U.S. Customs and Border Protection

Slip Op. 14–72

MID CONTINENT NAIL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and DUBAI WIRE FZE AND ITOCHU BUILDING PRODUCTS CO., INC., AND PRECISION FASTENERS, LLC, Defendant-Intervenors.

PUBLIC VERSION
Before: Gregory W. Carman, Judge
Consol. Court No. 12–00133

[Affirming in part and remanding in part the final results of Commerce's antidumping duty investigation of certain steel nails from the United Arab Emirates.]

Dated: June 26, 2014

Andrew W. Kentz, David A. Yocis, Jordan C. Kahn, and *Nathan W. Cunningham*, Picard Kentz & Rowe LLP, of Washington, DC, for plaintiff Mid Continent Nail Corporation. With them on the brief were *Adam H. Gordon*, *Robert E. DeFrancseco, III*, and *Laura El-Sabaawi* of Wiley Rein LLP, of Washington, DC.

Carrie A. Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Melissa M. Brewer*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Bruce M. Mitchell, *Mark E. Pardo*, *Ned H. Marshak*, and *Kavita Mohan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for defendant-intervenors Dubai Wire FZE and Itochu Building Products Co., Inc.

Michael P. House and *Sabahat Chaudhary*, Perkins Coie LLP, of Washington, DC, for defendant-intervenor Precision Fasteners, LLC.

OPINION AND ORDER

Carman, Judge:

Three cases are consolidated before the court, each challenging portions of *Certain Steel Nails From the United Arab Emirates*, 77 Fed. Reg. 17,029 (Dep't of Commerce Mar. 23, 2012) (final determination) ("*Final Results*"), *as amended*, 77 Fed. Reg. 27,421 (Dep't of Commerce May 10, 2012) (am. final determination and antidumping duty order), and the unpublished Issues and Decisions Memorandum incorporated by reference, *see* Issues and Decisions Mem. for the Less Than Fair Value Investigation of Certain Steel Nails from the United

Arab Emirates, A-520–804 (Mar. 19, 2012), *available at* http://enforcement.trade.gov/frn/summary/uae/2012–7067–1.pdf (last visited June 10, 2014) ("*I & D Memo*"). In the *Final Results*, the U.S. Department of Commerce ("Commerce," "Department," or "Defendant") determined that nails from the United Arab Emirates ("UAE") were being sold in the United States at less than fair value and calculated antidumping margins. Parties to the Commerce proceeding, both domestic and foreign, now challenge the *Final Results*. The Court upholds the *Final Results* in most respects but remands to Commerce to apply the improperly-withdrawn targeted dumping regulation.

BACKGROUND

Plaintiff in this consolidated action is domestic nail producer Mid Continent Nail Corporation ("MCN" or "Plaintiff"). Defendant-Intervenors Dubai Wire FZE and Itochu Building Products Co., Inc. (collectively "Dubai Wire") and Precision Fasteners, LLC ("Precision") are producers of subject merchandise from the UAE.[1]

I. *Relationship Between Millennium and Precision*

In determining whether Precision sold its product into the United States at less than fair value, Commerce calculated Precision's normal value ("NV"), representing the sales price of subject merchandise in Precision's home market, by means of constructed value ("CV"), i.e. the price at which Precision's nails would sell in its home market (the UAE) under ordinary market conditions. Use of CV is appropriate where, as here, the respondents do not have a viable comparison market in their home country. *See* 19 U.S.C. § 1677b(a)(4). An important consideration in determining CV is whether any other company exercises control over the company whose CV is being calculated. MCN alleged that the UAE company Millennium Steel and Wire LLC ("Millennium") controlled Precision through an affiliation relationship. *See I & D Memo* at 37. MCN submitted evidence into the record purportedly supporting the allegation of affiliation, and evidence was also gathered and placed on the administrative record by Commerce officials who visited Precision's UAE facility to conduct verification. *See generally* Analysis Mem. for Precision Fasteners, LLC, C.R. (Part

[1] MCN filed this action under Court No. 12–00133, and Dubai Wire and Precision entered Court No. 12–00133 as Defendant-Intervenors as of right. Separately, Dubai Wire and Precision filed their own challenges to the investigation; Dubai Wire is therefore the plaintiff in Court No. 12–00153 and Precision is the plaintiff in Court No. 12–00162. The cases filed by Dubai Wire and Precision are now consolidated with the current case filed by MCN.

2) 220[2] ("*Precision Analysis Memo*"). After examining the evidence, Commerce determined that Precision was an independent company, and not an affiliate under the control of Millennium. *See generally id.*; *see also I & D Memo* at 37.

II. *Targeted Dumping*

Pursuant to 19 U.S.C. § 1677f-1(d)(1)(A), Commerce generally "shall determine whether the subject merchandise is being sold in the United States at less than fair value" in one of two ways: by comparing "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise," or by comparing "the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise." It is common to refer to these two price comparison methods as "average-to-average" and "transaction-to-transaction," respectively.

The statute contains an exception to this general rule regarding price comparisons. Commerce "may" make its determination regarding sales at less than fair value "by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise" if two conditions are satisfied:

> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) [Commerce] explains why such differences cannot be taken into account using [average-to-average or transaction-to-transaction price comparisons].

19 U.S.C. §1677f-1(d)(1)(B).

Shortly after the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994) established the price comparison methods and their priorities as described above, Commerce held hearings and accepted comments about how it should implement its statutory authority over targeted dumping.[3] As a result, Commerce

[2] "C.R." indicates the confidential administrative record and "P.R." indicates the public administrative record. *See* ECF No. 21. The C.R. and P.R. were each submitted in two parts with overlapping numbers assigned to the documents, so the part will be indicated parenthetically to identify where a referenced document appears.

[3] The practice of structuring United States sales at less than fair value by directing them toward particular purchasers, regions, or periods of time is referred to as "targeted dumping." For a useful discussion of the Uruguay Round negotiations and subsequent amendment of price comparison methods in United States antidumping law, *see Borden, Inc. v. United States*, 22 CIT 233, 235–38, 4 F. Supp. 2d 1221, 1224–28 (1998).

promulgated a regulation stating that "normally" Commerce would limit the application of the targeted dumping methodology to those sales found to be targeted. *See* 62 Fed. Reg. 27,296–01 (Dep't of Commerce May 19, 1997) (final rule), *codified at* 19 C.F.R. § 351.414(f) (1997) (the "limiting regulation"). In 2008, Commerce published notice in the Federal Register which stated that Commerce was withdrawing the targeted dumping regulation and would no longer be bound by it. *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930 (Dep't of Commerce Dec. 10, 2008) ("*Withdrawal Notice*"). Although Commerce indicated that it would accept post-publication comments regarding the withdrawal, the withdrawal was given immediate effect. *Id.*

In its investigation of nails from the UAE, MCN alleged that the respondents had engaged in targeted dumping, so Commerce analyzed respondents' U.S. sales data to determine whether the allegation had merit. In the preliminary results of the investigation, Commerce determined that Precision and Dubai Wire had made sales that were targeted by customer, region, and time period. 76 Fed. Reg. 68,129 (Dep't of Commerce Nov. 3, 2011) (preliminary determination of sales at less than fair value) ("*Preliminary Results*"); *see also Targeted Dumping Memoranda*, C.R. 105, 110. Commerce found, however, that the ordinary average-to average methodology sufficed to account for the resulting price differences, so it did not apply the average-to-transaction price comparison method. *Targeted Dumping Memoranda*, C.R. 105, 110 In its final determination, Commerce again found that the U.S. sales of Precision and Dubai Wire were targeted by customer, region, and time period. *I & D Memo* at cmt. 1. In the *Final Results*, Commerce changed its approach from the preliminary results, deciding that the average-to-average method was insufficient to account for the price differences stemming from the targeted sales. 77 Fed. Reg. at 17,031. *See also I & D Memo* at cmt. 4. As a result, Commerce applied the average-to-transaction method. *Id.* In doing so, Commerce applied the average-to-transaction method to all of the U.S. sales of Precision and Dubai Wire pursuant to the *Withdrawal Notice*, rather than limiting the average-to-transaction method to targeted sales as required by the limiting regulation. *Id.*

III. *Surrogate Profit Values*

One of the factors Commerce may examine while determining CV, pursuant to 19 U.S.C. § 1677b(e)(2)(B)(iii), is the profit margin expected for production of the subject merchandise under ordinary

market conditions. *I & D Memo* at cmt. 6. Commerce sought evidence showing surrogate profit values, and the parties to the administrative proceeding placed a number of financial statements into the record. In the *Preliminary Results*, Commerce relied on a surrogate financial statement from the company Arab Heavy Industries ("AHI") for profit data. 76 Fed. Reg. at 68,134. When Commerce issued the *Final Results*, however, Commerce instead relied on the financial statement of the Abu Dhabi National Company for Building Materials ("BILDCO") for surrogate profit data. *I & D Memo* at 29. Commerce found that BILDCO's financial statement most closely satisfied the surrogate value selection criteria on which the agency relies when selecting between potential surrogate financial statements, and therefore used it as a source for surrogate profit values. *Id.* at 29–30.

IV. *Interest Rate Imputed to Loan from Affiliate*

Dubai Wire had received a long-term loan from an affiliated company at a non-market interest rate. *Id.* at 32. Commerce sought evidence from which it could impute a fair market interest rate to the loan for purposes of calculating Dubai Wire's financial expenses when determining its CV. Upon examining the relevant record evidence, Commerce determined to impute a rate at the mid-point of Dubai Wire's 2010 short-term loans.

DISCUSSION

I. *Jurisdiction and Standard of Review*

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c). The factual findings and legal conclusions of Commerce in the *Final Results* will be upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is commonly described as being "more than a mere scintilla," and "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *NSK Corp. v. U.S. Int'l Trade Comm'n*, 716 F.3d 1352, 1364 (Fed. Cir. 2013) (internal citations and quotations omitted). In assessing substantial evidence, the court determines whether the reviewed agency decision is reasonable given the record as a whole, "even if some evidence detracts from the [agency's] conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

When Commerce interprets the antidumping statute, which is within Commerce's purview via authority delegated by Congress, the court reviews Commerce's interpretation under the two-step framework set out in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council,*

Inc., 467 U.S. 837, 842–45 (1984). Within the *Chevron* framework, the court will defer to Commerce's interpretation unless there is "unambiguous statutory language to the contrary" or Commerce has reached an "unreasonable interpretation of language that is ambiguous." *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009). Unless Commerce's interpretation of ambiguous language in the statute is "arbitrary, capricious, or manifestly contrary to the statute," the court will not set it aside. *Chevron*, 467 U.S. at 844.

II. *Affiliation*

During the investigation, MCN urged Commerce to find that Precision and Millennium were affiliated on the basis that (1) Millennium was able to exercise control over Precision in a manner meeting the definitions in 19 U.S.C. § 1677(33), and (2) that the two companies were affiliates via a close supplier relationship. *I & D Memo* at 37.

The antidumping statute states in relevant part that the term "affiliated" applies to "[a]ny person who controls any other person and such other person." 19 U.S.C. § 1677(33)(G). For purposes of the statute, "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33). Commerce regulations state that "[i]n determining whether control over another person exists," Commerce "will consider the following factors, among others: Corporate . . . groupings; franchise or joint venture agreements; debt financing; and close supplier relationships." 19 C.F.R. § 351.102(b)(3). Even where these factors are present, Commerce "will not find that control exists . . . unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product." *Id.* These factors will be considered in light of "the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control." *Id.* Although the statute and regulations are silent as to the definition of a close supplier relationship, the Statement of Administrative Action defines it as a relationship "in which the supplier or buyer becomes reliant upon the other." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, at 838 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4174–75 ("*SAA*"). Control will be found where one party has the ability to control another, regardless of whether such control has actually been exercised. *See TIJID, Inc. v. United States*, 29 CIT 307, 321–22, 366 F. Supp. 2d 1286, 1299 (2005).

During the investigation, MCN based its allegations of control on several grounds. First, MCN claimed that Millennium and Precision

shared employees. *Precision Analysis Memo* at 2. According to MCN, the list of its managers that Precision submitted to Commerce during the POI included an individual identified in a 2006 letter as a [[ ]] of Millennium. MCN also pointed to a statement made after the POI by a former Precision employee on his LinkedIn profile, in which he referred to himself as the new [[ ]]. *Id.* at 3. Precision responded that the 2006 letter only shows that the person in question worked for Millennium "two years before Precision was formed" and that the man's statement on LinkedIn "was neither authorized nor known by Precision" and was "an inaccurate representation" by a former Precision employee. *Id.*

Second, MCN claimed that Millennium and Precision were alter egos that held themselves out to the public as a single entity. *Id.* MCN noted that the two companies shared a telephone number; had identical website design; [[ ]]; were regarded as a single entity in the listings of the International Staple, Nail, and Tool Association ("ISANTA") and International Code Council – Evaluation Service ("ICC-ES"); and marked a recent product shipment "Manufactured by Precision Fasteners (Millennium Steel and Wire)." *Id.* Precision attributed these mixed identifications to the [[ ]], which [[ ]]. This involved [[ ]]. *Id.* at 4. Precision noted that [[ ]]. *Id.*

Third, MCN alleged that Precision and Millennium [[ ]], with Precision [[ ]]. *Id.* According to MCN, Precision [[ ]]. *Id.* According to Precision, it [[ ]] pursuant to [[ ]]. *Id.* Precision notes that at verification, Commerce confirmed that Precision [[ ]] and [[ ]]. *Id.* Precision explained that its wire-drawing machines [[ ]], which Millennium agreed to do [[ ]]. *Id.*

Fourth, MCN claimed that Precision and Millennium were affiliated through a close supplier relationship because [[

]]. *Id.* at 4–5. MCN argued that Precision was dependent on [[ ]], and that [[ ]] Precision's ability to produce nails [[ ]]. *Id.* at 5. Thus, MCN claimed, [[ ]]. *Id.* Precision responded that [[ ]] during the POI, after which [[ ]]. *Id.* Precision noted that it moved to avoid [[ ]] by buying machines, but [[ ]] for access to high capacity electricity. *Id.*

Finally, MCN also urged Commerce to find affiliation based on the [[ ]] between [[ ]] resulting from Precision's [[ ]]. *Id.* at 6. MCN claimed that Precision [[ ]], which is typical of an affiliate rather than [[ ]]. *Id.* Precision countered that its [[ ]] were typical of [[ ]] and it fully [[ ]] its own production versus the [[ ]]. *Id.*

Commerce examined the evidence put forward by MCN and found no affiliation between Precision and Millennium under 19 U.S.C. § 1677(33) or via a close supplier relationship resulting in reliance. *Id.* at 6–7. Looking first at the alleged close supplier relationship, Commerce stated that the threshold question was of reliance and the relevant standard was found in *Stainless Steel Wire Rod from the Republic of Korea,* 71 Fed. Reg. 59,739 (Dep't of Commerce Oct. 11, 2006) (preliminary results of antidumping duty administrative review) ("*SSWR from Korea*"), where reliance was determined based on "the exclusivity and uniqueness of the supply relationship," and "not the level of cooperation between parties." *Id.* at 7. Commerce noted that Precision was able to produce all subject merchandise except [[ ]], and that Precision [[ ]] decreased throughout the POI. *Id.* at 7–8. Given this pattern of decreasing [[ ]], Commerce found the *SSWR from Ko-*

rea reliance standard for affiliation not met. *Id.* at 8. Commerce noted that [[

]]. *Id.* The characteristics of the [[ ]] did not evince [[ ]] because they [[ ]]. *Id.* Commerce distinguished between cooperative [[ ]] and a reliance relationship by noting that Precision did not *have to* cooperate [[ ]]. *Id.* at 9. The [[ ]] did not provide for "legal or operational" control because they did not provide for [[ ]] or advancing one party's interests over the other since both companies could [[ ]]. *Id.* at 9–10.

Regarding shared employees, Commerce found that the "evidence does not substantiate that during the POI Precision and Millennium employed even one individual concurrently," since the companies' [[ ]]. *Id.* at 12. Commerce found no evidence that the individual who was a General Manager of Millennium in 2006 [[ ]] came on at Precision as a Manager in 2010. *Id.* at 13. Commerce declined to credit the statement on a LinkedIn profile that the profile holder worked for "Millennium/Precision" for two months after the end of the POI. *Id.*

On Precision and Millennium holding themselves out as a single entity, Commerce found that the confusion stemmed from the [[ ]], but found none of the evidence to suggest any "discernible ulterior motive" or "appreciable leverage to exert control." *Id.* at 13–15. As to [[ ]], Commerce found that the evidence, especially from verification, did not show that the companies [[ ]], but did demonstrate some [[ ]]. *Id.* at 15–16. Commerce found this minor entanglement insufficient to demonstrate a finding of affiliation via control. *Id.* at 16. As for financial relationship, Commerce noted that financial relationship is

not a control factor under 19 C.F.R. § 351.102(b)(3). *Id.* Further, Commerce found no evidence of debt financing on the record. *Id.*

A. Contentions of the Parties

1. *MCN*

Before the Court, MCN contends that Commerce acted contrary to the substantial record evidence in determining that Precision was not affiliated with Millennium. MCN's argument is that "overwhelming evidence on the record of this investigation indicates that Millennium has the ability or capacity to exert control over Precision, including the potential to impact decisions concerning the production, pricing or cost of the subject merchandise." Mem. in Supp. of Mid Continent Nail Corp.'s Rule 56.2 Mot. ("*MCN Mem.*") at 13–14, ECF No. 41.

MCN reiterates before the Court the indicators of potential affiliation that MCN raised during the investigation: [[ ]] (*id.* at 14–17); Precision's [[ ]] from Millennium (*id.* at 18); an individual identified on LinkedIn as a [[ ]] (*id.* at 18–19); an individual who in 2006 worked as a [[ ]] at Millennium listed as Precision's General Manager during the POI (*id.* at 19); listings at ISANTA and ICC-ES implying the companies were alter egos of each other (*id.* at 19–20); [[ ]] (*id.* at 20–21); and the companies using [[ ]] (*id.* at 21). MCN also claims Precision was reliant on [[ ]] in a close supplier relationship in which [[ ]] needed to function. *Id.* at 22–26.

MCN claims that Commerce improperly ignored, or wrongly weighed, the record evidence regarding [[ ]], shared employees, alter egos, and [[ ]]. *See id.* at 12–22. Regarding Commerce's decision about a close supplier relationship, MCN also challenges how Commerce weighed the evidence. *Id.* at 22–33. MCN additionally claims that Commerce made two specific errors in characterizing the record: (a) in finding that Precision could produce subject merchandise, [[ ]], is belied by evidence that Precision [[ ]], *id.* at 26–27; and (b) in finding that Precision "utilizes [[ ]] only for the [[ ]]," *id.* at 27. MCN alleges that these findings are contrary to evidence that Precision [[

]] and continued to do so [[ ]] purchasing its own wire drawing machines. *Id.* at 27.

MCN claimed that the facts here were not truly distinguishable from *SSWR from Korea*, which Commerce purported to rely on, and therefore claims that Commerce acted contrary to its own established practice without providing a rational explanation. *Id.* at 28–29. Looking at the [[ ]] between Precision and [[ ]], MCN also points to their [[

Id. at 29–30. MCN argues that analogous facts have undergirded findings of affiliation in past investigations. *Id.* at 30–31. MCN also claims that Commerce looked to the wrong time period in basing its affiliation decision on the potential future relationship between Precision and Millennium, rather than their relationship during the POI. *Id.* at 31–33.

2. *Precision*

Precision supports the Commerce determination of non-affiliation on the grounds articulated by Commerce in the *Final Results*. *See generally* Def.-Int. Precision's Opp'n to Pl.'s Mot. for J. on the Agency R. ("*Precision Opp.*") at 11–34, ECF No. 66. Specifically addressing MCN's argument regarding Precision's [[

]], Precision argues that MCN's position would convert any [[ ]] into entities involved in a control relationship, which would be an unreasonable application of the statute. *Id.* at 23. Regarding the former General Manager of [[ ]] who later became Precision's General Manager, Precision points out that his [[

Id. at 26. Precision also rejects MCN's arguments that it has a close supplier relationship with Millennium for the reasons articulated by Commerce in the *Final Results*. *Id.* at 31–34.

3. *Commerce*

Commerce reasserts that it properly considered and evaluated the record evidence in the *Final Results*, reiterating its reasoning before the Court. *See generally* Def.'s Opp'n to Pls.' Mots. for J. Upon the Agency R. (*"Commerce Opp."*) at 8–21, ECF No. 63. Commerce points out that even if MCN could demonstrate that Precision and Millennium shared employees as alleged, MCN "fails to explain how that would result in control." *Id.* at 11. Similarly, Commerce notes the facts confirmed at verification regarding the companies' [[

]] and argues that

"although the parties' cooperation is shown, the record does not suggest that one party is [in] the position to 'control' the other party" on this basis. *Id.* at 13. Addressing the [[ ]] between Precision and [[ ]], Commerce notes that there are no provisions permitting [[ ]] to "impact decisions concerning the production, pricing, or cost of the subject merchandise." *Id.* at 14. Rather, the [[ ]] are "mutually beneficial and do not advance one party's interests over the other party's interests." *Id.* Commerce argues that the mutuality of the relationship is shown by the fact that Precision was able to [[ ]] and [[ ]]. *Id*. Commerce also noted that the [[ ]], in particular because there is an [[ ]]. *Id.* at 15. Crucial to Commerce's analysis is this [[ ]], which "demonstrates" to Commerce that "the relationship is not irreplaceable," as would be the case with an affiliation relationship involving control. *Id.* Also crucial, Commerce contends, is the lack of the kind of [[ ]] that might indicate the coordination of internal decision-making and impact production, pricing, and cost choices. *Id.* at 16. Commerce points out that, even though the companies shared, [[ ]], phone and fax services, Precision doesn't promote anyone but itself on its website. *Id.* at 17. Commerce insists that there is no close supplier relationship, as shown by the fact that Precision [[ ]] during the POI, may obtain that supply elsewhere, and has in fact [[ ]] during the POI. *Id.* at 19–20.

B . Commerce's Affiliation Determination Is Affirmed

The Court affirms Commerce as to a lack of affiliation because Commerce applied its statute and regulations correctly, and based its decision on a reasonable assessment of the substantial evidence on the record. The Court is required to uphold the *Final Results* unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Crawfish Processors Alliance v. United States*, 483 F.3d 1358, 1361 (Fed. Cir. 2007) (internal citation omitted). Where two decision makers might reach different conclusions from the same evidence, Commerce may choose one reasonable conclusion and its decision will still be sup-

ported by substantial evidence. *See Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966). The Court will uphold Commerce where the weight of the record in its entirety tends to support the determination, even where Commerce faces evidence that detracts from its conclusion. *See Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). The Court will not replace Commerce's decision regarding the evidence with its own judgment where Commerce made a reasonable call on how to settle questions raised by the record.

It is clear that Commerce engaged in the sort of searching evaluation of the record which is to remain undisturbed under the standard of review. The parties do not dispute the nature of the record evidence, but rather the conclusions to be drawn from it. Commerce acted reasonably in coming to a negative determination on the affiliation issue, since even those pieces of record evidence suggestive of overlap between the two companies did not demonstrate that Millennium was able to control Precision's decisions regarding the subject merchandise.

Commerce did not dodge or ignore evidence regarding the relationship between the companies, but rather closely examined it and reached conclusions that it was able to justify with specific analyses. To take one example, Commerce examined the details of the alleged sharing of employees and chose to base its determination on the quantum of that evidence. Certainly any reasonable mind could find that the LinkedIn profile—the sole piece of evidence that suggests an employee [[ ]]— was simply too tenuous and of questionable authenticity to form the basis for a finding that the companies shared employees. Furthermore, as Commerce points out, even assuming that the LinkedIn profile should be preferred over the contrary record evidence, a hypothetical finding that Millennium and Precision [[ ]] would not lead to a finding that Millennium controlled Precision.

It is especially worth noting that Commerce grounded its decision on its direct observations at verification, which undercut many aspect of MCN's allegations regarding the [[ ]] and provided robust evidence that Precision was not controlled by Millennium in this regard. The Court also finds that Commerce closely considered all of the evidence regarding the nature of the [[ ]] between [[ ]] and Precision, [[ ]], and comprehensively interpreted the cited evidence in a reasonable manner in the context of all of the record evidence. It would be impossible for the Court to say that no reasonable fact-finder could have concluded

as Commerce did on the record before it, and the Court is therefore obliged to affirm Commerce's finding that Precision and Millennium were not affiliated.

III. *Targeted Dumping*

Where a petition alleges that respondents to an antidumping investigation have engaged in targeted dumping, Commerce analyzes respondent sales to determine whether, in accordance with the statute, there is a pattern of export (or constructed export) prices for comparable merchandise showing significant differences based on the purchaser, region, or time period of the sale. *I & D Memo* at 4. (The existence of such a pattern is a threshold requirement for employing the average-to-transaction price comparison that constitutes the targeted dumping remedy. 19 U.S.C. § 1677f-1(d)(1)(B).)

In order to determine whether there is a price pattern showing significant differences along one of the targeting poles, Commerce employs a two-part test known as the *Nails* test.[4] *See I & D Memo* at 4; *see also Commerce Opp.* at 37. First, Commerce seeks a price pattern. It determines how many of the allegedly targeted sales, by volume, were made at a price more than one standard deviation below the weighted-average price of all sales. *Commerce Opp.* at 37. If the results include more than 33% of all of the allegedly targeted sales (to the allegedly targeted customer, region, or in the allegedly targeted time period), then a price pattern has been found and Commerce proceeds to the next step. *Id.* at 37–38. In the second step of the *Nails* test, Commerce determines whether the price pattern exhibits significant differences by looking for a price gap. *Id.* at 38. To do this, Commerce first determines the volume-weighted price gap of non-targeted sales; then the weighted average price of sales to the alleged target is compared to the next higher weighted average price of non-targeted sales. Commerce determines the volume of sales for which the difference between these two weighted average sales prices exceeds the volume-weighted price gap of non-targeted sales, and if the amount is over five percent of the total volume of sales to the alleged target, then Commerce finds that the price pattern exhibits significant differences. *Id.* Where both prongs of the *Nails* test are met, Commerce then applies the average-to-transaction price comparison methodology to all U.S. sales when determining the respondent's dumping margin. *Id.*

[4] The *Nails* test originated with *Certain Steel Nails from the People's Republic of China*, 73 Fed. Reg. 33,977 (Dep't of Commerce June 16, 2008) (final determination of sales at less than fair value), which was upheld by the Court of International Trade in *Mid Continent Nail v. United States*, 34 CIT ___, 712 F. Supp. 2d 1370 (2010).

Employing this test here, Commerce determined that both Dubai Wire and Precision had patterns of export prices for comparable merchandise that varied significantly among customers, regions, and time periods. *Final Results*, 77 Fed. Reg. at 17,031; *Dubai Wire Targeted Dumping Memo*, C.R. 105, at 4–5; *Precision Targeted Dumping Memo*, C.R. 110, at 4–5.

Although Commerce had found, in the *Preliminary Results*, that the average-to-average methodology accounted for the targeting, Commerce changed this approach in the *Final Results*, deciding that the average-to-average method was insufficient to account for the price differences stemming from the targeted sales. *Final Results*, 77 Fed. Reg. at 17,031. Commerce therefore applied the average-to-transaction method. *Id.* Commerce did not discuss whether the transaction-to-transaction method might account for the price differences. *Id.* In applying the average-to-transaction method, Commerce applied it to all of the U.S. sales of Precision and Dubai Wire pursuant to the *Withdrawal Notice*, rather than limiting it to targeted sales as mandated by the limiting regulation. *Id.*

The relevant comments of the respondents, each of whom objected to Commerce's targeted dumping analysis on multiple grounds, will be described below.

A. Contentions of the Parties

1. *Precision*

Precision argues that Commerce's determination that it engaged in targeted dumping is unlawful and not supported by the record. Precision identifies as an error that "Commerce failed to examine and take into account whether, and to what extent, any of Precision's sales identified by Commerce as 'targeted' were fairly traded sales (i.e., not dumped)." Brief of Pl. Precision Fasteners, LLC in Supp. of Pl.'s Mot. for J. upon the Agency R. ("*Precision Mem.*") at 7, ECF No. 33. In fact, Precision contends that most of its sales identified as targeted by Commerce were "fairly traded." *Id.* Precision's contention is that the statute does not permit Commerce to base a targeted dumping finding on a pattern of price differences in non-dumped sales. *Id.* at 7–8.

Precision also argues that the *Nails* test is flawed and illogical, leading to results inconsistent with the record evidence. *Id.* at 8. In this regard, Precision notes that the *Nails* test does not take into consideration that only an "insignificant number of transactions" were identified as targeted by customer and region; that Commerce relied on arbitrary geographic divisions for its region finding, rather

than using previously acknowledged official regions; and that Commerce ignored evidence of significant fluctuations in materials costs in making its finding of targeting by time period. *Id.*

Precision also claims that, even assuming the targeting analysis was legal, Commerce cannot justify application of average-to-transaction comparisons to all of Precision's U.S. sales when Commerce only found evidence of targeting for less than one percent. *Id.* Precision argues that such action was not only unreasonable but also violated the requirement in 19 C.F.R. § 351.414(f) that the average-to-transaction method be applied only to those sales identified as targeted. *Id.* at 9. For this argument, Precision contends that the *Withdrawal Notice* was "ineffective and contrary to law because it occurred outside the basic procedural framework required by Congress under the Administrative Procedure Act." *Id.* As a result, Precision insists that Commerce should be required to apply 19 C.F.R. § 351.414(f).

Precision also attacks Commerce's use of "zeroing" in calculating the targeted dumping remedy. *Id.* Zeroing is a calculation technique in which Commerce fails to treat fairly-traded sales as offsetting dumped sales, calculating them as if they were made at a zero dumping margin rather than a negative dumping margin. Precision argues that the use of zeroing in the targeted dumping calculation is inconsistent with statute and binding court precedent. *Id.*

2. *Dubai Wire*

Dubai Wire attacks Commerce's targeted dumping analysis on similar grounds. Dubai Wire, like Precision, argues that Commerce acted contrary to the antidumping statute when it based its targeting finding (of a pattern of prices that differed significantly) on an analysis of sales at prices above fair value. Mem. of Law in Supp. of Dubai Wire's Rule 56.2 Mot. for J. upon the Agency R. ("*Dubai Wire Mem.*") at 9–11, ECF No. 37.

Dubai Wire contends that Commerce acts contrary to statute, court precedent, and administrative practice in its "unreasonably rigid" reliance on a "strict mathematical formula" to conduct its targeted dumping analysis in a manner that, in Commerce's own words, proceeds "without determining 'why' an exporter's pricing behavior may differ significantly." *Id.* at 11-12 (quoting *I & D Memo* at 6). In doing so, Dubai Wire argues, Commerce has ignored "the established legal principle of *de minimis*," which "operates to ensure that the underlying purpose of the statutory provision is carried out." *Id.* at 13

(*quoting Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 902, 905 (Fed. Cir. 1999)). Dubai Wire echoes Precision on this point, noting that only extremely small percentages of its U.S. sales support Commerce's findings of customer and region targeting. *Id.* at 13–14.

Regarding the finding that Dubai Wire targeted its sales by customer, Dubai Wire claims that Commerce improperly rejected evidence regarding these sales which established that they varied from the ordinary course of trade and could not reasonably be compared to ordinary U.S. sales. *Id.* at 14–16. Dubai Wire also claims that Commerce acted contrary to the evidence by failing to properly consider the sharp increase in raw material prices when it analyzed Dubai Wire's U.S. sales for targeting by time period. *Id.* at 16–20. Regarding the finding of targeting by region, Dubai Wire claims that Commerce based its determination on a small error in freight charges which was documented in the record and should have resulted in an adjustment. *Id.* at 20–21.

Like Precision, Dubai Wire also contends that Commerce acted contrary to law and the record evidence when it applied the average-to-transaction method to all Dubai Wire sales, rather than only the sales identified as targeted. *Id.* at 21–22. Dubai Wire argues that Commerce's interpretation of the antidumping statute to permit such broad application of the targeted dumping methodology is flawed because the results are "unnecessarily punitive" and "do[] not further the statute's objective." *Id.* at 22. Dubai Wire also claims that Commerce has departed from "longstanding practice" without articulating any suitable rationale. *Id.* at 23. Dubai Wire, like Precision, argues that the *Withdrawal Notice* violated the APA by revoking 19 C.F.R. § 351.414(f) without notice and comment, and that the APA's "good cause" exception was inapplicable. *Id.* at 24–26.

3. *Commerce*

Commerce argues that it rightly rejected Precision and Dubai Wire's requests that Commerce "establish a *de minimis* standard," by which it would "analyze the number of targeted sales as a percentage of total U.S. sales." Def.'s Opp'n to Pls.' Mots. for J. upon the Agency R. ("*U.S. Opp.*") at 38, ECF No. 63. Commerce defends its current practice on the basis of its interpretation of the language in 19 U.S.C. § 1677f-1(d)(1)(B)(i) authorizing use of the average-to-transaction method when "there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time." According to Commerce, the statute "does not establish how this pattern [of export prices] should be measured with respect to the prevalence of underlying sales in relation to all sales."

Id. at 39. Commerce contends that it implements its reasonable interpretation of the statute when it measures targeted sales by volume rather than by number. *Id.* Commerce also claims that its interpretation in this regard was upheld in *Mid Continent Nail Corp.*, 712 F. Supp. 2d 1370. *Id.* In any case, Commerce argues, record evidence indicates that the percentage of the U.S. sales of Precision and Dubai Wire that were found to be targeted exceeds a *de minimis* level. *Id.* at 40.

Commerce also counters the argument that it erred in applying the average-to-transaction comparison method to all U.S. sales upon a finding of targeting. *Id.* at 40–41. Commerce first points out that the statute itself is silent as to how broadly Commerce should apply the method once a targeting finding is made, and argues from this that "nothing in the statute restricts" Commerce in this regard. *Id.* at 40. Commerce argues that applying the targeted dumping methodology to all sales is "the most effective way to unmask targeted dumping, and to implement the statute's goal," since an exporter can use "profitable sales" to gain an offset and hide sales dumped in a targeted fashion. *Id.* at 40–41.

B. Commerce Must Apply the Targeted Dumping Regulation

The Court finds that Commerce violated its obligation to provide notice and opportunity for comment prior to the rescission of the targeted dumping regulation. As a consequence, the Court finds that the *Withdrawal Notice* is invalid. The Court will therefore remand the case back to Commerce for redetermination. On remand, Commerce must apply the targeted dumping regulation, 19 C.F.R. § 351.414(f) (1997), mandating that Commerce limit the scope of the average-to-transaction method to those sales Commerce identifies as targeted sales.

Pursuant to the Administrative Procedure Act ("APA"), "[g]eneral notice of proposed rule making shall be published in the Federal Register" and shall include "either the terms or substance of the proposed rule." 5 U.S.C. § 553(b). After publishing the notice, the agency must "give interested persons an opportunity to participate in the rule making" by submitting comments. *Id.* § 553(c). Notice of a new rule must be published "not less than 30 days before its effective date" unless "otherwise provided by the agency for good cause found and published with the rule." *Id.* § 553(d). This good cause exception to the notice requirement applies if Commerce finds that notice is "impracticable, unnecessary, or contrary to the public interest" and incorporates that finding and an explanation into the new rule. 5 U.S.C. § 553(b)(3)(B).

The *Withdrawal Notice* is of the kind of "rule making" covered by the notice requirement because "new rules that work substantive changes in prior regulations are subject to the APA's procedures." *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). New agency requirements "that will affect subsequent agency acts and have a future effect on a party before the agency" trigger the need for notice. *Id.* at 373. This notice requirement "does not simply erect arbitrary hoops through which federal agencies must jump without reason," but "improves the quality of agency rulemaking by exposing regulations to diverse public comment," "ensures fairness to affected parties," and "provides a well-developed record that enhances the quality of judicial review." *Id.* (internal citation and quotations omitted).

Commerce insists that it satisfied its APA notice and comment obligations when it published two notices in the Federal Register seeking comment on its implementation of the targeted dumping provisions of the statute. *U.S. Opp.* at 50, citing *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 72 Fed. Reg. 60,651 (Dep't of Commerce Oct. 25, 2007) (request for comment) and *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*,73Fed. Reg. 26,371 (Dep't of Commerce May 9, 2008) (request for comment). Commerce argues that it need not publish the precise content of the rule it ultimately adopts in order for the notice to be effective, but may instead take action that allows the public "the opportunity to comment meaningfully consistent with the statute." *Id.* at 53.

Commerce also insists that the APA's good cause exception to the notice and comment requirement was met here. *Id.* at 54. Commerce states that it may have imposed on itself, with the limiting regulation, too much restriction as to how to conduct a targeted dumping investigation, with the effect of "inadvertently denying relief to domestic industries suffering material injury from unfairly traded imports." *Id.* at 55 (internal quotations and citations omitted). Commerce identified the need to provide speedy relief under the statute to U.S. producers as justifying a public interest exception to the APA notice and comment requirements here. *Id.* at 55–56. Finally Commerce argues that even if the *Withdrawal Notice* was improperly issued, the impropriety did not harm Precision and Dubai Wire because the *Withdrawal Notice* placed no new requirements on them. *Id.* at 57–58.

The Court finds that the two requests for comment did not satisfy the APA notice and comment requirement. An APA notice must "be sufficiently descriptive to provide interested parties with a fair op-

portunity to comment and to participate in the rule making." *Gold East Paper (Jiansu) Co., Ltd. v. United States*, 37 CIT ___, 918 F. Supp. 2d 1317, 1325 (2013) ("*Gold East Paper*") (internal quotations and citations omitted). As *Gold East Paper* noted, the comment requests and the *Withdrawal Notice* make no references to each other. *Id.* at 1326. It is not obvious to an interested observer that connected rule making is intended, since the comment requests "discuss the methodologies that Commerce will use to determine whether targeted dumping has occurred," but the limiting regulation "restricts Commerce's ability to impose the targeting remedy across all sales." *Id.*

The Court furthermore finds it improper here to apply the APA's good cause exception to providing notice and comment prior to rule making. "The good cause exception is to be narrowly construed and only reluctantly countenanced." *Id.* (quoting *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (internal quotations omitted). The limiting regulation was adopted only after prolonged agency consideration that included a hearing and the submission of extensive pre and post hearing comments. *See* 62 Fed. Reg. at 27,296. Commerce's argument for a good cause exception here boils down to the notion that the limiting regulation presented an urgent danger of harm to domestic industries so compelling as to permit deviation from normal notice and comment requirements. But there was no pressing urgency of a type that does not always exist in the trade context; as pointed out in *Gold East Paper*, this justification "could apply to *almost any* rule promulgated by the agency." 918 F. Supp. 2d at 1327 (emphasis in original). To permit the good cause exception here would be to allow the exception to swallow the rule and effectively nullify the APA's limitation on summary agency action.

Commerce states that APA notice and comment violations are generally subject to the harmless error rule, i.e., a violation by the agency will only result in invalidating the agency's action where a party has suffered prejudice from the violation. *See* 5 U.S.C. § 706 (stating that "due account shall be taken of the rule of prejudicial error" by courts reviewing agency action). Commerce contends that the respondents suffered no harm because "the regulation withdrawal did not impose any new obligations on them." *U.S. Opp.* at 57. Assuming without deciding that the harmless error rule applies in this context, the Court finds that the harmless error rule is not so protective of agency missteps. Because the harmless error rule is more susceptible to being abused in the administrative rule making context than in the civil or criminal adjudication process, courts must accordingly "exer-

cise great caution in applying" it in rule making cases. *Paulsen v. Daniels*, 413 F.3d 999, 1006 (9th Cir. 2005) (internal citations omitted). This potential for abuse exists because an administrative agency has such great discretion when rule making that it need not "adopt a rule that conforms in any way to the comments presented to it," and may even go so far as to "adopt a rule that all commentators think is stupid or unnecessary," so long as the agency simply explains its reasons. *Id.* (internal citations omitted). Consequently, a court should "focus on the process as well as the result," an exhortation that has led one court to find a notice and comment violation harmless "only where the agency's mistake clearly had no bearing on the procedure used or the substance of the decision reached." *Id.* (internal quotations and citations omitted). Here, the process used in determining whether Precision and Dubai Wire engaged in remediable sales at less than fair value, and the margin to be assessed to remedy alleged dumping, were both central issues of the *Final Results* that were substantially affected by Commerce's failure to apply the limiting regulation. The Court therefore rejects Commerce's argument that the notice and comment defect in the *Withdrawal Notice* was a harmless error.

When, in the course of rule making, an agency violates the notice and comment requirements of the APA and the violation is not harmless, the new rule is invalid, resulting in reinstatement of the prior rule. *Id.* at 1008. Similarly, a regulation withdrawn in violation of the APA notice requirement will be enforced. *Citibank, Fed. Savings Bank v. FDIC*, 836 F. Supp. 3, 7 (D.D.C. 1993). The Court therefore rules that Commerce's *Withdrawal Notice* was invalid and, as a consequence, the Court will remand the case to Commerce. On remand, Commerce must redetermine the respondents' dumping margins by applying the limiting regulation of 19 C.F.R. § 351.414.

C. Ruling on Other Targeted Dumping Issues Will Be Held in Abeyance

The Court has carefully considered the numerous other issues raised by the parties regarding the manner in which Commerce analyzed and decided the targeted dumping allegations in this investigation. Given that the Court is remanding the case to Commerce to apply the limiting regulation, Commerce will again face in its redetermination the statutory question, under 19 U.S.C. § 1677f-1(d)(1), of whether any pattern of prices that differ significantly can be accounted for using either the average-to-average or the transaction-

to-transaction[5] methodology. Commerce may decide that it cannot or should not apply the average-to-transaction methodology at all on redetermination. It would thus be premature for the Court to rule on the other aspects of the targeted dumping methodology challenged here, since the basis for those rulings may evaporate after the remand.

When Commerce files its remand redetermination, the parties will have a chance to file comments on the results. At that time, the parties may challenge any aspects of Commerce's targeted dumping methodology, and the Court will rule on such issues, as appropriate, after the redetermination and comments of the parties have been submitted for consideration.

IV. *Surrogate Profit Statements*

Normal value ("NV") is determined by Commerce based on the price at which the foreign like product is sold in the comparison market, as long as there are sufficient sales of an ordinary type to serve as a proper comparison. 19 U.S.C. § 1677b(a)(1). In an investigation such as the one underlying this case, however, where there is no viable comparison market for subject merchandise in the UAE, Commerce instead bases NV on CV. 19 U.S.C § 1677b(a)(4). Commerce is required to determine CV based on, *inter alia*, the actual expense and profit figures incurred by a company; if those amounts are unavailable, the statute permits Commerce, as relevant here, to determine CV based on "any other . . . reasonable method." 19 U.S.C. § 1677b(e)(2)(B)(iii). Here, Commerce chose to rely on a surrogate financial statement for the profit portion of CV. *U.S. Opp.* at 23.

When faced with the need to obtain a surrogate financial statement to establish CV, Commerce applies a set of surrogate financial criteria to choose between statements available in the record. Commerce weighs "several factors, including: (1) similarity of the potential surrogate company's business operations and products to the respondent; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; (3) the contemporaneity of the surrogate data to the POR; and, (4) the similarity of the customer base." *I & D Memo* at 27 (citing prior administrative decisions). In applying this test, Commerce consistently takes the position that "[t]he greater the similarity in business operations and products, the more likely that there is a greater correlation in the profit experience of the companies." *Id.*

[5] The Court notes that Commerce does not appear to have addressed whether or not the transaction-to-transaction method would have been able to account for the targeted dumping found here. The statute and the framework of judicial review in such cases require that Commerce state its rationale, which Commerce should do in the redetermination.

Here, there were six financial statements on the record from which Commerce could seek an appropriate surrogate: BILDCO; AHI; Global Fasteners Limited ("GFL") (a Dubai Wire affiliate); Al Jazeera Steel Products Co. SAOG ("Al Jazeera"); National Metal Manfacturing and Casting's Companies ("NMN"); and Conares Metal Supply Limited ("Conares"). *See U.S. Opp.* at 23. In the *Preliminary Results*, Commerce chose to use AHI's statement as a surrogate for profit in the CV calculation, finding that AHI "produces products in the same general category of merchandise as nails." 76 Fed. Reg. at 68,134. For the *Final Results*, Commerce chose instead to use BILDCO's financial statements as a surrogate. *I & D Memo* at 29. Commerce made this change because "BILDCO's business operations and products appear to be more similar" to the respondents', since it "is a trader and manufacturer of building materials," "is a steel processor," "operates within the same UAE construction industry," and even has the same "customer base, the construction industry" as respondents. *Id.* Commerce noted that "the principal activities of AHI are ship repair, shipbuilding and fabrication of relatively sophisticated products such as platforms, barges, and pontoons," and its "customer base includes the marine, offshore, and engineering industries." *Id.* Commerce therefore found that BILDCO's profit statement was "a more reasonable option" than AHI, which operated and served a market "substantially divergent from" respondents. *Id.*

Dubai Wire argued that Commerce should not use AHI's information due to the divergent industry in which AHI functioned, but sought to have Commerce use the profit statement of its affiliate GFL instead. *Id.* at 21–22. Precision argued that use of the AHI statement was "unlawful and unreasonable" since, as a shipbuilding company, AHI produced materials completely unlike steel nails. *Id.* at 22–23. Precision instead sought to have Commerce calculate CV profit by "using Precision's profit on the sales of drawn wire in the home market," arguing that drawn wire and nails are generally similar. *Id.* at 23. Precision alternatively argued for use of "one or a combination of several other producers of merchandise in the same general category as the subject steel nails," including GFL, BILDCO, Conares, Al Jazeera, NMN. *Id.*

MCN argues that AHI remained the best source of surrogate profit values. *Id.* at 24. MCN stated that Commerce must reject GFL data as unreasonable and inaccurate; must reject Precision's drawn wire sales due to insufficient quantities; and must reject the other potential contenders as less reliable than AHI. *Id.* at 24–25.

Commerce noted that, after issuing the *Preliminary Results*, the parties placed additional financial statements on the record for Com-

merce to consider under the test given above. *Id.* at 25. Commerce rejected Al Jazeera and NMN because they were not UAE companies and Commerce sought home market profit experience to the extent possible. *Id.* at 27. Regarding GFL, Commerce determined that GFL's 2010 profit calculation for sales of screws and nails was not reliable since GFL purchased its nails from affiliate Dubai Wire rather than producing them. *Id.* GFL also had not provided sufficient evidence about the cost difference between models of screws, and did not differentiate sufficiently between the costs of screw sales in its domestic versus export markets. *Id.* As a result, Commerce found that GFL's profit statements were unreliable and chose not to use them in calculating CV. *Id.* at 28. In response to the backup argument by Dubai Wire that Commerce should then simply use GFL's company-wide 2009 or 2010 financial statements, Commerce noted that those statements primarily reflected export sales rather than home market sales and were equally unreliable as to CV for that reason. *Id.*

Regarding Conares, Commerce's practice is to use third-party, non-proprietary, publicly available financial statements for CV profit calculations, but Conares' statements were proprietary. *Id.* at 29. Ranged statements from Conares that were non-proprietary were rejected as "imprecise" and not matching "the segmented operations that are reported in the proprietary version." *Id.*

Commerce also considered whether BILDCO or AHI provided a better surrogate. Neither BILDCO nor AHI produced subject merchandise, so Commerce examined which company operated most like Dubai Wire and Precision. *Id.* Commerce found that BILDCO was "a trader and manufacturer of building materials" and "a steel processor . . . [with] a steel processing facility to cut and bend steel" that "operates within the same UAE construction industry as Dubai Wire and Precision." *Id.* BILDCO also had "the same" customer base as Dubai Wire and Precision. *Id.* In contrast, Commerce noted that AHI's principal activities were "ship repair, shipbuilding and fabrication of relatively sophisticated products such as platforms, barges, and pontoons," and AHI had as customers "the marine, offshore, and engineering industries." *Id.* Considering all of these factors, Commerce determined that BILDCO's "business operations and products appear to be more similar to those of Dubai Wire and Precision" than the other options. *Id.*

A. Contentions of the Parties

1. *MCN*

MCN argues that Commerce's decision to rely on BILDCO's financial statement as a profit surrogate was unsupported by evidence and contrary to law. *MCN Mem.* at 34–39. The main thrust of MCN's argument is that BILDCO is more a trading company than a producer; while BILDCO appears to cut and bend rebar, MCN contends that BILDCO does not fabricate the rebar or any other steel product. *Id.* at 35–36. MCN contrasts this with AHI and notes that Commerce found in the *Preliminary Results* that AHI made products in the same category as respondents. *Id.* at 36. MCN cites record evidence that AHI is, predominantly, a steel fabricator. *Id.* at 37. MCN's view is that it was "manifestly unreasonable" for Commerce to switch its reliance from the AHI statement to the BILDCO statement. *Id.* at 37–38. MCN also claims that Commerce did not even address the low level of BILDCO's inventory "composed of raw materials," or operating and staff cost ratios, submitted by MCN in the *Final Results*, rendering them arbitrary and contrary to law. *Id.* at 38–39.

2. *Dubai Wire*

Dubai Wire argues that Commerce should have used the GFL financial statements. *Dubai Wire Mem.* at 29–45. Dubai Wire argues that it and GFL "are sister companies" far more similar than Dubai Wire and BILDCO. *Id.* at 32–33. GFL's home market and export sales were all before Commerce, while BILDCO's U.S. sales were not and its home market profit could not be calculated. *Id.* at 33. Alternatively, Dubai Wire contends that Commerce should have used GFL's audited financial statements of profit for 2009 or 2010. *Id.* at 34–35. Dubai Wire also attacks Commerce's determination that the GFL "profit calculation results in an unreliable profit figure," which was the rationale Commerce used for not relying on it. *Id.* at 35–43. Dubai Wire contends that Commerce improperly rejects Dubai Wire's request that CV profit be based on GFL's worldwide profit from its 2010 or 2009 financial statement. *Id.* at 43–45.

Finally, Dubai Wire claims that Commerce abused its discretion when it rejected the financial statement of Conares. *Id.* at 45–46. Dubai Wire placed Conares' financial statement on the record on November 3, 2011 as confidential information, and placed a public profit and loss statement summary on the record on December 22, 2011. *Id.* at 45. On February 21, 2012, Dubai Wire submitted Conares' financial statement as a public document, but Commerce rejected it as "new factual information" submitted after the deadline for new

factual evidence had passed. *Id.* at 45–46. Dubai Wire claims that the application of the deadline was contrary to law since the document itself was not new, only its designation as confidential or public. *Id.* at 46.

B. Commerce's Choice of BILDCO for Surrogate Profit Statements Is Affirmed

In reviewing Commerce's decision, the Court is mindful that the standard of review calls for the agency's decision to be upheld unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). The Court finds that Commerce based its decision to rely on the BILDCO financial statements on "such relevant evidence as a reasonable mind would accept as adequate" to support its conclusion. *See NSK Corp.*, 716 F.3d at 1364 (internal citation and quotation omitted). Commerce, faced with the need to identify a reliable surrogate financial statement from among those submitted into the record, articulated a sensible rationale for its choice that drew on and considered the evidence in the record. Because that decision was based on a reasonable evaluation of the evidence, the Court affirms this aspect of the Final Results.

Dubai Wire argues in the alternative that Commerce should have used the financial statement of Conares. Dubai Wire had placed Conares' financial statement on the record as business proprietary information, and for that reason, Commerce declined to use it. *I & D Memo* at 29 ("it is our practice to use non-proprietary, publicly available financial statements when presented with third-party financial statements"). After the deadline for the submission of new factual evidence had expired, Dubai Wire attempted to place Conares' financial statement on the record as a public document, but Commerce rejected it as untimely. Dubai Wire argues that Commerce's rejection was contrary to law because the data was not "new" but was simply the same data previously available to the parties under an Administrative Protection Order, now made available to the public. *Dubai Wire Mem.* at 46. Dubai Wire cites no authority for its argument. Commerce argues that the pubic version of the Conares statement was "'new' factual information in the sense that it had been designated as proprietary and analyzed as a proprietary document by Commerce and by the parties." *U.S. Opp.* at 33.

The Court is unaware of any authority indicating whether a public document, submitted to replace a confidential document after the evidentiary submission period has expired, is new evidence for purposes of the deadline. However, the Court notes that the applicable

deadline is contained in a Commerce regulation. *See* 19 C.F.R. § 351.301. This specific situation is not addressed with particularity in the regulation. In the absence of contravening authority, the Court must defer to Commerce on the interpretation of its own regulation, so long as that interpretation is reasonable. Here, Commerce has expressed to the Court the interpretation that its regulation does not permit the submission of a public version of a confidential document into the record outside the ordinary deadline for the submission of new factual evidence. *U.S. Opp.* at 33. The Court finds that Commerce has asserted a reasonable interpretation of its deadline regulation and, pursuant to *Chevron*, the Court defers to that interpretation. Therefore, the Court affirms Commerce's decision to reject the public submission of the Conares financial statement.

V. *Imputed Interest Rate*

Pursuant to 19 U.S.C. § 1677b(e)(2), Commerce is to account for payments for "general and administrative expenses" when calculating a party's CV. In doing so for Dubai Wire, Commerce examined interest payments that Dubai Wire made on a loan from an affiliate and disregarded them pursuant to 19 U.S.C. § 1677b(f)(2) (permitting Commerce to disregard transaction between affiliated parties where the transaction amount "does not fairly reflect" the usual amount "in the market under consideration"). Where Commerce applies the transactions-disregarded rule, the statute instructs Commerce to replace the disregarded data by using "the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated." *Id.* The statute directs Commerce to replace the actual interest payments made by Dubai Wire with surrogate data based on whatever information was in the record as to what Dubai Wire would have paid in interest if it obtained the loan from a non-affiliate, and to use the surrogate interest rate in the CV calculation as an element of Dubai Wire's general and administrative expenses.

Commerce considered several sources of information as potential bases of an imputed rate for Dubai Wire's long-term loan. MCN urged Commerce to impute a 2010 interest rate on the affiliated loan based on a weighted average of the rates of several unaffiliated bank loans held by Dubai Wire in 2010. *I & D Memo* at 31. MCN also argued that Commerce should increase the amount for accrued interest from 2008 and 2009 on the principal of the loan, based on MCN's view that the interest charged in those years was below market rate. *Id.* Dubai Wire contended that Commerce should base the imputed rate on a calculation from its financial statements, dividing interest expense by

average 2010 loan balance. *Id.* If, however, Commerce chose to use a rate based on market-rate loans from 2010, Dubai Wire asked Commerce to include an unaffiliated supplier's loan. *Id.* Dubai Wire also argued that Commerce's rate from the preliminary results was excessive because it was based on short-term unaffiliated loans rather than long-term unaffiliated loans. *Id.* Finally, Dubai Wire contended that the 2008 and 2009 accrued interest was at market rate and should not be adjusted upward. *Id* at 31–32.

Commerce agreed with Dubai Wire that its 2008 and 2009 accrued interest was at market rate, due to a 2004 restructuring effective through the end of 2009, and accordingly did not upwardly adjust it. *Id.* at 32. In setting an imputed market rate for the POI, Commerce constructed a rate representing the midpoint of Dubai Wire's several unaffiliated short-term 2010 loans. *Id.* at 33. Commerce chose to rely on these short-term loans because it found them to be the best information in the record given that they were actual rates and given that Dubai Wire did not enter into any unaffiliated long-term loans in the POI. *Id.* Commerce also preferred these loans over a calculation from Dubai Wire's financial statements based on the same finding. *Id.* Commerce did not include Dubai Wire's unaffiliated supplier loan in its calculation because it found that such loans "have considerations other than simply commercial lending" that can result in "favorable rates." *Id.*

A. Positions of Parties Regarding Interest Rate Imputed to Dubai Wire

1. *Dubai Wire*

Dubai Wire objects to the surrogate interest rate that Commerce chose to impute to its affiliate loan. Dubai Wire claims that the record contained evidence of long-term loans it and its affiliate obtained at lower rates in 2004 and 2009, respectively, which Commerce should have relied upon in accordance with its ordinary practice. *Dubai Wire Mem.* at 27–28. Dubai Wire also contends that Commerce ignored the record evidence when treating the affiliate loan as having been essentially a new loan for 2010 by virtue of its renegotiation, and in having stated that Dubai Wire's interest rates on short and long term loans in prior years were "comparable." *Id.* at 28. Dubai Wire claims that, in basing its imputed interest rate on these unsupported findings, Commerce acted contrary to law and without record support. *Id.* at 28–29.

2. *MCN*

MCN supports Commerce's decision on the imputed interest rate. MCN argues that Commerce acted in accordance with its established practice in refusing to use the loan rates of Dubai Wire's affiliate when there were multiple rates for loans to Dubai Wire itself on the record. Mid Continent Nail Corp.'s Resp. to Def.-Int.'s Rule 56.2 Mots. and Brs. in Supp. ("*MCN Resp. Mem.*") at 42, ECF No. 67. MCN also points out that Commerce has previously relied on short-term unaffiliated loans as it did here. *Id.* at 42–43 (citing administrative determinations). As to the 2004 loan rate Dubai Wire argues Commerce should have relied upon, MCN contends that Commerce acted reasonably in relying instead on data more contemporaneous with the POI. *Id.* at 43. As to Dubai Wire's contention that Commerce erred in interpreting the 2010 loan renegotiation as a "new" loan, MCN points to a questionnaire response in which Dubai Wire itself indicated that it had "settled its outstanding dues" to the lender via the renegotiation. *Id.* at 43–44. MCN's view is that Commerce based its determination that the old loan had been satisfied by a new loan via the renegotiation on this evidence in the record and therefore acted with record support. *Id.* Finally, MCN notes that Dubai Wire's financial statements support Commerce in finding that the imputed rate Commerce chose was "comparable" to Dubai Wire's "actual, effective market-based interest rate during 2010," which was "even higher" than the imputed rate "when properly time-adjusted." *Id.* at 44–45.

3. *Commerce*

Commerce justifies its decision not to rely on the rate of Dubai Wire's 2004 (or its affiliate's 2009) long-term loan by contending that it "was not required to rely on a previously negotiated 2004 or 2009 long-term loan rate to impute interest on a 2010 long-term loan simply because they were both long-term loans." *Commerce Opp.* at 34. Citing prior decisions where it declined to rely on loan rates outside the POI, Commerce claims that it was reasonable to rely on 2010 short-term loan rates instead given that the relevant long-term loans had been renegotiated in 2010, effectively nullifying the relevance of the pre-2010 rates. *Id.* at 34–35. Commerce also points out that the 2004 loan was, for all practical purposes, a "new" loan for 2010 because its 2004 terms were "replaced by newly renegotiated 2010 terms" effective after the end of 2009. *Id.* at 35. Finally, Commerce contends that Dubai Wire's argument that it paid non-comparable interest rates on both short-term and long-term loans in prior years is not supported by the record. *Id.* at 36. Commerce points out that Dubai Wire's argument relies on rates on loans obtained by

its affiliate, not itself, and states that it acted reasonably and in accordance with the record in using rates on loans obtained by Dubai Wire itself instead of those obtained by its affiliate. *Id.*

B. Commerce Is Affirmed as to the Imputed Loan Rate

Dubai Wire's complaint about the interest rate Commerce chose to impute is a quibble about Commerce's exercise of authority under the statute to decide the appropriate interest rate from "the information available" in the administrative record. 19 U.S.C. § 1677b(f)(2). The Court finds that Commerce gave due consideration to the evidence in the record in settling on the interest rate it imputed to Dubai Wire's long-term affiliated loan. Commerce's decision was reasonable because Commerce balanced the need to find a comparable loan with the nature of the available evidence to arrive at a measured solution. Contrary to Dubai Wire's arguments, Commerce reasonably interpreted the record evidence as to the true import of Dubai Wire's 2004 loan and its renegotiation. Commerce also reasonably weighed the competing interests in basing the imputed loan rate on long-term loans versus basing it on evidence about actual 2010 loans taken by Dubai Wire itself. In choosing to base the imputed rate on the midpoint of Dubai Wire's actual 2010 loans, even though those loans were short-term rather than long-term, Commerce made a rational decision of exactly the sort authorized by the statute. Commerce's decision also did not deviate in any unexpected or unreasonable manner from its prior pratice. The Court consequently affirms Commerce's decision regarding the interest rate to be imputed to Dubai Wire's long-term loan from an affiliate.

CONCLUSION

For the reasons given above, it is hereby

ORDERED that the decision of Commerce that Millennium and Precision were not affiliated companies be, and hereby is, affirmed; and it is further

ORDERED that Commerce's decision to use the BILDCO financial statements as a source for surrogate profit values in calculating CV be, and hereby is, affirmed; and it is further

ORDERED that Commerce's decision as to the most appropriate interest rate to impute to the loan Dubai Wire received from an affiliate be, and hereby is, affirmed; and it is further

ORDERED that this case be remanded to Commerce for a redetermination, during the course of which Commerce must apply the targeted dumping regulation improperly withdrawn by Commerce,

given that the court has ruled that the *Withdrawal Notice* was invalid as it violated the notice and comment requirements of the Administrative Procedure Act; and it is further

ORDERED that counsel for the parties shall confer and no later than July 14, 2014 shall submit via ECF a joint proposed scheduling order to govern the completion of the remand redetermination, the filing of comments by the parties, and the filing of a response to the comments by the Department.

Dated: June 26, 2014
New York, NY

/*s*/*Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op. 14–86

DUPONT TEIJIN FILMS, MITSUBISHI POLYESTER FILM, INC., SKC, INC., AND TORAY PLASTICS (AMERICA), INC., Plaintiffs, v. UNITED STATES, Defendant, TIANJIN WANHUA CO., LTD., FUWEI FILMS (SHANDONG) CO., LTD., AND SICHUAN DONGFANG INSULATING MATERIAL CO., LTD., Defendant-Intervenors.

Before: Jane A. Restani, Judge
Court No. 12–00088

[Commerce's second redetermination regarding calculation of normal value in non-market economy antidumping duty case sustained.]

Dated: July 22, 2014

Jeffrey I. Kessler, Ronald I. Meltzer, Patrick J. McLain, and *David M. Horn*, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, of Washington, DC, for plaintiffs.

David F. D'Alessandris, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Whitney M. Rolig*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington D.C.

David J. Craven and *Saichang Xu*, Riggle and Craven, of Chicago, IL, for defendant-intervenors.

OPINION

Restani, Judge:

This matter is before the court following a remand to the United States Department of Commerce ("Commerce") in *Dupont Teijin Films v. United States*, 931 F. Supp. 2d 1297 (CIT 2013) ("*Dupont Teijin Films II*"). Plaintiffs Mitsubishi Polyester Film, Inc. and SKC,

Inc. (collectively, "Plaintiffs") and Defendant-Intervenors Tianjin Wanhua Co., Ltd., Sichuan Dongfang Insulating Material Co., Ltd., and Fuwei Films (Shandong) Co., Ltd. (collectively, "Defendant-Intervenors") challenge various aspects of the Final Results of Redetermination Pursuant to Court Order, ECF No. 70–1 ("*Second Remand Results*"). For the reasons set forth below, Commerce's *Second Remand Results* are sustained.

INTRODUCTION

The court assumes familiarity with the facts of this case as set out in the previous opinion. *See generally Dupont Teijin Films II*, 931 F. Supp. 2d at 1299–1307. For ease of understanding, however, a brief summary is provided below.

This case involves challenges to Commerce's final results of redetermination in the second administrative review of the antidumping duty order of polyethylene terephthalate film, sheet, and strip ("PET film") from the People's Republic of China ("PRC"). *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of the 2009–2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 77 Fed. Reg. 14,493 (Dep't Commerce Mar. 12, 2012). Initially, Commerce calculated the dumping margins using India as the primary surrogate country. *Id.* at 14,494. Commerce calculated weighted-average dumping margins of 8.42% for Tianjin Wanhua Co., Ltd, 10.87% for Sichuan Dongfang Insulating Material Co., Ltd., and 8.48% for both Fuwei Films (Shandong) Co., Ltd. and Shaoxing Xiangyu Green Packing Co., Ltd. *Id.*

In its previous order in this case, the court instructed Commerce to reconsider its surrogate country selection using 2009 Gross National Income ("GNI") data. *Dupont Teijin Films II*, 931 F. Supp. 2d at 1307. Commerce ignored 2009 GNI data indicating that India was no longer economically comparable to the PRC, despite the data being on the record, claiming, very belatedly, that the data were not filed early enough in the proceedings. *Id.* at 1299, 1301, 1307. The court held that Commerce must consider record evidence and that the parties were not given a meaningful opportunity to comment on economic comparability. *Id.* at 1305.

On remand, Commerce utilized the 2009 GNI data to create a new list of potential surrogate countries and selected South Africa as the primary surrogate country to use in this administrative review because South Africa is at a similar level of economic development as the PRC, it is a significant producer of comparable merchandise, and there were reliable data that could be used to value the factors of

production. *Second Remand Results* at 1–2.[1] The change in the primary surrogate country resulted in higher margins of 19.49% for Tianjin Wanhua Co., Ltd, 14.25% for Sichuan Dongfang Insulating Material Co., Ltd., and 19.35% for both Fuwei Films (Shandong) Co., Ltd. and Shaoxing Xiangyu Green Packing Co., Ltd. *Id.* at 34.

Plaintiffs challenge Commerce's decision to use South Africa as the primary surrogate country for calculating the normal value of PET film, contending that South Africa is not a significant producer of comparable merchandise and that Commerce should instead use data from Thailand and/or Indonesia. Pls.' Cmts. on Commerce's Second Remand Determination 1–2, ECF No. 79 ("Pls.' Br."). Plaintiffs argue that South Africa is not a significant producer of comparable merchandise due to its relatively low volume of exports under Harmonized Tariff Schedule ("HTS") 3920.62, which covers PET film.[2] *Id.* at 3–4. Additionally, Plaintiffs contend that Commerce acted unreasonably in relying on the financial statement of South African producer Astrapak to determine that South Africa is a significant producer of comparable merchandise. Pls.' Br. 5–8.

Defendant-Intervenors agree with Commerce's rejection of Thailand as the primary surrogate country.[3] Cmts. of Def.-Intvnrs. on Second Remand Results 2, ECF No. 77 ("Def.-Intvnrs.' Br."). Defendant-Intervenors also agree that Commerce properly selected South Africa as the primary surrogate country, but they argue that Commerce failed to use all of the South African financial statements on the record in calculating the financial ratios. *Id.* at 3–4.

Defendant United States ("the government") responds that Commerce reasonably selected South Africa as the primary surrogate country and calculated the surrogate financial ratios in accordance

[1] Commerce disagrees with the court's instruction to reconsider its surrogate country selection using the 2009 GNI data. Commerce completed its redetermination under protest on this issue. *Second Remand* Results at 2–3.

[2] HTS 3920.62 covers "[o]ther plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials: [o]f polycarbonates, alkyd resins, polyallyl esters or other polyesters: [o]f poly(ethylene terephthalate)."

[3] Defendant-Intervenors believe that Commerce should have continued to use India as a surrogate country. Def.-Intvnrs.' Br. 2–3. Defendant-Intervenors, however, acknowledge that Commerce's decision not to use India as a surrogate country is based upon the court's prior decisions in this matter directing Commerce to consider the 2009 GNI data of record. *Id.* In doing so, Commerce found India was no longer "economically comparable" to the PRC and no longer qualified as a potential surrogate country. *Second Remand Results* at 7. Based on the court's prior decisions instructing Commerce to consider the 2009 GNI data, Defendant-Intervenors recognize that it is inappropriate to challenge Commerce's rejection of India at this time. Def.-Intvnrs.' Br. 2. Accordingly, the court does not address this argument.

with its policies and the law. Def.'s Resp. to Pls.' Cmts. Regarding the Remand Redetermination 4, ECF No. 82 ("Def.'s Br.").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012). The court will not uphold any determination by Commerce that 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. South Africa as the Surrogate Country

A. *Background*

Because the PRC is considered by Commerce to be a non-market economy[4] ("NME"), much of the antidumping investigation and subsequent administrative reviews have focused on selecting surrogates for valuing the various factors of production used in manufacturing PET film in order to calculate normal value. *See* 19 U.S.C. § 1677b(c)(1). The statute requires that surrogate values be based, "to the extent possible," on data from an economically comparable market economy country that is a "significant producer[] of comparable merchandise." *Id.* § 1677b(c)(4).

"Comparable merchandise," however, is not defined in the relevant statute or regulations, and Commerce asserts that it defines comparable merchandise on a case-by-case basis. Letter from Import Administration to All Interested Parties Attach II., SRPD 2 at barcode 3154951–01 (Sept. 17, 2013), ECF No. 80 (Apr. 7, 2014) ("Policy Bulletin 04.1"). Commerce considers factors such as physical differences in products, major inputs of production, whether the product is of low or high value added, and the production process. *Id.* In cases where the subject merchandise contains a major input that is specialized or used intensively in the production of the subject merchandise, comparable merchandise should be identified on the basis of a comparison of such major input. *Id.*

"Significant producer" also is not defined in the relevant statute or regulations. *Id.* Commerce alleges that it determines whether a country is a significant producer on a case-by-case basis as well. *Id.* A significant producer could be a top world producer of comparable merchandise or a country that is a net exporter of comparable mer-

[4] A nonmarket economy country is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

chandise, even if the country is not a top world producer. *Id.* Commerce, however, avoids assessing significant production relative to the NME country's production or the production of other potential surrogate countries, but instead Commerce assesses the output of the potential surrogate country in relation to world production and trade in comparable merchandise. *Id.* Commerce prefers to use world production data, but in many cases such data are not available and Commerce often will turn to export data. *See Second Remand Results* at 7–8; Def.'s Br. 12. Thus, the specific factual data relied on to make the determination of significant production will vary from case to case. Policy Bulletin 04.1; *Second Remand Results* at 10.

The surrogate values selected from an economically comparable significant producer are then used to compute the normal value, in this case the cost of production for a particular PET film producer from the PRC, as if that producer had operated in a hypothetical market economy. *See* 19 U.S.C. § 1677b(c)(1).

In the case at hand, Commerce selected South Africa as the primary surrogate country after determining that South Africa was economically comparable to the PRC, was a significant producer of comparable merchandise, and had adequate data available, as explained. *Second Remand Results* at 2.

First, Commerce considered comparable merchandise to be products covered by HTS 3920.62 and other PET- and polymer-based products, and Commerce found that all six potential surrogate countries exported products falling under HTS 3920.62. *Id.* at 7–11. In addition to export data, Commerce also looked at the financial statement of Astrapak, a South African producer of packaging materials. *Id.* at 8, 10–11. Astrapak's Flexibles Division manufactures high-density polyethylene films, low density single- and multi-layered films, plain and printed films, co-extruded film, blown film, film for pallet stretch wrap, and industrial pallet shrink shroud. *Id.* at 10. All of these films are produced by melting and extruding plastics that are used for food packing. *Id.* Commerce determined that because these products are produced in a similar way and with similar inputs for PET film, the products were comparable to the subject merchandise. *Id.* at 10. Next, Commerce concluded that both Thailand and South Africa were significant producers of comparable merchandise because they manufactured and exported merchandise comparable to PET film. *Id.* at 12. Finally, Commerce selected South Africa as the primary surrogate country due to concerns over the reliability of the data from Thailand.[5] *Id.* at 2, 13.

[5] Specifically, Commerce found that Polyplex Thailand received countervailable subsidies and therefore its data were not the best available information. *Second Remand Results* at

B. *South Africa Is a Significant Producer of Comparable Merchandise*

Plaintiffs argue that South Africa is not a significant producer of comparable merchandise due to its relatively low volume of exports under HTS 3920.62 and contend that Commerce's reliance on Astrapak's financial statement to determine that South Africa is a significant producer of comparable merchandise in the light of the export data was unreasonable. Pls.' Br. at 2–8. This challenge rests on two grounds. First, Plaintiffs argue that because there is no evidence that Astrapak produces any goods falling under HTS 3920.62, the export data are corroborated and show that South Africa is not a significant producer of comparable merchandise. *Id.* at 7. Second, Plaintiffs argue that Commerce acted unreasonably and inconsistent with its stated policy by comparing Astrapak's production to the exports of other surrogate countries in finding that South Africa is a significant producer of comparable merchandise. *Id.* at 5–6.

The government responds that Commerce reasonably selected South Africa as the primary surrogate country in accordance with its policies and the law. Def.'s Br. 6–15. The government emphasizes that when making a comparable product finding, Commerce does not limit its analysis to identical merchandise—it also considers the production of comparable merchandise. *Id.* at 7 (citing Policy Bulletin 04.1). Commerce found products under HTS 3920.62 to be comparable because that classification covers the subject merchandise. *Second Remand Results* at 8. Commerce also found products with polymers as the only major input, such as flexible films or rigid product containers that specifically require PET, to be comparable merchandise. *Id.* at 10–11, 18–20. The government argues that Commerce, in deciding that Astrapak produces comparable merchandise, appropriately considered products falling under the HTS heading of the subject merchandise as well as products with the same major inputs and uses as the subject merchandise to be comparable, consistent with Policy Bulletin 04.1. Def.'s Br. 7–8. The government also argues that Astrapak's production level shows that South Africa is a significant producer of merchandise comparable to PET film. *Id.* at 12–13.

13–15; *see* 19 U.S.C. § 1677b(c)(1). It is Commerce's practice to reject financial statements of a company that Commerce has reason to believe has benefitted from countervailable subsidies, especially when other acceptable data are available. *See Second Remand Results* at 14. Commerce's rejection of Thailand as a surrogate country, due to the suspected countervailable subsidies in Polyplex Thailand's financial statements, appears to be supported by substantial evidence and in accordance with law, and the parties do not challenge directly Commerce's justification for rejecting the Thai data.

1. *Commerce Reasonably Considered Astrapak's Merchandise to be Comparable to PET Film.*

Plaintiffs argue that South Africa's low ranking among exporters of goods falling under HTS 3920.62 (52nd out of 80 countries) shows that is it not a significant producer of comparable merchandise and contend that the data contained in Astrapak's financial statement corroborate, rather than rebut, the minimal production of comparable merchandise. Pls.' Br. 3–4, 7. Plaintiffs argue that Astrapak is not a producer of comparable merchandise because there is no evidence that Astrapak produces any goods falling under HTS 3920.62. *Id.* at 7. Thus, the only record evidence relevant to South Africa's production of comparable merchandise is the export data, which indicate that South Africa is not a significant producer. *See id.* This claim lacks merit.

Plaintiffs incorrectly assume that because Astrapak's products would not fall under HTS 3920.62, they are not comparable. *Id.*; Def.'s Br. 9–11. Aside from arguing that Astrapak's products do not fall under HTS 3920.62, plaintiffs do not actually specify why Astrapak's products are not comparable to PET film. Pls.' Br. 7. Commerce, however, is not restricted to looking at export data and the merchandise falling under the exact HTS heading covering the subject merchandise when determining if merchandise is comparable. Commerce should consider the record as a whole, including financial statements, to makes its findings, especially when the export data alone may not give an accurate picture of production. *See Dorbest Ltd. v. United States*, 30 CIT 1671, 1683; 462 F. Supp. 2d 1262, 1274 (2006) (using financial statements to determine that India was a significant producer of wooden bedroom furniture based on the totality of the circumstances).

Here, the record as a whole demonstrates that South Africa manufactured products falling under the relevant HTS heading as well as products comparable to the subject merchandise based on major inputs and uses. The export data showed only products that were exported, and they captured only a subset of all comparable merchandise, namely the products falling under HTS 3920.62. Although Astrapak's financial statement corroborates the fact that South Africa exports relatively small amounts of PET film classified under HTS 3920.62, the statement shows that Astrapak produces significant amounts of merchandise comparable to PET film that does not fall under HTS 3920.62. Commerce's decision to give little weight to South Africa's fairly low ranking in exports under HTS 3920.62 in the light of Astrapak's financial statement showing production of compa-

rable merchandise was reasonable, supported by substantial evidence, and in accordance with law.

2. *Commerce Did Not Act Unreasonably in Comparing Astrapak's Production to the Export Levels of Other Surrogate Countries in Finding that South Africa Was a Significant Producer of Comparable Merchandise.*

Based on the data on the record, Commerce determined that both South Africa and Thailand were significant producers of comparable merchandise. *Second Remand Results* at 9. First, Commerce looked at the export data and found that because Thailand exported over 44 million kilograms of PET film, it was a significant producer. *Id.* Second, Commerce found that Astrapak's Flexibles Division alone, which manufactures products comparable to PET film, as explained above, produced merchandise of greater value than the PET film exports of any potential surrogate country.[6] *Id.* at 10. On this basis, Commerce determined that South Africa was a significant producer of comparable merchandise. *Id.* at 12.

Plaintiffs argue that Commerce was unreasonable in comparing the value of Astrapak's merchandise to the value of the PET film exports of the other potential surrogates, as doing this compares production of two potential surrogate countries, which is inconsistent with Commerce's policy. Pls.' Br. 5–6. The court need not decide whether comparison of potential surrogates in this manner is somehow prohibited. Here, the government supports Commerce's comparison of Astrapak's production to other countries by explaining that the comparison was not a means of ranking the countries, but was reflecting Commerce's position that the export data alone were not sufficient to determine whether South Africa was a significant producer, as South Africa is not an export-focused country with regard to this product.[7] Def.'s Br. 13–15.

Commerce properly considered all record evidence in determining South Africa was a significant producer. Because world production data were not available, Commerce reasonably looked to other sources of data on the record, including export data and Astrapak's

[6] Astrapak's Flexibles Division produced merchandise valued at 182,805,481.42 USD. *Second Remand Results* at 10. The value of Thailand's PET film exports was 103,690,241 USD. Memorandum from Jonathan Hill to Director of AD/CVD Operations re: Selection of a Surrogate Country Attach. II, PD 34 at barcode 3037997–01 (Oct. 28, 2011), ECF No. 80 (Apr. 7, 2014).

[7] Commerce noted that only 10% of Astrapak's merchandise is exported and 90% is consumed domestically. *Second Remand Results* at 22. Because of the high amount of domestic consumption, South Africa's export data likely do not capture a significant amount of the comparable merchandise actually produced. *See id.*

financial statement. *See Dorbest*, 30 CIT at 1683; 462 F. Supp. 2d at 1274. In stating that Astrapak's Flexibles Division's production value was greater than the value of other potential surrogate countries' exports, Commerce was not defining "significant" solely in relation to other surrogate countries. Rather, Commerce was using Thailand as a benchmark to determine whether South Africa's production levels would qualify it as a significant producer. If Thailand is a significant producer—and the parties do not argue that it is not—and the record showed even greater production in South Africa, then South Africa logically would be a significant producer as well. Reading the record as a whole, rather than focusing solely on the export data for HTS 3920.62, Commerce reasonably could conclude that South Africa was a significant producer of comparable merchandise. Commerce's determination that South Africa was a significant producer of comparable merchandise thus was consistent with Policy Bulletin 04.1, is supported by substantial evidence, and is in accordance with the law.

II. Surrogate Financial Ratios

The court now turns to Defendant-Intervenors' challenge to Commerce's calculation of the surrogate financial ratios. Commerce usually relies on public information gathered from producers of identical or comparable merchandise in the surrogate country in calculating surrogate financial ratios. 19 C.F.R. § 351.408(c)(4) (2013). When the record contains multiple contemporaneous financial statements from different producers, Commerce's practice is to average the financial statements to eliminate any potential distortions that may arise from any one producer's statement. *See Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368, 1374 (Fed. Cir. 2010). When only a single producer's financial statements are available, however, this rationale does not apply. Under its current practice, "when considering multiple financial statements from a single company [Commerce] considers the financial statements overlapping more months of the POR to be more contemporaneous, and thus, preferable." *See* Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of 2008–2009 Administrative Review, A-552–802, at 14 n.78 (July 30, 2010), *available at* http://enforcement.trade.gov/frn/summary/vietnam/2010–19577–1.pdf (last visited July 15, 2014).

Two financial statements from Astrapak were placed on the record here. The first financial statement was for the period of March 1, 2009, to February 28, 2010 ("2010 Statement"). *See Second Remand Results* at 29. The second financial statement covered the period from

March 1, 2010, to February 28, 2011 ("2011 Statement"). *Id.* Commerce used the 2011 Statement in calculating the surrogate financial ratios, because it overlapped most with the period of review. *Id.*

Defendant-Intervenors argue that Commerce should have used a simple or weighted average of both financial statements. Def.-Intvnrs.' Br. 3. Defendant-Intervenors assert that the failure to average the two financial statements was unreasonable because both of Astrapak's statements are contemporaneous, no flaws have been discovered that would disqualify the use of either statement, and both statements overlap with the POR by a substantial period, four months for the 2010 Statement and eight months for the 2011 Statement. *Id.* at 3. Defendant-Intervenor's also rely upon *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of the 2009–2010 Antidumping Duty Administrative Review and Intent to Rescind, in Part*, 76 Fed. Reg. 62,356 (Dep't Commerce Oct. 7, 2011), and *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 39,680 (Dep't Commerce July 5, 2012), to argue that Commerce's practice is to average multiple financial statements. Def.-Intvnrs.' Br. 3–4. The government argues that Commerce's use of only the 2011 Statement in calculating the financial ratios was proper. *Id.* at 15–17.

The record here contains two financial statements from a single company, Astrapak, and does not contain financial statements from any other South African producer of comparable merchandise. Because the record contains the statements of only one company, Commerce's use of the financial statement that most overlapped with the POR (i.e., was the most contemporaneous) is both reasonable and consistent with its current practice. There was no need to average the financial statements because distortions caused by relying on only one company's financial statement are not a concern when only one producer's financial statements are available. Unless distortions are involved, Commerce may choose a simpler approach. The court thus holds that Commerce's use of the 2011 Statement in the remand determination is supported by substantial evidence and is in accordance with law.

CONCLUSION

For the foregoing reasons, Commerce's *Second Remand Results* are SUSTAINED. Judgement will enter accordingly.

Dated: July 22, 2014
New York, New York

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

Slip Op. 14–88

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

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

[On sixth administrative review of antidumping duty order on chlorinated isocyanurates, requests for voluntary remand granted, and motions for judgment on the agency record granted in part.]

Dated: July 24, 2014

James R. Cannon, Jr. and *Thomas M. Beline*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for the plaintiffs.

James K. Horgan, *John J. Kenkel*, and *Gregory S. Menegaz*, DeKieffer & Horgan, of Washington, DC, for the consolidated-plaintiff and defendant-intervenor Juancheng Kangtai Chemical Co., Ltd.

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

Jane C. Dempsey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. On the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *David W. Richardson*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington DC.

OPINION AND ORDER

Musgrave, Senior Judge:

This opinion addresses challenges to *Chlorinated Isocyanurates From the People's Republic of China*, July 18, 2014. Reg. 4386 (Jan. 22, 2013), PDoc 169 ("*Final Results*"), the sixth administrative review of an antidumping duty ("AD") order on chlorinated isocyanurates[1] from the People's Republic of China ("PRC") conducted by the International Trade Administration of the U.S. Department of Commerce

[1] The "subject merchandise" are all chlorinated isocyanurates. These are derivatives of cyanuric acid and consist of three primary compositions, trichloroisocyanuric acid, sodium dichloroisocyanurate, and sodium dichloroisocyanurate. Subject merchandise are available in powder, granular, and tableted forms and are created in three steps, first making the intermediate inputs cyanuric acid, caustic soda and chlorine gas, second combining these inputs, and third "shaping the finished products." Issues and Decision Memorandum for the *Final Results* (Jan. 14, 2013), PDoc 164 ("I & D Memo") at cmt. 1.

("Commerce"). Before the court in this consolidated action[2] are three motions for summary judgment on the agency record brought under USCIT Rule 56.2. One motion is brought by the consolidated-plaintiff and defendant-intervenor Arch Chemicals Inc. ("Arch"), an importer of the subject merchandise, and by the consolidated-plaintiff Hebei Jiheng Chemical Co., Ltd. ("Jiheng"), a producer and exporter of the subject merchandise from the PRC.[3] A second motion is brought by the consolidated-plaintiff and defendant-intervenor Juancheng Kangtai Chemical Co., Ltd. ("Kangtai"), a producer and exporter of the subject merchandise from the PRC.[4] The third motion is brought by the plaintiffs Clearon Corp. and Occidental Chemical Corp., U.S. producers of domestic like product (together "Clearon").[5] Collectively, the motions contest ten aspects of the *Final Results*: Commerce's (1) calculation of the selling, general, and administrative expense financial ratio ("SG & A ratio") using data pertinent to the Philippines, (2) alleged use of a 2011 financial statement not on the record, (3) treatment and calculation of intra-company transportation of intermediate products, (4) application of new methodology for valuing ammonia gas and sulfuric acid by-products, (5) selection of the Philippines as the primary surrogate country, and the surrogate value selection for (6) chlorine, (7) hydrogen gas, (8) sodium hydroxide, (9) electricity, and (10) urea.

Commerce asks the court to grant voluntary remand for three of its determinations, namely (1) its calculation of the SG & A ratios using Philippine data, (2) its calculation of intra-company transportation of intermediate products, and (3) its by-product valuation methodology, and it opposes the remaining issues of the three Rule 56.2 motions.[6] Arch and Kangtai contest three aspects of Clearon's Rule 56.2 motion, and in doing so argue that Commerce's surrogate value selection for

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[2] *Juancheng Kangtai Chemical Co., Ltd. v. United States*, Court No. 13–00056 and *Arch Chemicals, Inc. et al v. United States*, Court No. 13–00061, have been consolidated into this action, now styled *Clearon Corporation et al v. United States,* Consol. Court No. 13–00075. *See* Order (Apr. 22, 2013), ECF No. 20.

[3] Mot. for Judgment on the Agency R. pursuant to Rule 56.2 by Consol. Plaintiffs Arch Chemicals, Inc. and Hebei Jiheng Chemical Co., Ltd. (Aug. 15, 2013), ECF No. 27 ("Arch & Jiheng Rule 56.2 Mot."). Arch had also intervened herein on the side of the defendant. *See* Arch's Mot. to Int. as a Matter of Right, Court No. 13–00073 (Apr. 16, 2013), ECF No. 12.

[4] Mot. for Judgment on the Agency R. pursuant to Rule 56.2 by Consol. Pl.'s Juancheng Kangtai Chemical Co., Ltd. (Aug. 15, 2013), ECF No. 30 ("Kangtai Rule 56.2 Mot."). Kangtai had also intervened herein on the side of the defendant. Kangtai's Mot. to Int. as a Matter of Right, Court No. 13–00073 (Apr. 24, 2013), ECF No. 21.

[5] Mot. for Judgment on the Agency R. pursuant to Rule 56.2 by Pl.'s Clearon Corp. and Occidental Chemical Corp. (Aug. 15, 2013), ECF No. 31 ("Clearon Rule 56.2 Mot.").

[6] Def's Resp. to Pl.'s and Consol. Pl.'s Rule 56.2 Mot.'s for Judgment on the Agency R. (Feb. 24, 2014), ECF No. 49 ("Def's Resp.").

urea and hydrogen gas was the best available information on the record and that Clearon failed to exhaust administrative remedies concerning its by-product claims.[7]

For the reasons below, the court grants the three voluntary remand requests and also orders remand on the issue of surrogate country selection from the *Final Results*.

I. *Jurisdiction and Standard of Review*

Final administrative AD review determinations are evaluated under 19 U.S.C. §1516a(b)(1)(B)(i). Commerce's determinations, findings, or conclusions are sustained unless they are found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." *NSK Ltd. v. United States*, 481 F.3d 1355, 1359 (Fed. Cir. 2007), citing 19 U.S.C. §1516a(b)(1)(B)(i)); *see also United States v. Eurodif S.A.*, 555 U.S. 305, 316 n.6 (2009). Substantial evidence is "more than a mere scintilla", it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. V. NLRB*, 340 U.S. 474, 477 (1951), citing *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

In determining if Commerce's interpretation of a statute is in accordance with law, the court applies a two-step analysis set forth by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). First, the court examines whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Id.* Second, if the statute is silent to the specific issue or the legislative intent is not clear, the court must determine "whether the agency's answer is based upon a permissible construction of the statute." *Id.* at 843–44. *See also*, *e.g.*, *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359–60 (Fed. Cir. 2007). The court provides the agency deference on interpreting the statutes the agency administers and has found that "[a]ny reasonable construction of the statute is a permissible construction." *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004), citing *Torrington v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996).

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[7] *See* Def. Int. Arch Chemicals, Inc. Resp. to Pl.'s Clearon and Occidental's Rule 56.2 Mot. For Judgment on the Agency R. (Feb. 24, 2014), EFC No. 46 ("Arch Resp."); *see also* Def. Int. Kangtai Chemicals, Co., Ltd. Resp. to Pl.'s Clearon and Occidental's Mot. For Judgment on the Agency R. (Feb. 24, 2014), EFC No. 50 ("Kangtai Resp.").

II. *Background*

Commerce initiated the review covering four producers/exporters of the subject merchandise from the PRC and selected Jiheng and Kangtai as the two mandatory respondents in the review.[8] Commerce's Office of Policy issued a Surrogate Country Memorandum as part of the review which included the following "non-exhaustive" list of six potential surrogate countries that it determined were "most likely to have good data availability and quality" and were "at a level of economic development comparable to [the PRC] in terms of *per capita* gross national income" for the review based on figures from the World Bank's 2011 World Development Report:

Country	*Per Capita* GNI, 2009 ($USD)
PRC	3,590
Philippines	1,790
Indonesia	2,230
Ukraine	2,800
Thailand	3,760
Columbia	4,930
South Africa	5,770

See Memorandum to Mark Hoadley, Request for a List of Surrogate Countries for an Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China (Sep. 9, 2011), PDoc 37 ("Surrogate Country Memorandum"), referencing World Development Report 2011, World Bank. Commerce asked the parties to comment on the surrogate country selection and provide it with information for valuing factors of production. In response, the parties submitted surrogate country comments and surrogate value data from India, Thailand, the Philippines, and South Africa.[9]

Commerce published its preliminary results and selected South Africa as the primary surrogate country for valuing factors of produc-

[8] *See Initiation of Antidumping Administrative Reviews*, 76 Fed. Reg. 45227, 45229 (July 28, 2011). The review covered Jiheng, Kangtai, Nanning Chemical Industry Co., Ltd., and Zhucheng Taisheng Chemical Co., Ltd. for the period of June 1, 2010 through May 31, 2011.

[9] In its comments Kangtai offered Thailand and the Philippines as potential surrogate countries and noted that India had been the surrogate country for the first five reviews, that Commerce had removed India from the potential surrogate list, and that Commerce rarely selects a surrogate country that is not included in the list. *See* Kangtai's Sur. Country Cmts. (Dec. 19, 2011), PDoc 58 at 2–3. Arch commented that Thailand and the Philippines were the best surrogate countries options. *See* Arch Sur. Country Cmts. (Jan. 9, 2012), PDoc 55 at 2. Clearon commented that South Africa was the best surrogate choice. *See* Clearon Sur.

tion, finding it was the largest exporter of comparable merchandise among the countries on the potential surrogate list. For factors of production ("FOPs") where data was not placed on the record from South Africa or other countries on the list, Commerce relied on India data stating that it was the only alterative on the record, and that "even though India is not on the list of possible surrogate countries in the Surrogate Country Memorandum, India is a significant producer of comparable merchandise that has the data needed to calculate certain surrogate values." *See Chlorinated Isocyanurates From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 41746, 41479 (July 16, 2012) ("*Preliminary Results*") (citation omitted).

Commerce received comment and rebuttal briefs from the parties including a brief from Kangtai claiming India should be selected as the primary surrogate country or in the alternative South Africa should be selected. *See* Kangtai Rebuttal Brief at 1–2 (Dec. 10, 2011), PDoc 159. Commerce then issued its *Final Results* and choose the Philippines as the primary surrogate country, finding that it is economically comparable to the PRC, that it is a significant producer of comparable merchandise, and that the record now contained Philippine surrogate value data for all but one factor of production (steam). I & D Memo at cmt. 2. Responding to Kangtai's argument that India was the appropriate surrogate country, Commerce stated that when selecting a primary surrogate country it will normally first look to the potential surrogate list in the Surrogate Country Memorandum, and that "the list did not include India because India's *per capita* GNI did not fall within the range of countries proximate to the PRC." *Id.*

III. *Claims*

The first claim of Arch, Jiheng and Kangtai challenges Commerce's decision to treat employment and retirement benefits as SG & A instead of labor expenses when calculating the financial ratios. The parties aver that Commerce's determination is not supported by substantial evidence, that Commerce failed to provide an adequate explanation for its determination, and that its decision resulted in the double-counting of certain labor costs contrary to Commerce's stated policy. *See* Arch & Jiheng Rule 56.2 Mot. at 21–24; *see also* Kangtai Rule 56.2 Mot. at 31–38. Second, Kangtai argues Commerce erred in calculating the financial ratio by relying a 2011 financial statement not on the record. Kangtai Rule 56.2 Mot. at 38–39.

Country Cmts. (Dec. 19, 2011), PDoc 57 at 3. *See also,* Jiheng Sur. Value Sub. (Jan. 9, 2012), PDoc 65; Clearon Sur. Value Sub. (Jan. 9, 2012), PDoc 66; Kangtai Sur. Value Sub. (Jan. 9, 2012), PDocs 69, 70; Kangtai Sur. Value Sub. for Final Results, (Sept. 5, 2012), PDocs 116, 117.

In the third claim, Arch and Jiheng argue Commerce acted contrary to law by applying a new methodology for valuing intra-company transportation when calculating normal value in the *Final Results* without providing notice, or giving the parties an opportunity to comment, or providing the parties an opportunity to place requisite information on the record. The parties further claim Commerce failed to provide a reasoned explanation for the change in methodology. Arch & Jiheng Rule 56.2 Mot. at 31–35.

Fourth, Clearon, Kangtai, Arch and Jiheng challenge Commerce's valuation of the subject merchandise's by-product offsets, ammonia gas and recovered sulfuric acid, which are converted to produce ammonium sulfate. All parties claim Commerce changed its methodology for by-product valuation from the *Preliminary Results* to the *Final Results* without providing a reasoned explanation or support for its change in practice. Clearon contends that Commerce failed to account for the costs associated with converting ammonium gas to ammonium sulfate, that it ignored the language of its own questionnaire, that it disregarded its regulations, and that it permitted Jiheng and Kangtai to reduce their antidumping duty margins by withholding data. Clearon Rule 56.2 Mot. at 20–25. Arch and Jiheng claim Commerce made the change without providing the parties notice and an opportunity to comment and place requisite information on the record. Arch & Jiheng Rule 56.2 Mot. at 8–12, 24. Kangtai alleges that the determination was unlawful and unreasonable, that no party argued for the change in methodology, and that Commerce should apply the methodology it used in the *Preliminary Results*. *See* Kangtai Rule 56.2 Mot. at 38–40; Kangtai Resp. at 6–8; Cons. Pl. Kangtai Chemicals, Inc. Reply Br. in Support of its Mot. for Judgment on the Agency R. (April 23, 2014), EFC No. 59 ("Kangtai Reply") at 9–11.

In the fifth claim, Kangtai challenges Commerce's surrogate country selection methodology and contends that India is economically comparable to the PRC. Kangtai argues that Commerce's reliance on *per capita* GNI to determine economic comparability is unreasonable, and that the methodology it applied to select economially comparable countries, as well as its decision to eliminate India from the list of economically comparable countries, is not supported by substantial evidence and is not in accordance with law. Kangtai Rule 56.2 Mot. at 6–11; Kangtai Reply at 1–9.

The final five claims challenge Commerce's surrogate value selections for various factors of production. In the sixth claim, Clearon avers Commerce's surrogate value selection for hydrogen gas is unsupported by substantial evidence and contrary to law. Clearon ar-

gues that the Philippine GTA import data Commerce used to value Jiheng's hydrogen gas by-product is aberrational and unreliable, and that Commerce should have instead relied on domestic data from India. Clearon Rule 56.2 Mot. at 16–20. Seventh, Kangtai claims that Commerce's surrogate value selection for chlorine was not the best available information on the record and that it was not supported by substantial evidence. Kangtai avers that selected surrogate value was based on a small quantity of imports into the Philippines and that Commerce should have instead used Indian chlorine and caustic soda data to value chlorine. Kangtai Rule 56.2 Mot. at 11–27. In the eighth claim Clearon alleges that Commerce erroneously determined urea was not produced in the Philippines, and that instead of relying upon Philippine GTA import statistics to value urea Commerce should have used Philippine Bureau of Agricultural Statistics data. Clearon contends Commerce's rejection of the Philippine Bureau of Agricultural Statistics domestic prices for urea is not supported by substantial evidence and is contrary to law. Clearon Rule 56.2 Mot. at 11–16. Ninth, Jiheng and Kangtai claim that Commerce's reliance on the Philippine *Doing Business in the Camarines Sur* rates to value electricity is not supported by substantial evidence on the record, and that the Philippine *Meraloc* data is the best available information on the record to value electricity. Kangtai Rule 56.2 Mot. at 40–42; Arch & Jiheng Rule 56.2 Mot. at 15–21. In the tenth claim Kangtai challenges Commerce's surrogate value selection for sodium hydroxide. Kangtai argues that Commerce should have made a downward adjustment to reflect Kangtai's lower consumption of sodium hydroxide, and that Commerce's decision not to adjust the value is unsupported by substantial evidence. Kangtai's Rule 56.2 Mot. at 27–31.

Defendant intervenors Arch and Kangtai support Commerce's determination in opposing three aspects of Clearon's Rule 56.2 Motion. Arch and Kangtai both oppose Clearon's contention that Commerce's did not use the best available information for its surrogate value selection for urea and argue that Commerce's determination is supported by substantial evidence. Kangtai Resp. at 2–6; Arch Resp. at 3–5. The two parties also argue Clearon failed to exhaust administrative remedies concerning its claim that the two parties responses were insufficient for the proper by-product valuation of ammonium sulfate. Kangtai Resp. at 7–8; Arch Resp. at 8–10. Arch further opposes Clearon's claim that the selected surrogate value for hydrogen gas was not the best available information on the record and argues Commerce's determination was supported by substantial evidence. Arch Resp. at 5–8.

IV. *Statutory and Regulatory Framework*

In an AD administrative review Commerce determines if the subject goods will likely be sold at a less than fair value in the United States. In making this determination, Commerce calculates the "dumping margin" by subtracting the foreign product's price in the United States, the "export price", from the price in the producer's home country, the "normal value". *See* 19. U.S.C. §1675(a)(2)(A); 19 U.S.C. §1673; 19 U.S.C. §1677(35)(A). When determining the normal value of subject goods from a nonmarket economy ("NME") such as the PRC, Commerce makes its calculation based on "surrogate values" which are the "value of the factors of production" from surrogate market economy country data. *See* 19 U.S.C. §1677b(c)(1).

To value factors of production Commerce must use the "best available information" from the production and sales data it obtains from the parties in the administrative review on the record. 19 U.S.C. §1677b(c)(1). Commerce uses "to the extent possible" data from "one or more" surrogate market economy countries that are (1) "at a level of economic development comparable to that of the nonmarket economy country" and (2) "significant producers of comparable merchandise." 19 U.S.C. §1677b(c)(4). Commerce has a regulatory preference for valuing all factors of production, with the exception of labor, from one surrogate country. 19 C.F.R. §351.408(c)(2).

V. *Discussion*

A. Commerce's Requests for Voluntary Remand

The first three issues before the court concern Commerce's requests for voluntary remand for three of its determinations in the *Final Results*. First, Commerce requests voluntary remand to address party comments in the first instance concerning its financial ratio calculation using Philippine data. Second, it seeks remand to explain its changed methodology for determining the by-product valuation of ammonia gas and sulfuric acid. In its third request Commerce seeks remand to explain its change in methodology for its treatment and calculation of intra-company transportation of intermediate products.

The court has discretion over whether to grant remand when, as in the instance case, an agency requests the remand without confessing error to reconsider its position, and such requests are generally granted if the agency's concerns are found to be substantial and legitimate. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028–29 (Fed. Cir. 2001) ("*SKF I*"); *see also Nucor Corp. v. United States*, 33 CIT 207, 292, 612 F. Supp. 2d 1264, 1336 (2009). Concerns have been found to be substantial and legitimate when (1) the agency has a

compelling justification for the remand, (2) the justification for the remand is not outweighed by the need for finality, and (3) the scope of the remand is appropriate. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT___, 882 F. Supp. 2d 1377, 1381 (2013), referencing *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1522–26, 412 F. Supp. 2d 1330, 1336–39 (2005). Requests that are frivolous or made in bad faith, including those that compromise legitimate concerns for finality, are based on non-binding policy statements, or are merely legal tactics applied to avoid judicial review, may be denied.[10]

1. Calculation of Financial Ratio

Kangtai, Arch, and Jiheng contend Commerce failed to follow its stated practice for adjusting financial statements and this resulted in the improper calculation of the financial ratio in the *Final Results*. The parties argue that the ILO wage rate Commerce used to value the labor FOP includes labor, retirement, and employee benefit expenses, and that these expenses will be double counted if Commerce does not adjust the financial ratio to correctly reflect the financial statements. Kangtai Rule 56.2 Mot. at 31–38; Arch & Jiheng Rule 56.2 Mot. at 21–24. In its first remand request, Commerce does not admit that it erred in its calculation of the SG & A financial ratio, but contends that as a result of the number of possible surrogate countries that existed after the *Preliminary Results*, Kangtai, Arch, and Jiheng did not get the opportunity to comment on the calculation and Commerce did not have the opportunity to respond to comments. Commerce asks to address these comments in the first instance and accordingly "respectfully request[s] the Court remand the financial ratio calculation issue for Commerce to reconsider the SG & A financial ratio calculation in light of the comments concerning the alleged overstatement of labor in the normal value calculation". It claims that the court would not "be able review Commerce's determination, if the interested parties and Commerce have not in the first instance raised, considered and addressed the arguments." Def's Resp. at 51–52.

Commerce has a substantial and legitimate concern for requesting remand. Correcting a possibly inaccurate determination of normal

[10] *See Gleason Indus. Products, Inc. v. United States*, 31 CIT 393, 396 (2007), referencing *Corus Staal, BV v. U.S. Dep't of Commerce*, 27 CIT 388, 391, 259 F. Supp. 2d 1253, 1257 (2003) (suggesting "merely a change in policy" will not justify a voluntary remand over an interested party's objection), and *Lutheran Church--Missouri Synod v. Fed. Communications Comm'n*, 141 F.3d 344, 349 (D.C. Cir. 1998) (refusing to grant a "novel, last second motion to remand" which was based on a prospective policy statement that did not bind the FCC and stating that "the Commission has on occasion employed some rather unusual legal tactics when it wished to avoid judicial review, but this ploy may well take the prize").

value is a compelling reason for a remand request.[11] The need for finality in this instance is also not outweighed by the concern of protecting the administrate review from material inaccuracy. Further, Commerce has limited its request to the financial ratio calculation and this scope is appropriate. It does not appear Commerce's substantial and legitimate concern is frivolous or in bad faith, and Commerce's request for remand to reconsider the SG & A financial ratio calculation is granted. On remand, Commerce is requested to address the arguments as raised in the parties' briefs before the court.

Kangtai alleges that Commerce further erred in its financial ratio calculation by relying on a 2011 financial statement for Mabuhay Vinyl Corporation ("MVC"), a Philippine producer of sodium hypochlorite, that is not on the record. Kangtai Rule 56.2 Mot. 38–39, referencing App'x III.45, Surrogate Value Memorandum ("surrogate value chart"). Although Commerce references MVC's "2011" financial statement in the surrogate value chart, this reference is merely a typographical error. The record supports Commerce's claimed reliance on the 2010 MVC financial statement[12] in its calculation of the financial ratio.

The court recognizes a presumption of administrative legality and regularity in AD cases, and presumes that if the 2011 MVC had been submitted to Commerce it would have been included on the record.[13] There is no indication in the papers before the court that a 2011 MVC financial statement was ever submitted to Commerce, nor do any of the parties argue that it ever was part of the administrative record. Commerce cites to its reliance on the 2010 MVC financial statement

[11] Kangtai argues the court should not grant remand for Commerce to "consider these comments" on the "alleged overstatement of labor", but instead asks for remand to Commerce "to make the adjustments it said it would make but failed to execute" in the review which are consistent with its *Labor Methodologies* and its final determinations in *Stainless Steel Sinks* and *Certain Steel Nails*. Kangtai Reply at 20–21, referencing *Drawn Stainless Steel Sinks From the People's Republic of China: Investigation, Final Determination*, 78 Fed. Reg. 13019 (Feb. 26, 2013) and accompanying issues and decision memorandum at cmt. 4, and *Certain Steel Nails From the People's Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review,* 79 Fed. Reg. 19316 (Apr. 8, 2014) and accompanying issues and decision memorandum at cmt. 2. In response, Commerce asks in its remand request to address the comments made by both Jiheng and Kangtai concerning the SG & A financial ratio. The language of the request is appropriate and encompasses the concerns Kangtai raise in its comments on this issue.

[12] Jiheng Sur. Value Sub. (Jan. 9, 2012), PDoc 65 at Tab 4 ("2010 MVC Financial Statement").

[13] *See* 19 U.S.C. §1516a(b)(2)(A) (documents presented or obtained by Commerce are included as part of the administrative record); *see also Bohler-Uddeholm Corp. v. United States*, 20 CIT 1336, 1343, 946 F. Supp. 1003, 1009 n.18 (1996) (citations omitted).

in its *Final Results*,[14] and the numbers stated by Commerce in the surrogate value chart correspond to the numbers in the 2010 MVC financial statement.[15] The record accordingly does not support Kangtai's assertions that Commerce used a 2011 MVC financial statement, and Commerce's explanation with respect to the financial statement that it did rely upon is reasonable.

2. Change in Methodologies

In its second and third requests Commerce seeks voluntary remand to explain its change in methodology, consider comments by the parties, and collect additional relevant information if necessary, for its valuation of the by-products ammonia gas and sulfuric acid and its calculation of intra-company transportation. Def's Resp. at 53–54. Although adherence to previous methodology may be required in some instances, a change in Commerce's practice or methodology may be permitted in an administrative review if the change is for an adequate cause, if Commerce provides a reasoned explanation, and in making this change Commerce provides parties with timely notice and sufficient opportunity to provide the information required by the revised methodology.[16]

a. Calculation of Intra-Company Transportation of Intermediate Products

Commerce requests remand "to reconsider and explain its treatment and calculation of intra-company transportation" of intermediate products in response to Arch and Jiheng's challenge of its methodology, and its concern is both substantial and legitimate. *See* Def's Resp. at 54, referencing I & D Memo at cmt. 16. In the *Final Results*, Commerce changed the methodology it applied for valuing the intra-company transportation of intermediate products, treating it as a separate factor of production rather than considering it to be included

[14] I & D Memo at cmt. 13, referencing 2010 MVC Financial Statement.

[15] *See, e.g.*, the identical figures in: the 2010 MVC Financial Statement "Consolidated Statements of Income --Net Sales" section and the "Sales" line of the surrogate value chart (1,217,602,316 PHPs); the 2010 MVC Financial Statement "Consolidated Statements of Income -Cost of Sales" section and the "Cost of Sales" line in the surrogate value chart (863,303,184 PHPs); the 2010 MVC Financial Statement "Consolidated Statements of Income -- Direct Labor" section and the "Direct Labor" line on the surrogate value chart (26,437,846 PHPs).

[16] *See*, *e.g.*, *Arch Chemicals, Inc. v. United States*, 33 CIT 954, 963–64 (2009); *Anshan Iron & Steel Co., Ltd. v. United States*, 27 CIT 1234, 1241–42 (2003); *Fujian Mach. and Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1169–70, 178 F. Supp. 2d 1305, 1326–27 (2001); *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 998, 834 F. Supp. 413, 419 (1993); *Shikoku Chemicals Corporation v. United States*, 16 CIT 382, 388, 795 F. Supp. 2d 417, 421 (1991).

in overhead as it did in its *Preliminary Results*, without justifying this change. *Id.* The need for an agency to adequately address a departure from past practice is a compelling justification for a remand request.[17] The concern addressed by Commerce in its request, ensuring consistency in AD proceedings, is not outweighed by the need for finality.[18] Explaining a change in methodology for the calculation of one FOP is an appropriate scope for a remand request. There is no indication Commerce's substantial and legitimate concern is frivolous or in bad faith. Commerce's remand request is granted. On remand, Commerce is requested to collect additional relevant information if necessary, provide the parties an opportunity to comment on any new additional information, and provide an explanation that addresses the parties comments either in their briefings if no additional information is collected or as may be submitted to Commerce.

b. By-Product Valuation Methodology

Commerce claims that it changed its by-product valuation methodology for ammonia gas and sulfuric acid from the *Preliminary Results* to the *Final Results* without providing an explanation for the change.[19] Clearon, Kangtai, and Arch all challenged the determination in their motions,[20] and Commerce "respectfully requests a vol-

[17] *See SKF USA Inc. v. United States*, 31 CIT 951, 959, 491 F. Supp. 2d 1354, 1362 (2007) ("it is within Commerce's expertise and discretion to update its methodology for both increased accuracy and ease of use") (citation omitted); *see also Shakeproof Assembly*, *supra*, 29 CIT at 1522, 412 F. Supp. 2d at 1336, referencing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. Of Trade*, 412 U.S. 800, 808 (1973) ("it is an established principle of administrative law that an agency has a 'duty to explain its departure from prior norms').

[18] *See Allied Tube & Conduit Corp. v. United States*, 29 CIT 502, 508, 374 F. Supp. 2d 1257, 1262 (2005) ("Commerce must explain why it chose to change its methodology and demonstrate that such change is in accordance with law and supported by substantial evidence") (citation omitted); *see also Hussey Copper, Ltd.*, 17 CIT at 998, 834 F. Supp. at 419 (requiring remand on the ground that Commerce "failed to adequately articulate the reasons for its departure from its normal practice").

[19] Commerce claims it valued ammonia gas and sulfuric acid with individual surrogate values for each by-product in the *Preliminary Results*, and in the *Final Results* valued the two by-products by using the value of the down-stream product ammonium sulfate. *See* Def's Resp. at 5354, referencing *Preliminary Results*; *see also* I & D Memo at cmt. 14 (stating "[w]e are adjusting the manner in which we calculate the by-product offsets for both Jiheng and Kangtai to conform to the Department's recent practice. [Commerce] considers this by-product methodology more reasonable than the by-product methodology employed for the *Preliminary Results* because it is consistent with the information [Commerce] requests in our questionnaire . . ." and acknowledging it did not have information necessary on the record to calculate the by-product offsets).

[20] Clearon claimed that by using the value of the downstream product ammonia sulfate in its calculation Commerce overstated the value of the by-products, ammonia gas and sulfuric acid. It requests remand so that Commerce may collect appropriate information and adjust

untary remand . . . to consider these comments, provide an explanation and collect additional relevant information if necessary." Def's Resp. at 5354, referencing *SKF I*, *supra*, 254 F.3d at 1029. Kangtai, however, opposes its request for remand arguing that contrary to Commerce's claims the record contains the information necessary for valuing the two by-products, as evidenced by Commerce's calculation of the surrogate value costs in the *Preliminary Results*. It asks the court to restore the *Preliminary Results'* treatment of Kangtai's by-product on remand. Kangtai Reply at 9–10, referencing Def's Resp. at 53–54.[21] Kangtai also opposes remand on the grounds that Commerce excessively delayed briefing on the issue and that it did not properly brief the merits of its request. *Id.* at 10–11.

Kangtai's contention that Commerce did not properly brief the merits of its request lacks merit. In its remand request Commerce explained its change in methodology from the *Preliminary Results* to the *Final Results*. The court may reasonably deduce from the request that Commerce desires to reconsider its by-product methodology determination in light of the comments made Kangtai, Arch and Clearon, obtain additional information if necessary, and permit the parties to comment if additional information is collected.[22]

Commerce's concern is substantial and legitimate. Commerce provides evidence that it changed its methodology, and, as discussed above, addressing a change in methodology is a compelling justification for requesting a remand. The need for finality is not outweighed by the need for Commerce to ensure an accurate and consistent review result.[23] Here, Commerce is not attempting to "delay the day

the value to include only the by-products. Clearon Rule 56.2 Mot. at 20–25. Arch, Jiheng, and Kangtai argued that Commerce changed its methodology without providing an explanation and that it should value the by-products individually as it had done in previous review. Kangtai Rule 56.2 Mot. at 39–40; Arch & Jiheng Rule 56.2 Mot. at 24–31.

[21] Kangtai argued in its Motion for Judgment on the Agency Record that by valuing the offset based on the surrogate value for inputs, Commerce did not select the "best available information" for the by-product offset and that its determination was unlawful and unsupported by substantial evidence. It also claimed that no party asked for the change and that Commerce conceded it was missing the information to effect its change. Kangtai Rule 56.2 Mot. at 39–40.

[22] Def's Rep. at 53–54. *See, e.g., Albemarle Corp. v. United States,* 37 CIT ___, Slip Op. 13-106 (Aug. 15, 2013).

[23] *Cf. Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961) (noting the significance of the public interest in reaching what, ultimately, appears to be the right result in weighing a reconsideration request) (citation omitted); *see also SKF USA Inc. v. United States*, 630 F.3d 1365, 1373–74 (Fed. Cir. 2011) (Commerce has an obligation to provide an explanation and address important factors raised by comments from petitioners and respondents), referencing *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1358 (Fed. Cir. 2005), and *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997).

of reckoning" or asking for a "do-over anytime it wishes"[24] instead, its request to address a seeming departure from its past practice is consistent with the applicable statutory objective of "[securing] the just, speedy and inexpensive determination of every action and proceeding". *See* USCIT Rule 1. Commerce further appropriately limited the scope of its request to address a change in one methodology, the valuation of by-products, and it does not appear its substantial and legitimate concern is frivolous or made in bad faith. The court grants Commerce's remand request.[25] On remand, Commerce is requested to collect additional relevant information if necessary, provide the parties an opportunity to comment on any new additional information, and provide an explanation that addresses the parties comments either in their briefings if no additional information is collected or as may be submitted to Commerce.

B. Primary Surrogate Country Selection

Kangtai requests remand concerning Commerce's choice of the Philippines as the primary surrogate country. It argues that contrary to Commerce's findings, India is an economically comparable country to the PRC and that India should have been selected as the surrogate country for the review. Supporting its claim Kangtai avers that Commerce's sole reliance on *per capita* GNI to determine economic comparability is unreasonable, that Commerce misapplied its surrogate country selection methodology, and that the range of *per capita* GNIs Commerce determined to be proximate and economically comparable to the PRC is not supported by substantial evidence. Kangtai Rule 56.2 Memo at 6–11(citations omitted).

As discussed above, when valuing factors in AD reviews for NMEs Commerce must select data that are the "best available information" on the record. Commerce is also required under 19 U.S.C. §1677b(c)(4) to use "to the extent possible" surrogate country data

[24] *Corus Staal BV v. United States*, 29 CIT 777, 783, 387 F. Supp. 2d 1291, 1297 (2005) *aff'd*, 186 F. App'x 997 (Fed. Cir. 2006).

[25] Kangtai states the court must deny remand "to consider the issues anew and gather new information because [Commerce] . . . ultimately never answered the question of why [Commerce's] longstanding practice to value the immediate by-products generated in production of the subject merchandise should be abandoned" and because Commerce "unilaterally decided not to provide any reason whatsoever supported by the record that would have justified change in its practice." Kangtai Reply at 10. The language of the remand request is appropriate. Commerce requests remand to address the shortcomings in the *Final Results* that Kangtai points out: a lack of explanation for a change in by-product methodology. In passing, this court notes Kangtai and Arch allege that the issue is not properly raised here, as Clearon failed to exhaust administrative remedies concerning its contention that the respondents responses were insufficient for the proper by-product valuation of ammonium sulfate. For this court to comment on these allegations at this point would be premature.

that comes from one or more market economy countries that are (1) at "a level of economic development comparable to that of the nonmarket economy country" and (2) "significant producers of comparable merchandise". In making its surrogate country selection Commerce as a matter of policy applies a four-step procedural approach that is a "*sequential* consideration of the statutory elements". *See Import Administration Policy Bulletin 04.1: Nonmarket Economy Surrogate Country Selection Process* (Mar. 1, 2004) (italics added), *available at* http://ia.ita.doc.gov/policy/bull04–1.html (last visited July 10, 2014) ("Policy Bulletin 4.1"). First, Commerce's Office of Policy creates a list of potential surrogate countries that are at a "comparable level of economic development" to the NME country at issue ("potential surrogate country list"). Second, Commerce determines which countries on the potential surrogate country list are also producers of "comparable merchandise" to the merchandise subject to the AD order. Third, Commerce determines if any of the countries that satisfy steps one and two are also "significant" producers of the merchandise**.** Fourth, if more than one country exists in the selection process, Commerce chooses the country with the "best factors data" quality by evaluating the data's availability, reliability, and adequacy. Commerce generally selects a country from the potential surrogate country list, but will "go off" list if it determines all of the final listed countries lack sufficient data. Commerce also has a regulatory preference for valuing all surrogate values from one surrogate country. *See* 19 C.F.R. §351.408(c)(2).

Following this sequential approach Commerce listed the Philippines, Indonesia, Ukraine, Thailand, Columbia, and South Africa in its Surrogate Country Memorandum as those countries it considered to be "economically comparable to [the PRC] and most likely to have good data availability and quality" based on the 2011 World Development Report from the World Bank. *See* Surrogate Country Memorandum, referencing World Development Report 2011, World Bank.

1. *Per Capita* GNI as Indicator of Economic Comparability

Kangtai first challenges Commerce's sole reliance on *per capita* GNI to identify economically comparable countries to the PRC, arguing Commerce's reliance on the measure is unreasonable and contrary to law.[26] Kangtai contends that Commerce has used India as the primary surrogate country in the past 20 reviews, and that although it is aware that Commerce "always included its form language about economic comparability and GNI even when consistently selecting

[26] Kangtai Rule 56.2 Mot. at 7, referencing 19 U.S.C. §1516a(b)(1)(B)(I) and *Chevron U.S.A., Inc.*, *supra*, 467 U.S. 837 (1984).

India as the primary surrogate country", *per capita* GNI is a crude benchmark for determining economic comparability that does not consider all factors that contribute to determining if a country has a comparable significant industry. Kangtai Reply at 1; Kangtai Rule 56.2 Mot. 7–8. To support its claims Kangtai argues, without citation to the record, that "in modern times, [the PRC], India and the United States are compared frequently and generally as leading world economies", that India is "one of the world's largest countries with one of the largest economies", and that "it is self-evident that India is more economically developed than the Philippines but only due to its large population its *per capita* GNI ranking falls below the Philippines." Kangtai Rule 56.2 Mot. at 7–8.

The court finds Kangtai's arguments unpersuasive, and Commerce's reliance on *per capita* GNI reasonable and in accordance with law. In the *Final Results* Commerce explained that its selection of economically comparable countries for the review was consistent with its "long-standing and predictable practice of selecting economically comparable countries on the basis of GNI".[27] Commerce is provided substantial deference in both the interpretations of its AD statutes and the methodology it applies to fulfill its statutory mandate, and under the second prong of *Chevron* its interpretation will be sustained if it is found to be reasonable.[28] Commerce is not required by statute or regulation to select the same surrogate country it did in previous reviews, or the country with largest economy, or the most populated country, as Kangtai suggests. Rather, in *each* segment of the proceeding Commerce must value the factors of production from a surrogate country that is *at a level of economic development comparable to that of the NME* and a *significant producer of comparable merchandise*. *See* 19 U.S.C. §1677b(c)(4); *see also* 19 C.F.R. §351.408(b) (italics added). The applicable statute does not expressly define the phrase "level of economic development comparable" or what methodology Commerce must use in evaluating the criterion. 19 U.S.C. §1677b(c)(4). 19 C.F.R. §351.408(b) states that although other information may be considered when Commerce determines if a country is at a level of economic development comparable to the NME under 19 U.S.C. §1677b(c)(2)(B) or 19 U.S.C. §1677b(c)(4)(A), primary

[27] I & D Memo at cmt. 2, referencing *Magnesium Metal From the People's Republic of China: Final Results of the 2008–2009 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 75 Fed. Reg. 65450 (Oct. 25, 2010), and accompanying issues and decision memorandum at cmt. 4.

[28] *United States v. Eurodif S.A.*, *supra*, 555 U.S. at 316; *accord Timken Co.*, *supra*, 354 F.3d at 1342 ("any reasonable construction of the statute is a permissible construction"), citing *Torrington*, *supra*, 82 F.3d at 1044, and *SKF I*, *supra*, 254 F.3d at 1027.

emphasis will be placed on *per capita* GDP as the measure of economic comparability. Commerce later amended its methodology and explained that it now "uses *per capita* GNI, rather than *per capita* GDP, because while the two measures are very similar, *per capita* GNI is reported across almost all countries by an authoritative source (the World Bank), and because the Department believes that the *per capita* GNI represents the single best measure of a country's level of total income and thus level of economic development." *Antidumping Methodologies in Proceedings Involving NonMarket Economy Countries: Surrogate Country Selection and Separate Rates*, 72 Fed. Reg. 13246, 13246 n.2 (Mar. 21, 2007) (req. for cmts.).

Kangtai suggests that instead of using GNI to measure economic comparability, Commerce should have considered the chemical industry under review. Pointing to Indian data available for the subject merchandise Kangtai argues that India "has, and has had, a large and established chemicals industry from which to draw surrogate values - far more established than the other countries under consideration" and that "[N]o other country comes close to this amount of quality data."[29] The metric proffered by Kangtai, however, only addresses the second prong of the surrogate country criteria which requires a country be a "significant producer of comparable merchandise" without addressing economic comparability.[30]

The court in *Jiaxing Brother* recently addressed arguments similar to those raised by Kangtai. There the plaintiff claimed India's steel industry was more comparable to the PRC's than it was to the selected surrogate country, Thailand, regardless of the *per capita* GNI of each of the countries. It averred that Commerce's use of GNI as a measure of economic comparability was unreasonable and that it should have instead applied an industry-sensitive approach to determine economic comparability. *See Jiaxing Brother*, *supra*, Slip Op. 14–12 at 9–10. The court questioned how the industry-sensitive approach offered by the plaintiff would be administrable across all NME cases, noting the approach both "leaves open to debate which metrics Commerce should utilize to identify economically comparable countries" and makes identifying a surrogate country early in the proceedings "difficult if not impossible." *See id.* at 11. Determining that

[29] Kangtai claims that there is no good substitute for India that complies with Commerce's policy of selecting a country that provides both "good data availability and quality", and that both Commerce and the interested parties have voiced difficulties about finding surrogate values for the subject merchandise beyond those which come from the India data. Kangtai 56.2 Mot. at 7–9 (citations omitted).

[30] *See Jiaxing Brother Fastener Co. v. United States*, 38 CIT___, Slip Op. 14–12 (Feb. 6, 2014) (hereinafter "*Jiaxing Brother*") at 10, referencing 19 U.S.C. §1677b(c)(4)(B).

Commerce's use of *per capita* GNI was a reasonable interpretation of its statutory mandate to identify and select a surrogate country at a "level of economic development comparable" to the NME, the court found that *per capita* GNI is a "consistent, transparent, and objective metric to identify and compare a country's level of economic development." *Id.* at 10. The *Jiaxing Brother* decision is persuasive on this issue and Commere's use of GNI as a measure of economic comparability in the instant review is reasonable interpretation of the statute and is in accordance with law.

2. Application of Methodology for Selecting a Primary Surrogate Country

Kangtai claims Commerce erred in applying its surrogate country selection methodology resulting in the improper elimination of India as a surrogate country. Kangtai unconvincingly argues the court is split on this issue. It contends that the *Amanda Foods*[31] and *Ad Hoc Shrimp*[32] decisions correctly interpreted the statue by requiring a "weighing" of the three criteria - economic comparability, significant producer of comparable merchandise, and data availability – while the *Jiaxing Brother* and *Foshan Shunde*[33] decisions, which Commerce followed in the instant review, misconstrued the statute by approaching *per capita* GNI ranking as threshold statutory criterion. Kangtai Reply at 3–9.

The court is not split on the application of the surrogate country eligibility criteria as Kangtai suggests. All four cases approach the selection process by treating the *per capita* GNI ranking as a threshold statutory criterion that must be met before the other criteria are considered. The cases are, however, distinguishable as they address issues in two different stages of the surrogate country selection process. In *Foshan Shunde* and *Jiaxing Brother*, as in this matter, the court addressed the argument that a country which did not meet the threshold *per capita* GNI ranking criterion and was not on the potential surrogate country list in the Surrogate Country Memorandum, should still be considered economically comparable to the

[31] *Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT 1407, 647 F. Supp. 2d 1368 (2009) (hereinafter "*Amanda Foods*").

[32] *Ad Hoc Shrimp Trade Action Comm. v. United States*, 36 CIT ___, 882 F. Supp. 2d 1366, 1375 (2012) (hereinafter "*Ad Hoc Shrimp*").

[33] *Foshan Shunde Yongjian Housewares & Hardwares Co. v. United States*, 37 CIT ___, 896 F. Supp. 2d 1313 (2013) (hereinafter "*Foshan Shunde*").

NME.[34] In *Amanda Foods* and *Ad Hoc Shrimp,* the court addressed challenges to Commerce's surrogate country selection between two countries listed on the Surrogate Country Memorandum which had met the threshold *per capita* GNI ranking criterion.

The plaintiff in *Amanda Foods* challenged Commerce's selection of Bangladesh as the primary surrogate country for Vietnam, and contended Commerce erred in applying Policy Bulletin 4.1 in its surrogate country selection by not addressing the GNI differential between Vietnam and Bangladesh as compared to the differential between Vietnam and another country on the potential surrogate country list, India. The court ordered remand, finding that Commerce did not provide more than conclusory reasoning of why the GNI discrepancy between two countries on the potential surrogate list did not affect Commerce's final surrogate country selection:

> Nor has Commerce explained why the difference between Bangladesh and Vietnam, in *per capita* GDP, is not relevant in this case or why the difference in economic similarity to Vietnam is outweighed by the differences in quality data between Bangladesh and India. Rather, without explanation, Commerce has adopted a policy of treating all countries *on the surrogate country list* as being equally comparable to Vietnam. As Commerce's chosen designation has not been supported by any justification or evidence at all, it is not supported by substantial evidence.
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> Significantly, [Commerce's] Policy Bulletin states that each Surrogate Country Memorandum must explain how the chosen country satisfies each element of the statutory criteria. In accordance with [Commerce's] own policy, therefore, the Surrogate Country Memorandum must explain why its chosen surrogate country is at a level of economic development comparable to Vietnam. The memorandum in this case does not do so. Accordingly, the court cannot find on this record that Commerce's surrogate country selection is supported by substantial evidence.

[34] *See id.* at 1318–25 (plaintiffs unsuccessfully argued that Commerce's selection of a country listed on the potential surrogate country list in the Surrogate Country Memorandum, Indonesia, was unreasonable and accordingly unsupported by substantial evidence and that Commerce should have instead selected India, a country not on the list); *see also Jiaxing Brother*, *supra*, Slip Op. 14–12 at 4–14 (plaintiffs unsuccessfully argued that Commerce's selection of a country listed on the potential surrogate country list in the Surrogate Country Memorandum, Thailand, was unreasonable and accordingly unsupported by substantial evidence and that Commerce should have instead selected India, a country not on the list).

Amanda Foods, supra, 33 CIT at 1413, 1415, 647 F. Supp. 2d at 1376–78 (citations omitted; italics added).

In *Ad Hoc Shrimp* the plaintiff argued Commerce should choose Thailand rather than India from the potential surrogate country list as the primary surrogate country for the PRC. The court evaluated Commerce's policy of treating all countries on the potential surrogate list as equivalent in terms of economic comparability and ordered remand after finding Commerce's selection of India was not supported by a reasonable reading of the record:

> Commerce's policy of disregarding relative GNI differences *among potential surrogates* for whom quality data is available and who are significant producers of comparable merchandise is not reasonable, because it arbitrarily discounts the value of economic comparability relative to the remaining eligibility criteria (*i.e.*, significant production of comparable merchandise and quality of data). While it is true, as Commerce emphasizes, that the most economically comparable country would not be a reasonable surrogate choice if the dataset from that country was inadequate, this is equally true of the remaining criteria. Thus, for example, the most economically comparable country would be an unreasonable surrogate choice if it were not a significant producer of comparable merchandise, and the country with the absolute best dataset would similarly be an unreasonable surrogate choice if it were not economically comparable to the NME in question. Indeed, Commerce's own policy suggests that none of the three surrogate country eligibility criteria -economic comparability, significant production of comparable merchandise, and quality data -- is preeminent.
>
> Because none of Commerce's three surrogate country eligibility criteria is preeminent, it follows that relative strengths and weaknesses among *potential surrogates* must be weighed by evaluating the extent to which the *potential surrogates* satisfy each of the three criteria. If, for example, one *potential surrogate* has superior data quality and another is closer in GNI to the NME in question, Commerce must weigh these differences when selecting the appropriate surrogate. An unexplained and conclusory blanket policy of simply ignoring *relative GNI comparability within a particular range of GNI values* does not amount to a reasonable reading of the evidence in support of a surrogate selection *where more than one potential surrogate within that GNI range* is a substantial producer of comparable merchandise

> for which adequate data is publicly available. Rather, in such situations, Commerce must explain why its chosen surrogate's superiority in one of the three eligibility criteria *outweighs another potential surrogate's superiority* in one or more of the remaining criteria.

Ad Hoc Shrimp, *supra*, 36 CIT at ___, 882 F. Supp. 2d at 1374–75 (citations omitted; italics added).

Kangtai's attempt to demonstrate a split in the court's jurisprudence is misplaced. The issue before the court in *Amanda Foods* and *Ad Hoc Shrimp* was not the initial placement of a country on the potential surrogates list as it was in *Foshan Shunde* and *Jiaxing Brother*, but rather the merits of each of the potential surrogates on the list relative to each other.[35] Commerce complied with the applicable statute and regulation in applying the surrogate country methodology in the review.

Kangtai also unconvincingly argues that the surrogate country selection methodology Commerce applies results in "a surrogate country list that changes from review to review" and that it contravenes the importance of the AD law which is selecting a "reliable, consistent surrogate for [the PRC]". It claims that it was prevented from receiving notice of Commerce's change in surrogate country and that parties have no way of predicting what the normal value of their products will be in each segment of the review. Kangtai Rule 56.2 Mot. at 10–11; Kangtai Reply at 2–3.

As discussed above, Commerce is not required by statute or regulation to select the same potential surrogate countries or final surrogate country in each review, nor is it required to select the same surrogate country from the *Preliminary Results* to the *Final Results*. In each review, parties are given opportunities to present and comment on surrogate country selection and are presumed aware of the possible countries that may be selected as well as of the possibility

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[35] *See* Commerce Policy Bulletin 4.1; *see also, e.g., Ad Hoc Shrimp Action Committee v. United States,* Slip Op. 14–59, 38 CIT ___ (May 29, 2014) at 11 n.17 (discussing the application of the *per capita* GNI threshold statutory criterion versus a later weighing of the three criteria):

> [I]mportantly, Bangladesh's relatively less similar GNI to that of [the NME] (when compared with India's GNI) does not affect Commerce's determination that all three potential surrogate countries independently fell within the range of economic comparability to [the NME], and therefore that data from all three countries would satisfy that threshold statutory requirement. The appropriateness of placing Bangladesh on the initial potential surrogates list (based on Commerce's finding that Bangladesh's GNI fell within the range of economic comparability to [the NME]) is uncontested . . . [and] Commerce's initial placement of Bangladesh on the potential surrogates list is not the issue before the court.

that the selected surrogate country may change from review to review. This is true for the present review where Kangtai commented on the surrogate country selection after being informed early in the proceedings of the potential countries that may be selected. *See* Surrogate Country Memorandum at 5; *see* Request for Surrogate Country Cmts. (Oct. 28, 2011), PDoc 37; *see generally* Kangtai Sur. Country Cmts. (Dec. 19, 2011), PDoc 58; Kangtai Sur. Value Sub. (Jan. 9, 2012), PDocs 69, 70; Kangtai Sur. Value Sub. for Final Results (Sept. 5, 2012), PDocs 116, 117.[36] Although, Kangtai may not be completely certain of the country Commerce will choose as a surrogate, as a participant in previous administrative reviews it is aware of the process and methodology Commerce follows, and that the surrogate country selection occurs as part of a retroactive process where Commerce applies duties to entries after they have been sold.

3. Range of GNI Used by Commerce to Determine Economically Comparable Countries

Kangtai next challenges the range of GNI Commerce used to make its surrogate country selection and to determine that India was not a level of economic development comparable to the PRC. Arguing Commerce's decision to eliminate India was not supported by substantial evidence, Kangtai claims that Commerce has failed to provide any analysis explaining why countries are economially comparable to the PRC "if they are within a particular range of GNI, as opposed to a larger or smaller range" or why the range "changed from year to year".[37]

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[36] Kangtai argues The Omnibus Trade Act Report is evidence that Congress voiced similar fairness concerns about the retroactive application of factors of production in the surrogate country selection methodology. *See* Kangtai Rule 56.2 Mot. at 10–11, citing Omnibus Trade Act Report S. Rep. No. 100–71 at 106 (1987). However; Kangtai's argument is based on a selective reading of the report, which addresses concerns that imports from the PRC not be unfairly disadvantaged by the methodology when "price differences can be accounted for in whole or in part by quality differences in the imported merchandise":

> The Committee is particularly concerned that the imports from certain nonmarket economy countries, such as the People[']s Republic of China, not be unfairly disadvantaged by the use of the new methodology [the factors of production methodology] where price difference can be accounted for in whole or in part by quality differences in the imported merchandise. [Commerce] should ensure that, in computing the trade-weighted average price, it only uses prices that are in fact from arms-length sales to unrelated parties.

[37] Kangtai Reply at 1, referencing *Consol. Edison Co.*, *supra*, 305 U.S. at 229. *See* Kangtai Compl. ¶ 14 ("[t]he Department's conclusion that India was not at a level of economic development comparable to [the PRC] was not supported by substantial evidence"), referencing 19 U.S.C. §1677b(c)(1) and 19 U.S.C. §1677b(c)(2)(B) (requiring that the Department select surrogate values from "one or more market economy countries that are at a level of economic development comparable to that of" the PRC).

Commerce is granted broad discretion in its selection of surrogate countries for AD proceedings, and the court "will not impose its choice of which economy is more comparable . . . provided the choice made by Commerce is sufficiently reasonable and supported by evidence." *See* 19 U.S.C.§1516a(b)(1)(B); *see also Technoimportertexport and Peer Bearing Co. v. United States*, 15 CIT 250, 255, 766 F. Supp. 1169, 1175 (1991) (citation omitted). Commerce is not required to set a fixed range of GNIs into which potential surrogate countries must fall, but it must provide a reasoned explanation which permits the court to determine the process by which it reached its result was logical and rational, and this explanation must be supported by the administrative record.[38]

Commerce created the potential surrogate country list for the segment of the review at issue without explanation. The Surrogate Country Memorandum which contains the potential surrogate country list states:

> With regard to the first statutory requirement, the six countries on the non-exhaustive list below are at a level of economic development comparable to [the PRC] in terms of *per capita* gross national income (GNI). *Per capita* is the primary basis for determining economic comparability.
>
> This list provides you the countries that are economically comparable to [the PRC] and the most likely to have good data availability and quality. You may also consider other countries on the case record if the record provides you adequate information to evaluate them.

Surrogate Country Memorandum. While dismissing Kangtai's argument that India is economically comparable to the PRC in its *Final Results,* Commerce again made its determination without explanation:

> In the *Preliminary Results* [Commerce] stated that, for the purpose of selecting a surrogate country, Colombia, Indonesia, the Philippines, South Africa, Thailand and Ukraine were equally comparable to the PRC in terms of economic development. The list is comprised of countries that are proximate to the PRC in terms of GNI . . .. [T]he list did not include India because India's

[38] *See, e.g.*, *Dorbest Ltd. v. United States*, 30 CIT 1671, 1677, 462 F. Supp. 2d 1262, 1269–70 (2006); *see also Ad Hoc Shrimp*, *supra*, 36 CIT at ___, 882 F. Supp. 2d. at 1374, citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational").

> *per capita* GNI did not fall within the range of countries proximate to the PRC.
>
> [Commerce] finds that the selection of the range of economically comparable countries base on GNI, included in the Surrogate Country Memorandum, is reasonable and consistent with the Tariff Act of 1930, as amended.

I & D Memo at cmt. 2.

Even assuming, *arguendo*, the court could accept the *post hoc* rationalization Commerce provides in its Rule 56.2 response,[39] Commerce fails to provide India or the PRC's GNI ranking, India's GNI, or analysis, beyond conclusory statements, explaining why the GNIs of the countries on the potential surrogate list qualify as economically comparable and proximate to the PRC's GNI while India's GNI does not.[40] Commerce instead has advanced an explanation that amounts to "we did it because it is our policy to do it". This explanation is not reasonably adequate to support a conclusion and cannot serve as a basis for Commerce's reasoned decision-making. *See Ad Hoc Shrimp*, *supra*, 36 CIT at ___, 882 F. Supp. 2d at 1374, referencing *Consol. Edison Co.*, *supra*, 305 U.S. at 229 (1938).

After reviewing the record, the court also fails to find evidence on the record that could reasonably support Commerce's conclusion.[41] The administrative record consists of "a copy of all information presented to or obtained by [Commerce] during the course of the administrative proceeding". 19 U.S.C. §1516a(b)(2)(A)(i). Although Commerce can and does take into consideration its policies and methodologies as expressed in different administrative case precedent when making its determination, it cannot take the factual information underlying those decisions into consideration unless those

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[39] *See* Def's Resp. at 8 ("Although Commerce had selected India as the primary surrogate country in all of the earlier administrative reviews of this order, India became less economically comparable to [the PRC] over time. Indeed, given the *per capita* GNI data in the World Bank Report, India's and [the PRC]'s *per capita* GNI rankings had moved so far apart that Commerce dropped India from its surrogate country list, substituting other, more comparable countries.") & 11 (the PRC "has a large population and a GNI that is much higher than that of India").

[40] *Atcor, Inc. v. United States*, 11 CIT 148, 154, 658 F. Supp. 295, 300 (1987) ("[I]n reviewing agency action, the Court must base its decision upon the administrative record. New evidence may not be received. The Court must rely upon the rationale articulated by the agency. It may not rely upon *post hoc* rationalizations."), referencing *Abbott v. Secretary of Labor*, 3 CIT 54, 55 (1982), and *ILWU Local 142 v. Donovan*, 10 CIT 161 (1986).

[41] *PPG Indus. v. United States*, 978 F.2d. 1232, 1237 (Fed. Circ. 1992) (the court evaluates if the evidence on the record "could reasonably lead to [Commerce's] conclusion") (citations omitted).

facts are properly on the record of the proceeding before it.[42] Commerce has relied upon the World Development Report to determine those countries whose GNIs it views to be "proximate" and economically comparable to the PRC. It is therefore a part of the record. The record, however, does to reflect its inclusion. If Commerce is in possession of such evidence then it needs to incorporate it into the record so that the court may determine if that evidence could reasonably lead to Commere's conclusion.[43]

Commerce's selection of the GNI range for economically comparable countries on the potential surrogate country list and its determination that India does not qualify as a economically comparable country is not supported by a reasonable analysis and record evidence. For these reasons the court remands this issue to Commerce to (1) provide a reasonable explanation why the range of the GNIs listed on the Surrogate Country Memorandum qualify the countries as proximate and "economically comparable" to the PRC, including a discussion of why it believes India's GNI does not, if that continues to be Commerce's determination, qualify it as an economically comparable country, and (2) place the data on the record that it relied upon to make its determination.

C. Surrogate Value Selections

The parties also contest Commerce's surrogate value selection of the FOPs chlorine, hydrogen gas, sodium hydroxide, electricity, and urea. As noted above, when valuing FOPs Commerce must select the "best available information regarding the values of such factors in a market economy or countries", 19 U.S.C. §1677b(c)(1)(B), and it has regulatory preference for valuing all FOPs from a single surrogate country. 19 C.F.R. §351.408(c)(2) (Commerce will "normally value all factors in a single surrogate country"). Commerce is provided substantial discretion in its choice, but the court must be satisfied that when viewing the record as a whole a reasonable mind could conclude

[42] *Gourmet Equip. Taiwan Corp. v. United States*, 24 CIT 572, 577–78 (2000) ("Commerce's longstanding practice, upheld by this court, is to treat each segment of an antidumping proceeding, including the antidumping investigation and the administrative reviews that may follow, as independent proceedings with separate records and which lead to independent determinations").

[43] *See, e.g.,Changzhou Wujin Fine Chem. Factory Co. v. United States*, 701 F.3d 1367, 1377, 1379 (Fed. Cir. 2012) (stating that "[t]he grounds upon which an [agency action] must be judged are those upon which the record discloses that [the] action was based" and "review of an administrative decision must be made on the grounds relied on by the agency" such that "[i]f those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis") (citations omitted).

the best available information was selected, and Commerce's selection must be supported by substantial evidence and in accordance with law. *See Dorbest Ltd.*, *supra*, 30 CIT at 1676–77, 462 F. Supp. 2d at 1269.

For the court to determine that a reasonable mind could conclude that the surrogate value selections for chlorine, hydrogen gas, sodium hydroxide, electricity, and urea were the best available information Commerce must justify its selections by conducting a "fair comparison of the data sets on the record".[44] This court is unable to make this determination considering that Commerce has a preference for valuing all FOPs from a single country, and an evaluation of this preference is part of Commerce's process of comparing and selecting potential surrogate values. Commerce may decide to select a different surrogate country on remand and in doing so will need to analyze its surrogate value selections for the FOP anew. The court accordingly defers its determination on these issues pending the completion of the redetermination.

IV. *Conclusion*

For the reasons set forth above, this matter must be, and hereby is, remanded to Commerce for further consideration of the surrogate financial ratios, by-product valuation methodology, intra-company transport methodology, and the surrogate country selection in light of Clearon, Kangtai, Arch and Jehing's arguments and all relevant intervening legal developments. The results of remand shall be due October 21st, 2014, comments on the remand results shall be due 30 days from the date the remand results are filed with the court, and rebuttal commentary shall be due 15 days thereafter.

So ordered.

Dated: July 24, 2014
New York, New York

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

[44] *See Amanda Foods*, *supra*, 33 CIT at 1417, 647 F. Supp. 2d at 1378–79, referencing *Olympia Indus., Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1001 (1998), and *Allied Pac. (Dalian) Co. v. United States*, 30 CIT 736, 757, 435 F. Supp. 2d 1295, 1313–14 (2006).