at 2–4. The court declines to revisit its previous opinion as no party provides a sufficient reason for the court to do so. *See Calgon*, 145 F. Supp. 3d at 1323, 1326–28. The court, therefore, will only address new issues raised with respect to the POR5-contemporaneous GTA Philippine value.

calculated. Cherishmet Cmts. at 24–27; CAC Cmts. at 1–2; Albemarle & Huahui Cmts. at 5–6, 8; Jacobi Cmts. at 2–4. Albemarle, Huahui, and Jacobi argue that Commerce failed to compare the POR5-contemporaneous GTA Philippine value to the POR6-contemporaneous GTA Thai value, which it ultimately selected. Albemarle & Huahui Cmts. at 6–7; *see* Jacobi Cmts. at 2–4.[6]

Commerce complied with the court's remand order and lawfully chose not to rely on the POR5-contemporaneous GTA Philippine value. The remand order indicated that "Commerce was required to explain based on the record evidence why it rejected such data," referencing the other POR6-contemporaneous data, "*before* selecting the POR5-contemporaneous Philippine GTA data." *Calgon*, 145 F. Supp. 3d at 1328 (emphasis added). Commerce determined that certain POR6-contemporaneous data were reliable and, therefore, rejected the POR5-contemporanoeus GTA Philippine value because it was not POR-contemporaneous and thus not "fairly equal" to the other contemporaneous data. *Remand Results* at 24. Commerce recognized that even applying an inflator would not itself remedy all issues pertaining to lack of contemporaneity and, therefore, found it unnecessary to reopen the record. *Id.* at 24–25 (citing *Calgon*, 145 F. Supp. 3d at 1327). The statute acknowledges the importance of contemporaneity in its requirement for Commerce to evaluate AD margins each year. *See* 19 U.S.C. § 1675(a)(1) (providing for periodic reviews); *see Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1356 (Fed. Cir. 2016) (acknowledging "the statute's manifest preference for contemporaneity in periodic administrative reviews"). Commerce, therefore, properly, within the discretion afforded to it by the statute, compared the Philippine value to other values on the record, which were deemed reliable, and adequately explained why it was not equal. *See Calgon*, 145 F. Supp. 3d at 1327, 1328 n.16 (discussing the effect of time-based distortions on calculating AD margins); *see also QVD Food*, 658 F.3d at 1323 (discussing Commerce's discretion). That is all that is required.

Commerce did not abuse its discretion by not reopening the record. Because the court in its remand order explicitly noted that the underlying data are necessary for the court to fully review Commerce's choice, *see Calgon*, 145 F. Supp. 3d at 1327, it would likely be a better practice for Commerce to have reopened the record to allow a party to place that data on the record or for Commerce to have done so sua

[6] Cherishmet and CAC attempt to argue that other data on the record, namely the U.S. EIA data, confirms the reliability of the Philippine value. Cherishmet Cmts. at 25–26; CAC Cmts. at 2–3, 4. Commerce's reasonable rejection of the U.S. EIA data as a benchmark, however, is discussed below.

sponte.[7] But, contrary to the Respondents' arguments, the court's remand order did not require Commerce to do so. Instead, the remand order explained at length that Commerce was required to evaluate the propriety of record evidence containing POR6-contemporaneous data before it could consider other, non-fairly equal data. Commerce did so and, thereby, properly rejected the POR5-contemporaneous GTA Philippine value.

2. U.S. Value

On remand, Commerce did not consider data from the U.S. EIA "as a potential SV for anthracite coal" because the United States "is not at the same level of economic development as the PRC," noting that during the POR the Gross National Income ("GNI") for the United States was nearly ten times higher than the PRC's. *Remand Results* at 16 n.74, 26; *see also* Gov't Resp. at 13 n.3. Commerce's lawfully rejected this value.

Cherishmet and Jacobi, who concede that the United States is not economically comparable to the PRC, argue that Commerce was still required to consider the U.S. EIA data as an SV source. Cherishmet Cmts. at 28–29; Jacobi Cmts. at 17, 22–23, 24–25. They argue that the U.S. EIA data are product-specific, are contemporaneous with the POR, and actually serve to corroborate the POR5-contemporaneous Philippines GTA value. Cherishmet Cmts. at 29–30; Jacobi Cmts. at 17–22, 24. Alternatively, Cherishmet argues Commerce should have considered that data as a benchmark to gauge the accuracy of the other SVs on the record. Cherishmet Cmts. at 27, 29.

Commerce's decision not to rely on the U.S. EIA data is supported by substantial evidence. Commerce abided by the statutory directive to rely on surrogate data from an economically comparable country before considering data from non-economically comparable countries. By statute, "the valuation of the [FOPs] shall be based on the best available information regarding the values of such factors in [an ME] country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1)(B). In doing so, Commerce shall utilize "to the extent possible, the prices or costs of [FOPs] in one or more [ME] countries that are . . . at a level of economic development comparable to that of the [NME]." 19 U.S.C. § 1677b(c)(4). Commerce turns to

[7] Although Respondents would prefer Commerce to have employed either of these methods so that the underlying data could be placed on the record, adding the data guarantees only that more resources would be utilized in analyzing the data but does not guarantee that the data itself would be usable. Without the data on the record, neither the court nor Commerce can determine whether the POR5-contemporaneous GTA Philippine data suffer from similar lack of comparability issues as the POR6-contemporaneous GTA Philippine data. Nevertheless, the court need not entertain such possibilities in this case where there are other usable SVs on the record.

"other countries, including the United States" when it "finds that the available information accumulated pursuant to the previous described method is inadequate for purposes of determining the normal value." 19 U.S.C. § 1677b(c)(2). Commerce made no such finding that the SVs from economically comparable countries were inadequate; instead, Commerce determined that it had usable SVs from Thailand, Ukraine, South Africa, and Colombia.[8] *Remand Results* at 6–15. Commerce explained that during the POR the GNI for the United States was nearly ten times higher than the PRC's GNI and, in any event, "the record contains adequate data from countries which are at the same level of economic development as the PRC . . . ." *Remand Results* at 26, 29; *see also* Gov't Resp. at 13 n.3.[9]

Jacobi's and Cherishmet's reliance on *Clearon Corp v. United States*, Slip Op. 15–91, 2015 WL 4978995, at *4 (CIT Aug. 20, 2015), is misplaced. There, the court analyzed whether Commerce properly evaluated data considerations in selecting a primary surrogate country, rather than the selection of a particular SV. *Id.* Commerce selected the Philippines, a country found to be economically comparable to the NME, but failed to adequately explain whether India, which was non-economically comparable, provided a better source of data. *Id.* at *4–5. The court explained that Commerce "burden[s] the party proposing a non-listed country with demonstrating that no country on the surrogate country list provides the scope of 'quality' data that it requires in order to make a primary surrogate country selection" but "if that threshold is met, then Commerce must consider the quality of the data on [sic] the country not on the list that a party proposes." *Id.* Assuming arguendo that Commerce's selection of the particular SV for anthracite coal is guided by the same standards for Commerce's selection of a primary surrogate country and that *Clearon* is instructive, Jacobi and Cherishmet have not demonstrated that Commerce

[8] Jacobi also argues that the *Remand Results* run counter to Commerce's Surrogate Country Memorandum, which explicitly contemplates the use of SVs from the United States. Jacobi Cmts. at 24–26. Jacobi's argument fails. A plain reading of that memorandum clearly demonstrates that it closely follows the statutory directive discussed above and Commerce only contemplated using a non-economically comparable country's surrogate data where data from an economically comparable country were unavailable. *See* Deadlines for Surrogate Country and Surrogate Value Cmts. at 3, PD 73 (Aug. 2, 2013).

[9] Jacobi's additional argument that Commerce failed to comply with the court's remand order misunderstands the court's prior opinion. *See* Jacobi Cmts. at 22–23. In its prior opinion and after specifically documenting that Commerce had surrogate data on the record from Indonesia, Thailand, South Africa, and Ukraine, the court held that Commerce failed to "address[] contemporaneous surrogate data on the record from non-primary surrogate country sources." *Calgon*, 145 F. Supp. 3d at 1328. The remand order did not explicitly state that Commerce must address the U.S. EIA data, but, even if the remand order could be construed as requiring Commerce to address that data, Commerce did so. As discussed, Commerce lawfully disregarded the data on the basis of lack of economic comparability. *See Remand Results* at 16, 25–26, 29.

acted unreasonably. Neither party contests Commerce's determination that South Africa and Ukraine are economically comparable to the PRC and that both provide usable SVs. And, as explained below, Commerce's determination that Thailand is economically comparable and provides a usable SV is also supported by substantial evidence. Therefore, because the record contained several other sources of reliable data from surrogate countries on Commerce's list, Jacobi and Cherishmet have not met their burden to demonstrate that Commerce should have evaluated an off-list source, such as the U.S. EIA data.

Similarly, Cherishmet's reliance on *Blue Field* also fails. In that case, the court recognized that Commerce improperly "ignored useful data" from a country not on Commerce's list of economically comparable surrogate countries where Commerce relied on its so-called preference for prioritizing data from its primary surrogate country, even though the data from the primary surrogate country had "apparently aberrational qualities." *Blue Field*, 949 F. Supp. 2d at 1330; *see id.* at 1326–27 (explaining that the aberrational qualities in that case existed in part because the "range of rice straw prices [was] $10.00 to $90.08 per metric ton" but Commerce relied on a SV of $1350.88 from the primary surrogate country, about fifteen times higher than the upper limit of the range). Not only did Commerce correctly find here that the Thai data are not aberrational, as discussed, but it also did not ignore the U.S. data—instead, Commerce specifically explained why the *magnitude* of the United States' lack of economic comparability rendered the U.S. EIA value inappropriate to use as an SV. *See Remand Results* at 16, 25–26, 28.

Commerce also acted reasonably in not utilizing the U.S. EIA data as a benchmark. In the case cited by Cherishmet, the court recognized that "Commerce can use data [from other economically comparable countries on Commerce's surrogate country list] as benchmarks ...." *See Blue Field*, 949 F. Supp. 2d at 1332 (acknowledging that Philippines was on the surrogate list). That proposition does not support Cherishmet's position. Indeed, the court in *Blue Field* acknowledged that "[b]enchmarks, of course, become less informative the greater the difference in the levels of development of the countries from which the data derive." *Id.* at 1317. Such is the situation here; and, it is unlikely that a benchmark from the United States, a country that had a GNI nearly ten times higher than the PRC, would be probative. It is not the case that Commerce simply disregarded potential benchmarking data; instead, Commerce used POR-contemporaneous values from other economically comparable countries to establish a

range and determined that its selected SV fell within the range. *See Remand Results* at 41. Thus, Commerce properly refused to consider the U.S. EIA data as a benchmark.

3. Thai Value

Commerce found that the POR6-contemporaneous Thai GTA data met Commerce's SV selection criteria and were otherwise reliable. *Remand Results* at 10–12, 40–47.[10] The court sustains this aspect of Commerce's determination.

Respondents raise four challenges to Commerce's reliance on the Thai SV for anthracite coal. First, Jacobi argues that a 2013 U.S. Trade Representative ("USTR") report, which made "factual finding[s]" regarding corruption and transparency concerns with Thai customs, undermines the reliability of the Thai SV. Jacobi Cmts. at 13–15. Second, Albemarle, Huahui, and Jacobi contend that the POR6-contemporaneous Thai GTA data, which relate to a "basket category," is not specific to the type of anthracite coal consumed by the mandatory respondents. Albemarle & Huahui Cmts. at 9–10; Jacobi Cmts. at 5–9. Third, Respondents all argue that the Thai SV is unreliable due to discrepancies in export data and in data used to calculate the average unit values ("AUVs"). Cherishmet Cmts. at 9–12, 13–14; CAC Cmts. at 12–13; Albemarle & Huahui Cmts. at 10; Jacobi Cmts. at 10–13. Fourth, Cherishmet and CAC argue that Commerce's preliminary results of the eighth administrative review demonstrate that the Thai SV is unreliably volatile and that Commerce's determination here is arbitrary. Cherishmet Cmts. at 14; CAC Cmts. at 9–11.

Commerce's determination that the POR6-contemporaneous Thai GTA data are reliable is supported by substantial evidence. As a preliminary matter, Commerce acted reasonably here, where it refused to rely on the 2013 USTR report. Commerce determined that the report, which was not placed on the record of the review, nevertheless, did not question the reliability of the Thai SV. *Remand Results* at 44–45. Instead, the report merely comments on some Thai Customs' practices but does not show "that the specific SV data relied on by [Commerce in the *Remand Results*] is the result of the alleged Thai Customs practices and thus unreliable." *Id.* at 45. Although the report does provide evidence of manipulation by Thai Customs,[11] it

[10] Commerce also correctly disregarded issues with a potentially aberrant Malaysian export AUV, which were "higher than the other import values being considered," on the basis that the Malaysian export AUV "ha[d] no effect on the overall Thai AUV" of $0.33 per kilogram due to its very low quantity. *Remand Results* at 11.

[11] The report in relevant part discusses "the lack of transparency in the Thai customs regime," "discretionary authority exercised by Customs Department officials" including "the

does not clarify how significant these concerns are nor does it tie these concerns specifically to the import data being relied upon by Commerce. Thus, without more, the general concerns noted in the report do not sufficiently call into question the veracity of the specific Thai GTA data relied upon by Commerce or render the Thai data unreliable.

Moreover, record evidence does not impugn Commerce's conclusion that the Thai SV is sufficiently specific to the type of anthracite coal used by the mandatory respondents. The mere fact that the Thai data are derived from a basket category, i.e., HTS code 2701.11 "Anthracite Coal, Not Agglomerated," on its own does not demonstrate that the Thai data are not specific. Indeed, as Commerce recognized, the flaw in Albemarle, Huahui, and Jacobi's argument is further underscored by the fact that all four of the POR6-contemporaneous GTA data sources considered by Commerce each derive from the same basket category.[12] *See Remand Results* at 46–47; *see also* Cherishmet's Surrogate Value at Ex. 3D–3E, PD 152–60 (Nov. 20, 2013) ("Cherishmet's SV Cmts.") (South Africa and Ukraine); Pet'rs' Final Submission of Surrogate Value Data at Attach., PD 258 (Apr. 21, 2014) ("Pet'rs' Final SV Data") (Thailand and Colombia). Respondents, therefore, have failed to show that Commerce's determination regarding the specificity of the Thai data is unsupported by substantial evidence.

And, Respondents' arguments regarding discrepancies in export data fail. Commerce's *Remand Results* rejected arguments regarding discrepancies in export AUVs from Australia, Malaysia, and Ukraine, stating instead that Commerce "does not expect export and import data to match on a one-to-one ratio" due to "temporal differences, product mix differences, differences in level of sales . . . and differences in types of entry . . . ." *See Remand Results* at 7, 10, 43–44. Although Commerce's explanation leaves something to be desired, it is sufficient on this record and Commerce acted reasonably. The Thai value selected by Commerce is derived from import GTA data from Australia, Malaysia, and Ukraine, totaling 681,930 kilograms of im-

authority and discretion to increase the customs value of imports," and similar concerns. United States Trade Representative, 2013 National Trade Estimate Report on Foreign Trade Barriers 355 (2013), *available at* https://ustr.gov/sites/default/files/2013%20NTE.pdf (last visited Nov. 14, 2016).

[12] The Respondents' preferred SV, the previously rejected POR5-contemporaneous Philippine GTA value, also arise from the same basket category. Instead, Jacobi argues that the POR5-contemporaneous Philippine GTA value is "undisputed[ly] specific" because no party has challenged that value on the basis of specificity. *See* Jacobi Cmts. at 9. Not only is this conclusion unreviewable where Commerce has failed to put the underlying data on the record, but also the failure to challenge the specificity of a source does not automatically make it more specific than a source derived from the same basket category. Jacobi would also prefer that Commerce have relied on the U.S. EIA data, which Jacobi argues is "demonstrated to be specific." *Id.* But, as discussed, Commerce properly refused to rely on the U.S. data due to economic comparability issues.

ports.[13] Pet'rs' Final SV Data at Attach. Respondents are correct that the record contained export GTA data from each of these three countries covering the same time period and the same basket category of HTS 2701.11, and that data demonstrated that the quantity of exports of anthracite coal from these countries may be lower than the quantity of imports into Thailand as reflected in the GTA data. Cherishmet's Second SV Rebuttal Submission at Exs. 1–3, PD 263 (May 1, 2014) ("Cherishmet's Second SV Cmts."). Although the export data showed no quantities of exports from Australia or Malaysia to Thailand during the POR, *id.* at Exs. 1–2, the export data did corroborate that 483,000 kilograms (more than 70% of the quantity reported in the import data) of anthracite coal were exported from Ukraine to Thailand, *id.* at Ex. 3. Although the export value of $0.09 per kilogram calculated for Ukranian export data differed from the import value of $0.30 per kilogram calculated for Thai import data of anthracite coal from Ukraine, that fact alone appears insufficient to render Commerce's decision unsupported by substantial evidence where there is no information on the record to explain why this discrepancy between the GTA import data and export data exists. *See Remand Results* at 44 ("[P]arties offer no reasons for the differences except that the values do not match."); *see also Nation Ford*, 166 F.3d at 1377 (recognizing that Commerce has "wide discretion in the valuation of [FOPs]").[14]

Commerce further verified the import AUV by engaging in a comparative analysis of the Thai import data. Commerce determined that "the Thai GTA AUV falls between Colombia's AUV, which represents the upper tier of AUVs, and South Africa's and Ukraine's which falls below Thailand's AUV." *Remand Results* at 41. More precisely, the Thai value of $0.33 per kilogram fell above the Ukrainian value of $0.16 per kilogram and the South African value of $0.19 per kilogram, but fell below the Colombian value of $0.50 per kilogram. *See* Pet'rs'

[13] Specifically, the Thai GTA import data for anthracite coal indicates that 70,980 kilograms were imported from Australia into Thailand; 50 kilograms from Malaysia; and 610,900 kilograms from Ukraine. Pet'rs' Final SV Data at Attach.

[14] Commerce's understanding that export data and import data, even that from the same reporting service such as GTA, do not match on a one-to-one basis has further support in the record. For instance, the South African value, which Commerce described in its *Remand Results* as "GTA import data," does not show a one-to-one comparison in imports of anthracite coal from Ukraine (81,172,695 kilograms) as compared to the export GTA data from Ukraine (22,001,620 kilograms). *Compare* Cherishmet's SV Cmts. at Ex. 3E, *with* Cherishmet's Second SV Cmts. at Ex. 3; *see also Remand Results* at 12. A similar discrepancy exists in GTA import data for Indonesia as compared to GTA export data from Singapore, Malaysia, and Belgium. *Remand Results* at 8 (discussing Singapore). *Compare* Pet'rs' Surrogate Values for the Prelim. Results at Ex. 2A, PD 161–65 (Nov. 20, 2013) ("Pet'rs' SV Cmts.") (providing Indonesian import data), *with* Cherishmet's Second SV Cmts. at Exs. 2, 4 (providing Malaysia and Belgium export data).

Final SV Data at Attach.; Cherishmet's SV Cmts. at Exs. 3D–3E. Cherishmet's arguments that the Thai value is "significantly higher" than the South African and Ukranian values fail, *see* Cherishmet Cmts. at 12, because the Thai value is not so significantly higher such that it is aberrant. Although the Thai value is higher than the South African and Ukranian values, it is just barely two times as much as the Ukranian value and not even two times as much as the South African value. Commerce further found that the Thai value was derived from a commercial quantity of imports of 681,930 kilograms. *Remand Results* at 43; Pet'rs' Final SV Data at Attach. Admittedly, this quantity is meaningfully lower relative to the import volume, on which other values on the record are based,[15] thereby indicating that the Thai value is less reliable than these other values. Still, as explained, the Thai value viewed in isolation is sufficiently reliable to serve as an SV. Furthermore, the Thai value is within the range, which has an upper limit set by the Colombian value.[16] The Thai value is simply not aberrant.[17]

Commerce also looked at historical Thai GTA data and found that the Thai value "demonstrates no volatile behavior during the POR," but instead maintained a "gradual increase" from 2009 to 2011, which was "in line with Indonesia's and the Philippine's AUV" and which Commerce explained were the only two other economically comparable countries for which historical record data existed. *Id.* at 42. Commerce noted that "the anthracite coal SV for Thailand was 0.46, 0.62, and 0.73 kg/USD[18] for . . . 2009, 2010, and 2011, respectively."

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[15] For instance, Commerce acknowledges that the Thai value is derived from a smaller quantity than the South African and Ukranian values. *Remand Results* at 43; *see also* Cherishmet's SV Cmts. at Exs. 3D–3E (listing import quantity of 14,747,893 kilograms for Ukraine and 81,501,689 kilograms for South Africa). Regardless, Commerce's reliance on a commercial quantity is reasonable here for the purposes of demonstrating that the Thai value is not aberrant.

[16] The Colombian value properly sets the upper limit of the range and Cherishmet's arguments to the contrary fail. *See* Cherishmet's Cmts. at 21–24. Commerce determined that the POR6-contemproaneous Colombian GTA data met the SV selection criteria and were not aberrational. *Remand Results* at 6–7, 47–49. Cherishmet's arguments that United Nations ("UN") Comtrade export data for Belgium, which covered different time periods (2009–2012) and only partially overlap with the POR, shows a lower export AUV are unconvincing and not probative of the prices during the POR. Cherishmet also fails to submit evidence on the record regarding the significance of this evidence by demonstrating what percentage of imports of anthracite coal into Colombia derived from Belgium for 2009, 2010, 2011, and 2012. Thus, Commerce's decision to rely on the Colombian SV is reasonable here.

[17] Cherishmet also contends that U.S. EIA data render the Thai value aberrant. Cherishmet Cmts. at 13. But, as explained, Commerce properly refused to rely on the U.S. EIA data for benchmarking purposes.

[18] Commerce apparently inadvertently wrote "kg/USD," but it is clear from the context and the record material cited in the *Remand Results* that Commerce meant "USD per kilograms."

Id. at 42 n.170. Notably, the Thai SV for the POR of $0.33 is *less than* the Thai SV for anthracite coal from 2009 to 2011.[19] *See Calgon Carbon Corp. v. United States*, Slip Op. 11–21, 2011 WL 637605, at *9–10 (CIT Feb. 17, 2011) (upholding Commerce's SV where it was corroborated by other import data on the record). This analysis, therefore, helped confirm the reliability of the Thai import data. Indeed, this analysis by Commerce addressed the concerns raised by Cherishmet and CAC regarding the preliminary results of the eighth administrative review where Commerce undertook a similar comparative analysis and found the Thai import SV was unreliably volatile.[20] Here, Commerce reasonably explained away those preliminary results of the eighth administrative review by recognizing that the volatility analysis there involved different comparison countries because the surrogate countries between the two segments are different. *Remand Results* at 41. And, Commerce undertook a volatility analysis with the evidence on the record of the present review, resulting in a finding of "no volatile behavior." *Id.* at 42. Thus, Commerce's finding that the Thai SV is reliable is reasonable and supported by substantial evidence.

B. Significant Producer Methodology

After determining that it was "confronted with data sources of equal reliability from multiple possible surrogate countries," Commerce "select[ed] the anthracite coal SV based on which alternative surrogate country is the most significant producer of comparable

[19] Respondents' attempt to point to UN Comtrade data—data from a different source—to impeach the AUVs calculated in the GTA data is unsuccessful. *See, e.g.*, Cherishmet Cmts. at 13. Commerce's explanation of why export data and import data do not match one-to-one appears even more convincing where the difference appears in two different data sources. *See Remand Results* at 43–44.

[20] CAC also makes passing reference to an argument that Commerce improperly rejected a chart submitted by CAC regarding the preliminary results of the eighth administrative review from the record. *See* CAC Cmts. at 10. To the extent that CAC contends that Commerce's rejection of the chart was unlawful, CAC has not clearly raised any such argument before the court, at most making "bare assertions" without any meaningful argumentation or "citation to any applicable statutory or regulatory provisions," and thus any such argument is waived. *MTZ Polyfilms, Ltd. v. United States*, 33 CIT 1575, 1578, 659 F. Supp. 2d 1303, 1308 (2009) (quoting *Fujian Lianfu Forestry Co. v. United States*, 33 CIT 1056, 1078, 638 F. Supp. 2d 1325, 1349 (2009)). Regardless, it is unlikely CAC would have succeeded on such an argument given Commerce's regulation regarding the rejection of untimely filed factual information. 19 C.F.R. § 351.302(d)(1)(i); *see also Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1351–52 (Fed. Cir. 2015) (acknowledging Commerce's discretion regarding the ability to set and enforce its deadlines). Indeed, Commerce appears to have acted reasonably here in rejecting new factual information, where the deadline to submit SV information had lapsed and Commerce never reopened the record on remand. In any event, Commerce squarely addressed the substance of the volatility issue.

merchandise." *Remand Results* at 15–16. As a result, Commerce selected the Thai value because, of the countries from which Commerce had reliable SV information, Thailand was the most significant producer. *See id.* at 16.

Cherishmet, CAC, Albemarle, and Huahui argue that Commerce erred by relying on significant production rather than quantity of imports in selecting amongst potential SV sources, contrary to its practice. Cherishmet Cmts. at 15–18, 19–21; CAC Cmts. at 4–8; Albemarle & Huahui Cmts. at 10–11. CAC argues that "there is no rational link between Thai production of activated carbon and these import statistics" especially because Thailand's imports are "small" and do not represent a "commercial quantity." CAC Cmts. at 8–9.

Commerce appears to regularly use import volume as a tie-breaking methodology when faced with equally comparable SV sources. The parties have identified three situations in which Commerce has followed this practice. *See Peer Bearing Co.-Changshan v. United States*, Slip Op. 13–116, 2013 WL 4615134, at *4 (CIT Aug. 30, 2013), *vacated and remanded on other grounds*, 766 F.3d 1396 (Fed. Cir. 2014); Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Chlorinated Isocyanurates from the People's Republic of China; 2013–2014 at 6–7, A-570–898 (Jan. 4, 2016), *available at* http://enforcement.trade.gov/frn/summary/prc/2016–00366–1.pdf (last visited Nov. 14, 2016); Decision Memorandum for the Final Results of Antidumping Duty Administrative Review: Chlorinated Isocyanurates from the People's Republic of China; 2012–2013 at 9, A-570–898 (Jan. 21, 2015), *available at* http://enforcement.trade.gov/frn/summary/prc/2015–01604–1.pdf (last visited Nov. 14, 2016) ("*Chlorinated Isocyanurates 2012–2013*"). Although in the two chlorinated isocyanurates cases mentioned Commerce did not provide a reason for using import volume, in *Peer Bearing*, Commerce explained that it preferred data from Indonesia over data from the Philippines because Indonesia's data "were based on larger quantities and values and therefore 'more robust and representative of broader market averages.'" 2013 WL 4615134 at *4; *see also* Final Results of Redetermination Pursuant to Court Remand at 12, *Peer Bearing Co.-Changshan v. United States*, No. 09–00052 (CIT Oct. 2, 2012), ECF No. 124–1. Commerce has used this methodology in the eighth administrative review of the present AD order, where it valued anthracite coal based on imports from Romania because they were "so much larger than those into Mexico and South Africa that it demonstrates a broader market average for this input." Certain Activated Carbon from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Eighth Antidumping

Duty Administrative Review at 28, A-570–904 (Aug. 31, 2016), *available at* http://enforcement.trade.gov/frn/summary/prc/201621660–1.pdf (last visited Nov. 14, 2016). The government is able to point to only one situation in which Commerce relied on its significant producer rationale proposed here, but in that case Commerce did not provide a reason why it ranked the SV sources based on significant production. *See* Final Results of Redetermination Pursuant to Court Remand at 13, *Ad Hoc Shrimp Trade Action Comm. v. United States*, No. 13–00346 (CIT Sept. 14, 2015), ECF No. 65 (selecting Indonesia over India and the Philippines). Thus, Commerce's own decisions have explained that it uses[21] import volumes, which speak to the issue of broader market averages and, therefore, representativeness.

Commerce appears to have employed an approach that, in the absence of reasoning, gives the appearance of being results-oriented. It has failed to explain, on this record, why significant production's ability to encompass broad-based demand outweighs the representativeness associated with broader market averages. Substantial evidence review "requires Commerce to examine the record and articulate a satisfactory explanation for its action." *Bestpak*, 716 F.3d at 1378. Commerce explained that it "does not generally consider import quantity in its SV selection criteria, except in isolated cases," but specifically listed as one example of such an isolated case "select[ion] among competing SVs from secondary surrogate countries," the exact situation here. *Remand Results* at 42–43. Although it acknowledged that in some cases it has previously used volume of imports to select from alternative surrogate countries, Commerce rejected that approach here "because of the relative size of the significant production quantities of the potential anthracite coal SV sources." *Remand Results* at 32–33 ("Because South Africa's, Colombia's, and Ukraine's production quantities of activated carbon are considerably less than the Philippines, [Commerce] finds it reasonable to seek a secondary surrogate country whose production of activated carbon is similar to

[21] The court hesitates to state that Commerce has a clear "practice" in doing so, recognizing instead that Commerce has discretion in selecting among SVs. Although the Respondents argue that *Chlorinated Isocyanurates 2012–2013* established a practice to rank fairly equal SV sources by import volume, Commerce there simply stated that identifying "which of these . . . countries had the largest imports . . . during the POR . . . is consistent with our practice of determining whether an SV is aberrational . . . ." *Chlorinated Isocyanurates 2012–2013* at 9 & n.43 (citing Issues and Decision Memorandum for the Final Results in the Administrative Review of Glycine from the People's Republic of China at 6–9, A-570–836 (Oct. 9, 2012) *available at* http://enforcement.trade.gov/frn/summary/prc/2012–25595–1.pdf (last visited Nov. 14, 2016)). Thus, the practice mentioned refers to how to determine whether an SV is aberrational, rather than a selection methodology. Still, Commerce is required under the substantial evidence standard to "articulate a satisfactory explanation for its action." *Bestpak*, 716 F.3d at 1378.

the intensity of the industry[.]"). Commerce states it relied on significant production "because that is a factor in determining the overall surrogate country." *Id.* at 34 (citing Policy Bulletin 04.1). Commerce further explained "the greater the significant production of activated carbon, the greater the intensity of the industry within a particular country, and thus, the greater potential of broad-based demand for import of the inputs used in production of the comparable merchandise." *Id.* at 16.

Commerce erred by not engaging in a meaningful comparative analysis in selecting between the two so-called "tie-breaking" methodologies before it. Commerce's superficial reasoning failed to acknowledge that in the situations where Commerce must choose between fairly equal SVs there will always be relative size differences in significant production (as well as in import volume) and did not adequately provide standards or explain at what point a difference in significant production is meaningful enough to affect broad-based demand for imports, and why that is more important than a greater amount of imports, as they result in broader market averages. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must . . . articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In short, Commerce's self-affirming rationale applies to every situation where Commerce chooses between at least two fairly equal SVs, and Commerce therefore has not provided a case-specific reason for why it chose this methodology in this circumstance.

Commerce's explanation also does not show a rational connection to the record. For instance, Commerce did not weigh the fact that although the relative size of the significant production quantities differed, so too did the relative size of import volumes, which formed the underlying data to calculate the different AUVs. The following table represents the different methods by which to rank the countries for which Commerce evaluated potential SVs,[22] but excludes the Philippines and Indonesia, for which Commerce determined the appropri-

[22] More specifically, Commerce ranked significant production based on exports during the POR as follows: (1) the Philippines with 56,444,767 kilograms, (2) Indonesia with 22,835,450 kilograms, (3) Thailand with 6,555,094 kilograms, (4) South Africa with 662,157 kilograms, (5) Colombia with 287,186 kilograms, and (6) Ukraine with 43,329 kilograms. *Remand Results* at 33 & nn.145–47 (citing Pet'rs Cmts. on Surrogate Selection at 4, PD 128 (Oct. 23, 2013) ("Pet'rs' Surrogate Country Cmts.") (the Philippines, Indonesia, Thailand, South Africa and Colombia); Jacobi Cmts. on Surrogate Selection at Attach. A, PD 126 (Oct. 23, 2013) (Ukraine)). As the Respondents explain, the surrogate countries ranked based on import volumes during the POR would appear as the following: (1) South Africa with 81,501,689 kilograms, (2) Ukraine with 14,747,893 kilograms, (3) Indonesia with 1,797,220 kilograms, (4) Thailand with 681,930 kilograms, (5) the Philippines with 86,354 kilograms,

ate POR6-contemporaneous SV data were not reliable, *see* Remand Results at 16–17:

Significant Production	Import Volume
1. Thailand (6,555,094 kilograms)	1. South Africa (81,501,689 kilograms)
2. South Africa (662,157 kilograms)	2. Ukraine (14,747,893 kilograms)
3. Colombia (287,186 kilograms)	3. Thailand (681,930 kilograms)
4. Ukraine (43,329 kilograms)	4. Colombia (37,749 kilograms)

Commerce's stated concern in the *Remand Results* stems from the "relative size" of the significant production when moving from Thailand to South Africa,[23] the difference of which can be measured in absolute terms as 5,892,937 kilograms or in relative terms as almost ten times. *Remand Results* at 33. But, Commerce fails to adequately explain why that difference is more important than the difference in import volume when moving from Thailand to the next country above by import volume, i.e., Ukraine, which in absolute terms is 14,065,963 kilograms or in relative terms is over twenty-one times. Thus, the relative size difference for import volumes, which would affect whether the data relate to broad market averages, seems to be even more drastic than for significant production. And, as the Respondents argue, import volume may well be more important than significant production because the AUV used by Commerce is calculated based on these import volumes. *See, e.g.*, Cherishmet Cmts. at 15. Without addressing these important concerns, Commerce cannot continue to rely on its significant production rationale in this case. *See Peer Bearing Co.-Changshan v. United States*, 752 F. Supp. 2d 1353, 1372–73 (CIT 2012) ("Commerce must provide a rational explanation for its choice.").[24]

and (6) Colombia with 37,749 kilograms. Cherishmet's SV Cmts. at Exs. 3D–3E (South Africa and Ukraine); Pet'rs' SV Cmts. at Ex. 2A (Indonesia and the Philippines); Pet'rs' Final SV Data at Attach. (Thailand and Colombia).

[23] This is true because Commerce determined that the POR6-contemporaneous GTA data from the Philippines and Indonesia were not appropriate for use as an SV and, therefore, did not select the two largest significant producers. *Remand Results* at 16–17. Because Commerce selected Thailand, clearly its concern stemmed from the drop-off in significant production from the third largest significant producer (Thailand) to the fourth (South Africa).

[24] Further, Commerce's general belief that greater significant production creates greater intensity within the industry and greater potential for broad-based demand is belied by the only record evidence that speaks to this question. The only record evidence that speaks squarely to the question of "broad-based demand for import of the inputs used in production of the comparable merchandise," *see Remand Results* at 16, is the evidence of anthracite

Commerce's statement that it relied on significant production "because that is a factor in determining the overall surrogate country," *Remand Results* at 34 (citing Policy Bulletin 04.1), does not save Commerce's reasoning. As Commerce knows, the statute requires merely that Commerce in the NME context "to the extent possible" value FOPs "in one or more [ME] countries that are . . . significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). And, Commerce fulfilled that duty: Commerce's *Remand Results* make clear that Commerce found Colombia, Thailand, South Africa, and Ukraine, all significant producers of activated carbon. *Id.* at 8, 12, 13. Although the court does not hold that Commerce cannot or should not consider comparative significant production in appropriate situations, the court recognizes that Commerce has not demonstrated that this is such a situation. Commerce has not explained why this approach and the statute's mention of significant production for another purpose outweigh its alternative approach of using import volumes, which addresses broad market averages, representativeness, and the statute's goal of calculating AD margins "as accurately as possible." *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("In determining the valuation of the [FOPs], the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible.").[25] Thus, Commerce has failed to ground its choice of methodology in relevant findings that are supported by substantial evidence on the record of this case.

coal (an input in activated carbon) actually imported *into* each surrogate country. The import data demonstrates, then, that Thailand in reality did not have the highest import demand for anthracite coal under HTS 2701.11. Even though Commerce believes Thailand has a greater "potential" for broad-based demand for anthracite coal, that belief is controverted by the record evidence pertaining to import demand and any belief that Commerce may have with regard to broad-based demand for anthracite coal from domestic sources in each of the surrogate countries is clearly reliant on impermissible speculation. *See Zhejiang Native Produce and Animal By-Products Imp. & Exp. Grp. Corp. v. United States*, 32 CIT 673, 687 (2008) ("Commerce's determination must be based on record evidence and not speculation."). Thus, Commerce failed to provide a sufficient explanation for its selection of a tie-breaking methodology based on this record.

[25] Jacobi also argues that Commerce improperly applied its tie-breaking methodology when it determined that Thailand is a significant producer of activated carbon (1) because Commerce disregarded the legislative history's requirements that it be a "significant" and "net" exporter and (2) because Thailand is a net importer by value of activated carbon. *See* Jacobi Cmts. at 15–17. As Jacobi concedes, the statute is silent as to what constitutes a "significant producer" and the legislative history, which clarifies that "'significant producer' includes any country that is a significant net exporter," does not define the term "significant net exporter." H.R. Rep. No. 100576, at 590 (1988) (Conf. Rep.).

Commerce's interpretation of significant producer, which looked to whether the country exported comparable merchandise, is reasonable. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1989); *DuPont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005). First, the legislative history does not purport to create

CONCLUSION

For the foregoing reasons, Commerce's *Remand Results* are remanded for Commerce to reconsider its selection of an SV for anthracite coal in accordance with this opinion, by either further explaining its selection methodology and basing that explanation on the record evidence or by choosing its other selection methodology based on import volume. Commerce shall have until January 3, 2017, to file its remand results. The parties shall have until January 23, 2017, to file objections, and the government shall have until February 3, 2017, to file its response.

Dated: November 18, 2016
New York, New York

/*s*/ *Jane A. Restani*
JANE A. RESTANI
JUDGE

Slip Op. 16–110

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

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 13–00073

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an exhaustive definition of significant producer but instead states that the term significant producer "includes" significant net exporters. *See* H.R. Rep. No. 100–576, at 590 (1988) (Conf. Rep.). Commerce did not act arbitrarily in adopting this definition, as it has defined significant producers based on exported comparable merchandise in the past. *See* Decision Memorandum for Prelim. Determination of the Antidumping Duty Investigation of Boltless Steel Shelving Units Prepackaged for Sale from the People's Republic of China at 18, A-570–018 (Mar. 24, 2015), *available at* http://enforcement.trade.gov/frn/summary/prc/2015–07475–1.pdf (last visited Nov. 14, 2016). In any event, Jacobi concedes that Thailand was a net exporter by quantity. *See* Jacobi Cmts. at 15–16 (stating that Thailand had net exports of about 862,000 kilograms). Jacobi has not explained why approximately 862,000 kilograms would constitute insignificant net exports, and, given that Commerce found Thailand's imports of 681,930 kilograms to be of a commercial quantity, the court cannot discern such an explanation on this record. *See Remand Results* at 35 ("[T]he fact that a country exports comparable merchandise to other countries [is] a strong indication that the country is a significant producer of such merchandise."). Second, although Jacobi argues that Thailand was a net importer of activated carbon by value, Commerce's reliance on quantity is also reasonable. Commerce explained that in evaluating whether a country is a significant producer, it "consider[s] quantity, rather than value, . . . because quantities are not subject to influence from outside variables, such as currency fluctuations and inflation, among other external pressures." *Remand Results* at 35. The record evidence indicated that during the POR Thailand exported 6,555,094 kilograms of activated carbon. *See, e.g.*, Pet'rs' Surrogate Country Cmts. at 4. Accordingly, Commerce lawfully determined that Thailand is a significant producer. *Remand Results* at 36.

[Sustaining second results of remand of sixth (2010–2011) administrative review of antidumping duty order on chlorinated isocyanurates from the People's Republic of China.]

Dated: November 23, 2016

James R. Cannon, Jr. and *Ulrika K. Swanson*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for the plaintiffs.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. On the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *David Richardson*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington DC.

Gregory S. Menegaz, J. Kevin Horgan, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for the defendant-intervenor Juancheng Kangtai Chemical Co., Ltd.

Peggy A. Clarke, Law Offices of Peggy A. Clarke, of Washington, DC, for the defendant-intervenors Hebei Jiheng Chemical Co., Ltd. and Arch Chemical Co., Ltd.

OPINION

Musgrave, Senior Judge:

This opinion concerns the second redetermination ("*RR2*")[1] on the sixth (2010–2011) administrative review of chlorinated isocyanurates ("chlor-isos") from the People's Republic of China ("PRC") and will presume familiarity with the prior opinions on the matter.[2] The first opinion approved certain aspects of the methodology utilized by the defendant's International Trade Administration of the U.S. Department of Commerce ("Commerce" or "Department") but remanded for surrogate valuation of the normal value of subject merchandise, and the second remand was necessary for reconsideration, in relevant part, of Commerce's (1) selection of surrogate values for hydrogen gas and chlorine, (2) selection of the Philippines as the primary surrogate country; (3) selection of import data to value urea, (4) adjustment to the selling, general, and administrative (SG&A) expenses; and (5) methodology for calculating the by-product offset. *Clearon II*. On second remand, Commerce continues to find that the subject merchandise sales of Juangcheng Kangtai Chemical Co. Ltd. ("Kangtai"), and Hebei Jiheng Chemical Co., Ltd. ("Jiheng") were made for less than normal value ("NV") during the review period, *i.e.*, June 1, 2010

[1] *Final Results of Second Redetermination Pursuant to Court Remand*, ECF No. 106–1 (Mar. 22, 2016).

[2] *See Clearon Corp. v. United States*, 39 CIT ___, Slip Op. 15–91 (Aug. 20, 2015) ("*Clearon II*") (remanding first remand results); *Clearon Corp. v. United States*, 38 CIT ___, Slip Op. 14–88 (July 24, 2014) ("*Clearon I*") (remanding original "final" results). Herein, this court's preferred abbreviation of public and confidential documents in the administrative record (*i.e*, PDoc and CDoc), are preceded by "R-" whenever referring to documents in the remand administrative record.

to May 31, 2011 ("POR"). *RR2* at 1. The defendant-intervenors, Arch Chemicals, Inc. and Jiheng (together "Arch-Jiheng") and Kangtai, argue for further remand. The plaintiffs, Clearon Corp. and Occidental Chemical Corp. (together, "Clearon"), argue for sustaining the remand results, as does the defendant. For the following reasons, the second remand results will be sustained.

Discussion

I. Surrogate Values for Hydrogen Gas and Chlorine

In the second remand results, Commerce continued to use the Philippines as the primary surrogate country, but given (1) a record of a "relatively small quantity" of hydrogen gas and chlorine imported into the Philippines during the POR, (2) prior reviews having found that those chemicals in particular are costly to transport over long distances, thus "greatly" adding to the cost of the inputs, and (3) no evidence on the record of this review to indicate that the nature of transporting these two inputs had changed from the previous review, Commerce selected Indian domestic data pertaining to Indian producers of hydrogen gas and chlorine as "[t]he only remaining source of evidence available on the record" to value those inputs. *Id*. at 21–23; *see also* PDoc 104 at 4 & n.10. Clearon's comments support Commerce's redetermination on this issue.

Arch-Jiheng attempts a number of different avenues to argue that Commerce's determination is not supported by substantial evidence on the record: (1) Commerce's general preference for domestic prices applies only to pricing in the primary surrogate country, (2) there is no record evidence showing that hydrogen import data is unreliable, (3) the petitioners never raised the issue of hydrogen transportation costs in the instant review, (4), despite Commerce's exhaustion argument, Arch-Jiheng argues it did not fail to raise the issue of Commerce's "hazardous nature" language with respect to both hydrogen gas and chlorine, (5) Commerce has used import values for hydrogen gas in all subsequent reviews[3], (6) Jiheng's proposal to use import values is consistent with Commerce's normal practice of not adjusting surrogate values for alleged differences in shipping costs, (7) there is no record evidence showing that hydrogen is not frequently traded on an international basis, (8) using Indian data was contrary to Com-

[3] Commerce responding to this point by stating that it expressly acknowledged that possibility in the second remand results, specifically that it would reconsider the issue "in future reviews, if relevant information is placed on the record indicating that [its] prior findings regarding hydrogen and import statistics are no longer valid", *RR2* at 47; and argument continuing over the fact that final results for such reviews were, in fact, issued at the time of issuance of *RR2*.

merce's preferences to use contemporaneous data from a single surrogate country, (9) and Commerce has not indicated what evidence on the record of this proceeding indicates that the import values of the primary surrogate country are not reliable. Arch-Jiheng *RR2* Cmts at 21–30.

The court finds that these arguments either (1) overlook that Commerce's preference for domestic data from the primary surrogate country assumes *ceteris paribus* and is governed by whether those data are distorted, *see, e.g., Rhodia, Inc. v. United States*, 25 CIT 1278, 185 F. Supp. 2d 1343 (2001), which would also logically inform the choice between import data for the primary surrogate country or domestic data from a secondary surrogate country, (2) disregard the law of the case on this matter and/or incorrectly attempt to shift the burden of proof, (3) ask the court to substitute judgment for that of Commerce without persuading that Commerce's choice was unreasonable, *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("a court may [not] displace the [agency]'s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*"), or (4) fail to acknowledge Commerce's explicit statements on particular subject(s). The cases to which Arch-Jiheng cites do not appear apposite to the propositions asserted, and substantial evidence of record supports Commerce's selection of surrogate values for hydrogen and chlorine gas.

II. Primary Surrogate Country Selection

A.

Kangtai continues to challenge Commerce's primary surrogate country selection of the Philippines over India. Kangtai *RR2* Cmts at 5–20. Commerce explains that the choice was based on the Philippines being on the list of economically comparable surrogate countries at the same level of economic development as the PRC (the "OP List") while India was not. *See generally id*. at 14–21. The main difference on second remand is the use of Indian domestic data to value hydrogen gas and chlorine, but Commerce diminished the use of those inputs as accounting for only two of over 40 factors necessary for the production ("FOPs") of chlor-isos, depending on the producer's level of integration. *RR2* at 15–16.

Kangtai here complains of what it considers an impossibly opaque task, of having to prove that the data for India outweigh the fact that India is not on the OP List. *See Clearon II*, Slip Op. 15–91 at 10–11. Specifically, Kangtai argues: (1) that the very fact that Commerce

went outside the OP List for surrogate values for two important inputs shows that Kangtai met its initial burden of showing a lack of quality data for the Philippines and should have triggered a comparison of the quality of data for the Philippines against those of India on the record, and that it was improper for Commerce to avoid opining on the quality of the Indian data and instead place a greater, unspecified burden on Kangtai as opposed to engaging in the analysis "directed by" the second remand order; (2) that Commerce's articulated standard essentially equates "quality" as "quantity" or "availability," which is contrary to quality's plain meaning as "degree of excellence" or "superiority in kind", (3) that Commerce's justification on remand is simply that as long as the Philippines has data for an input, it is by definition of "higher quality" than the India data and Commerce need not even consider relying on India as a surrogate source; (4) that such a standard cannot be squared with Commerce's own policy statement discussing quantity and quality as two separate aspects of data consideration, either of which could necessitate having to look at off-list country data;[4] (5) that Commerce continues to conflate data quality and economic comparability notwithstanding the second remand order's express rejection thereof and improperly burdens Kangtai with having to prove every one of the Philippine data of less quality than the Indian data; (6) that Kangtai did address FOPs beyond hydrogen and chlorine that were of lesser quality, including the reliability of the MVC financial statement, concerning which Kangtai further argues Commerce misapplied the reason-to-believe-or-suspect standard for finding distortion and that it, Kangtai, was not required to prove, nor was Commerce required to formally investigate, the actual extent to which MVC benefitted from its declared subsidy programs before concluding that the MVC data should be disregarded; (7) that the very same reasons Commerce offered for choosing Indian chemical inputs over South African import statistics in the *Preliminary Results* are true for the Philippines data as well, and with regard to the defendant's criticism that Kangtai made no record citation to the Philippines import data to show it also does not have detailed concentration levels, Kangtai replies that "[a]ny cursory understanding of the import statistics or *Preliminary Results* or a mere glimpse of Commerce's surrogate value summary chart makes the same lack of

[4] *See* Policy Bulletin 04.1 ("it may happen that some countries meet both criteria, but sufficient data (with respect to quantity and quality) are not available to enable Commerce to use any of those countries as the primary surrogate."); *id*. ("a country that perfectly meets the requirements of economic comparability and significant producer is not of much use as a primary surrogate if crucial factor price data from that country are inadequate or unavailable.").

concentration specificity abundantly clear" for the Philippine data, unlike the more specific Indian domestic data; and (8) that the defendant's claims on Kangtai's arguments (*i.e.*, on (a) conflation of the quality of data with economic comparability, (b) valuing economic comparability over significant production in violation of the statute, (c) error in determining the Philippines was a significant producer, and (d) refusal to acknowledge that India has better data than the Philippines and produces more comparable merchandise) as "beyond the scope of remand" or "previously resolved" are either incorrect, disingenuous, inconsistent, ignore *Clearon II*, or consist of a combination thereof. "Ultimately, the United States still fails to separately consider the totality of the data quality in India compared to the Philippines separate from its improper view that the data quality in India is *per se* lower because India is less economically comparable based on per capita" gross national income ("GNI"). Kangtai *RR2* Reply at 8.

B.

The question here, as always, is whether the second remand results are supported by substantial evidence and in accordance with law. As previously discussed, the relevant statute, 19 U.S.C. §1677b(c)(4), at a minimum requires that the surrogate country be, to the extent possible: (A) "at a level of economic development comparable to that of the nonmarket economy country" ("NME"), and (B) a "significant producer[ ] of comparable merchandise."

Examining Commerce's primary country surrogate selection process as a general matter, *Clearon II* acknowledged that Commerce typically selects a country from the list of countries at the same level of economic development as the home country measured by per capita GNI, and it observed that Commerce will compare data from countries on the surrogate country list with data from a "less comparable country" when it becomes persuaded that none of the listed countries provide the requisite "scope of 'quality' data." *Clearon II*, Slip Op. 15–91 at 10–11. The opinion also observed "that Commerce's selection of the Philippines as the primary surrogate country has general support in the record", *id*. at 12, and therefore the question for remand as to whether the Indian data is in fact the "best" information available depended on "the quality of each challenged element of the Philippines data." *Id*. at 11. Commerce on second remand concluded from the foregoing that absent adequate showing that the Philippines lacks the quality of data necessary to complete the review, it was not required to conduct a comparison of those data with those of a country

at a less comparable level of economic development. *See id.* at 10–12. The court is unable to conclude that that is an unreasonable interpretation of *Clearon II*, and the results of the second remand comply to that extent with what was ordered. *See RR2* at 14–21.

Adhering to its selection of the Philippines as the primary surrogate country, Commerce explained, again, that the Philippines was on the surrogate country list and that there were quality data available for the "vast majority" of the FOPs. As mentioned, Commerce further explained that producing chlor-isos requires over forty FOPs, depending on the level of integration, including "dozens of chemical inputs, packing materials, electricity, labor, overhead, selling, general, and administrative expenses, and profit." *Id*. at 15. Although Commerce had previously alluded to the importance of hydrogen gas and chlorine, in considering the issue anew it downplayed their importance and considered that its determination to use Indian data for those inputs (hydrogen gas and chlorine) was now of lesser import when considered alongside the quality Philippine data for the remaining dozens of FOPs.[5] *See id*. at 15. As compelling as Kangtai's arguments may be, on Commerce's *volte-face* of the importance of those two chemicals to its choice of primary surrogate country, Commerce maintained that it preferred using the available quality of Philippine data for the remaining FOPs because the Philippines was an economically comparable country reflecting a similar "overall economic environment" as the NME, including "general labor and professional wages, interest rates, the availability of financing, [and] the sophistication of infrastructure." *Id*. at 15–16. Here, the defendant contends that Commerce's declining to compare specific data from the Philippines with Indian data was consistent with *Clearon II* because Kangtai had failed to meet its burden of persuading that the Philippine data for the remaining FOPs were not "quality" data. Def's Resp. to *RR2* Cmts at 11, referencing *RR2* at 15, 42. The defendant maintains that since the Philippines provided the requisite quality data for all FOPs except hydrogen gas and chlorine, no comparison with Indian data was required. *Id*., referencing *RR2* at 42.

Kangtai makes two arguments on Philippine data quality. First, it contends that the relevant Philippine financial statement for Mabuhay Vinyl Corporation ("MVC"), upon which Commerce relied, allegedly reflects receipt of countervailable subsidies, and it is Commerce's

[5] Commerce explained that "chlorine and hydrogen are not so critical as to warrant switching to India as the primary surrogate country, at the expense of quality data for all other [FOPs] chosen from a country at the same level of economic development." *Id*. at 15. That reasoning mirrors the preliminary results, in which Commerce used Indian data to value hydrogen and chlorine, but selected a primary surrogate country from the list of comparable countries. *See* PDoc 104 at 3–4.

practice "'to reject the financial statements of a company that [it has] reason to believe or suspect may have benefitted from countervailable subsidies[.]'" Kangtai *RR2* Cmts at 15, quoting *Golden Dragon Precise Copper Tube Grp. v. United States*, 39 CIT ___, ___, Slip Op. 15–89 at 10 (Aug. 19, 2015) (quoting *Chlorinated Isocyanurates From China*, 75 Fed. Reg. 70212 (Nov. 17, 2010), and accompanying issues and decision memorandum ("I&D Memo") at cmt. 3). Under this practice, Commerce excludes "financial statements that contain a subsidy that [Commerce] has found countervailable in the past." *RR2* at 43; *see also Chlorinated Isocyanurates from the PRC*, 76 Fed. Reg. 70957 (Nov. 16, 2011) and accompanying I&D Memo at cmt. 2. Kangtai argues the relevant tax incentives reflected in the MVC financial statement "very closely match" programs that Commerce found were countervailable in 1986. Kangtai *RR2* Cmts at 16–17 (citing *Canned Tuna From the Philippines*, 51 Fed. Reg. 43758 (Dec. 4, 1986) (final results). Kangtai points to Commerce's list of countervailable subsidy programs in the Philippines, albeit without precise argument on the potential relevancy of specific subsidy program(s). *Id*. (citation omitted).

Commerce rejected the argument that the MVC financial statements actually reflect "countervailable" subsidies, explaining that the tax incentives cited by Kangtai "are either too vague to tie to a previously countervailed subsidy," or have not been "previously countervailed as a subsidy." *RR2* at 23–24, 43 (citations omitted). The defendant adds that Kangtai's arguments do not show that the specific tax incentives at issue have been previously found to be countervailable and that Commerce was not required to treat them as countervailable or required to conduct a "formal" investigation into the matter. Def's Resp. to *RR2* Cmts at 11–12, referencing *Chlorinated Isocyanurates from the PRC*, 76 Fed. Reg. 70957, and accompanying I&D Memo at cmt. 2, and Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 100–576, at 590–91 (1988) (Conf. Rep.) ("OTCA"), reprinted in 1988 U.S.C.C.A.N. 1547, 1623–24.

Kangtai is correct, however, in arguing that there is only a "reason to believe or suspect" standard that the merchandise is subsidized, Kangtai *RR2* Cmts at 15–16, and in emphasizing that Commerce is not required to "conduct a formal investigation to ensure that . . . prices are not dumped or subsidized". OTCA at 590–91. The defendant's response, above, exaggerates the relatively low bar of the reason-to-believe-or-suspect standard in the sense that a finding of distortion does not depend upon the existence of a finding or determination of countervailability. On the other hand, Commerce must "base its decision on information generally available to it at that

time", *id*., which appears to be what Commerce has done here, because Commerce's additional finding that MVC may not have actually received these tax subsidies has support in the record. *See RR2* at 43 ("Kangtai did not provide any indication from MVC's financial statements that the company actually received any of these tax incentives"). Kangtai argues that MVC actually received income tax holiday tax benefits of 6.95 million Philippine Pesos (PhP) in 2010 and 2.65 million PhP in 2009, Kangtai *RR2* Cmts at 16, citing PDoc 65, Exh. 4, p. 23 (MVC Annual Report), but Commerce's position is that most of the listed subsidies are not income tax holiday incentives, and the financial statement does not state that MVC actually received the listed subsidies for, *e.g.*, duties on raw materials for an export product, or exemption from wharfage dues. *See* PDoc 65, Exh. 4, p. 23. Commerce thus declined to find that MVC actually received the specific subsidies, and it continued to rely on the MVC financial statements as "quality" data from the Philippines. *See RR2* at 43. The court can not substitute its own view of the matter therefor. *See Universal Camera, supra*, 340 U.S. at 488.

Continuing, Kangtai also argues that the Philippines data for four chemical inputs (calcium chloride, barium chloride, zinc sulfate, and sulfuric acid) "lack the specificity of the concentration levels." Kangtai *RR2* Cmts at 17–18. It cites the preliminary determination, in which Commerce rejected South African import values for four FOPs because it "did not have South African import statistics by the concentration level referenced in the GTA for those factors", and it argues that the Philippine import data suffer from the same flaw *Id*. at 17–18. The defendant's response is that Kangtai did not raise this argument in its first motion for judgment before this court, although it raised other arguments regarding concentration of chemical inputs.[6] *See* Kangtai Rule 56.2 Mot., ECF No. 30–1, at 27–31 (Aug. 15, 2013). The defendant thus argues it is too late at this state of the proceeding to insert new issues. Def's Resp. to *RR2* Cmts at 14, referencing *Dorbest Ltd. v. United States*, 35 CIT ___, ___, 755 F. Supp. 2d 1291, 1300 (2011) ("[r]emand proceedings do not grant the parties the right to a new antidumping investigation from the current date").

The court considers Kangtai's argument as proper elaboration on its general argument for India as the primary surrogate country and motivated by the holding of *Clearon II*. On the other hand, Kangtai's assertion spans only two or three sentences, is without reference to

[6] Kangtai previously argued that Commerce had erred in using Philippine data to value sodium hydroxide because Kangtai used a lower concentration level than the commercial norm, which argument *Clearon II* concluded was unpersuasive. Slip Op. 15–91 at 28–31.

the concentration levels of the specific inputs in the record, *see* Kangtai *RR2* Cmts at 17–18, and "[i]t is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *SmithKline Beecham Corp. v. Apotex Corp*., 439 F.3d 1312, 1320 (Fed. Cir. 2006), quoting *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001). *See also Home Prods. Int'l, Inc. v. United States*, 36 CIT ___, ___, 837 F. Supp. 2d 1294, 1301 (2012) (not the duty of a court to establish an argument's ossature). Be that as it may, the defendant points out that the four FOPs appear to be responsible for less than eight percent of the direct materials, and the court agrees this is insufficient reason for holding unreasonable Commerce's selection of the Philippines as the primary surrogate country.

C.

With respect to Kangtai's remaining challenges to the Philippines' quality of data, economic comparability, and the significant producer requirement, these have either been previously resolved or they are insufficient to impact Commerce's surrogate country selection. In brief, Kangtai argues that Commerce "conflated quality of data with economic comparability," Kangtai 2nd Remand Cmts at 2–3, that the statute does not value economic comparability over significant production, *id*. at 3–5, that Commerce erred in its analysis regarding whether the Philippines is a significant producer of comparable merchandise, *id*. at 5–13, and that India has better data than the Philippines and produces more comparable merchandise, *id*. at 13–20. These do not provide a basis for holding the second remand results unsupported by substantial evidence on the record or otherwise not in accordance with law, as, fundamentally, they argue for the court to substitute its own view of the record, which is not appropriate where Commerce's interpretation of the record is not shown to be unreasonable. *See Universal Camera, supra*, 340 U.S. at 488.

Kangtai first challenges Commerce's preference for data from a country at the same level of economic development as the PRC. *See* Kangtai 2nd Remand Cmts at 2–3. Kangtai argues the second remand results' statement that "[d]ata from a less comparable country is automatically at a disadvantage to data from a country at the same level of economic development" means that Commerce "conflated quality of data with economic comparability." *Id*. at 3. Kangtai is correct (Commerce's statement does appear to conflate), but the ultimate problem was one of persuasion. *See Clearon II*, Slip Op. 15–91 at 10–11 (Commerce "acts not unreasonably in burdening the party proposing a non-listed country with demonstrating that no country on

the surrogate country list provides the scope of 'quality' data that it requires in order to make a primary surrogate country selection"). In other words, Commerce expressed on second remand that it was simply not convinced that the merits of the Indian data outweighed the fact that India was not on the OP List.

Kangtai also argues Commerce improperly valued economic comparability over the separate factor requiring the surrogate country to be a significant producer of comparable merchandise. Kangtai *RR2* Cmts at 3–5. However, Commerce found that the Philippines satisfies both criteria: it is at the same level of economic development as the PRC, it is a significant producer of comparable merchandise, *e.g., RR2*at 19–20, and the court previously observed that the selection of the Philippines has "general support in the record." *Clearon II*, Slip Op. 15–91 at 12. Kangtai again discusses the *Ad Hoc Shrimp Trade Action Comm'n v. United States*, 36 CIT ___, ___, 882 F. Supp. 2d 1366, 1375 (2012) and *Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT 1407, 647 F. Supp. 2d 1368 (2009) decisions to argue that neither statutory factor or the quality and availability of data discussed in Commerce's policy bulletin is preeminent, *see* Kangtai 2nd Remand Results Cmts at 4–5, 11–13, but those (and other) cases have already been analyzed with respect to the points the plaintiff would attempt to revive here. *See Clearon I*, Slip Op. 14–88 at 25–30 (explaining that *Ad Hoc Shrimp* and *Amanda Foods* are distinguishable from this case because both involved countries on the surrogate country list). Both cases, moreover, are consistent with Commerce's approach here of "treating the per capita GNI ranking as a threshold statutory criterion that must be met before the other criteria are considered." *Id*. Kangtai's reliance on *Amanda Foods* and *Ad Hoc Shrimp* thus continues to be unpersuasive.

Additionally, Kangtai raises numerous additional arguments relating to the significant producer criterion. Kangtai *RR2* Cmts at 5–13, 18–19. For example, Kangtai disagrees with Commerce's explanation regarding the relationship between economic comparability and significant production; to wit, that Commerce "considers these two statutory factors (economic comparability and significant production) to be independent of each other" and that "both factors are threshold" requirements. *RR2* at 20. Kangtai disagrees, arguing that Commerce "cannot lawfully make one criterion a threshold requirement to the exclusion of the others." Kangtai *RR2* Cmts at 8–9. As these are both *statutory* criteria, and the court has already considered and rejected similar argument, more need not be said. *See, e.g., Clearon I,* Slip Op.

14–88 at 24–25, *Clearon II*, Slip Op 15–91 at 8 & n.7. Commerce requires both economic comparability and significant producer status, to the extent possible, and does not elevate the former criterion "to the exclusion of the others." *See* Kangtai *RR2* Cmts at 8–9; *RR2* at 20. Commerce's interpretation is thus consistent with the statute's plain language. *See* 19 U.S.C. §1677b(c)(4).

Commerce further explained in the second remand results that the significant producer factor is based on "evidence of actual production of comparable merchandise, even though it may be on a much smaller scale than that of the respondents or the NME under investigation." *RR2* at 20. Kangtai disagrees, relying on *Fresh Garlic Producers* to argue that significance is "a term of comparison" requiring reference to world trade. Kangtai *RR2* Cmts 6, referencing *Fresh Garlic Producers Association v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1313, 1338 (2015). Nonetheless, Commerce's interpretation of "significant" is entitled to *Chevron* deference, and it also appears to be consistent with the court's analysis in *Fresh Garlic Producers* that production may be significant when it affects world trade in any event. *See Fresh Garlic Producers*, 121 F. Supp. 3d at 1337–38. Kangtai does not point to record evidence that, or explain why, the Philippines' production of the comparable merchandise, sodium hypochlorite, was so low that it completely failed to affect world trade, and contrary to Kangtai's argument (*see* Kangtai *RR2* Cmts at 7), Commerce's interpretation does not equate significant production with "any" production. *See* Import Administration Policy Bulletin 04.1 (the significant producer analysis strives for consistency with "the characteristics of world production of, and trade in, comparable merchandise (subject to the availability of data on these characteristics)" but "should not be judged against the NME country's production level"). Commerce's reasoning is consistent with the Policy Bulletin and is not synonymous with "any" production. *See RR2* at 19–20.

Kangtai also cites to Commerce's determination on a certain frozen fish fillets as precedent for comparing data from a country on the surrogate country list with data from an off-list country. Kangtai *RR2* Cmts at 11, referencing *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam,* 79 Fed. Reg. 19053 (Apr. 7, 2014) (final results). But that determination did not state that Commerce was departing from its general policy of treating economic comparability and significant producer as threshold requirements "to the extent possible" consistent with 19 U.S.C. §1677b(c)(4). Rather, the determination involved a "unique industry" for producers of live pangasius fish consisting of only a "limited number of significant producers" world-

wide. *Certain Frozen Fish Fillets from the Democratic Republic of Vietnam*, 78 Fed. Reg. 55676 (Sep. 11, 2013) (preliminary results), and accompanying preliminary decision memorandum at 17. In other words, the facts of *Frozen Fish Fillets* are not quite analogous to those considered in the second remand results.

Kangtai next argues that India has better data than the Philippines and produces more comparable merchandise. Kangtai *RR2* Cmts at 13–20. These arguments either attempt re-litigation of issues already decided, or they are immaterial to the remaining issues, or they essentially call for supplanting Commerce's interpretation of the record and its statutory duties without persuading that Commerce's interpretation was unreasonable. Of course in the case of the latter, for the court to so order would run afoul of the standard of review. *See Universal Camera, supra*, 340 U.S. at 488.

Kangtai also challenges Commerce's explanation that, all else being equal, Commerce will consider data quality as a "'tie breaker'" in choosing between multiple countries on the OP List that are significant producers of subject merchandise. *See* Kangtai *RR2* Cmts at 13, quoting *RR2* at 41. Kangtai disagrees with Commerce's statement that data quality in such cases "is more a matter of data 'quantity'" and argues that that is against Commerce policy. *See id*. Apart from stating that this is a "new idea," Kangtai does not elaborate, nor does it explain why Commerce should not receive deference on a matter that is within its expertise. *See Atar S.R.L. v. United States*, 730 F.3d 1320, 1325 (Fed. Cir. 2013). In any event, the meaning of data quality versus quantity is not material here, because the Philippines is on the OP List and India is not, so Commerce is not "choosing between multiple countries on the surrogate value list." *RR2* at 41.

Finally, Kangtai argues that Commerce should have used Indian data because the size of India's chemical industry is more comparable to the PRC's. Kangtai Brief, at 18–20. But that does not require a different outcome. As Commerce explained, "'economic comparability' is not an industry-focused analysis." *RR2* at 16. Consistent with this court's decision sustaining Commerce's focus on GNI, the economic comparability prong is focused on the "overall economic environment," not the status of a particular industry within the economy. *See RR2* at 16; *see also Clearon I*, Slip Op. 14–88 at 22–25. The PRC, India, and the United States all have "large-scale chemical industries," yet "[t]he United States could not be considered economically comparable" to the PRC. *RR2* at 16. Focusing on a single industry would incorrectly read the "economic comparability" criterion out of the statute. *See id.*

That the PRC is an NME, moreover, means that its prices are not determined by the market forces of supply and demand. *Id*. at 17. The size of a particular industry may result from distortions inherent in the PRC's NME, making it inappropriate to require a surrogate country with a similarly-sized industry. *Id*. Kangtai challenges this rationale, arguing that, if true, it would prevent Commerce from relying on GNI to determine economic comparability. Kangtai *RR2* Cmts at 20. But the argument misses the mark. When considering an NME country, "Commerce presumes all respondents are government-controlled". *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1353 (Fed. Cir. 2015) (citing *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997)). Under that presumption, an industry may increase in size because the NME government is directing resources to certain favored companies in specific industries. *Cf. RR2* at 16. But government control over a company or an industry is different from growth in the economy as a whole reflected by GNI. For the above reasons, Kangtai's objections to Commerce's selection of the Philippines as the primary surrogate country are therefore unpersuasive at this stage.

III. Surrogate Valuation of Urea Using Indian Domestic Dealer Prices

To value the urea FOP, on remand Commerce opted for the Philippines' Bureau of Agricultural Statistics (BAS) data previously placed on the record by Clearon during the review. The initial *Final Results* had relied on data for Philippine imports of urea from the Global Trade Atlas, although Commerce prefers domestic data over import data when selecting surrogate values. The urea FOP was remanded due to expressed rationale that did not quite square with the record, and notwithstanding Commerce's further-expressed concern during litigation about the BAS data's market representativeness of domestic urea production in the Philippines.[7]

After further review, on second remand Commerce found the record inconclusive on the questions of whether all urea is imported or whether domestic fertilizer production includes production of urea. *See RR2* at 12, referencing Jiheng Sep. 5, 2012, SV Submission, at Attachment 2. On the other hand, Commerce acknowledged that in prior review(s) it had found the BAS data specific to urea, representative of a broad market-average, publically available, and tax and

[7] Commerce's final determinations must be sustained, if at all, on the basis articulated in the determination by Commerce itself. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156–168–69 (1962).

duty exclusive, making it reliable. *Id*. at 13. Commerce therefore relied on the BAS data for the present review after noting that while the underlying data notes that fertilizer production had decreased in the Philippines, there are no specific statistics about urea production itself or indication that the trend is significant. Commerce also noted that the domestic price of urea had slightly decreased from the previous year, which was the smallest decrease compared with other fertilizers, and that other data indicated that the import price of fertilizers is sensitive to the price of oil. Commerce inferred from this that changes in domestic price can be explained by changes in relevant market factors rather than by aberrationally small domestic production and further explained that it does not take economies of scale into consideration when choosing a surrogate value in any event. *Id*. at 13–14.

Challenging this reasoning, Kangtai and Arch-Jiheng stress that there is no evidence on the record of any domestic production, and that the record only supports the reasonable inference that all urea sold in the Philippines is imported. Arch-Jiheng, supported by Kangtai, argues that the three quotes from the articles it provided for the record — to wit, "92% of PHL fertilizer requirements are imported", "In 2004, the Philippines bought an aggregate volume of 8.8M tons of various fertilizer grades, with urea accounting for 30% and ammonium sulfate for 24%", and "Urea, potash, and half of the ammonium sulfate are imported while all the phosphatic grades (NP/NPK) and the rest of the ammonium sulfate are produced locally" — only support the inference that all urea is imported. *E.g.*, Arch-Jiheng *RR2* Reply at 15 (citation omitted). *See RR2* at 38–39. In response to such arguments during the remand, Commerce disagreed, stating:

> While these articles support the contention that urea is imported (a fact the Department is not contesting), they offer a somewhat vague picture of the market and industry specific to urea and do not state that 100 percent of urea is imported, or that there is no domestic production. Without any such statements, we cannot conclude the price represents 100 percent imports. The Department does not as a matter of course conduct a query into whether an apparently domestic price (*e.g.*, a price published by a government agency involved in domestic policy, such as an agricultural agency) is, in fact, based on domestic market sales. Clearly, if presented with evidence that the price

> was solely an import price (*e.g.*, a price published by a customs authority or a footnote indicating the price was based solely on imports), we would consider that evidence. In this case, however, there is no such evidence.
>
> The evidence implies that a large portion of urea is imported, but it does not preclude the possibility that urea is also domestically produced, albeit in small quantities, just as similar fertilizers are. Therefore we continue to rely on the BAS data as the SV for urea for this final remand redetermination.

RR at 39. Commerce ultimately concluded it would use the BAS data because, *inter alia*, "all else being equal (public availability, contemporaneity, *etc.*), the BAS data, which represents dealer prices in the Philippines, is the preferred source over the GTA data used in the underlying review."[8] *See RR2* at 12–13.

The court cannot fault Commerce's analysis. Bearing in mind that "the burden of creating an adequate record lies with interested parties and not with Commerce", *Nan Ya*, 810 F.3 at 1338, Commerce is permitted, and indeed is often required, to draw reasonable inferences from the record. *See, e.g. Daewoo Elecs. Co. v. Int'l Union of Electronic Elec., Tech., Salaried, & Mach. Workers*, 6 F.3d 1511, 1520 (Fed. Cir. 1993). "The question is whether the record adequately supports the decision of [Commerce], not whether some other inference could reasonably have been drawn." *Daewoo*, 6 F.3d at 1520 (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). Stated differently, the possibility of a different inference based on the same record does not mean that Commerce's finding is unsupported by substantial evidence. *See Swiff-Train Co. v. United States*, 793 F.3d 1355, 1367 (Fed. Cir. 2015) (citation omitted).

[8] Clearon also adds that Jiheng's SPIK excerpt indicates that the fertilizer industry "has been liberalized in 1987 fostering free competition *particularly in the urea market*." Clearon *RR2* Resp. to Cmts at 8, quoting PDoc 118 at Att. 2 (Clearon's emphasis). The page goes on to state that (apparently in 1987) the government provided subsidies "[a]s further incentive for the local producers of fertilizers." *Id. quoting id.* Clearon argues that "[t]his reference, therefore, does not establish that all of the urea sold in the Philippines is imported, but is reasonably understood to mean that *there is a competitive urea market in the Philippines* that includes local producers (albeit subsidized in 1987)." *Id*. (Clearon's emphasis). Clearon also notes that following the SPIK excerpt, the Attachment next includes a 2006 report by Florence Mojica-Sevilla, Senior Agribusiness Specialist, Center for Food and Agri Business, University of Asia and the Pacific, entitled "The Philippine Fertilizer Industry", and it calls attention to the report's statement that "local fertilizer plants depend partly upon the use of imported raw materials such as rock phosphate, anhydrous ammonia, and sulphuric acid." *Id.* at 9. Clearon further argues that since ammonia is the principle raw material for the production of urea, it therefore appears from the context that urea is in fact produced by "local fertilizer plants" in the Philippines, and that this attachment thus contradicts the notion that urea is not produced in the Philippines. *Id*. Such points, however, go beyond what was expressed in the second remand results.

Kangtai, however, argues that even assuming that the 8 percent of Philippines fertilizer that is produced domestically includes urea, the domestic price is not a reliable source because a typical Philippines domestic producer of chlor-isos would actually source its urea by imports. Kangtai *RR2* Reply at 12, referencing *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 300, 366 F. Supp. 2d 1264, 1274 (2005) ("the preference for domestic data is most appropriate where the circumstances indicate that a producer in the hypothetical market would be unlikely to use an imported factor in its production process."); *Yantai Oriental Juice Co. v United States*, 26 CIT 605, 617 (2002) (rejecting import data because Commerce failed to explain why the industry would purchase more expensive imported coal over domestic coal). Nonetheless, the record evinces a "domestic market" for urea, howsoever constituted. *Cf. Sulfanilic Acid From the PRC*, 65 Fed. Reg. 13366 (Mar. 13, 2000) (final results) and accompanying I&D Memo at cmt. 2 (the decline in the import tariff "effectively removed the distortions in the domestic price that we[re] previously attributed to th[e] 'abnormally high' rate" that had precluded selection of the domestic price in a prior review). Kangtai's arguments appear to implicate the market channels for the distribution of inputs, concerning which the court is referred to no information of record. *See, e.g,* Kangtai *RR2* Reply at 12 ("[i]n the Philippines, a hypothetical [chlor-isos] producer would source its urea from the abundant more reasonably price imports").

Continuing on this point, however, Arch-Jiheng argues Commerce erred in finding that the BAS data are tax and duty exclusive. Arch-Jiheng *RR2* Cmts at 16. But Arch-Jiheng did not, make that argument to Commerce, and therefore the court must find that it failed to failed to exhaust its administrative remedies in that regard. *See McKart v. United States*, 395 U.S. 185, 193–94 (1969)*; see, e.g., Qingdao Sea-Line Trading Co. v. United States,* 766 F.3d 1378, 1388 (Fed. Cir. 2014). In its comments to Commerce, Arch-Jiheng argued only that "there is no production of urea in the Philippines," and thus "there can be no domestic prices and [Commerce] must use the imported values." R-PDoc 82 at 1–5 (capitalization altered). It did not argue, as it does now, that even if there were domestic production, "the BAS data are not 'tax and duty free[.]'" Arch-Jiheng *RR2* Cmts at 17 (citing *RR2* at 13). Commerce provided the opportunity for comment on its draft remand results, noting its finding in a prior review that BAS data for urea was "exclusive of value added taxes." R-PDoc 74, Att. at 13, quoting *Final Results of Redetermination Pursuant to Court Remand*, CIT No. 08–00364, ECF No. 79, at 7–8 (Mar. 19, 2012), sustained by *Clearon Corp. v. United States*, 37 CIT ___, Slip

Op. 13–22 (Feb. 20, 2013) ("alt-*Clearon*").[9] As the defendant argues, Arch-Jiheng submitted comments regarding urea, but did not dispute that the BAS data for urea is tax and duty free. *See* Remand PDoc 82 at 1–5.

That does not, of course, address whether the BAS data are *actually* import duty exclusive, but when comparing two data sets, one from domestic sources and the other from import sources, "the conditional preference for domestic data is a logical starting point for achieving the objective set by Congress" because "it is reasonable to assume that a domestic price reflects the value of a factor of production more accurately than an import price." *Hebei Metals & Minerals Import & Export v United States*, 29 CIT 288, 300, 366 F. Supp. 2d 1264, 1274 (2005). *See also Taian Ziyang Food Co. v. United States*, 33 CIT 828, 890 n.61, 637 F. Supp. 2d 1093, 1148 n.61 (2009); *Home Meridian Int'l, Inc. v. United States*, 37 CIT ___, ___, 922 F. Supp. 2d 1366, 1376 (2013) ("[w]hen presented with conflicting evidence that provides substantial evidence to support opposite conclusions, the court will defer to Commerce's reasoned choice between the two"). The BAS data contain a domestic price that is published by a government agency involved in domestic policy, and the record does not show that price "was solely an import price." *RR2* at 39. Commerce retains discretion over its preferred data, and on the record here, the court cannot intrude upon Commerce's informed determination on this issue. *See Universal Camera, supra,* 340 U.S. at 488.

IV. "As-Adjusted" Financial Ratio Calculations

In the second remand results, Commerce adjusted the selling, general, and administrative (SG&A) ratio that it derived from the MVC financial statements in order to exclude the production labor items included in SG&A that were already included in the International Labor Organization (ILO) Chapter 6A surrogate value for labor.[10]

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[9] The defendant notes that in alt-*Clearon*, although Commerce ultimately selected Indian data, it did so because of its preference to use a single surrogate country, 19 C.F.R. §351.408(c)(2), and despite finding that the Philippine data "fulfilled its selection criteria." *See* alt-*Clearon*, Slip Op. 13–22 at 8–9.

[10] As previously discussed, the normal value of subject merchandise in a non-market economy is determined in part based on "the value of the factors of production utilized in producing the merchandise", 19 U.S.C. §1677b(c)(1), including "an amount for general expenses" and "other expenses," *id*. §1677b(c)(1), which includes labor expenses that are not related to production of the subject merchandise. In changing its methodology, via notice and comment, for determining the labor FOP in a given case, Commerce now employs a rebuttable presumption that ILO Chapter 6A data "better accounts for all direct and indirect labor costs" than Chapter 5B data, which had only "capture[d] the pre-tax monetary remuneration received by the employee." *Antidumping Methodologies in Proceedings Involving Non Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36092, 36094 (June 21, 2011) *("Labor Methodology"). See also Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor;*

Specifically, Commerce noted that the financial statements used in this review are consistent with the distinction between production labor and SG&A labor, listing "direct labor" and "supervision and indirect labor" as part of the costs of sales associated with the production of merchandise, but separately listing "salaries and wages" under "operating expenses", which refers to salaries and wages of non-production employees such as administrative and managerial employees and also refers to retirement benefits and employee benefits. *See* Def's Resp. to *RR2* Cmts at 31, referencing PDoc 65 at Att. 4, p. 34 (bracketing omitted). Commerce adjusted the operating expenses of the financial statement labeled "retirement expenses", but only to the extent that they reflected production labor, and it declined to adjust "employee benefits" since

> nowhere in the financial statements is there any definite indication that these benefits apply to 'regular' employees as there is in the notes for retirement benefits. Because the record provides no further details on these employee benefits, and because these benefits are presented on the face of the financial statements as "Operating Expenses," we are continuing to treat this line item as part of SG&A expenses.

RR2 at 7. *See also id*. at 28 ("a fully loaded ILO 6A SV does not account for all labor expenses; it only accounts for all production labor expenses, because the SV is only being applied to a FOP that accounts for production labor"); *id* at 30 ("Kangtai points to no record evidence indicating that 'regular' employees apply only to production labor"). The defendant elaborates that Commerce's practice in such cases is to rely on the classification in the surrogate ratio financial statements rather than "going behind" the financial statement to determine precisely what each item includes. *Id*., referencing *Certain Steel Threaded Rod from the PRC*, 79 Fed. Reg. 71743 (Dec. 3, 2014) (final rev. results) and accompanying I&D Memo at cmt. 3.

Challenging this determination, Kangtai argues Commerce is required, in accordance with its *Labor Methodology*, to remove the employee benefits as well as the other item(s) removed from SG&A labor, because those relate to production labor and are itemized among the SG&A of the financial statement. Kangtai *RR2* Cmts at

Request for Comment, 76 Fed. Reg. 9544 (June 21, 2011) ("Chapter 5B data includes two types of compensation: (1) [d]irect wages and salaries ('wages'), as well as (2) earnings data, which include wages plus bonuses and gratuities ('earnings'). The Department prefers 'earnings' data, when available, since it more accurately reflects the full remuneration received by workers.") (citation omitted).

21–24. Kangtai challenges the defense as overly reliant upon *Elkay*,[11] as that case is now under appeal. Kangtai argues it is not required to provide *additional* record evidence to show that the SG&A labor cost is overstated beyond simply pointing to the disaggregated SG&A expense items on the MVC financial statement that are already included in the ILO Chapter 6A data, and it asks that Commerce simply follow its *Labor Methodology* as published.

The court has considered the arguments on this issue and must conclude that substantial evidence of record supports Commerce's determination. Although it may *seem* unreasonable not to exclude the item self-described as *employee* benefits among the SG&A expenses of the MVC financial statement in accordance with Commerce's own *Labor Methodology*, at this point in time, the state of the law is such that it cannot be concluded unreasonable in fact. *Cf., e.g., US Magnesium LLC v. United States*, No. 2015–1864, 2016 WL 5845735, at *4 (Fed. Cir. Oct. 6, 2016) ("[g]iven that retorts are not listed as raw materials, and that retorts are grouped together with other expenses that are plainly not direct materials, it was reasonable for Commerce to conclude that the records do not show that TMI's supplier treated retorts as direct inputs"). Kangtai's argument, rather, is for substitution of its own view of the record to support such exclusion, which would not be appropriate. *See Universal Camera, supra*, 340 U.S. at 488.

V. By-Product Offset Calculation Methodology

As previously discussed, Commerce's normal by-product offset practice values such products as close to the split-off point as possible. *See, e.g., Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 76 Fed. Reg. 56396 (Sep. 13, 2011), and accompanying I&D Memo at comment 1a. On second remand, Commerce again determined the by-product offset by reference to the value of the downstream by-product ammonium sulfate, explaining that "[t]he net value of the ammonium sulfate reflects the product closest to the split-off point that does not result in the illogical outcome when we value the ammonia gas and sulfuric acid generated at the split-off point."[12] *RR2* at 10.

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[11] *See Elkay Mfg. Co. v. United States*, 38 CIT ___, 34 F. Supp. 3d 1369 (2014), *appeal filed, sub nom. Guangdong Dongyuan Kitchenware v. United States*, No. 16–2637 (Fed. Cir. Sep. 14, 2016).

[12] Commerce also confirmed that it was relying on the full amount of ammonium sulfate produced during the POR from those by products and not merely the amount of ammonium sulfate sold during the POR. *RR* at 33.

A.

To get to that split-off point in the production of subject merchandise, Commerce deducted from the net value of the ammonium sulfate the further processing costs of the ammonia gas and sulfuric acid involved in its production.[13] As its reasons for doing so, Commerce expressed two concerns. The first was that "neither respondent during the [POR] could measure and keep records of the actual amount of waste ammonia gas and sulfuric acid which was being produced"[14] and that, "[a]s a result, we were forced to go to the downstream product production records to obtain the data to derive the amounts of ammonia gas and sulfuric acid." *RR2* at 9. "Therefore the first point at which the Department could determine the amount of by-product produced was from the companies' books and records on the downstream product production." *Id*.

Arch-Jiheng and Kangtai contend the foregoing is no reason for not relying on surrogate values of record to value the ammonia gas and sulphuric acid by-products in this instance because (1) the "concern" permeates the first through the fifth administrative reviews, during which time Commerce never expressed it to be problematic as such when determining the amounts of ammonia gas and sulphuric acid relevant to the by-product offset[15]; (2) Commerce routinely accepts a by-product offset based on an estimation of the amount produced when the respondent (a) can demonstrate that the by-product was produced in the course of producing the subject merchandise, (b) does not maintain production records of the by-product, and (c) provides a reasonable calculation tied to the company's production records[16]; (3) the concern is at odds with Commerce's treatment in this same review

[13] In the final analysis, *per* Kangtai's previous suggestion, *see Clearon II*, Slip Op. 15–91 at 61, Commerce did not make any changes to Kangtai's by-product offset determined for the first remand results, *i.e.*, Commerce did not deduct the further processing costs from Kangtai's production of ammonium sulfate because Kangtai does not separately record the FOPS used to convert the ammonia gas and sulfuric acid into ammonium sulfate and it had allocated all the further processing costs to cyanuric acid. *See RR2* at 10–11.

[14] Arch-Jiheng points out that for the instant review this "finding" is factually incorrect on Jiheng's actual tracking of the actual amount of sulphuric acid it generated in the production of cyanuric acid. *See, e.g.,*Arch-Jiheng's Cmts on 2nd Remand Results at 11–12.

[15] As in this instance, during those reviews the relevant offsets were made based upon chemical calculations of the amounts of ammonia gas and sulphuric acid that would have been required for the amounts of ammonium sulfate produced during the relevant review periods.

[16] *See, e.g., Certain Corrosion-Resistant Steel Products From the PRC,* 81 Fed. Reg. 35316 (June 2, 2016) (*inter alia* final LTFV determ.) and accompanying I&D Memo at cmt 2 (although respondent did not track production of scrap, Commerce permitted an offset for scrap produced and sold, the amount of which was determined by calculating the difference between total input quantity of all major raw materials and subtracting the finished output);*Glycine from the PRC*, 80 Fed. Reg. 62027 (Oct. 15, 2015) (*inter alia* final rev. results) and accompanying I&D Memo at cmt 3 (accepting Baoding's records of sales of

of Jiheng's hydrogen gas and chlorine gas, because Commerce had verified Jiheng's production records for those products and relied on Jiheng's formulas therefor in the production of subject merchandise, and Commerce does not address why its methodological change is necessary or more accurate for the valuation of the ammonia gas and sulfuric acid; and (4) arguing that *DuPont Teijin Films China Limited v. United States*, 38 CIT ___, ___, 7 F. Supp. 3d 1338, 1347–48 (2014), stands for the proposition that a change in methodology premised on supposedly greater accuracy must be rejected where there has been no change in relevant facts from the previous reviews compared to the present, Arch-Jiheng contends Commerce has not indicated what change in facts in the present case concerning the use of the formulae supported a finding that its change in methodology would lead to greater accuracy.

This court regards Commerce's first concern (that the record lacked "full" metered measurements and records of ammonia gas and sulfuric acid production) not as a stand-alone reason for surrogate valuation using the actual value of the downstream ammonium sulfate product but as a restatement of what has always been the problem since the original investigation, and it is, by now, well-established that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently. *E.g., SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001). When an agency changes its existing "policy", *i.e.*, in the sense of a "course or principle of action previously adopted", then at a minimum the agency must "display awareness that it is changing position", "show that there are good reasons for the new policy", and be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016), quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (this court's alteration).

hydrochloric acid and ammonium chloride sales as sufficient support for production quantities for by-product offset purposes); *Drawn Stainless Steel Sinks From the PRC,* 78 Fed. Reg. 13019 (Feb. 26, 2013) (final LTFV determ.) and accompanying I&D Memo at cmt 9 (accepting calculation of scrap production for by-product offset purposes based on a ratio of total weight of stainless steel grades 301 and 304 scrap sold during the POI applied to production during the POI because the company did not track scrap production in its books); and *Steel Concrete Reinforcing Bars from Latvia,* 71 Fed. Reg. 74900 (Dec. 13, 2006) (final rev. results) (accepted respondent's claimed by-product offset calculation that was based on standards it used in the normal course of business rather than actual production). Arch-Jiheng adds that contrary to the defendant's claim that Commerce requires respondents to provide sufficient documentation of the actual amount of by-product produced, *see* Def's Resp. to *RR2* Cmts at 36 (citing *Mid Continent Nail Corp. v. United States,* 34 CIT 498, 511 (2010)), the case cited does not reflect a position taken by the court but merely quotes Commerce's decision in *Wooden Bedroom Furniture* and does not otherwise discuss Commerce's practice as applied (the court having determined that the issue before it did not involve a by-product offset but, rather, a correction to the reported costs).

But, the presumption behind such concepts, of course, is *ceteris paribus*, and Commerce now takes the position that it has not "changed" its methodology, averring that it has merely "adjusted" its policy into what it describes as a form of "capping" to suit the circumstances at hand. That position is obviously at odds with the analysis of *Clearon II*, and it is thus arguable whether Commerce has, therefore, not in fact displayed "awareness" that for purposes of the review at bar it has in fact "changed" its chosen course of action from its previous handling of the surrogate valuation of the ammonia gas and sulfuric acid (because the way in which respondents produced subject merchandise and handled the by-products thereof has not altered), or whether the only apparent circumstance of relevance to this issue for the instant review that is "different" as compared with prior reviews, as expressed as Commerce's second concern below, implies a difference of such significance, *primae impressionis*, that the forgoing administrative principles are inapplicable, to wit:

> [I]f we valued the by-products as close to the split off point as possible in this proceeding, as we had done in all prior reviews and the investigation of this case, then the amount of the by-product offset would result in an illogical outcome because the value of the ammonia gas and sulfuric acid (the immediate by-products) would be higher than the value of the ammonium sulfate (the by-product that is actually sold).[ ] In reality, . . . no company would combine two inputs, and incur additional processing costs, in order to make a lower-valued ammonium sulfate by-product. This was a clear indication that applying our methodology in the normal manner was not appropriate.

Id. at 9 (footnote omitted); *see also id*. at 34.

Commerce's solution has been perplexing to Arch-Jiheng and Kangtai, as this litigation has shown, and as above indicated. Nonetheless, in accordance with the foregoing Commerce is permitted, generally speaking, to change its methodology at any time, so long as it provides a reasonable explanation for the change.[17] Commerce has expressed a legitimate concern (*i.e.*, reason) for doing so here.

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[17] *E.g., Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1169, 178 F. Supp. 2d 1305, 1327 (2001) (Commerce is generally "free to discard one methodology in favor of another, the better to calculate more accurate dumping margins") (citation omitted); *Cultivos Miramonte S.A. v. United States*, 21 CIT 1059, 1064, 980 F. Supp. 1268, 1274 (1997) ("Commerce has the flexibility to change its position providing that it explains the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence").

B.

One exception changing a method or policy is when a party has relied upon a long standing methodology to its detriment. *See Shikoku Chemicals Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 421–22 (1992) ("*Shikoku Chemicals*"). Arch-Jiheng and Kangtai maintain that Commerce's new method is impermissible, as it gave them no opportunity to "respond," and is unlawfully retroactive, as it gave them no opportunity to adjust their behavior from the existing methodology upon which they claim they had reasonably relied. Arch-Jiheng *RR2* Cmts at 4–5; Kangtai *RR2* Cmts at 26–28.

As to their first argument, the defendant contends Arch-Jiheng and Kangtai have had numerous opportunities to object to Commerce's calculation and they are not entitled to additional procedure on this issue,[18] and as to their second argument it argues "immediate application is the rule where the new law affects only procedure or remedies." Def's Resp. to *RR2* Cmts at 40, quoting *Brother Industries, Ltd. v. United States*, 15 CIT 332, 337, 771 F. Supp. 374, 380 (1991) (citations omitted).[19] On this latter point, the defendant posits that *Shikoku Chemicals* basically relied on typical retroactivity principles, which normally apply to "congressional enactments and administrative rules", and it stresses that the respondents have not shown that Commerce's methodology here had the effect of a regulation or statute or demonstrated retroactivity pursuant to the applicable standards regarding (1) the "nature and extent of the change of the law," (2) "the degree of connection between the operation of the new rule and a relevant past event," and (3) "familiar considerations of fair notice, reasonable reliance, and settled expectations." Def's Resp. to *RR2* Cmts at 40, quoting *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1364 (Fed. Cir. 2005) (citing *Landgraf v. USI Film Prods*., 511 U.S. 244, 270 (1994)).

According to the defendant, *NTN Bearing Corp. of Am. v. United States*, 24 CIT 385, 400–01, 104 F. Supp. 2d 110, 124–25 (2000), *aff'd* 205 F.3d 1263 (Fed. Cir. 2002), is similar to this case and limited

[18] Elaborating, the defendant points out that in the original proceeding the petitioners raised concerns with the inflated values for ammonia gas and sulfuric acid and proposed that Commerce use a different approach in the final results. *RR2* at 35, citing PDoc 155 at 40–41. Arch-Jiheng responded that the prior decisions cited by the petitioners were distinguishable, *see* PDoc 157 at 16–19, and Kangtai did not respond, *cf*. PDoc 159 at 35. Arch-Jiheng and Kangtai had additional opportunities to challenge Commerce's by-product offset in the first and second remands, and to the extent they raised specific arguments regarding the by-product methodology, Commerce responded to them in the second remand results. *See RR2* at 31–37.

[19] *Cf. APEX Exp. v. United States*, 777 F.3d 1373, 1379 (Fed. Cir. 2015) (antidumping duty proceedings involve a "trade remedy" and their "antidumping duties are special remedial duties").

Shikoku to its facts, holding *Shikoku* inapt when Commerce did not "switch to[ ] any new methodology" when it abided an existing administrative preference as applied to the record. *Id*., 24 CIT at 401, 104 F. Supp. 2d at 125. The defendant contends the *NTN* plaintiff also failed to show actual reliance on the old methodology, because it did not establish that it "had actually adjusted its prices and, except for the change in methodology, . . . would be entitled to a revocation of the outstanding antidumping duty order." Def's Resp. to *RR2* Cmts at 41, quoting *id*. Likewise here, the defendant continues, Arch-Jiheng and Kangtai have not provided evidence of actual reliance but have only presented a general reliance interest argument, which is conclusory and unsupported by specific citations to the record. *Id*., referencing Kangtai *RR2* Cmts at 26–27 and Arch-Jiheng *RR2* Cmts 4–5. *See* R-PDoc 82 at 6; R-PDoc 83 at 19–20. Nor, the defendant emphasizes, have Arch-Jiheng and Kangtai shown that Commerce actually changed its methodology: "As Commerce explained, it did not alter its methodology in this review, but simply adjusted it given the specific facts in this review." *Id*., referencing *RR2* at 8–9.[20]

Clearon supports these remand results, arguing that there is no evidence that any party relied on any particular by-product offset methodology when determining its pricing, and that the parties have commented exhaustively on this issue. Regarding Arch-Jiheng's argument that a third remand is necessary because Commerce "makes no reference to either the parties' reliance on the previous methodology or to Commerce's failure to provide notice and opportunity to comment during the underlying review", Arch-Jiheng *RR2* Cmts at 4, Clearon argues there was no reason for Commerce to discuss either allegation because no error occurred. Clearon *RR2* Resp. to Cmts at 2–3.

Kangtai and Jihang, however, argue Commerce did in fact "change" its methodology and its "views" of their bookkeeping. However, this court need not resolve that question, because the record must encompass some form of evidence from which to conclude actual reliance upon the pre-altered methodology. *See, e.g., Fischer S.A. Comercio, et al., v. United States*, 38 CIT ___, ___, Slip Op. 14–58 (May 27, 2014) at 13 (plaintiff "offers no evidence in support of its reliance argument other than its bare assertion that it relied on Commerce's past meth-

[20] The defendant also references *Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1299–1300 (Fed. Cir. 2016), for the proposition that parties have no reliance interest in Commerce reaching the same results based on different records, however it is doubtful that the facts of that case are analogous to resolving the question of the degree to which the instant record "differs" from the prior administrative reviews with respect to the precise issue at bar.

odologies"); *Sanyo Elec. Co. v. United States*, 23 CIT 355, 366, 86 F. Supp. 2d 1232, 1243 (1999) (finding record evidence of actual reliance necessary to warrant remand under *Shikoku*'s reasoning); *Brother Industries, Ltd. v. United States*, 15 CIT 332, 339 (1991) ("in the absence of substantial evidence on the record, the Plaintiff's [had] failed to state a claim upon which relief [could] be granted"). It is not enough to simply assert reliance, but that, in essence, is what Kangtai and Jihang are arguing here.

Kangtai contends that "[t]his court is well aware, as explained in *Clearon II*, that respondents did rely on the former methodology", but that overstates the analysis of the prior decision, which only observed that Commerce had not addressed their reliance arguments. The court's examination of the record at this point does not independently reflect the type of reliance to which Kangtai alludes. Kangtai argues that it "kept its books and records in a particular way that Commerce accepted and found reliable to calculate a by-product offset", that it "did not make changes to its books and record", and further that it "actually relied on the fact that Commerce would continue to accept these records and grant the offset in the same manner in both POR 6 and POR 7", but the extent of that argument does not prove that such "reliance" was detrimental on this record.

Kangtai also argues that when Commerce "reversed course and determined to use a different methodology for the offset" it "determin[ed] Kangtai did not keep the appropriate books and records for the methodology it had consistently used prior." But Commerce did not determine that the respondents' books were not "appropriate" or insufficient for the purpose of determining whether a by-product offset could be granted, Commerce simply referred to the fact that "neither respondent during the [POR] could measure and keep records of the actual amount of waste ammonia gas and sulfuric acid which was being produced" as the reason for having to rely on the downstream ammonium sulfate product into which those by-products had been manufactured.

Kangtai further contends it "was unable to change its process to account for Commerce's new decision" and that, "[i]f given the chance, Kangtai would have attempted to change its books and records to account for Commerce's changed methodology", and that it "did change its recordkeeping after this review to attempt to fit into Commerce's new requirements for the offset", but again, such actions do not explain why Kangtai's prior recordkeeping (even assuming it had been in reliance upon how Commerce had calculated the by-product offset from the first through the fifth administrative reviews) was "detrimental." In other words, given Commerce's "second" con-

cern above, Kangtai does not explain how or why the result here would be any different even if it had had the chance to alter its recordkeeping to "comport" with "Commerce's new requirements for the offset".

Kangtai also emphasizes that due to the vagaries in the surrogate value methodology, it is not possible to know whether the ammonia and sulfuric acid surrogate values are distortedly high or the ammonium sulfate by-product surrogate value is distortedly low, as this is an issue in the inconsistencies of the surrogate value methodology which can change from year to year and country to country depending on the market. "Making the surrogate value price a factor in determining the appropriate by-product methodology is fraught with potential inconsistencies and does not allow parties to reasonably adjust their books and records and prices to account for which way Commerce will retroactively account for its by-product offset." Kangtai *RR2* Reply at 17. Whether that is true as a general matter, determinations on reliance must, of necessity, be made case by case, and the argument is not, on this record, a reason for holding Commerce's methodological "alteration" unlawful in this instance.

Summarizing: neither Arch-Jiheng nor Kangtai point to anything of record beyond their statements of reliance on Commerce's by-product offset methodology. There appearing to be no record evidence of actual reliance as such, neither Kangtai nor Arch-Jiheng persuades that their circumstances fall with the exception to the general rule that Commerce may change its methodologies at any time as long as it provides a reasonable explanation. Here, it is undisputed that Jiheng and Kangtai did not sell ammonia gas or sulfuric acid[21] and did not record the actual amounts of their production but did provide for the record the actual amount of ammonium sulfate produced. *See RR2* at 9. Kangtai originally reported its by-product as ammonium sulfate. *See* Second Remand Results at 35, citing PDoc 51, Part D at 17. In explaining why it preferred using the downstream by-product on this record and why that preference was consistent with prior practice and did not disrupt any reliance interest by the respondents, *RR2* at 7–10, Commerce has at least expressed a reasonably legitimate concern and reasons for "altering" the way in which it valued the ammonia gas and sulfuric acid by-products on this record, whether or not that amounts to a "change" of methodology. *Cf. National Classification Committee v. United States*, 765 F.2d 1146, 1153 (D.C. Cir. 1985) ("an agency may adopt new rules *without* affirmatively proving that the status quo is wrong") (original italics); *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1349 (D.C. Cir. 1985) (it is enough for the agency

[21] *See* PDoc 49 at D-32 to D-33; PDoc 51, Sec. D, at 17.

to show that "there is no cause to believe that the status quo is right, so that the existing rule has no rational basis to support it").

C.

Turning once again to Commerce's actual solution to valuing the ammonia gas and sulfuric acid, Commerce points out that its solution is in fact a form of capping. Arch-Jiheng argues Commerce's solution here is at odds with its "normal" capping practice, which is to cap the average of the surrogate values for the inputs as it did in cases such as *Multilayered Wood Flooring*[22] and Commere has stated that such behavior is its "practice."[23] The defendant responds that by advocating for Commerce to apply a capping methodology, Arch-Jiheng "concedes" that the values for ammonia gas and sulfuric acid were too high, and that Arch-Jiheng's cited cases "do not support a rigid capping method, but instead confirm that Commerce calculates the offset based on the record at hand." Def. 2nd Remand Response at 37. Arch-Jiheng replies that in none of the cases cited did Commerce deduct the FOPs from a downstream product to "cap" the value of the by-product offset. "[O]n the choice of 'capping methodology' as Commerce now calls its complete change in methodology, Commerce also has failed to provide a rational connection between the facts found and the choices made." Arch-Jiheng *RR2* Reply at 10. Kangtai raises similar argumentation.

Given surrogate values of record for ammonia gas and sulfuric acid that were higher than the downstream ammonium sulfate product into which those by-products were further-manufactured, however, for Commerce to theorize that the by-product offset for the ammonia gas and sulfuric acid by-products may be calculated based on the surrogate value of ammonium sulfate production less the further

[22] *Multilayered Wood Flooring From the PRC*, 76 Fed. Reg. 64318 (Oct. 18, 2011) (final LTFV det.) ("we have valued Layo Wood's byproducts using the simple average of the surrogate values for Layo Wood's wood veneer and wood core inputs").

[23] *See, e.g., Chlorinated Isocyanurates From the PRC,* 81 Fed. Reg. 1167 (Jan. 11, 2016) (final rev. results) and accompanying I&D Memo at cmt. 3 (capping the value of hydrogen by-product by the average of its input values and citing Commerce's "practice" to this effect); *Glycine from the PRC, supra,* 80 Fed. Reg. 62027 and accompanying I&D Memo at cmt 3 (did not cap hydrochloric acid because surrogate value was lower than the surrogate values for the inputs but capped the ammonium chloride surrogate value at the average of the inputs); *Certain Pneumatic Off the-Road Tires from the PRC,* 80 Fed. Reg. 20917 (Apr. 15, 2015) (final rev. results) and accompanying I&D Memo at cmt. 21 (capping the value of coal by-products to the value of the coal input surrogate values). *See also Tapered Roller Bearings & Parts Thereof, Finished and Unfinished, From the PRC*, 74 Fed. Reg. 3987 (Jan. 22, 2009) (final rev. results), and accompanying I&D Memo at cmt. 5 (did not use a surrogate value for the by-product that was higher than the cost of the finished good); *Certain Steel Nails from the PRC*, 73 Fed. Reg. 33977 (June 16, 2008) (final LTFV det.), and accompanying I&D Memo at cmt. 12 (did not use a surrogate value for the by-product that was higher than the cost of the finished good).

costs necessary for its manufacture is not an unreasonable solution to the problem Commerce identified. It is also, as Commerce explains, a form of "capping" in fact, albeit not the one pressed by the parties, and the defendant emphasizes that Commerce's solution is based on the actual, not hypothetical, record of production and sales. The court cannot substitute its own view of the record, *see Universal Camera, supra*, 340 U.S. at 488, but even if Commerce were to have considered using the surrogate values that directly pertain to ammonia gas and sulfuric acid on the record, it would still have been faced with having to consider "capping" or adjusting those values in a manner similar to the results reached here.

Substantial evidence of record supports Commerce's determination on this issue. In passing, briefly addressed here is Arch-Jiheng's argument that Commerce incorrectly calculated the FOPs for producing ammonium sulfate (*see* Arch-Jiheng *RR2* Cmts at 7–10): Apart from whether or not exhaustion is an issue, *see* Arch-Jiheng's Reply to 2nd Remand Cmts at 11–12, the court declines to order a third remand for correction of ministerial error for the reasons given in Commerce's Second Remand Results and as articulated in the defendant's brief. *See RR2* at 37; Def's Resp. to *RR2* Cmts at 38–39. *Cf., e.g., Dorbest Ltd. v. United States*, 32 CIT 185, 217 (2008) ("cases cited by [the plaintiff] do not go so far as to require that Commerce must correct late-raised ministerial errors").

Conclusion

For the above reasons, judgment will be entered sustaining Commerce's second results of remand.

Dated: November 23, 2016
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE